CITATION: Grossman v. Kline, 2020 ONSC 2714
COURT FILE NO: FS-20-16440
DATE: 20200430

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rachelle Grossman

AND:

Adam Kline

BEFORE: J.T. Akbarali J.

COUNSEL: *George Karahotzitis*, for the Applicant

Erin Chaiton-Murray, for the Respondent

HEARD: In writing.

ENDORSEMENT

Overview

[1] The applicant brings a motion seeking suspension of the respondent's parenting time with the parties' four-year-old daughter, C, or in the alternative, an order that the respondent adhere to strict COVID-19 protocols.

[2] Based on her affidavit, which explains that the applicant is part of a high-risk group, and that alleges that the respondent has not been following public health directives regarding COVID-19, Shore J. found the motion to be urgent on a presumptive basis, and designated me to hear it.

[3] I have now received and reviewed the parties' motion materials. I agree the motion is urgent within the meaning of the Notice to the Profession dated March 15, 2020. However, the urgency stems, not from the risks of COVID-19, but from the parties' own behaviour. Their ongoing conflict, and failure to communicate, has created the urgency because it has created the potential for the parties' conflict to cause damage to C.

[4] After reviewing the motion materials, I exercised my discretion to hear this matter in writing, for two reasons. First, the parties have ably put forth their positions in their written material, and as a result, the motion can be determined justly if heard in writing.

[5] Second, hearing this motion in writing is consistent with the primary objective set out in r. 2(2), *Family Law Rules*, O. Reg. 114/99, which requires the court to deal with cases justly.

Dealing with cases justly includes, among other things "giving appropriate court resources to the case while taking account of the need to give resources to other cases": *FLR*, r. 2(3)(d). During this partial shut-down of the court's operations due to the COVID-19 pandemic, it is more important than ever to consider how court resources should be deployed. I also note that my decision to hear the motion in writing is supported by the court's duty to promote the primary objective by active management of cases, including "if appropriate, dealing with the case without parties and their lawyers needing to come to court, on the basis of written documents or by holding a telephone or video conference": *FLR*, r. 2(5)(g).

Background

[6] After a cohabitation of about two-and-a-half years, the parties separated in May 2017. On September 1, 2017, the parties reached a partial separation agreement, including a parenting plan.

[7] Under the parties' current arrangement, the respondent has parenting time with C six nights and seven days out of fourteen. The parenting arrangement is thus almost equally shared.

[8] The applicant is a family physician. She has stage 3 breast cancer and is at high risk of experiencing complications and serious illness were she to contract COVID-19. Understandably, given the shared parenting arrangement in place between the parties, she wanted to understand the risks that C could be exposed to while in the respondent's care.

[9] The respondent is a lawyer. He lives with his new partner, Danielle Traub, who is also a lawyer. Ms. Traub's three-year-old daughter also lives with them when she is not in the care of her father. The respondent and Ms. Traub have decided to self-isolate during the pandemic with Ms. Traub's parents, who are seniors, at their cottage.

[10] The applicant objects to this arrangement. She states that the respondent is offside public health guidelines because (i) he is in a group of more than five people who are not of the same household, and (ii) he is not staying at his primary residence in Toronto, but at Ms. Traub's parents' second home in Thornbury, which is both, far from the applicant and from appropriate medical care should C become ill with COVID-19 while in the respondent's care.

[11] The applicant seeks an order for temporary sole custody of C, an order that C's primary residence shall be with the applicant for the duration of the COVID-19 pandemic, an order suspending the respondent's parenting time with C, and an order that the respondent's parenting time be limited to video conference calls only, or alternatively, an order directing the respondent to comply with COVID-19 protective measures and community based measures, including, among other things, an order that he not attend at the cottage and not invite third parties into his home other than his immediate family. This latter order, if granted, would, in the applicant's submission, preclude the respondent from self-isolating with Ms. Traub's parents in Toronto.

Issue

[12] I am asked to determine whether the parenting orders, or conduct orders, that the applicant seeks are in the best interests of C.

