

DBCFS v LS et al, 2025 ONSC 2335.

SUMMARY

The Society (DBCFS) is seeking temporary care and custody of the children, R.W. and K.D., pursuant to section 94(2) of the [Child, Youth and Family Services Act](#) (CYFSA). L.S. is the caregiver from which the children were removed, and she seeks to have the children returned to her care. The children are both members of the Horse Lake First Nation in Alberta, the Western Cree Tribal Council (WCTC) acts on behalf of the First Nation. As the children are Indigenous, the court adopts the augmented best interest test, which supplements the best interest provisions of the CYFSA with those of [An Act respecting First Nations, Inuit and Métis children, youth and families](#) (Federal Act). An analysis of the augmented best interests test suggests that the children are not adequately protected from the risk of harm by remaining with their caregiver, L.S., even under supervision terms. As such, the children are placed in the care of DBCFS, who seek to reunite the children with their family and Nation in Alberta.

REGION	Ontario
JURISDICTION	Ontario Superior Court of Justice
JUDGE	Edmundson, J.
PARTIES	Applicant 1. Dnaagdawenmag Binnoojiiyag Child and Family Services [“DBCFS”] Respondents 1. L.S. Previous Foster Parent 2. Western Cree Tribal Council on behalf of Horse Lake First Nation [“WCTC”] 3. Office of the Children’s Lawyer [“OCL”]
TREATY TERRITORY	Treaty 8
INDIGENOUS GROUP, COMMUNITY, OR PEOPLE	Horse Lake First Nation
APPLICABLE INDIGENOUS LAW	None

TOPICS	Access Best Interests Cultural Continuity Customary Care Interim Orders Interprovincial Priority Placement Temporary Care and Custody
LEGISLATION CITED	<u><i>An Act respecting First Nations, Inuit and Métis children, youth and families</i>, SC 2019, c 24.</u> Sections 8; 9; 10; 11; 12; 13; 14; 15; 16; 17 <u><i>Child, Youth and Family Services Act</i>, 2017, SO 2017, c 14, Sched 1.</u> Section 94
CASE LAW CONSIDERED	<u><i>Children's Aid Society of London and Middlesex v TE</i>, 2021 ONSC 788.</u> <u><i>Children's Aid Society of Ottawa-Carleton v T</i>, 2000 CanLII 21157 (ON SC).</u> <u><i>Kina Gbezhgomi Child and Family Services v JM</i>, 2023 ONCJ 93.</u>
CASE HISTORY	N/A

CASE BRIEF

DECISION

- R.W. and K.D. will be placed in the temporary care and custody of DBCFS.
- L.S. will have supervised access to the children, at the discretion of DBCFS.

FACTS

- The children in this case are R.W. (11) and K.D. (9).
 - R.W. and K.D. are members of Horse Lake First Nation in Alberta.
- The children's biological parents are S.D. (mother) and K.W. (father).
 - S.D. has two additional younger children, Z.D. and A.D., who live with their paternal grandmother.
 - The parents, grandmother, Z.D. and A.D. all live on Horse Lake First Nation.
 - The biological parents are not parties to this proceeding.
- R.W. and K.D. were removed from their biological parents' care (S.D. and K.W.) for addiction related concerns in 2015.
 - Both children are placed in the care of L.S.
 - L.S. is not a biological parent of R.W. and K.D.
 - L.S. acted as CEO of WCTC for 4 ½ years – within this time, she and her then husband became foster parents for WCTC.
- December 2016 – A Private Guardianship Order ["PGO"] is made with the consent of the parties.
 - The order states that L.S. will support R.W. and K.D. in remaining connected to their family, First Nation's culture, and community.
 - PGO: An order for an individual to assume parental responsibilities for a child, or other services for an incapacitated adult, when the parents or legal guardians cannot fulfill the role.
- L.S. does not abide by the terms of the PGO.
 - From 2016-2020, there is little to no contact between R.W., K.D., their family and Nation.
- In 2020, L.S. moves with the children to Ontario.

