CITATION: Ivens v. Ivens, 2020 ONSC 2194
COURT FILE NO.: 2197/13
DATE: 20200409

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOANNE IVENS, Applicant

AND:

CAMERON IVENS, Respondent

BEFORE: Kurz J.

COUNSEL: Ms. Ivens, Self-represented

Mr. Ivens, Self-represented

HEARD: by teleconference

Introduction

[1] During this COVID-19 pandemic, the courts are beginning to see a situation that approaches a crisis of its own: parents using the urgency of the moment to seize the sole right to parent their children, contrary to court orders. The suspension and limited administrative capabilities of this court have necessarily led it to be very strict in determining the level of urgency necessary to allow an audience with a judge. But that rigour does not mean that we should ignore blatant breaches of custody and access orders or the unilateral usurpation of parental roles under the guise of COVID-19 protection. Such a state of affairs would, in itself, create a situation of harm for children.

[2] Here, the Applicant, Joanne Ivens ("the mother"), brings an urgent motion. She seeks a "suspension" of the current 2/2/3 shared parenting arrangement regarding the younger two of the three children of the marriage, ("O and R"),[1] set out in the December 18, 2017 order of Justice Giselle Miller. That order calls for O and R to be in the care of

[1] I use only each child's first initial to identify him or her in order to protect the children's privacy.

the mother Monday – Wednesday, the Respondent, Cameron Ivens ("the father"), on Wednesday – Friday, and then on alternate weekends with each parent.

[3] In seeking a "suspension", the mother effectively requests an interim variation of Miller J's December 18, 2017 order. If granted, the result would be a temporary order that O and R remain in her exclusive care indefinitely, thereby eliminating all of the father's in-person parenting time with O and R. The mother's plan would see the father's contact with the children limited to daily electronic contact. The mother argues that O and R have told her that they wish to stay in her exclusive care, that they are anxious about staying with their father, and that the father is taking inadequate measures in light of the COVID-19 pandemic.

[4] The father opposes the mother's motion. He argues that nothing about the COVID-19 crisis or his response to it offers any reason to change the present parenting arrangements. He says that he understands and respects the protocols called for to combat COVID-19.

[5] With regard to the children's purported wishes, he argues that he has been fighting the same battle for parenting time with all three children since the parties separated, over eight years ago. Despite various reports and court orders supporting the importance of his parenting role with O and R, the mother has consistently attempted to undermine their relationship. He contends that she does so by consistently negatively influencing those children against him. She then attempts to rely on the wishes that she has elicited in her attempt to limit his contact with O and R. Yet a number of independent social workers agree that those children's expressed views are not independent or representative of the children's true views when out of their mother's control.

[6] The father asserts that on May 15, 2017 and again on December 18, 2017, Miller J., as the parties' trial judge, confirmed his concerns that the mother has been undermining his relationship with the children. He points out that more recently, in early 2019, the mother withheld the children from him for over three months, contrary to the

clear terms of Miller J.'s orders. This led Justice Erika Chozik to find the mother in contempt of the order of December 18, 2017. The mother was not penalized by Chozik J. only because she purged her contempt before the sentencing hearing. Yet while awaiting sentence, the mother brought another motion to change, seeking to allow O and R to determine their time with their father and in the alternative to reduce his parenting time and role. The father fears a repeat of the events of 2019, under the guise of COVID-19 protection of the children.

[7] For the reasons that follow, I find that this motion is urgent. But that the urgency is not the result of the COVID-19 virus or the risk that the father allegedly poses to the children. Rather the urgency arises from the mother's second unilateral refusal in just over a year to honour the Miller J. orders that provide for equal, shared parenting time for O and R and the father's right to final decision making for both children. A continuation of that refusal runs the real risk of emotional harm to O and R through the rupture of their relationship with their father. Accordingly, I dismiss the mother's motion and order that the regular 2/2/3/ parenting time continue. Because of the nature of the parties' conflict, I appoint Justice Kendra Coats as the case manager for this case. She will manage this case until the trial of the mother's motion to change.

Background

[8] Because the courthouses in this province are closed, I do not have access to the continuing record or the endorsement record of this proceeding. The background that I provide is based on the materials that have been provided to me by the parties for this motion. Each party has attached a large volume of materials to their affidavit(s). They have sent further documents to the court at my request, including the trial endorsement of Miller J. of May 15, 2017, the OCL report of Crystal Dorian and the pleadings for this motion to change. I have copies of some but not all endorsements of the court in this proceeding. The mother objects that the OCL reports are dated, which is true. I rely on them for background, context, and to the extent that they were relied upon by Miller J. at trial and her subsequent hearing.

[9] The parties were married on March 19, 2005. They separated on November 11, 2011. They have three children, B, born June 13, 2005 (currently 14 years old); O, born December 18, 2006, (currently 13 years old); and R, born May 13, 2009 (currently 10 years old). Miller J. found that the parties' relationship was a turbulent one, plagued by financial hardship. The father earns an amount not greatly over minimum wage in his job as an educational assistant. The mother is disabled with fibromyalgia and chronic fatigue syndrome. She subsists on Ontario Disability Support Programme payments and child tax credits.

[10] Following the parties' separation, the father initially exercised access to the parties' children at the former matrimonial home. He attended many nights to tuck the children into bed. This ended in January 2013, when the parties engaged in altercation. Their argument appears to have arisen out of his having taken up with a girlfriend and leaving it to the children to inform their mother. When she took him to task, he sent her a number of nasty texts, describing her in unflattering terms. During a subsequent quarrel, the father punched a hole in the wall in anger, although he did not touch the mother. This incident occurred in the absence of the children, although they were in the home.

[11] The mother contacted the police and the school. She instructed the school not to allow the father to pick up the children. She unilaterally terminated his access, the first of a number of occasions when she took it upon herself to do so. It is unclear when his access resumed, but from Miller J.'s trial reasons, it appears that months went by and that he then was allowed only supervised access.

[12] At some point, the father signed a peace bond with regard to the mother. It is unclear from the materials whether that peace bond was the result of the hole-punching incident.

Crystal Dorian OCL Report

[13] In her August 14, 2014 report, social worker and OCL clinical investigator, Crystal Dorian, stated that both parties admitted ongoing conflict in the presence of the

children. They also acknowledged their concern about the impact that their ongoing custody and access issues were having on the children. The mother expressed concern about the father's stability, substance abuse and parenting ability. The father admitted to a previous substance abuse problem that resolved when he was diagnosed with and treated for ADHD. He raised the concern that the mother was alienating the children against him. The mother was claiming that the children were refusing to see him because of his past abuse.

[14] Ms. Dorian stated that Halton CAS ("CAS") records do not reveal any child protection concerns regarding Mr. Ivens or that he poses any risk to the children. Rather, those records showed that both parties caused and participated in conflict in the presence of the children despite the advice of several professionals.

[15] Further, while there was no evidence that the children were coached by their mother, Ms. Dorian stated that they were "significantly influenced" by the post-separation conflict between their parents. However there was also no evidence that the mother had taken any steps or made any effort to support the father's relationship with the children. She wrote:

> Rather, Ms. Ivens has gone to great effort to ensure that Mr. Ivens does not have any contact with the children including keeping the children from school and preventing contact with the paternal extended family.

[16] The father, too, came in for a share of Ms. Dorian's criticism. He failed to recognize his part in the conflict. That part included punching a hole in the wall in the mother's presence, yelling at and harassing her when his access was unilaterally withheld or limited, his use of corporal punishment on the children and his substance abuse with Percocet while still living with the children. In addition, it was difficult for the children when the father took up with another woman, who along with her child, moved in with the father for a time.

[17] Ms. Dorian, called for the mother to have sole custody of the children because she was a capable caregiver and the parties were unable to communicate effectively regarding the children. Ms. Dorian felt that therapeutic reunification offered the children

and father the best chance of re-establishing their relationship. That plan involved therapy for all involved and a resumption of supervised access between the father and children.

