

WARNING

The court hearing this matter directs that the following notice be attached to the file:

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

87.—(7) Order excluding media representatives or prohibiting publication.— Where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding, the court may make an order,

. . .

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

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

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

. . .

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

ONTARIO COURT OF JUSTICE

CITATION: *Catholic Children's Aid Society of Toronto v. T.M.*, 2018 ONCJ 543

DATE: August 13, 2018

COURT FILE No.: Toronto C11630/17

B E T W E E N :

Catholic Children's Aid Society of Toronto

Applicant,

— AND —

T.M. (Respondent mother)

V.F. (Respondent father of S.F.)

W.O. (respondent father of A.O. and I.O.)

Before Justice Roselyn Zisman

Heard on July 24, 2018

Reasons for Judgment released on August 13, 2018

Marshall Matiascounsel for the applicant society
Paul McInnis counsel for the respondent mother
Gary Gottlieb counsel for the respondent father V.F.
Lauren Speers counsel for the respondent father W.O.

RULING ON MOTIONS

Zisman J.:

Introduction

[1] These motions, in the context of an outstanding child protection proceeding, were heard prior to trial as decisions needed to be made with respect to specific medical and educational issues with respect to the child A.O.

[2] Although the Notice of Motion filed on behalf of the W.O. who is the father of A.O. requests more extensive relief as indicated to counsel when these motions were set for hearing, there are credibility issues between the mother and the father W.O. that need

NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

to be determined at trial if not settled but the issues with respect to the child A.O. need to be determined immediately.

[3] The issues therefore to be determined on this motion are as follows:

- 1) Which parent shall be permitted to make the decision as to whether or not the child A.O. shall be medicated with the drug Biphentin or any other drug as a treatment for his diagnosis of a learning disability and the diagnosis of Attention-Deficit/Hyperactivity Disorder?
- 2) Which parent should be entitled to make the decision with respect to the choice of school for A.O. in September 2018?

Background

[4] The mother and the father W.O.¹ are the parents of two children A.O. (“A.”, “the child” or “the son”) who is 10 years old and I.O. (“I.”) who is 8 years old (collectively “the children”).

[5] The mother has been a high school teacher for 18 years and an assistant head of the math department at her school. The father is employed in the construction business.

[6] The mother and father separated 2013 but remained in the same home in a nesting arrangement until November 24, 2014. On that date the father was arrested and charged with a domestic assault and had conditions that prevented him from being in the home. The charges were withdrawn shortly thereafter due to concerns about the mother’s credibility as V.F. was staying with the mother and the Crown concluded that the mother’s motive was to get the father out of the home so she could move in with V.F.²

[7] Regardless of whether or not the assault occurred or who initiated the altercation, the society verified that the children had been exposed to domestic conflict. The children confirmed that this was an isolated incident but they were fearful of the argument that their parents had and that verbal arguments had been ongoing for some time.

[8] The parents have been involved in court proceedings in the Superior Court of Justice since the separation. Since September 2015, the children A. and I. have resided with the mother for about 60% to 62% of the time and spent the rest of the time with their father. Those proceedings had been set for trial when the child protection proceedings commenced in this court and are now suspended.

[9] The mother has another child S.F. who is 3 years old and whose father is V.F.

¹ As the father V.F. is not involved in these motions, I have referred to W.O. as the father and referred to V.F. by his initials.

² The reason for the withdrawal of the criminal charges is based on the father’s affidavit and a case note of the society social worker although the source of the society’s information is unclear in the case note.

[10] The Children's Aid Society and then the Catholic Children's Aid Society ("society") became involved with the mother initially in March 2014 after receiving information that since September 2013 the mother had been in a relationship with V.F. and she was aware at the time that V.F. was facing charges of being in possession of child pornography and that subsequently in February 2014 he was further charged with making child pornography. The file was transferred to intake as the mother proposed herself as a surety for V.F. and the society was concerned that the children would have contact with him and wanted to ensure that a plan of safety be established to ensure that the children would be safe from harm.

[11] Further concerns were raised as V.F. had a condition of no contact with children due to the charges he was facing and the mother had permitted him in her home and therefore placed all of the children at risk of harm.

[12] As of July 2015, the society advised that their concerns related to the children's possible exposure to adult conflict due to the custody and access disagreements between the mother and the father and the possibility of any risk that V.F.'s release from prison would pose for the children.

[13] The mother made ongoing complaints about the father's care of the children, including that he permitted the children to have alcohol and that the children did not do their homework in his home. But the society worker explained that these were not protection concerns and the society had no protection concerns about the father.

[14] On December 14, 2016 V.F. pleaded guilty³ to two counts of accessing child pornography and one count of making child pornography and was sentenced to 8 more months in jail. He had been in custody for about 2 years cumulatively. As part of his sentence a 10 year prohibition order was made that included not having contact or communication with any person under the age of 16 years unless under the supervision of a person approved by the court, except for his child, S.F. and then only with the approval of the mother.

[15] On January 23, 24, and 25th, 2017 V.F. had a separate trial and pleaded guilty to 3 additional charges of breaches of his recognizance involving being around children at Canada's Wonderland, the Toronto Zoo and a park next to the mother's home. He received a 2 year probation order.