- Events in Ontario:
 - 2020-2024: There is no contact between the children, their community, or their family, despite L.S. continuing to receive funds (from WCTC) to foster a cultural connection between the Nation and R.W. and K.D.
 - L.S. says the above is not a concern because the children attended other Nations and Powwows in Ontario.
 - DBCFS and WCTC disagree with this argument, as there is no evidence to support this. Even if there was, the Nations visited are not Cree, as Horse Lake First Nation is.
 - The children are left unsupervised with L.S.'s ex-husband, C.S., who is not to be unsupervised with children due to his history of sexual assault against minors.
 - L.S. learns that C.S. is sexually assaulting R.W. Despite this, L.S. continues to allow unsupervised contact between C.S. and the children.
 - In May 2024, L.S. sets up an iPad to record C.S. sexually assaulting R.W. She does nothing with this recording for 3 months.
 - August 9, 2024 – The first time in 5 years that the children visit their family in Alberta.
 - During this visit, an investigation is opened by WCTC for alcohol use and the treatment of the children by L.S. and her new partner, D.P.
 - The May 2024 video of C.S. sexually assaulting R.W. is provided to police on August 19, 2024.
 - The video is given to DBCFS, and an investigation into C.S. and L.S. begins.
 - C.S. is charged criminally.
 - DBCFS seeks temporary care and custody, the plan advanced is the children be placed in a group home supplied by the First Nation in Alberta. Their alternate plan is for the children to remain in care in Ontario with access to their family and Horse Lake First Nation.
 - WCTC advocates for the children to remain removed from L.S.'s care and to be immediately returned to Alberta to facilitate the eventual reunification of the children with their family. First Nation supports the plan for the children to be placed in the temporary care and custody of DBCFS with the placement in Alberta.

R.W. and K.D. are Brought to a Place of Safety

- On August 21, 2024, R.W. and K.D. are brought to a place of safety.
 - L.S. denies any wrongdoing but signs a 30-day Temporary Care Agreement [“TCA”].
 - Two days after signing, L.S. provided written notice to terminate the TCA in 14 days.
- On September 5, 2024, an order placing the children in the temporary care and custody of DBCFS is made.
 - Both R.W. and K.D. show signs of neglect, such as broken teeth, cavities, and ear infections.
 - The children also report being physically punished by L.S. Furthermore, K.D. reports that R.W. was sexually assaulted by another one of L.S.’s foster children.
- Two temporary care and custody motions are brought before the court.
 - DBCFS seeks placement of the children in a group home owned by the Nation [WCTC] in Alberta. Alternatively, they propose keeping the children in Ontario with access to their family and members of their nation.
 - WCTC seeks the immediate return of the children to Alberta so that they can be reunified with other family members. Alternatively, WCTC supports the children being placed in DBCFS’ custody and put in the group home run by the Nation.
 - L.S. seeks to have the children returned to her care or returned to her care under a supervision order. If this is not possible, L.S. requests that the children remain in Ontario so that extensive access can be exercised.
 - The Children’s Lawyer [“OCL”] appointed to represent the children supports the plan proposed by L.S.

ISSUE

1. What placement for temporary care and custody pursuant to section 94(2) of the CYFSA is in the best interest of R.W. and K.D.?

ANALYSIS

The Law

- Section 94 CYFSA – Outlines the options the court must consider in determining placement during the adjournment period of the final resolution to a protection application.

- There is two parts test the society must meet at a temporary care and custody hearing [“TCC hearing”]:
 - The Society must establish, on credible and trustworthy evidence, that there is a real possibility of the children being harmed if they are returned to the respondents.
 - The Society must further establish that the child cannot be protected by an interim supervision order. See [*Children’s Aid Society of Ottawa-Carleton v T.* \[2000\] O.J. No. 2273.](#)
- At the TCC stage the Society only has to demonstrate that it has reasonable grounds to believe that there is a protection risk for the child that justifies Society intervention.
- As the children are Indigenous, the *Federal Act* applies.
 - Jurisdiction to bring a protection application exists under provincial legislation (for Ontario, the CYFSA).
 - The *Federal Act* augments the CYFSA but prevails if there is conflict between the CYFSA and the *Federal Act*.
- The *Federal Act* must apply at all stages of a protection application when the child(ren) is Indigenous.
 - This includes a CYFSA s 94 hearing. The analysis for this hearing therefore begins with sections 10-17 of the *Federal Act*.
 - The above sections take priority as the provisions of the CYFSA are inconsistent with the *Federal Act*.
- Section 16 *Federal Act* – Priority placement of the Indigenous child should be followed, to the extent that it is in the best interests of the child.
- [*Kina Gbezhgomi Child and Family Services v T.* 2023 ONCJ 93:](#)
 - Statute creates the presumption that it is in an Indigenous child’s best interests to be placed with a parent wherever possible.

Application of the Law

- All parties acknowledge that L.S. is a parent under both federal and provincial legislation. She was also the person who was caring for the children prior to their removal.
 - As a result of this, placement with L.S. must be considered first.
- The court is satisfied that DBCFS has made out the two-part test of a TCC hearing:
 - There are reasonable grounds to believe that the children will suffer harm if returned to L.S.