[18] While she supported the mother's sole custody, Ms. Dorian sounded this note of caution regarding the mother's cooperativeness in the reconciliation process:

> If there is any evidence to support that Ms. Ivens has prevented Mr. Ivens from participating in decisions and/or has placed barriers, interfered or delayed processes that have prevented Mr. Ivens from establishing a relationship with the children, the Courts may want to reconsider custody of the children.

[19] It is worthy of note to point out that at the time of Ms. Dorian's investigation, B was at least open to seeing his father. Since then and despite having no contact, the 14 year old child's views of his father have hardened to hostility,

[20] The parties signed minutes of settlement based on Ms. Dorian's recommendations. However, the supervised access recommended by Ms. Dorian did not occur, as the mother claimed that the children refused to attend visits.

[21] On March 2, 2015, Justice Kendra Coats granted a temporary order that the father have supervised access with O and R at the Milton Supervised Access Centre. With regard to the father's access to B, the recommendations of the child's mental health treatment providers were to be considered in determining what access was in his best interests. Coats J. was concerned that access could have an adverse impact on B's fragile psychological condition.

Appointment of Andrea Barclay as Reintegration Therapist

[22] The parties agreed to retain an experienced reintegration therapist, Andrea Barclay, to assist with the reintegration of the children with their father. However B refused to participate. Accordingly, Ms. Barclay worked only with the parties, O and R. Miller J.'s trial reasons disclose that Ms. Barclay came to recommend that the father's

parenting time be increased to a level that was "…frequent, consistent and structured with the pace and supervision to be determined by the therapist".

[23] Further, Ms. Barclay expressed concern with reports made by O and R about the supervised visits which were not consistent with Ms. Barclay's own observations of those visits. Ms. Barclay also expressed concern with respect to the children's belief that their mother had cancer (which was not true) and that this was causing the children great anxiety and concern for their mother and instability for them.

[24] Miller J. noted that Mrs. Ivens had expressed distrust of Ms. Barclay. She tried to have her removed as reintegration therapist.

[25] Ms. Barclay's next proposed step was for full-day access on the Saturday and Sunday of alternate weekends, as well as one evening per week and holiday access. On August 20, 2015, Justice Douglas Gray granted the father unsupervised day access to O and R. That access began on alternate Saturdays and Wednesdays. After a month, the access was to expand to include every Wednesday from after school to 7:00 p.m. and alternate Saturdays and Sundays from 10:00 a.m. to 7:00 p.m.

[26] At the same time, Gray J. dismissed the mother's request to terminate Andrea Barclay's retainer. However, he requested that the OCL conduct another clinical investigation of this family. The OCL accepted and appointed social worker, Tracey Majewski as the clinical investigator.

Tracey Majewski's First Clinical Investigation

[27] During the course of Ms. Majewski's investigation, the mother took the position that the father should have no access to any of the children. She maintained that the children wanted no contact with the father. She presented Ms. Majewski with a panoply of complaints against the father, purportedly made by O.

[28] Yet Ms. Majewski wrote that O and R were relaxed and happy during the access visit that she had observed. In fact, they seemed to be enjoying themselves. For

his part, the father had behaved appropriately towards the children, Ms. Majewski commented that O:

> … seemed to have a natural and relaxed rapport with [the father] who was attentive towards their needs.

[29] Other highlights of Ms. Majewski's report included the following quotes:

- When this writer gently approached [O] about that fact that at the last interview, he told this writer that he did not want to see his dad and yet when I saw him with his dad he seemed happy and relaxed, he agreed that things were OK with his dad. He however, struggled to say this and then became quiet and guarded. He went on to say that things are difficult for him with his mom and dad and that sometimes he felt stuck in the middle.

- At the second interview [R] went on to say that it was difficult for her to answer questions about her parents and that it was difficult for her to say that she wanted more time with her dad, as it would make her mom sad.

- Andrea Barclay, the parties' reintegration counselor, "…provided information [to Ms. Majewski] that Ms. Ivens was consistently resistant to working with her, despite many efforts and she also felt that Ms. Ivens actively discouraged and even tried to disrupt the children attending access with their father.

- There have been numerous interviews with B and also attempts by B's counselors to support him in re-establishing a relationship with his father. They have all been unsuccessful to date. Indeed, in my own interview with B, I gave him the opportunity to meet with Mr. Ivens and he indicated that he did not want to. It does not appear that there would be any value, at this time, to pushing B to visit his father, given the psychiatric concerns.

- [O's] statements [to Ms. Majewski that were critical of the father] were not consistent with the observed interactions and affections he showed Mr. Ivens. Of greater concern to this writer, is that during the interview when Mr. Ivens brought O, O struggled to find the words to express how he felt. There appeared to be an inner conflict going on in O where there was a disparity between his feelings and what he felt he needed to say.

- This dispute has been ongoing since the separation of Mr. and Ms. Ivens in 2011. Progress has been made since the report of Ms. Dorian of the OCL in that [O and R] are now visiting their father.

- Of concern, however, is that [O and R] continue to be conflicted about their feelings for Mr. Ivens when there is no evidence to suggest that Mr. Ivens is harmful towards the children in any manner. Indeed all professional observations concur that [O and R] are enjoying their time with Mr. Ivens. It is also of grave concern that [B] is not visiting his father at all and moreover, that he has been given a diagnosis of PTSD as a result of fear of his father, when Mr. Ivens is viewed by all professionals as a positive influence in the lives of [O and R].

- Ms. Ivens has continued to actively work against the children having a positive relationship with Mr. Ivens and she has contributed towards [B] having no relationship with Mr. Ivens at all. Not only is this very concerning, but it is catastrophic for her children**.**

- …evidence suggests that through overt and covert behaviours Ms. Ivens is preventing the children from being able to fully (emotionally) connect with their father, despite the fact that they are seen to be enjoying their visits with him.

- I believe that, if the status quo remains, it is likely that [O and R] will ultimately reject their relationship with their father (as children in a loyalty bind often do since they feel that they need to choose one parent as a way to protect themselves from the conflict). The children can no longer wait for Ms. Ivens to make gains; it is therefore necessary that O and R be transferred to the custody of and primary residence with Mr. Ivens.

[30] The mother filed a dispute of Ms. Majewski's report. In her trial decision, Miller J. summarized the contents of that dispute and the OCL's response as follows:

> [73] Mrs. Ivens disputed certain aspects of Ms. Majewski's report. She produced medical documentation which contradicted the suggestions that Mrs. Ivens "made up" her health issues, that she was abusing B via Munchausen by Proxy. Mrs. Ivens took steps to follow Ms. Majewski's recommendation that she attend for a psychiatric assessment. The assessing psychiatrist, Dr. Dhaliwal, who also testified, found no mental health disorder. He testified as to the

absence of Munchausen by Proxy. Dr. Dhaliwal testified that he had and [sic] read through Ms. Majewski's report. He did not have Ms. Dorian's report.

[74] The OCL Response to Mrs. Ivens' dispute of July 20/16 was that there were no factual errors and no additional information that would cause any change in the recommendations.

Miller J.'s Trial Decision of May 15, 2017

[31] Following a 12-day trial of the issues of custody and access, Miller J. ordered that the parties share joint custody of the children but that their primary care be with the mother. Her order also included the following terms:

- The mother was given final decision-making rights regarding B, while the father was given the same r decision-making rights regarding O and R.
- The father was granted parenting time with O and R on alternate weekends and one night per week,
- In June 2017, the weekend time was to expand to a week-about parenting arrangement. This granted the father equal shared parenting rights over O and R.
- That arrangement was to include time for O and R to be with B at the home of the paternal grandparents on Wednesday evening during the father's parenting time (subject to B's wishes and the views of his treatment providers).
- It was to be the responsibility of the parent with whom each of O and R had been spending time to ensure that the child attends for a scheduled exchange unless the child is hospitalized.
- Illness of a child would not be a reason for the child not attending an exchange unless the child is hospitalized.
- The children were to enjoy unrestricted telephone access to the non-resident parent.
- However, the parent with whom the children are not may not contact the children unless in response to a message left by a child.

