CITATION: Axford v Axford, 2023 ONSC 7085
COURT FILE NO.: 725/17
DATE: 15-12-2023

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Nicole Morin Axford , Applicant

John Berton Axford, Respondent

BEFORE: The Honourable Mr. Justice A. Pazaratz

COUNSEL: John G. Cox and Alexandra Ogilvie, Counsel, for the Applicant

Zechariah Martin, Counsel, for the Respondent

HEARD: December 13, 2023

ENDORSEMENT

1 This is a motion by the Applicant mother seeking leave to file fresh or new evidence in relation to an appeal of an Arbitration award.

a. The one-day appeal hearing has been scheduled to be heard during the sittings of January 8, 2024, with Purge Court January 2, 2024 at 9 a.m.
b. At the outset of today's motion I confirmed with counsel that I will not be hearing the appeal, as a result of my previous involvement in case management.
c. Counsel also confirmed that notwithstanding my earlier involvement they consented to my dealing with this as a procedural motion.

2 The Arbitration Award under appeal is dated August 28, 2023, and was released August 30th.

a. The bitterly contested issue was whether two boys now 12 and 11 should change schools.
b. The Arbitrator ruled in favour of the father and ordered that the children should attend John T. Tuck Public School in Burlington, near the father's home.
c. With the Arbitration Award being released just days before the commencement of the school year, the children were immediately enrolled in the new school.
d. The mother filed an appeal and brought a motion seeking a temporary stay of the Arbitration Award pending determination of the appeal. She proposed that the children should continue to attend Hillfield Strathallan, a private school in Hamilton.
e. The mother's "stay" motion was dismissed by Justice Walters on September 26, 2023, primarily on the basis that the mother had not established that the children would suffer *irreparable harm* if the stay was not granted.

BACKGROUND

3 In her September 26, 2023 endorsement, Justice Walters provided a concise summary of the background.

> [1] The parties were married on November 7, 2009, and separated on April 3, 2016. There are two children of the marriage, 12-year old, John Brian Axford ("JB"), born June 7, 2011, and 11 year-old, Jameson Aedan Axford ("Jameson"), born June 19, 2012 ("the children"). Pursuant to the parties' Separation Agreement, disputes about the children's school are to be determined by the Arbitrator.
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> [2] This is a high conflict case. The parties have a parenting coordinator, Jessica Braude; a full-time therapist for the children, Dr. Danielle Ruskin; and a therapist at Hillfield Strathallan College ("Hillfield"), Dr. Gina Ranger, who has been working with the children for years.
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> [3] The children have been attending Hillfield Strathallan College, a private school in Hamilton, for 7 years.
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> [4] In 2021, the father brought a motion to have the children change schools. This was denied by the Arbitrator in an Award dated June 4, 2021 ("June Award"). That Award allowed for either party to trigger a *de novo* review of the children's school placement after April 1, 2023.
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> [5] The father triggered a review in June 2023 and the parties engaged in arbitration on the issue of the children's school.
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> [6] In an Award dated August 28, 2023 ("August Award"), the Arbitrator decided that the children shall be enrolled in and attend Tuck School, located at 3365 Spruce Avenue, Burlington, Ontario commencing in September 2023.
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> . . . . . .
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> [10] The parties signed a Separation Agreement, which provides the Arbitrator with jurisdiction to deal with various issues. Those issues are set out in a Mediation/Arbitration Agreement. Both parties were represented by counsel when the agreements were executed and continue to be represented. Paragraphs 30 and 31 of the Arbitration Agreement set out the parties' appeal rights.
>
> [11] On September 5, 2023, following receipt of the August Award, the mother served a Notice of Appeal dated September 1, 2023, a Notice of Motion dated September 5, 2023, and an Affidavit dated September 1, 2023, by email on the father's counsel. The mother seeks an appeal of the August Award claiming that the Arbitrator committed an error of law, and/or fact, and/or mixed fact and law relating to the best interests of the children. Seven grounds for appear are identified in the Notice of Appeal.

THE LAW

4 Counsel agree on the legal test on this motion for further evidence, although they disagree as to whether the mother has met that test. In any event, the test on this motion is different from the tests applicable to the previous "stay" motion, or the future determination of the appeal itself.

5 A party in a family law appeal may bring a motion to admit further evidence. That motion may be brought on the appeal of a variety of proceedings, including the appeal of an arbitration decision. Rule 38(29) & (46) of the *Family Law Rules*; section 134(4)(b) of the *Courts of Justice Act*; *Murakami v. Murakami* 2021 ONSC 1393 (SCJ).

6 The general test for admitting fresh evidence was set out by the Supreme Court of Canada in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759. The **"***Palmer test"* evaluates the admissibility of fresh evidence under the following four criteria:

a. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
b. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

c. The evidence must be credible in the sense that it is reasonably capable of belief; and
d. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

7 In *Spadacini-Kelava v Kelava*, 2020 ONSC 3277 (SCJ) – a case in which both parents appealed an Arbitration Award regarding parenting and financial matters – Justice Kurz reviewed the law relating to fresh evidence.

> [69] In *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ON CA), [1994] O.J. No. 276 (Ont. C.A.), McKinlay J.A., writing for the Ontario Court of Appeal stated at para. 10:
>
> > One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections are valid and compelling. However, **in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted.**
> >
> > [Emphasis added]
>
> [70] While *Sengmueller* was a family law case, it did not deal with parenting. The evidentiary issue in that appeal was whether the court could rely on fresh evidence related to a post-trial drop in the value of property that was included in an equalization calculation.
>
> [71] In *Decaen v. Decaen*, 2013 ONCA 218, the Ontario Court of Appeal wrote that "[w]here child welfare is at stake, a more flexible approach to fresh evidence is appropriate." In admitting the fresh evidence, the court found it only necessary to find that it bears directly on the best interests of the children, and that it is reasonably capable of belief (having been provided by the Office of the Children's Lawyer (the "OCL")).
>
> [72] The *Decaen* approach was approved by Weiler J.A., writing for the Ontario Court of Appeal in *H.E. v. M.M.*, 2015 ONCA 813. She added at para. 71:
>
> > Flexibility in such matters is consistent with the need for up-to-date information on children, whose fate often hinges on a determination by judges, and is thus in line with the overarching criterion for admission, namely, the interests of justice.
>
> [73] That being said, the proposed fresh evidence must still adhere to the Palmer test, and in particular it must be credible and *reasonably capable of belief (para. 72). In admitting some of the evidence offered to the court*, Weiler J.A. explained:
>
> > **75** In light of this court's discretion to admit fresh evidence and the [*Children's Law Reform Act*'s] purpose of ensuring that custody applications are determined based on the best interests of the child, it is in the interests of justice to admit the evidence.
>
> [74] In *Ojeikere* v. *Ojeikere,* 2018 ONCA 372 the Ontario Court of Appeal considered the admission of fresh evidence in an interjurisdictional case raising issues not entirely dissimilar to the key parenting issue in this appeal, whether the children should be returned to their original domicile. The court in *Ojeikere* had to determine whether an Ontario custody proceeding should be stayed in favour of a Nigerian one. The parents were Nigerian, but their children were

