W A R N I N G

The child in this case is the subject of proceedings under the *Child, Youth and Family Services Act, 2017*. This judgment is subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

> **87**(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.

COURT OF APPEAL FOR ONTARIO

CITATION: A.M. v. C.H., 2019 ONCA 764
DATE: 20190930
DOCKET: C66170

Pardu, Paciocco and Zarnett JJ.A.

BETWEEN

A.M.

Applicant (Respondent)

and

C.H.

Respondent (Appellant)

John Phillips and Julia Tremain, for the appellant

Brian Ludmer, for the respondent

Catherine Bellinger and Suzanne Stern, for the Office of the Children's Lawyer

Heard: August 14, 2019

On appeal from the judgment of Justice Paul W. Nicholson of the Superior Court of Justice, dated October 30, 2018 with reasons reported at 2018 ONSC 6472.

Pardu J.A.:

[1] B., a 14-year-old boy, had been showing increasing resistance to visits with his father. The trial judge concluded that the mother systematically and successfully poisoned the child's relationship with his father. The mother was

clearly uninterested in participating in therapy with a view to encouraging the child to reconcile with his father.

[2] The trial judge concluded that the child's long-term best interests favoured a reversal of custody and a suspension of access, intended to be time-limited, to the mother and her allies, in the hopes that the father and son could achieve some rapprochement. Accordingly, by judgment dated October 30, 2018, the trial judge ordered an immediate custody reversal and prohibited contact between the child and his mother and siblings for six months, with custody and access to be reviewed at the end of the six-month period, subject to certain conditions. In his reasons on motion dated January 18, 2019, the trial judge further ordered no contact between the child and the mother's extended family.

ISSUES

[3] None of the parties dispute the trial judge's factual findings. However, the mother, the appellant, and the Office of the Children's Lawyer (OCL), advocating for the boy's wishes, argue the trial judge's order (contained in the October 30, 2018 decision) be set aside because:

1. The trial judge improperly applied the best interests of the child test by:

    a) Failing to consider the potentially catastrophic consequences of separating the child from his mother;

b) Overemphasizing the mother's bad conduct; and

c) Failing to give effect to the child's wishes.

2. The trial judge erred in imposing a reversal of custody because:

a) The mother could not have anticipated it would have been ordered;

b) There was no expert evidence about the likely effects of such a remedy on the child; and

c) There was no therapeutic support in place to guide the transition.

3. The trial judge improperly delegated decision-making power, because he made review of custody and access provisions contingent on "reports from therapists" and whether the child had "meaningfully engaged" in therapy.

4. The trial judge erred in ordering the child to participate in reconciliation therapy without his consent to treatment, as contemplated by the *Health Care Consent Act*, *1996*, S.O. 1996, c. 2, Sched. A (*HCCA*).

[4] These are issues of mixed fact and law. Absent palpable and overriding error, this court should not intervene. Specifically, as this court has reiterated many times, an appeal court must not retry a custody case. Instead, this court "must approach the appeal with considerable respect for the task facing a trial judge in difficult family law cases, especially those involving custody and access issues": *C.S. v. M.S.,* 2010 ONCA 196, 262 O.A.C. 225, at para. 4. As stated in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13:

> Custody and access decisions are inherently exercises in discretion. Case by case consideration of the unique circumstances of each child is the hallmark of the process. This discretion vested in the trial judge enables a balanced evaluation of the best interests of the child and permits courts to respond to the spectrum of factors which can both positively and negatively affect a child.

[5] The trial judge has not made any palpable or overriding errors. His reasons are thorough, cogent, and owed considerable deference. Accordingly, I would not give effect to any of the mother or OCL's arguments and would dismiss the appeal.

FAMILY HISTORY AND FACTUAL FINDINGS

[6] Since there is no contest about the trial judge's factual findings, I summarize the family history relying on those findings.

[7] The parties married on April 25, 1998, separated June 28, 2014, and divorced on April 24, 2017. There are three children of the marriage. B. is the youngest child and the only child subject to these proceedings.

[8] In the summer of 2014, the mother unilaterally and surreptitiously moved the children's residence to Guelph from Toronto. She was ordered to return the children's residence to Toronto and did so on September 1, 2014. The same order awarded the father access on Sundays from 9:00 a.m. to 9:00 p.m. and on Wednesday evenings.

[9] The parties resolved their financial issues by order of September 14, 2016.

[10] By October 2016, the father's access was reduced to 45-60 minutes on Sundays when the children would have breakfast with him at a donut shop.

[11] The child has consistently stated that he does not enjoy the visits and does not want them to continue. He refused to engage with his father in any meaningful way during the visits.

