

FAMLNWS 2024-35
Family Law Newsletters
September 16, 2024

— **Franks & Zalev - This Week in Family Law**

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- Your Struggles Do Not Define You: Mental Health, Mental Illness and Parenting Time

Your Struggles Do Not Define You: Mental Health, Mental Illness and Parenting Time

***Gerasimopoulos v. Sambirsky*, 2024 CarswellOnt 6693 (S.C.J.) — Kraft J.**

Issues: Ontario — Parenting — Impact of a Parent's Mental Health

We are not sure why mental illness has such a stigma attached to it — but it unquestionably and (often) unfairly does. It is probably because mental illness is so incredibly misunderstood; one cannot "see it" or "touch it" as one can a cast on an arm or a leg — and until really quite recently, it was something that was not openly discussed. Or, as noted below, it may be because with most mental illness, it is hard to understand that someone can be unwell when they are unwell but perfectly well when they are healthy.

What parenting schedule should a court order where a good, loving, and involved parent suffers from serious episodic mental health issues that may present significant risks for their two young children? That is the difficult issue Justice Kraft was forced to grapple with in this case.

The Father and Mother had two young children, aged nine and six at the time of trial. The Father was diagnosed with Bipolar 1 Affective Disorder (also known as manic depression). He had successfully managed his condition with medication throughout the marriage. He had a good job as an account executive and earned a six-figure income.

Things began to unravel in late 2019 when the Father lost his job. Then the pandemic hit. He found a new job but was collapsing under the stress of living and working at home with young children and in a marriage that was unraveling. He suffered a manic episode in May of 2020, and he was apprehended by the police and admitted to St. Joseph's Health Centre for nine days. The Mother left the home with the children and the marriage ended.

After the Father was released from hospital, the Mother brought an *ex parte* motion and was granted sole decision-making authority, a temporary restraining order, and a temporary order for primary residence with video/phone access with the children. At a Case Conference held just over a week later, the terms were varied to require the Mother to consult with the Father before making decisions regarding the children and to prevent the Father from coming within 250 meters of the Mother's parents' home where she was living with the children. The Father agreed to pay child support. At the return of the motion, the parties agreed that the Father would have parenting time three days each week, supervised by the Mother's brother, for a total of eight hours per week.

Over the course of the next several months, the Father's life stabilized. He followed his treatment plan, found new employment, and remained under the care of his psychiatrist, Dr. Duff. He moved out of the matrimonial home to live with his mother in Niagara Falls, commuting to Toronto three days each week for his supervised parenting time with the children. The Children's Aid Society, which had investigated safety concerns, closed its file citing no parenting concerns about him.

Despite the improvement in his health, his requests for additional parenting time were rejected by the Mother, and he successfully brought motions to gradually expand his parenting time. He had his first unsupervised overnight in September 2021 — 16 months after the 2020 episode. After the matrimonial home was sold and the Father moved back to Toronto, his overnight parenting time was expanded.

In November 2022, the parties attended parenting mediation. They agreed to a phased-in schedule (the "interim agreement"), with the children spending five out of 14 overnights with the Father in Phase 1, and six out of 14 overnights in Phase 2. Phase 3 involved returning to mediation to address the Father's request for an equal schedule. As a condition of his parenting time, the Father was to immediately, and every three months afterwards, provide the Mother with a letter from Dr. Duff confirming that the Father was taking his medication, and refrain from smoking, consuming cannabis or other drugs or drinking (the Father historically suffered from alcohol use disorder but had been sober since 2019).

And so it went. Things were going well for the Father and the children. The children were spending five out of 14 overnights with him, unsupervised.