[16] The society commenced this Protection Application on October 5, 2017 as V.F. has been released from prison on September 7, 2017.

[17] The society sought an order that all 3 children were likely to suffer harm and required an order of supervision placing them in the care and custody of the mother. The terms of supervision requested included terms that V.F. have access to his daughter S.F. at the discretion of the society and no access to either of the other children. There were conditions that the mother not permit V.F. to be alone with S.F.

³ It is not disputed that there were thousands of pictures and some videos found on his home and work computer.

under any circumstances and not allow him in her primary residence. There were no terms with respect to the father.

[18] On the first court attendance on October 18, 2017 the parties agreed to a temporary without prejudice order placing the children in the care and custody of the mother but also agreed that the father's access would continue in accordance with the outstanding parenting arrangements in the Superior Court of Justice. The father has the children in his care on a 4 week schedule, weeks 1 and 3 from Thursday after school to return to school on Monday and on weeks 2 and 4 from Wednesday after school to Thursday return to school.

[19] On March 21, 2018, the parties entered into a Statement of Agreed Facts with respect to the finding of need of protection with respect to all of the children pursuant to section 37(2) (l) of the CFSA.

[20] On May 10, 2018 the parties agreed (the father taking no position) that S.F. be placed in the care and custody of the mother pursuant to a 6 month supervision order with terms that include V.F. having supervised contact with his daughter S.F. and no contact with the other children. It was agreed that the issue of the disposition with respect to the other children would be scheduled for trial.

[21] The issues between the mother and father relate to custody that is, decision making and the time the children spend with each parent. There is presently no order for custody or a parenting plan that determines which parent can make decisions regarding the children.

[22] Counsel for the society and counsel for V.F. did not participate in these motions and took no position.

Position of the parties

[23] It is the mother's position that she has always been the parent who arranged for the children's medical care, attended all of the appointments and she should be entrusted with making the decisions about their son's treatment for Attention-Deficit Hyperactivity Disorder ("ADHD"). In particular, it is submitted that the mother arranged for the psychological assessment that did not recommend medication and that the father has gone behind her back, taken the child to see a paediatrician, obtained medication and is administering that medication.

[24] The mother's motion initial sought the ability to enrol their son in Claude Watson School for the Arts ("Claude Watson") which is an arts based school for September 2018. The child auditioned and is now on a waitlist but it is unlikely he will be accepted. However, if he is accepted near the beginning of the school year the mother would like to enrol him in that school. The mother feels that an art based school would highly benefit their son who has an interest in the arts and loves to draw.

[25] It is the father's position that the mother's judgment and credibility must be questioned due to her judgment in being involved with V.F.

[26] It is the father's position that the mother has historically prevented him from being involved in the health care of his children and that he acted responsibly in seeking out a medical opinion after receiving the psychological report that diagnosed his son with ADHD. Due to the historic lack of co-operation, he only advised the mother after consulting with the doctor and she was invited to attend a further appointment but chose not to attend.

[27] The father also relies on the recommendations of the Office of the Children's Lawyer report filed in the domestic proceedings. The report recommended shared custody and a parallel decision making regime with the father being permitted to make medical decisions and the mother to make the educational decisions.

[28] With respect to the schooling issues although it may be moot, the father questions the mother's decision as their son is already having difficulties coping with the work in a regular school day and Claude Watson's academic curriculum is only a half day and the remainder of the day devoted to the arts.

General observations

[29] Although these motions are in the context of child protection proceedings, the issues involved relate to decisions with respect to issues more typically addressed in domestic proceedings. The society does not consider that the issues raise any child protection matters and therefore chose not to participate or take a position supporting one parent over the other.

[30] In this case, the parties do not agree with respect to most of the historic incidents that involves the children. The court is mindful that on a temporary motion none of the evidence has been scrutinized or subject of cross-examination and it is therefore difficult to make credibility findings. However, in some instances because of reliable third party evidence or inherent contradictions some credibility findings can be made. I will refer to these in the decision.

[31] Both counsel relied on articles appended to their respective affidavits, with respect to such topics as ADHD treatment, the benefit of an arts school program and the effect of trauma to bolster their respective positions.

[32] Although it is common to see such information being attached to affidavits, in some instances courts have permitted such information subject to a ruling as to weight. However, in this case, the articles relate to the very issues that the court must determine and both parties have taken divergent positions on those issues. The only basis for the admissibility of such articles would be if the court was prepared to take judicial notice of the information in these articles. I am not prepared to admit these articles as there is no evidentiary basis to do so.⁴

⁴ See *R. v. Find* (2001), 154 C.C.C. (3d) 97 (Supreme Court of Canada) and *R. v. Spence*, 2005 SCC 71 re test for courts taking judicial notice

[33] The father has also attached as exhibits to this affidavit a copy of the OCL report dated June 9, 2016 and an updating report dated November 21, 2017. The latter report was discontinued as a result of the commencement of this child protection proceeding and although it contains a summary of information obtained in the courts of the investigation it makes no recommendations. I place no weight on either report as the initial recommendations have not been subject to cross-examination. The scrutiny of the information and recommendations in the reports and the weight to be placed on those reports are more appropriately left to the trial judge.

