W A R N I N G

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. D.A.*, 2020 ONCJ 206
DATE: 2020·04·23
COURT FILE No.: Toronto CFO-19-15276

B E T W E E N :

CATHOLIC CHILDREN'S AID SOCIETY OF TORONTO

Applicant

— AND —

D.A.

Respondent Mother

— AND —

B.K.

Respondent Father

Before Justice Alex Finlayson
Heard on April 21, 2020
Endorsement released on April 23, 2020

Rachel Buhler ..... counsel for the applicant society
Mira Pilch ..... counsel for the respondent mother
B.K. ..... on his own behalf
Tammy Law ..... counsel for the Office of the Children's Lawyer, legal representative for the children, C.K. and J.K.

ALEX FINLAYSON J.:

1. This is the Society's motion to vary this Court's temporary Order of July 24, 2019, to permit the mother to have unsupervised access to the parties' two boys, C.K., age 12 and J.K., age 8.

2. This motion was originally brought in December 2019, but it did not proceed, due to certain mishaps relating to a motion for production of police records/ a Crown Disclosure Brief. As I will explain, until recently, the mother was subject to a number of criminal charges based on allegations that she assaulted the children, and that she allowed them to be assaulted by her sister(s).

3. When the Society initially launched this motion, it sought a different access schedule than the one now being proposed. That prior proposal included the involvement of the mother's brother as a support person. But that plan is no longer before the Court, in part due to the COVID-19 pandemic.

4. Now, the plan essentially advanced by the mother, which the Society more or less supports, is for weekend, overnight access each week. But due to Covid-19, she is prepared to have day visits for now, on Saturdays from 10:00 am to 5:00 pm. Because the father lives with the children in Oshawa, the mother would have him do the driving to and from Toronto to facilitate the visits, although she is prepared to pay him $15 per visit to compensate him for his travel costs.

5. To be clear, while I have said the Society supports overnights, it also says there should be an incremental increase first, to get to overnights. In effect, this may align with the mother's modified access proposal in light of Covid-19.

6. The father's position on this motion is four-fold. First, in his affidavit of April 20, 2020, he says the mother is continuing to minimize the protection concerns, that were also the subject of the criminal charges. Second, he raises various concerns about access in the context of Covid-19. Third, if there is to be expanded access, he takes issue with being asked to assume the burden of doing all the driving. And fourth, he also says that if the Court orders access, any schedule should be based around alternating weekends, instead of weekly access. How-

ever, the latter appears more so to be based on the burden that would be imposed upon him to drive back and forth to facilitate access in a weekly access scenario.

7. The Children's Lawyer's position is similar to that of the mother and the Society. The Children's Lawyer would only have two weeks of day time Saturday visits, before there would be an expansion to overnights for full weekends. The Children's Lawyer also says that the mother could have overnight visits during the week, since the children are not in school. However, I do not have evidence that the mother will be off work during the mid-week. To the contrary, her affidavit sworn April 15, 2020 says she works Monday to Friday. In any case, it appears that the Children's Lawyer's proposal for only two weeks of day time visits before there would be an expansion was also based more on an attempt to minimize the ongoing burden on the father of having to do too much back and forth driving, all on the same day.

8. This motion was argued based on the child protection concerns, but also with some emphasis on the Covid-19 issues. While the Covid-19 concerns are important, and unfortunately they form part of the factual matrix before the Court, the Court, the parties and the Children's Lawyer should not lose sight of the important child protection issues that brought the parents before the Court in the first place.

9. In analysing the issues in this case, I intend to first apply the *CYFSA* to the evidence before the Court, having regard to the child protection issues, to determine what I view to be the appropriate access order. I will then consider whether the Covid-19 concerns warrant a temporary change or alteration to the access that I would otherwise order, but for Covid-19.

10. To place this all in its proper context, it is necessary to review the history of this matter in some detail.

A. Background and Prior Proceedings

(1) Events Precipitating the Child Protection Application

11. The child protection application began in January 2019. Prior to that time, the mother had custody of the children and the father had alternating weekend access, pursuant to a pre-existing order of Goodman J. of the Superior Court of Justice dated October 8, 2018.

12. Prior to the commencement of this child protection proceeding, the mother, the two children, the mother's two sisters, whom I will refer to as Aunt R. and Aunt A., and Aunt R.'s teenage daughter, S., were all living together at an address in Toronto. At this time, the mother, Aunt R. and S. still live there. Aunt A. had to move out for reasons that I will explain relating to the criminal charges and their recent disposition.