[12] The mother's efforts to eliminate the father from the children's lives began well before separation, as the trial judge noted:

> [26] The Applicant Father testified that in the years prior to separation, starting in 2010, the Respondent Mother began criticizing the Applicant Father in front of the children for not making enough money. In front of the children she also said he could not wash dishes or fold laundry properly. The situation worsened in 2012, when the maternal grandmother started to spend two to four days per week at the family home. She joined in the criticism of the Applicant Father's inadequacies in providing for the family or helping with household duties in front of the children. The incessant nattering often ended with the Applicant Father and Respondent Mother engaging in yelling and screaming at each other. The Applicant Father testified that he would often end these arguments by leaving the matrimonial home. When he returned, the Respondent Mother had locked the door and he had to plead for 15 minutes with the children to let him in. This was a humiliating experience for him.
>
> [27] Starting in 2012, the Respondent Mother prohibited the Applicant Father from driving the children to school. The Respondent Mother and children would often visit the Respondent Mother's family farm for stretches of time without the applicant Father. The Respondent Mother and the children began to impose rules on the Applicant Father in the home. He was not permitted to eat with them at the table. He was not permitted to sit in the family

> room with the children as they watched television. The children told him to leave and the Respondent Mother did not intervene. He was not permitted to drive the children to their doctor's appointments. He was not permitted to wish the children goodnight. He was not permitted to enter the youngest child, [B.]'s, room.
>
> [28] The Respondent Mother, according to the Applicant Father's evidence, told him in these years prior to the separation that the children did not like him and did not need him.

[13] The social worker retained to convey the child's wishes reported that the mother's strongly negative feelings towards the father had contributed to the child's wish to discontinue visits with his father. The mother transmitted verbal and non-verbal communication to the children that revealed her disdain for the father and her disapproval of his parenting. Similarly, the trial judge found that mother was averse to the father playing any role in the child's life:

> [163] The Respondent Mother does not hide the fact that she sees no benefit to the child having a relationship with the Applicant Father. She moved the child away in an effort to limit that relationship. She has poisoned the child against the Applicant Father. She admits that she cannot co-parent with the Applicant Father.

[14] The trial judge also found that the child showed behaviour suggesting that the mother had influenced the child's resistance to a relationship with the father:

> - Views of parents one-sided, all good or all bad; idealizes one parent and devalues the other: [the child] is unable to articulate any good memories of time with his father and/or good qualities of his father.

- Vicious vilification of target parent; campaign of hatred: [the child] expresses hatred openly toward his father.

- Trivial, false and irrational reasons to justify hatred: [the child]'s hatred is based on allegations that are without merit. There is no evidence to corroborate allegations of extensive physical abuse, or of bad driving, or of an infested Matrimonial Home.

- Reactions and perceptions unjustified or disproportionate to parent's behaviours: [the child]'s insistence on short visits at a library and refusal to attend at the Matrimonial Home are irrational and unjustified.

- No guilt or ambivalence regarding malicious treatment, hatred, et cetera: [the child] believes he is justified in holding onto his hatred toward his father.

- A stronger, but not necessarily healthy, psychological bond with alienating parent than with rejected parent: [the child] has no bond with his father. He is closer to his mother, but is showing signs of an unhealthy attachment, becoming violent toward his mother.

- Denial of hope for reconciliation; no acknowledgement of desire for reconciliation: [the child] clearly articulated to several witnesses that he had no desire to participate in any counselling with a view to reconciliation.

[15] He later concluded that the mother had displayed behaviour tending to undermine the child's relationship with his father:

> [170] Regarding the alienating parent behaviours, I find that the Respondent Mother displays the following:

- Allows and insists that child makes decisions about contact.
- Sets few limits or is rigid about routines, rules and expectations.
- Refuses to speak directly to parent; refuses to be in same room or close proximity; does not let target parent come to door to pick up child.
- No concern for missed visits with other parent.
- Makes statements and then denies what was said.
- Body language and non-verbal communication reveals lack of interest, disdain and disapproval.
- Rejected parent is discouraged or refused permission to attend school events and activities.
- Does not believe that child has any need for relationship with other parent.
- Portrays other parent as dangerous, may inconsistently act fearful of other parent in front of child.
- Exaggerates negative attributes of other parent, and omits anything positive.
- Delusional false statements repeated to child; distorts history and other parent's participation in the child's life; claims other parent has totally changed since separation.
- Projection of own thoughts, feelings and behaviours onto the other parent.
- Does not correct child's rude, defiant and/or omnipotent behavior directed towards the other parent, but would never permit child to do this with others.

- Convinced of harm, when there is no evidence.
- False or fabricated allegations of sexual, physical and/or emotional abuse.
- Denigrates and exaggerates flaws of rejected parent to child.
- Extreme lack of courtesy to rejected parent.
- Relocation for minor reasons and with little concern for effects on child.

[16] For example, a mouse was found in an unattached garage shared with neighbor. The mother transformed this into an allegation that ants and rats infested the former matrimonial home, occupied by the father. She used this as an excuse for violating court orders regarding the children's visits to the father's home.

