COURT OF APPEAL FOR ONTARIO

CITATION: D.D. v. H.D., 2015 ONCA 409
DATE: 20150608
DOCKET: C57586 and C57587

Cronk, Gillese and Brown JJ.A.

BETWEEN

D.D.

Applicant (Respondent)

and

H.D.

Respondent (Appellant)

Charlotte Murray and Simon Wozny, for the appellant

Angelo P. Fazari and A. Iler, for the respondent

Heard: March 12, 2015

On appeal from the orders of Justice Theresa Maddalena of the Superior Court of Justice, dated July 31, 2013 and August 2, 2013.

Gillese J.A.:

[1] It is trite law that custody is to be decided based only on the best interests of the children. In *King v. Mongrain*, 2009 ONCA 486, 66 R.F.L. (6th) 267, this court emphasized that the utmost caution must be used before striking a party's pleading when custody and access are in issue. It explained that a full evidentiary record, including the participation of both parents, is generally

required for the court to make a custody decision in the best interests of the children.

[2] The present appeal calls out for a repetition of these principles.

BACKGROUND IN BRIEF

[3] To place the appeal in context, I will set out a brief outline of the most salient facts. A summary of the relevant orders in this matter can be found in Schedule A to these reasons.

[4] The mother, H.D. (the "appellant"), and the father, D.D. (the "respondent"), began cohabiting in May 2006 and were married in May 2008. They have two children: M.A. born on May 22, 2006, and D. born on May 1, 2011.

[5] Beginning in June 2009, the Children's Aid Society of the Niagara Region ("CAS") became involved with this family due to concerns about the risk of mental and/or emotional harm to the children as a result of exposure to domestic violence.

[6] Several incidents in 2011 and 2012 warrant mention and are included in the brief chronology that follows. The information is drawn primarily from affidavit evidence of the CAS worker that was involved with the family.

April 12, 2011 Incident

[7] On April 12, 2011, H.D. went to the Welland courthouse to get information about separating from D.D. She had M.A. with her in the car and was pregnant with D. D.D. followed H.D. in his own car and confronted her in the courthouse parking lot, refusing to leave unless she did. H.D. drove back to Niagara Falls. D.D. drove after her in a reckless fashion, steering into oncoming traffic and pulling alongside her vehicle. H.D. drove to the Niagara Falls police station for help. D.D. attempted to physically block her entry into the police station, and grabbed her. H.D. broke free, ran inside and the police intervened.

[8] As a result of this incident, D.D. was charged with criminal harassment, dangerous driving, intimidation and assault. He was released on bail the following day.

June 20, 2011 Incident

[9] On June 20, 2011, the police went to the family home unannounced to check on H.D. M.A. reported that D.D. was hiding in the basement. D.D. was charged with breach of his bail terms, which prohibited him from communicating with H.D. He was released the following day on bail.

August 1, 2011 Incident

[10] On August 1, 2011, D.D. followed H.D. while she was driving. She pulled over to tend to D. D.D. approached her, placed his hands on her hips and demanded that she get into his car. During the ensuing argument, D.D. yelled, “Easy way or hard way, we will be together”. H.D. left. D.D. was arrested and charged with criminal harassment and failure to comply with his recognizance.

[11] After this incident, the CAS recommended that D.D.’s access to the children be supervised. It suggested that access be arranged through Pathstone Mental Health, a local agency that provides third-party access supervision. H.D. made arrangements with Pathstone for D.D. to have access to the children but D.D. attended only four times before withdrawing from the program.

D.D. Pleads Guilty to Criminal Harassment

[12] On February 2, 2012, D.D. pleaded guilty to criminal harassment and breach of recognizance. The Crown withdrew the remaining counts. He was sentenced to a conditional discharge and 24 months’ probation.

The Consent Order

[13] H.D. and D.D. reached an agreement on the children’s custody and access, and on child and spousal support. Their agreement was enshrined in a

final consent order dated August 31, 2012 (the "Consent Order"). Under the terms of the Consent Order:

1. H.D. had sole custody of the children;

2. D.D. had access on Wednesday evenings, and during the day on Saturday and Sunday on the first, second and fourth weekends of each month; and

3. D.D. was to pay H.D., commencing September 1, 2012, child support of $1,488 per month (based on an annual income of $105,893) and spousal support of $1,746 per month.

