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Citation: *Van Roon v. Van Roon*, 2013 ONCJ 276

ONTARIO COURT OF JUSTICE
TORONTO NORTH FAMILY COURT

B E T W E E N:	)	
	)	
LYNDSEY ELIZABETH NORTON VAN ROON	)	**GARY GOTTLIEB, for the APPLICANT**
	)	
	)	
APPLICANT	)	
	)	
- and -	)	
	)	
	)	
MICHAEL PAUL VAN ROON		
RESPONDENT		**JONATHAN KRASHINSKY, for the RESPONDENT**
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	)	**HEARD: MAY 14, 2013**

JUSTICE S.B. SHERR

REASONS FOR DECISION ON MOTIONS

Part One – Introduction

[1] The applicant (the mother) has brought a motion seeking temporary relief including: custody of the parties' two children (the children), an order that the father have supervised access to the children and a restraining order.

[2] The respondent (the father) has brought a cross-motion seeking joint custody of the children, an equal time-sharing arrangement with them and an order transferring the case to the Ontario Court of Justice in Guelph, Ontario at the conclusion of the motions. He asks that the mother's claim for a restraining order be dismissed.

[3] The mother opposed the father's request to transfer the case to Guelph and asked that the case continue in Toronto.

[4] The parties also sought temporary support orders in their motions. They did not argue the support issues at the hearing of the motions, concentrating instead on the parenting and venue issues.

[5] The parties filed significant affidavit evidence on these motions. The motions were determined on the basis of these affidavits and the submissions of counsel. I also considered, at the father's request, an unsworn letter from the older child's daycare provider. Both parties asked me at the end of submissions to make temporary orders, irrespective of how I determined the venue issue.

Part Two – Background facts

[6] The mother is 29 years old. The father is 35 years old.

[7] The parties were married in May of 2008 and resided together until their separation on March 24, 2013.

[8] The older child is 4 years old. The younger child is 9 months old.

[9] The mother was on maternity leave at the time of the separation and staying at home with the children. She previously worked as a Registered Insurance Broker. She is presently in receipt of employment benefits. She and the children currently live in Toronto with her parents.

[10] The father works full-time for a healthcare company as a Remote Monitoring Specialist. He lives in Guelph with his grandmother.

[11] The parties and the children resided together in Guelph until the date of the separation.

[12] On March 24, 2013, the mother called the police after a dispute with the father. She had just returned to the home in Guelph after spending 9 days in Toronto with the children at her parents' home. The mother advised the father that she wanted to separate and deposed that she became frightened by his aggressive behaviour towards her. The police attended at the family home and assisted the parties in negotiating a temporary parenting agreement where the children would go with the mother to stay in Toronto until

March 26, come back to Guelph to stay with the father until March 28 and then return to the mother's care, with the expectation that the parties would negotiate parenting arrangements after that date.

[13] Despite her agreement, the mother did not return the children to the father on March 26, 2013. The children have remained with her at her parents' home in Toronto since March 24, 2013.

[14] The mother issued her application in this court on April 8, 2013. Her counsel alerted the father's counsel (who had just been retained) that he was bringing a motion without formal notice that day for emergency relief.

[15] The father appeared at court on April 8, 2013, without counsel, and sought an adjournment of the mother's motion. The adjournment was granted on terms, including that the children would remain in the care of the mother pending the return date, the father would have access supervised by a third party for a minimum of once per week for 2-3 hours, and that the father could not contact or come within 100 meters of the mother pursuant to section 28 of the *Children's Law Reform Act*. The court noted that it was cautious in ordering terms, particularly since venue was in issue and it only had the mother's evidence before it at that point.