[34] I am sympathetic to the father's frustration as a trial that he was eagerly anticipating was scheduled to commence in the Superior Court of Justice and was then stayed as a result of the child protection concerns with respect to the mother's involvement with V.F. I therefore understand his position that the court needed to understand the entire history between the parties and that his concerns about the mother be put into a historic perspective.⁵ However, these motions involve very narrow issues and those historic concerns cannot be determined or assessed on this temporary motion. Therefore, the court must rely on the evidence only directly relevant to the narrow issues before the court on these motions.

[35] I also need to assure the father that it is also understandable that he would be extremely concerned about the risks posed to his children in view of the serious criminal convictions against V.F. and that he would be concerned about the mother's minimizing those risks and concerned that the mother abide by the terms of supervision to ensure that his children have no contact whatsoever with V.F. However, those concerns have little if any relevance to the issues on this motion.

Events leading up to Psycho-educational assessment of Dr. Grace Vitale

[36] The mother deposes that their son was never identified with any issues until the assault in November 2014 and that it was only after the trauma of witnessing that assault that their son began to have issues at school.

[37] I find that there is no basis for this conclusion by the mother. Firstly, by November 2014 their son would only have just started Grade 1 and there is no report to indicate any concern or changes in his academic performance as a result of his exposure to the conflict between his parents. Secondly, the case note of the society worker of November 22, 2014 indicates that "the older children [A. and I.] are doing well academically." Thirdly in the mother's own affidavit she later deposes that it was only in September 2015, the start of Grade 2, that she contacted the teacher to see how her son was doing and was told he was "a little behind but there were other students in the same situation". However, given her experience as a teacher she did not want to risk him falling further behind and felt he should be moved out of a French immersion program into an English program. There is no evidence that the mother raised a concern that there was a connection between A. witnessing one incident of assault on November 2014 was connected or contributing to his learning difficulties.

⁵ The father's affidavit was 43 pages long with 83 exhibits and totaling about 400 pages and his reply affidavit (much of which was not proper reply) was 40 pages with 22 exhibits totaling about 60 pages.

[38] I do not find it relevant to determine which parent or if both parents agreed to place A. in the English program or if they disagreed with respect to A. attending summer school or why there was a delay in starting the IPRC process or why there was the delay in commencing a private assessment. Both parents blame the other.

[39] What is agreed is that by Grade 3, A. was only at a Grade 2 reading level and having trouble in math and his report card also indicates that he continued to be easily distracted.

[40] It is further agreed that the mother arranged for and her employment benefits paid for the cost of a private assessment by Dr. Grace Vitale. Dr. Vitale conducted the assessment on August 26, 28, 31 and September 10, 2017 and released her report sometime in October 2017. Both parents and the child were interviewed, a number of test were administered to A., the parents completed a developmental history questionnaire and the mother, father and teacher completed behaviour assessment scales and behaviour rating inventory scales and also completed the Connors questionnaire.

[41] Dr. Vitale concluded:

A...is a 9 year old boy who has completed Grade 3 at school.

On the WISC-V, A. demonstrates strong, consistent cognitive skills. Notable strengths included language-based processing, nonverbal reasoning, auditory working memory, and rapid visual scanning. One of the areas of relative difficulty was rapid copying.

In terms of short-term recall, A. demonstrated exceptionally well-developed visual short-term memory skills. While his verbal memory for a word list was average, A. had more difficulty recalling and organizing more lengthy information. Using a recognition-type format appeared to help his verbal recall.

Academically, A.'s mathematical skills were well-developed. However, reading, reading comprehension, math computation, and written expression were most challenging for him.

A's parents and classroom teacher reported concerns with inattention/distractibility, physical complaints, as well as anxiety/worry. Executive functioning difficulties (e.g. planning/organizing, working memory) were also reported.

The current constellation of strengths and difficulties is consistent with a diagnosis of a **Learning Disability** (day-to-day printing skills, verbal short-term recall for large amounts of information, phonological skills, and executive functioning) manifested primarily in the areas or reading (including reading comprehension), math comprehension, and written expression.

In addition, based in parent and teacher questionnaire data, in addition to anecdotal information gathered during the course of the current assessment, A. meets the criteria of **Attention-Deficit/Hyperactivity Disorder: Predominantly Inattentive Presentation (DSM-V)**.

[42] Dr. Vitale made a number of recommendations with respect to A.'s learning disability with respect to the benefit of an Individual Educational Plan ("IEP"), that he should receive assistive technology to assist with reading and written expression and the report also discusses the classroom implications.

[43] Regarding the ADHD diagnosis, Dr. Vitale made several recommendation that include the benefits of a small group instruction, motor breaks, an environment that is highly structured and predictable and the need for positive feedback. Dr. Vitale recommended that the parents share the report with the child's pediatrician and she provided sources of additional parent information and support for parents with children with ADHD.

Follow up to Dr. Vitale Report

[44] Instead of what one would have hoped and expected both parents to do namely, arrange a joint appointment with the child's doctor and the school to discuss the implications of the report, each of them on their own has created further chaos and conflict that has put the child in the middle of their dispute. Neither parent will now trust the medical professional the other parent consulted. Further and most unfortunately, the medical professionals involved have lost all semblance of neutrality.