October 20, 2012 Incident

[14] On October 20, 2012, H.D. and D.D. were arguing. He refused to leave her home after she asked him to. When she attempted to leave with the children, D.D. blocked the exit. H.D. eventually got by D.D. and put D. in her car. H.D. tried to leave the garage and D.D. repeatedly prevented her from leaving, at one point causing her to fall.

[15] When H.D. did manage to leave, she drove to the police station. D.D. followed. H.D. was scared to leave the car so she texted her mother who called the police. The police came out and escorted H.D. inside the station. D.D. drove away just before the police made contact with H.D.

[16] The following day, D.D. turned himself in and was charged with assault, forcible confinement and breach of probation. The trial of these charges took place in September 2013. As I explain further below, this is a matter of significance to this proceeding.

CAS Does Not Support D.D.'s Unsupervised Access

[17] After this incident, the CAS interviewed M.A., who was then 6 years old. M.A. corroborated much of H.D.'s report to the police as to what had taken place.

[18] In November 2012, the CAS provided H.D. with a letter indicating its position that D.D. exercise only supervised access.

[19] H.D. and the children then moved to a shelter.

H.D. Moves to Alberta

[20] In November 2012, H.D. also received a letter from the CAS confirming its support for her wish to move out of the Niagara region with the children. The letter said that when she moved, the CAS would make a request of the local children's aid society to continue to provide her and the children with services.

[21] In December 2012, CAS spoke with D.D. on the telephone about exercising supervised access to the children. D.D. told the CAS that he refused to have supervised access to the children.

[22] In February 2013, the Halton children's aid society apprehended the children from H.D. because she was transient, appeared unstable, was overwhelmed with the children, and homeless. The children remained in care for approximately 4 days before being returned to H.D.

[23] By March 2013, H.D. had indicated to the CAS her intention to move to Alberta to work. The Guelph children's aid society wrote to wish H.D. "all the best in your endeavour to 'start fresh' in Alberta".

[24] Very shortly thereafter, H.D. and the children left for Alberta. At that point, D.D. had not sought or exercised access to the children since October 2012.

[25] En route to Alberta, H.D. had a car accident. D.D.'s insurer told him of the accident.

The *ex parte* Order

[26] D.D. then brought a motion dated April 18, 2013, to vary the Consent Order, gain custody of the children, and end his child and spousal support obligations (the "Motion to Vary").

[27] By order dated April 23, 2013 (the "*ex parte* Order"), H.D. was ordered to return the children to Niagara "in the temporary without prejudice care" of D.D. The Motion to Vary was adjourned to May 8, 2013.

The Hearing on May 8, 2013

[28] H.D. returned to Ontario for the hearing on May 8, 2013. She made arrangements with the Alberta child welfare authorities for the children's care in her absence. H.D. was not represented by counsel on May 8 but did have the assistance of duty counsel.

[29] Both H.D. and duty counsel told the court that H.D. could provide letters from the Edmonton police, the child welfare authorities in Niagara, and her family doctor, and asked that the court review the documents. Among other things, H.D. told the court that the materials showed that she had been assessed by the child welfare authorities in Edmonton and there were no safety concerns for the children. Her materials also showed details of D.D.'s stalking and harassment. H.D. further indicated that the local CAS had given notice that the children would be apprehended if they were returned to the Niagara Region.

[30] The motion judge refused to accept the materials or hear from H.D. until the children were returned. She said that H.D. would have a full opportunity to retain a lawyer and file materials provided that she returned the children to Ontario. She ordered H.D. to provide the court and D.D. with the address of the shelter where she and the children were residing in Edmonton and adjourned the motion to May 22, 2013. The motion judge also required H.D. to place the children in D.D.'s care immediately, in accordance with the *ex parte* Order. H.D.

expressly promised to cooperate with the court orders, stating that she would "absolutely" bring the children back to Ontario.

[31] H.D. did not return the children to Ontario nor did she provide the children's address.

Legal Proceedings in Alberta

[32] When H.D. returned to Alberta, she immediately sought and obtained a legal aid certificate. She then sought to have the certificate transferred to Ontario.

[33] On May 16, 2013, the lawyer appointed by legal aid in Alberta wrote to D.D.'s counsel, seeking a two week adjournment of the May 22, 2013 hearing date so that counsel in Ontario could be appointed to act for H.D. The request was refused.