Part Three – Temporary parenting order

3.1 Legal considerations

[16] Section 24 of the *Children's Law Reform Act* (the Act) sets out that the court must make custody and access orders in the best interests of the children. This applies to both temporary and final orders. The court considered the relevant best interests criteria set out in subsection 24 (2) of the Act which reads as follows:

> **Best interests of child**
>
> (2) The court shall consider all the child's needs and circumstances, including,
>
> (a) the love, affection and emotional ties between the child and,
>
> (i) each person entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons involved in the child's care and upbringing;
>
> (b) the child's views and preferences, if they can reasonably be ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
>
> (e) any plans proposed for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[17] The court also considered subsection 24 (4) of the Act which reads as follows:

Violence and abuse

(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

(a) his or her spouse;

(b) a parent of the child to whom the application relates;

(c) a member of the person's household; or

(d) any child.

[18] The Ontario Court of Appeal in *Kaplanis v. Kaplanis* [2005] O.J. No. 275 sets out the following principles in determining whether a joint custody order is appropriate:

1. There must be evidence of historical communication between the parents and appropriate communication between them.
2. It can't be ordered in the hope that it will improve their communication.
3. Just because both parents are fit does not mean that joint custody should be ordered.
4. The fact that one parent professes an inability to communicate does not preclude an order for joint custody.
5. No matter how detailed the custody order there will always be gaps and unexpected situations, and when they arise they must be able to be addressed on an ongoing basis.
6. The younger the child, the more important communication is.

[19] Joint custody should not be ordered where there is poor communication and the parties fundamentally disagree on too many issues affecting the child's best interests. See: *Graham v. Butto*, 2008 ONCA 260; *Roy v. Roy* 2006 Canlii [2006] O.J. No. 1872 (Ont. C.A.).

[20] Courts do not expect communication between separated parties to be easy or comfortable, or free of conflict. A standard of perfection is not required, and is obviously not achievable. See: *Griffiths v. Griffiths* 2005 CarswellOnt 3209 (OCJ). The issue is whether a reasonable measure of communication and cooperation is in place, and is achievable in the future, so that the best interests of the child can be ensured on an ongoing basis. See: *Warcop v. Warcop*, 2009 CanLII 6423 (Ont. SCJ).

[21] The Court of Appeal has upheld joint custody in the absence of reasonably effective communication between the parents where it has been necessary to sustain a child's contact with a parent who has been subjected to a campaign of alienation. For example, such an order was upheld where a mother had laid down a pattern of resisting the father's access and was found by the trial court to be unable to appreciate the importance of the father's relationship with their children. See: *Andrade v. Kennelly*, 2007 ONCA 898.

[22] The status quo is a very important consideration on temporary motions for custody and access. See: *McEachern v. McEachern* 1994 CanLII 7379 (Ont. SCJ).

[23] Children should have maximum contact with both parents if it is consistent with the children's best interests. See: *Gordon v. Goertz* [1996] 2 S.C.R. 27.

[24] There is a presumption that regular access by a non-custodial parent is in the best interests of children. 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. See: *Jafari v. Dadar* [1996] 42 R.F.L. (3d) 349 (Ont. C.A.).

[25] The party who seeks to reduce normal access will usually be required to provide a justification for taking such a position. The greater the restriction sought, the more important it becomes to justify that restriction. See: *M.A. v. J.D.* [2003] O.J. No. 2946 (OCJ).

3.2 Positions of the parties

[26] The mother seeks sole temporary custody of the children and an order of supervised access for the father. She deposed that she is the primary caregiver for the children. She said that she was the victim of domestic abuse - the father would verbally demean her, isolate her, physically intimidate her and control the people she could see and talk to. She deposed that the father has an explosive temper and she fears him. The mother also alleged that the father has been inappropriately rough with the older child.

[27] The father denies all allegations of domestic abuse. He contends that the mother has manufactured these allegations to buttress her claim for custody and to keep the case in Toronto. He deposed that he has taken on a very active role in parenting the children, and prior to 2012 he was actually the primary caregiver of the oldest child for over one year. He seeks an order for equal parenting time and joint custody of the children. He also made many allegations criticizing the parenting ability of the mother and alleged that she was the abusive party in the relationship.

3.3 Analysis

[28] The court is often provided with limited independent information on temporary parenting motions upon which to make these important decisions for children. As a case moves forward, more information about a family becomes available and the best interests of children begin to crystallize. Such is the case here. The parties filed conflicting evidence on the material issues. This evidence has not been tested. On temporary motions, the court has to make decisions based on the evidence available to it at that point in time.