Canadian. The children had lived for five years with their mother in Nigeria, where their father had moved. The mother then returned them to Ontario without the father's consent. The Ontario court had to consider whether it could assume jurisdiction over the children's custody under s. 23 of the *Children's Law Reform Act*. That provision allows an Ontario court to assume jurisdiction in a custody case if a child would suffer "serious harm" if the child[69]. In *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ON CA), [1994] O.J. No. 276 (Ont. C.A.), McKinlay J.A., writing for the Ontario Court of Appeal stated at para. 10:

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[75] The court in *Ojeikere* considered the test for the admission of fresh evidence found in both *Palmer* and *Sengmueller.* Laskin J.A. writing for the majority, stated that the two tests are not materially different. However, the test in *Sengmueller* was "… perhaps more demanding", although that difference was irrelevant to the case before him.

[76] More germane to this case, Laskin J.A. found at para. 47 that "…both tests are applied more flexibly in custody or child welfare cases to allow the court to have up to date information about a child and the child's best interests."

[77] Applying the test in *Sengmueller*, Laskin J.A. wrote at para. 48 that fresh evidence is admissible in a parenting case if the moving party can prove that the proposed fresh evidence:

- Is credible;
- Could not have been obtained by reasonable diligence before trial or motion; and
- Would likely be conclusive of an issue on the appeal.

[78] That being said, Laskin J.A. signalled that when the fresh evidence related to the best interests of children and in particular, potential harm to them, the *Sengmueller* test would not be applied as rigorously as in other cases. The fresh evidence issue in *Ojeikere* was whether to admit the evidence of an OCL clinician. The clinician's affidavit concerned her interviews with the children and parents and attached the children's school records. The clinician's most relevant evidence "…set out the children's wishes, their feelings about their parents, and their objections to returning to Nigeria." (para. 43)

[79] Laskin J.A. admitted the evidence even though he found that it failed to meet the "due diligence" portion of the test. He wrote at para. 49:

> But I would not rely on any failure to meet the diligence requirement to preclude the admission of the fresh evidence. This court needs the evidence filed by the OCL to properly assess "serious harm". Finally, in my opinion, the evidence is likely conclusive of the principal issue on this appeal: would the children suffer serious harm if required to return to Nigeria?

Laskin J.A. added in the following paragraph that the fresh evidence "is critically important."

[80] In his concurring opinion, Miller J.A. took no objection to the introduction of fresh evidence. However he took a somewhat different view of some aspects of the children's views and preferences, which had been presented to the court through the fresh evidence.

[81] From all of this, I conclude that the more the proposed fresh evidence relates to the children's best interests and any risk of their harm, the less rigorously, the *Palmer* or *Sengmueller* test will be applied to the proposed fresh evidence.

8 In *Barendregt v. Grebliunas*, 2022 SCC 22 the Supreme Court recently provided additional and broad guidance on the issue.

[3] In my view, the test in *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, applies whenever a party seeks to adduce additional evidence on appeal for the purpose of reviewing the decision below, regardless of whether the evidence relates to facts that occurred before or after trial. Appellate courts must apply the *Palmer* criteria to determine whether finality and order in the administration of justice must yield in service of a just outcome. The overarching consideration is the interests of justice, regardless of when the evidence, or fact, came into existence.

[4] In cases where the best interests of the child are the primary concern, the *Palmer* test is sufficiently flexible to recognize that it may be in the interests of justice for a court to have more context before rendering decisions that could profoundly alter the course of a child's life. At the same time, finality and order are critically important in family proceedings, and factual developments that occur subsequent to trial are usually better addressed through variation procedures.

. . . . .

[29] Appellate courts have the discretion to admit additional evidence to supplement the record on appeal: *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, 1994 CanLII 83 (SCC), [1994] 2 S.C.R. 165, at p. 188; *United States of America v. Shulman*, 2001 SCC 21, [2001] 1 S.C.R. 616, at para. 43. Whether in criminal or non-criminal matters (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 107), courts have typically applied the four criteria set out by this Court in *Palmer* when parties seek to adduce evidence on appeal:

> (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);
> (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
> (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
> (iv) the evidence is such that, if believed, it could have affected the result at trial.

[30] *Palmer* applies when evidence is adduced on appeal "for the purpose of asking the court to review the proceedings in the court below": *Shulman*, at para. 44. *Palmer* does not, however, apply to evidence going to the validity of the trial process itself (*R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307, at paras. 76-77), nor to evidence adduced "as a basis for requesting an original remedy in the Court of Appeal", such as a stay of proceedings for an abuse of process (*Shulman*, at paras. 44-46).

[31] The *Palmer* test is purposive, fact-specific, and driven by an overarching concern for the interests of justice. It ensures that the admission of additional evidence on appeal will be rare, such that the matters in issue between the parties should "narrow rather than expand as [a] case proceeds up the appellate ladder": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44, at para. 10.

[32] The test strikes a balance between two foundational principles: (i) finality and order in the justice system, and (ii) reaching a just result in the context of the proceedings. The first criterion seeks to preserve finality and order by excluding evidence that could have been considered by the court at first instance, had the party exercised due diligence. This protects certainty in the judicial process and fairness to the other party. The remaining criteria — that the evidence be

relevant, credible and could have affected the outcome — are concerned with reaching a just result.

[33] While the interest in the finality of a trial decision and order in the justice system must sometimes give way to reach a just result, as I will explain, a proper application of *Palmer* reflects and safeguards both principles, as well as fairness to the parties.

. . . . .

[65] I turn now to an underlying question raised by this appeal: the flexible application of *Palmer* in cases involving the best interests of the child.