13. In November 2018, S. made certain disclosures at her school, alleging that Aunt A. was running a fundamentalist Pentacostal Church out of their home, and also out of a rented basement elsewhere. The three children were being made to pray in the late evening and into the early morning hours. The family had also been subjected to a 40-days long fast, although S. said that the children were allowed to eat at school, so as to not arouse any suspicion. S. disclosed that physical discipline was used during these religious rituals and the praying.

14. It appears, according to the father's evidence, that fundamentalist religious activities had been going on for quite some time. The father had become concerned about mother's religious beliefs and practices several years earlier, but he says his concerns were not taken seriously, or adequately addressed before.

15. In the affidavit materials before this Court, the mother denies that physical discipline occurred. She says, for example, that the physical discipline was not happening, arguing that if it were, other church members would have observed it. But the father says that the church members mostly consisted of the mother and her family. And he says that members of the mother's family did not take his past complaints or concerns seriously, either.

16. According to the initial affidavit of child protection worker Ms. Leitch sworn January 25, 2019, C.K., age 12, did not initially disclose being hit by either his mother or his aunts. But 8-year old J.K. did. He said that his mother had hit and pinched him, as did his aunt. While C.K. did not disclose hitting, Ms. Leitch reported that C.K. said that one time, he was made to hold his arms up in the air for an hour in the evening while praying, and that he would get in trouble for not praying "loud enough". He tried to put his arms down when Aunt A. closed her eyes.

17. In general, the evidence before the Court across different affidavits and in the police records/ Crown Disclosure, the source of which was at least one, and sometimes several of the three children, was that they were hit with cooking sticks and a drum stick, by one or more of the three sisters, including the mother in this case.

18. Following S.' disclosures and the boys' police interviews, the mother was charged with several counts of assault with a weapon, and with other related criminal offences. Aunt A. and Aunt R. were also charged with related offences.

19. The children went to stay with their father initially, before there was a child protection proceeding underway, and then they stayed with him after the child protection application was launched. Although there was some initial confusion by the Society about what the bail terms allowed (and the Society did allow some access early on contrary to the original bail terms[1]), the bail conditions for most of the proceedings to date restricted the mother's contact with the boys to supervised access only.

(2) The Temporary Care and Custody Hearing

20. Once this case began, on January 31, 2019, Pawagi J. placed the children in the care of their father, and ordered access in the discretion of the Society, a minimum of two times per week. Her order was made on a without prejudice basis.

[1] That was readily acknowledged by the Society. The Society did this in error; it was not deliberate.

21. After several adjournments for various reasons, the mother insisted on arguing the temporary care and custody motion, asking for the return of the children to her care. She did so, even though she was unable to obtain a bail variation that would have theoretically permitted the Court to make such an order.

22. On July 24, 2019, I heard that motion. Pursuant to oral reasons given on July 24, 2019, and a supplementary Endorsement that I released July 25, 2019, I continued Pawagi J.'s temporary without prejudice order, but made it a temporary order. To be clear and as I indicated at that time, the restrictive bail conditions were only one of several reasons that the Court did not make an order for the return of the children to the mother. There is a transcript of the Court's oral reasons in the file.

(3) The Motions for Production of Police Records/ the Crown Disclosure Brief

23. Already by the summer of 2019, the Society was supporting a relaxation of the restrictions on mother's contact with the children. But again, the bail conditions did not allow that. And, neither the Society (nor anyone else in this case) had pursued obtaining certain disclosure, including the police records/ Crown Disclosure Brief. On July 25, 2019, the Court directed the Society to do so, in order that it could fully formulate its position based on all available evidence, and so that the Court would have a fuller picture.

24. Following the temporary care and custody motion, the mother was eventually able to secure a bail variation that allowed for this motion to be brought for unsupervised access. As I indicated earlier, the Society initially brought the motion for expanded access, returnable in December 2019.

25. However, leading up to that, a number of production motions were brought, including a motion for production of police records/ the Crown Disclosure Brief in accordance with the Court's prior direction of July 25, 2019. What transpired with that motion caused a significant delay to the hearing of the access motion.

26. The first motion for production of police records/the Crown Disclosure Brief ostensibly resolved on consent. On November 20, 2019, counsel tendered a lengthy detailed order with many terms that regulated the production of the disclosure. Counsel for the Crown Law Office Civil was present in Court when the draft Order was presented to the Court.

27. But then, after the November 20, 2019 date, the Crown Law Office Civil took the position that it did not need to produce significant portions of the file until the resolution of the criminal case. The Crown took this position relying on a particular subparagraph buried in the multiple paragraph production Order. That subparagraph allowed for the police/the Crown to withhold the very records that it had just consented to release based on the fact that the mother's criminal trial was pending, subject to argument at yet another motion.