[45] Shortly after receiving the assessment report of Dr. Vitale the father met with Dr. Heikki Ylanko, a family physician who has been A.'s doctor since birth and sought a recommendation specifically to Dr. Kenneth Schelberg who is a pediatrician and who the father stated was a specialist in ADHD. The father deposes that Dr. Ylanko was not responsive with respect to any recommendations and all he sought was to seek advice as to how to best help A. and that he did not attend with the goal of obtaining medication as alleged by the mother.

[46] According to Dr. Ylanko, he did not believe that Dr. Schelberg was an expert and stated that he could recommend ADHD clinics. The father was aware of Dr. Schelberg as he has treated his partner's 3 children with medication for ADHD for many years.

[47] Dr. Ylanko shortly thereafter called the mother and advised her that the father had met with him to obtain a referral. It is alleged by the father and not disputed by the mother that Dr. Ylanko is a friend of the mother's family.

[48] The father alleges that as he did not receive a referral from Dr. Ylanko he obtained a referral from the children's "other family doctor", Dr. Daniel Shevanta to Dr. Schelberg. That referral note dated November 13th states that the referral is for "behavioural concerns." The referral included a copy of Dr. Vitale's assessment. It is agreed that A. has not displayed any concerning behavioural issues. There is an unknown handwriting on the note that states "friends of the I... family". This would refer to the father's new partner.

[49] The father deposes that he had been concerned for 2 years that A. struggled with attention issues, that Dr. Vitale's report confirmed his suspicions, and that he had waited and tried alternate strategies that were not working.

[50] In justifying taking the child to see Dr. Schelberg without any prior notice or without consulting with the mother, the father deposed that the mother has routinely taken the children to medical appointments and communicates the results of these appointments after the fact, if at all, to him.

[51] Counsel for the mother wrote to father's counsel on November 9th, 2017 advising that the mother has been made aware that the father was seeking a referral to Dr. Schelberg. Counsel advised that Dr. Ylanko felt that although Dr. Schelberg was a very good pediatrician he did not specialize in ADHD. Dr. Ylanko recommended a clinic in the Centenary Hospital or a clinic at Yonge and Davisville. The letter confirms that the mother believes that the father wished to medicate the child and she believed that there are alternate strategies. The letter concludes with a reminder that pending a final order or agreement about medical decisions that both parties must be consulted.

[52] Despite this correspondence, on February 22, 2018 the father took the child to Dr. Schelberg. After reading Dr. Vitale's assessment and speaking to the father and the child, Dr. Schelberg agreed with the diagnosis of ADHD and prescribed 20 mg Biphentin for 30 days.

[53] According to the father he did not begin giving A. the medication until late March.

[54] On April 9th the father advised the mother that he had taken the child to Dr. Schelberg who prescribed Biphentin and that he had begun to give the medication to the child.

[55] The next day the mother called Dr. Schelberg to advise that she was not aware that A. was being treated with Biphentin, she had not agreed to the medication and did not want him treated with the medication without her consent. The mother confirmed her opposition to A. being given medication in a subsequent email. There is some dispute between the mother and Dr. Schelberg's recollection of the details of that conversation.

[56] On April 13th, Dr. Schelberg met again with the father and the child. On April 24th, he sent the mother an email that stated as follows:

A...returned to see me on April 13/18 with his father and informed me that there had been significant improvement at home and school while A. was on Biphentin 20 mg. and as expected, I was informed that the dose was a little low (we always start with a low dose and slowly increase it to avoid side effects). Dad wishes to continue this medication at the higher dose of 30 mg, but I told him that I was not comfortable doing this without legal advice.

So today I spoke with an expert from the CMPA (Canadian Medical Protective Association), who informed me that I should do what I think is best for the child, and parents should work through their differences. I realize that you may not give the medication at your home and so on those days it will not work as it does not carry over and have effects from the day before.

[57] However, in Dr. Schelberg's affidavit filed on his motion, he deposes that he contacted the CMPA for legal advice to determine if it was permissible for him to prescribe Biphentin when the parents disagreed (as opposed to his email that stated he contacted the CMPA regarding the father's request to increase the dosage).

[58] Dr. Schelberg invited the mother to meet with him to discuss his reasoning for prescribing Biphentin and although she indicated she would make an appointment she never came to see him.

[59] On June 26, 2018 mother's counsel corresponded with Dr. Schelberg to advise him not to prescribe further medication for the child until the results of a pending court hearing to determine who could make the medical decisions for the child and specifically the decision as to whether or not A. should be prescribed Biphentin or any other medication.

[60] On June 28, 2018, Dr. Schelberg had another appointment with the father and A. Dr. Schelberg deposes that A. explained that the medication helped him focus and concentrate and he had no negative side effects. A. told him that he did not want to take the medication during the summer and when asked why, he said that his mom told him that he did not have ADHD.

[61] It is the opinion and experience of Dr. Schelberg that medication is the only effective treatment for ADHD. Behavioural and environmental treatments and therapies can be helpful in conjunction with medication, but alone are not enough for the successful treatment of ADHD.