[17] The trial judge concluded that the child's behaviour was not a justifiable response to poor parental behaviour by the father:

> [176] There is no doubt that the Applicant Father has struggled to successfully communicate with the children for many years. However, I do not find that his conduct played a part in damaging the children. In other words, his conduct did not constitute justified estrangement. Because of the poisoning by the Respondent Mother of the children, they wanted nothing to do with the Applicant Father, but his shortcomings were not the issue. Issues identified by the children (for example his driving, ants and rats in his house, and physical abuse) were not grounded in reality. They were figments planted by the Respondent Mother or created by the children themselves. This is not a hybrid situation. It is a unilateral, deliberate and successful alienation by the Respondent mother alone.

> [177] The alienation had been completed well before the separation. The OCL did not observe undue influence by the Respondent Mother recently because she did not need to continue the influence once alienation was a *fait accompli*. The evidence outlined earlier of the Respondent Mother's and children's demeaning attitude and bitterness toward the Applicant Father for two years prior to separation (not permitting him to eat with the family or watch TV with them) supports this conclusion.

[18] The father attempted to engage in reconciliation therapy with his son and Marcie Goldhar, a social worker. The mother was unable to act in a way consistent with reconciling the father and the child. Ms. Goldhar reported that further similar efforts at outpatient therapy were unlikely to be successful unless circumstances changed. The trial judge concluded that if the child was left with the mother, both she and the child likely would not comply with any order for therapy or attempts at reconciliation. In fact, the trial judge expected the mother and child may completely disobey any access order he made.

[19] By the end of the trial, the mother and the child both took the position that there should be no contact with father, or in the alternative, minimal contact.

[20] The trial judge rejected the possibility of leaving the child with the mother. He characterized her behaviour as amounting to emotional abuse, which would continue and permanently sever any relationship between the child and his father.

[21] He also rejected the possibility of leaving the child with the mother with an order for therapy, on the ground the mother would not participate.

[22] There was no third party proposed to take charge of the child.

[23] The trial judge concluded that the long-term best interests of the child required placing the child with the father and suspending the mother's contact with the child. He determined that the potential long-term detrimental impact of the child's severed relationship with his father far outweighed the short-term difficulties of the custody reversal and no-contact order.

ANALYSIS

1. Did the trial judge improperly apply the best interests of the child test?

[24] The mother and OCL suggest the trial judge improperly applied the best interests of the child test. Their arguments mainly focused on how the trial judge failed to consider the potentially catastrophic consequences of custody reversal for the child, overemphasized the mother's bad conduct, and failed to give the child's wishes any weight. However, the mother and OCL do not dispute any of the factual findings that informed the best interests of the child analysis. It is thus difficult to challenge the trial judge's discretionary weighing of the different factors.

[25] The trial judge explicitly considered the child's ties to his mother and the short-term disruption that would result from a transfer of custody to the father. The child was having difficulties while living with his mother. He had assaulted her. The mother struggled to meet the child's educational needs. While the child had lived almost exclusively with the mother for four years, the trial judge did not consider

this a stable home environment, due to the mother's inadequate and emotionally abusive parenting. Accordingly, trial judge concluded:

> [167] … I have no doubt that [the child] will initially struggle tremendously with the order I am making. However, continuing with the status quo in my view will not only result in a termination of the child's relationship with the Applicant Father but it will be detrimental to his emotional development in the long-term to continue to be exposed to the destructive parenting of the Respondent Mother. The long-term detrimental impact on the child of a permanently severed relationship with his father and ongoing exposure to the substandard parenting of the Respondent Mother far outweighs the emotionally challenging but temporary adjustment to living with the Applicant Father and short-term difficulties of having no contact with the Respondent Mother.

[26] The mother's conduct was profoundly harmful to the child and contrary to the child's best interests. The mother's conduct was highly relevant, and the trial judge did not err in giving it the importance he did.

[27] The trial judge also found that the child had been poisoned against his father and his wishes were not independent. Absent a challenge to this finding, the trial judge was entitled to put no weight on the child's wishes. The trial judge noted further he would not abandon the court's role of determining the best interests of the child just because the child will do what he wishes in any event. Instead, his goal was "to fashion an order that will prevent [the child] from voting with his feet": at para. 153.

[28] The trial judge's conclusions were reasonably available on the evidence and are entitled to deference. There is no basis to intervene.

2. Did the trial judge err in imposing a reversal of custody with a no-contact order?

[29] The mother suggests the remedy was extreme and she had no notice of it. However, the father explicitly claimed "sole custody" as an alternative claim to division of parenting time with detailed conditions. The mother's conduct and its effect on the child was front and center in the father's pleadings. Sometimes warring parents lose sight of their children's best interests. Under such circumstances, no one should be surprised if the trial judge fashions a parenting regime which is not in the precise terms sought by either party.

[30] The mother and OCL also submit that expert evidence about the effects of the remedy on the child, as well as therapeutic supports, was necessary before imposing such an extreme remedy.