28. One of the very purposes of the production motion in the first place, for which the Crown had notice, was to allow it to make any arguments concerning privilege or any other matter relating to production, including the fact that the mother's criminal trial was pending, so that the parties could get a ruling from the Court one way or the other. What was presented to the Court on November 20, 2019 was a draft Order, along with statements that led the Court to believe that the records would be produced. But what the Crown then did, in effect, was withhold information and assert the right to re-argue a second motion.

29. A second production motion had to be brought by the Society. By the time it was heard, the mother's criminal trial was just a few short weeks away. On January 28, 2020, the Crown consented, again, to release the records, this time unequivocally, in March 2020 to coincide with the commencement of the mother's criminal trial.

30. Unfortunately by that time, the Covid-19 pandemic was then underway soon after that. Due to reduced staffing, the Crown Law Office- Civil was unable to meet the deadline for production to which it had earlier agreed.

31. All this delayed the hearing of the access motion for over four months.

32. When the parties and counsel for the Crown appeared before me in November 2019, counsel for the Crown Law Office Civil did not highlight the Crown's intention to rely on the particular subparagraph and to withhold generous amounts of material from the disclosure. I presume that had the Society or any of the parties been made aware of this, the motion would have been argued, rather than presented to the Court as a consent. Certainly the Court would have required submissions, since it was the Court which directed the need for this information in the first place.

33. This ought not to have happened. The Crown Law Office Civil and/or the police have developed a lengthy list of standard terms that they wish to be included in draft production Orders, whether pursuant to the so-called "*Wagg"* procedure or some other version of that. The process that the Crown insists upon embarking to discharge its screening function sometimes results in a cumbersome and inefficient process. The Crown Law Office Civil routinely requires weeks to screen records. In this case, its draft Order required more than one Court attendance and multiple motions. Insofar as this case is concerned, the process that was followed, and the Crown's timelines and positions taken, ignored the reality of a child protection proceeding, that there are timelines in the legislation, and that children's interests (and parents' interests) are at stake.

34. In the future, when such production motions are brought, it is incumbent upon the Crown Law Office Civil to do more than just provide to counsel pages of confusing terms to form part of an order. In this case, the Crown ought to have actually alerted the parties (and the Court) as to how it intended to implement the Order, or at least to the prospect that it might withhold considerable amounts of information.

(4) The Mother's Criminal Charges Are Resolved in March 2020

35. On what was to be the first day of the criminal trial in March 2020, the mother and Aunt R. agreed to enter into peace bonds, whereas Aunt A. plead guilty to

some of the criminal charges. It is my understanding that she has yet to be sentenced, also due to the reduced Court operations during Covid-19.

36. On April 14, 2020, I directed the Society to obtain transcripts of the criminal proceedings at which Aunt A. plead guilty, and the other two sisters entered into peace bonds. Coincidentally, the transcript was delivered to the Society by email just at the outset of argument of this motion on April 20, 2020. The Court held the matter down and the transcript was circulated. This motion was argued with the parties and the Court having the benefit of reading the transcript, and the parties having the ability to make submissions about it.

37. The transcript of the criminal proceeding reveals that, (and notably with this child protection case and motion pending), there were extensive negotiations between counsel leading up to Aunt A.'s guilty plea, after which certain facts were read into the record, to which Aunt A. agreed. The transcript says nothing about the basis upon which the mother agreed to a peace bond. And there is a brief statement only about the basis for Aunt R.'s peace bond.

38. During argument of this motion, there was a suggestion by some counsel that a former Assistant Crown Attorney involved in the criminal case was too aggressive, but once there was a new Assistant Crown Attorney, the criminal case resolved. To the extent that this was true, and actually has any relevance to the issues before this Court, that can be addressed at trial.

39. In the result, the negotiated facts upon which Aunt A. plead guilty were that she had only held the drum stick and cooking stick in a "threatening manner" during prayer (and not that she actually hit with those objects). While in this child protection proceeding, the mother intends to challenge S.'s credibility, perhaps based on this transcript, and she intends to point out alleged inconsistencies in the children's statements in the police records/ Crown Disclosure Brief, and while the Children's Lawyer suggests there was inappropriate behaviour on the part of the father, in relation to the children's statements and his interactions with the police, I would point out the following.

40. S. was not a party to the criminal proceeding in which the admitted facts on which the criminal plea was based, were negotiated. Nor were the children. Just because Aunt A.'s criminal lawyer did a good job in constraining the facts before the criminal court does not mean that other facts cannot be proven in this proceeding. There are different parties and different standards of proof in this case. And, as I have said, the transcript primarily pertains to Aunt A., and not the mother in this case.

B. Legal Principles Concerning Access

41. This motion is brought pursuant to sections 94(9) and 104 of the *CYFSA.* The statutory best interest test set out in section 74(3) of the *CYFSA* governs this Court's decision. But because there is already an interim order in place, there must first be some threshold of change met in order for the Court to vary the July 24, 2019 Order on an interim basis.

