



[1] The applicant (the mother) has brought an amended Form 14B motion seeking an order for substituted service of her application and Form 35.1 affidavit on the respondents, by delivering the documents to the Children's Aid Society of Toronto (the society).

[2] The society asks that the motion be dismissed. The society submits that in its limited mandate to investigate child protection concerns, and provide services to families, it has no role in a private proceeding, nor resources to perform services that do not fall within the four corners of the *Child and Family Services Act (CFSA)*. Further, the society submits, that it cannot confirm or deny it has an address for the respondents, as, absent their consent or a court order, the society is precluded from disclosing that information.

[3] The issues for this court to decide on this motion are:

- a) Should an order be made for substituted service?
- b) If so, should the court order substituted service on the respondents through social media?
- c) Can the court order substituted service on the respondents through the society?
- d) Should the court order substituted service on the respondents through the society?

## **Part Two – Brief background**

[4] The mother and the respondent N.C. are the parents of an 8-year-old child (the child).

[5] The respondents M.L. and R.E. are the child's paternal aunt and uncle respectively.

[6] On March 5, 2013, in a proceeding under the *CFSA*, M.L. and R.E., were granted final custody of the child, pursuant to section 57.1 of that Act (the final order).

[7] The final order also provides that the mother's access to the child is in the discretion of M.L. and R.E. In their discretion, M.L. and R.E. may require the mother's access to occur at a supervised access centre with such conditions as may be reasonable in the circumstances, taking into account the best interests of the child.

[8] The mother issued an application on May 3, 2017. She seeks to change the final order, be granted specified access to the child and other incidental relief. She claims that M.L. and R.E. have denied her access to the child in 2017.

[9] The mother filed her initial Form 14B motion for substituted service on May 1, 2017. Justice Carolyn Jones did not make the order sought and set out detailed evidence that the mother needed to provide in support of her motion. She also required the mother to serve the society with the motion material as the society was a party affected by the motion as set out in subrule 14 (3) of the *Family Law Rules* (all references to rules in this decision are to the *Family Law Rules*).<sup>1</sup>

[10] The mother filed her amended Form 14B motion and the additional evidence requested by Justice Jones on May 24, 2017. The mother filed an affidavit of service attesting that she had served the society with the motion material on May 19, 2017.

[11] When no response from the society was presented to Justice Jones, she made an order on June 2, 2017 for substituted service of the mother's court documents. She required two forms of service. The first form required the mother to send three copies of the court documents to the society. The society was directed to forward a copy of the documents to the respondents at their last known addresses and provide the mother's counsel with an affidavit of service, who would then file it with the court. The second form provided that M.L and R.E. could be served with the court documents by private Facebook message and that N.C. could be served with the court documents by text message.

[12] The court office was subsequently advised that the society had forwarded a response to the Form 14B motion before Justice Jones had made her June 2, 2017 order. This response was not in the court file.<sup>2</sup>

[13] On June 6, 2017, Justice Jones endorsed that it was just, in these circumstances, to strike her order of June 2, 2017 and have the motion placed before another judge.

### **Part Three – Analysis**

#### **3.1 Should an order for substituted service be made?**

[14] Subrule 6 (15) sets out when documents can be served by substituted service. It reads as follows:

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<sup>1</sup> Subrule 14 (3) reads as follows:

#### **PARTIES TO MOTION**

14 (3) A person who is affected by a motion is also a party, for purposes of the motion only, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

<sup>2</sup> It is possible that the confusion occurred because the society's cover fax page referenced the wrong file name.

### **SUBSTITUTED SERVICE**

6 (15) The court may order that a document be served by substituted service, using a method chosen by the court, if the party making the motion,

- (a) provides detailed evidence showing,
  - (i) what steps have been taken to locate the person to be served, and
  - (ii) if the person has been located, what steps have been taken to serve the document on that person; and
- (b) shows that the method of service could reasonably be expected to bring the document to the person's attention.

[15] The mother has satisfied the criteria to make a substituted service order on the respondents. She has taken reasonable steps to try and locate the respondents and serve them. She conducted searches, without success, to determine where the respondents live. The mother has proposed methods of service that could reasonably be expected to bring the court documents to the respondents' attention.