[29] The evidence indicates that this is not a case for joint custody at this time. The parties made numerous allegations of abuse and improper parenting against the other. Their communication is very poor and they have a high level of distrust of each other. The parties have

been unable to agree on schooling and medical issues about the children. There is evidence that the father has a controlling personality and evidence of domestic violence by the father against the mother.

[30] The mother has been on maternity leave since July of 2012 and has stayed home to care for the children. The father has worked full-time since the beginning of 2012. The status quo prior to the separation was that the mother was the children's primary caregiver.

[31] The evidence indicates that the children have been well cared for by the mother. She has attended to their emotional and physical needs and has provided them with stability and security. It is not in the best interests of the children to disrupt this primary parenting arrangement.

[32] The evidence indicates that the father has been more involved with the children than stated by the mother. The mother described the father's role as playing with them for an hour each day. The father, however, provided detailed evidence of his role in caring for the children, including frequently picking up the older child from daycare. The court also accepts his evidence that prior to returning to work full-time in 2012 he took on an even more active parenting role.

[33] The evidence demonstrates that the father loves the children, has a positive relationship with them and is able to look after their instrumental needs (food, clothing, hygiene).

[34] Prior to the separation, the father would frequently care for the children on an unsupervised basis. The mother agreed with the father to provide him with overnight access at the time of the separation. Her emails shortly after the separation showed an intention to comply with this agreement. The mother changed her mind after she came to this court and obtained legal advice.

[35] The allegations of domestic violence by the mother are very concerning. For the most part, the domestic violence she described was verbal, but verbal abuse, which if true, would be emotionally frightening to the mother and any child who witnessed it. She described a man who could not control his temper and who would fly into rages when he didn't get his own way. She filed a picture showing where he punched a hole in the wall. She said that he aimed at her head and missed and he hasn't fixed the hole as an intimidating reminder to her (she said that the incident happened in 2011). She described how the father would frequently physically intimidate her, blocking her way and invading her physical space. She described how, when angered, the father would slam doors, smash tables and follow her around the house, yelling at her. She deposed that the father would often act this way in the presence of the children.

[36] The mother also provided the court with detailed evidence of controlling behaviour by the father. She deposed that he did not let her register the older child in junior kindergarten and would not let her immunize the children. He was the only licensed driver in the home and often controlled where she could go.

[37] The mother deposed that the father threw her out of the family home and she had no choice but to move to Toronto to live with her parents.

[38] The father denied the abuse allegations. He deposed that it was the mother's decision to leave the family home – he did not want to separate. He admitted punching a hole in the wall in 2009 during an argument, but denied aiming a punch at the mother. He pointed out that there was no medical evidence of abuse and no reports by the mother to the police or to a Children's Aid Society about abuse. He submitted that the fact that the police did not lay charges on March 24, 2013, when they attended at the home, and worked out the parenting schedule, supports his position that the mother was unafraid of him and was never abused. He also attached emails between the parties after the separation as evidence that the mother supported his relationship with the children and was unafraid of him.

[39] The mother concedes that she never reported the abuse. She said that she was ashamed of being a victim of abuse and fearful of the father.

[40] The father alleged that the mother was the aggressor in the relationship, frequently verbally abusing him. He provided no corroboration for this evidence.

[41] It is certainly easier to establish the existence of domestic violence when there is corroborative evidence from doctors, the police or a Children's Aid Society. However, this court is well aware that victims of domestic violence (male or female), for many reasons, including shame, lack of self-esteem, emotional paralysis and fear, often do not report domestic violence. The failure to report it doesn't mean that domestic violence hasn't occurred. On the other hand, the reporting of domestic violence at this time doesn't necessarily mean that it actually took place. The evidence has to be closely scrutinized.