[66] This Court has explained that these cases may require a more flexible application of the fourth *Palmer* criterion: *Catholic Children's Aid Society*, at p. 188. The Court recognized that the best interests analysis — which takes into account a broad range of considerations, including the needs, means, condition and other circumstances unique to the child before the court — widens the scope of evidence that could affect the result. This criterion, however, remains a condition precedent for the admission of evidence in family appeals. But the flexible approach to the fourth criterion is not the only aspect of *Palmer* that warrants further discussion in the family law context. Two other aspects include (i) the exceptional circumstances where a failure to meet due diligence is not fatal; and (ii) the existence of variation schemes that address factual developments that postdate trial. I address each in turn.

(a) *A Failure to Meet Due Diligence Is Not Fatal in Exceptional Circumstances*

[67] First, given both the premium placed on certainty in cases involving children and the importance of having accurate and up-to-date information when a child's future hangs in the balance (*Catholic Children's Aid Society*, at p. 188), evidence that does not meet the due diligence criterion may nonetheless be admitted in exceptional circumstances. Let me explain. Finality and order — in both their individual and systemic dimensions — are *particularly* important in cases involving the best interests of the child: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 13. Children should be afforded the comfort of knowing, with some degree of certainty, where they will live and with whom. And unfortunately, an appeal only prolongs the cloud of uncertainty and the hardship and stress a child must endure.

[68] Protracted litigation also places additional strain on the parties' resources. In the context of a spousal separation, families who resort to the adversarial process are often in crisis, with two households now in need of support. As this Court recognized in *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, family litigants, particularly women, are often already shouldering the economic consequences of a marital breakdown. Some will be unable to afford the financial and emotional cost of court proceedings at first instance, let alone the strain of relitigating the facts on appeal. Needlessly prolonging this adversarial process does little to assist parties who must find a way to restructure their relationships and cooperate for the sake of their children.

[69] Certainty in a trial outcome can ensure an end to a period of immense turmoil, strife, and costs; parties should do what they can to promote it. Evidence that does not satisfy the due diligence criterion should therefore generally not be admitted, even on an appeal of a best-interests-of-the-child determination.

[70] That said, an absence of due diligence may in rare instances be superseded by the interests of justice: see *Children's Aid Society of Halton (Region) v. A. (K.L.)* (2006), 2006 CanLII 33538 (ON CA), 32 R.F.L. (6th) 7 (Ont.

C.A.), at para. 56. There may be exceptional cases involving a child's best interests where the need for finality and order may need to yield in the interests of justice. The intervener the Office of the Children's Lawyer provides one such example: in urgent matters requiring an immediate decision — a pressing medical or other issue bearing on the child's best interests — it may not serve the interests of justice to require a party to show due diligence and further prolong or delay proceedings.

[71] In other cases, admitting the additional evidence may not offend the principle of finality at all, despite the failure to meet the due diligence criterion. For instance, where the appellate court has already identified a material error in the trial judgment below, evidence that may help determine an appropriate order — whether to show the need for a new trial, support a substitute order, or otherwise — may exceptionally warrant admission: *Children's Aid Society of Halton (Region)*, at paras. 27 and 52-56; *Children's Aid Society of Toronto v. P. (D.)* (2005), 2005 CanLII 34560 (ON CA), 19 R.F.L. (6th) 267 (Ont. C.A.), at paras. 8-9. This may promote timely justice, consistent with a child's need to have their future determined with due dispatch: C. Leach, E. McCarty and M. Cheung, "Further Evidence in Child Protection Appeals in Ontario" (2012), 31 *C.F.L.Q.* 177.

[72] To be clear, such exceptional circumstances do not dispense with the other *Palmer* criteria — the evidence still must be relevant, credible, and have some material bearing on the outcome. Similarly, the best interests of the child cannot be routinely leveraged to ignore the due diligence criterion and admit additional evidence on appeal. An appeal is not the continuation of a trial. Rather, the party must satisfy the judge that the interest of finality and order is clearly outweighed by the need to reach a just result in the context of the proceedings. In such circumstances, the interests of justice may demand additional evidence to be admitted on appeal.

(b) *The Existence of Variation Schemes That Address Factual Developments That Postdate Trial in Parenting Cases*

[73] Turning to the second feature that arises in the family law context, the admission of post-trial evidence on appeal may be unnecessary because, unlike decisions that award damages in one final order, litigation about ongoing parenting arrangements remains subject to court oversight. Specifically, variation schemes permit a judge of first instance to vary a parenting order where a change of circumstances justifies a review of a child's best interests. As I will explain, the admission of post-trial evidence on appeal unnecessarily undercuts both finality and order in family law judgments, as well as Parliament's statutory design.

[74] Because variation procedures are available in parenting cases to address changes arising post-trial, the interest in reaching a just result can be fostered through other means. The admission of post-trial evidence on appeal therefore unnecessarily undermines finality and order in family law decisions.

[75] Moreover, courts must be wary of permitting parties to use the *Palmer* framework to circumvent legislative schemes that provide specific procedures for review. An appeal cannot serve as an indirect route of varying the original parenting order. A variation application and an appeal are distinct proceedings based on fundamentally different premises.

[76] In a variation proceeding, "[t]he court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision": *Gordon*, at para. 11. The applicant bears the burden of proving that a child's best interests differ from those determined in the original decision because the circumstances on which that decision was based have materially changed since trial. Once an applicant discharges this burden, the assessment is prospective: a variation judge must enter into a fresh inquiry to determine where the best interests of the child lie, considering the findings of fact of the judge who made the previous order, together with the evidence of new circumstances (*Gordon*, at para. 17). Finality in this context respects the trial judge's

> original determination of the child's best interests: *Gordon*, at para. 17; *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at p. 688, per Sopinka J.
> [77] An appeal, in contrast, is designed to determine whether there is an error in the trial decision. In other words, the correctness of the previous decision — and not the implications of subsequent events — is the focal point in an appeal. This assessment is inherently retrospective, with the review typically circumscribed within the four corners of the judgment below. Here, finality in the original decision is preserved unless the court identifies a material error.
> [78] It is essential that variation procedures and appeals remain distinct in the family law context: holding otherwise would unfairly require the opposing party to defend the original order — absent a material error — in the wrong forum, with appellate judges effectively performing the work assigned to first instance judges in variation procedures. This would displace the corrective function of appellate courts and allow litigants to circumvent Parliament's variation scheme.
> [79] Litigants must not be permitted to game the system in this way: an appeal is not an opportunity to avoid the evidentiary burden in a variation proceeding; nor is it an opportunity to seek a fresh determination, after remedying gaps in a trial strategy with the assistance of the trial judge's "preliminary" reasons. Such a tactical approach in family cases will often be at the expense of the children.
> [80] Consequently, in an appeal of a parenting order, courts should consider whether a variation application would be more appropriate in the circumstances. Where an application for additional evidence amounts to what is "in substance a disguised application to vary" (*Riel*, at para. 20), a court may refuse to admit additional evidence without considering the *Palmer* criteria.

