

ONTARIO COURT OF JUSTICE

CITATION: *Trudeau v. Auger*, 2020 ONCJ 197

DATE: April 17, 2020

COURT FILE No.: Sault Ste. Marie 88/18

B E T W E E N :

SUZANNE LOUISE TRUDEAU

Applicant

— AND —

YANNICK AUGER

Respondent

Before Justice R. Kwolek

Heard on April 8, 2020

Reasons for Judgment released on April 15, 2020

Shadrach McCooye**counsel for the applicant(s)**
Yannick Auger **on his own behalf**

KWOLEK J.:

[1] In chambers, I made the following endorsement on April 6, 2020:

The court has reviewed the motion brought by the applicant dated April 3, 2020, to suspend in person access for the respondent father to the child Jules. The child Jules has a genetic condition which allegedly includes respiratory issues and other underlying conditions placing him at high risk should he contract Covid-19. I am satisfied, on reading the mother's material only, that this is an urgent matter that should be heard.

[2] This case is distinguishable from the final result in Justice Pazaratz's decision in *Ribeiro v. Wright*, where he found the motion not to be urgent. In that case there had been a final order in place, and there was no evidence that the child had any heightened health risk should the child contract the Coronavirus.

[3] This court in Sault Ste. Marie has established that the protocol for seeking to bring a matter before the court as urgent is to bring a s. 14b motion, which will then be placed before a judge to determine if the motion should be heard on the grounds of

urgency. The current protocol will not be to schedule the matter on a Wednesday list day.

[4] Should a judge determine that the matter is in fact urgent, the judge will provide instructions as to how the matter is to proceed. All such hearings are now proceeding by way of telephone or other electronic hearings in the absence of counsel and the parties at the court house.

[5] In this case the court orders that:

- 1) The motion dated April 3, 2020 shall be deemed to be urgent and may proceed to an interim hearing.
- 2) The respondent shall be granted until April 8th, 2020 or such further time as may be directed by the court for him to file responding material which can be served and filed electronically with the court.
- 3) Additional material shall only be filed with leave of the court.
- 4) The parties shall be in contact with the trial co-ordinator as soon as possible for the purpose of setting a date for the hearing of the motion. One hour is required for the hearing of the motion. “

[6] The father was able to file responding material immediately and a hearing was held on April 8, 2020 at 2 p.m. with counsel for the mother, the mother and the father attending the motion by telephone conference. The court reserved its decision for one week and did not make any order suspending access in the interim, although aware of the mother’s position that she would not be allowing the father to have regular access in the meantime.

Legal Issues

[7] This case deals with whether the father’s current access to the child Jules Luc Auger, born [...], 2016 should be temporarily suspended. The father’s existing order for access has been in place since May 25, 2019 with a previous order for access made dated November 2018. The mother has been the primary caregiver of the child since birth.

[8] The father currently has access during the week and daytime access on the weekend but no overnight access. The matter is set to proceed to trial in October.

[9] The mother has brought a motion and is seeking an urgent order suspending all in person access to the father “until it is deemed safe by a medical professional for the said child to leave the home.” Counsel for the mother acknowledged when the matter was adjourned that the mother is seeking some direction from the court regarding access and does not necessarily seek the opinion of a physician that the access should proceed.

Factual Background

[10] The child Jules is special. He suffers from a genetic condition called hypotonia commonly known as floppy baby syndrome. The parents separated when the child was

about 18 months old and the child remained in the primary care of the mother. The mother asserts that the child suffers from respiratory issues and other underlying conditions and that he is “high risk” because of his condition.

[11] The mother states “Covid-19 attacks the lungs and Jules as it is[sic] has breathing problems and uses a suction machine and asthma inhalers to help keep his airways open”.

[12] The mother also asserts that Jules also currently has a urinary tract infection and has had “three different antibiotics to clear it up.” She indicated in her affidavit on April 3, 2020 that Jules will be on these antibiotics for another two weeks. The mother claims that Jules’ immune system “at this time is even lower than normal” because of his taking of these antibiotics.

[13] The mother also claims in her affidavit that her mother is immune compromised and if Mr. Auger had in-person access with Jules he would be putting Jules and the maternal grandmother at particular risk. She asserts that she has been in isolation with Jules and her mother since March 13, 2020 and no one has been in or out of her house. Jules’ home therapies and home nurses “have been put on hold because none of his workers wanted to risk him getting sick because the risk is so high.”

[14] She also claims that all of her groceries and medications have been picked up for them and sanitized before coming into the home.

[15] The child is non-verbal, requires a catheter, and is also fed through a gastric feeding tube.

[16] The father was apparently sent home from work on March 18, 2020 due to being sick and voluntarily agreed to forego his access to Jules on March 18, 21 and 22, 2020. That suspension of access, the court finds, was in the best interests of the child.

[17] The mother claims that she has offered electronic access to the father and he has refused those offers. At the hearing of the motion the father indicated that he did not have Wi-Fi and could not afford the data cost of electronic access. He seemed willing to exercise some access, including electronic access, pending the release of my decision.

[18] The mother indicates that she “has offered and intends to make up all of the in-person access that Mr. Auger would miss, once the pandemic passes and it is safe for Jules to go out again”. She has offered the father in person access at the home of the mother by exercising access at the home of the mother outside on the deck.

[19] She claims that the father lives in an apartment with a constant flow of people coming in and out, smokes and is constantly going to convenience stores and grocery stores.

[20] The mother comments that sending the child out could be fatal to him if he contracts Covid-19. In her affidavit the mother advised that she did not know if the father was working because if he was working that would also put the child Jules at risk.

[21] The father has indicated to counsel for the mother that he would like to recommence in-person access.

[22] The father has responded to the mother's allegations in his material which material is not sworn. Given the difficulties that the father has in having documentation sworn on short notice, the court will accept such information. The father no longer has legal counsel. I am also aware of the fact that the father has requested that he have a French interpreter for the trial and it does not appear that English is his first language. The father wished to proceed with the motion and did not request a translator for the motion. I did question the father about his knowledge regarding the pandemic.

[23] The father is aware of the Covid-19 pandemic and has indicated that means "social distancing, washing hands often, stay home, avoid public places".

[24] He also states as an example of how he is responsible is the use of wipes and hand sanitizer on things "touched every day".

[25] He also states, it appears, that he had no knowledge of a suction machine or of asthma inhalers used by the child Jules.

[26] The father's last in-person access was March 12, 2020 from 5 to 7 p.m.

[27] The mother initially requested that the father get tested for coronavirus before he could have access.

[28] The father claimed that he had a "Covid-19 assessment from work" allowing him to return after being symptom free and self-isolating after his illness in March. It does not appear that he received a formal Covid-19 test but his employer cleared him to return to work after being symptom free for a few days. Although the Ontario government has recently announced an increase in testing for Covid-19, it does not appear that the father would be currently eligible for testing under the existing criteria.

[29] The father is concerned about a suspension of access given the uncertainty as to how long this pandemic will last.

[30] The father also advises that he has been laid off from work as a result of Covid-19 as of April 3, 2020 and is now available at all times to assist with the care of Jules and it also means that he does not interact with people at work.

Background of Coronavirus

[31] The current pandemic for the Coronavirus has infected, as of April 13, 2020 at 4 p.m., according to John Hopkins University, almost two million people across the planet. Over 118,000 deaths have been caused by Covid-19. Canada has over 25,000 cases and Ontario Health reports as of April 13, 2020 at 10:30 a.m. that there have been 291 deaths in Ontario from the virus with 760 patients hospitalized in Ontario with 203 in ICU on a ventilator. Covid-19 cases in the United States have within a short period of time increased exponentially with over 570,000 confirmed cases as of April 13, and over

21,000 deaths attributable to Covid-19. Over 100,000 cases have been confirmed in New York city alone with approximately 6,900 deaths.

[32] There has not been a pandemic in the world of this magnitude since the Spanish flu of 1918 and 1919.

[33] There are currently only ten reported cases of Covid-19 in the District of Algoma with a number of such cases reportedly being identified as occurring outside the city of Sault Ste. Marie and with no one hospitalized in Sault Ste. Marie as of April 13, 2020 as a result of Covid-19.

[34] Governments across the world have taken unprecedented actions, in an attempt to minimize infections and fatalities and to “flatten the curve” or slow the progression of the virus so that those who are ill will not overwhelm the medical facilities available to treat the virus. There are some locations described as “hotspots” such as New York City where communities have been overwhelmed by the number, severity and fatalities attributable to Covid-19.

[35] Adults over 71 have been told to self-isolate and not leave their homes. Those people who have compromised immune systems have been told to do the same. In-person classes in schools have been suspended in Ontario since March 13, 2020 and it is unclear when they will resume.

[36] Non-essential businesses have been shut down. The courthouse is in a virtual lock down with trials cancelled and matters proceeding, such as this hearing, by audioconference call in the absence of the personal attendance of lawyers and clients.

[37] Notwithstanding the status of this pandemic, if the child Jules was a “normal” child without any health concerns, the court would not have considered the motion seeking to suspend the access as urgent. If parties are able to mitigate the risk and comply with directives of the public health authorities, the risk to children may be mitigated. The court felt that Jules peculiar circumstances justified a closer look at his circumstances and his safety and elevated his case to one of urgency.

[38] Preliminary data indicates that children generally do not exhibit serious symptoms and are able to fight off the virus unless their immune systems are compromised. It is generally those individuals with multiple health issues, the elderly or those subject to a high viral load such as front-line workers who face the greatest threat from the pandemic. There also appears to be some variation as to the strength or virulence of some coronavirus strains which could also potentially affect the severity of the symptoms. (see article Arturo Casadevall and Liise-anne Pirofski dated April 6, 2020 entitled “It’s Still Hard to Predict Who Will Die from Covid 19”, Bloomberg Opinion posted on John Hopkins University of medicine website)

[39] In addition, the mother raises the issue of the maternal grandmother, who is reportedly immune compromised, staying in the mother’s home, and heightened issues with the child Jules’ immunity due to the child taking anti-biotics and increased risk due to the father’s contact with others due to his employment. I am advised by the mother

that this child, Jules is at risk and is further immune compromised. I have no medical information to confirm the assertions of the mother that Jules is immune compromised.

[40] Justice Pazaratz made the following comments in *Ribeiro v. Wright*, 2020 ONSC 1829:

On the one hand, in this case there is an existing parenting order. There is a presumption that all orders should be respected and complied with. More to the point, there is a presumption that the existing order reflects a determination that meaningful personal contact with both parents is in the best interests of the child.

None of us know how long this crisis is going to last. In many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. But children's lives - and vitally important family relationships - cannot be placed "on hold" indefinitely without risking serious emotional harm and upset. A blanket policy that children should never leave their primary residence - even to visit their other parent - is inconsistent with a comprehensive analysis of the best interests of the child. In troubling and disorienting times, children need the love, guidance and emotional support of *both* parents, now more than ever.

11 In most situations there should be a presumption that existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to - including strict social distancing.

12 In some cases, custodial or access parents may have to forego their times with a child, if the parent is subject to some specific personal restriction (for example, under self-isolation for a 14 day period as a result of recent travel; personal illness; or exposure to illness).

13 In some cases, a parent's personal risk factors (through employment or associations, for example) may require controls with respect to their direct contact with a child.

But no matter how difficult the challenge, for the sake of the child we have to find ways to maintain important parental relationships - and above all, we have to find *ways to do it safely*.

[41] Counsel for the mother asked the court to consider material that has been filed in previous affidavits filed in the continuing record. I have reviewed all of the affidavit material referred to by counsel for the mother, particularly those provisions relating to the care of the child Jules as well as the father's responses.

[42] In her affidavit dated July 25, 2018 the mother details the child's needs and services that he normally requires including physiotherapy and occupational therapy. There is no historical information in those affidavits that indicates the child suffers from any immune deficiency nor that the child suffers from respiratory problems.

[43] The mother has recently cancelled the normal trips that the child would have taken to Sick Children’s Hospital and has cancelled any home visits with health care professionals to minimize potential exposure of the Covid-19 virus to the child Jules.

The Current Risk From Covid-19 – Material Change in Circumstances

[44] The closing of schools and public events and venues and restrictions on contact between individuals is meant to slow down the widespread infection of Covid-19. This is a health protection strategy to “flatten the curve” and to attempt to ensure that the medical system is able to handle the influx of patients into hospitals needing the services of the intensive care units and ventilators. There is no current cure for Covid 19. Researchers around the world are attempting to develop a vaccine to protect the world’s population. The use of ventilators and care in ICU units is simply meant to control the symptoms while the disease runs its course and to minimize damage to the lungs of patients and to allow as many patients as possible to recover. Currently, based on news reports in Canada, approximately 50 percent of deaths appear to have occurred in long-term care facilities where the most vulnerable and susceptible patients are housed and 90 percent of deaths have occurred for individuals over 60 years of age.

[45] The rapid transmission of the disease is currently evident in the United States and in other countries such as Italy, Spain, and the United Kingdom. Absent the current measures in place, including physical distancing and isolation, we have been advised that the spread of the disease and its severity would have been much worse.

[46] The current measures being employed in Canada other than the shutting down of institutions include the following:

- 1) Washing of hands frequently and thoroughly with soap and water for at least 20 seconds;
- 2) If soap and water are not available then alcohol based hand rubs can be used;
- 3) Avoid touching your eyes, nose and mouth with your hands;
- 4) Cover your nose and mouth with a disposable tissue or the crease of your elbow when you sneeze or cough;
- 5) Regularly clean and disinfect frequently touched surfaces;
- 6) Do not share food, drinks, utensils;
- 7) When outside the home stay at least two metres away from other people;
- 8) Keep at least two metres away from people who are sick;
- 9) Stay at home when you are sick even if symptoms are mild;
- 10) Stay at home whenever possible;
- 11) Masks, it now appears, if properly worn and removed, should be used to help prevent infecting others. Masks won’t effectively protect the wearer from infection from Covid-19 but may help prevent the spread, especially if the wearer must be closer than two metres away from a person.

[47] The events of Covid-19 are life altering circumstances that have affected virtually every facet of our daily lives. The onset of the pandemic, the court finds, is a material change in circumstances which can potentially justify a change in the existing court order.

Does Covid-19 Justify a Suspension of Access?

[48] It is not enough, to demonstrate that the onset of Covid-19 is a material change in circumstances. The current case law would seem to support the view that in most circumstances, Covid-19 will not be sufficient on its own to justify a variation of an existing court order if any risk can be dealt with by appropriate compliance with existing community and public health directives. (see *Ribeiro v. Wright*, supra; *Le v. Norris*, 2020 ONSC 1932; and *Douglas v. Douglas*, 2020 WL1492280, a decision dated March 25, 2020 of Justice McPherson)

[49] The personal circumstances of this family will be affected by the passage of time. As of April 17, it will be two weeks since the father has stopped working. Secondly, Jules antibiotics for his UTI should be completed as well. The father reports that after his initial sickness in March, after a period of self-isolation he has been symptom free since prior to March 25, 2020, when he returned temporarily to work. It will be well over three weeks since the father has exhibited any signs of illness by April 17, 2020.

[50] The mother has indicated that her mother is residing with her as she is “immune compromised” and “my father works at the hospital”. No further details have been provided as to her mother’s condition nor why other arrangements could not be made to “isolate” the maternal grandmother elsewhere.

[51] The court is not satisfied, based on the evidence before it, that the father’s access should be curtailed based on an assertion that this would place the maternal grandmother at risk.

[52] The father has indicated an awareness of the safety measures and precautions that need to be provided and completed to ensure the safety of Jules and his family and to prevent an expansion of the Covid-19 epidemic. The father resides alone in an apartment in a six-unit apartment building. The father must take the following precautions to mitigate the risk to Jules by:

- 1) disinfecting items such as door knobs that may be touched by others entering his home and apartment;
- 2) maintaining social distancing;
- 3) staying at home except for necessary appointments such as attending for food and medication;
- 4) allowing no one else to enter his home;
- 5) avoiding going out of his home unnecessarily;
- 6) limiting his access visits with his son to visits within his own home and not taking him to any public location;
- 7) wearing a mask or other facial covering when necessary;

Has there been a sufficient change in circumstances for this family to currently warrant a suspension of the father’s access visits?

[53] No medical documentation has been provided that would indicate that the child Jules would be at risk if he would spend a few hours at his father’s home a week in accordance with the current access order or that such access would put the maternal

grandmother's health at risk, especially if the safeguards described above were followed.

[54] There is no evidence that the father is not complying with the public health directives regarding physical distancing and other measures to reduce risk to a manageable level. The evidence confirms that when he was ill, he voluntarily agreed to suspend a number of access visits in Jules best interests. There was no evidence that there were significant problems with the father's access immediately before the suspension of his access in March of 2020 when the father became ill and the Covid-19 pandemic began expanding rapidly across the globe. The mother did not seek to eliminate the father's access but suggested that access missed could be made up at a certain date in the future when the pandemic has passed and even suggested a time period in May when such access could be made up.

[55] Currently, there is some uncertainty as to how long it will take the pandemic to subside and medical authorities are referring to a second or third wave for Covid-19 to be present in our communities. It is suggested that Covid-19 will be present in our communities until an effective vaccine is tested and becomes available for the general public. It is unclear when we will return to a state of "normalcy." Such a period, it has been suggested, may be as long as a year to 18 months in the future.

[56] Although the parents initially agreed to a suspension of access when the father became ill, there is now a disagreement between the parents as to when access should recommence. I find that based on the evidence before me, in-person access can recommence after April 24, 2020, assuming that the father will comply with the Covid-19 safety strategies as described in paragraph [52] and no further intervening events. The child will have been off his antibiotics by that time and the parties can use the intervening time period to prepare for the recommencement of access.

[57] The father must also comply with any future public health directives relating to Covid-19. He must not attend at any location other than at his residence for access and should be wearing a mask when he is within two metres of Jules. If he has any symptoms of any illness, he should forego his in-person access for an appropriate period of time ensuring the safety of Jules.

[58] The court is not satisfied that an order should be made at this time to suspend the father's access and the court will decline to make such an order at this time. The court does so recognizing the mother's sincere concerns as to how best to protect Jules during this pandemic. My order is without prejudice to a further motion being brought on further and better evidence.

[59] Some circumstances that may justify a suspension of access in the future would include:

- 1) evidence of a disregard for the safety and well-being of the child by the father by disregarding the directions relating to Covid-19;
- 2) specific medical evidence relating to this child that access to the father would place the child at significant risk;

- 3) increased and better general information about Covid-19 relating to the risk of taking a child with Jules' medical conditions for access visits out of his home even with safeguards and precautions in place;
- 4) Specific evidence relating to the increased risk within the child's community of Sault Ste. Marie and the risk of the child travelling from his home to the father's residence.
- 5) The child or the parents becoming ill in circumstances that a visit or visits would place the child at significant risk. Should the child become ill, he should reside with his primary parent, namely his mother, with access temporarily suspended to the father. Should the father exhibit Covid-19 symptoms, his access shall be suspended.
- 6) A more restrictive order being made by the authorities to quarantine or restrict public movement in the community. In the event of such a restriction, the child would remain with his mother as primary caregiver.

[60] I would repeat Justice Pazaratz's concluding comments in *Ribeiro v. Wright*, cited above:

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.

29 My denial ... is without prejudice to the issue being returned to court if more serious and specific COVID-19 problems arise. Any future motion would again have to be reviewed by the Triage Judge. However, I hope that both parents will understand the limitations of the family court process at this critical time.

30 None of us have ever experienced anything like this. We are all going to have to try a bit harder - for the sake of our children.

[61] Covid-19 has made life difficult and challenging for parents and courts alike.

[62] In court proceedings, there is often a lack of trust between the parties. Each parent believes that the other is not acting in the best interests of the child while, in truth, the court finds in this case that both are attempting to do so. Trust is all the more important when the health and well-being of a child is at stake.

[63] I would ask the parties to communicate and co-operate with each other in Jules' best interests, ensuring his health and well-being, and being flexible in agreeing to alter or vary the access provisions accordingly.

[64] Although the court is not making an order varying the existing court order, an example of changes in access that may be in Jules' best interests could be replacing the two hour or two and one-half hour visit with shorter visits on the mother's deck rather than transporting the child away from the home for an access visit of short duration. A second change may be a more regular, even if brief, contact with the child by the father using an electronic form of communication.

[65] Given the rapidly changing landscape of Covid-19, this court did not wish to make minor changes to the existing order when the parties are better equipped to deal with access provisions that work best for Jules.

[66] Given the novel questions raised by the applicant and the limited financial resources of both parties, and financial hardship that will be caused by Covid-19, this is not an appropriate case where costs should be ordered.

Conclusion and Order

[67] For reasons described above, the court orders that:

- 1) the motion for a suspension of the father's access at Tab 12, Volume 2 is dismissed with access to recommence after April 24, 2020.
- 2) No order as to costs.

Released: April 15, 2020

Original signed by

Justice R. Kwolek, Ontario Court of Justice