[42] The mother's parents did provide some corroboration of inappropriately aggressive behaviour by the father. Her mother described incidents where the father acted towards them in a physically intimidating manner. Her father deposed about an incident where the father grabbed him from behind at a birthday party, squeezed him hard and threw him into a pool, causing him injuries. He deposed that the father appeared to be angry at him. This version of the incident was corroborated by a friend of the mother's. The maternal grandmother also deposed how the father would isolate the mother from them.

[43] I have taken into consideration that the corroborating evidence of abuse comes from witnesses aligned with the mother and that the father's mother (also an aligned witness), observed no evidence of abuse. I have also considered that a number of the abuse allegations are historic.

[44] It was the father's conduct subsequent to the April 8, 2013 temporary order that provided the court with the best corroboration of the mother's evidence. The temporary order provided that the father would have access supervised by a third party. One would think that his focus, with the eyes of the court upon him, would be that he would cooperate with the access supervisor, behave appropriately and enjoy his time with the children. The father did the opposite.

[45] The email exchange between the access supervisor and the father concerning the first scheduled visit was filed. Quite reasonably, the access supervisor wanted to know where they would be going on the visit. Her preference was to go to one location. The father told her that he first wanted to take the children to an appointment and unreasonably refused to disclose what this appointment was for or where it would take place. The access supervisor expressed her discomfort about this and pressed the father for specific information about the appointment. The father dug in his heels, refusing to provide it. The father at one point wrote to the access supervisor:

> Your responsibility is to supervise, not dictate terms – only the court can do that. There is no stipulation in the court order that says I need to divulge anything to you other than an initial meeting location. Nor is there anything stated in the court order that we must stay in any one location provided the children stay within the city limits of Toronto. If you wish to violate that court order of your own cognizance or as otherwise being directed by outside influences, I seriously recommend you consider the legal ramifications to you directly. As you have not retained council (sic) in this matter and have no direct personal interest, you have no recourse to confer with council. As to the location, I have relayed to you multiple times the area as being only a few minutes walk from our agreed upon meeting location. I do not have the exact address committed to memory, but I will give it to you personally when you meet with me with my children. I'm sure the judge would be very interested in hearing that you or Lyndsey are attempting to go against the court order of the court.

[46] The father eventually revealed that he had booked a dentist appointment for the children. His booking of this appointment, without prior consultation with the mother, was inappropriate.

[47] This evidence supports the mother's contention that the father has a controlling personality. Despite the court order, he was going to dictate how the visit took place, notwithstanding the discomfort of the access supervisor. He was going to arrange dental appointments for the children and felt no obligation to advise the mother or the access supervisor about this. The court views the email set out above as an attempt to control and intimidate the access supervisor, who was acting in a voluntary capacity.

[48] The predictable result was that the access supervisor no longer felt comfortable supervising access and only one access visit has taken place since April 8, 2013. The father put his need to assert control over the need of his children to see him and enjoy their time with him.

[49] On a preliminary basis, this evidence demonstrates poor judgment on behalf of the father, raises a concern about his ability to prioritize the needs of the children and corroborates the mother's allegations about his controlling personality and judgment. If the father acts this way when he is being monitored by the court, it causes a real concern about how is he acting behind closed doors.

[50] It is in the children's best interests to be placed in the temporary custody of the mother. The mother should have the ability to make schooling decisions about the older child and medical decisions about both children on a temporary basis.

[51] Based on the evidence set out above, it is in the children's best interests to take a cautious approach with respect to access. However, the concerns expressed about the father do not rise to the level where access needs to be supervised. The father has been actively involved in parenting the children and has a positive relationship with them. Other than the children's likely exposure to domestic violence by the father towards the mother, the evidence does not support a finding that the children are at physical or emotional risk in his care.

[52] The court considered that the youngest child is only nine months old and is most closely connected to the mother. The court also considered that it is important not to expose the children to too many transitions at this time, due to the current level of conflict and mistrust between the parties.