APPEAL GROUNDS

9 The mother's Amended Notice of Appeal seeks to set aside the Final Award of the Arbitrator and have the children return to Hillfield Strathallan College immediately – or in the alternative that the matter be remitted for a fresh hearing before a new Arbitrator. I will list her grounds for appeal as she submits that many of them relate to some of the fresh evidence the mother seeks to adduce.

1. The Arbitrator committed an error of law, and/or fact, and/or mixed fact and law relating to the best interests of the children, as follows:

    a. The Arbitrator failed to obtain and consider evidence, and did not give reasons as to why he did not obtain and consider the evidence from the children's therapist, Dr. Danielle Ruskin, in the face of evidence from the Applicant that Dr. Ruskin did not feel it was in the children's best interests to change schools at this time and in the face of evidence from the Applicant that Dr. Ruskin was working with the children to address issues between the children and the Respondent.
    b. The Arbitrator failed to obtain and consider evidence, and did not give reasons as to why he did not consider or obtain evidence from the Parenting Co-ordinator, Jessica Braude, in the face of evidence from the Applicant that Jessica Braude did not feel it was in the children's best interest to change schools at this time.
    c. The Arbitrator failed to consider the children maintaining a therapeutic relationship with Dr. Ranger, which would be terminated by a change of school to John T. Tuck Public School as there is no therapist offered there, and/or failed to give meaningful reasons as to his consideration of this factor and the weight attached to this factor.
    d. The Arbitrator failed to consider the significance of the children's relationship with their peers at their current school, and connection to the Hamilton community, or how those would be impacted by a

change of school, and/or failed to give meaningful reasons as to his consideration of these factors and the weight attached to these factors.

e. The Arbitrator failed to consider the significance of Jameson's (specific needs).
f. The Arbitrator failed to give due weight to JB's need for stability and the support/accommodation JB. was receiving in this respect from Hillfield Strathallan College, and/or failed to give meaningful reasons as to his consideration of these factors and the weight attached to these factors.
g. The Arbitrator erred in accepting the Respondent's evidence that JB's Independent Learning Plan could be directly implemented by John T. Tuck with all of the supports available to JB at HS.C. without independent evidence from the school that this was possible.
h. The Arbitrator failed to consider the impact on the children's relationship with the Respondent by a change of school, and/or failed to give reasons as to his consideration of this factor and the relevance and weight attached to this factor.
i. The Arbitrator placed undue weight on the significance of the children's absences, and/or misapprehended as a matter of fact the reason for the absences, and failed to consider the impact a change of school would have on the children's attendance, and/or failed to give reasons as to this factor and the relevance and weight attached to this factor.
j. The Arbitrator failed to give due weight to the children's views and preferences that they wished to remain at Hillfield Strathallan College.
k. The Arbitrator failed to consider the children's final report cards and made an error of fact in determining that the children were not doing well academically and/or progressing academically, and/or failed to give reasons as to why he did not consider the final report cards and the relevance and weight to be attached to this evidence.
l. The Arbitrator failed to consider the children's progress with conduct at their current school and made an error in fact by determining that the children were continuing to experience difficulties with peers and teachers and/or ignored evidence relating to the resolution of peer and teacher conflict and/or failed to give meaningful reasons as to why this evidence was not considered and the relevance and weight to be attached to this evidence. This in turn meant the Arbitrator failed to consider the impact to the children's academic progress if they were to change schools.
m. The Arbitrator failed to give due consideration to the stability that Hillfield Strathallan College offers to the children, and Hillfield Strathallan School is the only school the child, Jameson, has ever attended, and the child, JB, attended from Senior Kindergarten.
n. The Arbitrator failed to give sufficient reasons as to why the other factors the Arbitrator considered. including the section 7 analysis, trumped the primary factor of stability for the children in remaining at Hillfield Strathallan College and the best interests analysis.

2. The Arbitrator erred in law in allowing financial considerations to prevail over the best interests of the children
3. The Arbitrator erred in law in allowing concerns over the financial circumstances of one party (unproven by credible evidence) to trump legitimate best interests concerns.
4. The Arbitrator committed an error of law and/or mixed fact and law by putting the onus only on the Appellant to demonstrate that the children's best interests were

met by them continuing to attend Hillfield Strathallan College, and failing to place any onus on the Respondent to show why a change of schools. was in their best interests.

5. The Arbitrator committed an error of law and/or mixed fact and law by placing undue emphasis on the Applicant's plan for the children's education and her capacity and commitment to carry out the plan, and the Arbitrator committed an error in law and/or mixed fact and law by failing to consider or give sufficient reasons relating to the Respondent's plan for the children's education or his capacity and commitment to carry out the plan, nor did the Arbitrator consider and/or give meaningful reasons concerning both parents who have joint decision making, and the need for both parents to be able to carry out and commit to either education plan proposed by either parent regardless of where the children attend school.
6. The Arbitrator committed an error of fact and/or misapprehended the evidence relating to the extent of the Applicant's involvement with the children's schooling, and failed to consider that the Applicant has a Masters Degree in Education.
7. The Arbitrator committed an error of law and/or mixed fact and law by considering and/or placing undue emphasis on the Applicant's personal relationships and personal decisions, which were irrelevant to the decision on the choice of school.
8. The Arbitrator committed an error of law by failing to ensure procedural fairness, by:

    a. Accepting the Respondent's Financial Statement dated June 26, 2023 as reply evidence contrary to the *Family Law Rules*, without providing leave and/or reasons in the face of objections from counsel. for the Appellant.
    b. Accepting the Respondent's Financial Statement dated June 26, 2023 without the Respondent providing his tax returns or notices of assessment for the last three years, contrary to the *Family Law Rules*, without leave and/or reasons in the face of objections from counsel for the Appellant.
    c. Failing to adjourn the motion for a short period and directing both parties to produce financial statements with tax returns and notices of assessment, as required by the *Family Law Rules* in the face of objections from counsel for the Appellant.
    d. Accepting hearsay evidence without reasons in the face of objections from counsel for the. Appellant.
    e. Allowed and relied on improper Reply evidence submitted by the Respondent, and failed to give reasons as to why the Reply evidence was admissible, in the face of objections from counsel for the. Appellant.