42. There are a number of well-known principles that apply when the Court is called upon to consider an interim variation of access pending trial in a child protection case. See *Catholic Children's Aid Society of Toronto v. R.M., 2017 ONCJ 784.*

43. These include that this Court's decision requires a full contextual analysis. The threshold test to be met is a flexible test. The threshold is not as onerous as the material change test that applies in domestic cases. In a child protection proceeding, there must be a sufficient change in circumstances.

44. In order to determine whether the change is sufficient, the Court should consider the extent of the variation sought and whether it is proportional to the changed circumstances. The Court should consider whether the changed circumstances reduce or increase the risk of harm to the child.

45. The Court must keep in mind the objectives in the *CYFSA.* It is important to remember that the mother was the parent with whom the children resided prior to child welfare intervention. The Court's order should promote family reunification,

provided that the children can be safe during access. Generally, the Court should gradually increase access in a safe way. This will have the added benefit of giving the trial judge additional evidence as to how the mother was able to parent during access. This will be taken into account when a final decision is made at a trial.

C. Analysis Respecting Access

46. With those principles in mind, I find that the threshold has been met in this case for the following reasons:

(a) Although the mother had been having limited supervised access at the Society's office (and then essentially no in person access since some point after the Covid-19 pandemic began), the supervised visits had gone well for quite some time before Covid-19;

(b) Although questions remain about what transpired leading to the criminal charges and this child protection proceeding, the criminal case is now resolved. The mother's peace bond does not restrict her from having access;

(c) Mother has participated in counselling with Joanna Seidel. There were 11 sessions during the course of the criminal proceeding. She also participated in a parenting course. She did this counselling at her own expense to avoid lengthier wait lists;

(d) Aunt R., who still lives with the mother, participated in counselling with her daughter, S. I am told that this has improved their relationship. As a result of the child protection concerns, S. went to live with her grandmother for a while. But I am told that she has now returned to live with her mother, Aunt R., and

the mother in this case, and she entered into a VYSA. Therefore things have improved on that front;

(e) Aunt A., whom it appears accepted primary criminal responsibility for the events in question, has moved out of the home. There is a term in the mother's peace bond that requires no contact between Aunt A., C.K. and J.K.;

(f) Aunt A. is still before and under the scrutiny of the criminal court; and

(g) Both children want to see their mother more.

47. Having found there to be sufficient change in this case, I turn to the statutory best interests test. I do not intend to discuss each subsection in section 74(3) in this Endorsement, but I have considered the various sections in the context of the submissions and the affidavit evidence.

48. I will focus on certain aspects of the statutory best interest test, however.

49. First, although they are not determinative, the children's views and wishes are a mandatory consideration in the best interest test. They are important and entitled to special consideration. See section 74(3)(a) of the *CYFSA.*

50. As I said, the children want to see their mother more. Based on the record before the Court at this stage, I agree with the Children's Lawyer that those views and wishes are both independent, and have been consistent.

51. Second, the children have done well in the father's care, despite the turmoil of their primary residence being changed. The Children's Lawyer attributes this entirely to the mother's past parenting. Without making a finding one way or the other as to who should get the credit for the smooth transition, the children described good relationships with both parents. However, given the interruption in the relationships, work needs to be done at this point by way of an access order with terms to promote their relationships with the mother, and to reunite the mother and the children.

52. That said, I remain concerned about the risk to the children. The father has raised a legitimate concern that the mother's position is that S. essentially lied when she reported the statements respecting the religious activities and physical discipline. Insofar as the religious practices are concerned, these are admitted by Aunt A. to some extent in her guilty plea, but as I said, not the physical discipline.

53. The Court continues to have concerns about the mother's insight and her apparent minimization of what transpired. Although the mother attended counselling, there is very little information in the affidavits before the Court about the insight that she gained. The affidavits do little more than describe the "course content" of the counselling and parenting course that she took, rather than explain what she learned, how she applied it to her past parenting and how she will implement any change going forward.

54. It may be that initially, the mother was more reserved as to what she was willing to say about this, because the criminal charges were pending. But I note that since their resolution in early March, she has added no additional evidence as to her insight. And she has gone a step further in continuing to deny untoward activities.

55. If the mother wishes to take this approach at a trial in this case, she is free to do so. It may very well be that her version of events will prevail at the trial. As the Children's Lawyer pointed out, the trial judge may very well characterize the protection concerns differently than the Society has characterized them, and differently than the Court at this stage of the case has characterized them.

56. But this approach to this litigation also places the Court in a somewhat of a difficult position at this stage, especially if it the mother's denials/minimizations are not true.