[53] The father will have temporary access to the children each Saturday from 10 a.m. to 6 p.m. The father shall designate a third party (preferably one of his relatives) to pick up and drop off the children at a location to be chosen by the mother. The father shall notify the mother's counsel who this person will be. The mother shall advise the father's counsel about the exchange location. If the father cannot obtain a third party to conduct exchanges, the parties can agree to a third party selected by the mother to conduct them. Failing agreement, the exchanges shall take place at the Toronto Supervised Access Centre as soon as the Centre can facilitate the exchanges. The access times would be modified in accordance with the hours that the Centre can accommodate the exchanges.

[54] It is hoped that if the father conducts himself in a responsible manner, the access can be extended to overnights sooner, rather than later.

[55] Given the father's unilateral action of setting up a dentist appointment for the children without notifying the mother, there will be an order that he is not to take the children to any medical or dental appointment, or schedule any extra-curricular activities for the oldest child without her prior consent.

Part Four – Request for a restraining order

4.1 Legal considerations

[56] Justice Robert J. Spence, in *McCall v. Res*, 2013 ONCJ 254 (CanLII), recently reviewed the legal principles with respect to restraining orders. I adopt his analysis which is set out in paragraphs 27-31 as follows:

> **2. The statutory scheme**
>
> [27] The statutory authority for the making of a restraining order emanates from section 35 of the *Children's Law Reform Act* ("CLRA") and section 46 of the *Family Law Act* ("FLA"). Section 35 of the CLRA provides [my emphasis]:
>
> **Restraining order**

35. (1) On application, the court may make an interim or final restraining order against any person if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. 2009, c. 11, s. 15.

Provisions of order

(2) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:

1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant's lawful custody.

2. Restraining the respondent from coming within a specified distance of one or more locations.

3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.

4. Any other provision that the court considers appropriate.

Section 46 of the FLA provides [my emphasis]:

Restraining order

46. (1) On application, the court may make an interim or final restraining order against a person described in subsection (2) if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody. 2009, c. 11, s. 35.

Same

(2) A restraining order under subsection (1) may be made against,

(a) a spouse or former spouse of the applicant; or

(b) a person other than a spouse or former spouse of the applicant, if the person is cohabiting with the applicant or has cohabited with the applicant for any period of time. 2009, c. 11, s. 35.

Provisions of order

(3) A restraining order made under subsection (1) shall be in the form prescribed by the rules of court and may contain one or more of the following provisions, as the court considers appropriate:

1. Restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant's lawful custody.

2. Restraining the respondent from coming within a specified distance of one or more locations.

3. Specifying one or more exceptions to the provisions described in paragraphs 1 and 2.

4. Any other provision that the court considers appropriate. 2009, c. 11, s. 35.

> [28] Although the legislation permits the court to make a restraining order prohibiting or restricting the father's contact with the mother or the child, it does not permit the court to make a restraining order which extends to "family", "friends" and "acquaintances" of the mother, which the mother has requested in this case. Accordingly, that particular request for relief by mother cannot be granted.

3. Case law

> [29] Before the court can grant a restraining order, it must be satisfied that there are "reasonable grounds [for the mother] to fear for her own safety or for the safety of [her child]". In *Fuda v. Fuda* 2011 CarswellOnt 146 (Ont. S.C.), Justice McDermot had this to say, at paragraph 31 [my emphasis]:
>
> It is not necessary for a respondent to have actually committed an act, gesture or words of harassment, to justify a restraining order. It is enough if an applicant has a legitimate fear of such acts being committed. An applicant does not have to have an overwhelming fear that could be understood by almost everyone; the standard for granting an order is not that elevated. A restraining order cannot be issued to forestall every perceived fear of insult or possible harm, without compelling facts. There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. A court must be able to connect or associate a respondent's actions or words with an applicant's fears.
>
> [30] In *Azimi v. Mirzaei* 2010 CarswellOnt 4464 (Ont. S.C.), Justice Ruth Mesbur made the following comments, at paragraphs 7 and 9 [my emphasis]:
>
> More importantly, Horkins J made specific findings of fact that the applicant had physically and verbally abused the respondent, with psychological abuse being more frequent. It is telling that today, when the respondent raises the issues of her ongoing psychological fear of the applicant, the applicant simply suggests she should get counselling. [In this case] I accept that the respondent has reasonable grounds to fear for her own safety and the safety of the child who is in her custody. This fear extends to both their physical safety and psychological safety.
>
> [31] What I take from these cases is:
>
> - The fear must be reasonable
> - The fear may be entirely subjective so long as it is legitimate
> - The fear may be equally for psychological safety, as well as for physical safety