[34] H.D. also brought an application for an emergency protection order in the provincial court of Alberta. She tried to have the application heard on May 21 and then May 22, 2013.

[35] On May 23, 2013, she obtained an order which provided that D.D. was not to be within 200 metres of her or the children and was not to communicate with her or the children either directly or indirectly.

The Contempt Motion

[36] On May 15, 2013, D.D. brought a contempt motion against H.D. for her failure to return the children to Ontario in accordance with the *ex parte* Order and the order dated May 8, 2013. The return date for the contempt motion was also May 22, 2013.

The Hearing on May 22, 2013

[37] On May 22, 2013, H.D. was not present in court. Duty counsel spoke on her behalf. He advised that H.D.'s Alberta lawyer sought a two week adjournment of the May 22, 2013 hearing so that an Ontario legal aid lawyer could be appointed for H.D.

[38] The court refused the adjournment request.

[39] The motion judge then found that H.D. was in contempt for failing to comply with the orders requiring that the children be returned to Ontario and issued a Canada-wide arrest warrant and a warrant of committal (the "Contempt Order").

The Orders under Appeal

[40] When the Motion to Vary was returned on July 31, 2013, H.D. was not present but her counsel was. The court found that it had jurisdiction over the

children and that H.D. had failed to advise the Alberta court of relevant Ontario court orders. Consequently, the motion judge ordered that all prior Ontario court orders continued in effect.

[41] The motion judge said that H.D.'s counsel could be present in the courtroom when the Motion to Vary was argued. However, she prohibited H.D. and her counsel from participating in the motion in any way. This prohibition included denying H.D. the right to file any materials. It also prevented her counsel from cross-examining D.D. and his witnesses and from making submissions. The motion judge ordered that the hearing on the Motion to Vary would be held on August 2, 2013.

[42] On August 2, 2013, the matters in issue were decided solely on evidence adduced by D.D. The motion judge heard oral evidence of D.D. and his mother. No other witnesses were called.

[43] By orders dated July 31, 2013, and August 2, 2013 (the "Orders under Appeal"), D.D. was given custody of the children; H.D. was given supervised access to the children but access was made subject to her providing D.D. with a psychiatric report that D.D. found acceptable; D.D.'s child and spousal support obligations were terminated; and H.D. was ordered to pay D.D. child support based on imputed annual income of $20,000.

[44] As will become clear, it is significant that the custody component of the Orders under Appeal was made pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[45] H.D. appeals to this court. She asks that the Orders under Appeal be set aside and the Motion to Vary remitted for a fresh hearing before a different judge of the Superior Court of Justice.

The Fresh Evidence

[46] On the appeal, fresh evidence was filed to explain what had happened with the children since the Orders under Appeal were made. The fresh evidence shows the following.

[47] After the Orders under Appeal were made, H.D. returned to Ontario to give evidence at D.D.'s criminal trial on September 19, 2013. The criminal trial related to charges stemming from the October 20, 2012 incident described above. After completing her testimony, H.D. was arrested and jailed for her contempt. She was sentenced to a total of 60 days' incarceration for her contempt, and remained in jail until November 18, 2013.

[48] D.D. was convicted of assault and breach of probation.

[49] Because of H.D.'s incarceration, the children were apprehended in Alberta and returned to Ontario, where they were apprehended by the CAS.

[50] The CAS then began a child protection proceeding in the Ontario Court of Justice. The children were initially placed in the temporary care and custody of the CAS. The parents were later given supervised access.

[51] The children were placed in their paternal grandmother's care for an extended visit, commencing on December 23, 2013. Thereafter, the grandmother was given temporary care and custody of the children, subject to CAS supervision. The parents were both permitted supervised access to the children.

[52] At the oral hearing of the appeal, the court was advised that the children remain in their paternal grandmother's temporary care and custody and that D.D. also lives in the home with unsupervised access to the children. Apparently the CAS is aware of this arrangement and does not oppose it.

[53] An assessment under s. 54 of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 (the "*CFSA*"), has been ordered for both parents but the assessment had not been started by the time the oral hearing of this appeal took place.

THE ISSUES

[54] The appellant raised many issues on appeal, which can be summarised as follows. Did the motion judge err in:

1. awarding custody to the respondent without properly considering the children's best interests and without affording the appellant procedural fairness;

2. making the appellant's access to the children conditional on the respondent's approval; and

3. her determination of the child and spousal support issues.