9. The Arbitrator committed an error of law by failing to make an adverse inference against the Respondent for the Respondent's failure to properly place his financial circumstances and income before the Arbitrator, or the Arbitrator failed to give any meaningful reasons as to why the Arbitrator did not make such an adverse inference when invited by the Appellant to do so.
10. The Arbitrator committed an error of law in failing to treat the parties fairly by making an adverse. inference against the Appellant and not the Respondent, and by placing too much focus on the Appellant's inability to carry out an education plan without discussion of the Respondent's ability to do the. Same.
11. The Arbitrator committed an error of law by taking "judicial notice" of the rate of return on investments to determine the Respondent's income, to make a finding that no income should be imputed to the Respondent, or that it would be difficult for him as a retired athlete to work, when the Respondent had not filed his tax

returns for the previous 2 years or provided sufficient evidence as to his efforts to secure employment.

12. The Arbitrator committed an error in law by applying the *Children's Law Reform Act* instead of the *Divorce Act.*

CURRENT MOTIONS

10 The mother's November 20, 2023 motion (now before me) seeks the following relief:

1. An order that the following fresh evidence be obtained and permitted in support of the Appellant's appeal of the Arbitrator's Award dated August 28, 2023:
    a. Evidence from Jessica Braude (Parenting Coordinator) that the Arbitrator refused to accept;
    b. Evidence from Dr. Danielle Ruskin (children's therapist) that the Arbitrator refused to accept;
    c. Updated Views and Preferences of the Children Report to be conducted by Dr. Rachel Birnbaum;
    d. The Respondent's refusal to sign documentation for therapy to continue for the children with Dr. Danielle Ruskin;
    e. The Respondent's refusal to sign the parenting coordinator agreement for Jessica Braude in order for Ms. Braude to continue her role as parenting coordinator;
    f. Police Report from incident on September 6, 2023;
    g. The Children's Aid Society Records from the incident dated September 6, 2023 and follow up of the case worker; and
    h. The Children's Progress at John T. Tuck Public School.
2. An order that the Respondent execute the necessary documentation for the release of the unredacted police reports with respect to the incident on September 6, 2023 (attached at Schedule 'A').
3. An order that the Respondent execute the authorization and direction to the Children's Aid Society for the release of the unredacted records with respect to the parties and the children of the marriage from the incident on September 6, 2023 (attached at Schedule 'B').
4. An order for costs of this motion on a full recovery basis.
5. Such further and other relief as this Honourable Court deems just.

11 The mother filed two affidavits in support of her motion.

12 The father filed one affidavit in response, and also in support of his cross-motion dated December 4, 2023 in which he requested:

1. An Order dismissing the Appellant's motion to adduce fresh evidence on the appeal.
2. In the alternative to paragraph 1, an Order that if the Appellant Nicole Axford's motion to adduce fresh evidence is granted, the children's report cards from John T. Tuck Public School, dated November 13, 2023, be obtained, and appear as fresh evidence before the judge hearing the Appellant's Appeal of the Arbitrator's Award, dated August 28, 2023.
3. An Order that the Appellant Nicole Axford be prevented from bringing additional motions before the Appeal of the Arbitrator's Award, dated August 28, 2023, without leave of the court pursuant to Rule 37.16 of the *D*.
4. An Order requiring Ms. Nicole Axford to pay Mr. John Axford's costs of this motion on a full recovery basis.

5. Such further and other relief as Mr. John Axford may request and this Honourable Court deems just.

13 As well, both parties filed factums and case law.

PARTIAL CONSENT

14 At the commencement of the hearing of the motion the parties presented a Consent dealing with some of the claims raised in their respective motions:

1. No later than Friday December 15, 2023 at 4:00 p.m., the Applicant and Respondent shall execute a Direction to the Halton Children's Aid Society (attached at Schedule 'A') for the immediate release of any and all unredacted records pertaining to the Halton Children's Aid Society investigation arising out of the occurrence at John T. Tuck Public School on September 6, 2023.
2. No later than Friday December 15, 2023 at 4:00 p.m., the Applicant and Respondent shall execute a Direction to the Halton Regional Police Service (attached at Schedule 'B') for the immediate release of any and all unredacted records pertaining to the Halton Regional Police Service investigation arising out of the occurrence at John T. Tuck Public School on September 6, 2023.
3. Subject to the ultimate discretion of the Court, both parties consent that the Children's Aid Society records in paragraph 1 above and the Halton Regional Police Records in paragraph 2 above shall form apart of the Appeal Record.
4. Subject to the ultimate discretion of the Court, both parties consent that the children's report cards from John T. Tuck Public School dated November 13, 2023 shall form apart of the Appeal Record.
5. The parties shall sign any further and other documentation as may be required by the Children's Aid Society or the Halton Regional Police Service to effect the terms of this consent.

15 So at that point the parties were in agreement that *some* fresh evidence should be presented to the judge dealing with the appeal.

16 The most contentious – and vigorously debated – issue relates to the mother's request to present fresh evidence from Jessica Braude (the parenting co-ordinator) and Dr. Danielle Ruskin (the children's therapist) – and secondarily, the mother's request for an updated Voice of the Child report from Dr. Rachel Birnbaum.

DR. DANIELLE RUSKIN & JESSICA BRAUDE

17 The mother's requests for evidence from Braude & Ruskin are related, and form what is arguably a fundamental aspect of her appeal. I will briefly summarize her position as to the relevant history and dynamics.

18 Jessica Braude has been actively involved as parenting coordinator since she was retained by the parties in March 2022. She is a family law lawyer, accredited family law mediator, and family law arbitrator at JJ Integrative Family Law. The Parenting Co-ordination Agreement signed by the parties gives Braude the discretion and authorization to communicate directly with the Arbitrator.

19 Dr. Daniele Ruskin is a registered Clinical and Health Psychologist. Since May 2022, by agreement between the parties, Dr. Ruskin has been actively involved in a therapeutic capacity with the children. Dr. Ruskin also maintained ongoing contact with Hillfield Strathallan and the school counsellor Dr. Gina Ranger. Ranger has been actively involved with the children.

20 Braude and Ruskin work together, and they both have extensive familiarity with the children, including some significant emotional and personal issues the children have each experienced, and the impact which the conflict between the parents has had on the children.

2023 SCHOOL ISSUE

21 The father had previously – unsuccessfully – made this same proposal about the children switching from Hillfield Strathallan to John T. Tuck Public school in 2021. The same Arbitrator dismissed that request. His reasons at the time included the children's need for stability and their views. But the resulting June 4, 2021 award provided that the father could return the issue after April 1, 2023, for a de novo determination.