[31] In finding that the mother alienated the child from the father, the trial judge was not purporting to make a psychiatric diagnosis of any syndrome or condition. Rather, he was making factual findings about what happened in this family. This is the stuff of which custody trials are made, and as conceded, no expert opinion was required to enable him to do so.

[32] Those factual findings logically led to certain remedies being appropriate or not. The trial judge did not need expert evidence before choosing the remedy that was in the best interests of the child.

[33] Further, judges deciding custody cases do so in places as diverse as Cochrane, Ontario and downtown Toronto. It cannot be assumed that comprehensive parenting capacity assessments are universally available or affordable. Even competent assessors may not have the luxury of lengthy time to evaluate family dynamics and appropriate remedies.

[34] This was an 11-day trial. The trial judge had the full opportunity to assess the parties in examination in chief and in cross examination, and to assess the reports of the counsellors who had worked with the family and the evidence of other witnesses. No one else had that same opportunity, which equipped the judge to decide what remedy promoted the best interests of the child.

[35] It is noteworthy that in circumstances similar to these, this court upheld a trial judge's decision transferring custody because of parental alienation, without expert evidence on that issue: *Fiorito v. Wiggins*, 2015 ONCA 729.[1]

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[1] That case seems to have had a very happy ending. In a subsequent hearing Hebner J. observed that: "On the evidence as a whole, I find that a change in custody has made a remarkable difference in the relationship these three girls have with their father. In fact, I can safely say that the change in custody has saved that relationship. Were it not for the change in custody, I have no doubt whatsoever that the children would not have any sort of relationship with their father": 2016 ONSC 3678 at para. 32.

[36] Some expert assessments may be very helpful to a trial judge, but they are not a prerequisite to making the order the trial judge thinks is in the child's best interests, based on all of the evidence at the end of the trial. In fact, the trial judge is obliged to make that order, regardless of whether expert evidence is adduced.

[37] There is also no legal requirement for therapeutic support when custody reversal is contemplated, though it might be helpful in some cases. Here, it would be of doubtful utility, given the mother's refusal to participate in that process.

[38] The trial judge had few choices. The mother and the child were unwilling to participate in reconciliation therapy on an outpatient basis. If the child remained with his mother, it was virtually certain that the child would lose any chance for a relationship with his father, who was a reasonably competent parent.

[39] The clear evidence about risks to the child if he stayed with his mother justified a change in custody and the no-contact order. The trial judge chose this remedy to promote the child's long-term best interests, not to punish the mother. There is no basis to intervene.

3. Did the trial judge improperly delegate decision-making power to therapists?

[40] The trial judge hoped that six months would allow for a beginning of a rapprochement between the child and his father. If the mother and child had supported this plan, it is likely that the child would have then been returned to his mother's care, if that remained his wish, with access having been solidly

established with the father. I see no error in the trial judge setting a target date to assess how the process was unfolding.

[41] It is true the trial judge stated that review of the custody and access provisions "cannot be undertaken until [the child] has meaningfully engaged" with therapy. Yet, the trial judge also noted that the "court will review the custody and access provisions" in six months and the specific review date "will not be set until the court is satisfied said review is appropriate based upon the reports from the therapists" (emphasis added). The therapists were to submit their reports by March 1, 2019, at which point trial judge, not the therapists, retained ultimate authority to set a review date.

[42] The trial judge did not foreclose the parties from asking him to revisit the arrangement if there had been a change in circumstances. In fact, the mother moved twice before the trial judge, seeking access first on January 9, 2019 and then again on May 28, 2019. The trial judge heard both motions on the merits and did not impose any pre-condition to the mother's ability to bring the motions.

[43] Accordingly, there was no improper delegation of decision-making power.

4. Did the trial judge err by ordering the child to participate in reconciliation therapy without the child's consent, as contemplated by the *HCCA*?

[44] In his judgment of October 30, 2018, the trial judge ordered that the changed custody regime would not be reviewed until:

- The father and the child took “steps to engage and meaningfully participate in supportive reconciliation therapy with either Carol Jane Parker or Marcie Goldhar”. The father and the child were to follow the therapist’s recommendations.
- The mother engaged and meaningfully participated in therapy to gain insight into her alienating behaviour and work towards supporting reconciliation between the father and his son.

[45] The judgment of October 30, 2018, which is the order under appeal, does not directly order the child or the mother to participate in therapy. Rather, it sets participation in therapy as a prerequisite to the fixed date review of the change in custody. If the child or the mother refused to participate in the therapeutic process, they would lose the opportunity to have a fixed date review of the change in custody, without the need to show a change of circumstances. In that sense, the order made still left some scope for choice on their part as to participation in the therapy and the question of forcing treatment on an unwilling participant does not directly arise. This would be sufficient to dismiss this ground of appeal.