[55] The fresh evidence raises an issue as to this court's jurisdiction to hear the appeal – or, at least, that part of the appeal that relates to custody – given that the children are now the subject of proceedings under the *CFSA*.

[56] I will deal first with the jurisdictional issue and then turn to the three issues set out above. Thereafter, I will address the question of the appropriate remedy.

DOES THIS COURT HAVE JURISDICTION TO HEAR THE APPEAL ON THE MATTER OF CUSTODY?

[57] In the present case, the fresh evidence shows that the children are now subject to provincial child protection proceedings. There is no question that, given the child protection proceedings, a statutory stay would apply to custody proceedings under the provincial *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*"). However, the custody order called into question on this appeal was made under the federal *Divorce Act*. Thus, the question arises, in light of

the provincial protection proceedings, can the custody aspects of this appeal proceed or are they stayed until the child protection proceedings are complete?

[58] Section 57.2 of the *CFSA* provides for a statutory stay of custody proceedings under the *CLRA*, another provincial statute. Section 57.2 of the *CFSA* reads as follows:

> If, under this Part, [Part III – Child Protection] a proceeding is commenced or an order for the care, custody or supervision of a child is made, any proceeding respecting custody of or access to the same child under the *Children's Law Reform Act* is stayed except by leave of the court in the proceedings under that Act. [Emphasis added.]

[59] It will be noted that s. 57.2 does not purport to stay custody proceedings under the federal *Divorce Act*. Given the doctrine of federal paramountcy, it is not readily apparent that the *CFSA*, a provincial law, could effect such a stay.

[60] There is virtually no jurisprudence on the jurisdictional question raised on this appeal and what there is offers little assistance.

[61] In *Re Catholic Children's Aid Society of Metropolitan Toronto* (1972), 26 D.L.R. (3d) 266 (Ont. H.C.), a child was subject to a series of orders under child welfare legislation. Subsequently, the mother was awarded custody of the child under the *Divorce Act*. The question arose as to whether the divorce judge's order ousted the jurisdiction of the provincial court, which was hearing the child protection proceedings. The court concluded that the provincial court still had

jurisdiction to hear the child protection proceedings. The court did not consider the question raised in the present case, namely, whether the ongoing child welfare proceedings precluded it from dealing with custody under the *Divorce Act*. However, given that the divorce court made the custody order, it is apparent that the court assumed jurisdiction and decided custody, despite the ongoing protection proceedings.

[62] *Children's Aid Society of St. Thomas & Elgin (County) v. Z.(C.)* (2003), 43 R.F.L. (5th) 264 (Ont. C.J.), stands somewhat in contrast to *Re Catholic Children's Aid Society of Metropolitan Toronto*. At para. 12 of *Z.(C.)*, the court sets out the general proposition that child protection legislation "trumps" the jurisdiction of any court on the matter of custody. However, at para. 14 of *Z.(C.),* the court states that this proposition has been applied in cases involving custody applications under provincial legislation after a Crown wardship order has been made.

[63] It is noteworthy that the interaction between child protection proceedings and custody proceedings under the *Divorce Act* was not specifically at issue in *Z.(C.)*. Moreover, and significantly, at the time that the Orders under Appeal were made, child protection proceedings had not been initiated. The right to appeal the custody order, in the face of intervening protection proceedings, is different from the commencement of a custody application in the face of ongoing child protection proceedings.

[64] The jurisdictional question raised on this appeal is significant and has the potential to affect many other parties and proceedings. It was not squarely raised nor fully argued on this appeal. The provincial and federal governments have not been notified of the question nor have they been given the opportunity to address the court on this matter. It may be that the relevant statutes can be read in harmony, given that protection legislation and custody legislation deal with different aspects of child care – one public and one private.

[65] Consequently, I decline to decide this matter and will assume that the court has jurisdiction to decide the issue of custody.

[66] I wish to be clear, however, that the child protection proceedings can and should continue. The children's best interests dictate that they do so, as does the public interest in ensuring that the children are protected.

[67] I would conclude by noting a consequence of the fact that the custody order in this appeal was made under the *Divorce Act*. The *CFSA* makes clear that the court in the child protection proceedings does not have the authority to override a custody order made under the *Divorce Act*. Section 57.1(1) of the *CFSA* gives the protection court the power to make a custody order, but s. 57.1(6) limits that power, stating:

> (6) No order shall be made under this section if,
>
> (a) an order granting custody of the child has been made under the *Divorce Act* (Canada)….

