

CITATION: Kucan v. Santos, 2017 ONSC 6725
COURT FILE NO.: FS-07-FD334125FIS
DATE: 20171108

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: JOSIP KUCAN, Applicant

AND:

DEBORAH SANTOS, Respondent

BEFORE: C. Horkins J.

COUNSEL: *Andrew Vankoughnett*, for the Applicant

Warren Milne, duty counsel for the Respondent

HEARD at Toronto: October 12, 2017

ENDORSEMENT

BACKGROUND

[1] The parties were married in 2004 and separated in 2008. They have one child, Luka Ivan Kucan (“child”) born April 18, 2006.

[2] Several years ago, the mother obtained an order giving her custody of the child. The father, Josip Kucan, is bringing a motion to vary that final order. Given the urgency of his motion, the existing custody order and file was not available.

[3] Since the child’s birth, Mr. Kucan has had irregular access to the child. The mother refuses to follow an access schedule.

[4] On September 28, 2017, Mr. Kucan brought an *ex parte* motion seeking various relief including temporary sole custody of their child, an order that the mother’s access be supervised, a psychiatric assessment of the mother, a restraining order against the mother and enforcement of the order by the police.

[5] Mr. Kucan did not serve the mother because he feared that if his motion material was served on the mother, the child “would suffer hell”. He explained that the mother has exposed the child to increasing threats of “physical harm as well as verbal, emotional and psychological abuse”.

[6] I adjourned Mr. Kucan's motion to October 12, 2017 to allow service on the mother and provide her with time to file responding material. The mother was served with the motion material in court on September 28, 2017. On that day, the mother was in court before me on a motion brought by Jean Pantelidis, the father of her second child. The motions that the fathers have brought are related as I will explain below.

[7] For ease of reference, I will refer to the motion in this application as the "Kucan motion" and the companion motion as the "Pantelidis motion"

[8] On September 28, I made various temporary orders. Based on the evidence that was before me, I was satisfied that orders had to be made to ensure that the child was protected, pending the hearing of the motion. I found that there was an immediate danger to the emotional health of the child if he remained in the care of his mother. Of note, I ordered that Mr. Kucan shall have temporary custody of the child and gave the mother telephone access.

[9] The mother did not comply with my September 28 order. She refused to release the child into his father's care. As a result, the father had to rely on the police to enforce the order.

[10] On October 12, 2017, I heard the return of Mr. Kucan's *ex parte* motion. I reserved my decision and continued the temporary custody and telephone access orders made on September 28. I also issued an urgent order requesting the involvement of the Office of the Children's Lawyer ("OCL") to appoint counsel for the child and/or conduct a s. 112 investigation. At the end of the motion, the mother completed all of the documents necessary for the OCL to consider my order.

[11] Before I consider Mr. Kucan's motion, I will explain the connection between the Kucan motion and the Pantelidis motion.

THE PANTELIDIS MOTION

[12] The mother had a second child with Jean Pantelidis. This child is now 4 years old. After a trial before McWatt J, Mr. Pantelidis was awarded sole custody of the child and the mother was given access (*Santos v. Pantelidis*, 2017 ONSC 674).

[13] The two families are connected because of the mother's conduct that is set out in detail in McWatt J's reasons. McWatt J made extensive findings of fact that I rely on for the Kucan motion and the Pantelidis motion.

[14] Mr. Kucan testified at the Pantelidis custody/access trial. I will refer to this testimony below. The reasons of McWatt J and the evidence that was before me on September 28, 2017 led me to suspend the mother's access to both children with telephone contact as arranged by the fathers.

[15] I continue to rely on the reasons of McWatt J and the decisions that I have made to date in the Pantelidis and Kucan motions.

ANALYSIS - KUCAN MOTION

[16] These reasons must be read together with my September 28 and October 12, 2017 endorsements issued in this application. They must also be read together with the reasons of McWatt J 2017 ONSC 674 and the decisions I made in the Pantelidis application.

McWatt J Decision and Pantelidis Matter

[17] McWatt J made many findings of fact that are relevant to the issues on the Kucan and Pantelidis motions. The McWatt decision reviews the mother's unacceptable conduct and the emotional and physical harm the children have been exposed to as a result of her conduct. These findings of fact must be considered before deciding what order is in the best interests of the child. As a result, I will start with a review of this decision and what has since transpired in the Pantelidis matter.

[18] On January 7, 2016, after continuous and repeated non-compliance with court orders, the court struck the mother's pleadings in the Pantelidis matter on all issues except custody and access. McWatt J heard the custody and access trial and released her decision on February 3, 2017. The court gave Mr. Pantelidis sole custody of the child. The mother was granted unsupervised access pursuant to a detailed access schedule.

[19] Within hours after McWatt J's decision was released, the mother emailed Mr. Pantelidis and told him that she would not comply with the access schedule in the order. Three days later, the mother called the police and tried to enforce the access that she wanted (not what the order provided).