57. Although helpfully, each parent and the Children's Lawyer drew to the Court's attention relevant excerpts from the police records/ Crown Disclosure Brief to either

support the credibility of the children's statements or to attack them, underlying the summaries there are still 100's of pages of actual disclosure and videos filed in the Continuing Record, plus Ms. Law advised the Court that additional disclosure should be obtained prior to trial.

58. At this point the Court is not going to embark upon an attempt to reconcile the alleged inconsistencies in the evidence. That would not be prudent. That will have to wait for the trial, with *viva voce* evidence and an opportunity for cross-examination.

59. At this stage, I find that there is still risk here. Notably, while the Society said it supports an expansion of access, it also takes the position that it verified the inappropriate physical discipline, notwithstanding the outcome of the criminal proceeding.

60. All that said, there is now a peace bond in place. And while the mother's affidavit evidence could have been much better and fuller in terms of her progress and insight gained in the counselling and parenting courses that she took, she did demonstrate effort by engaging in the programming, immediately and at her own expense early on.

61. The mother's peace bond requires ongoing counselling, and I will impose other terms and conditions to protect the children while access increases, incrementally and safely.

62. In that vein, I would not order an immediate move to overnights, or move to overnights too quickly, or order too many consecutive overnights. I appreciate that, as mother's counsel and the Children's Lawyer argue, the mother and the children have had supervised access for a long time and the children want to see her more. However, the problematic behaviour that triggered the criminal charges and this protection application occurred in the late evenings/early mornings, and it remains a serious issue to be determined and if proven at trial, one that will have to be addressed.

63. The mother says at this time, she will not be forcing the children to pray during unsupervised access. She does not want the children to feel uncomfortable or awkward. She does, however, intend to resume attending church, perhaps once Covid-19 is over. Yet she has provided almost no evidence about where that will be taking place, or in what forum or context.

64. So more information is needed in that regard. But mother's counsel readily indicated that the mother would consent to terms regarding this, which I will therefore detail below.

D. Analysis Respecting Covid-19

65. Unfortunately, Covid-19 intervened. This has complicated matters, rendering argument of this motion somewhat more nuanced.

66. Over the last several weeks, a body of case law has quickly developed. The cases have emanated from both the Superior Court and from this Court. Many are custody and access decisions, and a fewer number are decided in the child protection context. The outcomes in the cases are that sometimes courts order access and sometimes they do not. Some decisions decide that a case is not even sufficiently urgent based on court protocols to be heard during the court's reduced operations.

67. Among other things, the outcomes in the cases depend on various distinctions drawn. For example, some cases depend upon the nature of the case (domestic versus child protection), whether there was a pre-existing access order in place or not, or whether a parent had engaged in other problematic behaviour, such that he or she should not be trusted to comply with Covid-19 protocols. These are just some of the circumstances that are dealt with in the cases.

68. There have also been discussions, including in at least one decision of Pawagi J. in *Children's Aid Society of Toronto v. T.F., 2020 ONCJ 169,* about the propriety of blanket policies of children's aid societies to suspend in person visits altogether. To be clear, in this case, the Society is not taking that position; to the contra-

ry, it supports the expansion of access, that in person access can again resume, and it supports the lifting of supervision, despite Covid-19. It was the father in this case who did not agree.

69. There are many helpful general principles articulated in the various cases. But of course, each case will turn to some degree on its facts. In this case, in the end, the Court must balance the importance of the parent-children relationships at stake, the other child protection concerns, and then the safety concerns of a health nature.

70. No expert evidence was filed in this case (nor was there any expert evidence referred to in most of the reported cases)[2]. While some things about Covid-19 may seem obvious, the science behind Covid-19 is not yet fully known and it is evolving.

71. There is much information available in the public domain about Covid-19, but none of it was put before the Court on this motion, nor were any arguments made about the extent to which the Court may take judicial notice of certain matters relating to Covid-19. Rather, the mother and father filed evidence about the steps they are taking. Their evidence assumes a level of knowledge about Covid-19 directives and the science that is publicly available, on the part of the Court, without tendering it in any form.

72. In the absence of expert evidence, certain other publicly available evidence being filed, and any submissions about the absence of either, the Court will craft an order with government and public health directives in mind. I would not go so far as to suspend in person access because of general Covid-19 concerns in this case, in light of the evidence that I was given, from the mother in particular, about her circumstances and practices as they relate to Covid-19.

[2] I am aware of at least two bail decisions in the criminal context in which expert evidence was provided to the Court. See *R v. J.R., 2020 ONSC 1938 and R. v. Williams, 2020 ONSC 2237.*

73. In this case, the mother works in a grocery store. That caused the Court (and the father) some concern, based on the common-sense assumption that she has been, and will be coming into contact with an increased number of members of the community (customers in the store and other employees).

74. However, the mother has offered much evidence about numerous efforts to minimize her risk of exposure due to this. In particular:

(a) The mother deposes that there is a security guard at the entrance of the store, who limits the amount of persons who can enter the store;

(b) Customers are given gloves to pick up their groceries;

(c) The mother wears gloves and a mask during her shifts;

(d) Until recently, the mother worked as a cashier. There was a plexiglass shield between herself and customers. Just before the motion, the mother secured a promotion, is working in the back office and now comes into contact with members of the public less often;

(e) There is a limited staff of 10 people (mother included) working in the store;

(f) No one working in the store has become sick;

(g) The mother is the only person who brings groceries into her home, since she works in the grocery store; and

(h) The mother immediately changes and washes her clothes when she gets home.

75. The mother also works part-time at a hospice for children. However, during Covid-19, the children who normally live in the hospice, are staying at Sickkids

hospital. Instead, the hospice is being used to provide end of life care to adults right now. That also caused the Court some concern, given news reports about the spread of Covid-19 spread in retirement homes, which seem to the Court, in general, to be a related kind of facility.

76. However, the mother's evidence (and it is very current evidence – her affidavit on this point was sworn just a few days ago) is that there are just 8 residents in the hospice in which she works, none of whom have Covid-19. Because the residents are vulnerable, the mother regularly submits to Covid-19 screening (questionnaires and temperature taking) each time that she goes to work there.

77. The mother takes the street car to work. That too caused the Court concern, based on assumptions of increased contact with members of the community while in transit. However, the mother says that the street car is very empty. She says she has never encountered more than four other passengers on the street car. She wears gloves and a mask while on the TTC on the way to work, too.

78. Earlier, I said that Aunt R. and S. live in the home with the mother. Aunt R. does not work. Aunt R. is remaining at home. They have both talked to S. about the importance of social distancing. S. goes out for a short-walk only. Otherwise she stays home, works on school work and socializes with friends via Zoom. The mother and Aunt R. do not allow visitors to their house.

79. There is no evidence, expert or otherwise, before the Court that either the mother, the father, the children or either Aunt R. or S. have any particular pre-existing conditions or sensitivities that might make the consequences of catching Covid-19 more drastic for any of them. That is not to say that this Court is not taking seriously the potential of the parents or the children catching Covid-19 in the absence of pre-existing conditions, or more generally the impact on the broader public interest (ie. in terms of increasing the spread of the disease).

80. However, having decided that unsupervised access is appropriate based on the Court's consideration of the child protection issues raised in this case, the ques-

tion to decide is whether Covid-19 is a reason to further delay the commencement of unsupervised access?

81. My answer to that question is no. It is evident, in part due to her jobs, that the mother is very aware of what is required of her in relation to Covid-19. She says that she would never knowingly expose the children to a risk of harm. If she were to develop symptoms such as a fever and cough, she says she would suspend access and tell the father right away.

82. The mother has even offered to the Court that she will quit her jobs. I found that to be compelling. This speaks to her strong desire to resume seeing the children, to the point that she would offer to do this.

83. The Court must be careful not to judge this issue, measured through the lens of an unrealistic socio-economic yardstick. It seems unfair to me that parents of modest means, or of low income, who are forced to work in essential services during Covid-19, or to take public transit to keep grocery stores running upon which we all rely, or to care for the vulnerable, would then have to potentially jeopardize having face to face contact with their children, particularly when they are doing their best and taking all necessary precautions (in accordance with current understanding of what are necessary precautions) related to Covid-19.

84. At least two decisions of the Superior Court have made similar comments. See the decision of Fryer J. in *S.D.B. v. R.B.B., 2020 ONSC 1745* ¶ 16, which cites the unreported decision of Nakonechny J. in *Zee v. Quon, Toronto Court File: FS-16-412436* dated March 27, 2020.

85. In *S.D.B. v. R.B.B.,* the father's new partner's daughter was working at a fast food restaurant Mucho Burrito and that raised a concern about access. At ¶ 16, Fryer J. said that "the fact that one family member may be working outside the home is not necessarily a ground to alter a parenting arrangement absent evidence that the person working is not following recommended protocols."

86. Fryer J. cited Nackonechny J.'s decision in *Zee v. Quon*, in which Nackonechny J. was satisfied that the mother, a health care professional, and the mother's employer, were both aware of the necessary protocols, and that the mother would take precautions to keep the child safe.