Then the Father experienced a second manic episode in June 2023 when the children were with him. Unfortunately, they witnessed it. His Father (the paternal grandfather) contacted the police to perform a wellness check after the Father canceled a planned visit with the children. When the police attended at the home, the Father would not let them enter, and the police had to break down the door, in front of the children. The Father had also prepared a last will and testament and had his son (then eight-years-old) witness his signature. The Mother testified that the children reported to her that they thought they were "going to die". The older child reported to the OCL, which prepared a Voice of the Child Report, that he was "scared at the time because he thought his father would be going to jail", that he just wanted to "feel safe" with his father, and that if he felt unsafe, he could call his grandfather who would probably tell him to give his father medication to help him feel better.

After the second manic episode, the Father's in-person parenting time was suspended on consent. He continued having Facetime and phone contact with the children, but he did not have in-person contact with the children for months. The Mother then only agreed to limited parenting time supervised by her father. The Father brought another motion to expand his parenting time and the list of approved supervisors. He was granted parenting time on alternating Saturdays and Sundays from 11 a.m. to 4 p.m., and Wednesdays after school from 3:30 p.m. until 8 p.m., supervised by his father or by a professional supervisor.

The parties then attended a five-day trial before Justice Kraft in April 2024.

At the trial, the Father sought a graduated schedule in accordance with their interim agreement. As part of his plan of care, he included a detailed six-part safety plan designed by Dr. Duff to mitigate any risk presented by a future manic episode.

The Mother sought supervised parenting time and to continue with the current schedule with the children spending 13 hours per week with the Father. She argued that the children were scarred from their exposure to the Father's 2023 manic episode and she did not trust him to self-report the onset of a future episode, which was the cornerstone of his safety plan.

The Father also sought sole decision-making authority with respect to the children's sports and extra-curricular activities, which was disputed by the Mother. He did not object to the Mother having sole decision-making authority over medical and education decisions, with a robust consultation provision.

Justice Kraft granted the Father unsupervised parenting time starting with four out of 14 overnights and increasing to five out of 14 overnights at the start of the 2024/25 school year. She also granted him sole decision-making authority over the children's sports and extra-curriculars.

Justice Kraft commenced her analysis with the best interest factors set out in s. 16(3) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) and the primary consideration of the children's physical, emotional and psychological safety, security and well-being in s. 16(2) of the *Divorce Act*. She also set out the principles a court will take into account in determining whether to make an Order for supervised parenting time, which are worth a reminder:

[25] A parent seeking supervised parenting time for the other parent bears the burden of establishing that supervision is necessary: *W.H.C. v. W.C.M.C.*, 2021 ONCJ 308, *Klymenko v. Klymenko*, 2020 ONSC 5451.

[26] In *Stec v. Blair*, 2021 ONSC 6212, at paras. 22-24, Fowler Byrne J. reviewed the law related to supervised access and explained the reason that it is not automatically granted:

a. Supervised access is a great intrusion into the relationship between a child and parent and its continued imposition must be justified: *Young v. Hanson*, 2019 ONSC 1245, at para. 32, also cited in *G. v. F.*, 2021 ONSC 1362 at para. 47.

b. The intrusion is less striking when supervision is by a family member in a home setting, but nonetheless, it is not a long-term solution. Supervised access is designed to provide a temporary and time-limited measure, to resolve a parental impasse over access, rather than provide a long [term] solution: *M. (B.P.) v. M. (B.L.D.E.)*, (1992), 1992 CanLII 8642 (ON CA), 97 D.L.R. (4th) 437, at para. 33. (Ont. C.A.)

c. The onus lies on the person seeking that parenting time be supervised, to show that such supervision is necessary. The greater the restriction on regular parenting time, the more important it is to show why the restriction is necessary: *Liu v. Xie*, 2021 ONSC 222, at para. 69, *Docherty v. Catherwood*, 2015 ONSC 5240, para. 38.

[27] Supervised access "is beneficial for children who require gradual reintroduction to a parent, or whose safety requires it until such time as the parent is sufficiently rehabilitated and a child is no longer in danger or physical or emotional harm." *Najjardizaji v. Mehrjerdi*, 2004 ONCJ 374 (CanLII), [2004] O.J. No. 5472 (OCJ).