- The father was prohibited from consuming alcohol or drugs while the children are in his care, except in accord with a prescription.
- Other than Mother's and Father's Day, there were to be no changes to the schedule.
- The OCL was requested to update its report for a December 18, 2017 hearing.

[32] Miller J. found that the Halton CAS ("CAS") had investigated a number of complaints, primarily made against the father. Little of the complaints was substantiated. In particular:

- On February 21, 2013 the CAS "verified" that the children were exposed to the conflict thereby putting them at risk of emotional and mental harm. File closed due to Mr. Ivens no longer visiting the home and Mrs. Ivens taking steps regarding legal custody and access.
- On December 2, 2013 the CAS did not verify Ms. Ivens' complaint regarding the father's use of inappropriate discipline toward B. The CAS accepted the father's explanation that he was merely restraining B. In fact, during the course of the investigation, the mother disclosed using physical discipline with O. Both parents were cautioned about using physical discipline with any of the children. The CAS noted that both parents had already been cautioned about exposing the children to conflict between them.
- On January 5, 2017, the CAS concluded that O had accessed pornographic material in the father's home and without his knowledge. It found that he had not been deliberately exposed to pornography so closed the file.

[33] Miller J. pointed to numerous attempts by the mother to involve the Halton Regional Police Service against the father, with no charges being laid. That said, the father did enter into a peace bond with regard to one incident. Miller J. pointed to no evidence that the father was ever tried or convicted of a criminal offence against the mother or children.

[34] Miller J. was even-handed in allocating responsibility to both parents for the emotional harm that the children were suffering because of the intractable parental conflict. She wrote:

> [80] The parties have a history of serious conflict both before and after separation. They agree that this is harmful to the children, but despite being repeatedly advised by various professionals that their conduct is harmful to the children, [they] seem incapable, to date, of regulating their behaviour toward one another. Their ability to make joint decisions in the best interests of the children, rather than furthering their own interests, is compromised.

[35] Miller J. was critical of the father for failing to support the mother's attempts to obtain psychiatric care for B. She stated that he went so far as to claim that she suffered from Munchausen's Syndrome by Proxy; in other words blaming her for the child's psychiatric condition. Instead, the child's pediatric psychiatrist diagnosed B with Generalized Anxiety Disorder, Social Anxiety Disorder, Major Depressive Disorder and Post Traumatic Stress Disorder. The father also suffered from substance abuse at some point while the parents were together, although he never abused drugs while the children were in his care post-separation.

[36] Miller J. also pointed to the father twice disparaging the mother in social media, although he removed the second offending post when directed to do so by Ms. Barclay.

[37] On the other hand, Miller J. faulted the mother for sending negative messages to the children about their relationship with their father. She wrote:

> [113] **Mr. Ivens accuses Mrs. Ivens of a deliberate, calculated campaign to alienate [B] and the other children from him. There is support for this view in the evidence before the Court.** Mrs. Ivens gave the children treats - movies and food - following Mr. Ivens visits with them immediately post-separation. On one occasion [B] told Mr. Ivens he did not want to cuddle with him - he said he was scared and didn't want to hurt mommy's feelings. Mrs. Ivens falsely let the children believe that she had cancer, causing them to be reluctant to leave her. [O], in the first supervised visit with Mr. Ivens under the supervision of Ms Barclay expressed his intention not to talk to Mr. Ivens. This resolution broke down in the course of the visit when [O] said "I can't hold it in any more" after which he comfortably engaged with Mr. Ivens, on that and many subsequent occasions. [O] filmed loose pills, a bong and

> lubricant at Mr. Ivens' house then showed the videos to his mother. Both [O and R] reported to Mrs. Ivens that they did not engage with Mr. Ivens or did not enjoy their visits with him when it was clearly observed by Ms Barclay that they had. [O] wrote thank you notes for gifts from family members except Mr. Ivens' mother with whom Mrs. Ivens has never got along.
>
> [114] In addition, Mrs. Ivens went so far as to bring a motion to have Ms Barclay removed as the reunification therapist. **Mrs. Ivens' expressed concerns that Ms Barclay had taken against her and was unfairly supporting Mr. Ivens are not borne out by the evidence.**
>
> [115] None of the professionals involved observed any overt acts by Mrs. Ivens to alienate the children from their father, and the children reported, both in and out of Mrs. Ivens' presence, that she encourages their relationship with Mr. Ivens. [O] spontaneously reported that Mrs. Ivens told him that she needs a break. Despite this, **the only logical conclusion to draw from the children's behaviour toward Mr. Ivens is that Mrs. Ivens has communicated to them, overtly or covertly, consciously or unconsciously, that it makes her unhappy when they enjoy their visits with Mr. Ivens. Mrs. Ivens herself, in final submissions, acknowledges that this appears to be the case.** [Emphasis added]

[38] Miller J. placed great reliance on Ms. Majewski's first report as well as the evidence of Ms. Dorian and Ms. Barclay. For example, she stated:

> [110] What remains are the concerns raised by the observations and conclusions of Ms. Dorian, Ms. Majewski and Ms. Barclay with respect to Mrs. Ivens' failure to support efforts for the children to have a health relationship with Mr. Ivens.

[39] In addition, as set out below, Miller J. asked the OCL "…and in particular Ms. Majewski for continuity…" to prepare a follow up report for a hearing six months later to monitor the progress of her May 15, 2017 order.

[40] Despite her reliance on the evidence of Ms. Majewski, Miller J. did not follow the OCL social worker's recommendation to grant the father full custody of the children. She made that decision accepting that that may be the last chance to reunify the father with B. Miller J. reasoned that so sudden and complete a change may cause the children more harm than good. She also felt that the father may not be fully prepared for

the change. Rather, she granted the father increasing access to O and R, leading to a week about-shared parenting arrangement for them.

[41] As Justice Chozik of this court summarized at para. 16 of her contempt decision of March 27, 2019, discussed below, Miller J. "…put in place carefully worded, clear and unequivocal terms to ensure that the principle of maximum access was given effect by the parties."

Tracey Majewski's Updated OCL Report

[42] Ms. Majewski prepared her updated report for Miller J. on November 30, 2017. Highlights of her report include the following quotations:

- [B, R and O] remain three young and vulnerable children who have been trapped in this highly conflictual parenting dispute, for a significant period of time. The ruling of the Honourable Justice Miller of May 15, 2017 has given the parties and [O and R] an opportunity to enjoy the richness of a co-parenting experience, while respecting the mental health of [B].

- [O and R] express verbal resistance to their relationship with Mr. Ivens; [O and R] have been observed by professionals, on multiple occasions, to be relaxed and contented in the care of Mr. Ivens; all of the children's aid investigations have been closed at the intake level where there are no ongoing concerns for the safety of the children with either parent; [B] has expressed that he does not want a relationship with Mr. Ivens, and; Ms. Ivens has continued to express concerns about her children when they are in the care of Mr. Ivens.

- Firstly, this writer would like to comment that there has been a visible shift in the attitudes of [B] towards Mr. Ivens during the 3 investigations of the OCL, even though [B] has had no contact with Mr. Ivens at all, during this time. In the first OCL report of Ms. Dorian, [B] was, at least, open to trying to visit with his father. During the updated OCL investigation of this writer, [B] had not worked with Ms. Barclay towards a reunification and was not open to seeing his father. During this investigation, this writer noted that [B]'s negative feelings about this father had intensified considerably, where he spoke with force, emotion and hatred. [B] expressed that his father was getting worse and became quite emotional as he spoke. It seemed to this writer, that [B]'s feelings were even closer to those of Ms. Ivens, than they were in previous investigations.

- Unfortunately, [O and R] are acutely aware of the intensity of [B]'s negative feelings towards Mr. Ivens and they appear to feel pressured and influenced by them.

