CITATION: A.A. v. R.R., 2020 ONSC 1887
COURT FILE NO.: FS-15-20422

DATE: 20200416

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
A.A.	)	*Reginald M. McLean,* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
R.R.	)	*Chad D. Rawn,* for the Respondent
Respondent	)	
	)	
	)	**HEARD:** April 16, 2020

ENDORSEMENT

FAIETA J.

[1] The Applicant mother brings this motion for an order to:

- Suspend the access schedule, ordered by this Court on consent in May, 2019, for as long as the Respondent father continues to work as an emergency room physician during the COVID-19 pandemic; and

- Alternatively, enforce the regular access schedule that pertains to when their child physically attends school (6 out of 14 nights with the Respondent father).

[2] This motion was deemed urgent by a triage judge and scheduled for a hearing today.

[3] In his Factum, the Respondent father asks that the parties continue to operate on the holiday access schedule.

[4] For reasons given below, I order that the parties have access to their child, AR, on alternating weeks until this child's school is re-opened.

BACKGROUND

[5] AR is five years old and in junior kindergarten. The Applicant is an unemployed and lives in Scarborough. The Respondent is a doctor and lives in Mississauga. Their child was

conceived during a brief relationship. Shortly after their relationship ended, the Respondent notified the Applicant that she was pregnant with his child. The Respondent demanded that the Applicant abort her unborn child. The Applicant refused to do so. Within a few months of the birth of their child, the Respondent commenced an action against the Applicant for damages arising from the child's birth on the basis that the Applicant had fraudulently mispresented that she was taking the birth control pill before they had sexual intercourse. This claim was struck without leave to amend on the basis that it had no reasonable chance of success. In addition, Justice Perell, wisely ordered that the parties not be identified by name and that the court file be sealed in order to minimize the risk that the child might someday read his decision and learn of the circumstances surrounding the child's birth: *P.(P.) v D.(D)*, 2017 ONCA 180. The Court's file in this family law proceeding is also sealed.

[6] After their child was born, a lengthy and bitter family law proceeding over custody, access and child support ensued. It was settled by mediation in May, 2019. The settlement provides for shared, but unequal, parenting time in favour of the Applicant. Its terms are reflected in a consent Order granted by Justice Kristjanson on May 29, 2019 ("Consent Order").

[7] The Applicant mother states that the Respondent has returned their child two days late after the child's last two visits. The parties having differing views on how the parenting schedule applies during the period of the COVID-19 pandemic. In addition, the Applicant submits the Respondent's access to AR should be temporarily suspended on the grounds that it is not safe for AR to be in close physical contact with the Respondent or his parents, all of whom are doctors, during this period as they are routinely exposed to COVID-19.

ISSUE #1: SHOULD THE RESPONDENT' ACCESS TO AR BE TEMPORARILY SUSPENDED

[8] The Applicant submits that the Respondent's access should be suspended on the basis that he is at high risk of being exposed to COVID-19 as a result of being on the front lines of the healthcare response to COVID-19 pandemic.

[9] I adopt the views expressed by Justice Pazaratz in *Ribeiro v Wright*, 2020 ONSC 1829 at paras. 20-24:

> 20 If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion - but they should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time. They should not even presume that raising COVID-19 considerations will necessarily result in an urgent hearing.
>
> 21 We will deal with COVID-19 parenting issues on a case-by-case basis.
> a. The parent initiating an urgent motion on this topic will be required to provide specific evidence or examples of behavior or plans by the other parent which are inconsistent with COVID-19 protocols.

b. The parent responding to such an urgent motion will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to - including social distancing; use of disinfectants; compliance with public safety directives; etc.
c. Both parents will be required to provide very specific and realistic time-sharing proposals which fully address all COVID-19 considerations, in a child-focused manner.
d. Judges will likely take judicial notice of the fact that social distancing is now becoming both commonplace and accepted, given the number of public facilities which have now been closed. This is a very good time for both custodial and access parents to spend time with their child at home.

22 Everyone should be clear about expectations during this crisis. Parents want judges to protect their children. But with limited judicial resources and a rapidly changing landscape, we need parents to act responsibly and try to attempt some simple problem-solving before they initiate urgent court proceedings.

23 Judges won't need convincing that COVID-19 is extremely serious, and that meaningful precautions are required to protect children and families. We know there's a problem. What we're looking for is realistic solutions. We will be looking to see if parents have made good faith efforts to communicate; to show mutual respect; and to come up with creative and realistic proposals which demonstrate both parental insight and COVID-19 awareness. [Emphasis added]

24 In family court we are used to dealing with parenting disputes. But right now it's not "business as usual" for any of us. The court system will always be here to deal with truly urgent matters, especially involving children. But that means there will be little time or tolerance for people who don't take parenting responsibilities or COVID-19 seriously.

[10] The Applicant mother provides the following evidence to demonstrate that the Respondent's "behaviour or plans" are inconsistent with COVID-19 protocols:

- "As one might suspect, my concerns about the ongoing COVID-19 pandemic grew exponentially over the month of March 2020. My initial maternal instinct was that AR should not be continuing to travel to the Respondent's family home in Mississauga for the time being. The Respondent, his mother, his father and his brother are all doctors and all reside together. The Respondent in particular is an emergency room doctor [at a local hospital], on the front lines of the healthcare response to the novel corona virus. A visit to the [local hospital]'s website shows that they are pleading to the public for donations of masks and other protective equipment, which they have been forced to start rationing;

- "It is an unfortunate but unavoidable fact that the Respondent is at high risk of being exposed to COVID-19";

- "AR faces an ever-increasing risk of exposure to COVID-19 as the pandemic continues and the Respondent, along with his immediate family members, continue to work in a

healthcare system that is quickly becoming monopolized by the fight against the novel corona virus"; and

- "He is not staying home, he is not social distancing and he cannot be while working in the emergency room. While I appreciate that it is important for AR to maintain her relationship with her father through this pandemic, I plead that the Court ought to consider whether it is safe for AR to maintain close physical contact with the multiple members of RR's household that are routinely exposed to COVID-19. The Respondent could still speak to his daughter frequently by way of video call or telephone".

[11] The Respondent provides the following responding evidence:

- "… the hospital where I am primarily employed was built just after the 2002-2003 SARS outbreak and is especially well equipped to respond to the COVID-19 pandemic and therefore to maximally and effectively keep me safe from the COVID-19 virus";

- "While I believe that I have a higher propensity to come into contact with individuals afflicted with the COVID-19 virus, my interactions with those individuals involve extensive safeguards that when followed almost mitigate said risk and put me at no greater risk than anyone else contracting the virus at their workplace. I do verily believe that my training, experience and workplace safeguards and precautions make me even less of a risk";

- "When I am not at work, contrary to the Applicant's sworn statements in her affidavit, I fully adhere to all of the province's requirements regarding social distancing, staying at home and refraining from non-essential travel. I do this both when AR is with me and when AR is with the Applicant. I follow a meticulous handwashing routine for myself and AR which is a normal part of my everyday routines, as do other residents of the time, all medical doctors";

- "The Applicant has errantly indicated that my brother resides in Mississauga at our home";

- "My father, although a medical doctor, is working only part-time and is mainly practicing telemedicine. He has no workplace exposure to COVID-19";

- "My mother is a medical doctor and is seeing patients. She is however conducting many of her patient meetings by video and/or over the phone during the COVID-19 pandemic. She is well trained in COVID-19 protocols and to my knowledge and experience follows them as meticulously and diligently as I do"'

- "The current provincial protocol for patients that suspect they may have COVID-19 are not supposed to go to the doctor's office. Such patients are requested to go to a COVID-19 clinic or to go to the emergency room at a hospital. If they go to an emergency room,

they meet doctors in full Personal Protective Equipment (PPE) gear. Doctors are well aware of the current pandemic and are trained and prepared to meet such patients. There is a near 0% risk of contracting COVID-19 when PPE is properly used";

- "My mother and I have passed all COVID-19 screening protocols which are in place to ensure that we are safe and personally capable of providing medical services to our patients";

- "No members of my family have ever had COVID-19";

- "The Applicant's materials are rife with conjecture, speculation and assumptions. The Applicant's materials show that the Applicant has little understanding or appreciation of my or my family members' training, experience, implementation of protocol and PPE to heavily mitigate the risk of any of us contracting COVID-19 and incidentally exposing AR to COVID-19";

- "I have been professionally trained as to all proper COVID-19 protocols and the proper use of all Personal Protective Equipment (PPE) to prevent my contracting the COVID-19 virus. I have followed all such protocols carefully, meticulously and diligently from first incidents of COVID-19 to the present day";

- "I am an emergency room doctor. I am not a doctor focused on the care or treatment of COVID-19 patients. The majority of my patients have conditions that do not have any relation to COVID-19";

- "At my hospital any patient that has COVID-19 is assigned to a completely different floor. I do not presently have any COVID-19 patients that I am providing services to"; and

- "My workplace has adequate and sufficient PPE that enable me to safely perform my functions as a doctor and to not contract COVID-19. Should the hospital that I work at not have adequate supplies of PPE, I will not provide medical services out of a concern for my safety. Without adequate and sufficient PPE, I would not see a single patient and would have a 0 risk of contracting COVID-19 from my place of employment".

[12] I find that the Applicant is woefully inadequate to demonstrate that the Respondent's behaviour and plans present a risk of COVID-19 that would support a suspension of the Respondent's access to AR. On the other hand, the Respondent provided a relatively detailed and fulsome response that addresses COVID-19 safety concerns including giving the assurance that he would adhere to COVID-19 safety measures and would not provide medical services without adequate and sufficient PPE.

[13] I find that the Applicant has failed to demonstrate that it would be in AR's best interests to temporarily suspend the Respondent's access during the COVID-19 pandemic.

ISSUE #2: WHAT IS THE RESPONDENT'S RIGHT OF ACCESS WHILE AR'S SCHOOL IS CLOSED?

[14] Paragraphs 3 and 4 of the Consent Order state:

> 3. AR shall reside with the parties as follows:
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> (i) On alternate weeks with RR from Wednesday after school with return to school the following Monday morning;
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> (ii) On alternate weeks with RR on Wednesday from after school with return to school the following morning;
>
> (iii) Unless otherwise provided herein with AA;
>
> (iv) Pick-ups and drop-offs shall take place at AR's school on school days;
>
> (v) During the months of July and August, in lieu of the regular schedule described above, AR shall have a visit for two (2) consecutive weeks with each parent in both months subject to a short visit with the other parent for one (1) evening during each two (2) week period; and
>
> (vi) The balance of holidays including without limiting the generality of the foregoing, March break, Christmas Holidays, Thanksgiving, and Halloween, shall be divided equally between the parties.
>
> 4. The regular residential schedule for AR shall be reviewed by April 1, 2020 with a view to increasing the time AR spends with RR in accordance with her best interests. If the parties are unable to agree, they shall submit the review to mediation and, if necessary, to arbitration with a mutually agreeable professional.

[15] The Respondent father submits that the period of school closure during the COVID-19 pandemic is a continuation of March break and, as a result, it amounts to a "holiday" within the meaning of the Consent Order. As a result, access time should be divided equally in accordance with paragraph 3(vi) of the Consent Order. In this regard, the Respondent relies on *Placha v. Bennett*, 2020 ONCJ 164 where the Court found that the March break had been extended by two weeks in response to the COVID-19 pandemic. However, *Placha* is of no assistance as the Government of Ontario subsequently announced that the "Learn At Home" would be extended to re-establish teacher led learning by grade. In particular, those children in Kindergarten-Grade 3 would have teacher-led learning with five hours of work per student per week with a focus on literacy and math: See Government of Ontario, *Ontario Extends School and Child Care Closures to Fight Spread of COVID-19*, March 31, 2020, 1:15 pm. One of the definitions of "holiday" found in the Oxford Dictionary states that it is "a day on which ordinary occupations (of an individual or a community) are suspended; a day of exemption or cessation from work; a day of festivity, recreation, or amusement." AR continues these limited school activities. In my view,

this current period bears little resemblance to a "holiday". Accordingly, I find that paragraph 3(vi) is inapplicable.

[16] Further, I do not accept the Applicant's position the access provisions found in paragraphs 3(i) and (ii) of the Consent Order, are applicable. These provisions only apply when AR is attending physically attending school. It would make no sense for the parties to pick and drop off AR at school while it is closed during this period.

[17] At the hearing of this motion I raised paragraph 3(iii) of the Consent Order. It provides that AR shall reside with AA" unless otherwise provided herein". Each party submits that the provision is inapplicable given their views that other provisions of paragraph 3, as described above, are applicable. Given the conclusions that I have reached regarding the applicability of the other parts of paragraph 3, I find that paragraph 3(iii) is applicable.

[18] However, given that schools may remain closed for many more weeks, it would not be in AR's best interests for the Respondent to have no access during this period as contemplated by paragraph 3(iii).

[19] The Applicant's position (paragraph 3(i) and (ii)) would result in six evenings (or 5 ½ days) of access every 14 days rather than the Respondent's position (paragraph 3(vi)) of equal, shared access. It is apparent that both parents have a close and caring relationship with AR. In my view, it is in AR's best interests for her parents to have equal, shared access while the child's school is closed.

Order

[20] Order to go as follows:

1) The Applicant's motion to suspend access is dismissed;

2) The Respondent shall have access with the child, AR, commencing on April 17, 2020, on an alternating week basis, until AR's school opens, whereupon the parties shall revert to the school access schedule contained in paragraph 3 of the Consent Order;

3) Transportation to effect access shall be the responsibility of the party commencing their access visit. Access exchanges shall be made at Noon at the Tim Horton's restaurant closest to each of the parties' homes. The parties may have a member of their family make the access exchange if they are unable to attend;

4) Such law enforcement agencies as may have jurisdiction are hereby authorized and directed to enforce this Order pursuant to section 36 of the *Childrens' Law Reform Act*;

5) The parties shall deliver their written costs submissions by April 21, 2020 and responding costs submissions by April 24, 2020 to a maximum five pages in length each. I encourage the parties to make every effort to resolve the question of costs; and

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

Faieta J.

Date: April 16, 2020