87. In conclusion, in *S.D.B. v. R.B.B.,* Fryer J. held:

> There are many people who cannot work from home and who need to work to support their family. Furthermore, there are those working in essential services upon whom we all continue to rely including health care workers, transit workers and those who support the food supply chain among others. To suggest that parenting time should be suspended simply because a member of the household works outside the home is not reasonable.

88. In this case, the mother works both in health care, and in a grocery store, (which is in support of the food supply chain). I agree with the approaches of Fryer J. and Nakonechny J. on these points in these cases.

89. Furthermore, the Court is also concerned that were the mother forced to quit her job, in this current economic climate and uncertain future, that she would or might have difficulty getting new employment. This is a particular concern in the child protection context. The Court wishes to be mindful that in making orders, it does not as an unintended consequence, add any additional stressors on this family, such as financial ones, unless absolutely necessary.

90. To be clear, the father, with whom the children primarily reside, also works. He works as a land surveyor. He sometimes works from home, and some of the time he is out of the house. He too has provided evidence about how he is handling the Covid-19 crisis.

91. But because he has become the children's primary parent as a result of the child protection proceedings, his contact with the children is not in issue. Submissions relating to Covid-19 were not made in the context of the father.

92. Since his contact with the children and the impact of Covid-19 was not made an issue, I do not need to detail what he is doing. But to be clear, I am satisfied based on the record that what he is doing is appropriate, too.

93. Therefore, the record before the Court has satisfied me that both parents are taking Covid-19 seriously and both are being vigilant from a health point of view. Both will protect the children on this front to the extent possible.

94. In the result, the schedule that I am imposing is based on the facts of this case, in response to the other child protection concerns, and not based on Covid-19 *per se*. I am ordering certain terms relating to Covid-19, but they do not impact the schedule itself. In other words, even if there were no Covid-19 right now, the schedule would not change. Some of the terms and conditions would.

E. Analysis Respecting The Transportation Arrangements

95. There is evidence before the Court about how the children's transportation should be handled if access is ordered, as the father lives in Oshawa. I also heard competing positions about the cost of a driving trip between here and Oshawa, and whether the cost should be shared between the parents. Prior to the suspension of in person supervised access, the Society had arranged for drivers.

96. The larger issue respecting driving, especially during the first phase of the increased access when there will be day visits only, is that if the father does all the driving, he would have to drive the children from Oshawa to Toronto, hang around in Toronto for several hours with nowhere to go (because of the various Covid-19 closures) and then drive them back to Oshawa at the end of the visit. Or he would have to do two round trips over the course of one day in a few short hours.

97. The cost issue was not that strenuously pursued in argument, however, since the parents more or less agreed, in order to deal with these logistics, to use the Go Train instead, at least some of the time.

98. To be clear the father is opposed to increased access at all, but if the Court orders access, he said he would prefer the Go Train for one of the legs of the journey. No one really raised a Covid-19 issue relating to the use of the Go Train. The parties essentially agreed with the proposition that the Go Train will likely have very few passengers on it during this Covid-19 pandemic, just like the mother's evidence respecting the decreased volume of users on the TTC. Regarding the Go Train, this is probably even more the case on weekends, when the exchanges will be occurring under my Order.

99. And I have no reason to question that the mother will socially distance from others with the children on the train, in light of what I said above about how she is handling Covid-19 generally.

F. Conclusion and Orders

100. I appreciate that the father is fearful of Covid-19. I want him to understand that the Court has heard his concerns and takes them seriously. The children are likely anxious too. In this case, both parents can play a role in managing any such anxiety.

101. And I also appreciate that the schedule I am ordering is not on an alternating weekly or weekend basis, for which the father argued in the alternative. Rather, I am ordering that the mother have access each week.

102. Although I have not ordered what the father asked for, I also wish to be clear that I found the father's position and approach to this motion, still to be very reasonable.

103. The father conducted himself in a very appropriate and respectful way during this motion. Even though he appeared on his own, he filed helpful affidavit materials, which I have considered.

104. I wish the father to understand that I am ordering this outcome because in my view, it is important to the children's relationships with their mother (and frankly to their continued good relationship with their father, too) to get regular contact between the children and their mother going without any further delay. Any logistic or inconveniences can be addressed in due course, perhaps shortly in the summer when this matter returns before this Court.

105. So based on the forgoing, I find that it to be in the children's best interests that access to their mother now expand gradually, but safely on terms and conditions.