- This writer remains concerned that the emotional health, of all three children, remains at risk. [B] has become extremely rigid and inflexible in his thinking about Mr. Ivens where his memories have become distorted and exaggerated over time; it is not healthy for him to continue to think and feel in this manner. In addition, [O and R's] relationships with Mr. Ivens will remain at risk, unless efforts are taken that lead Ms. Ivens and [B] to modify their negative thoughts and feelings about Mr. Ivens and the subsequent messages that they give to [O and R]; to teach [O and R] skills that enable them to separate their feelings from those of Ms. Iven and [B]; [O and R] are protected from exposure to negative influences about their father, and/or; [B] is successfully reunified with Mr. Ivens.

- It seems important to this writer, that Ms. Ivens is seen to the children to be, practically, involved in facilitating and promoting the children's relationships with their father.

- Ms. Ivens needs to complete some therapeutic counselling to help develop insight into her negative impact on the emotional health of the children. Without this, it is difficult to know how the children could be successful in their relationships with their dad.

Miller J. Decision of December 18, 2017

[43] On December 18, 2017. Miller J found that the situation remained a high conflict one. Nonetheless, the parties were continuing to obey her previous order. But because of concerns about the three children being separated from one another for lengthy periods of time, Miller J. changed the parenting arrangement from week-about to the present 2/2/3 arrangement.

[44] Miller J. remained concerned about the children continuing to receive negative messages from their mother about their father despite the shared custody arrangement. In that regard, she reflected the concerns that Ms. Majewski had raised. Miller J. stated:

> It is essential that [O] and [R] are not exposed to negative views of Mr. Ivens. Not only must Mrs. Ivens refrain from doing so herself, which she assures me she does, but she must also ensure that [O and R] are not exposed to negative views of Mr. Ivens expressed by [B]. Mrs. Ivens must employ disciplinary tactics, if necessary, to ensure that [B] does not speak negatively of Mr. Ivens to [O] and/or [R].

Contempt Motion Before Chozik J.

[45] During the hearing before Miller J. in December 2017, the mother expressed the desire to take the children to Sri Lanka, the place of her birth, for an extended visit at some unspecified future date. The father consented, provided that he receive the appropriate make-up time. Miller J., agreed, ordering:

> If such a trip is taken, Mr. Ivens should be given the same amount of uninterrupted time with the children, to be taken all at once or in separate time periods, as a makeup.

[46] The mother took that trip to Sri Lanka between January 5 and 30, 2019. The father cooperated with the trip. He even bought O a camera and equipment to use while away. As Chozik J. later found on March 25, 2019, the father saw this as the trip of a lifetime for the children. She wrote:

> He shared in their excitement despite his apprehension and also looked forward to their return. The evidence further demonstrates that the father was more than accommodating with a sudden and last minute variation in the parenting schedule dictated by the mother in order to allow the mother and the children to get ready for the trip.

[47] The father fully expected that the makeup time ordered by Miller J. would be as faithfully provided as his cooperation with the trip. That assumption turned out to be misguided. The mother refused to allow him to exercise any of his shared parenting time following her return. She did not relent until she was found in contempt of court by Chozik J. on March 25, 2019 and then sought to purge her contempt. The father went over three months without seeing the children.

[48] The mother offered Chozik J. a variety of excuses for her failure to obey the December 18, 2017 Miller J. order. She originally told the father that the children were jet-lagged. When the father protested, she high-handedly wrote to him: “[m]y bad for thinking you would give the kids a few days to adjust before resuming the regular schedule." Then, after any reasonable period for the children’s alleged recovery from jet-lag had elapsed, she wrote to the father to baldly refuse to provide him any further in-person parenting time. She claimed that the children did not wish to see him. She then cryptically added “there is concern in regards [sic] to the children’s emotional wellbeing in your care.” Adopting a high-minded tone, she added:

> I am asking for your respect, understanding and cooperation in listening to the kids and what they want. I know this will not be easy for you, but, please be open to hearing the kids [sic] voices.

[49] In finding the mother guilty, beyond a reasonable doubt, of contempt of the December 18, 2017 Miller J. order, Chozik J. also found that:

- The Order of Miller J. clearly and unequivocally stated what is and what is not to be done.
- The letter from Halton Children's Aid Society ("CAS") dated February 11, 2019 confirmed that the mother's concerns regarding the father's treatment of the children and messy house were investigated and not verified. The CAS file was closed on January 21, 2019.
- [the mother’s] failure to deliver the children to the father's care on February 1 and February 6, 2019, were willful and deliberate breaches, which effectively deprived the father of access to the children. The children – who [were] 9 and 12 years old – do not get to make decisions about whether or not to comply with a court order or whether or not to see their father, just as they do not get to make decisions about going to school.
- As a result of the mother's contempt, the father had then not seen the children for more than three months.

- The deliberate breaches by the mother of the letter and spirit of these Orders [i.e. of Miller J of January 15 and December 18, 2017] are very serious. They warrant very serious consequences.

- In light of the contempt finding, it was not necessary to consider whether, as the father alleged, the mother had breached any other terms of the Miller J. orders. "[However] it is my view that his allegations are not without foundation."

[50] On April 1, 2019, Chozik J. granted the mother's request to adjourn the sentencing portion of the contempt hearing to June 21, 2019. The mother made the request in order to take the opportunity to purge her contempt by allowing make-up parenting time. Chozik J. set out the terms of the father's make-up time with O and R. She also ordered that neither parent have contact with the children while they were to be in the other parent's care. She also ordered the parties to come up with a reunification plan for the father and all three children.

[51] On May 29, 2019, about a month after Chozik J. found her in contempt of Miller J.'s December 15, 2017 order and before Chozik J. sentenced her, the mother brought a motion to change both Miller J. orders. The mother sought an order granting her primary care of the children and that the father's access be "as per [O and R's] wishes". In the alternative, she sought alternate weekend access, from Friday to Sunday and Wednesday after school until 7:00 p.m.

[52] On June 21, 2019, Chozik J. found that the mother had granted the make-up time, as ordered. For that reason, she chose not to sentence the mother to any further penalty. In making this decision, Chozik J. was critical of both parties for their behaviour since April 1, 2019. She was critical of the father for hiring an investigator to monitor the mother's movements, but was equally critical of the mother for the very movements that the father felt it necessary to monitor.

[53] What the father's investigator had discovered was that the mother was picking up O and R from school along with B for about a half hour before the father was

scheduled to pick up O and R. This was contrary to Chozik J.'s order that neither parent have contact with the children while they were to be in the other parent's care.

[54] Put another way, while her sentencing for contempt was pending, the mother was breaching a fresh parenting order made by the sentencing judge. While Chozik J. did not punish her for this behaviour, the mother was secretly and improperly meeting the children before they came into their father's care. In the context of the history of this case and the issue of the mother influencing the children against the father, that behaviour could only raise suspicions about her motivations. Why did she feel it necessary to breach a court order to speak to the children during the father's parenting time?

[55] Chozik J. also noted that the father had offered an acceptable reunification plan regarding all three children. The parties disagree about what happened to that plan, but I do not see it as being material to the issues in this urgent motion as they relate to O and R. However it is an issue that merits consideration during the course of case management of this proceeding. It should be discussed at the first case conference following the release of this decision.

The Mother's Recent Steps to Terminate the Father's in-Person Parenting Time

[56] The parenting arrangement continued as ordered by Miller J. until March 27, 2020. However, on March 23, 2020, the Mother wrote to the father on Our Family Wizard ("OFW")[2]. Referencing the COVID-19 pandemic, she proposed that O and R now stay in her exclusive care. O and R's only contact with the father would be electronic. As she had before she left for Sri Lanka, the mother offered make-up time to the father, this time in the summer. She claimed that her proposal reflected the children's wishes.

[2] All of the correspondence between the parties between March 23 and 27, 2020, referenced below, took place on OFW. Miller J had ordered the parents to use this medium to communicate.