4.2 Findings

[57] The evidence reviewed in subsection 3.3 above supports, on a balance of probabilities, findings that:

a) The mother's fear of the father is reasonable.

b) That even if the extent of the mother's fear of the father is subjective, it is legitimate.

c) That the mother fears for her psychological safety as well as her physical safety.

[58] The father's behaviour after the April 8, 2013 court order informs this court that the order made under section 28 of the *Children's Law Reform Act* is insufficient to protect the mother and a temporary restraining order is required. Even knowing (or he should have known) that the court was closely examining his behaviour during the adjournment period, the father acted in a controlling and inappropriate manner. The evidence dictates the need for a structured order with consequences for breaches.

[59] At this point, the father should have no contact with the mother except in limited circumstances. The father will be temporarily restrained from contacting the mother or coming within 100 meters of her home or where she may be reasonably expected to be. The only

exceptions to this term will be for attending at a Supervised Access Centre if the parties use one for access exchanges, attending at court appearances and attending any settlement meetings arranged by counsel. The father should designate a third party, preferably a family member, to communicate with the mother about access. He can also communicate with her about access through counsel.

[60] The evidence did not support granting a restraining order that extends to the children. The children do not appear to be afraid of the father, he has a loving relationship with them and his contact will be structured in accordance with the access order.

[61] A separate endorsement for the restraining order will be prepared.

Part Five – Venue

[62] The father has asked that the case be transferred to the Ontario Court of Justice in Guelph. He is not asking that the mother be required to move back to Guelph with the children. This is an important distinction.

[63] The applicable rules for considering venue are subrules 5 (1), (2) and (8) of the *Family Law Rules* (the rules), which read as follows:

> **WHERE CASE STARTS**
>
> **5.** (1) Subject to sections 21.8 and 21.11 of the *Courts of Justice Act* (territorial jurisdiction — Family Court), a case shall be started,
>
> (a) in the municipality where a party resides;
>
> (b) if the case deals with custody of or access to a child, in the municipality where the child ordinarily resides, except for cases described in,
>
> (i) section 22 (jurisdiction of an Ontario court) of the *Children's Law Reform Act*, and
>
> (ii) subsection 48 (2) (place for child protection hearing) and subsection 150 (1) (place for adoption proceeding) of the *Child and Family Services Act*; or
>
> (c) in a municipality chosen by all parties, but only with the court's permission given in advance in that municipality.
>
> **STARTING CASE — DANGER TO CHILD OR PARTY**
>
> (2) Subject to sections 21.8 and 21.11 of the *Courts of Justice Act*, if there is immediate danger that a child may be removed from Ontario or immediate danger to a child's or party's health or safety, a party may start a case in any municipality and a motion may be heard in that municipality, but the case shall be transferred to a municipality referred to in subrule (1) immediately after the motion is heard, unless the court orders otherwise.
>
> **TRANSFER TO ANOTHER MUNICIPALITY**
>
> (8) If it is substantially more convenient to deal with a case or any step in the case in another municipality, the court may, on motion, order that the case or step be transferred there.

[64] There was no dispute that the children were ordinarily resident in Guelph at the outset of the application. The family resided there before the mother moved to Toronto with the children, without the father's acquiescence or consent. This means that ordinarily the case should have been started in Guelph pursuant to clause b of subrule 5 (1).