[62] In support of the mother's position, Dr. Ylanko filed an affidavit. Dr. Ylanko deposes that A. was diagnosed with a "slight learning disability" and he is getting appropriate classroom support as well as extra help from his mother who is a teacher. Dr. Ylanko states that this has led to steady and ongoing improvement in his school performance and that by January 2018 he was already reading at an early Grade 3 level.

[63] Dr. Ylanko then states that although A. meets the criteria for ADHD, predominantly inattentive type, he is also experiencing significant anxiety and disruption of his routine from the separation of his parents and that this would make the diagnosis of ADHD much more difficult as a major mood disorder would lead to similar symptoms and difficulties in attention, focus and concentration.

[64] Dr. Ylanko states that he is aware that A. was prescribed a stimulant by a general pediatrician in February 2018. He further states that on May 29th the child told him that he feels hyper on it and develops nausea and vomiting when he takes it. Dr. Ylanko deposes that A. told him that his concentration is the same on the medication as it is off and that this would make the diagnosis of ADHD less likely.

[65] Dr. Ylanko then opines that A. may benefit from another assessment for possible ADHD by an ADHD specialist where the role of a mood disorder related to stress from his parents' separation can be taken into account. Dr. Ylanko states that is he is on the waitlist at the Hospital for Sick Children and that "ultimately non-pharmacological treatment that addresses all issues would be most likely to help him."

[66] On May 30th, the day after Dr. Ylanko deposes A. told him he had side effects from the medication and that it made no difference to his concentration, A. told the society social worker in a private meeting that when he takes the medication he feels "mostly normal, however, he has noticed that he is able to finish his work quicker and feels more energetic." A. stated that he worries that he will vomit after taking the medication and that he has vomited twice.

[67] A. also told the society social worker that he does not want to take the medication as his mother does not want him to take the medication because he has no signs of ADHD and that his father told him he has to take it until he is 18 years old and that he is confused as both parents are saying different things.

[68] Dr. Schelberg is critical of Dr. Ylanko's opinion as he is only a general practitioner, not a psychiatrist and it appears from Dr. Ylanko's report that he has diagnosed A. with a major mood disorder related to his parents' separation. Dr. Schelberg points out that mood disorders related to an event such as separation would have a more recent onset and would not have been noted over several years by various teachers. It is possible for A. to have a major mood disorder, something he did not test for, as well as ADHD and treatment for both can occur simultaneously. Dr. Schelberg states that if the symptoms of ADHD were actually symptoms of another issue like a major mood disorder, the Biphentin would not have had the "dramatic results" it has had in treating those symptoms.

[69] Dr. Schelberg reiterated that he stands by the diagnosis that was also set out in Dr. Vitale's report of ADHD/ Inattentive and his diagnosis of Biphentin for the treatment of the disorder. He states that he would not have prescribed the medication if he was not 100% sure of its effectiveness that it was in A.'s best interests. He further states that, "it is imperative that both parents and medical professionals are made aware of A.'s medical issues and any concurrent treatment."

[70] Both Drs. Ylanko and Schelberg have relied on information from the respective parent who they saw. Neither doctor had independent information from A.'s teacher to determine if in fact there had been "dramatic" or "significant" changes or improvements in the child's school performance or attentiveness. Both parents take credit for any improvements. The father maintains that it is a result of A. taking medication on the days A. is in his care and the mother maintains it is a result of the fact that her home is more structured and she is following the recommendations of Dr. Vitale.

[71] Both doctors are critical of the other's expertise. Although Dr. Schelberg is a paediatrician with 30 experience and it is a large part of his practice is to treat children with ADHD, Dr. Ylanko is critical of him as he is not an ADHD specialist. However, Dr. Ylanko is only a family doctor and is not only questioning the child's ADHD diagnosis but is also opining about a possible mood disorder and that a non-pharmacological treatment would most likely help him. Further, Dr. Ylanko states that the child on a wait list to be seen at the Hospital for Sick Children leaving the impression that this is in relation to treatment for ADHD whereas it relates to counselling.

[72] Dr. Ylanko based on his affidavit filed on these motions has in my view lost all objectivity and has become an advocate for the mother as opposed to a neutral medical professional that the court can rely upon.

[73] Dr. Schelberg has also lost all objectivity as he has based his opinion about the appropriate treatment for A. based only on information from the father. Although he relied on the assessment of Dr. Vitale, he did not have any information from the mother to ascertain A.'s behaviour in her home, her methods of dealing with him and whether or

not she observed improvements in A. in her home and what information that mother had with respect to how A. was doing in school.

[74] Dr. Schelberg in my view acted totally inappropriately in continuing to prescribe medication for this child being aware that the mother did not agree, that the medication was only being given to the child when in his father's care and being aware that there was a pending court proceeding to determine the issue. I highly question the legal advice he received that in these circumstances he should simply do what he considered to be in the child's best interests. Both doctors have put this child even further in the middle of their parents' conflict and have not acted in the child's best interests.

[75] The most current information from the school with respect to A. was his February 2018 interim report card that shows some improvement in math and some improvement in reading but his reading skills are still below grade average and require extensive remedial work. The comments by the teacher state that he is still requires reminders to remain on task and to avoid participating in and creating distracting situations with his peers and that he seems distracted and fidgets with pencils or items on this desk.