[57] Less than three hours later, the father responded, rejecting the proposal. Referring to the events of early 2019, he stated that she had "burned this bridge with me countless times, the last time resulting in me not seeing the children for months." He added that the children would be safe in his care.

[58] The mother replied about 4 ½ hours later, just minutes after she failed to return the children to the father as required by the December 18, 2017 Miller J. order. Adopting a familiar tone, she wrote: "… [i]t is unfortunate that you prefer to punish them for your actions over their preferences and best interests." She agreed to drop the children off with the father but stated that the drop off should occur at her home, rather than at Food Basics. That is where he had previously requested that they be dropped off with him on March 18, 2020. He had been shopping for the arrival of the children and the shopping had gone late. After hearing from O on the same subject, the father agreed.

[59] Two and a half hours later, the mother reversed her position. She wrote another message to the father, stating that the Ontario government's shut down of schools and non-essential businesses that day, as well as the children's expressions to her of their anxiety, led her to refuse to hand them over to him.

[60] Resuming her high-minded tone, the mother added:

> [y]our position and reasoning for not putting the children's needs first, is due to personal issues. These are adult issues that have to do with court and have nothing to do with the children's best interest.
>
> …
>
> As events unfold, I am willing to reconsider, but as of now, the children will remain in my care.

[61] In response, the father rejected the mother's position and rationale. He added that R had been allowed to stay over at a friend's house for two nights after the World Health Organization had declared a worldwide pandemic. He threatened a contempt

motion if the children were not returned to him that evening. The mother complied. That was the last time that he saw the children before the hearing of this motion.

[62] After the children were returned to her on March 27, 2020, the mother wrote again to the father. She reiterated that the children wish to remain with her. She added a new allegation, that [O] had shown her a video of his room at the father's home. It was unsanitary. She stated that the video "…showed bugs crawling around [the father's] home." She added that upon his return to the mother's home, O slept until 3:00 p.m. because he had not slept well in his father's home.

[63] The father responded that the bugs were discovered after a bed in O and R's bedroom had been moved. The presence of the bugs was caused by O and R bringing food to their room against the father's direction. Some of that food was left under the bed and unsurprisingly, attracted bugs. With regard to sleeping, [O] had complained to the father of a similar problem sleeping at his mother's home.

[64] The mother's reply on March 27, 2020 encapsulated her argument for this motion, and arguably, her approach to the father's contact with the children since separation:

> Cam, just to confirm …
>
> Is this to say it is your position that despite the children's anxiety, preferences and choice to remain at my residence during this pandemic, void a hospitalization for coronavirus or their mental health, you expect your parenting time to continue 2:2:3 on the schedule, for the duration of this pandemic?

[65] During the argument of this motion by teleconference on April 6, 2020, the mother admitted that she withheld the children from returning to their father, referring to the primacy of their wishes, her view of their anxiety and her view of the father's ability to keep the children safe during this pandemic.

[66] Following the hearing of this motion by teleconference, I ordered that the parenting terms of the December 18, 2017 order be respected until I release this decision.

Law

Urgency

[67] Under the Notice to the Profession posted in this court's website on March 15, 2020 ("the Notice"), urgency in non-child protection family law matters is not defined, but it is described as including:

1. requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home);

2. urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child;

3. dire issues regarding the parties' financial circumstances including for example the need for a non-depletion order.

[68] In *Thomas v. Wohleber*, 2020 ONSC 1965, I considered various factors, including the dictionary definition, the Notice, and case law. I found at para. 38 that the following factors must be present in order to meet the Notice's requirement of urgency:

> The concern must be immediate; that is one that cannot await resolution at a later date;
>
> The concern must be serious in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;
>
> The concern must be a definite and material rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical;

> It must be one that has been clearly particularized in evidence and examples that describes the manner in which the concern reaches the level of urgency.

[69] *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.) is the leading Ontario case on urgency in custody and access issues during this pandemic. In that case, Pazaratz J. refused to allow a motion to proceed that had been brought by a primary caregiver, seeking to suspend her former spouse's access. Pazaratz J. found that moving party's vague concerns that the other parent would not exercise social distancing did not meet the high test of urgency. He found at para. 20 that parents "…should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time." Rather, the moving party claiming urgency must provide specific evidence or examples of parental behaviour that creates a level of urgency. Much the same is required of responding parties, to assure the court that the concern is unwarranted. In these difficult times, both parents or spouses must "… act responsibly and try to attempt some simple problem-solving before they initiate urgent court proceedings." (para. 22).

Jurisdiction to Make an Interim Order Varying a Final Custody Order

[70] The *Divorce Act* grants the jurisdiction to make interim (s. 16(2)) and final custody and access orders (s. 16(1)). Under s. 17(1)(b) the court may make a final order varying an earlier final custody and access order. In order to make such a variation order, the court must be satisfied that :

> **Factors for custody order**
>
> **(5)** Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[71] In *Gordon v. Goertz*, [1996] 2 SCR 27, the Supreme Court of Canada set out the components of the material change in circumstances test for a variation of a parenting order. As McLachlin J., as she then was, wrote for the court:

> **12** What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way… The question is whether the previous order might have been different had the circumstances now existing prevailed earlier... Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place"…
>
> **13** It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> [references cited in decision deleted]

[72] It bears noting that McLachlin J. also pointed out at para. 11 of *Gordon v. Goertz*, that the starting point of the court's consideration regarding a material change of circumstances is the assumption that the original order was correct. The consideration of a material change looks only to events that have occurred since the original order. Here, that is the order of Miller J. of December 18, 2017 regarding the 2/2/3 arrangement and the order of May 15, 2017 regarding the father's right to final decision making for O and R.

[73] All of that being said, there is no express jurisdiction in the *Divorce Act* to allow an interim variation of a final custody or access order. Nonetheless, judges have previously made such orders in clear and urgent cases. In *Crawford v. Dixon*, [2001] O.J. No. 466 (S.C.J.), Granger J. cites with approval James G. McLeod's commentary on *Dancsecs v. Dancsecs* (1994), 5 R.F.L. (4th) 64 (Ont. Gen. Div.). That commentary states:

> On balance, although the court should not make it a practice to vary final orders on an interim basis, if the moving party makes out a clear case for relief and proves that the need for the variation is urgent, there seems to be little reason to deny the power to vary. Such a denial might encourage the other side to delay.

[74] Put more simply, as set out in *Stuyt v Stuyt*, [2006] OJ No 4890 (S.C.J.):

> … generally, the custodial status quo will not be changed on an interim custody motion in the absence of compelling reasons indicating the necessity of a change to meet the children's best interests;

[75] In *Berta v. Berta*, 2019 ONSC 545, I reviewed a number of authorities with regard to the test for an interim variation of a final support order. I found that the test has four components, requiring the moving party to prove:

1. A strong *prima facie* case;
2. A clear case of hardship;
3. Urgency; and
4. That the moving party has come to court with "clean hands".

[76] The first three factors should apply to an interim variation of a parenting order. The fourth factor applies only to the variation of a support order, not to parenting issues. A person who deliberately refuses to obey a support order will generally not be granted the right to claim an interim variation of that order because that person comes to the court with metaphorically “unclean hands”. With regard to parenting issues, we must ensure that a parent’s misconduct does not detract from the determination of the parenting issues based only on the child’s best interests (see *D.D. v. H.D*., 2015 ONCA 409 at para. 87)

[77] Of course, in applying the remaining first three components of this test to parenting issues, each of the components must relate to the best interests of the child or children at question.

Tension Between Best Interests Factors

The Child's Views and Preferences

[78] Each of the parents before the court adverts to principles that are central to the determination of the best interests of a child. The mother relies on the expressed wishes of the children while the father refers to each parent's obligation to obey custody and access orders and to the "maximum contact principle". Both parents' factors are highly relevant in this case.