[46] In later orders which are not part of this appeal, on motions brought by the parties, the trial judge did make orders requiring the child “to accept and attend the court ordered therapist”: see, for instance, the order of January 18, 2019, with

reasons reported at 2019 ONSC 527. As such, it is useful to review the extent of a judge's authority to make therapeutic orders in custody cases.

[47] I begin by reviewing the court's jurisdiction to make therapeutic orders under *Divorce Act*, 1985, c. 3 (2nd Supp.) and the *Children's Law Reform Act*, R.S.O. 1990, c. C.1. Next, I analyze the interplay between the *HCCA* and legislation governing custody. I conclude that the *HCCA* is not a controlling factor when a judge decides whether to make a therapeutic order in a custody case.

(a) Jurisdiction to make therapeutic orders in custody cases

[48] The *Divorce Act* and the *Children's Law Reform Act* give judges broad authority to make custody orders and other corollary orders about a child's life.

[49] Sections 16 (1) and 16(2) of the *Divorce Act* provide as follows:

> 16(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> …
>
> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restriction in connection therewith as it thinks fit and just. [Emphasis added.]

[50] Sections 28(1) (a), (b) and (c) of the *Children's Law Reform Act* state:

> (1) The court to which an application is made under section 21,

> (a) by order may grant the custody of or access to the child to one or more persons;
>
> (b) by order may determine any aspect of the incidents of the right to custody or access; and
>
> (c) may make such additional order as the court considers necessary and proper in the circumstances [Emphasis added.]

[51] Accordingly, where parents cannot agree, a court may make orders about almost any aspect of the child's life, including education, religious training, diet, vaccinations, recreation, travel, and so on. This includes making an order for counselling or therapy.

[52] Other statutory provisions support this conclusion. For instance, section 17(8)(b) of the *Family Law Rules*, O. Reg. 114/99 grants a court the power to make an order at a case conference, settlement conference or trial management conference requiring a party to attend a program offered through a community service or resource. Here, the plain meaning of the term "program" would include counselling or therapy.

[53] Additionally, under s. 30 of the *Children's Law Reform Act*, a court may appoint a skilled professional to report on the needs of the child and the ability and willingness of the parties to satisfy the needs of the child. Not infrequently, the professional might recommend a course of treatment to promote the well-being of the child: see, for instance, *Leelaratna v. Leelaratna*, 2018 ONSC 5983. A court should not be powerless to implement those suggestions.

[54] As the trial judge pointed out in *Leelaratna*, a "large and liberal interpretation of the statutory and regulatory powers conferred upon the courts to make a wide variety of orders with regards to parenting, including therapeutic orders, is also entirely consistent with the courts' duty to promote the best interests, protection and well-being of children": at para. 52.

(b) Effect of the *HCCA* on a court's ability to make therapeutic orders

[55] The OCL argued that if the child refuses consent to therapy, the *HCCA* prevents a court from ordering the child to participate in therapy. This is because section 10 of the *HCCA* prohibits a health practitioner from administering treatment to a capable person without that person's consent, and from administering treatment to an incapable person without the consent of the person's substitute decision-maker:

> 10 (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,
>
> (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
>
> (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

[56] However, there are some salient differences between the *HCCA* and the legislation directly governing custody cases.

[57] The *HCCA* concerns the relationship between individuals and health care practitioners. It sets up a statutory regime and an administrative tribunal, the Consent and Capacity Board (the Board), to resolve differing views about a patient's wishes and capacity.

[58] The *HCCA* also aims to protect of a person's autonomy to make decisions about their own well-being, even if those decisions are not in their best interests. This prioritization of autonomy above best interests is noted in *Starson v. Swayze*, 2003 SCC 32, [2003] 1 SCR 722, at para. 76:

> The legislative mandate of the Board is to adjudicate solely upon a patient's capacity. The Board's conception of the patient's best interests is irrelevant to that determination. As the reviewing judge observed, "[a] competent patient has the absolute entitlement to make decisions that any reasonable person would deem foolish" (para. 13). This point was aptly stated by Quinn J. in *Koch (Re)* (1997), 33 O.R. (3d) 485 (Gen. Div.), at p. 521:
>
> > The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.

[59] In *Starson*, the only issue before the Board was whether Professor Starson was capable of refusing consent to medication. The wisdom of his decision should not have had any bearing on this determination. The Supreme Court of Canada ultimately ruled that the Board had inappropriately focused on Professor Starson's best interests, and disregarded clear evidence of his capacity to refuse treatment.

[60] In contrast, custody decisions prioritize the best interests of the child.

[61] Section 16(8) the *Divorce Act* states that in making a custody order, "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child."