[20] Faced with this immediate refusal to follow the order, Mr. Pantelidis brought an urgent motion before McWatt J to force the mother to comply. In an endorsement dated February 27, 2017, McWatt J told the mother "that a court order is something she must abide by or there are consequences". McWatt J. stated that in part the mother's breaches of the order were caused by the absence of pick up and drop off times at the child's daycare. McWatt J fixed times for pick up and drop off. McWatt J also addressed the mother's troubling behaviour: "the [mother] has shown an undeterred campaign throughout these proceedings to refuse to comply with court orders". She noted that the mother should have agreed on pick up and drop off times with Mr. Pantelidis. Her lack of cooperation caused the father to bring the urgent motion. As a result, McWatt J ordered the mother to pay the father costs. Unfortunately, the February 27, 2017 endorsement did not deter the mother's concerning behaviour. She continued to ignore the order.

[21] Since June 2017, the mother has abandoned her weekday access privileges to the Pantelidis child, leaving Mr. Pantelidis to do all of the pick-up and drop off at school. As a result, he had to hire someone to provide afterschool care for the child. Mr. Pantelidis works and he needs this assistance. The daycare provider was recommended by the child's school. Mr. Pantelidis met with the daycare provider and satisfied himself that she was highly qualified to care for the child after school.

[22] Mr. Pantelidis notified the mother and gave her a link to the daycare that he was using. The mother told Mr. Pantelidis that she did not approve of the person chosen. The mother has been openly hostile with this daycare provider. She has been harassing the daycare provider by telephone, has made inflammatory statements to the daycare provider and has threatened to shut down her business.

[23] Mr. Pantelidis continued in his efforts to have the mother follow the weekend and holiday access schedule. As he explains, this has been "a nightmare" because the mother continually refuses to comply with the court ordered access schedule. Her compliance with the order is sporadic and this creates "chaos" for Mr. Pantelidis and the Pantelidis child.

[24] Mr. Pantelidis sends the mother regular emails to keep the mother apprised of the child's progress. He facilitates evening telephone calls between the mother and child. These calls are creating a great deal of stress for the Pantelidis child because the mother asks the child probing questions about the father, rather than talking to the child about his activities. Mr. Pantelidis has politely asked the mother to avoid her probing questions. The mother response is to accuse the father of lying.

[25] As in the past, the mother continues to make false allegations against Mr. Pantelidis. She calls the police and the Children's Aid Society ("CAS") if she does not get her way. There is no evidence to suggest that there has ever been any merit to her complaints.

[26] This summer, the mother filed a report with the police falsely complaining that Mr. Pantelidis was not complying with the court order. She has refused to return the child to Mr. Pantelidis at the end of her access time. On one occasion this summer, Mr. Pantelidis had to call the police who had to physically remove the child from the mother and return him to the father.

[27] Early in September 2017, the CAS contacted Mr. Pantelidis and told him that they were conducting an investigation due to the mother's complaint about him. She told the CAS that he was not feeding the child, that he is always sick in the father's care and that there have been two recent "police enforcements". The CAS investigated and closed the file. Of note, the CAS rejected the mother's complaints against Mr. Pantelidis. The CAS concluded that the mother's conduct poses a risk of emotional harm to the child. They recommended that the mother seek counselling.

[28] McWatt J found at para. 96 that Mr. Pantelidis has been “financially devastated by the criminal and family proceedings, having spent tens of thousands on them to date, mainly because the [mother] does not obey court orders and has been allowed to manipulate the criminal and family systems”.

[29] The financial burden on Mr. Pantelidis continues. McWatt J ordered the mother to pay the father \$192 a month for child support. The mother has ignored this order and has paid nothing for child support.

[30] McWatt J found that the mother acted in bad faith and ordered her to pay full indemnity costs to the father. Mr. Pantelidis has five cost orders against the mother totaling \$73,973.52. The mother has not paid any of these cost orders. Instead, she transferred her condominium to her parents on June 21, 2017. Mr. Pantelidis has sued her for fraudulent conveyance.

[31] In the trial decision, McWatt J gave many shocking examples of the mother’s concerning behaviour. While I rely on the entire decision and the findings of fact, I highlight some key parts of this decision.

[32] The trial judge found that the mother’s behaviour creates ongoing turmoil for Mr. Pantelidis and their child. The mother had made allegations of assault against Mr. Pantelidis. He was found not guilty after a trial before the criminal court. Serious adverse findings were made at this criminal trial about the mother’s lack of credibility. That judge described the mother as “argumentative, aggressive, very strong willed ... prone to theatrics and ... intolerant of any view but her own”.

[33] Before McWatt J, the mother continued to allege assault against Mr. Pantelidis. McWatt J found that the mother was “obviously lying”.

[34] McWatt J found the mother’s habit of making false allegations of criminal conduct (against both fathers) to be reprehensible. At para. 100 the judge states:

She has shown an open disregard for family court orders. She also thwarted two criminal court orders when she invited both Mr. Kucan and the respondent to return to live with her after she had them charged with assault. And what is more reprehensible is the fact that when she was no longer happy with their behaviour, she had Mr. Kucan charged and attempted to have Mr. Pantelidis charged for the breaches she instigated.

[35] McWatt J found that the mother involved both children in the litigation. She “coached the child ... to gain an advantage in the criminal and family litigation”. McWatt J stated “I am convinced that Ms. Santos will lie and use her children ... to achieve her ends”.

[36] McWatt J described how the mother launched vicious text and email campaigns against Mr. Pantelidis. The judge found that the mother was “emotionally out of control”.