[79] To begin with the mother, she has always emphasised the centrality of her children's wishes, even when they were quite young. She relied on the children's expressed views and preferences during Ms. Majewski's first clinical investigation in 2016, when B was 11, O was 10 and R was 7. She justified her contempt in large measure by relying on what she claimed to be O and R's wishes when they were 12 and 9, respectively. She goes further, attempting to invoke "Katelynn's Principle" to emphasize the centrality of the wishes of O, now 13 and R, now 10.

[80] The importance of taking children's interests and views into account in decisions involving them was well summarized by Audet J. in *N.H. v. J.H.* **,** 2018 ONSC 4436, as follows at para 44:

> A child's views and preferences with regards to decisions affecting him or her, while clearly a factor to be considered since the coming into force of the *Children's Law Reform Act*, have in recent years taken a much more prominent role than they ever did in parenting disputes. This is evidenced by the recent changes in the *Child, Youth and Family Services Act*, S.O. 2017, c. 14, sch. 1, which, while not applicable here, have put a child's views and wishes at the top of the list of factors to be considered when assessing a child's best interests. The importance of children's right to express their views and preferences, and for those to be considered by the court in making decisions affecting them, has been discussed at length in various recent decisions including by Justice Kukurin in *Children's Aid Society of Algoma (Elliot Lake) v. P.C.-F.*, 2017 ONCJ 898, and is further demonstrated by the development in Ontario of the Katelynn's Principle (Ontario Bill 57) and the Voice of the Child's Reports which are now available as part of the services offered by the Office of the Children's Lawyer.

[81] In *Carter v. Mackie*, 2017 ONCJ 541, Justice Jane Caspers described Katelynn's Principle" as follows:

> **134** On April 29, 2016, the Coroner's Jury, at the end of the Inquest into the Death of Katelynn Angel Sampson, cited as its first recommendation what has come to be known as "Katelynn's Principle".
>
> "Katelynn's Principle" states that
>
> "A child must be at the centre where they are the subject of or receiving services through the child welfare, justice and education systems.
>
> A child is an individual with rights:
>
> * Who must always be seen
> * Whose voice must be heard
> * Who must be listened to and respected
>
> ...
>
> Actions must be taken to ensure the child who is capable of forming his or her own views is able to express those views freely and safely about matters affecting them.
>
> A child's view must be given due weight in accordance with the age and maturity of the child..."
>
> **135** Children involved in any type of family case - whether to remove them into care or disputes about child care and parenting arrangements following divorce or separation - must be able to have their views heard when decisions are made that will affect them.

[82] The views and preferences of the child have long been a factor in the determination of parenting issues. However those views and preferences are but one of many factors in the determination of a child's best interests in judicial parenting decisions. The numerous factors that a court may consider in determining how much of a child's wishes should guide the court's decision making were summarized by the Ontario Court of Appeal in *Decaen v. Decaen*, 2013 ONCA 218 as follows:

> **42** In assessing the significance of a child's wishes, the following are relevant: (i) whether both parents are able to provide adequate care; (ii) how clear and unambivalent the wishes are; (iii) how informed the expression is; (iv) the age of the child; (v) the maturity level; (vi) the strength of the wish; (vii) the length of time

> the preference has been expressed for; (viii) practicalities; (ix) the influence of the parent(s) on the expressed wish or preference; (x) the overall context; and (xi) the circumstances of the preferences from the child's point of view: See Bala, Nicholas; Talwar, Victoria; Harris, Joanna, "The Voice of Children in Canadian Family Law Cases", (2005), 24 C.F.L.Q. 221.

[83] A child's views and preferences gain greater weight as the child gets older and more mature. As Sheard J. stated in *Clark v. Moxley*, 2017 ONSC 4971 at para. 50, in regard to the wishes of a 12 year old boy: "…it is the duty of this Court to determine Noah's best interests, even if to do so may not align with his stated views and preferences." In *Kemp v Kemp*, [2007] OJ No 1131 (S.C.J.), Blishen J. stated:

> The weight to be given to the child's stated preference depends on the facts of the case, and is a function of age, intelligence, apparent maturity and the ability of the child to articulate a view. See *Stefureak v. Chambers*, [2004] O.J. No. 4253.

[84] As well, courts must always assess the independence of the views that children express. If they are not independent, they will be given little weight (*Fielding v. Fielding*, 2013 ONSC 5102 at para. 168, affd., 2015 ONCA 901).

The Duty to Obey Parenting Orders

[85] The father refers to two principles, which in this case are related, although that is not always the case. The first is that it is the duty of the mother to ensure that the order of Miller J. is obeyed. A parenting order is not a suggestion nor is it a recommendation. It is a command and direction which must be obeyed. Compliance is not optional (*Dumont v. Lucescu*, 2015 ONSC 494 at para. 43).

[86] Mossip J. put the issue very well in *Reeves v. Reeves,* 2001 CarswellOnt (Ont. S.C.J.):

> Based on a significant number of studies and case law in this area, any support or encouragement by one parent that the children not have a relationship with the other parent simply demonstrates the irresponsibility of the parent who has the children and demonstrates that parent's inability to act in the best interests of their children. Children do not always want to go to school or want to go to

> the dentist or doctors. It is the responsibility of good parents to ensure the children go to school, go to doctors, and go to the dentist. Good parents manage their children's health and safety issues without necessarily the consent or joy of their children. A healthy relationship with both parents is a health and safety issue that good parents ensure takes place.

[87] Two recent COVID-19 cases reinforce the principle that court orders regarding custody and access must be obeyed. In *Ribeiro v. Wright*, 2020 ONSC 1829, Pazaratz J. stated that:

> There is a presumption that all orders should be respected and complied with. More to the point, there is a presumption that the existing order reflects a determination that meaningful personal contact with both parents is in the best interests of the child.

[88] In *Cooper v Teneyck* 2020 ONSC 23789, Madsen J. wrote:

> [14] What is "urgent" at this time is that this mother and this father work together to adapt and shape their existing parenting order to work in the current circumstances. **That order continues to govern.** There is no presumption that COVID-19 permits a primary residential parent to terminate the children's time with the other parent.
>
> [Emphasis in original]

[89] Furthermore, the COVID-19 pandemic does not grant parents the right to exercise self help in the face of their subjective view of the parenting abilities or arrangements of their former spouse. McGee J. set that principle out in the recent case of *Ahmadi v. Kalashi*, 2020 ONSC 2047, at para. 8, as follows:

> Ms. Kalashi is not permitted to simply engage in self help, or to interpret public health directives as a license to terminate parenting time. If she fears that the current routine may compromise their son's well being, or her mother's health; then she must provide specifics [to the court] and an alternate form of transportation.

The Maximum Contact Principle

[90] Here, there is a second principle which arises out of the father's arguments, although he does not directly cite it. It is the maximum contact principle. As the Ontario Court of Appeal recently confirmed in *Rigillio v Rigillio*, 2019 ONCA 548, courts

determining custody and access issues must advert to the maximum contact principle set out in s. 16(10) of the *Divorce Act*. That provision reads as follows:

> **Maximum contact**
>
> **(10)** In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
>
> [Emphasis added by Ontario Court of Appeal in Rigillio]

[91] At para. 10 of *Rigillio*, the appellate court added that any judge who departs from the maximum contact principle must provide reasons for doing so. The failure to do so is a reversible error in law.

