

CITATION: Lenihan v. Shankar, 2021 ONSC 330
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SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Kevin William Lenihan, Applicant

AND

Indira Shankar, Respondent

BEFORE: The Honourable Justice McGee

COUNSEL: A. Chris and J. Hunt-Jones, for the Applicant
D. Kilgour, for the Respondent until November 20, 2020
A. Pasha, for the Respondent until November 20, 2020
K. Sidhu, November 23, 2020 Agent for the Agent Counsel for the Respondent

ADDITIONAL WRITTEN REASONS

Overview

1. Text messages, emails and social media postings have become leading sources of evidence across a wide array of criminal, civil and family disputes. Judges have before them the actual words and deeds of the parties, written or posted in the party’s own hand.
2. Or do they?
3. In an era of “fake news” it should come as no surprise that from time to time, courts will be presented with fake evidence. Accessible technologies have made it easier than ever to generate or alter phone calls, texts, emails, social media accounts, photographs and even experts’ reports in a manner that disguises their origin and fakes, or “spoofs”, their intended purpose.
4. This was an intensely litigated custody, access and mobility claim between the parents of a toddler who had been in her mother’s care since birth. Having left the American jurisdiction where she and the father had met and married, the mother took a number of steps to draw the father away from his family of origin while keeping him at an emotional distance. By the time their daughter was born, she was resident in Ontario, a jurisdiction in which she was a permanent resident and the father had no immigration status.
5. Almost every attempt that the father made personally or through the Ontario courts to have knowledge of, and to build a relationship with his daughter was met with subterfuge, amplified allegations of abuse and wrongdoing, or silence. He issued this Application shortly after their daughter’s birth and, as litigation progressed, the context for the parenting claims shifted

dramatically. What began as a request for access to information and a parenting schedule shifted to a determination of whether a young child could have any meaningful relationship with her father and her paternal grandparents while in her mother's care.

6. As the litigation advanced to trial, the daughter's well being in her mother's care came into sharp focus, as did the mother's extreme actions in keeping everyone – particularly the father – at a distance; no one person or professional or institution knowing the full picture.

7. The mother did not name the father on their daughter's Statement of Live Birth or obtain a birth certificate. She asserted court Orders to professionals and the hospital which did not exist and ignored Orders that did exist, particularly Orders for disclosure. At a period during which she had an open file with Peel Children's Aid Society, she cleverly resided in a woman's shelter that did not permit unscheduled visits. She did not disclose the parent of her second child or his legal name to the father, the Society, the OCL or the Court while threatening the Lenihan family that the father "would be a slave to my husband".

8. A four-week, in-person trial to determine custody, access and mobility began on November 16, 2020. The father and his mother travelled to Ontario two weeks in advance to sit out their required quarantine period in a local hotel where they maintained their residence throughout the proceeding.

9. And then, on the fifth day of trial, the parenting claims were dramatically recast in response to a series of transparent and shocking forgeries created by the mother: an altered paternity test, a forged "Sperm Donor Agreement" and a sham email exchange between the father and his counsel which alleged the planning of a criminal act to remove the mother from the litigation.

10. The mother's counsels immediately withdrew from the record upon realizing their unwitting participation in placing false evidence before the Court. That Friday afternoon I granted the mother's request to continue the trial in-person, self-represented. The day concluded with witness planning for Monday, generous directions on self representation and the sorting of details for that evening's weekend transfer of the parties' daughter to the father.

11. Thirty (30) hours later, the mother boarded a plane for Delhi, India, first class, with a transfer from Delhi to Bengaluru. She took the younger son and did not stop to say goodbye to the daughter for whom she was seeking custody. And she never came back. Her agent counsel attended on the Monday, seeking leave for Indira to continue with the trial on Zoom from her family home in India. I granted the request and ordered Indira to provide travel and other particulars, including a copy of her return ticket. A return ticket was never provided.

12. The evidence received during this four-week custody trial satisfies me that the father is caring and competent, is attuned to their daughter's needs and is genuinely willing to foster the mother-daughter relationship while being appropriately protective. On the mother's urgings, he has been extensively investigated by the Toronto and Peel CAS. He has been further vetted by a

Children's Lawyer who found him to be a fully available and capable caregiver. His plan of care is sound and supported by extended family.

13. At the conclusion of trial, I found that there was no outcome available to me on the pleadings but for the granting of custody to the father. He was a more than capable parent to whom the care of a young child had been voluntarily transferred three weeks prior. This was no longer a mobility claim, that is, a question as to whether the daughter's primary residence should remain in Ontario or be transferred to Oregon, USA. There was no one in Ontario to care for her.

14. Despite the mother's statements to the contrary, there was no reasonable basis to believe that she was returning to Ontario.¹

15. In my December 10, 2020 oral judgement, I granted the applicant father custody, and the mother access in the form of a multidirectional Order proposed by father's counsel. Before doing so, I listened carefully to the mother's lengthy closing submissions which she insisted be delivered before that of the applicant.

16. All trial claims were decided in my oral reasons and the final Order which contain the name and birth date of the parties' daughter for enforcement purposes. I will not here reference that identifying information, but instead will use the initial "A", which is not her actual initial.

17. I offer these additional reasons for assistance to an appellate court and to courts considering a variation of my final Order; and to draw attention to the evidentiary challenges of spoofed communications and postings created to damage a parent's credibility and tendered to gain litigation advantage.

Introduction and Credibility

18. In the balance of my reasons I will refer to the father as "Kevin" and the mother as "Indira" which is not my usual practise. But this was an unusual trial in which the issues were made personal, sometimes unbearably so. I will first set out a chronology of relevant events, address the parties' claims regarding the authenticity of certain electronic evidence and then offer a summary of findings before closing with some final thoughts.

19. The reader will rightly conclude that my chronology is of unusual length for a relatively brief parenting relationship. I found it necessary to set out a comprehensive chronology so that my reasons were clear when deciding the authenticity of electronic evidence, that is, whether certain emails, texts and postings were what they purported to be.

20. Ultimately, I found that Indira's evidence as a whole was not credible. Her testimony constantly altered to fit the optimal reward/risk perception of the moment. Her oral testimony was

¹ In a security follow up to a phishing call to my parents' home on December 19, 2020, I was advised on December 22, 2020 that Indira Shankar remained outside of Canada.

not merely inconsistent, it was contradictory. Sometimes it simply made no sense. When confronted by a blatant lie she turned her answer elsewhere or remained silent. She boasted that she had never made a mistake, and she was lightening quick to blame everyone else for her actions, particularly her prior lawyers.

21. In marked contrast, Kevin's evidence at trial was measured, consistent, and reliable. He admitted his shortcomings. His statements were corroborated by the documentary evidence and the testimony of others. His evidence was child centred. In all respects in which the parties' evidence conflicts, I prefer Kevin's evidence to that of Indira.

22. In preparing the chronology section of my additional reasons, I am indebted to the exemplary crafting of closing submissions by Kevin's legal team. As referenced in my oral reasons, I received tens of thousands of documents in evidence, spread over 56 exhibits, most of which took the form of document briefs including hospital records, CAS records, police records, communications between the parties, communications between counsels, a Section 112 Report of the Office of the Children's Lawyer, and psychological assessments.

23. During the four weeks of trial, I matched the applicant's documentary and witness evidence to the exhibits and found it to be wholly reliable; and, in writing these additional reasons, I was able to further confirm evidentiary sources because the closing submissions were written in the form of a factum. That is, the location of the evidence in the court record was referenced amongst the paragraphed submissions. It was enormously helpful and has allowed me to deliver these reasons in a timely fashion. Where I have adopted the structure or language of the applicant's closing submissions, I have done so with confidence that it accords with my independent view of the evidence.

Chronology

The Parties Meet

24. Indira holds an MBA and is a citizen of India with permanent residency in Canada. Kevin is a software engineer with a bachelor's degree in computer science. The parties met in Oregon in March 2017 when Indira was working on contract through a temporary visa.

25. Kevin was well settled in Oregon. He owned his own home in a community near his parents, Tom and June Lenihan, close to his two brothers and their families. June testified at trial that the Lenihan family was delighted to welcome Indira into their lives, and Tom testified that Indira seemed to be a very happy person. June and Tom have been married for 38 years and are the grandparents of five, including A.

26. When Kevin and Indira met, she told him that she had Canadian permanent residency and that she was living and working in the U.S. on an H1B visa through a contract at Intel. He did not learn until much later that she was six years his senior.

27. Neither did he know that she was married. She did not disclose to him or state on their application for a marriage certificate that she was married to Mr. Daravath Nageswara Rao on January 23, 2015. There is no record of a divorce between Indira and Mr. Rao, an Indian citizen.

Mr. Rao

28. Indira's evidence concerning Mr. Rao changed throughout the trial, depending on the context of her testimony. When claiming that Kevin was not A's father, she referred to Mr. Rao as her husband. When she realized the risk of bigamy, she claimed that the marriage certificate with Mr. Rao was fake and she refused to answer further questions. Later she stated that her marriage to Mr. Rao was annulled in 2016.

29. In the document briefs are thousands of emails from Indira to Kevin, his parents and the extended Lenihan family. In September 2020 her emails to Kevin taunted him with tales of how she "and her husband" were laughing at his efforts to see his daughter and the money that he was spending. In a September 19, 2020 email to June Lenihan she writes,

"Karma is a bitch bigger than you June bitch. Come every month to obtain spend few [thousand] dollars. My daughter is worth it. Your son will be a slave to my husband in Canada. It's a challenge. [Thumbs up emoji] Your son is a slave for my husband. Challenge. [Thumbs up emoji] My husband is richer than you but still we don't waste money for lawyers. But we want you to spend for lawyers for the next 18 years. Yay yay a ya yayayy Crazy bitch June."

30. As progress was being made during the trial to obtain a birth certificate for A (through a mid-trial Order for a declaration of paternity), Indira abruptly asserted that Mr. Rao was also A's legal father, and that he would have to consent to the issuing of any government documents. She claimed that Mr. Rao was having daily Skype calls with A, and that she calls him "Daddy". This contradicted earlier oral testimony and court filings. Indira had never recorded Mr. Rao in any of her Form 35.1 Parenting Affidavits, nor had she ever previously asserted a parenting relationship.

31. When asked about her future plan of care, Indira listed her mother and Mr. Rao as her supports, both of whom currently live in India. She testified that her mother would come to Ontario on a visitor's visa and that she was sponsoring Mr. Rao. She provided no evidence of sponsorship and was evasive when asked for details. Late in the trial, she threw out a comment that Mr. Rao was her son's father which, upon examination of when she was last in India, was not possible.

32. The most telling use of "Mr. Rao" was when Indira called him as a witness on Zoom. I disqualified that young man's evidence when it became clear that he was not who he was presented to be. He had no independence and had the appearance of a student. He read answers to prepared questions and then in cross examination looked at his phone. At the same time, Indira was on her phone or outside the view of the camera. When I required Indira to step into the frame of the

camera “Mr. Rao” froze his screen and was no more. Indira offered nothing further on behalf of her witness.

The Parties Marry

33. The relationship moved quickly. Kevin and Indira moved into his Oregon home in May 2017 and discussed starting a family. Later that month Kevin asked Indira to marry him on a trip to Alaska. A wedding was planned, but Indira told Kevin that if they got married sooner, it would help her keep her job at Intel by settling her immigration status in the United States.

34. Kevin agreed to marry immediately, and they exchanged vows in Las Vegas on June 11, 2017. The wedding took the Lenihan family by surprise as it was their tradition to lead up to a wedding over a period of time, after an engagement party. But they accepted the couple and pledged their support.

35. Indira grew distant almost immediately after the wedding. She told Kevin an entirely different work story – that the project at Intel had ended and that she would need to return to Canada to maintain her status as a permanent resident and renew her H1B visa. She promised to return to the United States as soon as possible.

36. Indira left for Vancouver, British Columbia a few weeks later.

37. Kevin and his family accepted her information at face value even though in hindsight, it made little sense. They went up to Vancouver for a visit at the end of the month and were further confused as to her actual residence and her purpose in having moved. Then in August, Indira announced that she was pregnant. All concerns were set aside as the welcome news was celebrated.

38. A short while later, Indira told Kevin that she was lonely and was moving to the Toronto area, where she said that her father had a restaurant and she had contacts for employment. She moved in September 2017 and began working for a company called Onex. When Kevin’s job ended in October 2017, he came to Brampton to stay with Indira on a visitor’s visa, only to learn that there was no restaurant or family in Ontario.