[28] The Courts have taken the view that because supervised access creates an artificial environment, it should not be ordered as a long-term arrangement: *Hunt v. Hunt*, 2023 ONSC 5411, at para. 43.

Justice Kraft did not find that continued supervision was necessary to protect the children's best interests. In reviewing the best interest factors, she found that the children were connected to and bonded with both parents; that the Father had been very involved in the children's care; that the Father was, presently, mentally healthy, showing insight into his illness, taking accountability for his behavior; and was under the treatment of Dr. Duff. Most importantly, the Father agreed to follow a six-part safety plan developed by Dr. Duff:

a. As a first level of assurance, [the Father] would contact [the Mother] immediately upon sensing any early signs of decompensation. The children would then not visit with [the Father] and his parenting time would be suspended until his treating psychiatrist/physician determined that he was capable to resume parenting.

b. Secondly, [the Father] will grant permission to his treating psychiatrist/physician that if they have reason to believe his mental wellness was wavering that they should directly reach out to [the Mother] to inform her of the concern. [The Father's] parenting time would similarly be discontinued until he was sufficiently better. If CCAS is involved at that time, then they can assess the situation and determine a timeline for restarting and increasing [the Father's] parenting privileges;

c. Thirdly, [the Mother] will have permission to contact [the Father's] treating psychiatrist or physician if she felt there was cause for concern to answer her concerns;

d. Fourth, [the Father] will give permission to release his clinical records to [the Mother] and her legal counsel;

e. Fifth, [the Father] will be given a prescription for Risperidone 1-2 mg which he will fill and have on hand at home which he can use proactively in the event that he senses early signs of decompensation.

f. Sixth, [the Father] will go to the emergency department to consult with a psychiatrist if he is sensing early signs of decompensation and is unable to make an appointment with his treating psychiatrist or physician in a timely manner.

Justice Kraft rejected the Mother's concern that the Safety Plan required the Father to self-report, which he had failed to do in 2023, causing the children to witness the episode, the police kicking in the front door to the Father's home, and his paranoid behavior.

While these, on their face, appear to be valid concerns raised by the Mother, Justice Kraft did not agree with her that there was a risk to the children's safety presented by the Father's bipolar condition:

[84] Dr. Duff testified that Bipolar 1 is a manageable condition and, if properly managed, people with Bipolar can be very high functioning, but for the time when one is in an episode. She also testified that there is a stigma attached to Bipolar 1 in the sense that people are afraid of it. It is a difficult disorder to understand that someone can be unwell when they are unwell but perfectly well when they are healthy. **Dr. Duff specifically testified that the stigma of Bipolar is that people will still not trust the person with Bipolar or misjudge the person and blame things on Bipolar.**

.

[110] [The Father] has demonstrated that he is a capable and excellent parent when he is well. He has also demonstrated insight into his condition. [The Father] has sought help and treatment, not just from Dr. Duff, but from Frances Martin and now from a new therapist offered to him through his EAP. He has attended Bipolar peer groups and he is committed to his overall wellness by maintaining a healthy lifestyle and engaging in mindfulness . . .

[111] **[The Father] has also demonstrated that he has insight into the early warning signs that a manic episode is happening for him . . .** While [the Father] acknowledges that he did not reach out to [the Mother] to let her know that he was having early signs of a manic episode in 2023, he did reach out to Dr. Duff and he is now committed to letting [the Mother] know as well. The steps of the proposed Safety Plan clearly demonstrate that [the Father] is prepared to be an "open book" to allay [the Mother's] concerns because it is also *his* priority that the children do not have exposure to him in a manic episode. His desire to be an involved, co-parent with [the Mother], is the reason that [the Father] has authorized,

- a. Dr. Duff or his treating physician, to reach out to [the Mother] if they have any concerns;
- b. [the Mother] to reach out to Dr. Duff if she has any concerns; and
- c. [the Mother] to receive all of Dr. Duff's clinical records and notes.