[68] The *Divorce Act* confirms that *CFSA* proceedings cannot modify a *Divorce Act* custody order. Section 20(2) of the *Divorce Act* provides that a custody order made under its provisions "has legal effect throughout Canada."[1] Section 20(4) then provides that the custody order, as an order with effect across Canada, may be varied only in accordance with the *Divorce Act*.

THE CHILDREN'S BEST INTERESTS

The motion judge's reasons

[69] The motion judge did not issue written reasons nor did she give oral reasons. However, the following points relating to her custody order can be gleaned from a review of the transcript of the hearing.

[70] The motion judge said that she was "willing" to make a custody order under the *Divorce Act* – rather than under provincial legislation – to assist with the enforcement of the order in Alberta. She also indicated that she had concerns about H.D.'s mental health and possible use of drugs. Additionally, she expressed frustration with the police and the various children's aid societies for failing to implement her order requiring that the children be returned to Ontario. Further, the motion judge said that it was in the best interests of the children that they be returned to Ontario.

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[1] Section 20(2) reads as follows: "Subject to subsection 18(2), an order made under any of sections 15.1 to 17 or subsection 19(7), (9) or (9.1) has legal effect throughout Canada." In this case, the motion judge purported to make the custody order under s. 16(1) of the *Divorce Act.* However, as the matter before the court was a motion to vary a custody order, it appears that the court would have been acting pursuant to s. 17(1)(b) of the *Divorce Act*.

Standard of Review

[71] An appellate court is not to overturn a custody order in the absence of a material error, a serious misapprehension of the evidence or an error in law: *King v. Mongrain*, at para. 32. In the present case, as the motion judge gave no reasons for varying the custody order, no deference is owed that decision.

[72] In any event, however, the motion judge made clear errors of law which dictate that the custody order be set aside. Those errors are made manifest through a consideration of this court's decision in *King v. Mongrain*.

King v. Mongrain

[73] The facts of *King v. Mongrain* are remarkably similar to those of the present case.

[74] In *King v. Mongrain*, the mother moved from Ontario to Quebec with the parties' two children. The father brought custody proceedings in Ontario. Despite repeated court orders that the mother return the children to Ontario, the mother refused to comply. Her refusal was related to the father's alleged assaultive behaviour. The father had been charged with a number of offences based on domestic violence. The children's aid society had been involved with the family and, at one point, indicated that the mother was not to give the father access to the children until an agreement, to which the children's aid society was a party, had been reached.

[75] Eventually, the mother's pleadings were struck because of her contemptuous behaviour and custody was ordered in favour of the father.

[76] This court set aside the custody order saying, at para. 23:

> Even if the [mother's] conduct justified an order striking her pleading, the [father's] material did not provide a basis on which the motion judge, acting in accordance with the relevant statutory provisions, could determine that a final custody order in favour of the [father] was in the best interests of the children.

[77] That same reasoning applies in the present case.

An Inadequate Evidentiary Basis to Decide Custody

[78] In *King v. Mongrain,* this court explains that a full evidentiary record, including the evidence of both parents, is generally required in order for the court to determine the best interests of a child. At paras. 30-31, this court recognizes the power of family courts to strike pleadings but makes clear that it is preferable that such a sanction be avoided when the matter to be decided is custody or access:

> [C]ourts should use the utmost caution in striking pleadings where children's interests are involved and it is generally preferable to avoid using that sanction…. The reason for that admonition is simple – <u>in order to make custody and access decisions in the best interests of the child, the court needs the participation of both parties</u>. [Emphasis added.]

[79] As in *King v. Mongrain*, the motion judge in the present case decided the custody issue on an inadequate evidentiary basis: the evidence was solely that adduced by the respondent. And, much of that evidence was about the tortured procedural history of this case, the children's aid societies' failures, and the police's failure to enforce the warrant for H.D.'s arrest and return the children to Ontario. Furthermore, it will be recalled, at the hearing H.D.'s counsel was not allowed to even make submissions on whether D.D. should have custody, let alone cross-examine D.D. or lead evidence.

[80] Just as in *King v. Mongrain,* the one-sided presentation of evidence did not provide an adequate basis on which the motion judge, acting in accordance with the relevant statutory provisions, could determine that a final custody order in the father's favour was in the children's best interests.

