

WARNING

This is a case under the *Child, Youth and Family Services Act, 2017* and 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.

CITATION: DCAS v A.S. and D.M. 2023 ONSC 6867
COURT FILE NO.: FC-23-36
DATE: 20231205

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Durham Children’s Aid Society

)
)
) Heather Chan, for the Applicant Society
)
)

Applicant

- and -

A.S.

)
) Not in attendance
)
)

Respondent Mother

D.M.

)
) Nandishi Bekah, for the Respondent Father
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)

Respondent Father

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)
)
) **HEARD:** December 1, 2023

JUSTICE ALEX FINLAYSON

PART I: NATURE OF THIS PROCEEDING

[1] The Respondents are the parents of three children, named L.S., who is almost 12, C.M. age 10 and T.M. age 9. These parents have been involved in extremely high conflict litigation before this Court. These parents have consumed a tremendous amount of this Court’s judicial resources. The details of the litigation are set out in a decisions of this Court dated November 14, 2023, and in a Ruling on the father’s 14B Motion released November 27, 2023: see *A.M.S. v. D.M., 2023 ONSC 6534* and *A.M.S. v. D.M., 2023 ONSC 6690*.

[2] The Court does not intend to repeat in full what it has already said in those two decisions in any detail; these Reasons for Decision should be read in conjunction with this Court’s two recent decisions/rulings.

[3] That said, it bears repeating that these children have been exposed to emotional harm. This Court became so concerned for these children as the prior proceedings unfolded before it, that in the November 27, 2023 ruling, this Court convened a hearing under section 81(4) of the *Child, Youth and Family Services Act, 2017* (the “CYFSA”). It took the unusual step of doing so on its own motion, to determine whether the grounds existed for there to be a hearing under section 90(1) of the *CYFSA*, or for the children to be brought to a place of safety.

[4] The Society finally issued a protection application on December 1, 2023.

A. The Hearing Under Section 81(4) of the CYFSA

[5] In the November 27, 2023 Ruling, I invited the parties to file *facta*. I indicated that if either the Society or either of the parents wished to challenge the Court’s jurisdiction to direct a hearing of this nature on its own motion, then they had to file *facta*.

[6] The Society did not file a factum. The question about the Court’s jurisdiction to have taken the aforementioned step has instead been rendered moot by the Society finally issuing a protection application. This case is now going to proceed in a child protection court, where it belongs.

[7] The father however filed a factum and raised a different jurisdictional issue. I will address his jurisdictional issue, in the related prior proceeding.

[8] The mother did not appear on December 1, 2023. She did not file anything.

B. The Court's Temporary Order of December 1, 2023 Made in the Protection Application

[9] As the Society has now brought a protection application, on December 1, 2023, the Court instead held a hearing respecting the children's temporary placement. I made a temporary without prejudice Order under section 94(2)(d) of the *CYFSA* placing all three children in the care of the Society. I ordered police assistance to locate and apprehend the children. I appointed the Office of the Children's Lawyer for all three children. I also ordered access in the discretion of the Society.

[10] For further clarity, I meant to order supervised access in the discretion of the Society, but did not state that in my Endorsement of December 1, 2023, due to my oversight. Therefore, I am amending the Order of December 1, 2023 now, to provide that the parents shall have supervised access in the discretion of the Society. I expect that is how the Society would have exercised its discretion anyway.

[11] I also indicated to the parties on December 1, 2023 that I would release written reasons later. I do so now.

C. The Court's Written Reasons Respecting Its Jurisdiction to Direct A Child Protection Hearing

[12] The issue is moot. Despite the mootness, I nevertheless contemplated writing a decision about my jurisdiction to have convened the hearing on December 1, 2023, and if necessary, to order a child welfare agency to commence a protection application, in a case of this nature, where:

- (1) the parents were not acting appropriately and protectively, and where the Court had learned all about that during the high conflict litigation before it;

- (2) children were being harmed in the process;
- (3) the Society took the misplaced and inappropriate position, that these parents should be left to their own devices to litigate under the *Divorce Act* or the *Children's Law Reform Act*; and
- (4) the Society otherwise abdicated its responsibilities for the protection of children.

[13] However the question of the Court's jurisdiction to compel a child welfare agency to commence a proceeding is an important issue. It is important to give those who might be affected by such a decision the opportunity to make submissions. As no one filed any of the written submissions that the Court invited or required, no one made the arguments on December 1, 2023, and in light of the issuance of the protection application instead, I find that it is more prudent to leave this issue for another day.