Analysis

[13] My colleague Pazaratz J. wrote a brief decision that operates as a clarion call in these uncharted times: *Ribeiro v. Wright,* 2020 ONSC 1829. There, Pazaratz J. noted that COVID-19 has caused an extremely difficult and stressful period for everyone. He noted the presumption that existing parenting orders – which, in my view, should be understood to include existing parenting agreements – should be respected and complied with, because there is a presumption that the existing arrangement "reflects a determination that meaningful personal contact with both parents is in the best interests of the child".

[14] On the other hand, Pazaratz J. noted that the "well-publicized directives from government and public health officials make it clear that we are in extraordinary times". These extraordinary times require us, for the most part, to suspend our daily routines and activities in favour of a strict policy of physical distancing and limiting community interactions as much as possible.

[15] Although in many respects, our lives will be on hold until COVID-19 resolves, Pazaratz J. wrote that:

> 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.

[16] He noted that while in most cases, there would be a presumption that normal parenting time would continue, subject to whatever modifications may be necessary to ensure all COVID-19 precautions are adhered to, there may be some cases where a "parent's lifestyle or behaviour may raise sufficient concerns about parental judgment that direct parent-child contact will have to be reconsidered. There will be zero tolerance for any parent who recklessly exposes a child (or members of a child's household) to any COVID-19 risk."

[17] Pazaratz J. noted that each family will have its own unique issues and complications. "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" [emphasis in original].

[18] Pazaratz J. also wrote:

> 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.
>
> 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.

[19] It is through this lens that I assess the applicant's motion.

Is the respondent in breach of public health orders or directives?

(i) Is the respondent impermissibly participating in a gathering of more than five people who are not members of a single household?

[20] Under s. 7.0.2(4) of the *Emergency Management and Civil Protection Act*, R.S.O. 1990, c. E.9. an order dated March 28, 2020, entitled "Organized Public Events, Certain Gatherings" was made: O. Reg. 99/20, Schedule 1. Schedule 1 of the March 28, 2020 Order provides:

> (1) Subject to subsection (3), no person shall attend,
>
> (a) an organized public event of more than five people, including a parade;
>
> (b) a social gathering of more than five people; or
>
> (c) a gathering of more than five people for the purposes of conducting religious services, rites or ceremonies.
>
> (2) For greater certainty, subsection (1) applies to an event or gathering even if it is held at a private dwelling.
>
> (3) Subsection (1) does not apply to the following:
>
> 1. A gathering of members of a single household.
> 2. A gathering for the purposes of a funeral service that is attended by not more than 10 persons.

[21] The applicant argues that the respondent is in breach of this order because he is participating in a social gathering of more than five people: himself, Ms. Traub, C, Ms. Traub's daughter and Ms. Traub's parents. She argues that they did not ordinarily reside together before the COVID-19 pandemic, and so the exception in subsection (3)(1) does not apply.

[22] The respondent argues that he has formed a single household, not a social gathering, with C, Ms. Traub, her parents and her child, such that the exception in subsection (3)(1) does apply.

[23] Each party has been in contact with public health officials, and argues that their interpretation of the order has been validated by those officials. I place no weight on this evidence. The emails that the applicant attaches to her affidavit do not provide the unqualified support she suggests they do. The email the respondent attaches to his affidavit suggests he is abiding by the spirit of the public health order, but does not establish what he explained to the public health official about the arrangements he had made. In any event, it is my role on this motion to determine whether the respondent's actions, in view of the public health order and directives, make a different parenting order, or parenting conduct orders, necessary in C's best interest.

[24] I accept that the respondent, Ms. Traub and the children were not part of a single household with Ms. Traub's parents before the pandemic. At that time, the respondent and Ms. Traub were residing with the children in their home in Toronto. They were working in Toronto. They had the assistance of their nanny to care for the children.

[25] On March 13, 2020, the respondent began working exclusively from home. Ms. Traub also began working exclusively from home in March. The applicant also made the decision to work exclusively from home. Other doctors in her practice took over the necessary in-person consultations with the applicant's patients due to her immunocompromised state. It was around this time that many businesses, including the Superior Court of Justice, transitioned to fully remote work arrangements.

[26] At the beginning, the respondent and Ms. Traub continued to employ their nanny to allow them to work from home. To manage the potential risk of her being exposed on public transit, they began driving their nanny to and from work.