There was “no justification” for the emails and texts. As the judge stated, “the applicant will do anything she wants to get her way. She appears to have few moral boundaries”. The mother’s sister and brother-in-law testified at the trial. McWatt J accepted their evidence that they “have had enough of the trail of chaos Ms. Santos constantly leaves in her wake”.

[37] Findings of fact were made concerning the mother’s parenting skills relating to both children. The judge found that she yells and swears in front of her children. After the separation, the mother used false assault charges against Mr. Pantelidis to obtain an order that father’s access be supervised.

[38] The trial judge described the mother’s view of parenting in para. 100 as follows:

The applicant's overall view of parenting is to diminish the role of the respondent as much as possible. Along with the evidence in the trial, this conclusion is supported by the draft order she prepared for trial, in which she requests that the respondent get every other weekend access once the child starts school this September. She also seeks a grossly disproportionate amount of annual holidays.

[39] McWatt J’s findings of fact in para. 100 as set out below are extremely concerning:

1. The applicant's overall view of parenting is to diminish the role of the respondent as much as possible. ...
2. I accept counsel for Mr. Pantelidis' submission that those who testified for his client are "a group of people who have had enough of the trail of chaos Ms. Santos constantly leaves in her wake." I agree. Instead of ill motives against Ms. Santos, Mr. Garaci, Mr. Verdun, Ms. Lolly Santos and Mr. Kucan are concerned that Nicholas is not receiving the care he should in the applicant's custody. Their evidence tends to support the conclusion that Nicholas would be better raised by Mr. Pantelidis, who would provide to him what is in the child's best interests.
3. Ms. Santos has been shown to lack credibility. She has diminished her penchant for yelling and swearing in front of her children when, clearly, she does. She has shown that she is capable of fabricating evidence in the criminal justice system and here to achieve her goal of keeping the fathers of her sons out of their lives. She used the assault charges against the respondent to enforce supervised access when the CCAS had asked for no such condition. Ms. Santos seems to believe that she can lie without consequence, but that everyone else is subject to "Karma".

4. She has shown an open disregard for family court orders. She also thwarted two criminal court orders when she invited both Mr. Kucan and the respondent to return to live with her after she had them charged with assault. And what is more reprehensible is the fact that when she was no longer happy with their behavior, she had Mr. Kucan charged and attempted to have Mr. Pantelidis charged for the breaches she instigated.
5. She has shown that she is also prepared to use the CCAS for her purposes -- threatening to call them if the fathers stepped beyond her perceived lines.
6. She has shown that when she does not get her way, she sets into motion a course of damaging communications by phone or text. Mr. Kucan lost his job. Mr. Pantelidis lost a customer and his friend Domenic and his wife were subjected to unnecessary and damaging comments. This court ordered her not to contact potential witnesses in this trial because she would try to interfere with them and disrupt the proceedings.
7. The applicant has no appreciation nor does she seem to care about the costs of the proceedings. This is all part of her inability to take responsibility for her own actions. ...

[40] Mr. Pantelidis was granted sole custody of the child because the mother did not act in the child's best interests. Aside from recognizing that the mother would provide the child with the "basic needs", McWatt J in para 101 set out serious concerns about the mother's ability to parent both children as follows:

- (c) ... There is also no guarantee that Ms. Santos will maintain stability for Nicholas in her home by fostering a positive relationship for him with the respondent. That relationship is at the mercy of her "wish and will".
- (d) The respondent is more capable of providing Nicholas with guidance. Ms. Santos has shown herself to be irrational, verbally abusive and, at times, physically violent. There is no evidence in this trial that she has assaulted Nicholas. He is only 3 years old. There is evidence, however, that she is capable of assaulting the child because she has hit Luka. Ms. Santos has shown no interest to almost a resistance to making sure that Nicholas and Luka can obtain some success in school. Her objection to speech therapy for Nicholas -even though it was to be fully funded by the respondent -and her failure to follow up on the issue is support for this finding. She has refused to have Luka assessed or tutored even though his father and the respondent have

testified that he is a poor student. The fact that she refused to complete the OCL intake forms is also support for this conclusion.

- (e) Mr. Pantelidis plans to register Nicholas for a day care program near to his work. This, he believes, is necessary so that the boy can mix with other children and participate in daily activities rather than be left to do little in the applicant's care. Ms. Santos has shown no interest in putting either child in extracurricular activity. She has shown resistance even to Luka's soccer, allowing it only because Mr. Kucan pays for it and does most if not all of the transportation.

...

- (g) There is credible evidence in the trial that Mr. Pantelidis is a responsible parent. There is an abundance of evidence in the trial that Ms. Santos' ability to parent is somewhat impaired. She has managed to involve Luka in her various litigations and has made him fearful of losing his family if he does not do what she says. She has made poor choices for the children as a parent by not fostering good relations with their fathers. She has purposely cut them off from extended family because she does not get along with them.

[41] Mr. Kucan testified at the Pantelidis trial. While the issue of custody and access to the Kucan child was not before McWatt J, Mr. Kucan's evidence at trial was relevant to the mother's ability to parent.