[76] Despite the volumes of materials filed on these motions, there is no explanation as to why A.'s final report card for Grade 4 was not provided to the court. Both parents refer to discussions with the teacher. I am not prepared to put any weight on that evidence due to its hearsay nature and in view of the divergent versions of the information both parents states that they received from the teacher.

The Law

[77] Although both counsel agree that these motions will be determined based on their factual context, it is important to consider the legal framework. I have proceeded to consider these motions on the basis that the decision must be based on the best interests of the child.

[78] Section 74 (3) of the *CYFSA* provides that in making a decision with respect to the best interests of a child the court shall consider various factors. The relevant factors with respect to these motions are as follows:

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

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

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

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

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

ANALYSIS

Which parent should determine the child's medical treatment for ADHD?

[79] In accordance with the new provisions of section 74 (2) *CYFSA* the court must consider a child's views and wishes and that they be given due weight in accordance with the child's age and maturity. However, where the issue is whether or not the child should be given medication, I find that this is a decision that should be made by a child's parents or failing an agreement as in this case by one of the parents. Further, in this case the child has expressed different views about whether or not the medication is effective and whether or not he wishes to take the medication depending on which parent he is with. Therefore, I place no weight on anything the child has said on this issue.

[80] I have considered the other relevant provisions in determining the issues before the court.

[81] Initially reading the materials and hearing submissions on behalf of the mother it appeared that she would be the parent best suited to make decisions about A.'s treatment of his ADHD as she has been the parent primarily responsible for making medical decisions in the past. Although the father provided many examples of incidents where he alleges that the mother did not include him or advise him of medical appointments there is no evidence that she ever made any medical decisions that were contrary to A.'s best interests.

[82] However, upon closer examination I have the following concerns about the mother's judgment with respect to the treatment of A.'s ADHD:

- (a) although the mother deposes that she agrees with Dr. Vitale's recommendations, she does not appear to accept the diagnosis. She states that Dr. Vitale is not a medical doctor and cannot diagnose ADHD and quibbles with the fact that there was not an actual diagnosis of ADHD but that the report only states the A. "meets the criteria for ADHD/Predominantly Inattentive Presentation (DSM-V)". She now appears to be suggesting that A.'s symptoms relate to the stress associated with the parents' separation in 2013. However, Dr. Vitale was aware of the separation and one would have expected the mother to raise this issue with Dr. Vitale either during the assessment or subsequent to receiving the report;
- (b) the mother relies on a report from the Toronto District School Board about the effects of trauma and the symptoms of trauma to bolster her position that A.'s exposure to witnessing domestic violence could be a possible contributing factor to his learning deficits and lack of self-regulation and that this should be explored before resorting to medication. I find that this generic article is not admissible as it does not address the unique situation of this child. If this was a concern by the mother, I would have again expected her to raise it with Dr. Vitale;
- (c) the mother states that Dr. Vitale advised her that it would be good practice to have the recommendations in place for at least a year

and then reassess. But there is no first hand evidence from Dr. Vitale and such a recommendation is not in her report. There is no evidence that the father was also provided with this opinion;

- (d) the mother has not sought out any medical specialist to obtain a second opinion with respect to the use of Biphentin as prescribed by Dr. Schelberg. Although it may be understandable that she has a lack of confidence in Dr. Schelberg, as he continued to meet only with A. and the father and prescribed medication without her consent, nevertheless, that does not explain why she did not seek out another medical specialist's opinion;
- (e) the mother states that she agrees with Dr. Ylanko's recommendation that it would be helpful to have both parents and A. attend at an ADHD clinic but she has not taken any steps to arrange this;
- (f) the mother appears to be blaming A.'s symptoms on the lack of routine and structure in the father's home. However, the findings of Dr. Vitale were also based on information from A.'s teachers and there is no evidence that A. is more focused at school on the days he is in the care of his mother rather than his father;
- (g) the mother relies in her experience as a teacher but there is much merit in the adage that one should not treat their own child. The mother is not a medical doctor and not in a position to diagnose or determine treatment for her own child;
- (h) the mother blames the father for not ensuring that A. does his homework and that he spends too much time on the computer and playing video games but even if true, that would not change the diagnosis. Dr. Vitale was made aware of the mother's concerns about the father's parenting. The report states the mother noted fewer difficulties in her home than those noted by the father due to the mother's home being highly structured and that she provides A. with organizational support. Nevertheless, the mother noted that A. had difficulties with his attention and focus as well as executive functioning skills and these issues were also observed by Dr. Vitale during the course of the assessment;
- (i) the mother also relies in the fact that over 30 years ago her brother was diagnosed with ADHD and she is aware of the steps taken by her parents to assist him. Surely, there have been advances in the treatment of ADHD over these many years and the mother's reliance on her own experience is troubling;
- (j) the mother states that she has implemented Dr. Vitale's recommendations and the school has also made changes and there have been great improvements. But there is no evidence from the

teacher to corroborate her opinion and there is the added complication that since March the father has been giving A. medication so it is not possible to determine the cause of any improvement;

- (k) the mother is critical of Dr. Schelberg's opinion as he is only a general pediatrician and not a specialist in ADHD but then relies on the opinion of Dr. Ylanko who is only a family practitioner; and
- (l) the mother has drawn A. into the conflict and according to A. has told him he does not have ADHD and he is aware that she does not want him to take medication.