[112] Further, [the Father] has agreed that his parenting time will be immediately suspended without the need for [the Mother] to go to court to get an order to that effect, if he is in the midst of a manic episode.

[113] **No one can guarantee that [the Father] will not have a future manic episode. However, [the Father] is willing to bend over backwards to do everything in his power to prevent an episode and to alert the necessary people if he feels he is decomposing.** The evidence on record already demonstrated that [the paternal grandfather] could hear in [the Father's] voice if he is decomposing. The evidence is also clear that [the Mother] has been aware when [the Father] is "sick" or "sounding off". This means that [the Mother] can call Dr. Duff if she is worried and with some additional psycho-education, if there are any signs, at all, A. can tell [the Mother] immediately. While there is a component of [the Father] having to also self-identify when he feels symptoms coming on, [the Father] has already demonstrated that he has sought help in these circumstances. He did not seek help from [the Mother], but he is now willing to do so. **[emphasis added]**

While Justice Kraft acknowledged that the Mother's concerns about the Father, his parenting judgment, and ability to keep the children safe, were "understandable" (which, of course, were the reason she was seeking continued supervision), her Honour was concerned that the Mother's behaviour demonstrated an unwillingness to support the Father's relationship with the children:

[66] This is a critical factor the Court has considered. While [the Mother] maintains that she is supportive of the children having a relationship with [the Father], I am not persuaded that she has taken active steps to facilitate their relationship with [the Father] or that the children feel that their mother values the relationship with their father. Many of the steps taken

by [the Mother] in this case, although they emanate from her concern about the children's safety and rightly so, particularly when [the Father] has been unwell, also demonstrate that [the Mother] has been unable to place A.'s and L.'s needs and best interests ahead of her own anxieties about [the Father].

In the meantime, the Mother did not do herself any favours. Since separation, the Mother had, among other things: disclosed the existence of the restraining order to the children; made unilateral decisions about the children in breach of a court order; refused to relax the restraining order to allow the Father to attend the children's activities or interact with their teachers when his health stabilized; sought to decrease the Father's supervised parenting time for no apparent reason, which request was rejected by the court; rejected supervisors proposed by the Father; relied on the terms of the restraining order and refused to allow the Father to attend the child's first day of school in September 2021 — 16 months after his first episode and while he was healthy; alleged to the Society that the Father stopped taking his medication, which was not true, and which resulted in the temporary suspension of the Father's parenting time; and, unilaterally sold the Father's car after his license was suspended by his doctor. Was this behaviour more or less damaging to the children than their witnessing the Father's episode? We will let you decide.

Had the Mother shown more sympathy towards the Father, or agreed to relax the restraining order and increase his parenting time when he was healthy, Justice Kraft *may* have found her stated concerns more credible. Instead, her Honour felt that the Mother was "biased" against the Father's bipolar disorder, had "generalized fear" about his ability to parent, even when he is well, and that her fear and anxiety were negatively impacting the children:

[68] **I find that [the Mother] has a generalized fear about [the Father] ability to parent the children effectively because he suffers from an episodic mental health condition.** The allegations by her are that his mental health condition makes him unfit to parent the children without 24 hour supervision by another adult. These anxieties are based in her fear about [the Father] potentially having a manic episode in the future and it is these anxieties on which [the Mother] submits that the children cannot have a normalized relationship with their father even when he is well.

[69] [The Mother] insists on [the Father's] parenting time remaining supervised. **If the court were to make the order [the Mother] requests, there would be no basis from which [the Father] could argue a material change in circumstances that would justify him having unsupervised parenting time in the future.** I say this because Dr. Duff testified that [the Father] is currently mentally healthy and fully recovered from the 2023 episode. **On what possible basis, therefore, could [the Father] bring a Motion to Change and argue that his parenting time should become unsupervised?**

[70] While I am persuaded that [the Mother] is aware that the children love their father and vice versa, I am not of the view that she is actively demonstrating to the children that their relationship with their father is important. I believe that [the Mother] has been unable to do so, out of fear that the children's emotional safety and physical safety are at risk when they are in their father's care. I believe that with an appropriate Safety Plan in place, [the Mother] will be able to let go of some of her bias against Bipolar and anxiety about [the Father's] mental health condition, so she can proactively communicate to the children that she truly believes that it is critically important to them to have a close and meaningful relationship with both parents. **[emphasis added]**

First, what an incredibly astute observation by the court. Given the Father was, at that time, healthy, an award of supervised access would *never* be open to variation — what could the Father point to in the future as a material change so as to void the requirement for supervision? The passage of time? Uh . . . We don't think so: *Wiegers v. Gray* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Brown v. Lloyd*, 2015 CarswellOnt 790 (C.A.); *H.D. v. L.M.D.* (2016), 81 R.F.L. (7th) 357 (B.C. S.C.); *Coppin v. Arboine*, 2018 CarswellOnt 19895 (S.C.J.). Perhaps her Honour could have ordered a review *de novo* at some point in the future? In *C v. N* (Ont. C.A.), the court held that reviews were appropriate where "the parties', or children's, circumstances were uncertain at the time the original order was made". But what would justify a different outcome at some point in the future if the Father was healthy **now**?

Justice Kraft was clearly — and properly — concerned about pigeon-holing parents with mental health issues as less capable than mentally healthy parents:

[109] The role of the Court is to recognize stereotypes, bias, and discrimination against marginalized groups and/or individuals when such issues present and ensure that decisions are not based on any such biases, or reliance on stereotypes. In the case at bar, [the Mother's] position on the limits needed on [the Father's] parenting time, allegedly to protect A. and L., are **rooted in negative stereotypes and a long-held stigma that mental health conditions and illness prevent someone from being a fit parent.** While there is a significant push to promote understanding and encourage education about mental health and mental illness in society, **there remains a great deal of stigma. A parent's mental illness is not, on its own, a reason to deny someone decision-making responsibility or limit someone's parenting time.** The issue, as with all parenting matters, is whether an illness, be it physical or mental, impacts a parent's ability to care for a child or places a child at risk. [The Mother] is essentially asking this Court to deny [the Father] decision-making responsibility and limit his parenting time and ability to spend time with his children without someone else being present because of his Bipolar diagnosis and the future threat of a manic episode. **To do so, given that [the Father] has been declared mentally healthy by his psychiatrist, would be tantamount to this Court being swayed by the stigma and negative stereotypes about people with Bipolar.** I have based my decision only on what is in A.'s and L.'s best interests given that [the Father] is currently mentally healthy, with the implementation of a Safety Plan to recognize that he suffers from a chronic, episodic, health condition, to mitigate against future harm to A. and L. To limit [the Father's] parenting time to 13 hours a week of supervised only parenting time as proposed by [the Mother], in my view, would be using his Bipolar diagnosis as a barrier to him having equal treatment under the law. I am not persuaded that denying the children unsupervised parenting time with their father is in their best interests or in keeping with the role of a Canadian court to assess the circumstances of these children, with the parents they have. **[emphasis added]**

We could not agree more with Justice Kraft's comments about recognizing and not falling prey to myths and stereotypes (we wrote about this recently in the domestic violence context in our comment on *K.M.N. v. S.Z.M.* (2024), 98 R.F.L. (8th) 275 (B.C. C.A.), in the July 15, 2024 (2024-27) edition of *TWFL*.) The primary focus in a parenting case is the child, not the parents, and the *Divorce Act* require courts to give "primary consideration to a child's physical, emotional, psychological safety, security and well-being" when making parenting decisions.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.