[81] This is not to suggest that the family courts may never strike pleadings or that, if struck, custody and access cannot be decided. *Haunert-Faga v. Faga* (2005), 203 O.A.C. 388 (C.A.), is an example of a case in which this court upheld a decision to strike pleadings in a family law case where custody was an issue. However, in that case, the Office of the Children's Lawyer was representing the children's interests in the proceedings. In the present case, no one represented the children.

Failure to Consider the Children's Best Interests

[82] Under s. 16(8) of the *Divorce Act*, when making a custody order, the court "shall" take into consideration only the best interests of the children, as determined by reference to the children's "conditions, means, needs and other circumstances". Under s. 17(5) of the *Divorce Act*, before varying a custody order the court "shall", among other things, take into consideration only the best interests of the children. Consequently, the motion judge was required to consider the children's conditions, means, needs and other circumstances. This was not done.

[83] The court considered the limited evidence it had of H.D.'s purported erratic behaviour and mental health challenges. Those considerations were appropriate because they relate to H.D.'s ability to parent and the children's best interests.

[84] However, the motion judge appears to have given no consideration to D.D.'s ability to parent, a matter which is particularly troubling given his admitted guilty pleas to criminal harassment in the domestic context. At the hearing of the Motion to Vary, D.D. attempted to distance himself from his guilty pleas, saying that he pleaded guilty simply to get the criminal proceedings over with. However, his affidavit filed on the Motion to Vary confirmed that he had pleaded guilty to criminal harassment arising from the April 2011 incident.

[85] Additionally, it is most concerning that the motion judge made no reference to, and appears to have given no consideration to, the following:

- the history of domestic violence and intimidation that had shaped the family's circumstances;
- the fact that up to the time of the hearing, the children had lived with their mother throughout their lives and she had been their primary caregiver;
- the children were aged 2 and 7;
- since the second child's birth, the father had spent very limited time with the children, having exercised only sporadic access visits;
- the father had voluntarily chosen not to exercise access and thus had not seen the children since October 2012 – a period of many months; and
- the concerns expressed by the Ontario protective authorities about D.D.'s domestic violence.

[86] Two additional points need to be made.

[87] First, the courts are to consider *only* the children's best interests when making custody decisions. A court cannot award custody to one parent to punish the other for non-compliance with court orders. Moreover, while the motion

judge's frustration at the failure of the police and the CAS to implement her orders and return the children to Ontario is understandable, those matters were irrelevant to the issue of custody.

[88] Second, this was not a "kidnapping" case. There was no term in the Consent Order requiring that the children remain resident in Ontario. Moreover, H.D. moved with the children with the CAS's knowledge and approval. Further, prior to the move, D.D. had not exercised access – or even sought to exercise access – for a number of months and he had told both the CAS and H.D. that he did not intend to have access visits with the children, given that they were to be supervised.

[89] In the result, the order as to custody cannot stand.

ACCESS MADE CONDITIONAL ON THE RESPONDENT'S APPROVAL

[90] In the Orders under Appeal, the appellant was given supervised access to the children only if she "provides a psychiatric report…satisfactory to [the respondent]". The appellant submits that the determination of access is a judicial function and was improperly delegated.

[91] I agree.

[92] In *M.(C.A.) v. M.(D.)* (2003), 67 O.R. (3d) 181 (C.A.), this court emphatically stated that the court cannot delegate to a third party its power to determine access. At paras. 20-24 of *M.(C.A.)*, Rosenberg J.A., writing for the

court, gives four reasons why delegation is improper. All four reasons apply in the present case.

[93] First, it is unclear what the psychiatric report would have to demonstrate in order for the appellant to have access to the children. Second, the appellant's mental health is not the only consideration as to whether she should have access. If access is in the children's best interests, should it be denied absent the report? And if access is not in their best interests, should a report entitle the appellant to have access? Third, there is no statutory authority to delegate decision-making as to access to a third party. Fourth, such a delegation improperly fetters the appellant's access to the court on the question of access.

[94] This order reflects a clear error in law and must be set aside.

CHILD AND SPOUSAL SUPPORT

[95] No reasons were given for the orders made in regard to child and spousal support. Moreover, there was a virtual absence of evidence and inquiry on those issues. The orders cannot stand.