[83] I also have concerns about the father's judgment as follows:

- a) the father did not consult with the mother with respect to arranging an appointment with Dr. Ylanko to ascertain what next steps they should take to consult with a medical specialist as a result of Dr. Vitale's assessment;
- b) instead of seeking a recommendation from a doctor for a ADHD medical specialist, the father sought a recommendation specifically to Dr. Schelberg from both Dr. Ylanko and then from Dr. Shevanta. He did so without any consideration of the fact that the mother would raise concerns about Dr. Schelberg and be skeptical of his opinion as she was aware he was treating the father's new partner's children for ADHD with medication;
- c) the father provided no evidence that he was implementing any of the recommendations made by Dr. Vitale in his home. Within less than a month of receiving the assessment report he arranged for an appointment with a medical specialist and shortly thereafter obtained a prescription for Biphentin;
- d) the father instead of advising the mother of Dr. Schelberg's opinion and the prescription for Biphentin and suggesting they both arrange for a referral to a doctor specializing in ADHD, he began to administer the medication aware that A. would only be receiving any benefit on the days when he is in the father's care; and
- e) the father has also involved A. in this conflict as he has told him that he needs to take the medication until he is 18 years old. A. is aware that his father wants him to take medication whereas his mother does not.

[84] The court is therefore left with the dilemma of finding that neither parent has acted in the best interests of this child with respect to determining what medical treatment is appropriate for ADHD.

[85] The mother has determined that because she provides a more structured home environment and because she is a teacher and has some experience dealing with students and a family member with ADHD that she is in a better position to determine the proper treatment of her son's ADHD. However, I find that the mother wishes to divert the primary reason the society is involved with the children by casting aspersions onto the father and she has also allowed her distrust and disapproval of the father to cloud her judgment.

[86] The father has also allowed his concern about the mother's choice of V.F. as a partner and his long standing attempt to vary the current parenting arrangements to cloud his judgment.

[87] Counsel for the father has provided the court with several decisions⁶ in which the court held that the best form of treatment of ADHD was with medication. Despite one of the decisions being my own decision, in those cases there was uncontroverted evidence that the treating physicians agreed on the course of treatment and its benefits for the particular child involved.

[88] Just as I am not prepared to rely on the article submitted by father's counsel about the benefit of medications in treating ADHD, I am not prepared to rely on the evidence and findings in other cases about the best treatment for ADHD. It is trite law that each case must be determined on the evidence presented and with respect to the particular needs of the specific child before the court.

[89] I find that I must order that both parents take the course of action that both of them should have followed initially that is, to contact the child's pediatrician to obtain further information about what next steps, if any, should be taken as a result of Dr. Vitale's assessment. However, as I have found that both Dr. Ylanko who is the child's doctor and Dr. Schelberg who is a pediatrician are not neutral professionals who are credible to both parents, another source of referral is necessary.

[90] At the conclusion of the oral submissions, I advised the parties that pending my decision, A. should be no be seen any further by Dr. Schelberg and that A. should not be given any Biphentin until further court order. I wish to be clear that this order was not meant to be a reflection on Dr. Schelberg's medical opinion that was based on the information that he relied upon. Rather, the decision was based on the fact that he continued to prescribe medication without the consent of both parents or without a court order determining which parent was authorized to make that decision.

[91] I find that it is vital that both parents act jointly regarding a determination of the proper treatment for A.'s diagnosis of ADHD. The child is already aware that his parents do not agree. It is in his best interests that both parents provide him with the same message about his diagnosis and the treatment he requires before any further damage is done to this child. For any treatment to be truly effective it must be administered consistently and by both parents. This would include both medications, if recommended, and a consistent structure and routine in both homes. It is time that both

⁶ Biloddeau v. Gegus, 2017 ONCJ 618; J.P.K. v. S.E., 2017 ONCJ 306

parents stop blaming each other for past transgressions and act in their son's best interests. It is a sad reflection on both parents, who clearly love their son and only wish the best for him, that the court must now micromanage how they are to act in obtaining the best possible medical treatment for him. I will outline those details in the order being made.

Which parent shall determine what school A. attends in September 2018?

[92] Counsel for the mother presented only a few submissions on this issue essentially it is now a moot issue as A. is only on the wait list for Claude Watson and it is unlikely he will be selected to attend.

[93] The mother has presented her belief that A. has a strong interest and love of drawing and music and that he wished to audition and attend Claude Watson. The mother outlines the merits of the school and of an arts based program. She also attached to her affidavit an article about the benefits of an arts based curriculum. As previously indicated such articles are not admissible as they offer no relevant evidence as to the benefit of such a program for this particular child.

[94] Although it is the father's position that A. should remain in his current school for Grade 5 which is the last grade of that school, he could not resist pointing out and providing the provincial school ratings indicating that the home school in his neighbourhood is rated higher than the home school A. attends in his mother's neighbourhood. I find that the statistical ratings of the schools is not admissible as they do not address the particular benefits of a particular school for this child.