39. Meanwhile, Indira was becoming increasingly hostile to his family. She was preoccupied with the cancelled engagement party. She picked a fight with her sister-in-law over a dress and sent e-mails to his family so distressing that her former brother-in-law had to intervene with a request that she stop emailing them.

40. Kevin looked for work that he could do remotely until Indira received her H1B visa. He hoped that her moods and intermittent rages would settle once the baby was born and they were able to resume their married life in Oregon.

41. But there were increasing signs that Indira had no intention of returning to Oregon. As that reality descended, what was left of their fragile relationship unravelled. Kevin said that he wanted

a divorce, and Indira threatened that if he left, she would move to India and raise the baby to believe that it did not have a father.

42. It was a threat that Kevin never forgot.

43. The parties attended marriage counselling and Kevin temporarily went to stay in a hotel. Pending the first counselling session, Indira started texting Kevin extensively, accusing him, among other things, of trying to “run away from the father responsibilities” threatening to commit suicide, and claiming that the baby’s health was “in danger” and that Kevin was “killing” the baby.

44. At trial, Indira denied having sent these and other emails that “make her look bad,” but at the same time, she has refused to produce her texts or emails. Absent the ability to compare sender and recipient email or text strings for the same period, and now viewing the evidence as a whole, I accept the email communications as tendered by Kevin.

45. The parties resumed cohabitation in December 2017 and later that month Kevin returned to Oregon, as he was almost at his 90-day limit of time that he could spend in Canada as a visitor. His plan was to return to Ontario after Christmas; but shortly after his departure, Indira suggested in a text that he extend his visit to give the parties space, and to allow Kevin to focus on his job search. Kevin agreed and said that he would return to Ontario later in January for Indira’s next pre-natal appointment. He still believed that Indira was in Canada for only so long as was required to get her visa.

46. Notwithstanding her suggestion that Kevin extend his stay in Oregon, shortly after the holidays, Indira started sending Kevin hundreds of threatening and accusatory text messages. These included, but were not limited to:

- a. “There is a difference between a sperm donor and a father”.
- b. “Absent fathers, run away fathers, don’t have any rights. They should be happy if they get a minimal visitation right (if the mother is generous).”
- c. “If you are lucky you will get to see your daughter. Most likely you might not see us again”.
- d. “Runaway fathers runaway grandparents don’t have rights”
- e. “I am not threatening you rather challenging you openly. For all the hardship you put through now, for all the smartness you show me now I will make sure you will get it back when the baby arrives. I will show all these evidence to court and do everything to prove that you were never involved”

- f. “If you don’t care for me now, you will never get to see me or the baby again. It’s a challenge, it’s not a threat. And your parents will never get a chance to see the baby if you don’t help me now.”
- g. “You made 18 weeks of my pregnancy hell. My mission is to make the next 18 years hell for you and your family”
- h. “You are irresponsible. You didn’t care for me when I have gestational diabetes. And how the hell should you be allowed to see the baby once it arrives”

47. The onslaught of messages continued throughout the month of January. They were not answered by Kevin who was shocked by their receipt. He cancelled his planned return trip. The cancellation, and the lack of any reply from Kevin to her messages seemed to further enrage Indira.

48. Indira turned her texts on at the Lenihan family, blaming them for Kevin’s hesitance to return to Ontario. I received a brief of those text messages from Indira to June Lenihan, and to Beth Lenihan (Kevin’s sister-in-law) and other family members from December 1, 2017 to January 29, 2018. They number into the hundreds and are relentless. Eventually Beth’s husband Greg texted back:

I mean this in the nicest way possible. You need to seek out professional mental health. Beth has blocked you from her phone after all your abuse and I’ll be doing the same right after this text. Once we’ve heard that you’re seeing a professional, we can talk about unblocking you. We still love you, but simply can’t handle the abuse.

49. Indira picked up the pace, now focussing on Kevin and how he and his family were causing the [in utero] baby harm. She told him that if he kept doing what his family told him, (blaming them for his failure to return) that he would go to jail for breaking his commitment. She called Greg a criminal and a chicken who was gaslighting her and accused June of forcing her into an abortion. She texted repeatedly that she wanted to teach the Lenihan family a lesson, foreshadowing that:

The law here is very strict and if grandparents show up unannounced or try to visit the baby without mother’s permission, it can be construed as harassment and police can be informed right away. God bless Ontario for saving my daughter from the evil abusive bitch June and Tom (the husband she stole from another woman) man stealing runs in Lenihan family. Beth stealing Kevin, June stealing Tom. Thank God I live in Ontario.

50. The texts continued and were peppered with recurring themes:

- a. “Don’t think Canadian family law will be nice to runaway dads”

- b. “If you don’t come here to care for me when I am pregnant then you don’t deserve to be a father”
- c. “When it come to child visitation rules my baby my rules, if you don’t help me now”
- d. “I will go to India [because] I cannot manage alone here. You are not taking care of me so I will go to India”
- e. “If you don’t help me now as per your responsibility you will never see the baby. You don’t deserve to be a father”
- f. “If you don’t come and if you are not around during labour your name will not be on the birth certificate and I have told it to you many times. You have taken things very lightly. If you are not on the birth certificate then you have no visitation rights. If I deliver in India and if you are not in the hospital you will not get legal visitation rights because you will not be added to the birth certificate.”
- g. “Court supervised visitation, how does that sound?”
- h. “For everything scores are kept and all this cuts down your visitation time and access”
- i. “It is your right privilege and pride to be included in your daughters birth certificate as a father. If you don’t, then in future you have to take a DNA test in court prove that you are the father [...] I am sure you know who are the kind of men who are sent to DNA test by court-rapists, one night stands, run away”
- j. “For all the hardship you have put me and the baby how can you even expect me and baby to be nice to you”
- k. “You lost us and keeping your job and baby, such a irresponsible idiot, cruel nasty, because you were raised by a bitch”

The Separation and First Claim of Birth

51. By the end of January 2017, Kevin considered the marriage over. He secured a job in Oregon starting February 1, 2018 and negotiated a two-week parental leave for an anticipated birth at the end of March.

52. In early February 2018, Indira sent Kevin a series of text messages that suggested the baby had been born two months prematurely. He replied with questions, whether she and the baby were alright and asked that one of the doctors at the hospital call him. After receiving Kevin’s message, Indira carried through with the lie that the baby had already been born and told him, among other

things, that the baby was “very low weight”, “in the NICU” and “breathing on [a] ventilator”. Indira also claimed that Kevin and his family were the “cause” of the alleged premature birth suggesting that Kevin’s relatives had “prayed for the baby to die”.

53. Kevin was suspicious about Indira’s claims about the baby being born. He had come to believe that she had a propensity for lying. He asked for details of the birth and none were received. He asked for a picture, tried contacting local hospitals and the Children’s Aid Society, but no one was able to provide him with information.

54. Indira sent various excuses for not sending a picture and called Kevin “selfish” and “mean” for asking for a picture of the baby rather than asking about her. She also claimed that she had received various calls from the Children’s Aid Society about Kevin wanting to put the child up for adoption. She also claimed Kevin had told the CAS that he would sign a waiver of parental rights in order to avoid paying child support. She refused to tell him where she was living.

55. All Indira’s assertions were false, and they previewed the first pattern that I saw throughout the litigation: Indira’s projection of false statements attributed to Kevin.

The Birth

56. Indira again began texting Kevin about going into labour in late March 2018, the anticipated birth date. Kevin made arrangements to take time off work and to fly to Toronto with his parents once he received reliable information that their child had been born. He received a photo of the baby, and he immediately asked what hospital they were in, as he was booking a flight for the next day.

57. Indira would not provide the information and instead, questioned him about where he would be staying and for how long. He became extremely distressed when she texted him that their daughter had been born with craniosynostosis, a condition in which a newborn’s skull is prematurely fused. In her texts, Indira blamed the condition on Kevin having abandoned her.

58. Kevin and his parents flew to Toronto, and after landing, spent several hours trying to find Indira. She would not provide the hospital name and alleged that there were various “rules” in place with respect to Kevin being permitted to see the baby that had been imposed by the Children’s Aid Society and the hospital.

59. Kevin made repeated requests for the name of the hospital until Indira finally provided the name of the hospital at 9:36 p.m. that evening, after earlier providing only the name of the hospital group.

60. A subsequent review of the hospital records shows that on the morning of the day that Kevin was travelling to Toronto, Indira had a meeting with hospital staff and advised them that she had “full custody” of the baby and that the father could only receive information about the baby “with her consent”.

61. No such Order or agreement existed. There has been no Order for custody until my final order of December 10, 2020.

62. Kevin attended the hospital the following day and saw the baby in an isolette in the NICU. He was overjoyed. And he noted two things from the hospital records: the birth date was a day earlier than Indira had advised, and their daughter had been given an unfamiliar first name, quite different from the name that had been discussed.

63. Indira would not answer Kevin's questions about the baby's true date of birth or her surname. But he did learn from hospital staff that the diagnosis of craniosynostosis was real. Together the parents met with the surgeon who explained the required series of surgeries.

64. Kevin tried to attend the hospital the next evening for another visit. He was advised by the hospital staff that Indira was not there, and that they had been instructed not to give him any information about the baby or to allow him to see her without Indira being present.

65. He returned again on the next day and was able to have a further visit. During the visit the parents argued. Indira still refused to tell Kevin A's full name or what she claimed was her date of birth. Kevin asked the hospital staff for information about A but was told that due to Indira's representation that she had "full custody", Kevin needed to get information from her.

66. Kevin wanted his parents to see their new granddaughter, but Indira warned that she had taken out restraining orders against his parents, and she threatened to take one out against Kevin if he did not respect her. When she was questioned at trial as to why she would say such a thing, Indira turned the blame on the Lenihans, averring that they should have known that there was not a restraining Order, and that it was their fault that they had not seen the baby.

67. Throughout her stay at the hospital, Indira continued to claim that it was the hospital "rules" that prevented Kevin from having information and that outside agencies like the CAS were "controlling" the situation. Indira repeated that Kevin "lost some rights" because he "abandoned" her and said "daddy earns play time with baby" by being "nice" to Indira.

68. Kevin asked to again see A the next day. Indira refused, claiming that there was a discussion going on about the baby being transferred to another hospital and that the hospital had "cancelled visitor rights for everyone". Not knowing his daughter's full legal name, or being able to see her, or to what hospital she might be transferred, Kevin retained counsel who brought an immediate ex-parte motion for information.

The Ex-Parte Motion before Justice Goodman

69. On April 5, 2018 Kevin obtain an ex-parte Order on a temporary and without prejudice basis that gave him direct access to information about A's medical care and restrained Indira from removing the child from the Greater Toronto Area. Indira was served with the Order the next day.

70. Anticipating a negative reaction, Kevin did not ask to see A again until April 8, 2018. Indira did not respond. Kevin waited at the hospital for several hours. Eventually, Indira came out of the hospital with a security guard and Kevin was told to leave. The same day, Indira attended at a police station asking for assistance in having Kevin removed from the hospital and to “block him from having visitation rights with A”.

71. The following day, Kevin’s counsel wrote to Indira formally requesting that she facilitate parenting time. But unbeknownst to Kevin, Indira had gone to the hospital staff that morning alleging that “on April 3rd or 4th” during his visit with A, Kevin was “touching [A’s privates] and had his fingers up the baby’s vagina.”

72. Thus began the next pattern that permeated this litigation: disproportionate retaliation for a perceived aggression.

73. In the subsequent investigation, hospital staff made clear that they had observed no such behaviour and that no other abnormalities had been observed. A was examined by Dr. Fregonas, who “found absolutely no evidence of trauma.” Staff advised that Indira was the sole author of the allegations despite her claims (which continued to the very end of trial) that it was the hospital that expressed concerns of sexual abuse.

74. In fact, it was the mother’s false allegations that had raised alarms with the hospital. It was recorded in the hospital records that the hospital had “several concerns about mother’s mental health” and as a result, had notified police and CAS.

75. Kevin was horrified by these allegations. He subsequently learned that, as a result of the hospital’s concerns about Indira, the CAS had taken steps to seek a warrant for A’s apprehension from her mother’s care. The CAS was unsuccessful and for reasons not in the record before me, the Toronto Children’s Aid Society neither followed up nor submitted a further warrant.