- Furthermore, imposing supervision terms will not protect the children in L.S.'s care.
- Considering the best interest factors under section 10 of the *Federal Act*, it is not in the best interest of R.W. and K.D. to be placed back with L.S.
 - L.S. allowed for unsupervised contact between C.S. and R.W., despite knowing the significant risk of sexual harm.
 - Furthermore, she sent R.W. back to C.S., where she experienced further harm, to 'catch' the crime on video. This reasoning for exposing R.W. to more harm is not only misguided, but is clearly not true, because she waited three months before giving the video to the police.
 - Additionally, there were multiple signs of neglect when the children were removed.
- Although not a reason for removal, L.S. did not maintain her obligations to the children's cultural connection plan that was agreed upon when R.W. and K.D. were first placed in her care. This is relevant to the test to be met in deciding placement.
 - L.S. claims to have maintained her obligations by visiting nearby Nations in Ontario.
 - This pan-Indigenous approach is not acceptable under a specific agreement for cultural connectivity, or the provisions of section 10 of the *Federal Act*. This is especially true when considering that L.S. was the CEO of WCTC for many years; she possesses a sophisticated understanding of different First Nations.
- No kin or out of care placements have been identified by any party.
- The analysis of both acts indicates that R.W. and K.D. should be placed in the temporary care and custody of DBCFS. Once this is ordered, the choice of residential placement rests with DBCFS.
- DBCFS has chosen a placement close to Horse Lake First Nation.
 - This placement not only respects the wishes of the First Nation but is also in the best interests of the children under s 10 of the *Federal Act*.
 - This also satisfies the placement provisions of the *Federal Act*, as the children will be reunited with their Indigenous community, including their two half-siblings. This further indicates that DBCFS' care plan is not meant to place the children in extended Society care but rather, meant to foster reconciliation and reunification with their Nation.

- The children express a desire to remain in the care of L.S.
 - The court says this is to be expected, as they have lived with L.S. for the majority of their lives.
 - The court takes their desires into consideration but also considers the other factors relevant in determining best interests, such as risk of harm and safety.

Access

- Since the removal of R.W. and K.D., L.S. has communicated with the children without the approval of DBCFS.
- The children have exhibited difficult behaviors during and after their visits with L.S.
 - There is concern that L.S. is unable to address the children's needs separately from her own emotional needs.
- Since being placed in care, the children have started having regular access with their biological family in Alberta.

RELEVANT EXCERPTS

[38] These children are First Nations children and therefore An Act respecting First Nations, Inuit and Metis children, youth and families (“the Federal Act”) applies. While the jurisdiction to bring an application before the court is under the provincial legislation, CYFSA, the Federal Act augments the CYFSA and where there is conflict the Federal Act prevails.

[40] The test under CYFSA is augmented by the Federal Act. When an Indigenous child is involved, the Federal Act applies at every stage of a child protection proceeding, including when the court is determining a temporary care and custody hearing under s. 94(2) of the CYFSA. See: *Children's Aid Society of London and Middlesex v. T.E.*, 2021 ONSC 788, at para. 20.

[41] The Federal Act alters the method of analysis at s.94 hearings under the CYFSA given its paramountcy over provincial legislation. When the Federal legislation is triggered then the s.94 hearing analysis starts under sections 10 through 17 of the Federal Act. These sections take priority to the extent that the provisions in the CYFSA are inconsistent with the Federal Act.

[48] The Federal Act requires that I consider the best interests of the children in determining their temporary placement. S.10(2) of that Act requires that the court first considers the child’s physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child’s connections to his or her culture.

[53] Secondly, I find that Ms. L.S. has not maintained her obligations under the cultural connection plan that was required and agreed upon when the PGO was granted on consent in 2016. While this was not the reason for the children’s removal in September 2024, it is relevant to the test to be met in any decision about placement, including a temporary placement, under the Federal Act.

[56] This pan-indigenous approach is not what Ms. L.S., the family, and the First Nation agreed to in the cultural connection plan. A pan-indigenous approach is not acceptable in the face of a specific agreement for cultural connectivity or the provisions of s.10 of the Federal Act which states at s.10(2):

When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture." (emphasis added)

[62] Section 16(2) of the Federal Act requires that when the order of priority in s.16(1) is being applied the possibility of placing the child with or near children who have the same parent as the child, or who are otherwise members of the child's family, must be considered in the determination of whether a placement would be consistent with the best interests of the child. The placement in Alberta provides for the children to be in close proximity to their mother's two younger children.