Child Support

[96] The motion judge's apparent rationale for ordering a change in child support was her order changing custody from the appellant to the respondent. As I have found that the order changing custody cannot stand, the change in child support must also fall.

[97] Section 17(4) of the *Divorce Act* provides that, before a court makes a variation in respect of child support, the court *shall* satisfy itself that a change of circumstances as provided for in the applicable guidelines occurred since the making of the child support order. Without the change in custody, there was no finding of a change in circumstances that would warrant a variation in child support.

Imputing Income to H.D.

[98] No adequate inquiry was made before child support obligations were imposed on H.D.

[99] Section 19(1) of the *Federal Child Support Guidelines*, SOR/97-175, permits the court to impute such income to a spouse for the purposes of child support as the court considers appropriate in the circumstances. Income may be imputed when the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by, among other things, the reasonable health needs of the spouse.

[100] The motion judge imputed to the appellant an annual income of $20,000. In so doing, she appears to have simply accepted the respondent's bald assertion that the appellant, a high school graduate who had worked part-time at a casino many years earlier, could work and earn approximately $20,000 per year. This, however, runs contrary to the motion judge's statement that she

would be “surprised” if the appellant could earn any income at all because the appellant might be “incapable of working…given her medical condition”. Nonetheless, the motion judge imputed the income, as requested, and said that the appellant could seek a variation if it turned out that she could not earn $20,000 annually.

[101] The respondent’s bald assertion that the appellant could earn $20,000 per year is insufficient to meet the legal test for imputation of income for child support purposes. There must be a rational basis for the amount selected and it must be grounded in the evidence: *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.), at para. 44. Furthermore, imputation of income on the basis of intentional under-employment or unemployment requires a consideration of such factors as the age, education, experience, skills and health of the person to whom income will be imputed, as well as the availability of job opportunities: *Drygala*, at para. 45. As previously indicated, the record is virtually bereft of any evidence on these matters and the motion judge does not appear to have appreciated the applicable legal principles when imputing income to the appellant. Moreover, the motion judge herself recognized that the appellant may not be able to work in any job at all, given her medical issues.

Spousal Support

[102] Section 17(4.1) of the *Divorce Act* requires the court to satisfy itself, before varying spousal support, that there has been a change in the condition, means, needs or other circumstances of either former spouse. The motion judge gave no reasons for terminating D.D.'s spousal support obligations to H.D., and there is no indication that she took these mandatory considerations into account before ordering that spousal support be terminated. This order cannot stand.

REMEDY

[103] Section 21(5) of the *Divorce Act* gives this court the power to order a new hearing into custody and to make any order that ought to have been made below. For the reasons already given, in my view, the Orders under Appeal must be set aside and the Motion to Vary should be heard afresh.

[104] Setting aside the Orders under Appeal will have the effect of restoring the Consent Order. I say this because the *ex parte* Order does not purport to deal with custody. In this regard, I would point out that the *ex parte* Order required H.D. to return the children to the "temporary without prejudice <u>care</u>" of D.D. (emphasis added). Care, of course, is not the same thing as custody. Therefore, the last order dealing with custody is the Consent Order.

[105] The appellant seeks an order permitting her to fully participate in a new hearing of the Motion to Vary. It seems to me that such an order is unnecessary.

I would order a new hearing of the Motion to Vary. At this point, both the appellant and the respondent have full rights of participation in that hearing. To the extent that the Contempt Order can be argued to bar H.D. from participating, that order is spent. It was based on H.D.'s failure to return the children to Ontario, a matter that is no longer operative.

DISPOSITION

[106] Accordingly, I would allow the appeal, set aside the Orders under Appeal, and order that the Motion to Vary be heard before a different judge of the Superior Court of Justice. In the circumstances, I would suspend the operation of the respondent's child support obligations under the Consent Order, pending further order of the court on this matter.

[107] As I stated earlier, the children's best interests dictate that the child protection proceedings continue. It may be that a hearing of the custody aspect of the Motion to Vary should await resolution of the child protection proceedings. While that is a matter for the parties to pursue, if so advised, I strongly encourage them to agree on a process that gives priority to the children's best interests. Such an approach will ensure a child-focussed approach to the resolution of the matters that divide the parties.

[108] If the parties are unable to resolve the matter of costs of the appeal, they shall file brief written submissions on the matter, to a maximum of three pages, within fourteen days of the date of release of these reasons.

Released: June 8, 2015 (“E.E.G.”)