[16] The next step is to determine what form of substituted service should be made.

### **3.2 Service through social media**

[17] Substituted service orders by social media are becoming increasingly common. See: *Jewish Family and Child Services of Greater Toronto v. K.B.* [2016] O.J. No. 2377 (OCJ); *Blois v. Salacki*, 2016 ABQB 323; *Eastview Properties Inc. v. Mohamed* [2014] O.J. No. 4220 (SCJ – Small Claims Court); *Cash Flow Recoveries Inc. v. Crate*, 2017 O.J. No. 931 (SCJ – Small Claims Court). These orders reflect the reality of today's methods of communication, which are increasingly electronic. See: *Burke v. Doe*, [2013] B.C.S.C.

[18] In *K.C.F. v. M.W.*, 2016 ONCJ 689, Justice Victoria Starr set out multiple methods detailing how a party could be located and served through social media, including through Facebook accounts and text messages.

[19] The mother has been able to communicate with R.E. through his Facebook account. The mother attached to her affidavit a Facebook message sent to her by R.E. on March 14, 2017. This confirms that it is R.E.'s Facebook account and that the account is likely still active.

[20] The mother also attached copies of the Facebook account profiles of M.L. and R.E. and identified their pictures posted on their accounts.

[21] The court is satisfied that it can reasonably be expected that the court documents will come to the attention of the respondents M.L. and R.E. if they are notified about them by private message on their Facebook accounts.

[22] The mother could not locate an address for N.C., but was able to provide a phone number for him. The court is satisfied that it can reasonably be expected that the court documents will come to N.C.'s attention if he is notified about them by text message on his telephone.

[23] The court will make an order for substituted service that the respondents may be served with the court documents by social media.

### **3.3 Can the court order substituted service on the respondents through the society?**

[24] The simple answer to this question is yes.

[25] Subrule 6 (15) gives the court considerable latitude in determining the method of substituted service.

[26] It is common for courts to make substituted service orders through third party individuals, corporations and public bodies. In this court, substituted service orders are frequently sought and granted through the Family Responsibility Office and the City of Toronto (for recipients of social assistance). Often, these institutions will have a far lesser connection to the litigants than the society has to the parties in this case.

[27] Children's Aid Societies are not and should not be exempted from the making of these substituted service orders.

### **3.4 Should the court order substituted service of the documents through the society?**

[28] Orders for substituted service are important.

[29] The importance of such orders is apparent in this case. There is a child protection history with this family. The final order from the child protection case provides limited access to the mother. Clearly, there were risk concerns for the child. The mother claims that she is now being unreasonably denied access to the child and seeks to change the final order.<sup>3</sup> It is critical that the respondents be served with her court material so they can participate in this case and the court will have all the relevant information necessary to make its decision.

[30] If the order for substituted service is flawed, there is a risk that the respondents may not receive notice of the case, and a default order will be made without the benefit of all relevant evidence – possibly leading to a flawed decision for the child.

[31] For this reason, many judges, including myself, will often order two forms of substituted service to ensure that notice of the proceedings is received.

[32] The court has considered that the society has limited resources and certainly does not wish to strain them. In this respect, the society is no different than the Family Responsibility Office or the social assistance department of the City of Toronto. The court should first

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<sup>3</sup> The Facebook message sent by R.E. to the mother confirms that R.E. and M.L. do not want the mother to exercise access to the child at this time.

determine if other forms of substituted service are available before it imposes additional service obligations on these public institutions.

[33] The mother has been unable to find addresses for the respondents. Accordingly, ordering service by mail or courier is not an option. The mother was also unable to locate email addresses for the respondents. There are two apparent methods for the mother to contact M.L. and R.E. – through their Facebook accounts and through the society. She can only contact R.C. by text and through the society.

[34] The importance to the child and the respondents of ensuring that the respondents obtain notice in this case significantly outweighs any resource issues of the society, particularly considering the limited role it will be asked to play at this stage of the case.

[35] The court took into consideration that the society may not have a current address for one or more of the respondents, as the final child protection order was made in March, 2013. This form of service is far from perfect, but will be ordered as the second form of substituted service to improve the likelihood that the respondents will receive notice of the mother's court documents. The court finds that this method of service can reasonably be expected to bring the court documents to the respondents' attention.