[65] Subrule 5 (2) provides an exception to the general rule about where to start a case where there is an immediate danger of the removal of a child from Ontario, or an immediate danger to a child's or party's health or safety. In situations of domestic violence, this would include an immediate danger to a child or party's physical or emotional safety (See: *Azimi v. Mirzaei* 2010 CarswellOnt 4464 (Ont. SCJ), where this comment was made in the context of determining whether a restraining order was warranted). In such circumstances, a party may start a case in any municipality and the motion may be heard there. However, the subrule also provides that after the motion is heard, the case shall be transferred to the municipality where the children ordinarily resided, unless the court orders otherwise.

[66] There was an issue as to whether there was an immediate danger to the mother's health or safety at the time of the application as the mother and the children were already in Toronto, living with her parents. However, the evidence indicates that the parties were in a state of crisis in their relationship at the time. The mother described in paragraphs 26 and 27 of her affidavit of May 10, 2013 frightening, abusive behaviour by the father at and near the time of the separation. She alleged that he threatened to take the children and keep them from her. I find on a balance of probabilities that she was legitimately afraid of him and what he might do in light of her decision to remain in Toronto with the children. The mother provided sufficient evidence to fall within subrule 5 (2).

[67] In any event, once the motion was before the court and the parties had spent so much time and expense on it, it was appropriate for the court, pursuant to subrule 2 (3) (saving time and expense) and subrule 2 (5) (dealing with as many aspects of the case as possible on each occasion), to make a temporary order. To the credit of counsel for the parties, they both asked me by the end of submissions to use these subrules, if necessary, to make a temporary order, irrespective of the venue issue.

[68] This leads the court to determine whether the case should be transferred back to Guelph. Counsel for the mother asked the court to "order otherwise", as provided for in subrule 5 (2). He argued that this phrase gives the court a wide discretion to keep the case in Toronto and that the court is not limited by the "substantial convenience" test in subrule 5 (8).

[69] However, the court prefers the father's interpretation of subrule 5 (2) - that the court's discretion to keep the case in Toronto is narrow. An ordinary reading of the subrule leads to the conclusion that there is a presumption that the case will be transferred back to Guelph, even if there was an immediate danger to the health or safety of a party or a child that necessitated starting the case in Toronto. While this presumption is rebuttable, it appears that there would need to be compelling circumstances to do so.

[70] A narrow interpretation of the phrase "to order otherwise" is appropriate. In cases of domestic violence, the time when parties separate is often the most volatile and where a party is most at risk. Subrule 5 (2) provides a short-term safety valve for such parties. However, it also is crafted to discourage forum shopping and parties using self-help to move the children from the municipality where they ordinarily reside. Courts are very reluctant to grant temporary mobility orders, even in situations of alleged domestic violence, before the evidence can be properly tested. See: *Plumley v. Plumley*, 1999 CanLII 13990 (Ont. SCJ). The risk of a liberal definition of "to order otherwise", as suggested by the mother, is that parties will allege domestic violence as a mechanism to change the jurisdiction of children and of the case prior to a proper exploration of the issues.

[71] The mother has not demonstrated an evidentiary basis for this court to keep the case in Toronto. While the court has found sufficient evidence on a balance of probabilities to support the mother's allegations of domestic violence at this stage, it is acutely aware that these allegations are denied and that the evidence has not been tested through examination. A more thorough examination may very well lead to different conclusions. The findings in this decision are only preliminary.

[72] The mother made an alternative argument (in the event that I accepted the narrow interpretation of subrule 5 (2) proposed by the father) that I should maintain the case in Toronto under subrule 5 (8), as it is substantially more convenient to do so.

[73] I agree with the father that ordinarily the determination of a subrule 5 (8) motion should be made by the presumptive court (in this case Guelph). However, all rules should be read in conjunction with Rule 2 – to deal with cases justly and in consideration of subrule 2 (3) (saving time and expense) and subrule 2 (5) (dealing with as many aspects of the case as possible on the same occasion).

[74] The parties are of limited means and spent considerable money and emotional energy on these motions. It is not consistent with the objectives of Rule 2 to require them to argue the venue issue again in Guelph, so I will rule on this request.