76. Indira retained her first counsel, Ms. B. in advance of the return of Justice Goodman’s ex-parte motion, and the parties agreed to continue several terms of the April 5, 2018 Order. The resulting consent Order of April 19, 2018 included Indira’s request for paternity testing, that Kevin was to issue an Application by May 31, 2018, and that the parties were to schedule a case conference.

77. Kevin continued to ask whether A’s birth had been registered and whether he was named as the father on the birth certificate. Indira’s counsel responded that she had completed the online registration for the baby’s birth and that the birth certificate was “processed”, but that Kevin’s name was not included because Indira told her that Kevin had insisted that he “wanted DNA testing first”, and “wanted the child put up for adoption if the child was mentally retarded”.

Thwarted Attempts to Create a Parenting Schedule and Obtain Medical Information

78. Kevin’s counsel worked hard to establish a parenting schedule, but Indira insisted that any

access be supervised so that their daughter could not “be sexually abused again”. Eventually, Kevin agreed to a form of supervision, not to protect their daughter, but to be protected from false claims of abuse.

79. A proposed visit in early May 2018 did not occur and, in the interim, Kevin was taking steps in Oregon to obtain a divorce. When Indira was served with the divorce petition on May 18, 2018, there was another disproportionate retaliation. The same day that she was served, Indira made a complaint to the Peel Regional Police.

80. The police notes from May 18, 2018 record Indira making a walk-in complaint of domestic assault, threats and a sexual assault that varied with each telling. Upon learning that Kevin was in Oregon during the alleged assaults the police refused to act on the complaint and cautioned Indira against making further false allegations.

81. But the attempted complaint had its desired effect. When Kevin was advised of the police attendance, he cancelled his scheduled visit at the end of May. He was genuinely frightened by the prospect of a false arrest in a foreign jurisdiction.

82. Kevin decided to focus on litigation to obtain protective Orders for parenting time. He issued this Application, but then ran into a series of difficulties with service. Indira’s first counsel, Ms. B. had gone off the record and Indira was ignoring any communications. When she finally responded approximately six weeks later it was through her second counsel, Ms. D, to deal with an issue with A’s OHIP coverage, no doubt triggered by the fact that Indira had not obtained a birth certificate of A or a health card.

83. Meanwhile, Kevin was continuing his efforts to obtain A’s medical information as provided for in the April 19, 2018 Consent Order; particularly from their daughter’s pediatrician, Dr. Kao. His counsel wrote to Dr. Kao on June 28, July 10, and July 19, 2018 requesting a complete copy of A’s medical file and enclosing the April 19 2018 consent Order and an Authorization and Direction signed by Kevin. No response to these requests and many others has *ever* been received.

Dr. Kao

84. Dr. Kao was called by Indira to give evidence at trial. He is a qualified paediatrician practising in Brampton. He acknowledged that he has never produced a copy of A’s medical file to Kevin, which is in breach of the consent Order of April 19, 2018.

85. At various points in this proceeding, Dr. Kao has written letters of support for Indira which have been highly critical of Kevin, notwithstanding that he has never met Kevin and has refused to have a phone call with him. The letters have contained false information about Kevin and the status of the litigation, the information for which has been supplied by Indira.

86. Dr. Kao acknowledged that failing to comply with the court Order was a breach of his own internal file management policy and the policies of his professional governing body.

87. Why did Dr. Kao put his young patient – acknowledged to be A – at risk by refusing to provide her father with information necessary to her day-to-day care? Was he an advocate for Indira, or her pawn?

88. In cross-examination Dr. Kao testified that he deliberately refused to comply with the court Order because it contained information that he believed the father was not entitled to, such as the “litigation strategy of the mother”.

89. Dr. Kao’s startlingly frank admission that he has prioritized his patient’s mother’s litigation strategy over the health of his patient has had significant consequences within this litigation and, most concerning, has resulted in a caregiving parent having no medical records for his daughter.

90. I disregard the evidence of Dr. Kao as he has acted outside the scope of his professional duties and lacks impartiality.

Continuing Efforts to Establish a Parenting Schedule

91. In August 2018, Kevin’s counsel wrote to Indira asking for a weekly update on A, a current picture, and to arrange for service of the Application. Indira responded through her third lawyer, Ms. S. on August 28, 2018. Among other things, Indira claimed through her counsel:

- a. That police had advised her to “block” Kevin from her phone and to not have any communication with him through text or e-mail; and
- b. That she was unwilling to provide a picture of A to Kevin alleging that Kevin had made comments that he would “post A’s picture on the internet and that he has the right as her father to ‘sell the baby on Craigslist’”.

92. Both statements were patently false. A Case Conference was scheduled, and counsel asked for parenting time during the week of the Conference as Kevin would be travelling to Ontario to attend court. Indira refused, now asserting that the CAS did not agree to Kevin having any parenting time, or a photo of the baby. Her counsel’s letters extensively repeated claims that Kevin had sexually abused A at birth, and that he wanted to put her up for adoption “to make money.” And included in the letters were new claims, such as the Lenihan family owning firearms.

93. Kevin’s counsel immediately sought and received confirmation from the CAS that they were not recommending any limits on Kevin’s parenting time or his ability to have a photo of the parties’ daughter.

94. Upon learning that the CAS had not confirmed her statement, Indira made a complaint against her CAS caseworker, accusing her of a “fabrication of evidence”, “racism”, “discrimination”, “harassment”, “racial profiling”, “threatening”, “human rights violation”, and that she was “biased towards the mother because she is immigrant, single and coloured (non white)”, and “supporting the father who is abusive”.

95. Here begins the third pattern: the making of a complaint against any professional that discharged his or her duty in a manner that contradicted Indira's wishes.

Case Conference Before Justice Thorburn – October 2019

96. The parties attended a Case Conference before Justice Thorburn on October 19, 2018 and entered into a consent Order that provided for Kevin to have supervised parenting time with A. He agreed to the supervision as it was the only form of parenting time to which Indira would agree, and it protected him from false allegations.

97. The consent Order also set out terms for paternity testing, the mother's production of documentation to obtain their daughter's health card and disclosure that would support Indira's many claims against Kevin.

98. Indira did not produce any disclosure, nor did she facilitate A's paternity test. She avoided efforts to arrange for supervised visits. Only after a threat to return the matter to court did she agree to retain a professional supervisor, Jane Walsh. A timetable was arranged, and Kevin agreed to pay the full cost of the visits, notwithstanding that the Order provided for the costs to be shared.

Supervised Visits – November 2018

99. Jane Walsh was retained to supervise the visits. She is a social worker/psychotherapist who specializes in family counselling, family mediation, and access supervision. Prior to working in private practice, she worked as a counsellor in a women's shelter and as a domestic violence intake worker at the Children's Aid Society of Toronto. She has over 20 years of professional experience and provided concise and clear-eyed testimony of her involvement with the family.

100. Ms. Walsh testified that she spoke with Indira at considerable length to create a schedule for the upcoming visits that took into account all of her concerns and commitments. Indira agreed to the schedule, then missed the first visit completely, and was late to the remaining visits. Indira objected to rescheduling the missed visit. Ms. Walsh contrasted Indira's conduct to Kevin's promptness and patience.

101. As a client/parent, Ms. Walsh observed Kevin to be easy to deal with and comfortable with small children to a degree "outside the range" of what she typically sees in her practice. She related how he demonstrated a high level of parenting skill, having brought age-appropriate toys for A and playing in a fun and comfortable manner. She related their conversations on child development during A's naps, and her concern that A rarely cried and went to strangers easily – flags that an unattached child has learned that crying will go unanswered.

102. Ms. Walsh testified that she saw no need for Kevin's parenting time to be subject to supervision and she encouraged Indira to allow Kevin's parents to participate in at least one of the visits, as they were also in Canada and had never seen their granddaughter. Indira refused an in-person visit, but ultimately allowed June and Tom Lenihan to have a video call with A.

103. Ms. Walsh expressed feeling “threatened” by Indira throughout her involvement. Indira would change plans then blame Ms. Walsh for having acted against her. She constantly questioned her professional qualifications.

104. I observed Indira taking the same approach during her cross examination of Ms. Walsh. In fact, Indira put to Ms. Walsh that she had reported her to her governing body, which was previously unknown to Ms. Walsh. Indira acknowledged that the complaint had been immediately dismissed, and then carried on with her questioning of Ms. Walsh’s credentials.

105. Highlighted in my mind and referenced in my oral decisions was Ms. Walsh’s dismay that Indira asked that an iron supplement be administered to A during one of Kevin’s visits, with the expectation that the iron pill would make A sick.

January 2019 Motion Before Justice Kristjanson

106. A second Case Conference proceeded on January 11, 2019 but nothing further was resolved. Indira brought a motion in January 2019 to move the case to Brampton and an Order was made on consent – the Justice Kristjanson consent Order – with these additional terms:

- a. Kevin would have one weekend of parenting time with A each month in Ontario, and full weeks in each of July and August;
- b. Kevin would take A for a paternity test as Indira had not facilitated this;
- c. Kevin would pay child support of \$910 per month; and
- d. Requesting the assistance of the Office of the Children’s Lawyer.

107. Within days of the Order Indira sent Kevin a hostile e-mail which, among other things, accused him of having stolen a bracelet of A’s during the visit with Jane Walsh, criticized his family, and called him a “selfish cruel person” and an “extremely abusive and power hungry narcissist”.

February 8 – 10, 2019: Parenting Time Pursuant to the Consent Order: A Trap is Laid

108. Pursuant to the consent Order of Justice Kristjanson, Kevin’s first unsupervised weekend was February 8 – 10, 2019. His parents came with him from Oregon for the visit, booked a hotel suite and rented a car. The location for the exchange was chosen by Indira and turned out to be a Tim Horton’s kiosk inside a gas station. Indira travelled to the gas station by Uber to meet them. She brought with her a third party whose name remains unknown to this day.

109. The third person was not helpful. She asked for Kevin, Tom and June's personal identification, despite Indira knowing them all well. The Lenihans agreed to show their identification but refused to allow the third person to copy their driver's licenses as requested. The person refused to give her name.

110. The consent Order of Justice Kristjanson specifically provided that Indira was to give Kevin all of A's necessary items for the weekend, including her stroller, health card, formula, clothing and other items. Indira provided a stroller that held a diaper bag, but the bag was quickly discovered to be almost empty – it contained only 2 diapers, one serving of ready-made formula but no bottle, virtually no clothes, no health card, no feeding instructions and no medication or medical instructions.

111. When Kevin asked Indira for the outstanding items and for the car seat that she had brought to the exchange, Indira accused him of "abusing" her and walked away carrying the car seat. The third party told the Lenihans that there was a Canadian Tire down the road where a car seat could be purchased.

112. Indira and the third party then got into the Uber with the empty car seat and drove away, leaving the Lenihans at a gas station in the month of February, with an eleven-month-old, virtually no supplies and no car seat.

113. The family set to work. Kevin and his mother drove to the Canadian Tire to purchase a car seat while Tom waited at the gas station with A. Tom recalled his surprise that A so quickly and peacefully fell asleep on his shoulder even though they were meeting for the first time. The store manager saw the situation and brought out a stool on which Tom could sit while he was waiting. When Kevin and June returned, Tom installed the car seat and then the whole family drove to Loblaws to pick up supplies for the weekend, including food, diapers and wipes to add to the clothes and toys that they had brought from Oregon.

114. Mrs. Lenihan testified at trial that the initial shock of the situation did not settle until well after the visit, as the family focussed on the immediate challenges of getting a car seat and supplies and the joy of having a full weekend with their granddaughter. In looking back, she described the events as unimaginable to have been deliberately done by a parent.

115. But the events were just getting started.

116. Kevin sent an e-mail update that evening, as required by the Order and he asked again for the health card and the other missing items. Indira sent a series of hostile responses attaching photos of the required baby items as proof that she had supplied them in accordance with the court Order.

117. On the invitation of counsel, I have reviewed the metadata of the photos sent by Indira that evening and note that they were taken at approximately 10:45 p.m. that evening, several hours

after the exchange. In my view, the photos demonstrate that Indira in fact still had these items in her possession and had not given them to Kevin.

118. It was an excellent visit notwithstanding the bad start. Kevin’s parents stayed in one room of the suite, and A and Kevin stayed in the other. It was the first time that the grandparents had spent time with their granddaughter, and they were delighted. It was a joyous occasion.