[62] Similarly, section 24(1) of the *Children's Law Reform Act* states that the merits of a custody or access application "shall be determined on the basis of the best interests of the child". Section 24(2) sets out the factors used to determine the child's best interests:

> (2) The court shall consider all the child's needs and circumstances, including,
>
> (a) the love, affection and emotional ties between the child and,
>
> (i) each person, including a parent or grandparent, entitled to or claiming custody of or access to the child,
>
> (ii) other members of the child's family who reside with the child, and
>
> (iii) persons involved in the child's care and upbringing;
>
> (b) the child's views and preferences, if they can reasonably be ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and

> education, the necessaries of life and any special needs of the child;
>
> (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
>
> (f) the permanence and stability of the family unit with which it is proposed that the child will live;
>
> (g) the ability of each person applying for custody of or access to the child to act as a parent; and
>
> (h) any familial relationship between the child and each person who is a party to the application.

[63] In contrast, Ontario's child welfare legislation, the *Child, Youth and Family Services Act*, *2017*, S.O. 2017, c. 14, explicitly provides that if a service being provided to a child under the care of a children's aid society is treatment to which the *HCCA* applies, the consent provisions of the *HCCA* apply: s. 22(7). Further, s. 23(1) provides that a service provider may provide a counselling service to a child who is 12 years or older with the child's consent, but that subsection has no application where the service is a treatment under the *HCCA*.

[64] The same legislative choice to refer to *HCCA* provisions is not part of the *Children's Law Reform Act* or the *Divorce Act.*

[65] Under the *Children's Law Reform Act* and the *Divorce Act*, the child's views and preferences are only one factor among many in determining the child's best interests. Consequently, a child's refusal to attend counselling is not necessarily determinative of their best interests.

[66] Having said that, *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181 at paras. 81 and 82 highlighted the potential tension between a child's growing autonomy and the child's "best interests" norm:

> [81] The general purpose of the "best interests" standard is to provide courts with a focus and perspective through which to act on behalf of those who are vulnerable. In contrast, competent adults are assumed to be "the best arbiter[s] of [their] own moral destiny", and so are entitled to independently assess and determine their own best interests, regardless of whether others would agree when evaluating the choice from an objective standpoint.
>
> [82] The application of an objective "best interests" standard to infants and very young children is uncontroversial. Mature adolescents, on the other hand, have strong claims to autonomy, but these claims exist in tension with a protective duty on the part of the state that is also justified [citations omitted].

[67] As a result, the majority in *A.C.* stated that the best interests standard "must be interpreted in a way that reflects and addresses an adolescent's evolving capacities for autonomous decision-making": at para. 88.

[68] Under this interpretation of the best interests standard, a minor's wishes will have greater weight as their maturity increases. In some cases, the court "will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor": *A.C.*, at para. 87. Scrutiny of a child's maturity will intensify in relation to the severity of potential consequences of medical treatment or its refusal: *A.C.* at

paras. 95. This is partly because it is inherently difficult to assess an adolescent's ability to make medical decisions: *A.C.*, at paras. 70-79.

[69] The majority in *A.C.* listed questions to assist courts in assessing maturity:

> What is the nature, purpose and utility of the recommended medical treatment? What are the risks and benefits?
>
> Does the adolescent demonstrate the intellectual capacity and sophistication to understand the information relevant to making the decision and to appreciate the potential consequences?
>
> Is there reason to believe that the adolescent's views are stable and a true reflection of his or her core values and beliefs?
>
> What is the potential impact of the adolescent's lifestyle, family relationships and broader social affiliations on his or her ability to exercise independent judgment?
>
> Are there any existing emotional or psychiatric vulnerabilities?
>
> Does the adolescent's illness or condition have an impact on his or her decision-making ability?
>
> Is there any relevant information from adults who know the adolescent, like teachers or doctors?: at para. 96

[70] While *A.C.* was decided in relation to Manitoba's child welfare legislation and its application of the best interests test, the above principles are still relevant for interpreting the best interests standard under the federal *Divorce Act* and Ontario's *Children Law Reform Act*.

[71] Taking this together, the *HCCA* does not limit the courts' jurisdiction to make therapeutic orders in the child's best interests. A court must always consider a child's view and preferences, but a child's refusal to participate in a therapeutic intervention will not necessarily determine whether a court can make such an order. Rather, a court must assess the child's maturity and weigh their wishes accordingly, in relation to the various factors listed in section 24(2) of the *Children's Law Reform Act*.

[72] There are of course risks in making therapeutic orders. The child may refuse to comply. A health care practitioner may consider that the child is capable and that he or she cannot override the child's refusal. The attempts at therapeutic intervention may fail. Courts cannot fix every problem.

[73] That said, time and time again, experienced family court judges have emphasized the value of access to a broad variety of remedial measures. Again, in *Leelaratna*, the trial judge observed, "there are often no legal solutions to family problems. Therapeutic orders can be very effective tools to help the family move forward, reduce the parental conflict, and help children transition though the emotional turmoil of their parents' litigation in a healthier way": at para. 52, see also *Fiorito*, where a reversal of custody and therapy was ordered to remedy a father's estrangement from his children. Judges deciding custody cases should be enabled to create or support the conditions which are most conducive to the flourishing of the child.