[92] In *Ferreira v. Ferreira*, 2015 ONSC 3602, McGee J. invoked the maximum contact principle when she found that the children had unjustifiably rejected their father. In doing so, McGee J. offered her full-throated support for the maximum contact principle, writing:

> **28** Not only is maximum contact a legal prerogative, it is consistent with children's best outcomes following their parents' separation. Maximum involvement of parents in children's lives after separation is supported by a large body of research on outcomes of divorce for children.
>
> **29** To make a child fearful of his or her other parent is a form of child abuse.
>
> **30** The combined effect of the legal obligations and the research underscores a presumption that regular access by a non-custodial parent is in the best interests of children.
>
> **31** The right of a child to visit with a non-custodial parent and to know and maintain or form an attachment to the non-custodial parent is a fundamental right and should only be forfeited in the most extreme and unusual circumstances. *Jafari v. Dadar*, [1996] N.B.J. No. 387. The party who seeks to reduce normal access is required to provide a justification for taking such a position. The

> greater the restriction sought, the more important it becomes to justify that restriction. *M.A. v. J.D.* [2003] O.J. No. 2946.
>
> **32** A child's relationship with a non-custodial parent should be interfered with only in demonstrated circumstances of danger to the children's physical or mental well-being: see *Pastway v. Pastway* (1999), 49 R.F.L. (4th) 375 (Ont. Ct. (Gen. Div.).

[93] That being said, it must be noted that despite the court's finding on the specific facts of each of *Rigillio* and *Ferreira*, the wording of *DA* s. 16(10) explicitly subordinates the maximum contact principle to the child's best interests. The principle is to be honoured only to the extent that it is "consistent" with the child's best interests. That point was emphasised by L'Heureux-Dubé J., writing in dissent on the result but not in her analysis of best interests in the seminal Supreme Court of Canada decision, *Young v. Young* , [1993] S.C.J. No. 112, at para 40 and 53.

[94] The maximum contact principle has some application in these extraordinary days as well. Fear of coronavirus, while understandable in the context of protecting our children, cannot be the sole determinant of parenting arrangements. Pazaratz J. alluded to that fact in *Ribeiro v. Wright* when he wrote:

> **10.** None of us know how long this crisis is going to last. In many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. But children's lives – and vitally important family relationships – cannot be placed "on hold" indefinitely without risking serious emotional harm and upset. A blanket policy that children should never leave their primary residence – even to visit their other parent – is inconsistent with a comprehensive analysis of the best interests of the child. In troubling and disorienting times, children need the love, guidance and emotional support of *both* parents, now more than ever.

Analysis

Issue No 1: Does the Mother Raise a Strong Prima Facae case?

Mother's Arguments Ring Hollow

[95] The mother fails to raise a strong *prima facae* case that she will succeed in changing either Miller J. order, particularly but not exclusively in the context of the COVID-19 pandemic. Her arguments regarding the children's views and preferences and her complaints regarding the father's parenting ring hollow when considered within the context of her long campaign to distance the father from O and R. In weighing the children's right to be heard against the need to obey court orders and to maintain maximum contact with their father, all in the context of their best interests, the evidence before me points to their need to maintain their court ordered contact with their father.

Miller J. Made Clear Findings in Favour of Equal Shared Parenting

[96] As Miller J. alluded to after 12 days of trial and numerous professional and lay witnesses, neither parent in this case has been an exemplar of parental conduct. Fault can be placed at the feet of each parent for their conduct since the parties separated. Miller J. considered all of the mother's criticisms of the father. As set out above, she even adopted a number of them.

[97] Yet, despite finding those faults, Miller J. found that it was in the best interests of O and R that they have equal shared parenting time with the father. She also found that the father should have final decision-making responsibility regarding O and R.

[98] Further, while Miller J. did not find that the mother was "alienating" the children *per se*, as the father claimed, she did find that there was evidence to support his claim. She also found that the mother was not supporting the children's relationship with their father.

[99] Six months after the trial, Miller J. reiterated that an equal shared parenting arrangement was in O and R's best interests. She warned the mother about the importance of sheltering the children from negative views about their father. She emphasized the point by speaking of the need for disciplinary measures, if necessary, to ensure that B, who is clearly estranged from his father, does not speak negatively about him to O and R. The fact that Miller J. had to make that latter direction shows the

need for the mother to ensure that the rupture between B and his father this does not spread any further than it already has to O and R.

[100] As set out above and in *Gordon v. Goertz*, both sets of findings of Miller J. are assumed to be correct and must be the starting point of any analysis. The issue of material change in circumstances must look only to events since those orders were made, most specifically, since December 18, 2017.

Little Material Change

[101] There is no strong *prima facae* case here that there has been a material change in circumstances regarding the children since the time of Miller J.'s second order. The passage of three years is not, in itself a material change of circumstances, although it can be a factor (*Brown v. Lloyd*, 2015 ONCA 46 at para 10-11, *L.I.O. v. I.K.A.*, 2019 ONCJ 962 at para 26). The same may be true with regard to a child's changed views. However the evidence does not show a change in O's views and those of R do not seem to be central to this motion. More importantly, there is reason to question whether those views, as expressed by the mother, are independent.

[102] The evidence in this motion shows little material change since December 18, 2017 in the factual matrix of this family or its parental dynamics. In fact, it is clear that little has changed. Nothing that any of the OCL social workers, Ms. Barclay or even Miller J. found has changed the mother's attitude or approach towards the father. She has continued to display her assumption that she alone, of the two equal parents, knows and is entitled to decide what is best for O and R. She continues to ignore Miller J.'s allocation of final decision making responsibility regarding O and R to the father.

The Continuation of the Mother's Long-Standing Pattern

[103] Of equal concern, the mother has continued her pattern of behaviour that is at best unsupportive and at worst detrimental to O and R's relationship with the father. She has continued her years-long campaign, began when B was 9, O was 7, and R was 5, to allow the children to dictate the terms of their relationship with their father. She continues in this motion to advocate for that result, which, not coincidentally, perfectly aligns with her long-held position towards the father.

[104] The children's views, as expressed by the mother, who presents herself as their advocate, have historically not been independent. Like a prism, the mother's influence seems to have refracted the children's expressed views into concordance with her own. But while the children have historically mouthed the words that the mother wishes the court to adopt, their actions outside of her influence have often demonstrated otherwise.

[105] It is telling that the mother includes in her affidavit a message posted by O to Prime Minister Trudeau's COVID-19 Instagram feed. In it, O laments that no one listens to him in his desire to remain exclusively with his mother. Rather than try to reassure her son or convince him that it is safe and appropriate to return to his father, the mother uses the post to support her claim in this motion. She expresses no ambivalence regarding the son's apparent rejection of his father. Instead, she declares her pride in her son advocating for himself in a manner that just happens to coincide with her views.

[106] It is of interest that the mother does not explain how this post came to be or how it came into her possession. Instead she presents it as if she just happened upon it. She states:

> On March 24, 2020, I read a social media comment posted by [O] to the followers of Justin Trudeau on Instagram, seeking support.

[107] Equally telling was an answer the mother gave to my question during the hearing of the motion. I asked the mother what she had done to ease the anxiety of her children about their father's home or to encourage them to return to his care. Unable to point to anything she had done or said to that effect, she had to admit that she had done

nothing of the kind. Rather, she stated that there is nothing that she could do to discount their fears. Her role, she stated, is to advocate their concerns.

The Mother's Complaint that the Father Refused to Negotiate with her

[108] The mother complains that the father refused to negotiate with her, leaving her with no choice but to bring this urgent motion. During the argument of this motion, I asked her about her willingness to negotiate: had she offered the father any compromise? Her answer, without irony, was that she had offered him makeup time this summer. She did not seem to understand that her conduct just a year earlier had undermined any credibility she could muster in making that offer. She seemed at a loss to understand why the father would not accept her reasonable offer.

[109] The father was clear that he felt she had burned her bridges of cooperation after she withheld the children for three months after the Sri Lanka trip. In doing so, she reverted to her pattern of relying on the children's alleged wishes and then pointing to the father's alleged parenting flaws. None of this was new. All of it had previously been dismissed. She only complied with the restoration of the father's equal parenting time in the face of a contempt finding.

[110] Even now, a year or so after that finding, she seeks to relitigate aspects of that contempt motion before me. She complains of the father's service of the contempt motion and the impropriety of his bringing the motion when she had arranged a case conference.