106. Therefore, I make the following orders:

(a) Commencing Saturday, April 25, 2020, and then for the next three Saturdays thereafter (for a total of four Saturdays), the mother shall have access to the boys in Toronto between 10:00 am and 5:00 pm. The father shall drive the children to the mother's home in Toronto and the mother shall return them via Go Train to the Oshawa Go Station at the end of the visit[3]. The father shall then pick the children up at the Oshawa Go Station for the mother's arrival;

(b) Prior to the next phase of access provided for in (c) below, the Society and the Children's Lawyer shall check in with the children and ensure that the unsupervised visits are going well. If there are any issues or concerns relating

[3] Neither parent supplied the Go Train Schedule for this motion. The parents should be flexible with one another if the return time is not exactly 5 pm. The essential purpose of this paragraph is to allow the mother to have a meaningful visit of several hours for the next four weeks. I do not want her visits to be significantly curtailed because of any dispute about a train schedule. Also the parents will have to communicate with each other so that the father arrives at the Go Train station at the time the train arrives in Oshawa.

to access, then the matter is to be brought back before me and a date is to be obtained by 14B Motion. The father may also return the matter to Court early if he has concerns;

(c) Commencing on Saturday, May 23, 2020, the mother shall have weekly access to the boys in Toronto from Saturday at 10:00 am until Sunday at 5:00 pm, with the father doing the drop off in Toronto at the mother's home and the mother returning the children via Go Train to the Oshawa station;

(d) In addition to the access provided for in paragraphs (a) and (c) above, the mother may have regular telephone and video contact with the children;

(e) The mother shall follow the terms of the peace bond;

(f) The mother shall not allow Aunt A. to have any direct or indirect contact with either child;

(g) The mother shall not use, or allow anyone else to use physical discipline with the children, including hitting or pinching;

(h) The mother shall not use any inappropriate verbal discipline with the children, and she shall ensure that she interacts with the children in an age appropriate manner;

(i) Both parents shall allow the Society, and the Children's Lawyer to monitor and/or check in with each of them, and with the children about access or about other issues relating to this case, during access visits or otherwise. In the case of visits at the mother's home during Covid-19, the mother shall allow the Society to check in electronically, or via phone;

(j) The mother undertakes not to require the children to pray with her. Therefore, there shall be an order that she shall not compel the children to pray while they are in her care. In addition, on consent, when the mother is prepared to resume church services, she shall provide the Society, the Children's

Lawyer and the father with details about the church that she plans upon attending and its practices;

(k) Both parents shall strictly adhere to all government of Canada and Ontario, and any municipal government directions, and any public health directions concerning Covid-19. In addition, the mother shall continue to employ all safety protocols that are put in place by her employers while she is at work, including regular hand washing, glove and mask wearing, and routine Covid-19 screening at the hospice;

(l) If there are any changes to either Aunt R. or S.'s circumstances, including either getting a job or leaving the house more frequently than what is described in the mother's affidavit (summarized in this Endorsement) during the Covid-19 crisis, then the mother shall advise the father and the Society of these changes. If there are concerns, the matter may be brought back to the Court by 14B Motion by any party or the Children's Lawyer;

(m) As a further condition of access during Covid-19, no one other than the mother, Aunt R. and S. shall enter into the mother's home, except in an urgent or emergency situation, such as a medical situation or where urgent home repairs are required;

(n) When the mother and the children need to be out in the community during visits, for example during their return trips to Oshawa at the end of visits, the mother shall ensure that the children practice social distancing and regular hand washing or hand sanitizing;

(o) Both parents are to reinforce with the children proper Covid-19 practices, such as social distancing when out in the community, and hand washing, when they are in their care;

(p) If either the mother, the father, the children, Aunt R. or S. display any symptoms of Covid-19, then the mother or the father as the case may be shall notify each other and the Society and the Children's Lawyer, the mother's access

shall be immediately suspended and the matter is to return before me by 14B Motion immediately to determine next steps;

(q) Any party may apply to delete or vary any of the Covid-19 terms (in particular paragraphs (k) to (p)) at an appropriate time when governments/public health relax the restrictions currently in place, or if there is new scientific evidence to suggest that would be appropriate;

(r) The next Court date is July 13, 2020 at 10:00 am. It is scheduled to be an in-person attendance. The purpose is a settlement conference. On that date, there shall also be a discussion about what additional records the parties believe they require for trial, and the Court shall set a date for disclosure motion at that time to be argued on another date, if those issues do not resolve on consent on July 13, 2020;

(s) All parties should file briefs for the Settlement Conference, including with Offers to Settle in sealed envelopes;

(t) If additional terms respecting the mother's access are sought, such as perhaps for a different schedule during the summer, or because of some logistic issue, then this may be spoken to on July 13, 2020 and the Court may set a process for the resolution of that, if necessary; and

(u) The Society shall order and file a copy of the transcript of Aunt A.'s sentencing, once that occurs.

107. I wish to thank all counsel, and the father for their thorough materials, their thoughtful submissions and for their assistance with this matter.

Released: April 23, 2020

Signed: Justice Alex Finlayson