“E.E. Gillese J.A.”
“I agree. E.A. Cronk J.A.”
“I agree. David Brown J.A.”

Schedule A
Summary of the orders below

August 31, 2012: Henderson J. Consent Order

- Sole custody of both children to H.D.
- D.D. has access as follows:
    - Saturday and Sunday from 10:00 a.m. to 6:00 p.m. on the first, second and fourth weekend every month
    - Every Wednesday from 4:00 p.m. to 7:00 p.m.
    - Other times as agreed upon by the parties
- D.D. to pay child support to H.D. in the amount of $1,488.00 per month based on his income for 2011 of $105,893.00 per year, commencing September 1, 2012
- D.D. to pay spousal support to H.D. in the amount of $1,746.00 per month, commencing September 1, 2012

April 23, 2013: Henderson J. *ex parte* Order

- The Niagara Regional Police, OPP, RCMP, and all other police forces are ordered to locate the two children and return them to the Regional Municipality of Niagara
- Upon the children's return to the Regional Municipality of Niagara, the children shall be in the temporary without prejudice care of D.D.

May 8, 2013: Maddalena J.

- Order of Henderson J. dated April 23, 2013 to continue
- H.D. shall immediately provide the court and D.D.'s counsel the address in Edmonton, Alberta for the children
- The police, OPP, RCMP or other forces, including the Edmonton Police Force, are ordered to apprehend the children and return them to Ontario, in accordance with Henderson J.'s order dated April 23, 2013

May 22, 2013: Maddalena J.[2]

- H.D. to pay costs to D.D. in the amount of $10,814.00

June 26, 2013: Maddalena J.

- H.D. has not purged her contempt; she cannot file materials or bring any motions before the court until her contempt is fully purged

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[2] During the May 22, 2013 hearing, Maddalena J. found H.D. in contempt. That finding is not reflected in the formal written order dated May 22, 2013.

- This matter may be set by D.D.'s solicitor for an uncontested hearing to be scheduled with the trial coordinator before Maddalena J.
- Spousal support of $1,746.00 payable monthly by D.D. to H.D. is suspended effective June 1, 2013, until further court order
- Orders of Henderson J. dated April 23, 2013 and Maddalena J. dated May 8, 2013 and May 22, 2013 are continued
- The RCMP is directed to execute the Canada Wide Warrants issued pursuant to this court action

July 31, 2013: Maddalena J.

- This court has jurisdiction over the issues involving the two children
- H.D. did not disclose the existence of three Ontario court orders (dated April 23, 2013; May 8, 2013; and May 22, 2013) to the Alberta court
- The Alberta Emergency Protection Order was based on incomplete disclosure; therefore, all prior orders made by this court shall continue
- D.D. shall notify CAS immediately upon the children's return to the Niagara region

August 2, 2013: Maddalena J.

- Sole custody of both children to D.D., pursuant to s. 16(1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)
- The police, Niagara Regional Police, OPP, RCMP, Edmonton police, and any other police force having jurisdiction shall enforce the terms of this custody order, and apprehend the two children and return them to Ontario in D.D.'s care and custody
- H.D. shall have access to the children supervised by Pathstones and only once the children are returned to Ontario in the custody and care of D.D., and H.D. provides a psychiatric report to D.D. that is satisfactory to him
- The provisions of the Consent Order that award H.D. custody, child support and spousal support, and award D.D. access, are terminated
- H.D. to pay D.D. child support of $306.00 per month, in accordance with her imputed income of $20,000.00 per year, under the federal child support guidelines, commencing August 2, 2013 and continuing monthly thereafter
- H.D. to provide D.D. a copy of her tax returns and/or notices of assessment each year no later than June 1, and child support to be adjusted accordingly; however, H.D.'s income shall be set at no less than $20,000.00 per year
- H.D. shall refrain from harassing or annoying, directly or indirectly, D.D. and the children
- H.D. to pay costs fixed at $14,653.84

- H.D. is prohibited from commencing any further court applications, motions and/or filing materials for custody, access, child support and spousal support, until such time as the contempt as set out in Maddalena J.'s order of May 22, 2013 is purged and the children are returned to Ontario in the custody and care of D.D.
- Unless this order is withdrawn from the Office of the Director of the Family Responsibility Office, it shall be enforced by the Director and amounts owing shall be paid to the Director, who shall pay them to the person to whom they are owed