[75] The onus is on the mother to demonstrate that it is substantially more convenient for the case to be heard in Toronto. The word substantially is critical to this analysis – it is not enough for it to be more convenient for her, or somewhat more convenient, in the overall analysis, to hear the case in Toronto. See my comments in: *Nyari v. Velasco*, [2008] O.J. No. 2383 (OCJ).

[76] The mother was unable to meet her onus. Many of the reasons she set out in her material to resist the transfer of the case to Guelph went more to the issue of whether she and the children should be forced to return to Guelph. That is not the issue for this court to decide.

[77] Guelph is a short distance from Toronto. While she doesn't have a car, the mother has family support and can likely obtain transportation assistance for court attendances. There is public transport available, if necessary, between the cities. Potential witnesses are located in

both Toronto and Guelph and if the case is ever tried they would only likely be required to testify on one day. This is not a significant inconvenience, considering the distance between the cities.

[78] The mother can arrange for court security at the court in Guelph, just as she can arrange for it in Toronto, if she feels unsafe. There is no risk to her safety by attending court in Guelph.

[79] The mother argued that she would be put to the cost of obtaining new counsel if the case is heard in Guelph. Guelph is not far for Toronto counsel to travel. However, even if the mother will need to obtain new counsel, retaining Toronto counsel, who would not act if the case was transferred to Guelph, was a risk that she took, given the strong possibility that this case would be transferred there. It is not a significant factor in this analysis.

[80] Lastly, this court has not yet started its case conferencing function due to the focus on the emergency motions. Disruption of the case management function of a court can be a factor in the substantial inconvenience analysis. See: *Nyari, supra,* paragraph 38. The case management process can begin just as easily in Guelph as it can in Toronto.

[81] This order will accomplish the objectives of subrule 5 (2). A structured and enforceable temporary order will be in place that provides safeguards for the safety of the mother and the insulation of the children from conflict between the parents. It will hopefully stabilize what was an unstable situation at the time the motion was brought. The mother is living with her parents and is safe at this time. The father is not contacting her and will be prevented from doing so for the time being. The court is not requiring that the mother move back to Guelph - it is only requiring her to litigate this case in Guelph. A more thorough exploration of the merits of the case can be continued in the jurisdiction where the children ordinarily resided.

[82] This case will be transferred to the Ontario Court of Justice in Guelph.

Part Six – Conclusion

[83] The parties did not address in their submissions the support issues raised in their respective motions, or the mother's requests in her motion for production of information and an independent medical examination of the father. None of these requests were urgent and the court commends counsel for concentrating on only the urgent issues in this case. The portions of the motions not dealt with shall be adjourned to be heard by the court in Guelph.

[84] An order shall go on the following terms:

a) The mother shall have temporary custody of the children.

b) A restraining order restricting the father's contact with the mother shall be endorsed separately. The mother's request for a restraining order with respect to the children is dismissed.

c) The father shall have access to the children as follows:

i) Every Saturday from 10 a.m. to 6 p.m.

ii) The father shall designate a third party to exchange the children at a location chosen by the mother. The father is to notify the mother's counsel who this person will be. The mother is to notify the father's counsel about the exchange location.

iii) In the event that the father is unable to find a third party to exchange the children and the parties cannot agree on another person to conduct the exchanges, the exchanges shall take place at the Toronto Supervised Access Centre, as soon as the Centre can accept the case. The access hours will be modified to be in accordance with the available hours of the Centre.

iv) The father shall not take the children to any medical or dental appointments or schedule any extra-curricular activities for the oldest child without the prior consent of the mother.

d) This case is transferred to the Ontario Court of Justice in Guelph for a case conference and continuation of the portions of the motions not dealt with by this court, at a date to be coordinated with the trial coordinator in Guelph.

[85] If any party seeks costs of these motions they shall serve and file their written submissions no later than May 31, 2013. The other party will then have until June 11, 2013 to make written response. The submissions should not exceed three pages, not including any offer to settle or bill of costs. The submissions should be provided to this court's trial coordinator's office.

[86] The court thanks counsel for their excellent presentation of these motions.

Justice S.B. Sherr

Released: May 21, 2013