(c) Application to this case

[74] Each case must be determined on its own specific facts. The trial judge hears from all the witnesses and as such, is in the best position to assess the child's best interests. If there is no error in law, no palpable and overriding error of fact, and no misapprehension of evidence, appeal courts should not interfere.

[75] In my view, there was no such error in this case. The trial judge considered the views and preferences of the child as conveyed through the OCL. He ultimately concluded the mother had poisoned the child against the father and the child's wishes were not his own. That is, the child lacked the requisite maturity to refuse counselling with his father. As addressed earlier, absent a challenge to this factual finding, the trial judge was entitled to put no weight on the child's wishes.

[76] The trial judge reasonably concluded that the child's best interests required contact with the father and reconciliation therapy, over the child's heated objections. Without any conclusive evidence that such orders are ineffective — see for instance, Nicholas C. Bala and Katie Hunter, "Children Resisting Contact & Parental Alienation: Context, Challenges & Recent Ontario Cases" (2015), Queen's University Legal Research Paper No. 056, online: <ssrn.com/abstract=2887646> — this court should not and cannot interfere.

[77] Given this conclusion, it is not necessary to explore the application of the *HCCA* to the order for counseling made by the trial judge, including the questions

of whether the social worker was a health practitioner, whether the counseling ordered was treatment, and whether the child had capacity to refuse consent.

FRESH EVIDENCE

[78] The test for fresh evidence on appeal is as follows: (1) could the evidence have been adduced by due diligence; (2) is the evidence relevant; (3) is the evidence credible; and (4) could the evidence reasonably be expected to affect the result: *Palmer v. The Queen,* [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212 at p. 775.

[79] We admit the fresh evidence on the appeal but this court is not in a position to weigh the conflicting evidence.

[80] Each of the parties has filed large amounts of fresh evidence relating to events following the trial. The child has behaved badly. The father says that the mother has repeatedly breached the court orders made by the trial judge and done everything she can to undermine the process crafted by the trial judge. The mother says the child is not doing well and should be returned to her care.

[81] The police had to assist in transport of the child to his father's home, and the child has run away on numerous occasions. The trial judge, who remained seized of the matter, outlined some of the further problems at paras. 2-4 of his reasons on a post-trial motion heard January 9, 2019, reported at 2019 ONSC 527:

> [2] … [The child] has also engaged in other rebellious behaviour since the trial decision. He would leave his father's home early in the morning and return late at night

> if at all. He has, with the assistance of friends, vandalized his father's home and contents of the home, completely trashing his father's home office work space.
>
> [3] He was refusing to eat any of the food prepared for him by his father and demanded money from his father for takeout food.
>
> [4] He has alleged to the school, neighbours, police and Children's Aid Society ("CAS") that his father has been abusive towards him, and does not have adequate food or bedroom furniture for him. He has attempted to engage the CAS and the police to become involved. Both agencies have investigated and have not verified any of his concerns. The CAS has investigated the concerns and plans to close the file. The father has accommodated [the child]'s requests for bedroom furnishing, buying new items.

[82] The mother continued to violate the trial judge's orders and undermine the child's restoration of a relationship with the father, as the trial judge observed at paras.15-17:

> [15] Since the trial decision was released on October 30, 2018, the mother admits to only a few occasions of brief contact with the child. In the materials that the mother has filed at the Court of Appeal and before me, she has clearly displayed a complete lack of appreciation for the counterintuitive message she has given to the child. She has failed to include in any of her affidavit evidence that she has in any way discouraged the rebellious and destructive conduct and disrespectful attitude of [the child] towards his father. Not once did she claim that she has told the child to submit to his father's custodial authority, that he attend school or Cadets, or that he cooperate with his father in attending counselling in accordance with the court expectations. She has shown to the court and to the child that she is unable to accept

> the trial decision, and therefore has continued to act in a manner that is contrary to the child's best interest
>
> [16] Rather than admonishing [the child] for his defiant, rebellious, and self-destructive conduct and encouraging him to comply with the court order, she used his behavioral meltdown as evidence in support of her unsuccessful motion to stay. Surprisingly, the OCL supported the mother in this litigation strategy.
>
> [17] In light of the messaging presented to [the child], there is little wonder that he has struggled so tremendously to accept the transition to his father's care and custody. To her credit, the mother is now (in her submissions for this motion) articulating a desire to facilitate a smooth transition for the child to get him back on track with school and Cadets and to support the current court order for this part of his life. The child need his mother to not only say these things, but also to mean what she says.

[83] The trial judge left the original six month review in place but made ancillary orders to promote the goal of reconciliation.

[84] Matters got worse and the trial judge heard three motions on May 28, 2019, with reasons reported at 2019 ONSC 3503.