[27] On March 19, 2020, the applicant's counsel wrote to the respondent's counsel to enquire about the respondent's and Ms. Traub's nanny, asking them to reconsider having the nanny attend at their home due to the potential that the nanny was being exposed to people who were not taking all COVID-19 precautions. The applicant had by then already made the decision to ask her nanny to stop attending her home to minimize the risk of exposure to COVID-19.

[28] The appellant argues that the severity of the situation was becoming increasingly apparent by the end of March. This is consistent with the parties' evidence of their decisions. On March 27, 2020, the respondent and Ms. Traub decided that their nanny should no longer attend in order to limit the risk of exposure to COVID-19. Her last day attending at their home was on March 24, 2020. At about the same time, the respondent and Ms. Traub decided it would be safest for them to relocate to Ms. Traub's parents' cottage in Thornbury to self-isolate. This arrangement provided the following benefits:

a. Ms. Traub's parents could provide child care for the children – who are three and four years old – so that the respondent and Ms. Traub could continue their law practices from the cottage, and do so in a way that was safer than if the nanny continued to assist, given her uncertain exposures.

b. The respondent and Ms. Traub could provide supports to Ms. Traub's parents, by running their necessary errands, thus protecting them given their age and resultant higher risk of complications and serious illness should they contract COVID-19;

c. The children would have more ability to be outdoors without encountering others due to the lower population density.

d. As of the swearing of the respondent's affidavit, Thornbury has yet to have a confirmed case of COVID-19, though that does not mean that the virus is not circulating in the community.

[29] In addition, the respondent deposes they are following other COVID-19 precautions including:

a. The six of them are not seeing any other people, including other family members, except whomever the children see when they are with their other parent[1].

b. When it is necessary to go out, they wear gloves and masks, use hand sanitizer, wash their hands frequently, and practice physical distancing.

c. The respondent is ensuring that C washes her hands frequently.

d. The children are not having playdates or using playground equipment.

[30] In my view, these arrangements are reasonable. They are far from what Pazaratz J. was concerned about when he described behaviour that would raise "sufficient concerns about parental judgment" that would warrant ceasing direct parent-child contact.

[31] The respondent and Ms. Traub may not have been ordinarily part of the same household as her parents before the COVID-19 pandemic, but there is nothing in the order preventing them from choosing to form a single household for the duration of the pandemic. The applicant relies on a screenshot from the Ontario Medical Association's website advising people against visiting extended family members due to the risk of COVID-19. While I proceed on the basis that the

[1] In C's case, this includes a family of three who live in the same building as her, who are providing supports to the applicant, and with whom the applicant and C enjoy social time. The applicant states this other family also has an immunocompromised family member and are taking all COVID-19 precautions. At the same time, the applicant has ceased seeing her parents and her partner. Her partner provides some support by delivering groceries to her, but he does not come into her home and they remain physically distant when he drops off supplies for her.

website accurately sets out public health advice, it does not address situations where the extended family has combined into a single household for the purposes of getting through the challenges the pandemic presents.

[32] The respondent, Ms. Traub, and her parents' decision to combine into a single household provides substantial benefits to all members of the household, from child care supports to enable the respondent and Ms. Traub to continue to earn income while ensuring the children's needs are met, to supporting Ms. Traub's parents, to ensuring that the people to whom the children are close – and in particular for C, the respondent, Ms. Traub and Ms. Traub's daughter – remain a constant part of their lives at a time when everything else has changed.

[33] In these uncertain times, everybody needs to get by somehow. The decisions the respondent and Ms. Traub have made to get by during this pandemic are responsible and consistent with public health guidelines.

[34] I do not accept that by forming into a single household of six, the respondent has exposed the applicant to any increased risk. He deposes that, if he were required to stay in Toronto, he would still see Ms. Traub when she returns to Toronto to facilitate parenting time with her child and her child's father. The respondent's exposure would be the same – to Ms. Traub, and through her, to her child and parents – and thus C's exposure would be the same. However, the effect of an order requiring him to stay in Toronto would be to fracture his family during the COVID-19 pandemic, and deprive both him and C of the opportunity to be with the rest of his family unit regularly.