[68] I am mindful of the requirement of s.9(2)(d) that child and family services for an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous Group, community or people. I find that the plan of DBCFS and Horse Lake First Nation best addresses this consideration.

LEGISLATION CITED

An Act respecting First Nations, Inuit and Métis children, youth and families, SC 2019, c 24.

Section 8

Purpose

8 The purpose of this Act is to

- (a)** affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
- (b)** set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
- (c)** contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

Section 9

Principle — best interests of child

9 (1) This Act is to be interpreted and administered in accordance with the principle of the best interests of the child.

Principle — cultural continuity

(2) This Act is to be interpreted and administered in accordance with the principle of cultural continuity as reflected in the following concepts:

- (a)** cultural continuity is essential to the well-being of a child, a family and an Indigenous group, community or people;
- (b)** the transmission of the languages, cultures, practices, customs, traditions, ceremonies and knowledge of Indigenous peoples is integral to cultural continuity;
- (c)** a child's best interests are often promoted when the child resides with members of his or her family and the culture of the Indigenous group, community or people to which he or she belongs is respected;

(d) child and family services provided in relation to an Indigenous child are to be provided in a manner that does not contribute to the assimilation of the Indigenous group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and

(e) the characteristics and challenges of the region in which a child, a family or an Indigenous group, community or people is located are to be considered.

Principle — substantive equality

(3) This Act is to be interpreted and administered in accordance with the principle of substantive equality as reflected in the following concepts:

(a) the rights and distinct needs of a child with a disability are to be considered in order to promote the child's participation, to the same extent as other children, in the activities of his or her family or the Indigenous group, community or people to which he or she belongs;

(b) a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(c) a child's family member must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;

(d) the Indigenous governing body acting on behalf of the Indigenous group, community or people to which a child belongs must be able to exercise without discrimination the rights of the Indigenous group, community or people under this Act, including the right to have the views and preferences of the Indigenous group, community or people considered in decisions that affect that Indigenous group, community or people; and

(e) in order to promote substantive equality between Indigenous children and other children, a jurisdictional dispute must not result in a gap in the child and family services that are provided in relation to Indigenous children.

Section 10

Best interests of Indigenous child

10 (1) The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child and, in the case of decisions or actions related to child apprehension, the best interests of the child must be the paramount consideration.

Primary consideration

(2) When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, as well as to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture.

Factors to be considered

(3) To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including

- (a)** the child's cultural, linguistic, religious and spiritual upbringing and heritage;
- (b)** the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (c)** the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an important role in his or her life;
- (d)** the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;
- (e)** the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f)** any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs;

(g) any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and

(h) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Consistency

(4) Subsections (1) to (3) are to be construed in relation to an Indigenous child, to the extent that it is possible to do so, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.

Section 11

Effect of services

11 Child and family services provided in relation to an Indigenous child are to be provided in a manner that

(a) takes into account the child's needs, including with respect to his or her physical, emotional and psychological safety, security and well-being;

(b) takes into account the child's culture;

(c) allows the child to know his or her family origins; and

(d) promotes substantive equality between the child and other children.

Section 12

Notice

12 (1) In the context of providing child and family services in relation to an Indigenous child, to the extent that doing so is consistent with the best interests of the child, before taking any significant measure in relation to the child, the service provider must provide notice of the measure to the child's parent and the care provider, as well as to the Indigenous governing body that acts on behalf of the Indigenous group, community or people to which the child belongs and that has informed the service provider that they are acting on behalf of that Indigenous group, community or people.

Personal information

(2) The service provider must ensure that the notice provided to an Indigenous governing body under subsection (1) does not contain personal information about the child, a member of the child's family or the care provider, other than information that is necessary to explain the proposed significant measure or that is required by the Indigenous governing body's coordination agreement.

Section 13

Representations and party status

13 In the context of a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child,

- (a)** the child's parent and the care provider have the right to make representations and to have party status; and
- (b)** the Indigenous governing body acting on behalf of the Indigenous group, community or people to which the child belongs has the right to make representations.

Section 14

Priority to preventive care

14 (1) In the context of providing child and family services in relation to an Indigenous child, to the extent that providing a service that promotes preventive care to support the child's family is consistent with the best interests of the child, the provision of that service is to be given priority over other services.

Prenatal care

(2) To the extent that providing a prenatal service that promotes preventive care is consistent with what will likely be in the best interests of an Indigenous child after he or she is born, the provision of that service is to be given priority over other services in order to prevent the apprehension of the child at the time of the child's birth.