[42] The mother suggested at trial that the two fathers were colluding to ruin her life. McWatt J soundly rejected this argument and found that the fathers were simply supporting each other. At paras. 94-95 the judge stated:

94 I find that, after what these two men have been through at the hands of the applicant, the only resort they had was to support each other in order to gain any ground in circumstances where they had found very few people willing to believe them previously.

95 Both men complained in their evidence that the CCAS did nothing to unearth Ms. Santos responsibilities for the situations that arose in their respective relationships or to investigate whether the applicant was coaching the boys to lie or pretend in the criminal cases. It is not the mandate of the CAS to do so. The judge at the respondent's criminal trial believed that Luka had been coached [by the mother] to lie about the incident. I am convinced of the same based on the evidence in this trial. I have already expressed my concern about Nicholas' actions in front of the initial CCAS worker and have found that he, too, was probably put up to his behavior on that day by the applicant. In the face of this type of manipulative behavior by the applicant, it is understandable why the two

men must support each other in this trial. And, both of them are sincerely concerned that the boys are not receiving the care that is in their best interests.

[43] The fathers continue to look to each other for support. This was evident from their decision to bring their motions before this court on the same day.

[44] Mr. Kucan made several surreptitious recordings of his telephone conversations with the applicant in contemplation of his litigation over access and custody issues. McWatt J allowed this evidence at the Pantelidis trial because it was highly probative in considering the mother's various accusations against the fathers. These recordings, like the recent one that was filed on the motions before me, show that contrary to the mother's evidence, she yells at the children, uses vulgar profanities in their presence and threatens physical harm.

[45] I agree with McWatt J's finding that the mother's "past conduct is highly relevant to her ability to act as a parent". While McWatt J did not order the mother to undergo a psychological assessment or obtain counselling, she agreed that the children would benefit if she did. At pars. 106 the judge stated:

106 Finally, I agree with Mr. Anthony's submission that Ms. Santos' getting some kind of psychological assessment and counselling would benefit the parties and her children. Mr. Pantelidis asked for it in his Answer. Mr. Kucan testified that he volunteered to do a psychiatric assessment when he was involved with Ms. Santos, hoping that she would do the same. She did not. Her role in the children's lives will continue for years. If she does not control her behavior, she will continue to have a diminished role in their upbringing because of no one but herself.

[46] There is no evidence that the mother has taken any steps to obtain counselling or any type of an assessment.

Mr. Kucan's evidence

[47] For the purpose of this motion, I accept the evidence of Mr. Kucan over the bald denials contained in the mother's responding affidavit. There is ample evidence to show that the mother will lie to gain an advantage.

[48] The mother does not follow a regular access schedule. As Mr. Kucan explains, the mother allows him to see the child "whenever it is convenient for her to do so". Mr. Kucan has never had a vacation with the child. On one occasion, he planned a vacation, and at the last minute, the mother refused to provide her consent.

[49] Prior to the orders I made, Mr. Kucan only had access to the child when the mother needed a babysitter and during soccer. The mother refused to facilitate the

child's soccer activities, but allowed Mr. Kucan to take the child to this activity. The mother refuses to contribute to the soccer fees. Mr. Kucan has been paying child support since December 2008.

[50] Mr. Kucan has been responsible for the child's soccer for over four years. The mother rarely attends and when she does she is usually late.

[51] The mother attended the child's soccer practice for the first time in September 2017. While at the practice, the mother got into a confrontation with the soccer coach and Mr. Kucan that caused the child to cry. On occasion, Mr. Kucan needs help driving the child to soccer, but the mother refuses to help.

[52] On September 24, 2017, the child was distraught because the mother had told him he was cut from the soccer team. Mr. Kucan called the coach and learned that this was not true. He spoke to the child to assure him that he was still on the team. Mr. Kucan believes that the mother lied to the child for no reason other than to be vindictive. He believes that the mother wants to interfere and end the bond that the child and father have with soccer.

[53] After the McWatt decision was released, the mother's unacceptable conduct intensified. Mr. Kucan hoped that the decision would motivate the mother to "keep her intolerable conduct in check". This did not happen. Mr. Kucan became increasingly alarmed, particularly after the telephone call with the mother. This is the call that recorded the mother's profanities and words that demeaned both fathers in the child's presence. The recording also confirmed her threat to "wack" the child if he mumbled his words.

[54] Mr. Kucan relies on the evidence that he gave at the Pantelidis custody and access trial. This evidence that the trial judge accepted is relevant to this motion. I rely on the evidence as set out by McWatt J in paras 69- 80 and 87-91 of her judgment:

68 Mr. Kucan is gainfully employed and in a stable relationship. He is Luka's father and his only child. Joey and the applicant met in 2000. They married in 2004 and Luka was born on April 18, 2006. He and the applicant were separated on July 5, 2009.

69 Mr. Kucan was also charged with assaulting the applicant about 10 years ago. He, too, was acquitted after a trial. On July 23, 2008, Justice Forsyth, in the Ontario Court, found that Ms. Santos was not a credible witness, but was motivated in the prosecution to prevent Mr. Kucan from seeing his son Luka.

70 Initially, after release on the assault charge, and while on bail, the applicant phoned Mr. Kucan and asked him to come home. He did. While he lived with her, if he did things she did not approve of, like leaving a drink on the kitchen counter, Ms. Santos would pick up the phone, hold it

up and threaten to call the police. One day, when she got home, she "went ballistic", according to Mr. Kucan. She called the police and had him charged with a breach of his recognizance for being with her.

71 He got out of custody again, this time on a house arrest release when his brother posted a \$30,000 bail. He lost his job because of the charges and because the applicant would not stop calling his work place.

72 The applicant called the police once again sometime later and told them that Mr. Kucan had threatened to kill her parents and "put a hit on her". His bail was revoked and he spent 5 months in Maplehurst Correctional Centre awaiting his trial. He eventually pleaded guilty to the fail to comply with recognizance charge for living with the applicant when he was ordered not to have any contact with her.

73 Mr. Kucan was not permitted by the applicant to see his son, Luka, for 2 and 1/2 years during this time. He missed the boy's second and third birthdays. In his efforts to gain access to Luka and to expose emotional and perhaps psychological issues he suspected the applicant suffered from, he volunteered to take a psychiatric exam to prove that he was a fit father and to en-courage Ms. Santos to have herself assessed. She refused.

74 He knows of 2 relationships since she and Mr. Pantelidis have separated that the applicant has had, which have culminated in conflict. The first is with a man called "Derek" who the applicant has taken out restraining orders on. The second, John McAuliffe, contacted Mr. Kucan's parents to explain that he had been dating the applicant and she was making his life "a living hell" by calling his employer and revealing things he had told her in confidence. Mr. McAuliffe was about to lose his job and he needed to understand what was going on. Mr. Kucan testified that he did not get involved with these men because he feared that the applicant would curtail his access to Luka if he did.

75 The applicant has never allowed Mr. Kucan to take Luka out for Halloween or to take a vacation with him outside Ontario. Three years ago, Mr. Kucan proposed to take his son on a beach holiday. The applicant agreed to the holiday. Mr. Kucan had a travel letter prepared for Ms. Santos to sign. She refused to go to the office where the letter awaited her signature until Mr. Kucan provided her with gas money to get there. He complied with this and other demands and booked and paid for the tickets. The applicant subsequently revoked her consent to Luka travelling and Mr. Kucan went on the holiday by himself.

76 It appeared to me on the evidence from the applicant and Mr. Kucan that, had he not agreed to pay for and facilitate soccer in Luka's life, Mr. Kucan would rarely see his child.

77 Mr. Kucan testified that he had concerns for his son's learning difficulties. He testified that, in spite of begging the applicant to get Luka tutoring, Ms. Santos appeared not to care about or ignored the possibility that her son needed extra academic support. Mr. Kucan's partner is a teacher and is presently tutoring Luka when he is with his father.

78 During a recent incident at school, Luka was suspended for choking a female student. Instead of trying to get to the bottom of the incident, the applicant portrayed the event as Luka acting out what Mr. Pantelidis did to her on January 9, 2015. It is of concern that Ms. Santos consistently uses her children to prove facts which might assist her in litigation. I have no evidence of the incident except from the applicant and find her testimony on this point to be wholly unreliable and self-serving. Of note is the fact that Ms. Santos does not find the incident sufficient to warrant any sort of intervention or therapy for Luka.

79 Mr. Kucan testified that Ms. Santos has discussed the present family court proceedings with Luka and that the boy also asked him whether, when he was 4 1/2 years old, Mr. Kucan hit his mother and went to jail for it. Luka also told Mr. Kucan that his grandmother had told him that his father was violent and would not be allowed to see him.

80 Mr. Kucan made several surreptitious recordings of his telephone conversations with the applicant in contemplation of this and his own litigation about access and custody issues. He also made one recording of the applicant's mother, which I have already discussed. Although the applicant objected to the admissibility of the recordings, I admitted them.

...

87 The recordings are highly probative in this case considering the criminal accusations made against the respondent. They are also relevant to the applicant's claim of having not sworn or raised her voice around her sons or how she comports herself around them, generally. The recordings conveyed the applicant's temper. If she was not in agreement with what Mr. Kucan said, she simply shouted over him and used profanity. She also raised her voice and swore around Luka. In the first recording played in court, Luka tells his father that if Ms. Santos does not receive Mr. Kucan's support cheque by a certain date, he would not be allowed to play soccer any more. In the second recording played, Mr. Kucan's car battery had died and he was late in picking Luka up for soccer. The applicant yells

vulgar profanities at Mr. Kucan, including, "Soccer is over for you and your son. You just want to get laid and fucked." A child's voice is heard in the background of the applicant's location. Another recording of Ms. Santos was played with her speaking to Luka, who was with his father when Portugal won the soccer world cup. Luka passed on Mr. Kucan's congratulations as Ms. Santos is Portuguese. Ms. Santos response to the boy was, "tell your dad to kiss my ass".

88 Mr. Kucan testified that when the respondent was charged, he went to the CCAS worker, Ms. Hall, to try and get "something done" about the applicant. Ms. Hall did not want to hear anything he said, including the fact that Luka needed counselling and the applicant refused to get him any.

89 Mr. Kucan testified that he has been afraid to get involved in these proceedings because the applicant will curtail his access to his son.

90 In cross-examination, Mr. Kucan admitted to the applicant that he is very concerned about his son and questions him constantly about whether he is okay and whether his mother is doing any activities with him. He testified that he liked Mr. Pantelidis as, while the parties were married, he could trust the respondent to act in an appropriate way with Luka. He testified that he is not helping Jean to "railroad" the applicant, but for the best interests of their sons. He agreed there was not a "cuss word in the English language" that he had not used to describe the applicant and that she was a "sadistic bitch".

91 In the cross-examination, he testified that he is friends with the respondent because he realizes that the two brothers need to foster a good relationship and he wishes to continue to have the boys do so if Nicholas is in the respondent's sole custody. When the applicant suggested to Mr. Kucan that he has no relationship with Nicholas', Mr. Kucan testified that he is afraid to say even "hello" to Nicholas due to the ongoing litigation and, in any event, Nicholas hides behind her when he arrives to pick up Luka. He testified that he feels like a "terrorized sperm donor" rather than a father. He told the court that he regrets not being able to parent his son, but that the applicant's mother, Iberia, has done a good job in his place.

[55] As noted McWatt J rejected the mother's suggestion that the two fathers were colluding against her. She found that they were supporting each other, given what they had been through dealing with the mother.

[56] Mr. Kucan explained that he could no longer "sit idly by and watch [the child] in such a horrendous environment". As a result, he decided to bring his motion and seek custody.

[57] As noted, Mr. Kucan has a stable job and his girlfriend is a teacher who has helped to tutor the child. The mother has refused to get the child help with his school work.

[58] Mr. Kucan has a good relationship with the mother's sister and brother-in-law (Mark Verdun). They testified for Mr. Pantelidis at his trial. I rely on the following evidence from the judgment. It is further proof that Mr. Kucan acts in the best interests of the child and the mother does not. At paras 57-62, McWatt J reviewed the brother-in-law's testimony that she accepted:

57 Mr. Verdun and his wife are on good terms with Mr. Kucan. Joey did not tell the applicant about his relationship with her family as he believed she would then try to diminish what access he had to Luka. I believe him. Mr. Verdun has a relationship with Luka only through the boy's father and has chatted with him. In one of the chats when he asked the boy how he was doing, Luka told him that he "was doing okay, but did not believe his mother loved him". He told his uncle that she yells at him and sends him to his room. She has also threatened to cut off Luka's access to his extended family if he does not do what he is told.

58 Mr. Verdun believes that Mr. Kucan would be better situated to provide Luka with what would be in the boy's best interest.

59 Mr. Verdun testified that access of the fathers to the two boys was "conditional on the applicant's wish and will". There were many times when he and his family were to see the two boys with their fathers, but the applicant simply denied the fathers' access.

60 Mr. Verdun testified that when the applicant learned that he and his wife were going to be witnesses at the trial, she called and argued with Lolly, telling her that she did not have to attend the trial. When Lolly told her that she had to answer to a subpoena, the applicant ended the conversation by saying, "Your husband is cheating on you. Karma's a bitch, your daughter has colitis and she is going to die!"

61 Mr. Verdun denied that he was being vindictive toward the applicant. There is no doubt that he was heartened when she met Mr. Pantelidis. I find that, having seen her actions towards Mr. Pantelidis and towards Mr. Kucan, Mr. Verdun felt obliged to tell this court about Ms. Santos' controlling, vindictive and irrational behavior.

62 Ms. Santos attempts at cross-examining Mr. Verdun were without success. I accept his evidence and consider it weighty in these proceedings because he is part of Ms. Santos' family. He had no motive to exaggerate, fabricate or colour his testimony.

[59] The mother's sister, Lolly Santos, testified before McWatt J who found Lolly to be a credible witness. The following evidence at paras. 66-67 of the mother hitting the child is most concerning:

66 The applicant, she testified, does not do much with the two boys except take them shopping. The only times Ms. Santos would go to Luka's soccer games was when the games were close to her sister, Ibe's, home as she could visit and socialize with Ibe while Luka played soccer. She saw the applicant hit Luka on the head in front of her and a girlfriend at Canada's Wonderland and her sister Ibe has complained to her that the applicant hits Luka over the head with his text books.

67 Lolly was a credible witness. And, like her husband, Mark, I find that she came forward and testified on behalf of the respondent because she has seen the actions of her sister, Ms. Santos, towards the respondent and Mr. Kucan and can no longer tolerate it.

[60] Just as the mother made false complaints against Mr. Pantelidis, she is continuing this reprehensible behaviour against Mr. Kucan.

[61] In July 2017, the Peel Children's Aid Society received a complaint from the mother about Mr. Kucan. The CAS investigated this complaint and closed the file on September 22, 2017. In a letter dated October 12, 2017, the Chief Legal Counsel for the Peel CAS states that the mother reported that the child was "at risk of emotional harm from the father [Mr. Kucan] due to post separation conflict". The CAS investigation concluded its investigation and it "did not verify the reported child protection concern". The child did not report any issues to Peel CAS and appeared happy to be in the care of either parent". The Peel CAS was aware of my recent order.

[62] I am not convinced that the child was "happy" to be in the care of the mother. As McWatt stated in para. 101(g) of her reasons, the mother "has managed to involve [the child] in her various litigations and has made him fearful of losing his family if he does not do what she says." Clearly, the child requires the OCL to appoint counsel so that his voice can be heard without fear of repercussions.

[63] Mr. Kucan now takes the child to school. He does not live in the school district, but appreciates that the child should not be moved in the school year.

The Mother's Affidavit

[64] The mother's response to both motions is telling. Her affidavit reinforces the concerns that this court has about the mother's ability to parent. The affidavit primarily focuses on the judgment of McWatt J that the mother did not appeal. In essence, the

mother denies the numerous serious findings of fact made against her and insists that she is right and everyone else, including the trial judge, is wrong.

[65] The mother's affidavit does respond to the September 11, 2017 telephone call that Mr. Kucan recorded. This recording is addressed in my September 28 endorsement that I issued on both motions. I summarized the key parts of this recording in my Pantelidis endorsement as follows:

[8] These conversations revealed the AM's temper and use of profanity around the children as well as threats. Unfortunately this behaviour has continued as confirmed in a new telephone tape recording between AM and Josip. After the call finished, the AM did not hang up and the recording of her and Luca continued. She used extensive vulgar profanities when speaking with Luka. She referred to the two fathers as "asshole number one" and "asshole number two". She told Luka to "shut your mouth, you know nothing" and when he mumbled she said if he kept on mumbling "you're going to get wacked in the mouth". AM acknowledges that this is a recording of her speaking and there is no doubt that she was speaking to Luka.

[66] First the mother states that the recording is not admissible. I disagree. This recording was admitted for the same reasons McWatt J allowed the telephone recordings at trial as set out in paras. 80-87. The best interests of the children support the admission of the tape and the tape recording is highly relevant to the issue of the mother's ability to parent. Furthermore, the tape is further evidence of the conduct that she continually denies (use of vulgar profanities in the presence of the child, demeaning the father and threatening to physically hit the child).

[67] The mother's shocking behaviour is clearly revealed in the tape recording and yet she insists that it does not reveal any shocking behaviour. Instead, she is of the view that the tape recording shows that she is the victim of "[Mr. Kucan's] continued mental and emotional abuse". There is no evidence that supports her view.

[68] The mother also seeks to explain the recording by saying that "everyone uses explicit language" and it does not mean that she is "a violent and abusive person" or that she would "follow through" with her threat to "wack" the child.

[69] McWatt J. considered whether the mother would commit violence or abuse against the children. At para. 103, the judge stated that the mother "has never denied or refused the evidence that she has hit Luca on the head more than once".

[70] The mother's response to the tape recording reveals a profound lack of appreciation for her damaging conduct. It also reveals that she has no understanding that her conduct exposes the children to the risk of emotional harm.

The Best Interests of the Child

[71] The mother's unacceptable conduct was clearly described in McWatt J's judgment. The mother was warned that she should seek counselling and control her behaviour. The CAS also recommended counselling. The mother has taken no steps to address her unacceptable conduct. She exhibits no appreciation for the harm that this conduct causes the children. Her harmful conduct continues unabated.

[72] Unlike the Pantelidis matter, Mr. Kucan and the mother have not had a recent trial. Both fathers came to court to change an existing order.

[73] When I heard the Mr. Kucan motion on September 28, 2017, counsel for Mr. Kucan had not yet served his motion to change the original custody order. The file had not yet arrived from storage. On October 12, counsel advised the court that Mr. Kucan's motion to change the custody order had just been served. The mother must respond within the time allowed under the *Family Law Rules*, otherwise she will be in default.

[74] Pending the hearing of the motion to change the order, this court must issue an order that shields the child from the mother's harmful behaviour. The order must eliminate the risk of emotional harm to the extent that this is possible.

[75] The mother has engaged in a stream of repetitive conduct that is a complete disregard of court orders and her obligation to always act in the best interests of the children. Her conduct creates chaos for the fathers and children. There is no certainty to any access schedule because the mother chooses to ignore it. Her false complaints to the police and the CAS have caused terrible stress for the fathers.

[76] The mother's threats made against the Pantelidis daycare provider and her confrontational behaviour with the child's soccer coach are examples of why she cannot be trusted to have ongoing contact with the child's school, soccer coach, health care providers or any other third party that provides care to the child or assists the child with sports and learning.

[77] The mother is committed to making the father's life as difficult as possible. She does not understand that this conduct in turn creates an uncertain and harmful environment for the child. As the CAS found, such conduct exposes a child to the risk of emotional harm.

[78] The father asks the court to order the mother to attend a psychiatric assessment and that access be supervised pending the results of this evaluation. I acknowledge that the court has the power to order a parent to attend a psychiatric evaluation (see *Young v. Young*, 2013 ONSC 4423 at para.87; *V.S.J. v. L.J.G.*, [2004] O.J. No. 2238 and *Merkand v. Merkand*, [2006] O.J. No. 528 (Ont. C.A.)).

[79] There is no question that the mother's behaviour is very concerning. She appears to have serious anger management problems. McWatt J agreed with the Mr. Pantelidis' submission at trial that the mother should seek counselling or some kind of psychological assessment. The mother was not ordered to do so, but cautioned that if she did not "control her behaviour" she would continue to have a diminished role in the upbringing of the children "because of no one but herself". The CAS has also recommended counseling.

[80] This is not a case where a s. 30 assessment under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 should be conducted. Such assessments are costly. Mr. Kucan is now responsible for the child. I have no confidence that the mother would pay a child support order if she was ordered to do so.

[81] Mental health problems may or may not be an explanation for the mother's conduct. There is simply no evidence from a third party or a medical professional that might assist in understanding if this is the cause of the mother's unacceptable behavior.

[82] In the circumstances of this case, the obligation must rest with the mother to pursue whatever treatment she requires. She has ignored such advice in the past. McWatt J warned the mother that her failure to control her behaviour will result in a diminished role in her child's life. The same result follows for the Kucan child.

[83] If the mother wishes to play a role in the child's life, then the mother must accept that she has a problem. She must realize that her conduct is unacceptable and that it exposes the children to emotional harm. She must seek out whatever help, treatment and or counselling is required. It is not the mother who should decide what help, treatment and/or counselling she requires. This is the role of an appropriate professional who is fully informed about the mother's behaviour and the decisions of this court.

[84] The orders I am making give the mother a fair opportunity to have the cause of her behaviour diagnosed by a professional and treated. It gives the mother an opportunity to satisfy the court that she can act in the best interests of the child.

[85] The orders I am making are in the best interest of the child. In summary, Mr. Kucan shall continue to have temporary custody of the child pending further order of the court on his motion to change the order. The mother shall have supervised access as set out below.

[86] Given the mother's conduct, an order restraining her conduct with the father and child is required. Except as allowed in these orders, the mother shall not communicate with the father or child, directly or indirectly, and shall not come within 500 meter of the father or child.

[87] Finally, there is the issue of the child's school and child support. The father does not live in the area where the child's school is currently located. He has agreed that the child will complete the current school year in this school. He will ensure that the child is

safely transported to and from school. He may need the help of his family to manage this transportation. If the father wishes to change the child's school for the year starting September 2018, then he shall bring a motion before Justice Kiteley and such motion shall be heard before the end of May 2018.

[88] The father has been paying the mother child support. This is no longer required given that the father has temporary custody of the child. This child support shall terminate effective November 8, 2017 (the date of this decision).

[89] I do not have the order that requires the father to pay this child support. I vary that order and strike the paragraph that orders the father to pay the mother child support. The father's counsel is requested to provide the court with a copy of the order so that the order I am issuing can provide a specific reference to what is being varied.

[90] Should the mother at some point in the future, regain custody of the child, then the court can deal with child support for her at that time.

CONCLUSION

[91] I make the following orders:

1. The father, Josip Kucan ("father") shall have temporary sole custody of the child Luka Ivan Kucan ("child") born April 18, 2006 pending further order of the court.
2. Effective November 8 2017, the father is no longer required to pay the mother child support. I strike the paragraph of the order that required the father to pay child support.
3. The mother, Debbie Santos ("mother") may have telephone access to the child as arranged by the father as long as she engages in conversation with the child that the father deems appropriate. The frequency, duration and continuation of such telephone access is in the father's discretion.
4. The father shall provide the mother with information about the child's health and education. The father shall provide this information to the mother by email. The mother shall not have direct access to the child's teachers, school officials, doctors, dentists, health care providers, summer camp counsellors, coaches or daycare providers. The father shall report to the mother twice a month.

5. The mother shall have supervised access to the child at a Supervised Access Center ("SAC") on the following terms. It is the mother's obligation to arrange this access with the SAC. The access shall take place no more than twice a month. The two monthly access visits shall be scheduled on a Saturday or Sunday. Each access visit shall be no more than two hours. The mother shall request access at the SAC location that is closest to where the father resides or the child's school.
6. If the mother wishes to respond and dispute the father's motion to change, she shall comply with *Family Law Rule 15 (9)*. If she fails to comply then the father's motion will be unopposed and he can proceed as permitted in *Family Law Rule 15*.
7. If the mother files a response to the father's motion to change, it shall be her obligation to provide evidence to satisfy the court that the cause of her behaviour has been diagnosed, treated and is under control. Specifically, she must satisfy the court that allowing her to have custody or unsupervised access to the child is in the child's best interests. Any evidence that the mother relies upon shall be served on the father and filed with the court no later than October 1, 2018.
8. The father's motion to change shall be heard by Justice Kiteley on a date after October 31, 2018 and before December 31, 2018. Counsel for the father may secure a date from the trial co-ordinator.
9. The mother shall not bring any motions without first obtaining leave to do so from Justice Kiteley.
10. If the father wishes to change the child's school for the year starting September 2018, then he shall bring a motion before Justice Kiteley and such motion shall be heard before the end of May 2018.
11. Except as allowed in these orders, the mother shall not communicate with the father or child, directly or indirectly, and shall not come within 500 meter of the father or child.
12. The father's obligation to pay the mother child support is terminated effective November 8, 2017. The paragraph of the order that requires the father to pay child support is struck.
13. The mother's approval of this order is waived. Counsel for the father shall provide me with a draft copy to review and sign.
14. The father was successful and is entitled to costs. He seeks \$5,000 all inclusive. This is reasonable. I fix the father's costs at \$5,000 and order the mother to pay these costs.

15. The father shall provide a copy of this decision to the Office of the Children's Lawyer.

C. Horkins J.

Date: November 8, 2017