22 On June 12, 2023, the father brought a motion before the Arbitrator triggering the review of where the children are to attend school and requesting that the children be enrolled in and attend at John T. Tuck Public School commencing in September 2023.

23 On June 21, 2023 the mother brought a cross motion which included requests for the following:

1. An Award that the views and preferences of the children of the marriage ... be heard by way of one of the following methods:

    a. A report from Danielle Ruskin;
    b. The children speak directly to the Arbitrator;
    c. A voice of the child report by Ian DeGeer; or
    d. The Arbitrator speak directly and privately with Jessica Braude and Dr. Danielle Ruskin.

2. An Award that the children be represented by independent counsel, Sam Misheal or Geoffrey Carpenter.
3. An Award that any of the above professionals shall be retained equally by the mother and father.
4. An Award that the children of the marriage shall continue to attend Hillfield Strathallan College until they respectively complete their secondary education.
5. An Award that the costs of the children attending Hillfield Strathallan College be shared on an equal 50/50% basis.

24 The father opposed any mechanism to ascertain the children's views and preferences, on the basis that those views had been influenced and manipulated by the mother.

25 The Arbitrator's written ruling in relation to Ruskin and Braude included the following:

> 24. As a general comment, it is important to note that both parents, in this case, are represented by very experienced and knowledgeable family law lawyers and, as such, what I require as a decision maker is not more lawyers repeating arguments made by one side or the other. What is missing in the record before me is information, directly or indirectly, that tells me how these children are experiencing their life and how that experience might impact on the particular issue in question, that being which school they should be attending this fall.
> 25. There are circumstances where appointing counsel to speak on behalf of the child is an appropriate and essential ingredient of hearing the views and preferences of a child, but I have concluded that this is not one of those cases.
> 26. The children have been seeing Dr. Danielle Ruskin as their therapist and Jessica Braude as the parenting coordinator. There is a consensus, it seems, between counsel that the children have a good relationship with both these professionals and that they have been instrumental in assisting the parents in getting over disagreements when they have arisen from time to time.
> 27. Ideally, Dr. Ruskin, as the children's therapist should be providing to JB and Jameson a place of refuge where they can discuss their life concerns and views without fear that they are going to be repeated to their parents. Similarly, the children's involvement with Jessica Braude is based on a confidential relationship as spelled out in the PC Agreement. 28. A holistic analysis of these children's lives and their needs lead me to conclude that it is vitally important to preserve the relationship between the children and their therapist and the parenting coordinator.

> Given the intense level of animosity and conflict between the parents, it would be foolish to involve Dr. Ruskin or Ms. Braude into the decision making process on this motion. It is imperative that the relationship between these children and the professionals not be tampered with and thereby ensuring that they cannot be perceived by either parent as having taken a side in the decision making process and jeopardize their effectiveness.

26 The mother submits that this is a vital component of her appeal:

a. The Arbitrator confirmed that to determine the issues he required "information...that tells me how these children are experiencing their life and how that experience might impact on the particular issue in question..."
b. The Arbitrator acknowledged that Ruskin and Braude were each likely to have precisely that sort of "information...that tells me how these children are experiencing their life and how that experience might impact on the particular issue in question..."
c. Having identified that Ruskin and Braude each likely had information very relevant to the best interests analysis he was required to undertake, the Arbitrator then unilaterally made the decision not to allow either of them to present potentially determinative evidence.
d. The mother submits the Arbitrator's rationale for rejecting this critical evidence from two witnesses was entirely speculative and without any evidentiary basis. At paragraph 32 of his written ruling on the issue the Arbitrator stated:

> (a) Even though communication between Dr. Danielle Ruskin and the arbitrator might be allowable by the Parenting Plan, converting that communication into evidence on which a decision can be made can jeopardize the sanctity of the therapist/client relationship that Dr. Ruskin has with JB and Jameson. As already indicated, I do not want to jeopardize the positive relationship that now exists and for that reason I decline to consider this option.

e. The mother submits that the Arbitrator's blanket rejection of vitally important information was premature and arbitrary. He presumed that involving Ruskin and Braude "*can* jeopardize the sanctity of the therapist/client relationship" (emphasis added), but he invited or conducted no inquiry as to whether that potential concern was actually relevant (or determinative) with respect to these two professionals and their involvement with these two children.
f. The Arbitrator presumed Ruskin and Braude would be reluctant to provide evidence or information, but he made no effort to determine if that presumption was correct. He didn't ask.
g. The Arbitrator made no effort (and allowed no opportunity) to determine whether *some* important information might be obtained from Ruskin and/or Braude, without jeopardizing or undermining the work they were doing with the children.
h. Indeed, the Arbitrator presumptively foreclosed the possibility that one or both of these professionals might actually want to participate in the determination of the school issue which was weighing heavily on the minds of these two young boys. They might have wanted to come forward to prevent a harmful result for the children, because they knew how upset the children were about the prospect of changing school.
i. The mother submits that rather than off-handedly dismissing the availability of professional evidence, the Arbitrator should have conducted a careful and sensitive inquiry to determine the quality and nature of the potential professional evidence, and to ascertain the views and recommendations of Ruskin and Braude as to whether their participation in the Arbitration process would have positive or negative implications for the children. *Rather than presume, he should have*

asked. The professionals should have been given an opportunity to weigh in on the issue.

j. Related to this, while the Arbitrator expressed a desire to preserve the children's important therapeutic relationships, the mother submits he failed to address the impact of the children losing a similarly vital therapeutic relationship with Dr. Ginger Ranger, the school therapist at Hillfield Strathallan. Ruskin and Ranger communicated with one another on an ongoing basis, concerning the children. Had she been given the opportunity, Ruskin could have at least commented on the impact on the children if leaving Hillfield Strathallan would result in their severing a long-standing and beneficial therapeutic relationship with Ranger.

k. The mother submits the Arbitrator also made presumptions about how Dr. Ruskin should respond to the decision to change school, without making any effort elicit the psychologist's views or recommendations as to how the situation should be handled. In his Final Award, the Arbitrator stated,

> "I appreciate the fact that the children are at the pre-teen age and stage of development that can be confusing during this time of social and emotional growth. A decision relating to school is one that directly and significantly affects the student… It is important for the parents to receive direction from the children's therapist Dr. Danielle Ruskin for them to present a common front and acknowledge the children's feelings. Of course, it is also vital that Dr. Ruskin meet with JB and Jameson to discuss the results of this decision and the adult decision-making process."

L Finally, the mother submits that if the Arbitrator's rejection of relevant evidence was intended to preserve ongoing and beneficial professional relationships involving the children, the Arbitrator failed in his final ruling to include any provision which would preserve those therapeutic relationships. The children last saw Dr. Ruskin on September 12, 2023. The mother wants Ruskin to continue her work, but she says the father won't agree. Similarly, the mother says after the father succeeded in changing the children's school, he delayed renewing the parenting co-ordination agreement for several months, and he has now only extended it until February 1, 2024 (right after the appeal is heard).

27 Beyond those general concerns, the mother also submits there is a very specific reason why Dr. Ruskin's evidence should have been heard – and still needs to be received.

a. In his written decision, the Arbitrator made certain factual findings about the children's school attendance and related problems. The Arbitrator attributed those problems to the mother's inappropriate behaviour and inability to effectively parent. This formed the basis of key factual and credibility determinations adverse to the mother.

b. However, the mother says Dr. Ruskin was actively involved in relation to those problems. Dr. Ruskin can confirm that the children's behaviours and school attendance problems were caused by the *father* – not the *mother*.

c. The mother submits that this misapprehension of the evidence was caused by the Arbitrator's refusal to utilize readily available evidence which would likely have had a significant impact on his analysis of each parent's position.

d. The mother submits her proposed fresh evidence from Dr. Ruskin will shed important light on the parties' respective parenting skills, and the actual experiences of the children.

28 The father submits that the proposed fresh evidence from Dr. Ruskin does not meet the first part of the Palmer Test.

a. The father says if the mother felt Dr. Ruskin had relevant evidence, she should have used due diligence to present that evidence during the Arbitration Hearing.
b. The mother says she tried. She brought a motion asking the Arbitrator to receive evidence from Ruskin. The Arbitrator rejected the request, without detailed reasons.
c. The father submits due diligence would have required the mother to take further action then – by appealing the Arbitrator's interim evidentiary ruling – rather than waiting until an appeal of the final Award.
d. The mother submits the Arbitrator's duty to fully investigate the best interests of the children was an ongoing obligation, and that once he received Dr. Birnbaum's report setting out the magnitude of the children's resistance to changing school, the Arbitrator should have re-visited the issue of whether information from Ruskin (and Braude) should have been considered.
e. I am satisfied that the mother made very specific efforts to present Dr. Ruskin's evidence to the Arbitrator. I am less convinced that the due diligence requirement would have required the mother to immediately appeal the Arbitrator's blanket rejection of the evidence of Ruskin and Braude. At that point the mother would not have been in a position to fully assess the extent to which the pending Voice of the Child Report from Dr. Birnbaum might have adequately outlined the children's concerns and emotional reactions.
f. In any event, as noted above, in *Ojeikere* the Court of Appeal stated that the due diligence criterion should not be rigidly applied if it would lead to a miscarriage of justice, and where the evidence is required in order for the court to properly determine the best interests of children.

29 I am satisfied that fresh evidence from Dr. Ruskin would satisfy the balance of the Palmer test:

a. There can be no doubt that the evidence would be relevant. Even the Arbitrator acknowledged the depth of Dr. Ruskin's involvement and insight with respect to the children, including all of the family conflict concerning the school issue.
b. Equally, there is no suggestion Dr. Ruskin's evidence would not be credible. The Arbitrator recommended (or presumed) she would continue her involvement after the children changed school.
c. I am satisfied that Dr. Ruskin's evidence, if accepted, could reasonably have affected the result, when taken with all of the other evidence.

30 Many of the mother's arguments in support of her request for fresh evidence from the parenting co-ordinator Jessica Braude are similar:

a. Ruskin and Braude worked together. Both have close relationships with the children.
b. The Arbitrator used the same rationale to reject evidence from either of them, without making any inquiry as to whether either professional had a view on the subject.
c. As with Ruskin, Braude likely has some relevant evidence.

31 On balance, however, I am not prepared to order fresh evidence in relation to Jessica Braude (without prejudice to the appeal judge or another judge revisiting the issue).

a. Braude's evidence does not so comfortably satisfy the due diligence part of the Palmer test. In Ruskin's case, the mother specifically brought a motion requesting that the Arbitrator consider receiving evidence from the psychologist. But the parenting co-ordinator's proposed involvement was a lesser alternate suggestion that the Arbitrator could meet privately with both Ruskin and Braude.
b. As well, Braude's professional role was different than Ruskin's, and the mother has not established that Braude's evidence would have the same sort of significance in terms of relevance and likely impact on the result.
c. Beyond that, since Ruskin and Braude worked closely together, Ruskin's evidence would largely cover the same information about the children.

DR. RACHEL BIRNBAUM

32 The mother's request for an updated Voice of the Child Report from Dr. Rachael Birnbaum raises some complex considerations, and heightens the need to distinguish an appeal from a variation proceeding, as cautioned in *Berendregt*.

33 A recap:

a. The mother has consistently stated that the children adamantly didn't want to change schools.
b. The father did not dispute those stated preferences. But he took the position that those expressed views should not be considered because they were the product of influence and manipulation by the mother.
c. Despite the father's objection, the Arbitrator assigned Dr. Rachel Birnbaum to conduct a Views of the Child Report.
d. Dr. Birnbaum issued a detailed written report which confirmed that both children expressed strong and consistent opposition to changing schools. They both very clearly wanted to remain at Hillfield Strathallan.
e. In his August 28, 2023 Award, the Arbitrator acknowledged the clarity of the children's desire to remain at Hillfield Strathallan. He concluded, however, that children's views and preferences were only one factor to be considered, and based on the totality of the evidence the children's desire not to change school was not a determinative factor. The Arbitrator ordered that the children change school, despite their opposition.
f. The mother now seeks an updated report, to provide current information as to the children's views and experiences.
g. The father submits such an update is inappropriate and irrelevant, because the children's stated preferences have already been deemed to be only one factor, and not determinative of the school issue. Beyond that, the father submits that an updated report about the children's post-award views is inconsistent with the function of an appeal, and that to the extent that any update about the children's current views might be relevant, it would be in the context of a variation proceeding.
h. The mother counters that the Arbitrator erred in presuming that a support network would remain in place for the children, while the Arbitration Award failed to include any mandatory provisions requiring this. The mother says the children have not only lost their support from Dr. Ginger Ranger (which was anticipated when they left Hillfield Strathallan), but they also lost their support from Dr. Ruskin (because the father has decided not to continue with her) and their support from Jessica Braude is tenuous, because the father allowed the parenting co-ordination agreement to lapse for several months

after the children changed schools -- and more recently he only extended the PC agreement to February 1, 2024.

i. The mother submits with all of these professional supports being stripped away from the children, it is vitally important that the judge hearing the appeal have comprehensive information available about the children's current circumstances. If her appeal is successful, she is asking the court to immediately transfer the children back to Hillfield Strathallan. An updated Voice of the Child Report could assist in ensuring that if more decisions about school are to be made, the process will be sensitive to the children's *current* situation.

j. The mother also submits that while the father argues that post-Arbitration-Award developments should not be considered in the appeal context, the father is the one who brought a cross-motion for the children's November 13, 2023 report cards to be presented as fresh evidence on the appeal. And as noted above, this was agreed to in the Consent the parties filed at the commencement of the motion hearing.