D. The Court's Written Reasons Respecting the Temporary Without Prejudice Order in the Protection Application

[14] This motion is now governed by section 94(2) of the *CYFSA*. It reads:

94(2) Where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child,

(a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;

(b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;

(c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other

person, subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate; or

(d) remain or be placed in the care and custody of the society, but not be placed in a place of temporary detention, of open or of secure custody.

[15] Pursuant to section 94(4), the Court must not make an order under section 94(2)(c) or (d) unless the Court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause 2(a) or (b).

[16] Pursuant to section 94(5), before making an order placing a child in care under section 94(2)(d), the Court must consider whether it is in the child's best interests to make an order under clause 2(c) to place the child in the care and custody of a person who is a relative of the child or a member of the child's extended family or community.

[17] It is well established that at a temporary care and custody hearing involving a removal, there is a two-part test that the Society must meet. The Society must demonstrate, on credible and trustworthy evidence, that there are reasonable grounds to believe that there is a real possibility that if a child is returned to the person having charge of the child prior to the Society's intervention, it is more probable than not that the child will suffer harm. Further, the onus is on the Society to establish that the child cannot be adequately protected by terms of conditions of an interim supervision order: *see Children's Aid Society of Ottawa-Carleton v. T.*, 2000 CanLii 21157 (Ont. S.C.J.)

[18] The Court must choose the order that is the least disruptive placement consistent with adequate protection of the child as required by subsection 1(2) of the *CYFSA*; see also *Children's Aid Society of Hamilton v. B.D. and F.T.M.*, 2012 ONSC 2448. The degree of intrusiveness of the Society's intervention and the interim protection ordered by the Court should be proportional to the degree of risk: *see Catholic Children's Aid Society of Toronto v. J.O.*, 2012 ONCJ 269.

[19] The parents will have an opportunity to respond to the Society's motion in due course if they wish. But based on the record before me at this point, there is absolutely no question that the first branch of the test is met for the purposes of making a temporary without prejudice Order. Just a sample of some of what is set out in the Court's earlier two decisions reveals that:

- (1) Over the course of an eight-year period between February 6, 2015 and February 24, 2023, there had been some 29 phone calls to two child welfare agencies from family members, police, childcare providers, schools, counsellors, social service providers, health care providers and anonymous persons;
- (2) There had been nine investigations, and fifteen other kinds of interventions, taken by the child welfare agencies along the way;
- (3) Child protection concerns, mostly relating to emotional harm, had been verified on multiple occasions, yet in each instances, files were then closed by the Society;
- (4) While closing files, the Society still had "significant concerns" that the children were being exposed to adult conflict;
- (5) The parents had not been successful in putting supports into place to protect the children from conflict;
- (6) Court orders were not being followed;
- (7) For example, the mother refused to abide by a court orders for an assessment in the related proceeding. Both parties refused to abide by a myriad of procedural directions in orders of this Court; and
- (8) In that regard, both parents were litigating the parenting issues in an out of control fashion. The Court admonished them to stop it. They did not listen.

[20] Having found the first part of the test is met, I turn to the question of the children's temporary placement. I find the Society's position on this to be both incredible and irresponsible.

Now that the Society has finally brought a protection application, it merely sought to place the children with the mother, under a supervision Order. The Society's own material demonstrates why that its position in this regard is highly inappropriate (let alone what this Court has already written about this family and the risk to these children, in the two aforementioned decisions).

[21] In the affidavit of child protection worker Ms. Wiseman dated November 30, 2023, the Society states:

- (1) The Society is worried that the children's immediate physical, emotional and psychological needs are not being met;
- (2) The mother has refused to allow the worker to verify their well being by meeting with the children;
- (3) The mother has refused to disclose the children's location;
- (4) The Society is worried that the children have been emotionally harmed and are at risk of emotional harm due to exposure to ongoing domestic conflict between the parents;
- (5) The children have been taken out of school. Before he was taken out of school, L.S. made islamophobic statements at school;
- (6) The mother is refusing to abide by this Court's Order of November 14, 2023;
- (7) The mother has sent the Society various correspondence, or copied the Society with various correspondence, that was high accusatory in nature, largely based on misinformation. The Society is now concerned about the mother's overall wellness and is concerned about her ability to make decisions and care for the children;
- (8) The mother is refusing to meet with the Society. Most recently on November 30, 2023, the mother told the Society she is in a remote location of Ontario;