Section 15

Socio-economic conditions

15 In the context of providing child and family services in relation to an Indigenous child, to the extent that it is consistent with the best interests of the child, the child must not be apprehended solely on the basis of his or her socio-economic conditions, including poverty, lack of adequate housing or infrastructure or the state of health of his or her parent or the care provider.

Reasonable efforts

15.1 In the context of providing child and family services in relation to an Indigenous child, unless immediate apprehension is consistent with the best interests of the child, before apprehending a child who resides with one of the child's parents or another adult member of the child's family, the service provider must demonstrate that he or she made reasonable efforts to have the child continue to reside with that person.

Section 16

Priority

16 (1) The placement of an Indigenous child in the context of providing child and family services in relation to the child, to the extent that it is consistent with the best interests of the child, is to occur in the following order of priority:

- (a)** with one of the child's parents;
- (b)** with another adult member of the child's family;
- (c)** with an adult who belongs to the same Indigenous group, community or people as the child;
- (d)** with an adult who belongs to an Indigenous group, community or people other than the one to which the child belongs; or
- (e)** with any other adult.

Placement with or near other children

(2) When the order of priority set out in subsection (1) is being applied, the possibility of placing the child with or near children who have the same parent as the child, or who are otherwise members of the child's family, must be considered in the determination of whether a placement would be consistent with the best interests of the child.

Customs and traditions

(2.1) The placement of a child under subsection (1) must take into account the customs and traditions of Indigenous peoples such as with regards to customary adoption.

Family unity

(3) In the context of providing child and family services in relation to an Indigenous child, there must be a reassessment, conducted on an ongoing basis, of whether it would be appropriate to place the child with

- (a)** a person referred to in paragraph (1)(a), if the child does not reside with such a person; or
- (b)** a person referred to in paragraph (1)(b), if the child does not reside with such a person and unless the child resides with a person referred to in paragraph (1)(a).

Section 17

Attachment and emotional ties

17 In the context of providing child and family services in relation to an Indigenous child, if the child is not placed with a member of his or her family in accordance with paragraph 16(1)(a) or (b), to the extent that doing so is consistent with the best interests of the child, the child's attachment and emotional ties to each such member of his or her family are to be promoted.

Section 94

Adjournments

94 (1) The court shall not adjourn a hearing for more than 30 days

- (a) unless all the parties present and the person who will be caring for the child during the adjournment consent; or
- (b) if the court is aware that a party who is not present at the hearing objects to the longer adjournment.

Custody during adjournment

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

- (a) remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention under this Part;
- (b) remain in or be returned to the care and custody of the person referred to in clause (a), subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate;
- (c) be placed in the care and custody of a person other than the person referred to in clause (a), with the consent of that other person, subject to the society's supervision and on such reasonable terms and conditions as the court considers appropriate; or
- (d) remain or be placed in the care and custody of the society, but not be placed in a place of temporary detention, of open or of secure custody.

Where child is subject to extra-provincial order

(3) Where a court makes an order under clause (2) (d) in the case of a child who is the subject of an extra-provincial child protection order the society may, during the period of the adjournment, return the child to the care and custody of the child welfare authority or other person named in the order.

Criteria

(4) The court shall not make an order under clause (2) (c) or (d) unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2) (a) or (b).

Placement with relative, etc.

(5) Before making a temporary order for care and custody under clause (2) (d), the court shall consider whether it is in the child's best interests to make an order under clause (2) (c) to place the child in the care and custody of a person who is a relative of the child or a member of the child's extended family or community.

Terms and conditions in order

(6) A temporary order for care and custody of a child under clause (2) (b) or (c) may impose,

- (a) reasonable terms and conditions relating to the child's care and supervision;
- (b) reasonable terms and conditions on the child's parent, the person who will have care and custody of the child under the order, the child and any other person, other than a foster parent, who is putting forward a plan or who would participate in a plan for care and custody of or access to the child; and
- (c) reasonable terms and conditions on the society that will supervise the placement, but shall not require the society to provide financial assistance or to purchase any goods or services.

Application of s. 107

(7) Where the court makes an order under clause (2) (d), section 110 (child in interim society care) applies with necessary modifications.

Access

(8) An order made under clause (2) (c) or (d) may contain provisions regarding any person's right of access to the child on such terms and conditions as the court considers appropriate.

Power to vary

(9) The court may at any time vary or terminate an order made under subsection (2).

Evidence on adjournments

(10) For the purpose of this section, the court may admit and act on evidence that the court considers credible and trustworthy in the circumstances.

Child's views and wishes

(11) Before making an order under subsection (2), the court shall take into consideration the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained.