CITATION: Chahine v. Martins, 2020 ONSC 1825
COURT FILE NO.: FS-20-16175
DATE: 20200415

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SAMIR CHAHINE	)	*Gary S. Joseph,* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
ANGELA CATARINA MARTINS	)	*Michael G. Cochrane,* for the Respondent
Respondent	)	
	)	
	)	
	)	**HEARD:** April 14, 2020

ENDORSEMENT

FAIETA J.

[1] The parties separated one month ago after the Applicant father left the matrimonial home. They are the parents of a four-year old daughter. Custody and access arrangements regarding their daughter is not governed by an agreement or court order. Both parties are teachers. The Respondent mother has refused to allow the Applicant father to meet in person with their daughter. She states that she does not "feel comfortable" with such visits during the COVID-19 pandemic despite the Applicant repeatedly assuring the Respondent that he has complied, and will continue to comply, with all COVID-19 protocols. Despite her concerns regarding exposure to COVID-19, the Respondent visits her parents and leaves their daughter in her care while she shops for groceries. Both parents are admittedly immune compromised particularly as a result of their ongoing battles with cancer for which they are receiving chemotherapy.

[2] The Applicant moves for an order granting him parenting time with Mary commencing forthwith with exchanges between the parties' homes occurring every Friday.

[3] The Respondent, by cross-motion, seeks an order that Mary remain in the primary care of the Respondent and that the parties will initiate a 14 day period of self-isolation for the balance of April, 2020, and that commencing in May, 2020 the Applicant will phase-in contact with Mary in the Respondent's home at a time and date to be agreed upon, and then in later May 2020 the Applicant shall have parenting time on alternate weekends.

[4] Each parent seeks an order that the other parent be compelled to comply with all COVID-19 protocols.

[5] For reasons described below, I find that it is in Mary's best interests for her parents to have shared and equal parenting time with her.

BACKGROUND

[6] Mary will be five years old in August, 2020. The parties separated on March 13, 2020 after almost six years of marriage. Upon their separation, the Applicant served the Respondent with this Application which, amongst other things, makes a claim for the shared and equal parenting of Mary. The Respondent and Mary reside in the matrimonial home. The Applicant lives alone in a four-bedroom home.

[7] The Applicant alleges that the Respondent was physically, verbally and emotionally abusive and controlling towards him during their marriage. The Respondent denies these allegations. In what amounts to a *non sequitur*, the Respondent states that she would not have been immediately hired as a math teacher by a Toronto school board sixteen years ago had she displayed these abusive and controlling behaviours.

[8] On March 14, 2020, the Respondent told the Applicant that he could only see Mary in her presence. The Respondent also contacted police and reported that she was scared that the Applicant would take Mary away from her. The Applicant states that at no time did he tell the Respondent that he wanted to take Mary away from her.

[9] A text message exchange between the Respondent dated March 16-17, 2020 reads as follows:

> Applicant: Sent the Kumon by mail. Should get to the house on Tuesday. How is Mary? I can see Mary Monday, Tuesday evening, Wednesday, Thursday morning since I need to have a witness with me and I have asked Grayson. Let me know when I can see her. Do you or your parents or Mary need anything food or water or anything? I bought a little extra things.
>
> Respondent: You abandoned Mary and I in the middle of a pandemic. I do not feel comfortable with you and a third party coming here to [omitted], in the midst of a covid-19 pandemic. I have purchased what we need. You left us with an empty fridge and abandoned us. You abandoned our home. I am taking care of Mary and my parents help me with our 4-year old daughter who you have left in my care as you chose to move to another residence. [Emphasis added]
>
> Applicant: This is not abandonment. I am still here and would like to see Mary. I was left with no choice but to take these measures.
>
> Respondent: You may see Mary but not alone. I will be present.

[10] On the same day, the Applicant's counsel notified the Respondent that an urgent motion would be brought for access if she would not agree to allow Mary to spend time with the Applicant.

[11] Since March 19, 2020, the Applicant has communicated with Mary by video call. The Respondent states that this occurs on a daily basis, sometimes for up to two hours. The Respondent denies that she distracts Mary, makes inappropriate comments and attempts to engage in inappropriate discussions. Respondent states that the Applicant is sometimes impatient with Mary and that if the Respondent speaks on the call he rudely tells her to be quiet. The Applicant states that the Respondent dictates that the video calls occur just before Mary's bedtime. On the other hand, the Respondent states that the Applicant dictates the time of the video calls.

[12] The Applicant states:

> During my first few video chats with Mary, the Respondent was on the screen with Mary for the duration of my conversations with Mary. She interjected and tried to get my attention. For example, she made and held up signs for me to read while I was on video chat with Mary. She asked Mary to bring over our wedding photo to show me that Mary put a heart shaped sticker on the photo. The Respondent brought up the day I left and questioned why I did it. Mary asked me if I still loved mommy and if I abandoned her.
>
> The Respondent began reducing her time on screen but continued to interfere or interject with comments. On April 9, 2020, she held up a family photo in front of the screen. She makes comments about the things I say to Mary. If I tell Mary to be careful, the Respondent tells me not to say that to Mary because the Respondent is present. Mary has had to ask the Respondent to stop talking because she wants to talk to me. I have learned to ignore the Respondent's interruptions as best I can.

[13] On March 22, 2020, the Applicant sent a toy home for Mary with groceries but the Respondent refused to give it to Mary citing COVID-19 concerns.

[14] On March 30, 2020, the Respondent's counsel advised that:

> … While my client appreciates that Mr. Chahine wishes to spend time with Mary, in light of the current COVID-19 pandemic, it is not the ideal time for children to be travelling back and forth between households. It is safer for everyone to simply remain in their respective homes for the time being.
>
> I understand that the parents have arranged contact between Mary and Mr. Chahine through Google. I assume we are in agreement that conversations should be frequent and the content child-focused. I would propose that the contact through Google continue and that we monitor how the situation evolves over the next few weeks.

> It is also my understanding that your client would like to send toys to Mary. However, in the circumstances this should wait while we see how the situation around the spread of this virus evolves prior to any packages being shipped to the home. …

[15] Counsel for the parties subsequently exchanged emails. On March 30, 2020 and March 31, 2020, counsel for the Applicant advised that the Applicant was strictly observing all social distancing requirements. On April 3, 2020, the Applicant's counsel advised that his client would be bringing an urgent motion "… to address our client's concerns with the activities of your client during the COVID crisis and to address a proper parenting schedule that recognizes the importance of our client in the child's life".

[16] The Applicant states that he has taken all necessary precautions to avoid contracting COVID-19. He states:

> The Respondent is basing her decision to unilaterally withhold Mary from me on the current virus outbreak. At no time would I endanger Mary. I am taking, and will continue to take, all necessary precautions and adhering to all safety measures, including social distancing, proper hand washing and hygiene, use of disinfectants, and compliance with public safety directives, to ensure Mary's safety during the COVID-19 pandemic. I have been social distancing and residing alone in a new, fully furnished, four-bedroom home with a fenced backyard since March 13, 2020. I will continue to work from home and will pick up and drop off Mary using my vehicle.

[17] The Respondent does not challenge this evidence.

[18] The Applicant states that the Respondent has not adhered to COVID-19 safety protocols as he states that the Respondent has taken Mary to visit her maternal grandparents. As noted earlier, the Respondent admits to taking Mary to visit her maternal grandparents. She leaves them with her parents while she goes grocery shopping. The Applicant states that the Respondent's parents both have cancer and attend hospitals, and are therefore at an increased risk of exposure to COVID-19. The Respondent does not deny this evidence. She states that her parents are "sick with cancer" although they are not in and out of hospitals. Her mother's last hospital visit was two weeks ago for chemotherapy. The Respondent states that she is her parent's only support. She visits her parents and leaves Mary with her parents when she shops for groceries.

[19] Based on his interpretation of the security alarm log for the matrimonial home, the Applicant states that the Respondent has been leaving her home on a daily basis for extended periods of time and returning home at inappropriate times, sometimes after midnight. He states that since March 17, 2020, the alarm has been armed 16 times. On three occasions it has been armed for 3 to 4 hours, on four occasions it has been armed for 7 to 11 hours and on four occasions it has been armed overnight. The Respondent denies that she leaves her home on a daily basis. She states that these records do not show that she leaves her home as she states that the alarm is also engaged when he goes into the backyard or goes outside to throw out garbage.

Urgency – Scheduling of the Motion

[20] At the outset of this motion, the Respondent expressed the concern that the Applicant's motion should not have been scheduled for a hearing.

[21] With a few exceptions, the operations of the Superior Court of Justice are suspended to help contain the spread of COVID-19 and thereby protect the health and safety of all court users. See the Notices to Profession issued by Chief Justice Morawetz on March 15, 2020 and April 2, 2020 and the Notice to Profession issued by Regional Senior Judge Firestone on April 2, 2020. As a consequence in the Toronto Region, in respect of family law matters, aside from a motion for a consent order, and certain case conferences, only those matters that are "urgent family law events as determined by the presiding judge … will be heard during this emergency period, including: (a) requests for urgent relief relating to the safety of a child or a parent; (b) urgent issues that must be determined relating to the well-being of a child …" [Emphasis added]

[22] On April 7, 2020, a triage judge determined that the Applicant's motion should be scheduled for a hearing today. She stated:

> … The Applicant has brought a motion for a residential schedule for the parties' daughter, age 4. The parties separated on March 13, 2020, and the Applicant moved out of the matrimonial home that same day. The Respondent has refused to facilitate any access between the child and the Applicant since separation allegedly out of concern regarding COVID-19. The police have already been involved with this family and, on a preliminary basis, this case has the potential of escalating to a high conflict case.
>
> On a preliminary basis, I am satisfied that this matter is urgent.

[23] The Respondent submits that I should re-consider whether the Applicant's motion is "urgent" given that the triage judge's finding of urgency was made on a preliminary basis. She submits that Mary is safe in her care and thus this matter should not have been scheduled for a hearing.

[24] The Applicant submits that the following views expressed by Justice Myers in *Wang v. 2426483 Ontario Limited*, 2020 ONSC 2040, paras. 7-18, a civil proceeding, should be adopted in this case:

> [7] The court is now routinely receiving submissions on the merits and ostensibly on the issue of "urgency" both before and even after the court has scheduled a matter for hearing.
>
> [8] It seems that there may be a misunderstanding of the nature of the scheduling process.
>
> [9] The Notice to the Profession is not a statute passed by the Legislature of Ontario. It is a notice to the public that,

> "[t]o protect the health and safety of all court users and to help contain the spread of the 2019 novel coronavirus (COVID-19), the Superior Court of Justice (SCJ) is suspending all regular operations, effective Tuesday, March 17, 2020, and until further notice."

[10] The Notice to the Profession asked everyone – litigants and lawyers alike – to recognize the exceptional times and to try to cooperate to avoid the need for court proceedings where possible. It provides:

> During this temporary suspension of regular operations, the Court calls upon the cooperation of counsel and parties to engage in every effort to resolve matters.

[11] The Notice to the Profession provides guidelines for those who nevertheless need to access the courts while they are not in full operation. People needed to be told the kinds of matters that could be accommodated, the types of materials that they should file, and the email addresses to contact to reach court personnel. This is all important information for the purposes of explaining to the public and the legal profession the processes put in place to maintain operations by the extraordinary efforts of the Superior Court of Justice.

[12] However, none of this affects the court's jurisdiction or the applicable rules of law. All court proceedings continue although only a very few are being scheduled for hearing at this time. Scheduling is an administrative function of the court. Normally, in the civil division in Toronto, hearings are scheduled by administrators over the telephone or by email and by judges in Civil Practice Court. Many factors go into scheduling that are not the subject of discussion with or among the litigants. The availability of judges for the type of hearing proposed, the availability of courtrooms, of staff, and numerous other administrative inputs may be brought to bear.

[13] Counsel may be invited to make submissions on the timing of a proposed hearing including whether there is a degree of urgency. Or not.

[14] But it is not a legal determination. There is no need or call for detailed submissions. There is no need for submissions on the merits of the proposed proceeding before and certainly not after the scheduling determination has been made.

[15] The court has very limited access to staff with full computer capabilities at present. Much back and forth about urgency, the merits, and parsing of the terms of the Notice of Profession are literally clogging up the Motion Coordinator's email. This is not required. In the main it is not helpful. And it must stop.

[16] The court has jurisdiction to schedule and hear a proceeding that is brought before it. If a matter appears to be one that should be scheduled, a case conference is frequently convened. In that way, the presiding judge can quickly contact the parties and determine an appropriate schedule for the exchange of materials and hearing, if any.

> [17] Submissions on the merits and emails arguing back and forth among counsel about urgency should not be sent to the court unless invited. Once a civil proceeding is booked in Toronto under the Notice to the Profession, there is no basis for further submissions to be delivered on the issue of urgency. Nor is the issue before the motion judge. Parties are always free to seek adjournments and appropriate scheduling terms before a judge presiding at a hearing. But they do not challenge the scheduling of the hearing itself. The court's administrative process is not part of the *lis* or the dispute between the parties.
>
> [18] It is not the intention of the Notice to the Profession that hearings will become bogged down by arguments over the applicability of its terms. It is not a new front for parties to battle. Once a hearing is scheduled by the triage judge(s) the Notice to the Profession is spent and the presiding judge will deal with the parties in the manner she or he determines is appropriate. [Emphasis added]

[25] In my view, the views expressed by Justice Myers in *Wang* are equally applicable in a family law proceeding. This Court's and the parties' limited resources should be used to address the merits of the substantive relief sought on scheduled motion rather than to re-consider the administrative decision to schedule the hearing. This approach is consistent with the primary objective of the *Family Law Rules* expressed in Rules 2(2)-(4). Accordingly, I decline to re-visit whether the Applicant's motion should have been scheduled for a hearing.

Case Conference

[26] The requirement for a case conference under the *Family Law Rules* may be waived under Rule 14(4.2) "… if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice". The Respondent has denied Mary in person parenting time with the Applicant by virtue of her sole possession of the matrimonial home following their separation. For several weeks the Applicant either directly or through counsel, has attempted to make arrangements with the Respondent for in-person parenting time, without success. As in *Endicott v Endicott*, 2015 ONSC 3180, which dealt with similar circumstances, I find that it is in the interests of justice to waive the requirement of a case conference prior to the hearing of this motion.

Parenting Time

[27] The Applicant seeks to have Mary reside with him on a week on, week off basis. Both parties are teachers. Schools are presently closed as a result of the COVID-19 pandemic. There is no dispute that the Applicant was a very active participant in Mary's upbringing prior to their separation.

[28] The Respondent submits that Mary is too young to immediately participate in a week-on, week-off parenting plan given that she has solely lived with the Respondent over the last month. Instead, the Respondent proposes the following phased arrangement whereby starting in May, 2020 the Applicant will have parenting time with Mary in the matrimonial home on dates to be

agreed upon and then later in May, 2020 the Applicant Father will have parenting time with Mary on alternate weekends. More precisely, the Respondent's draft Order proposes:

> 7. For the balance of April, 2020 the Applicant Father … will continue to have daily contact with Mary via social media and such contact shall be arranged at a fixed time each day and the parties will adhere to the following behavioural rules and guidelines for the video conferencing/calls:
>
> (a) The parties shall not record Mary or each other;
>
> (b) The parties shall ensure that the calls are child-focused and will not discuss these proceeding during calls or with Mary;
>
> (c) The Applicant shall not interrogate Mary with respect to her whereabouts or use the calls for the purpose of information gathering in the family proceedings; and
>
> (d) The Applicant and Respondent will initiate a 14 day period of self-isolation for the balance of April, 2020.
>
> 8. Commencing in May, 2020, following the 14 day period of self-isolation described in paragraph 7(d) of this Order, the parties will begin a phase-in of residential contact visits between the Applicant and Mary, with the Applicant attending at the matrimonial home for the visits at agreed up on dates and times and the parties will ensure adherence to the following terms with respect to this phase of residential contact with Mary:
>
> (a) The parties shall follow the same behavioural rules and guidelines that governed the video conferencing visits in April, 2020;
>
> (b) The visits will be with the Applicant only and on the understanding that both he and the Respondent are practicing strict self-isolation. The parties will avoid contact with each other, other than as may be required to address the needs of Mary; and
>
> (c) Both the Applicant and Respondent will commit to each other that they are practicing all the recommended safety measures in their respective homes.
>
> 9. In addition to ongoing video conferencing and visits in the matrimonial home with Mary, commencing later in May 2020 (assuming that the residential visits at the matrimonial home proceed without any difficulties), on dates to be agreed upon, the parties will begin to phase-in regular residential visits, which will include the Applicant having alternate weekend visits with Mary at his home … from Saturday morning to Sunday night, with exchanges of Mary to occur at an agreed upon place and time, and the parties shall ensure adherence to the following terms with respect to this phase of residential contact with Mary:
>
> (a) The parties shall follow the same behavioural rules and guidelines that governed the video conferencing visits in April 2020;

(b) The visits will be with the Applicant only and on the understanding that both he and the Respondent are practicing strict self-isolation;

(c) Both the Applicant and Respondent will commit to each other that they are practicing all the recommended safety measures in their respective homes;

(d) The Applicant shall ensure that the Respondent is given opportunities for video chats with Mary during her visits with the Applicant in his home; and

(e) The Respondent will retain Mary's passport and the parties will each provide an undertaking confirming that neither of them will remove Mary from the Greater Toronto Area without an order of the court.

11. Any period of residential contact between the Applicant and Mary must be preceded by a 14 day period of isolation for the Applicant and the Applicant will not be permitted to expose Mary to his extended family until further order of the court.

[29] The Respondent has provided no reason for the requirement of a 14 day period of self-isolation before Mary is allowed to have in-person contact with the Applicant as there is no evidence to suggest that the Applicant has not complied with COVID-19 protocols or that he has displayed any COVID-19 symptoms.

[30] Further, the proposal that the Applicant's parenting time occur in the matrimonial home is an unnecessary limitation. Again, there is no reason given for this requirement. It is a bad idea considering all the circumstances including the Respondent's unnecessary call to the police on March 14, 2020 and her behaviour during the video conference calls.

[31] The Applicant states:

Prior to separation, I was responsible for considerable childcare duties for Mary. After Mary was born, I primarily card for her and fed her through the night (she was formula fed). When Mary began attending school, I would wake her up, make her breakfast and dress her each morning, even on the weekends. The Respondent would drop off Mary at school in the morning and I would pick her up from her maternal grandparents' home at approximately 4:30 pm. Once the Respondent started new employment, I would also drop off Mary at school in the mornings. Once at home, I would cook dinner and feed Mary before playing with her. The Respondent typically returned home from work at 5 or 6 pm and continued working at home. On numerous occasions, she would spend the rest of the evening out with her family or friends and would not return home on time to see Mary before she went to sleep.

I was mainly responsible for the bedtime routine. After the Respondent gave her a bath, I would brush Mary's teeth, put her to bed and read her a book or sing her a song. I would help Mary with her homework, read her books, play with her, do crafts with her, and organize and take her to events and outings. I would also take Mary to her medical

> appointments, Kumon reading programs, Portuguese lessons, music classes and dance classes. I would also get groceries and cook for the family.
>
> During our marriage, the Respondent and I made decisions relating to Mary together. However, the Respondent regularly undermined my role and voice as a parent and attempted to control my parenting of Mary. She repeatedly indicated to me that, because she gave birth to Mary, her rights as the mother were paramount and she should make all decisions relating to Mary. She also repeatedly indicated that Mary came from her and was hers to keep, and I had no rights to Mary.

[32] The Respondent did not dispute the above evidence as her evidence on the issue of the parenting history was as follows:

> While Samir was involved in child care and some of the bedtime routine for Mary, he and I shared those duties just as we shared decision-making with respect to her.

[33] At the hearing of the motion, the Respondent suggested that Mary was too young for a week on, week off parenting arrangement. I disagree. Mary has had the benefit of two parents being fully part of her life until March 13 and she should continue to benefit from the same arrangement , The Respondent's concerns regarding COVID-19 are hollow given that she has offered no evidence to counter the Applicant's repeated assertion that he has complied with all COVID 19 protocols and given that she admits to visiting her parents regularly and appears to spend a considerable amount of time out of her home. In short, the Respondent's reasons for refusing to allow the Applicant to have in person contact with Mary have nothing to do with Mary's best interests.

[34] Mary's best interests are served by having two parents fully participating in her life and development. Accordingly, I accept the Applicant's request for a shared and equal parenting plan. To address any concern that Mary may wish to speak with her non-custodial parent, I order that the non-custodial parent be permit to video conference with Mary on two occasions during the week. Both parents should put Mary's interests first by supporting her during this transitional period in order to make it as smooth as possible.

[35] Finally, I ask the parties, particularly the Respondent, to seriously reflect on the following comments by Justice Pazaratz in *Ribeiro v. Wright*, 2020 ONSC 1829, paras. 27-28:

> 27. Every member of this community is struggling with similar, overwhelming COVID-19 issues multiple times each day.
>
> a. The disruption of our lives is anxiety producing for everyone.
>
> b. It is even more confusing for children who may have a difficult time understanding.
>
> c. In scary times, children need all of the adults in their lives to behave in a cooperative, responsible and mature manner.

d. Vulnerable children need reassurance that everything is going to be ok. It's up to the adults to provide that reassurance.

e. Right now families need more cooperation. And less litigation.

28. I would urge both parents in this case to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner.

Order

[36] Order to go as follows, on a temporary basis:

- The Applicant is granted leave to bring this motion prior to attending a case conference;
- On consent, the parties shall:
    - Stay home with Mary, except for recreational walks and transporting Mary to and from the parties' home or emergency trips to visit a doctor or hospital;
    - Regularly wash their hands and wash Mary's hands frequently;
    - Wear protective disposable gloves and masks ensuring Mary is wearing the same apparel during any such recreational walks or transportation; and
    - Comply with federal, provincial and municipal governmental orders and directions related to COVID 19 as set out and updated here:

      https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks.html

      https://www.ontario.ca/page/2019-novel-coronavirus#section-7

      https://www.toronto.ca/home/covid-19/
- The Applicant shall have parenting time with the child, Mary Chahine, born August 3, 2015, commencing on Friday, April 17, 2020, on an alternating week basis, with exchanges between the parties' homes occurring every Friday at 5 pm;
- Each party, during their non-custodial week, shall video conference with Mary for up to thirty minutes on Mondays and Wednesdays at 6:30 pm subject to variation by the written agreement of the parties;
- The City of Toronto Police, Ontario Provincial Police, Royal Canadian Mounted Police and/or such other law enforcement agencies as may have jurisdiction are hereby

authorized and directed to enforce this Order, pursuant to section 36 of the *Children's Law Reform Act*;

- Service by one party on the other of the materials to date by email is validated. Service by email is permitted so long as the suspension of regular court operations continues;

- The parties shall deliver their written costs submissions, no more than five pages in length, by April 21, 2020 and responding costs submissions by April 24, 2020. I encourage the parties to make every effort to resolve the question of costs; and

- This order takes effect without a formal order being signed and entered.

Date: April 15, 2020

Faieta J.