119. The baby slept and ate well. She played with toys, sang songs and moved to music. On Sunday, February 10, 2019 the OCL clinician assigned to the case, Eva Casino, came to the hotel for a two-hour observational visit. Ms. Casino observed happy play time interactions between daughter, father and grandparents, and she noted A to be “eating well with a lot of happy smiling”, and observed Kevin change his daughter’s diaper and apply diaper cream and noted “no diaper rash”. The baby was returned Sunday evening healthy and happy.

120. The next day, the CAS called. They had received two community reports of harm. One from the Holiday Inn Hotel and the other from Canadian Tire. Indira’s fourth lawyer, Ms. G, wrote to Kevin’s counsel advising that Indira would be bringing a motion to have Kevin’s parenting time supervised in accordance with a position being taken by the CAS. Ms. G’s letter suggested that the police were also involved.

121. Both concerns were immediately investigated by Peel Children’s Aid Society.

- a. The Holiday Inn report from an anonymous “employee” that he had observed the family fighting amongst themselves while ignoring the baby was immediately suspect. The Lenihans had stayed at the Homewood Suites Mississauga hotel. Ms. Clayton of the Society reported that the day before, Indira had called the Society, asking for information about what hotel Kevin was staying in. The Society had not disclosed the location.
- b. The Canadian Tire report from an anonymous “employee” that he had observed the baby abandoned at the store was also suspect. The store was closed at the time that the purported employee called in, and the store manager advised that they would have called the police, not the CAS.

The CAS determined that each report was “malicious”.

122. Not receiving the sought-after verification, Indira took A to Dr. Kao for an examination late in the day of February 11, 2019. Dr. Kao subsequently wrote a letter that he had observed scratches and a rash on A, asserted that A had lost weight while in her father’s weekend care and had suffered a “change in demeanor”. Because nothing had been observed by Ms. Casino on the Sunday and Indira had not mentioned a scratch or redness to the Society Monday morning, Kevin believes that Indira caused harm to A to support her claims.

123. Dr. Kao's letter sets out potential issues with Kevin's parenting due to his medical and mental health conditions. The information in the letter concerning Kevin had come from Indira. On cross examination at trial it was clear that Dr Kao had no reasonable or objective basis for his assertions that A had lost weight while in her father's care or had a changed demeanour; however, the allegations of a scratch and redness were corroborated by the CAS notes of an in-person visit on February 13, 2019.

124. I do not find that there is sufficient evidence to determine who harmed A, or if harm was indeed done to A, as the scratches and redness were not outside ordinary childhood abrasions. I am satisfied by the evidence of Ms. Casino that A was not harmed while in her father's care.

Indira's Motion for Supervised Access

125. Indira's motion for supervised access was heard on March 7, 2019. Justice Stevenson was presented with competing affidavits and Dr. Kao's letter, and after careful consideration, she directed that a CAS worker be produced the next day for oral testimony.

126. On the second day of the motion, Punitha Monoharan of Peel CAS gave evidence of the Society's investigation, concluding that the community reports were malicious. Justice Stevenson dismissed Indira's motion, and ordered that Kevin's parenting time continue in accordance with the consent Order of Justice Kristjanson, subject to a CAS safety plan to which Kevin consented.

127. Indira was ordered to pay Kevin \$7,500 in costs. When arguing costs, Indira took the position that the CAS should be responsible for the costs of the motion for "coercing" her into bringing a motion and giving "incomplete and false testimony".

Parenting Time from March 2019 to the Pandemic

128. The visit of March 8 – 10, 2019 was mostly uneventful, but for Kevin's renewed request for a copy of A's health card. Indira agreed to e-mail it. She did not. The visit went well as confirmed in the OCL summary of a second observational visit on the Sunday.

129. Kevin and his parents, or one of them, continued to travel to Ontario every month for weekend visits and a full week in each of July and August 2019. The visits went well. The set up of the hotel suite allowed for some normalization of family life as meals were prepared on site and the growing toddler could play in a common area. The paternal family did outdoor activities in the summer and took advantage of a playcentre in the winter. Common activities and traditions were developed. During each of the visits, Kevin would send Indira a daily update in accordance with the terms of the Order of Justice Kristjanson.

130. In contrast, Indira provided Kevin with little to no information about their daughter and refused to tell Kevin where she and A were living. In June 2019, Kevin sought this information from Eva Casino, but Ms. Casino also did not know where A and Indira were living.

131. Over the summer, the CAS closed their investigation into Indira's allegations, and determined they could not verify any of the concerns set out in Dr. Kao's letter.

132. In June of 2019, Kevin learned that Indira had given birth to a second child. His counsel inquired of Indira's fifth lawyer, Mr. T as to detail about where their daughter was living and what adults were in the home. No response was provided, but for a series of hostile e-mails criticizing Kevin for asking for private information.

The OCL Report

133. The Office of the Children's Lawyer accepted the file for a clinical report on February 7, 2019; but by April 1, 2020 the clinician, Ms. Eva Casino was ready to discontinue her involvement because Indira would not engage.

134. Finally, in late April, Indira agreed to meet with the investigator and the process began. Indira's May 3, 2020 intake history repeated familiar themes and added false statements, such as Kevin's brother losing access of his child, the grandparents losing access, Kevin attempting suicide, forced sex, a relationship between Kevin and his sister-in-law and the Lenihans not allowing A to see Indira's mother.

135. The OCL's final Report was dated and delivered July 30, 2019. The Report detailed 18 substantive allegations that had been made by Indira against Kevin, all of which the clinician had investigated and determined were false.

136. In her Report, Ms. Casino set out Kevin's natural ability as a parent and his capable caregiving. She recommended terms for Kevin's parenting time, ongoing court supervision of the file and a psychiatric evaluation of the mother. In the words of the clinician, the psychiatric assessment was necessary "to determine if the allegations [made by Indira against Kevin] are just malicious or are related to mental health, as this will have an impact on her parenting."

137. The Report recommended that A be placed in her mother's sole custody.

138. At trial, Ms. Casino provided additional context for what appeared to be a custodial recommendation that was inconsistent with her assessment.

139. Ms. Casino first spoke to the significant delay in getting Indira to participate. She related her own observations of Indira's extreme emotional fluctuations and her "propensity to engage in alienating behaviour". She expressed particular concern about the false community reports made to the CAS about Kevin in February 2019, and her certainty that Indira had carefully planned to sabotage the weekend of February 8 – 10, 2019.

140. Ms. Casino related how the sheer number of false allegations raised by Indira against Kevin over the course of her investigation caused her "very serious concerns" and "exceeded what is typically seen even in high conflict custody access disputes." She also agreed that it was likely, if

not inevitable, that Indira would tell A the many lies that she had told others about Kevin wanting A to be aborted or put up for adoption.

141. Ms. Casino confirmed several times in her evidence that she observed Kevin to be very attuned to A as a parent, and that she was “extremely comfortable” in his care. In her evidence, Ms. Casino expressed her view that it was important for A to have “as much contact with Dad as possible” and that her “primary concerns” in conducting the assessment were Indira’s mental health and the issue of alienation.

142. Why then the recommendation that A be placed into Indira’s custody?

143. Ms. Casino’s evidence at trial clarified her expectation that her report would be subject to later review, once the psychiatric testing was complete. She anticipated that there would be ongoing judicial management and oversight of the file to ensure Indira’s compliance with Kevin’s parenting time. When specifically asked during cross examination whether she regarded her recommendations as a final, long-term parenting regime for A, Ms. Casino answered “No”.

144. In reviewing the whole of her Report and her oral evidence, I find it most unfortunate that Ms. Casino did not take steps to defer the delivery of her report until after the recommended psychiatric assessment, and/or that she did not state her recommendations as temporary. Perhaps it was simply her view in the summer of 2019 that sole custody was a practical solution for a young child going through a series of surgeries in Ontario with an out-of-province father.

145. A’s present circumstances are much different. A’s surgeries are complete, and she has no special needs as Indira confirmed in A’s Montessori enrolment.

146. I do accept Ms. Casino’s June 2019 recommendation that joint custody is not in A’s best interests. Indira has shown no ability to place A’s needs above her own drive to dominate and sabotage Kevin’s parenting. When a sampling of post June 2019 events was put to Ms. Casino at trial, she testified that she would be “horrified” if any of it was true and she hoped that the Children’s Aid Society would have been involved.

Children’s Aid Society

147. Kamilah Clayton assumed the lead role with respect to A’s file from November 2018 until the file was closed in November 2019. She provided evidence supplemental to the Peel CAS Records of the Society’s involvement.

148. I adopt the applicant’s summary of her evidence and the CAS Records:

- a. The family first came to the attention of the Society in February 2018 when a Region of Peel Healthy Babies Healthy Children worker called and reported Indira was experiencing social isolation. The Society was also contacted by Wendy Pastuck, a social worker at Etobicoke General Hospital, following A’s birth,

reporting that the hospital was concerned Indira was not stable enough to care for A. Ms. Clayton confirmed that the Society sought a warrant to seek A's apprehension prior to her discharge from the hospital but the warrant was not obtained. After A's hospital discharge, Indira received support from the Society and A was seen by a nurse through the Society's Infant Wellness program.

- b. Between May and July 2018, the Society received a variety of reports about Indira's care of A, primarily from fellow residents and staff in the shelter where Indira was residing. These reports included allegations of A being left alone in the shelter lobby, being fed while vomiting, A being left alone on a table, and being dressed in soiled clothing. Indira's caseworker made personal observations of A's bouncy chair being placed on a bed (where Ms. Clayton confirmed she would be at risk of falling off the bed), A's diapers being soaked with urine, and Indira not having a bassinette.
- c. In July 2018, the Society verified a concern of limited caregiving skills/risk that the child is likely to be harmed given repeated incidents of Indira failing to put A in a proper car seat while driving in a vehicle. This included personal observations by her case worker. Another such incident was reported to the Society on or about August 9, 2018, after the Society had already verified the concern. Ms. Clayton confirmed that the Society "reminded" Indira to use a car seat and no further steps were taken regarding this issue. The investigation related to the August 2018 car seat incident was closed because Indira would not sign a consent for the Society to obtain information from UBER about what had occurred.
- d. The Society attempted to make an unannounced visit to observe A at the shelter where Indira was living in August 2018 but was not permitted to do so by the shelter staff. Ms. Clayton testified that the purpose of an unannounced visit is to observe the true living circumstances of the child without giving the parent an opportunity to fix or correct the Society's concerns in advance. Ms. Clayton confirmed that if unannounced visits are frustrated, a complete, thorough investigation cannot be completed. The shelter continued to prohibit unannounced visits in the months that followed.
- e. Throughout 2018, Indira made a number of complaints/statements to the Society about Kevin. This included telling the CAS she did not want Kevin to have a weekend visit with A in May 2018, without being able to explain why, saying she had to move to a shelter because Kevin "knew her address", accusing Kevin of having firearms, threatening to kill her, and wanting the child aborted, complaints about child support and wanting charges to be laid against Kevin, and asking the Society to "supervise the web" so Kevin did not use a picture to "sell" A online. Notwithstanding Indira's various allegations, Ms. Clayton confirmed the Society

had no independent concerns about Mr. Lenihan. Ms. Clayton recalled being advised by Indira's previous caseworker, Vanessa Woods, that Indira made a complaint about her after the Society contradicted Indira's false representation that the Society took the position Kevin should not have access to, or a picture of, A.

- f. In November 2018, Ms. Shankar refused to receive ongoing voluntary services from the Society's infant wellness program, which Ms. Clayton confirmed is a Society program that assigns infant care consultant nurses to perform regular check-ups/assessments of children under 18 months of age involved with the Society.
- g. Ms. Clayton confirmed that, following her assignment to the case and the complaint about Ms. Woods, a new caseworker, Punitha Monoharan, was assigned in November 2018. Subsequently, in January 2019, the Society closed its file, having determined that A was in a stable and supportive environment as Indira was living in a shelter and had support from shelter staff in caring for A. Within days of the file closure, the Society received another anonymous complaint from a shelter resident that A's diapers were not being changed, was crying often, being given rotten milk, and being left alone. Ms. Clayton confirmed that the Society had a face-to-face meeting with Indira on January 31, 2019 and as no concerns were observed that day, the file was still closed. A few days later, another report from a shelter resident was made about A's care on February 3, 2019.
- h. Ms. Clayton testified that the Society received purported community complaints about Mr. Lenihan on February 9, 2019 (from a Holiday Inn hotel) and on February 11, 2019 (from a Canadian Tire). Ms. Clayton confirmed the Society's record that the day before the Holiday Inn complaint was received, Indira had called the Society, asking for information about what hotel Kevin was staying in. Ms. Clayton testified that the caseworker followed up on both reports and determined them to not be credible/verified.
- i. Ms. Clayton also confirmed that Kevin contacted the Society in February 2019 to note a marking he had seen on A during his weekend visit, and to express concern about Indira's failure to provide A's supplies for the visit. Ms. Monoharan discussed these concerns with Indira during a call on the morning of February 11, 2019, during which call she also discussed the community calls from the Holiday Inn/Canadian Tire and advised they appeared to be "malicious". Ms. Clayton confirmed that the case note from Indira's call with the worker on the morning of February 11, 2019 made no mention of Indira having reported A suffering from scratches to her chest and diaper area or diaper rash. However, during a further call later that day after attending her pediatrician's office, Indira complained of A suffering from scratches, diaper rash, unhappy demeanor, and reported she had not been properly cleaned during her visit with her father on the weekend. Indira then

made a request for the Society to investigate the alleged concerns about Kevin and referred to previous allegations of Kevin touching A “inappropriately”. Indira later reported to the Society that A had been “subject to abuse and neglect” by Kevin during his supervised access visits at Jane Walsh’s facility in November 2018. Ms. Clayton testified that Indira was “really pushing Punitha to investigate Kevin” and that she sent an angry e-mail to Ms. Monoharan and Ms. Clayton on February 12, 2019 accusing the Society of “taking sides”.

- j. Ms. Monoharan and another worker, Bobby Thomas, conducted an in-person assessment of A on February 13, 2019, and observed scratches on her body and redness on her vagina. Indira reported to the workers during this visit that Kevin “drinks alcohol at night” and may have “neglected” A and asked the CAS to “ensure her child’s safety.” The same day, the Society received a report about A from her pediatrician, Dr. Kao, expressing concern about Kevin’s care and parenting of her. The Society made several attempts to follow up with Dr. Kao about his report but received no response. When Ms. Monoharan spoke to Kevin about the concerns that had been observed, Kevin was clear that there were no issues with A’s care during his time and thanked the Society for the update about A.
- k. Ms. Clayton testified that the Society was advised on February 26, 2019 that Indira was bringing a motion to have Kevin’s upcoming March 2019 parenting time supervised. Ms. Clayton confirmed that the Society would not have instructed or encouraged Indira to take such a step, as they do not take positions or give advice to parents in the context of family law proceedings.
- l. Ms. Clayton confirmed that as the Society’s investigation regarding the reports made in February 2019 was ongoing at the time of the motion, they recommended three options for a “safety plan” for Kevin’s visit to proceed. She testified that Kevin and his parents met with the Society in accordance with one of the three recommendations of the Society and agreed to implement the terms of the safety plan being recommended. However, she confirmed this plan was not implemented on consent as Indira asked to impose additional terms not recommended by the Society. Accordingly, the motion proceeded contested and Ms. Monoharan gave oral evidence at the hearing.
- m. Ms. Clayton confirmed that after the motion was decided, Indira sent a series of angry e-mails to Ms. Monoharan, accusing her of “trying to get her in trouble”, lying under oath, trying to “help” Kevin, “misrepresenting” facts to the court, and failing to give evidence to the judge, among other things. Ms. Clayton testified she did not share any of Indira’s concerns about Ms. Monoharan’s evidence given to the Court on March 8, 2019, and confirmed that the Society deemed the nature of Indira’s communication with Ms. Monoharan to be harassment, advised her to

block Indira's e-mails, and assigned a new worker (Bobby Thomas) to the case.

- n. Ms. Clayton confirmed that in accordance with the Society's safety plan, a Society worker attended the exchanges for Kevin's parenting time in March and April 2019. No concerns were noted with respect to Kevin's care of A, and she was noted to be very happy when she saw/was with Kevin and his parents. In late March 2019, the Society concluded that none of the allegations raised about Kevin in February 2019 were verified.
- o. Ms. Clayton testified that the Society remained involved with Indira and A after the investigation related to Kevin closed. She confirmed the Society had difficulty contacting Indira throughout the spring of 2019. Dr. Kao was also unresponsive to communications from the Society during this period. The worker, Bobby Thomas, attempted an unannounced visit in May 2019 and was advised that Indira was no longer living in the shelter where she had resided up that point.
- p. The Society received another complaint about Indira's care of A from staff at the new shelter she was living in on May 16, 2019. Notwithstanding this, the Society closed the file on May 30, 2019. Ms. Clayton testified this was done, in part, because Indira and A continued to have "stability" living in the shelter and additional safeguards by way of other people being present to observe A. After the file closure, another report came in from a doula named Amy Macneil who reported that A was not being fed properly. The Society contacted the shelter for feedback, who advised they could not confirm or deny the information the Society had received. The Society still proceeded with the file closure as no information had been received to "substantiate" the report.
- q. Ms. Clayton confirmed that the Society's final investigation related to the family occurred in the fall of 2019, when a case manager at the shelter reported that Indira's children were living in filthy conditions. Bobby Thomas met with several shelter staff who repeated their concerns about Indira's living conditions and the children. The Society was able to conduct an unannounced visit and determined Indira's living condition to be "not clean and unhygienic for the children to live". Indira advised that she was in the process of moving and agreed to stay in a hotel on an interim basis. Bobby made subsequent visits to see Indira in the hotel, and a final announced visit shortly after she moved into a new apartment. As no concerns were noted on these visits, the file was closed.
- r. Ms. Clayton confirmed in her testimony that the Society stopped being involved and stopped receiving community reports about Indira after she moved out of the shelter system into her own apartment. Ms. Clayton also confirmed the Society had never been given information about Indira's second child, other than that his name is "Sanjay".

149. The name of the younger child was only just discovered on his flight ticket to India provided during this trial. His name is Krish (or Krishna) Ryan Shankar.

The Final Surgery in August 2019 and Indira's Complaints of Sick Kids Medical Staff

150. The final Sick Kids surgery to correct A's craniosynostosis was scheduled for late August 2019. Four days before Kevin's September visit, Indira's sixth lawyer, Mr. B., wrote to Kevin's counsel that the visit must be supervised because Kevin did not "have the skill set to deal with a child in need of suture care."

151. Kevin contacted the pediatric nurse coordinating A's care at SickKids, Shannon Seager, and the surgeon, Dr. Christopher Forrest, inquiring as to what ongoing suture care was required. Ms. Seager responded that A was doing well post-operatively, that no ongoing suture care was required, and she provided Kevin with simple instructions on how to address any scabbing on A's head, if any. This communication was shared with Indira's lawyer who then agreed that the visit could proceed unsupervised.

152. Following this exchange, Indira made a lengthy complaint against Ms. Seager that resulted in this highly competent and caring professional withdrawing from A's treatment.

153. It was learned during trial that Indira had also made a complaint against Dr. Forrest, the head of the surgical team that had saved A's life. Dr. Forrest testified that Indira's complaint to the College of Physicians and Surgeons of Ontario was a direct result of him having provided medical information to the father.

154. The complaint was read by Dr. Forrest. It was far reaching and vitriolic. Indira accused the surgeon of having advised Kevin that A "can be removed from Ontario immediately", and that there are "planning strategies to advance fathers position in custody battle". She requested that Dr. Forrest stop "disrespecting the mother, playing games with the mother" and "be more transparent with the communication". Dr. Forrest denied these various allegations and commented that they were "not based in any reality".

155. Dr. Forrest testified that this kind of relationship breakdown with a parent makes it difficult to continue providing medical care to the child patient, and that he made inquiries about discharging himself from A's care as a result of the complaint. Dr. Forrest also gave evidence that he received another communication from Ms. Shankar in October 2020 that resulted in him seeking advice from his medical malpractice insurer, the Canadian Medical Protective Association.

156. All of Indira's complaints against medical staff at Sick Kids have been dismissed.

The Psychological Assessments

157. The parties attended a Settlement Conference in October 2019. No settlement was reached, and the matter was put to the May 2020 trial sittings. Kevin sought to have the OCL-recommended

psychiatric assessment completed prior to trial and was granted leave to bring a motion for such an Order, as Indira refused to participate.

158. The motion for an assessment was heard in January 2020 and Indira was ordered to undergo a psychological assessment with Kevin's proposed clinician, Dr. Susan Walker-Kennedy. Indira was also ordered to pay Kevin \$9,500 in costs of the motion, payable within 60 days. Indira then brought a motion in January 2020 for a psychological assessment of Kevin, and that the costs Order of Justice Bloom be set aside. Her motion was dismissed, and Indira was ordered to pay a further \$1,500 in costs to Kevin, payable within 60 days.

159. As set out in my oral reasons, Indira then attempted to circumvent the court-ordered assessment, as she had earlier attempted to avoid the OCL investigation. She did eventually participate in the assessment, but then she engaged her own assessor, Dr. Jean Sziba-Day.

160. At trial, applicant's counsel objected to Dr. Sziba-Day testifying and asked that if admissible, her evidence be given little weight for three reasons: she had produced no file or notes, she acknowledged that she had relied only on information provided by Indira and she had not made a thorough review of the OCL Report which was the genesis of the assessment.

161. I permitted Indira to call Dr. Sziba-Day and found her testimony instructive, particularly the background portion of her report which set out the information provided to her by Indira. With the whole of the evidence now before me, I am able to conclude that the information given to Dr. Sziba-Day by Indira was false and misleading. And yet in the face of that manipulation, Dr. Sziba-Day identified many of the same personality traits and narcissistic personality tendencies in Indira as was noted in Dr. Walker-Kennedy's court ordered assessment.

162. Dr. Walker-Kennedy identified Indira as presenting with a Narcissistic Personality Disorder, noting that the disorder consists of "a pervasive pattern of grandiosity, a constant need for admiration and a lack of empathy." She noted that Indira showed a "capacity to disregard the truth when it suited her purposes" and she gave a number of examples, one of which was personally distressing to the clinician: Indira persistently asserted that they had a prior personal relationship, which was false. Dr. Walker-Kennedy was also troubled by Indira's obsessive allegations about Kevin. She recommended psychotherapy on the basis that the nature of her personality disorder was serious enough to warrant ongoing intervention.

163. Indira has provided no evidence that she has taken any course of therapy, counselling or any other form of intervention.

Montessori School

164. In December 2019, Indira sought Kevin's consent to enroll A in Montessori School. With trial only five months away, and A only two years of age, Kevin took the position that school enrollment was premature. Indira ignored Kevin and secretly enrolled A in a Montessori School

in January 2020. She did so without a court Order for custody.

165. Indira did not disclose any school attendance until a letter dated April 23, 2020 on the letterhead of P.T. Montessori School was found within her trial exhibits. Linda Harrison is the principal and owner of P.T. Montessori School. Kevin contacted Ms. Harrison to inquire whether A was in fact enrolled in the school.

166. Ms. Harrison responded that A had not ever been enrolled at her school and was upset that the letter Kevin had received was a fabrication. She identified the differences between her official letterhead and that of the forged letter. She advised that the person purporting to sign on behalf of the school did not exist.

167. She was further distressed to receive an e-mail from Ms. Shankar on July 8, 2020 that accused Kevin of having made up the letter about A being enrolled at P.T. Montessori – a letter that Indira placed in her trial exhibits.

168. Indira refused to provide Kevin with any particulars of A’s actual school until November 9, 2020, a week before the start of trial, while Kevin was still in quarantine. When it was received, Kevin was not able to verify enrolment or any other information because he was not listed as A’s parent. On November 23, 2020, I made a midtrial Order allowing Kevin to obtain all information with respect to the school. The actual school at which A was enrolled is Montessori Works, and their records show that Indira wrote “N/A” under the “second parent” information in A’s enrollment form, and did not list Kevin as a contact or an authorized individual to pick up A.

Trial Management Conference Before Justice Price – January 2020

169. The parties attended a Trial Management Conference before Justice Price on January 31, 2020. Indira was ordered to produce various disclosure about A, including details about all of A’s caregivers, activities, medical care providers, and a copy of her birth certificate. Her response was incomplete. No birth certificate was produced. Indira again refused to provide historical telephone and text message records.

170. Further inquiries were unsuccessful. Indira’s seventh lawyer, Ms. K advised that she was working on gathering the outstanding information, and that Indira would shortly be applying for A’s birth certificate.

March 2020 – Skype Calls Begin

171. The onset of the pandemic put off the May 2020 trial date, and travel restrictions prevented in-person visits. Kevin proposed weekly Skype calls to maintain contact. Initially, Indira refused, claiming that she had limited computer access in the shelter where she was living. The CAS records show that that Indira had moved out of the shelter months earlier, and, this is the same time period during which she produced a lease for an apartment. Later, Indira proposed facilitating the calls on Monday mornings at 7:00 a.m. again (*i.e.* 4:00 a.m. in Oregon). Ultimately, the parties were

able to agree to the first call occurring on March 29, 2020 at 10:00 a.m. EST.

172. Kevin testified that A appeared unable to see and/or hear him during the first call. Thanks to a year of monthly visits, A knew her father well, and yet was unresponsive to sounds he was making. She did not look at the camera.

173. The difficulties persisted. Sometimes Indira did not answer Kevin's calls at all. Other times she was late, or like the first call, A was not able to hear or see him. Kevin would call or email Indira to get the call going and would receive no response, or Indira would say that he had not called. Kevin proposed to start recording the Skype calls to avoid any future false claims about whether or not they were occurring.

174. Later that week, on April 5, 2019, Indira sent Kevin a series of abusive messages through Skype, calling him gay slurs and using a range of offensive language. The messages are worth recording. They were entirely unprompted, and Kevin sent no reply to any message. Each line concluded with a happy or sad face emoji.

Indira 9:54 a.m.

It's amazing to what lengths a delusional psycho can go He had his 5-minute access with the child as per schedule and still crying victim and saying the call didn't happen. That's proof that he is a delusional psycho.

That delusional psycho always uses his parent's money to bribe lawyers and doctors to write reports that mother is ill and hiding from attending the evaluation.

This delusional psycho who sleeps with women has paid off doctor to say he needed empathy, A delusional psycho rapist who rapes women wants empathy!!!

Such a joke.

So gay!!! A straight man will not behave like this. Only a gay will behave like this. Coward, when are u going to man up?? Take treatment to become a man a long as you are gay this is how you will behave. Gay men expect empathy while real straight men take care of women. Now I know why your uncle called you gay because you are gay. There is no doubt. Gay people are always troublemakers because they are jealous of hot men hot women. They want extra attention and have jealousy about hot women and hot man.

Indira 10:10 am

A straight man would have found someone in 3 years and spent all the

money on his new woman and had a new family. But unfortunately, gay men have no such options so they continue to harass woman and waste their money in paying off people. That's how gay gets happy.

The lawyers know they found a rich fool who will pay them and people in their network. Gay men want to see their daughters for sex. That's why they look out for their daughters.

Now I know why many years back the law was strict on these gays. They deserved it. If gays are allowed to reproduce this is what gonna happen. Rich gay fool who doesn't know where to spend his parent's money.

175. The messages continue for a further 47 lines sent in bursts at 10:40 am, 11:02 am, 11:17 am, 11:33 am, 1:16 pm, 5:22 pm, and 6:47 pm.

176. Indira refers to Covid as "karma," repeats that "This child is not even yours" that Kevin is a "drug dealer" that "my son's father is my daughter's father" and concludes with a sneer about incest amongst the Lenihan family members.

177. Kevin's counsel raised this behaviour with Indira's counsel, who simply denied it and accused Kevin of fabricating the Skype records. Indira's counsel also claimed to have a record of calls having occurred that did not take place, but no such records were ever produced.

178. Kevin was scheduled to have a call with A on May 16, 2020, the day after the extended deadline that counsel had agreed upon for Indira to serve her trial exhibits. Indira called Kevin and asked to reschedule the call, claiming she was having a "breakdown" and criticizing him for wanting to keep the file trial ready. The same day, Indira sent Kevin a series of messages through Skype accusing him of "harassing" her with paperwork and making other insults and accusations. She made a reference to her "husband" wanting to have a conversation with Kevin.

179. Not having any information about Indira's supposed husband, Kevin requested information through counsel. Indira's counsel indicated that she had a husband in India but did not respond to Kevin's requests for further information.

180. Through the spring of 2020, the Skype calls continued to be inconsistent and sporadic. Sometimes the calls started later than scheduled, and other times the call did not occur at all. On June 6, 2020, Indira did not answer Kevin's calls and he sent her a series of e-mails asking if the call would take place. When Kevin's counsel wrote to Indira's counsel, he received a purported record of the call having happened on June 6, 2020. That record was examined at trial and I am satisfied that it was actually a record of the March 29, 2020 call with the date changed.

181. The parties attended assignment court on July 7, 2020 at which time Indira consented to her counsel's request to be removed from the record. Following a number of other video attendances, the trial was scheduled for November 16, 2020.

Indira Escalates

182. The calls initially improved during the summer, but then suddenly stopped in August. Indira refused further calls, e-mailing Kevin and his counsel that there was no Order in place requiring her to facilitate the calls and therefore no obligation on her to do so. Kevin brought a motion and, in the period leading up to the motion, her emails became angrier and more abusive. Now representing herself, she emailed on August 27, 2020:

Go screw yourself. Or even better ask your lawyer to arrange for a woman for you. He seems to be a pimp who will do anything for money. Looks like if you pay more money he might send his own wife to sleep with you. Bcoz usually honest lawyers will not lie so much. You must have thrown money so he is ready to do anything. Try throwing him more money and I am sure he will share his wife with you.

183. The emails became personal. She wrote that “Andrew (applicant’s counsel) will see his kids everyday. You cannot see your child. You lost the chance dummy. Never again will my husband and I be so nice to you.” She emailed at length about her husband and that he was the only reason Kevin received access, but now they “told I am right and Kevin is garbage. You lost yet another chance to be close to A. I’m not hurt. I am laughing about how you set yourself up.”

184. On Friday August 28, 2020, Indira texted, “You will not get access to A. You talk to your lawyer or his wife. Spend time with them not with us. You wanted to harass me even after giving you access to A using your lawyer. So you will end up with less access.” Multiple, lengthy emails followed over the next few days. They were personal to counsel and to Kevin, taunting him that he would get no more access and that it was his fault. On August 28, 2020 she wrote:

You son of bitch.

Why are you stalking me over Skype. You can watch all you want but you will not get to see A. You act too smart in court this is what you will get.

My husband and I were laughing at how a psycho can set himself up. We had a good time with our 2 kids we had good weeknight Friday date night we enjoyed and we’re all happy. Same with your lawyer they also have a family. You are the only lonely psycho. Talk to your lawyers if you feel like [talking] to A. Go screw yourself for the rest of your life. I want to see you cry. You should miss A. I love that. We respected you and gave you access but you screwed yourself over.

Apologize to me and accept that you made a false accusation then access will continue. Otherwise you will not get any shit.

I want to see you hurt. A already forgot you. She loves her step father more.

She calls him Daddy with so much love. You're already replaced dummy. You are too late. You are a fool who gave up your spot and now you want to come back and the spot is taken.

185. Indira goes on at length, repeatedly taunting Kevin about spending his money on legal fees, paying child support without getting access and she finishes "Oh so sad. I feel for this dumb ass. I already filed bankruptcy, so I don't care about costs. But you have to pay lol lol lol. Ha aha ha."

September 4, 2020 – Motion for Daily Skype Calls

186. The motion for Skype calls was finally heard on September 4, 2020. In response to Kevin's motion, Indira filed a lengthy Affidavit that contained frightening and entirely false allegations, including the claim that Kevin was sending sexually explicit messages to A and Indira through Skype.

187. But then at the motion, Indira consented to an Order being made for daily Skype calls, and that Kevin would record all the calls through Skype to avoid any further dispute about whether or not the calls were happening.

188. Problems continued. A was still regularly unable to see and/or hear Kevin during the calls. The camera was often pointed away from A's face, and at times Kevin could not see A in the frame of the call at all. There were a few good visits. Sometimes the camera was pointed at Indira or A's brother instead of A, or A was focused on something off camera and seemed unable to see the video call. A was also often completely unresponsive to any sounds or gestures Kevin made during the calls. The recording of a number of those calls were played during the trial.

189. Noted in the calls were troubling situations that placed A's safety and well-being into question, such as:

- a. A riding in a moving car without being buckled into her car seat;
- b. A jumping up and down on a table with limited intervention by Indira;
- c. A crying and having an excessively runny nose without receiving any comfort or attention from Indira; and
- d. A and her brother eating white sugar out of a bag on the floor.

190. Meanwhile, the abusive emails continued. They got nastier and were often sexualized. Kevin did not respond, which seemed to escalate Indira. Indira mocked Kevin with having been replaced and ridiculed him for paying for a trial that he could not win. She wrote, "If I facilitate access for fucking 10 minutes a day then that's it, I can save thousands of dollars on trial fees. But you have to spend money for trial lawyer and you also need to defend yourself from Peel Police and you need a lawyer for that. Even if you win family court (which you will not, if I facilitate

access for fucked up 10 minutes) the crown attorney might not let you cross the border back home to USA.”

191. The emails continued to intensify through September, spiralling into madness. Indira claimed that her husband “was a millionaire horse owner in Oakville” who was the father to her son, that Kevin would have to move to Canada to be a free babysitter for A and would be a slave to her husband. At the same time, many of the emails were perfectly rational, like her email that she had blocked the junior lawyer’s email, “so that [Kevin] can only receive emails from the senior lawyer so that it costs [Kevin] more money.” She asked him to send her more emails so that she and her husband can be entertained. She promised to give him the run around every day.

False Claim of Hospitalization in September 2020

192. On September 15, 2020, Indira advised that A was “in the hospital” and “isolated” from Indira on account of various symptoms and indicated she was being tested for Covid-19. Indira’s e-mail to Mr. Chris concluded by saying “Right now she is in hospital and testing is in progress and currently she is isolated.” When Kevin called at the time of his daily Skype call, Indira indicated she could not speak at that moment but that she would e-mail additional information. She didn’t. She did not even answer Kevin’s request for the name of the doctor.

193. The only doctor’s information that Indira provided was Dr. Kao’s information. Through counsel, Kevin requested the name of the hospital A was in, her treating doctor, and the barcode to her health card to track the Covid test results online. Indira did not provide this information, indicating only that A’s health card was “expired” and that Kevin would need to act as a financial guarantor for the hospital costs. Kevin’s counsel responded that he would cooperate in whatever manner was necessary to address any billing issue, but again requested full details of A’s hospitalization, as well as an update on her health status. Kevin never received a response to this request, nor did he hear anything further on the alleged billing issue.

194. Kevin contacted a number of hospitals in the Mississauga/Brampton area but was unable to get any information. His counsel sent a letter to Dr. Kao’s office, and only received replies that Dr. Kao would get back to him. He never did.

195. Ultimately, Kevin brought a motion to compel Indira to provide the medical information he was seeking. Kevin was successful on this motion and Indira was ordered to produce the outstanding medical information within five days, and to pay \$700 in costs to Kevin.

Offer to Transfer A to Kevin’s Care

196. Immediately following the motion, Indira sent an e-mail to Kevin’s counsel saying that she wanted to turn A over to Mr. Chris so that she could be transferred into Kevin’s care. Kevin’s counsel responded that this request would be facilitated. Indira then denied sending this e-mail and claimed her e-mail address had been “hacked”.

197. I do not accept that her email had been hacked. It is the same email address that Indira has used throughout this proceeding, including the address from which she sends documents to the court. She wrote to Kevin at 7:51 am on September 25, 2020:

Please talk to [your] lawyer and let us know what date works for him so we will drop off A with Andrew Chris and that's it. We are done. I do not want to hear from you or her after that. I am very strict about this. I have nothing to do with you after that...I think that she will be fine with you and your family and she doesn't need me or her brother. I think it's a win win situation where you get A and I was able to get rid of you completely from my life. I don't want to see or hear from you or A again. Just give me a reasonable date and we will drop her off at Andrew's office and we are done.

At 7:59 am we emailed Kevin and his mother

I copied June Lenihan so she can help in expediting this matter. I look forward to hearing from you the date I can drop A with her belongings to Andrew Chris office and that's it. After that I do not want to hear from Kevin or A. I and my son will go to India and be with my parents. I want to stay close to my parents and they are more important to me than A. I am sure A will be happy with Kevin and the Lenihan family and they are better people to raise A and all I need is a date where I can drop her off and from that point I cut off my relationship with Kevin and A (in order to get rid of Kevin from my life)

198. Within days the Offer was forgotten. Indira did not produce A's medical information in accordance with the terms of the Order. Nothing was received until after Indira had retained her ninth lawyer, Mr. P, in October 2020. On October 22, 2020, in response to a request from Kevin's counsel, Mr. P wrote enclosing a copy of a Covid-19 test dated September 19, 2020 which was four days after the date when Indira had said that she was hospitalized. Mr. P, and later at trial, Dr. Kao each confirmed that A had never been hospitalized.

199. The inescapable conclusion is that Indira took A for an unnecessary Covid test to cover up her claims about what had transpired on September 15, 2020.

Forgery of Paternity Test

200. Indira's Answer seeks an Order declaring Kevin to be A's father, but her inconsistency during the litigation led to an agreement for a formal test. In April 2019, Kevin completed paternity testing with A in accordance with the Order of Justice Kristjanson. As expected, the test results confirmed that Kevin was A's biological father.

201. Paternity was not an issue. Then in October 2020, Kevin learned that Indira had contacted the lab that conducted the test and was making inquiries about the authenticity of the result. On October 30, 2020, Mr. P served a copy of a lab report that stated that Kevin was *not* the biological father.

202. The second report was examined by Kevin's counsel. It had the same laboratory information and date as the April 2019 test, but the conclusion and probability of paternity fields had been altered, and the footnotes below the conclusions had been typed over. It was a clear forgery. Kevin's counsel responded to Mr. P., sharing his observations and a copy of the actual test. The next day, Mr. P. advised that he was no longer representing Indira.

203. Further details were learned at trial, leaving no doubt that Indira obtained a copy of the actual test and altered it. I heard testimony from Ms. Harrison, the Senior Customer Representative at the lab that conducted the tests. Ms. Harrison confirmed that the test result produced by Indira did not come from her lab and explained how it had been altered.

204. Upon Mr. P advising that he was no longer representing Indira, Indira stopped facilitating Kevin's daily Skype calls for three days.

Forgery of Will-Say

205. In the weeks leading up to trial, Indira served a purported will-say statement from Elizabeth Dietz, a high school friend of Kevin. Indira had listed Elizabeth as her witness in the January 2020 Trial Scheduling Order and had referenced her in her OCL intake history. The will-say contained terrible allegations about Kevin.

206. When Indira indicated that she would not call Ms. Dietz at trial, Kevin was granted leave to do so. Ms. Dietz testified that she had never met or spoken with Indira or any lawyer acting on Indira's behalf, and that no one had ever contacted her about giving evidence in this proceeding on Indira's behalf.

207. Ms. Dietz was referred to an e-mail from Mr. P to Kevin's counsel dated October 22, 2020, enclosing an 11-page "will-say" statement purportedly written and signed by her on August 4, 2020, purportedly notarized by a Ketsia McCleave. Ms. Dietz confirmed that the signature on the statement was not her signature, that the e-mail address listed in the statement was not her e-mail address, that she does not know Ketsia McCleave, and that she did not write the letter in question.

208. Ms. Dietz gave evidence that she was shocked when a copy of this statement was first provided to her, that it caused her to have heart palpitations, and that seeing it caused her to feel as though her "identity had been stolen." Ms. Dietz described Kevin as a person with "a lot of integrity" and she "could not say enough good things about him". She was horrified by the allegations that were made about Kevin in her name.

The Start of Trial

209. As the trial progressed, I learned that Indira retained her tenth lawyer, Ms. P, in the weeks leading up to trial, then made last minute arrangements for Mr. K to be her trial counsel. Neither the tenth nor the eleventh lawyer knew about the other until they met on the morning of the trial.

210. Indira had instructed Ms. P to serve a different Opening Statement on the eve of trial than what had been earlier provided. The changed Opening sought Orders that Kevin was *not* the father and sought Orders that he have no contact with A. This was a complete surprise to Kevin's legal team. Their understanding was that the triable issues were custody, access and mobility.

211. With the revised Opening came the same fake paternity test, with a brand-new document: a "Sperm Donor Agreement." The agreement was in the altered form of a standard precedent and was purportedly signed by Indira, Kevin and "Mr. Rao". Kevin had never seen it before. It was a transparent forgery, poorly executed and internally inconsistent.

212. Much later in the trial, the forged Sperm Donor Agreement was put to Indira during her cross-examination. She refused to answer any questions, but to say that it had been created by Ms. P against her instructions. She also stated that Ms. P had done five different Openings and she wasn't sure which one was sent to the other side or the Court because Ms. P had decided for herself what to do. Applicant's counsel obtained leave to call Ms. P as a Reply witness. She stated clearly that the Sperm Donor Agreement has been given to her by Indira and that she was only instructed to serve one version of the Opening, although there had been multiple revisions leading up to the final document.

213. Indira withdrew her claim that Kevin was not the father and I addressed the paternity question directly. Indira finally produced a copy of A's Statement of Live Birth. Kevin was not listed as the father. I learned that Indira had never obtained a birth certificate for A despite having been ordered to do so by prior Justices.

214. The start of trial provided a stark contrast to Indira's later assertions that she always wanted to co-parent with Kevin – that it was he who refused to work cooperatively. When making such statements she appeared utterly sincere and charming. She talked about facilitating access and consistently sharing information. Indira would share best parenting phrases, mirror my concerns as her own (often using the exact same words) and would lament the many lawyers and professionals who had failed her.

215. But when confronted with her own contrary statements and actions, she never sought to explain, only to deny and blame. She said that it was Ms. P who had created the strategy of claiming non-paternity at the start of trial, against her instructions.

Authenticity of Electronic Evidence

216. The *Evidence Act*, R.S.O. 1990, c. E-23 contains specific provisions about establishing the authenticity and integrity of evidentiary materials that qualify as "electronic records" within the meaning of section 34.1(1) of the *Act*. The phrase "electronic record" is broadly defined as follows:

"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6).

217. Section 34.1(4) of the *Evidence Act* confirms the low threshold test at common law for establishing the authenticity of electronic documents at the admissibility stage. The required standard of proof is some evidence capable of supporting that the electronic document is what the party adducing it claims it to be.

218. Sections 34.1(5) to (7) of the *Evidence Act* set out threshold criteria for establishing the integrity of the electronic document that is proposed to be admitted as evidence, as follows:

Application of best evidence rule

34.1(5) Subject to subsection (6), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

Same

(5.1) The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system by or in which the data was recorded or stored, or by evidence that reliable encryption techniques were used to support the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

219. In the absence of evidence to the contrary, the integrity of the electronic records is presumed, per section 34.1(7).

220. The best evidence provisions work to ensure that an electronic document accurately reflects the original information that was inputted or recorded on the device. With electronic documents, the focus shifts to the information contained in the document, rather than the document itself. The threshold for admissibility is low and at this stage, concerns are generally limited to the completeness and accuracy of the record.

221. Authenticity is a separate determination. As set out by the Ontario Court of Appeal in *R. v. C. B.*, 2019 ONCA 380, at paras. 654-68 and 72:

Authentication is the process of convincing a court that a thing matches the claim made about it. In other words, it is what its proponent claims it to be. Authentication is intertwined with relevance: in the absence of authentication, *the thing lacks relevance unless it is tendered as bogus*. Thus, authentication becomes necessary where the item is tendered as real or documentary evidence.

At common law, authentication requires the introduction of some evidence that the item is what it purports to be: *R. v. Donald* (1958), 121 C.C.C. 304 (N.B. C.A.) (N.B. C.A., at p. 306; *R. v. Staniforth* (1979), 11 C.R. (3d) 84 (Ont. C.A.), at p. 89; *R. v. Hirsch*, 2017 SKCA 14, 353 C.C.C. (3d) 230 (Sask. C.A.), at para. 18. The requirement is not onerous and may be established by either or both direct and circumstantial evidence.

For electronic documents, s. 31.1 of the *Canadian Evidence Act* assigns a party who seeks to admit an electronic document as evidence the burden of proving its authenticity. To meet this burden, the party must adduce evidence capable of supporting a finding that the electronic document is what it purports to be. Section 31.8 provides an expansive definition of "electronic document", a term which encompasses devices by or in which data is recorded or stored. Under s. 31.1, as at common law, the threshold to be met is low. When that threshold is satisfied, the electronic document is admissible, and thus available for use by the trier of fact.

To satisfy this modest threshold for authentication, whether at common law or under s. 31.1 of the CEA, the proponent may adduce and rely upon direct and circumstantial evidence. Section 31.1 does not limit how or by what means the threshold may be met. Its only requirement is that the evidence be capable of supporting a finding that the electronic document "is that which it is purported to be". That circumstantial evidence may be relied upon is well established: *Hirsch*, at para. 18; *R. v. Colosie*, 2016 ONSC 1708 (Ont. S.C.J.), at para. 25; *R. v. Bulldog*, 2015 ABCA 251, 326 C.C.C. (3d) 385 (Alta. C.A.), at para. 35; see also *R. v. Evans*, [1993] 3 S.C.R. 653 (S.C.C.), at p. 663. [...]

Emphasis added

222. The burden of proving authenticity of an electronic document is on the person who seeks its admission. As set out by the Saskatchewan Court of Appeal in *R. v. Hirsch* 2017 CarswellSask 77 (C.A.), citing *Watt's Manual of Criminal Evidence*, (Toronto: Thomson Reuters, 2016) at page 104; "the threshold is met and admissibility achieved by the introduction of *some* evidence of authenticity." As this suggests, the integrity (or reliability) of the electronic document

is not open to attack at the authentication stage of the inquiry. Those questions are to be resolved under s. 31.2 of the *Canada Evidence Act* – *i.e.*, the best evidence rule, as it relates to electronic documents.

Text Messages exchanged between Kevin and Indira from December 2, 2017 to April 4, 2018

223. In the first week of trial, while Indira was represented by counsel, Kevin tendered a complete record of all text messages exchanged between the parties from December 2, 2017 to April 4, 2018. He explained how he had exported the messages from his phone into a printable format using an application called “GIIApps SMSShare 2”. June Lenihan confirmed that Kevin downloaded the messages on her phone in the same manner. Mr. K raised no objection to the document brief being marked as an exhibit, he did not cross-examine Kevin on the authenticity of the documents and in fact, he put the messages to Kevin within the narrative of Indira’s claims of abandonment.

224. In the following weeks, while Indira self represented, she claimed that the texts were all fake, created to make her look bad. I do not accept her claim that the texts are fake for the following reasons:

- a. Throughout the litigation, Kevin’s counsel has made repeated requests for Indira to produce her own records of communication between her and Kevin for the purposes of comparison. Indira refused or ignored all such requests and did not produce any of her own cell phone records to substantiate her position at trial.
- b. When it was put to Indira in cross-examination that it would not have been possible for Kevin to “create” text messages from Indira that were pictures she took of herself, Indira responded that Kevin downloaded these photos “from her Facebook”. However, she provided no proof of said photos ever having been posted to or downloaded from Facebook.
- c. In Indira’s Response to Request to Admit dated and signed April 8, 2020, Indira admitted to having sent a number of the text messages to Kevin and June Lenihan found in their records of text correspondence that, at trial, she tried to allege were forgeries. As an example, Indira admitted to fact #260 in Kevin’s Request to Admit dated March 11, 2020, that she sent a text to June Lenihan on January 13, 2018 that said “You are a narcissistic bitch!!”
- d. On cross-examination, Indira asked June Lenihan what phone number for Indira she claimed to have received the text messages in question from. June confirmed the phone number was 647-741-2129. The Our Family Wizard records found in Indira’s own Exhibit Brief list this number as being her phone number.

225. Midway through the trial, Indira asked to call an expert in forensic authentication of electronic messages who was neither listed as a witness, nor had produced a report. His qualifications and familiarity with the evidence were entirely unknown. I did not amend the Trial Scheduling Order to permit the person to be called pursuant to Rule 20.2 of the *Family Law Rules*. Moreover, expert evidence from a forensic examiner is not required to authenticate a text message, see pages 77-78 of *R. v. C.B.*

226. I find that June and Kevin's evidence, and the overall patterns of the evidence as a whole, are sufficient to establish that the brief of text messages between Kevin and Indira from December 2, 2017 to April 4, 2018 is authentic. Indira produced no evidence to give an air of reality to her claim that these were messages created by Kevin to make her look bad.

E-mails from Indira to Kevin and Kevin's Counsel

227. Indira took the position that certain e-mails sent from her e-mail account to either Kevin or his counsel that placed her in a bad light were not authentic. Her repeated assertion was that someone, probably Kevin, was accessing her e-mail account and sending e-mails on her behalf. I similarly reject this proposal because:

- a. Indira only used one email account in her dealings with Kevin, his counsel and the Court record. It always remained the same. She was the only one who held the password for the account.
- b. The assertion lacks any air of reality. At no time did Indira change the account, change her password or set up a new account, any one of which would be the natural next step were her email to have been "hacked" or used inappropriately.
- c. Kevin gave very clear and credible evidence that he has never accessed Indira's e-mail account and/or sent e-mails on her behalf or purporting to be her.

Emails received from kevinlenihan.usa@gmail.com

228. Indira tendered three emails from this account, asserting that they had been sent by Kevin.

1. An e-mail to Dr. Forrest dated September 3, 2019:

The email made various complaints about A's care and the mother, stating that the sender wanted to put A up for adoption. Dr. Forrest confirmed in his evidence that this was a different e-mail address than the one he had otherwise used to correspond with Kevin, that the tone of this e-mail was inconsistent with his other communications from Kevin, and that he could not say with any certainty whether this e-mail had, in fact, come from Kevin.

2. An email to Dr. Kao dated September 3, 2019:

This email also made complaints about A's care, the mother and repeated the same assertions that the sender wanted A to be put up for adoption.

3. An e-mail to Montessori Works dated July 15, 2020:

This email expanded on the same themes, a sampling: "Indira just wants to show off that she is different and awesome and she always acts very smart, has too much attitude and wants to show that she is the best. Ideally she should stay at home and quit her job and take care of children, as any good woman will do. ...I had told her to give away A to foster care because in my opinion Indira is keeping A because she wants child support from me. I had told Indira to abort the baby when she was pregnant and move on with her life, she gave birth to baby A and now asking for child support..."

229. For the following reasons, I find these three emails to be inauthentic, that is, *not* what they appear to be.

- a. Kevin confirmed the two e-mail addresses he uses, and that he does not have any other e-mail address. He testified that he did not create this account, nor had he ever used it.
- b. The e-mails are written in a style inconsistent with Kevin's communications and consistent with Indira's communications, inclusive of content, word choice and spelling.
- c. The e-mails repeat false claims that were consistently voiced by Indira to the CAS, hospital staff, the CAS, the OCL and her own psychological assessor. In contrast, adoption was never raised by Kevin and is antithetical to his every action and claim within the proceeding.
- d. Kevin had no knowledge of Montessori Works until November 9, 2020.
- e. The right-hand header in the Montessori Works e-mail indicates that the e-mail was printed by a user signed in to the ".usa" account consistent with all other e-mails printed by the account user indrea.shankar@gmail.com.

When this "tell" was pointed out to Indira on cross-examination she claimed that the e-mail was forwarded to her by the Montessori school, a claim that lacks any air of reality as there is no record of a forwarding e-mail. The only plausible conclusion is that Indira downloaded this e-mail from the ".usa" account because she is the creator and holder of this account.

230. Although inauthentic, I admit these emails into evidence because they are probative of Indira's extensive efforts to damage Kevin's character, particularly in the eyes of their daughter's service providers and the Court. As set out in *R. v. C. B.*, an inauthentic communication may be relevant if it is tendered as bogus.

Further Bogus Emails between Kevin and Indira

231. In cross-examination, Indira's counsel put various e-mails to Kevin that he identified as fake. The emails had common characteristics:

- a. There were discrepancies in the content.
- b. The emails were set out in strings, but the dates of individual messages in the string jumped backwards and forward in time.
- c. One email referenced the OCL investigator six (6) months before the OCL was appointed.
- d. The formatting of the emails show that they are not printed from a Gmail or an Outlook mailbox account – rather, they appear to be the text of e-mails, copied and then pasted into a Word or other word processing document.

232. Also put to Kevin were spoofed pornographic Instagram postings that were tendered in Indira's exhibit books. They will bear no further comment in these reasons but to underscore Tom Lenihan's sober reflection that there is no line that Indira will not cross.

Manufactured Our Family Wizard Logs

233. As he witnessed the extent of manipulated communication, Kevin grew increasingly cautious. He communicated with Indira primarily through counsel, and otherwise by e-mail or Skype. He saved all emails in a reliable electronic format and he sought permission from the Court to record Skype visits. He did not use Our Family Wizard, nor was its use ever court ordered.

234. In her exhibit books for trial, Indira produced a number of purported "Our Family Wizard" records that she says were used to share information about A with Kevin. As with various other documents produced by Indira, these documents contained numerous internal inconsistencies, including:

- a. Dates in the correspondence log appearing out of Order.
- b. The purported payment record for the program was in an e-mail dated June 12, 2018, yet the receipt details showed the payment as having been made on January 12, 2020.

- c. The records do not link the “Kevin” identified therein to any e-mail address used by Kevin.

235. Indira failed to provide any explanation for these internal discrepancies. The only reasonable conclusion is that Indira created two accounts – one in her name and one in Kevin’s name – and then used the two accounts to generate messages that could be admitted as evidence.

Summary of Findings

236. This four-week trial was heard during the 2020 pandemic. The applicant and his legal team attended in person, the respondent attended for the final three weeks by Zoom and all the witnesses gave testimony by Zoom, but for Kevin, his mother, and Indira’s personal support worker (who was just as surprised as everyone else that her client had left the country).

237. I find that Indira’s patterns of conduct display the extreme lengths to which she is prepared to control Kevin, and when she can not control him; to exclude him from her and their daughter’s life. At no time has she demonstrated an ability to tolerate him, or any male parent. Her assertions of a “husband” in the months leading to trial were fantastic. Rarely were her interactions with Kevin child centred. Most were retaliatory; some were perverse.

- a. Denying Kevin and his parents access to information about, and physical contact with, A at the hospital at her birth;
- b. Going to the hospital staff and police when A was a newborn making a false allegation that Kevin had sexually abused A, allegations that could have ruined Kevin’s life;
- c. Going to police and making false allegations that Kevin had threatened to harm her, or had harmed her;
- d. Taking the position that Kevin could not have any contact with A or even a picture of her by falsely asserting this was the position of the Children’s Aid Society;
- e. Taking the position that Kevin could only have supervised parenting time with A for most of the first year of A’s life;
- f. Actively sabotaging the father daughter relationship in a manner that placed A at risk and may have caused her direct harm;
- g. Bringing a motion to have Kevin’s parenting time supervised based on false reports she made or caused to be made by an ally to the Children’s Aid Society;
- h. Failing to facilitate basic video conference parenting time between Kevin and A when Kevin was unable to travel to Ontario during the pandemic;

- i. Falsifying a DNA test result to raise questions about Kevin's paternity of A on the eve of trial and forging a Sperm Donor Agreement in an attempt to remove his standing as a parent.

238. These and other actions demonstrate Indira's inability to put A's needs above her own, or to even recognize A's needs as separate from her own. I find that the patterns of conduct identified in these reasons: the projection of false statements attributed to Kevin, disproportionate retaliation for perceived aggressions, and the making of complaints against any professional that discharged his or her duty in a manner that contradicted Indira's wishes, have placed A at risk.

239. I find that Indira's extreme need to control how she is perceived by others has also placed A at risk because no one professional (other than perhaps Dr. Kao) or agency has had a full and accurate picture of her parenting, including the CAS, who have been involved with Indira throughout A's young life. Indira has put up roadblocks at every turn to prevent the CAS, the shelter system and the hospital from having a full picture and, in doing so, has placed A at risk.

240. In contrast, I find that Kevin can offer A a stable, healthy and emotionally rich childhood. He has forged a strong attachment to A in the face of unimaginable adversity and maintained that attachment through remarkably engaging Skype/videoconference visits. I watched a number of those recordings and saw Kevin playing peekaboo with stuffies, singing songs, playing with toys and reading to A; fostering a connection with A well beyond what I previously thought was possible through a video link.

241. I find that Kevin has a detailed plan of care that will meet all of A's medical, educational and emotional needs. I heard evidence from Dr. Forrest that A's surgeries were successful, and that she is not due for a follow-up appointment until 2022. Dr. Forrest testified that it is not necessary for A to have ongoing care through SickKids, as long as she is monitored by a pediatrician and referred to another pediatric hospital with a department specializing in craniofacial conditions. I then heard from Dr. Craft, a pediatrician in Tulane, Oregon who is able to take A as his patient and who is familiar with craniosynostosis, its treatment and local specialists.

242. Kevin testified as to an educational plan for A with specifics as to where and how she will attend. She will have stable housing. I am satisfied that Kevin will ensure that A's relationship with her mother is fostered and protective.

243. In comparison, I have significant concerns with Indira's plan of care. Her most recent 35.1 Parenting Affidavit is full of omissions and lacks supporting evidence. It did not include her address, the name of A's younger brother, his father or the husband referenced in Indira's many emails. It did not include the name of A's actual Montessori school.

244. Joint custody is not an available option in these circumstances. As set out in *Kaplanis v Kaplanis*, 2005 CarswellOnt 266 (C.A.), joint custody requires there to be some potential for appropriate communication between the parents, particularly when their child(ren) is/are young.

As I set out in *Y. v. F.-T.* 2017 CarswellOnt 11169, sometimes joint custody is in a child's best interest even in the absence of communication when her primary care parent has a pattern of marginalizing her other parent.

245. Neither situation is applicable here. Indira is no longer a residential parent and her prior acts of gatekeeping, withholding medical and educational information, misdirection, falsification of documents, lies and the filing of forged document with the Court have poisoned any possibility of joint consultation or joint decision-making.

246. Past conduct is relevant to a decision on custody and access pursuant to the *Children's Law Reform Act* section 24(3.). I find that Indira's past parenting misconduct is extreme and dispositive. I find that it is not in A's best interests to be placed in Indira's custody or for Indira and Kevin to have joint custody. As Tom Lenihan testified, the verbal attacks that Indira has made on the Lenihan family – who are A's family – have been “despicable”. He correctly observed that there has been “no line that Indira will not cross”.

Some Final Thoughts

247. As our court transitions to a fully digital platform, this trial was a stark reminder of the potential for the manipulation and misuse of electronic evidence.

248. The most common internet definition of a spoofed email is when the email address in the “From” field is not that of the sender. It is easy to spoof an email, and not always so easy to detect. For sophisticated senders – such as actors who are “phishing” for information of commercial value – the origins of a spoofed email may never be detected.

249. Spoofing originates from the idea of a hoax or a parody, and in the early days of the internet, it was a legitimate tool for managing communications so that a user believed that an email came from one source, when it actually came from another.

250. Spoofing first arose as a term in family law (more commonly referred to in the U.S.A. as divorce law) to describe cell phone users hiding their identity and/or location for nefarious purposes. As a result of advances in mobile apps, websites, forwarding services and other technologies, callers are now able to change how their voice sounds, to evade a blocked number or to pretend to be a person or institution with whom their target was familiar. Targets can be tricked into disclosing sensitive information, harassed, stalked and frightened.

251. Any electronic medium can be spoofed: texts, emails, postings to social media, and even messaging through a reputable software program specifically designed to provide secure communications between sparring parents.

252. What stood out in this case was the purpose of the spoofed communications. Instead of tricking or scaring the target, electronic communications were spoofed to deliberately damage the other parent's credibility and to gain litigation advantage.

253. In *R. v. C. B.*, the Ontario Court of Appeal foreshadowed the relevance of inauthentic electronic evidence. “[T]endered as bogus” is a critical catch that is not always apparent. A party’s lament that “it wasn’t me” may appear credible at one stage of the proceeding but may no longer be credible at a later stage. An email or text that on first reading appears authentic might later be found to be inauthentic when examined within the evidence as a whole.

254. Fake electronic evidence has the potential to open up a whole new battleground in high conflict family law litigation, and it poses specific challenges for Courts. Generally, email and social media protocols have no internal mechanism for authentication, and the low threshold in the *Evidence Act* that requires only some evidence: direct and/or circumstantial that the thing “is what it appears to be;” can make determinations highly contextual.

255. In a digital landscape, spoofing is the new “catch-me-if-you-can” game of credibility.

256. I urge lawyers, family service providers and institutions to be on guard, and to be part of a better way forward. Courts cannot do this work alone, and the work must be done well. High conflict litigation not only damages kids and diminishes parents; it weakens society as a whole, for generations to come.



McGee J.

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DATE: 2021 01 14

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Kevin William Lenihan

Applicant

- and -

Indira Shankar

Respondent

ADDITIONAL WRITTEN REASONS

MCGEE J

Released: January 14, 2021