34 This is a difficult issue, but with all issues relating to children, their best interests must always be paramount.

a. I agree with the father that Voice of the Child Reports are not to be routinely updated as a matter of course. Even when they are initially considered, there must be a very specific purpose, and any potential information needs to be relevant to an issue which is properly before the court.

b. As well, there is the obvious concern that even before the first Voice of the Child Report was issued, the father took the position that the result was a foregone conclusion because of manipulation of the children by the mother. To the extent that this dynamic may be in play, the court must be alive to the danger that further similar inquiries of the children may repeat or compound any pressure they may perceive.

c. Also, to the extent that the Arbitrator has found the children's views and preferences – no matter their strength – are not a determinative factor, then there is a presumption that unless the appeal is successful, the weight which the Arbitrator assigned to views and preferences is deemed to be appropriate.

d. But at the same time, the evidence on the current motion before me is that the children have not only experienced the major changes intended by the

e. Arbitrator (changing school, losing Dr. Ginger Ranger); but they have also experienced the likely unintended consequence of losing Dr. Ruskin, and their support through Jessica Braude is tenuous because there is nothing in the Arbitration Award to compel the father to continue the parenting co-ordinator's services.

f. So the court must also be alive to the very real dynamic that the father now seeks to use the children's recent report cards as fresh evidence to presumably suggest that they're doing well – and in the absence of the professionals the children could previously turn to, there is little mechanism in place for the children's voices to be heard if they feel that they are not doing well.

35 As with all aspects of this motion for fresh evidence, it is important to mindful that my task is not to decide the merits of the appeal itself (and as set out above, I won't be the judge hearing the appeal). My task is to determine the motion and cross-motions brought by the parties on the issue of whether any additional evidence should be presented for consideration by the judge hearing the appeal.

36 I must be mindful that these two adolescents have complex histories and sensitivities which may raise an issue about their resilience to change or upheaval in their lives:

a. Eleven-year-old Jameson has suffered health issues because of a diamondback rattlesnake bite on the foot at age three, while the family resided in Arizona in 2015. Jameson has had over 20 surgeries because of the snake attack. Jameson suffers from PTSD, anxiety, panic attacks, and resulting trauma from the snake bite. On November 28, 2022, Jameson underwent extensive surgery at McMaster Children's Hospital for further corrections to the foot. Hillfield has recommended Jameson undergo a psychoeducational assessment (the mother says the father refused to consent).
b. Twelve-year-old JB suffers from anxiety and resulting trauma from witnessing Jameson's snake bite in 2015. JB has an Independent Learning Plan resulting from a psycho-educational assessment.
c. Both children have been through a lot, and undoubtedly the ongoing conflict between the parents has not helped.
d. In situations like this, the court has an obligation to take charge and encourage finality.

37 I make no presumption as to the eventual result of the appeal. But on a file which has already had far too much litigation, my obligation to the children includes a requirement that I anticipate some of the possible outcomes, to try to ensure that the appeal hearing itself – and any other proceedings which may result – are as efficient and productive as possible.

a. If the appeal is dismissed, an updated Voice of the Child Report may be of little utility (although it may give rise to a variation motion, because contentious issues don't seem to go away).
b. If the appeal is allowed, among the options, the court may send the matter back for a redetermination, or it may substitute an order based on the information available to the appellate court. As stated, if the appeal is successful, the mother will want the children returned to Hillfield Strathallan immediately.
c. This was a binary issue (change school or don't change school). If the appeal is allowed, some important and complex issues may have to be addressed in a very timely way. The fact that we are in the middle of the school year only makes things more complicated.
d. I have already determined that fresh evidence should be presented from Dr. Ruskin. But given the fact that her last involvement with the children was on September 12, 2023, that evidence is slightly dated.
e. As a result, given the seriousness of the issues; the magnitude of the children's previously identified views on the school issue; and the live issue on the appeal as to whether the children's views were adequately considered, I feel it is in the children's best interests to ensure that the appeal judge has up to date information as to their current situation.
f. The mother's counsel has advised that Dr. Birnbaum is available to do an updated Voice of the Child Report quickly, in time for the hearing of the appeal. While such interventions are always somewhat intrusive, I must balance the pros and cons of children being heard or not being heard. Given their ages, and their suddenly reduced support network, I feel it is safest to err on the side of making sure these children's views and experiences can be independently ascertained.

THE ORDER

38 On consent, order pursuant to the Consent filed on December 13, 2023.
39 Not on consent:

a. The Applicant shall be permitted to file fresh evidence by Dr. Danielle Ruskin, in the form of an affidavit or report presented as sworn evidence.
b. No later than Monday December 18, 2023 at 4:00 p.m., the Applicant and Respondent shall execute a direction to Dr. Ruskin authorizing her to prepare and release a statement explaining and summarizing her involvement and professional services in relation to the parents and the children JB and Jameson.
c. The Applicant's motion for fresh evidence from Jessica Braude is dismissed, without prejudice to a future court requesting or authorizing such evidence.
d. An updated Voice of the Child Report shall be prepared by Dr. Rachel Birnbaum.
e. Counsel shall attend on the previously scheduled Purge Court, January 2, 2024 at 9 a.m. (by Zoom) to address any scheduling issues relating to the filing of materials, or the scheduling of the hearing of the motion. On that return, counsel may also address any timelines or mechanism for the determination of any costs claims (costs will not be argued on that date).
f. If any issues need to be addressed prior to January 2, 2024, counsel may contact the court to arrange a teleconference with Justice Pazaratz.

Justice Alex Pazaratz

Date: December 15, 2023