[85] The trial judge described the continuing problems and his response to the mother's request for access or the return of the child at paras. 3-10:

> [3] The evidence clearly establishes that on the surface [the child] is not doing well. He is not attending school, not attending Cadets, has caused damage to his father's home, refuses to submit to his father's rules, attends at his mother's home and communicates with his GM [maternal grandmother] contrary to non-contact orders and runs away from father's home several times a week

requiring engagement of the police for assistance in locating and returning him.

[4] On the other hand, [the child] has shown some glimpses of progress toward the goal of rebuilding his relationship with his father ("the goal"). He has engaged in some meaningful discussions with his father regarding a plan for his education and he willingly attended a dinner out and a Raptor's game with his father. He has also resided primarily at his father's residence in compliance with my orders. Unfortunately, he also continues to display very blatant acts of disrespect towards his father, recently pouring the bulk of contents of 2 water bottles over his father's head while laughing.

[5] I do not agree with the OCL and the Respondent Mother that [the child] is in crisis, or at least not a crisis over which he has no control. He is not a child without options who is forced to live on the street. He has the option of living under the roof provided by his father and eating the food provided by his father. He has the option to bathe at his father's, attend school, Cadets and therapy. He chooses not to. If he is in crisis it is because he is not allowed to have what he wants – to reside with his mother. The solution is not to give in to his rebellious behaviour and give him what he wants. I am more concerned about what he needs.

[6] The suspension of contact between [the child] and his mother and her family is not meant as a punishment for [the child] or anyone else. The suspension of contact is meant to eliminate the distraction from the goal.

[7] Unfortunately the distractions caused by the Respondent Mother and GM in particular go well beyond inane distractions such as a squirrel is to a dog.

[8] The reversal of custody and suspension of access was not meant to be a permanent solution. The purpose of these and the many related orders was to get everyone, as Mr. Ludmer suggested, on the same path, or to use another metaphor, the plan was to get everyone in the same boat and paddling in the same direction. By

> allowing [the child] the option of maintaining contact with the negative influence of the Respondent Mother and GM, these individuals are telling [the child] that he does not have to comply with court orders or work on his relationship with his father.
>
> [9] To allow continued contact or to grant the Respondent Mother's request to return [the child]'s residence to the Respondent Mother, is to return [the child] to the situation he experienced prior to the order reversing custody. The findings I made after 11 days of trial clearly established that such a situation was not in [the child]'s best interest. Although he was attending school more regularly and attending Cadets, psychological dysfunction caused by the alienating conduct of the Respondent Mother had started to set in. [The child] had started to skip school, had become addicted to video games and had become oppositional to his mother. All of this was on top of showing a total lack of respect for the Applicant Father. In my view, cracks were starting to form in [the child]'s foundational needs to show respect for authority and in particular, his parents. I cannot place [the child] back into that situation.
>
> [10] However, it is evident to me that the current situation is also not working. There is no evidence that the Respondent Mother has accepted the trial findings regarding alienation and the value of [the child]'s relationship with the Applicant Father. Until that happens, I cannot be assured that everyone will be on the same boat and on the same path toward the goal.

[86] On June 4, 2019, the child and his friend came to the father's home. The child's friend assaulted the father (age 70) with his fist. The child and his friend left the home as the father called police.

[87] On June 11, 2019, the child climbed to the roof of the father's home. The child threatened to beat his father up when the father asked him to come down.

When the child did come down from the roof, he physically attacked his father, leaving the father with severe bruises to his head, and injury to his arm.

[88] On June 17, 2019, the child and his friend threatened to beat the father to death in the basement of his home. The child assaulted his father. The father suffered significant bruising and swelling to his face, eye, head and ear. The father contacted police and the child was charged. Ultimately the child was released on condition he have no contact with his father. Given the court orders preventing contact with the mother, the child was found to be a child in need of protection and is now in a foster placement pursuant to an order of the Ontario Court of Justice.

[89] On July 31, 2019, the father was advised the child went absent from the foster home without permission. Police later that day advised the father that the child had stolen a cell phone from another child.

[90] On August 6, 2019, in an incident apparently related to the child's robbery of another child, the child himself was assaulted and suffered broken bones under his eye. He required surgery and had plates implanted in his face.

[91] There have been significant changes since the trial judge's decision of October 30, 2018. The child is now approaching his 15th birthday and seems even more entrenched in his attitude towards his father. The process that the trial judge contemplated has not gone well. Considering the serious credibility issues in this case, the Superior Court is best positioned to deal with these new developments.

CONCLUSION

[92] The trial judge has not erred in any respect justifying appellate intervention. The appeal is dismissed. The parties may make brief written submissions as to the costs of this appeal, due within 30 days of the release of these reasons from the father, and within 15 days thereafter from the mother.

Released: September 30, 2019
"GP"

"G. Pardu J.A."
"I agree David M. Paciocco J.A."
"I agree B. Zarnett J.A."