(9) Ms. Wiseman and family service worker Tina Abrahams went to the mother's house on November 30, 2023. The mother has various documents taped to her front door, warning police officers not to trespass, and listing what appeared to be parts of "the criminal code and laws associated with human rights"; and

(10) When Ms. Wiseman told the mother that she would be bringing a protection application, the mother told her that she would be "liable for any harm that came to her children, that this was a life-threatening situation, that [the father] had previously threatened to kill her and was not afraid to go to jail, and that [the father] had previously abused the children "beyond spanking" and therefore the children would be at risk in her care".

[22] Inexplicably, after setting all this out, at ¶ 27 of her affidavit, Ms. Wiseman states that a "strength of this family", is that the parents have both taken "actions to protect their children from perceived harm or danger and will seek legal, medical and therapeutic support to facilitate their efforts to meet their children's best interests". Details are not provided. This is a *pro forma* statement. It is not helpful. It is not rooted in the evidence that has been put before me.

[23] The mother is very clearly not amenable to the supervision of the Society. Even if she were, I find the children would be at too great a risk in her care any longer.

[24] Although the Society is not seeking to place the children with him, the father is not an option either right now. He has not seen the children in months. In the reasons dated November 14, 2023, I gave the parties one last opportunity to stop acting like this and to comply with the underlying Order of Leef J., in tandem with proceeding with the previously ordered custody and access and mental health assessments, out of which some evidence about either parent's capacity might emerge. They have not done so. The father then went before another judge and obtained leave to proceed by way of an uncontested trial, without completing the assessment. The father is also the subject of three pending criminal charges.

[25] Although the Society is also not seeking to place the children with family or community members, the father argued on December 1, 2023 that I should make such an Order. As I indicated already in the November 14, 2023, there is no evidence before the Court about the viability of the father's family members as potential kin caregivers for the children. The Society needs to assess any plan that the father decides to put forward. Further information can then be put before the Court in due course. The Court is also aware from the prior proceedings, that members of the father's family have been involved in the parental conflict.

E. The Society's Conduct

[26] This Court is completely baffled by the decisions that this Society has taken.

[27] Exactly how many more referrals was it going to take, how many more verifications of emotional harm had to be made, and what more had to happen, before the Society decided it was going to act?

[28] Why did it take an Order of this Court of November 27, 2023, directing a hearing on its own motion, for the Society to finally take action?

[29] Why was that even necessary, when this Court had twice before made referrals to the Society (in addition to the myriad of referrals from all the other persons listed above)?

[30] And why then, once it finally brought a protection application, did it seek an order for supervision with the mother, that is obviously not going to address the concerns, given her current attitude?

PART II: AMENDED ORDER

[31] There shall be no change to the procedural orders on page 1 of the December 1, 2023 Endorsement . Otherwise, the Court's Order of December 1, 2023 shall now read as follows:

- (1) The children, L.S., born ..., C.M., born, and T.M., born ... shall be brought into the care of the Durham Children's Aid Society, and they shall be placed in the care of the

care and custody of the Durham Children's Aid Society on a temporary without prejudice basis;

- (2) For clarity, the Order that the children shall be taken into the temporary without prejudice care of the Durham Children's Aid Society means that they shall be placed in care, and not with either parent or with other family members at this time;
- (3) Any police force having jurisdiction in a location where the children may be shall be directed to assist the child welfare worker in having the children to come into care. In that respect, any police force shall locate, apprehend and deliver the children to the care of the Durham Children's Aid Society;
- (4) The Office of the Children's Lawyer is appointed for all three children pursuant of section 78 of the *Child, Youth and Family Services Act, 2017*;
- (5) The parents shall have supervised access in the discretion of the Society;
- (6) The question of other terms and conditions is adjourned to be argued at a later time;
and
- (7) This matter is adjourned to January 16, 2024 at 10 AM for 60 minutes, for the second appearance on this protection application.

The Honourable Justice A. Finlayson

Released: December 5, 2023

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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Durham Children's Aid Society

Applicant

- and -

A.S.

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REASONS FOR DECISION

Justice Alex Finlayson

Released: December 5, 2023