[95] The father's opinion as to the merits of his local school is also based on that fact that his partner's children go to that school. He then proposes that his daughter's school be moved so she would then be in the same school as his partner's children. He shows no insight into how moving his daughter out of the school she has attended for several years and leaving her friends would be detrimental to her. He also questioned the mother's motivation as it is his belief that Claude Watson feeds into the high school where the mother currently teaches. Even though it appears that one of the reasons he wishes the children to attend schools closer to his home is for his convenience as he acknowledges that he frequently late in bringing the children to school as the school they attend is closer to the mother's residence.

[96] The father shows a lack of good judgment in his inability to ensure that both children attend school on time. This is especially important for A. in view of his learning disability and his ADHD diagnosis and Dr. Vitale's recommendations with respect to consistent routines and of course the importance of A. not missing any of his school work. If all of A.'s needs are to be met, the father must also ensure that he follows all of Dr. Vitale's recommendations and not just provide medication to his son.

[97] I find that the crucial evidence lacking in the mother's affidavit is whether or not the program at Claude Watson is suitable for A. in view of his learning disabilities and his ADHD. I would have expected that the mother, instead of relying on her own experience as a teacher, would have consulted A.'s teacher or Dr. Vitale to determine if A. could handle all of the academic school work that would be presented in only a half

day at Claude Watson. There is also no evidence that Claude Watson could implement the recommendations made by Dr. Vitale and accommodate A.'s special learning needs.

[98] The mother's desire that A. attend Claude Watson, if he is accepted, raises further concerns about her acceptance of the diagnosis made by Dr. Vitale and about her lack of insight and judgment. It is of note that Dr. Ylanko even weighed in on this decision and opined that A. should attend an arts based school again indicating a total lack of any impartiality and being prepared to give a medical opinion about any decision the mother wishes to make.

[99] I find that A. should remain in his current school for the school year of 2018 to 2019. In view of this decision I do not need to make a finding as to which parent should have final decision making on which school A. should attend.

[100] Although the decision with respect to what school I. should attend was not before me and it appears the father agrees that she continue in her current school, I wish to be clear that pending further court order or agreement of the parties she should also continue to attend her current school.

Other issues

[101] There are references to the children needing to attend counselling in both parents' affidavits and again with blame being cast by each of them against the other regarding various aspects of the focus of the counselling and the involvement of both parents in the process. During submissions both counsel submitted that they could agree to a mutually acceptable counsellor for the children without the necessity of the court's intervention. I strongly urge counsel and the parents to arrange such counselling.

[102] Counsel for the father also raised the issue Dr. Ylanko no longer being the children's attending doctor. I advised that I was not prepared to make any ruling on that issue due to the agreement as to the narrow focus of these motions. However, this is an issue that should be deal with in the trial if the parties are unable to resolve this issue.

[103] Counsel for the mother presented his Bill of Costs at the conclusion of the motion. As the primary issue of which parent should be permitted to make the medical decision with respect to A.'s treatment of ADHD has not been determined by this motion, the issue of costs shall be reserved to be determined either by myself if the issue is returned before me prior to trial or by the trial judge who may be in a better position to assess the successful party on these motions after a trial.

Conclusion

[104] There shall be an order as follows:

1. Both the mother and the father W.O. shall immediately contact Dr. Vitale to obtain a referral from her for a medical specialist (a paediatrician or child psychiatrist) specializing in ADHD.
2. If Dr. Vitale is unable to make such a referral then the mother and the father W.O. shall contact the College of Physicians and Surgeons to obtain a list of doctors with this speciality. If such a list is not available, then both the mother and the father W.O. are to provide a list of 3 specialists, from whatever source is available, and both parents shall choose a mutually agreeable specialist.
3. If by August 28th, the parties are unable to choose a mutually agreeable specialist to treat A., then a Form 14B with a supporting affidavit not to exceed 3 pages, with the curriculum resume attached as an exhibit, shall be submitted to the court explaining why the mother or father prefer a particular specialist. The court will then appoint a medical specialist for the child.
4. Both the mother and the father W.O. will then attend the appointment together with the specialist who shall be provided with Dr. Vitale's assessment and the child's final Grade 4 report card and sign any consents requested by that doctor including if requested, the records of both Dr. Ylanko and Dr. Schelberg.
5. Both the mother and the father W.O. will follow the recommendations of the chosen specialist.
6. If the parties still disagree, a date for an urgent motion shall be obtained from the trial co-ordinator's office before me. The attending specialist shall be requested to provide a report or a copy of the medical notes outlining recommendations for treatment of the child's ADHD. Both parties will be permitted to file an affidavit with respect to their respective positions, not to exceed 3 pages and with no more than 4 exhibits. The court will then determine which parent shall be able to make medical decisions with respect to the child A.O.'s treatment for ADHD.
7. Pending an agreement by the mother and the father W.O. or further court order, the child A. shall not be treated by Dr. Schelberg and shall not be given any Biphentin.
8. The child A.O. shall remain in his current school for the school year of 2018 to 2019.
9. The issue of costs of these motions shall be reserved either to myself if the motion is further returnable before me or is otherwise settled or to the trial judge to be determined at the conclusion of the trial.

Signed: Justice Roselyn Zisman