[111] As set out above, after being found in contempt and while awaiting sentencing, the mother brought a motion to change, whose first head of relief was to put the parties' then 12 and 9 year children in charge of deciding their contact with their father. If the court required any proof of the extent to which the mother is unwilling to accept the father's role as a parent, let alone an equal one, that is it.

Mother's Arguments of Risk in the Father's Home

[112] I turn next to the other arguments that the mother makes about the risk that the father poses to the children during this pandemic. First of all, she relies on the presence of insects in the children's room in the father's house. But his explanation for the presence of those insects; hidden food left under the bed, rings true. Children can and often do bring food to their rooms and then forget about it, with predictable consequences. Once this state of affairs was discovered, the father immediately cleaned the carpet under the bed and then disinfected the carpet. His conduct in that regard raises no COVID-19 risks for the children. What is of concern is that O took a video of the scene, came to show it to the mother and she then referred to it in this motion.

[113] With regard to the father asking the children to meet him at a Food Basics supermarket at the time of the March 18, 2020 changeover, that was not the best plan. But he agreed with the mother and O's request that the changeover took place elsewhere. The mother then says that the father tried to take the children to Tim Horton's. Her evidence in that regard is hearsay as is the father's response, offered during the course of argument, about buying food through a drive through window. Neither party's evidence on this point is admissible. Even if it were, the father's alleged actions, taken before the fuller lockdown imposed in Ontario, are not sufficient to find that his care of the children will expose them to undue risk. Similarly, the father's attendance at his parents' home, where he maintained social distance in their home, while not advisable, is not evidence sufficient to remove his parenting role in the manner requested by the mother. From his explanation, I accept that he took social distancing seriously at that time, as did his parents. However, as this province tightens up its recommendations and rules limiting social distancing, a repeat of that visit, absent an emergency, is not recommended.

[114] In looking to the mother's varied complaints about the father's parenting, I am guided by the comments of Chappel J. , echoing those of Gray J. as follows in *Roloson v. Clyde,* 2017 ONSC 3642:

> Not every circumstance, event or mistake by a parent that detrimentally affects a child will be considered a material change in circumstances for the purposes of a variation application. As Gray, J. stated in *Kerr v. Easson,* 2013 ONSC 2486 (S.C.J.), at para. 62, aff'd 2014 ONCA 225 (C.A.), "[p]arents are not perfect and they will make mistakes. The court will not assume jurisdiction to correct every mistake in the guise of a material change in circumstances."

[115] I recognize that in these times of pandemic, parents must be especially vigilant in protecting their children. But that fact does not appoint each parent as judge and jury of the other. That arrangement would only increase friction and conflict between the parents and lead to another form of harm to the children, as it has here.

[116] I am satisfied that the father understands the importance of COVID-19 isolation and that he will act accordingly.

Conclusion Regarding Strong Prima Facie case

[117] In sum, the mother has not proven that she has a strong *prima facie* case in favour of variation. Starting from the correctness of Miller J.'s orders and findings, I see no material change in circumstances at this time other than the hardening of B's views of his father and the continuation of the mother's pattern of conduct that fails to support and even undermines the role of the father. The fact of this pandemic does nothing to change that; it simply amplifies it.

[118] I add that the evidence in this motion fails to offer a strong *prima facie* case that a trial judge will find that any of the present circumstances were either not foreseen or could not have been reasonably contemplated by Miller J. in 2017. Nor does anything before the court lead me to conclude that if Miller J. did foresee the present circumstances, she would have made an order along the lines that the mother now seeks.

<u>Issue No. 2:</u> Has the Mother Demonstrated a Clear Case of Hardship?

[119] The answer to issue no. 1 should suffice to resolve this motion. However I briefly answer the two following questions simply to amplify the points raised above and to explain the urgency that I find in this motion.

[120] The hardship that the mother would experience were this motion dismissed is far less than the hardship that the father would experience were I to grant it. My historical review of the facts of this case points to the father having to continuously fight to remain an equal parent of his children. He is faced with a co-parent who is unwilling to accept his equal parenting role. Like Sisyphus of Greek myth, each time that the father seems to make progress, the mother pushes the bounder of his parenting role back down the mountainside.

[121] Most importantly, from the children's point of view, their relationship with their father since separation appears to have always been contingent upon the mother's acquiescence. To have them cut off from direct contact with their father at this time would reinforce the mother's message of his second-class parenting status. It would confirm for them that he is not a safe or competent parent; that he cannot be trusted. Despite numerous investigations, none of that has been found to be true. As I have stated above, I do not find it to be true today.

<u>Issue No. 3</u>: Is this Motion Urgent?

[122] As I stated above, I find this motion to be urgent, but not for the reasons proffered by the moving party, the mother. As Pazaratz J. stated in *Ribeiro v. Wright* and as quoted above, parents and courts must not presume that the existence of the

present health crisis will automatically result in a suspension of in-person parenting time. Each case must be determined on its merits.

[123] Here, if the mother's long-term position were achieved, the father's relationship with the children would wither, as it already has with B. All that is presently left of that relationship is the child's hostility for a parent he has not even seen in more than half a decade.

[124] I recognize that there are complexities and mental health concerns with regard to B that are not fully before the court in this motion. But the court cannot ignore the simple fact that 14 year old B has no meaningful relationship with the father and has not had such a relationship for more than a third of his life.

[125] Put simply, the longer that O and R are kept away from direct contact with their father, the more likely it is that they will become as estranged to him as their brother, B. That result would be, to borrow Ms. Majewski's term, catastrophic for them. The urgency of the present situation is to avoid that occurring for O and R.

Conclusion

[126] It is untenable that O and R's relationship with the father is contingent on the mother's willingness to both obey a court order and support that relationship. It is unacceptable for any parent to use this crisis as an excuse to usurp parental responsibilities to which they are not entitled. Children have the right to have their voice heard, but not to have their parent act as whisperer or megaphone, or both. Especially at times like this, parents must work together and support each other. That has not occurred here.

[127] As great as the danger of COVID-19 undoubtedly is, another great danger here, as it is for many families before this court, is the virus of conflict. Putting children in the middle of conflict, demonstrating that fighting and arguing is how adults manage their disputes, making children take sides in a lose-lose game, all corrode a child's

emotional equilibrium. Children have no special mask or protective gear that can shield them from this type of virus.

[128] Times like this must bring out the best, not the worst in parents. They must learn, to paraphrase former Israeli prime minister, Golda Meir, to love their children more than they hate each other.

Order

[129] For the reasons set out above, I order as follows:

1. I dismiss the mother's motion other than as set out below.

2. The mother shall continue to obey Miller J.'s orders of May 15, 2017 and December 18, 2017.

3. Both parents shall obey all public health directions with regard to social distancing, hand washing and other aspects of protecting themselves and the children from the coronavirus.

4. This motion to change proceeding will be case managed by Coats J. of this court until trial or further order.

5. The parties shall forthwith arrange a case conference with Coats J. by teleconference.

6. The issue of make-up time, if any, will be canvassed at the first case conference hearing.

7. If the father is seeking his costs of this motion, he may file a two-page, double spaced submission, along with any bill of costs and authorities upon which he relies, within 7 days. The mother may file her response within a further seven days. There will be no reply without my direction.

[130] While I cannot order it, I strongly suggest that the parents agree to engage in a form of counselling/mediation with each other that will assist them to communicate better and be able to work together rather than at odds with each other. They need to understand that their conflict and their roles in that conflict pose a great risk of emotional harm to O and R. Those children have spent much of their lives caught within the vortex of their parent's intractable conflict. The parents must do more to free their children if they wish to grow up to be emotionally healthy adults. I recognize that the parents have little income between them and that the father's employment related benefits for counselling are limited. I suggest that, with the assistance of Coats J., they look into resources that may be available at this time at no cost.

[131] In the circumstances of the COVID-19 emergency, these Reasons for Decision are deemed to be an Order of the Court that is operative and enforceable from the time of their release without any need for a signed or entered, formal, typed Order.

(Original signed by)

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Kurz J

Released: April 9, 2020