[36] With respect to the society's submission that it cannot confirm or deny if it has an address for the respondents, the court is not asking it to confirm or deny if it has a current address for the respondents – only that it send the documents to the respondents at their last known address in its records. The parties in this case were all parties in the *CFSA* case and all are aware that the society had addresses at that time for the respondents.

[37] It also strikes a discordant note that the society facilitated the finalization of the section 57.1 order placing the child with M.L. and R.E., but opposes an order that it mail the mother's court documents to them, when the mother is seeking access with the child, has not been kept updated on the respondents' addresses and the society might know them.

[38] The mother has sought the least intrusive form of substituted service in her motion. She could have sought an order pursuant to subsection 39 (1) of the *Children's Law Reform Act* (the CLRA) requiring the society to provide the respondents' addresses to the court.<sup>4</sup> Rather than

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<sup>4</sup> Subsection 39 of the CLRA reads as follows:

**Information as to address**

39. (1) Where, upon application to a court, it appears to the court that,

- (a) for the purpose of bringing an application in respect of custody or access under this Part; or
- (b) for the purpose of the enforcement of an order for custody or access,

the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in clause (b) is made, the court may order any person or public body to provide the court with such particulars of the address of the proposed respondent or person against whom the order referred to in clause (b) is made as are contained in

seeking the addresses of the respondents, she only asks that the society send the court documents to them. In these circumstances, this is a reasonable request.

[39] The court is attuned to the fact that the mother's court documents identify the involvement of the child and the parties in a child protection case and wants to ensure that this information does not inadvertently become public.<sup>5</sup> This order will provide that the mother's counsel will send a Notice to the respondents through private message on social media, in the format contained in Form 6A of the rules. Since this is the prescribed notice for an Advertisement under the rules, the form should be changed at the top to be titled Notice. Form 6A does not contain any information that would identify the child or any of the parties having been involved in a child protection proceeding.<sup>6</sup>

#### **Part Four – Order**

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

- a) Substituted service of the mother's application, Form 35.1 and a copy of this endorsement can be effected upon the respondents in the following manner:
  - i) The mother, through her counsel, is to forward to the respondents M.L. and R.E., by private Facebook message to their respective last known Facebook accounts, a properly completed notice in the format of Form 6A

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the records in the custody of the person or body, and the person or body shall give the court such particulars as are contained in the records and the court may then give the particulars to such person or persons as the court considers appropriate.

#### **Exception**

(2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.

#### **Compliance with order**

(3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.

#### **Section binds Crown**

(4) This section binds the Crown in right of Ontario.

<sup>5</sup> Subsection 45 (8) of the *CFSA* states that 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 child protection hearing or is the subject of a child protection proceeding, or the child's parent or foster parent or a member of the child's family. This prohibition is why the names of the parties are being initialized in this endorsement.

<sup>6</sup> A copy of the Form 6A will be delivered with this endorsement to the mother and the society.

under the *Family Law Rules*, with the notice to be titled “Notice” rather than “Advertisement”. A copy of such message is to be attached to an affidavit of service, to be filed with the court.

- ii) The mother, through her counsel, is to forward to the respondent, N.C., by text message, to the cell phone number identified by the mother in her affidavit, a properly completed notice in the format of Form 6A under the *Family Law Rules*, with the notice to be titled “Notice” rather than “Advertisement”.
  - iii) The mother, through her counsel, is to forward three copies of her court documents and a copy of this endorsement to the society. The society is directed to forward copies of these documents to the respondents by ordinary mail to the last known address of each of the respondents in its records. The society is then directed to forward to counsel for the mother an affidavit of service, attesting to such service. The affidavit of service does not need to identify the respondents’ addresses – only that the documents were sent to the respondents by ordinary mail at their last known address in the society’s records.
- b) Service in this manner shall be good and valid service of such documents upon the respondents.
  - c) The case is adjourned to July 28, 2017, at 10:30 a.m. in First Appearance Court.

Released: June 8, 2017

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Justice S.B. Sherr