[35] More importantly, the respondent's evidence is that none of the six people in his household have had direct contact with anyone else for over a month[2]. They have formed a bubble. The respondent is not acting irresponsibly, or recklessly exposing C, and by extension the applicant, to the risk of COVID-19.

[36] This is not a case like *Guerin v. Guerin,* 2020 ONSC 2016, where the parties, who had been in a nesting arrangement, moved back in together at the outset of the pandemic. In that case, the mother was immunocompromised, and two of the parties' children had asthma. The father was not transparent about his compliance with COVID-19 protective measures, and the mother

[2] The applicant deposes that C states that Ms. Traub's father was not at the cottage on March 27 and 28, 2020 when C was there. It would have been preferable if the respondent addressed this evidence directly in his affidavit. However, he specifically denies seeing Ms. Traub's sister, and deposes that all members of their combined household of six have only seen each other for over a month. In view of the totality of the evidence, I accept that the six people living in the Traub family cottage are only seeing each other, with the exception of the children who see their other parents, and whomever they see when with the other parent. I note that the applicant deposes that she has spoken directly to Ms. Traub's child's father about his COVID-19 precautions and she has raised no issue relating to Ms. Traub's child's potential COVID-19 exposure in her motion.

had reason to believe he was not being forthright with her. He would not even confirm whether he had washed his hands.

[37] The respondent's actions in this case are not akin to those of the father in *Guerin*. He has given extensive evidence about his behaviour and the prudent steps he is taking to guard against the risk of exposure to COVID-19.

(ii) Is the respondent in breach of public health orders or directives by self-isolating at the cottage in Thornbury?

[38] The applicant also argues that the respondent should not be self-isolating with C at the Traub family cottage in Thornbury. She states that hospitals in smaller centres do not have adequate resources and if C were to become ill, she would be far from the applicant and in a less well-resourced centre, which is not in her best interests. She refers to public statements by the Premier of Ontario requesting that people not attend their second homes.

[39] The respondent states that there is no public health order in place that prevents people from going to, or isolating in, their second homes. He deposes that if C were to become ill, he would return her to Toronto for treatment. He notes that the Mayor of the Town of Blue Mountains, of which Thornbury is a part, has confirmed that the large, local grocery store is well-stocked, and acknowledged that there may be good reason for people to self-isolate in their second homes. He has indicated that, while not exactly encouraged, people who choose to self-isolate in their second homes who are following the rules do not pose a risk to that community.

[40] The respondent also deposes that he does not stop during his trips between the cottage to Toronto when he travels to pick up or drop off C. He is thus not exposing C to risks in communities along the route of travel.

[41] In my view, the risk to C from COVID-19 by spending her parenting time with the respondent at the Traub family cottage is negligible. On the parties' evidence, I am not convinced that the risk to C of becoming ill and being unable to receive adequate treatment in time is anything but theoretical. I accept that the respondent is a loving and concerned parent, who has taken steps to educate himself about the risks of COVID-19 and how to avoid them, and that he is committed to taking those steps. I am confident that, should C become ill notwithstanding both parents' efforts to protect her from COVID-19, the respondent would act in her best interest to attend to her care appropriately.

Conclusion

[42] As with all parenting motions, I must make my determination in accordance with the best interests of the child: s. 24 *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[43] In the circumstances of this case, it is in C's best interests that the parties continue the parenting arrangements that they agreed to with respect to parenting time and decision-making. There is no reason here to displace the presumption, noted by Pazaratz J. in *Ribeiro*, that existing parenting arrangements will be respected.

[44] First and foremost, the current parenting arrangement promotes and fosters the close and loving relationships that C has with both her parents, and with Ms. Traub and her daughter. It provides stability and continuity for C at a time when most other aspects of her daily life have changed.

[45] It is, of course, also in C's best interest that she and both her parents do not contract the virus. The respondent is minimizing the risks to his household, and to the applicant, by taking prudent measures to prevent the risk of exposure to COVID-19. Thus, I am not convinced that any health-related concern justifies the changes in the parenting orders that the applicant seeks.

[46] It is also in C's best interest that the respondent continue to earn an income. The respondent's current living situation allows him to do that.

[47] I also decline to make any of the parenting conduct orders sought by the applicant. I am concerned that any conduct orders made would simply provide fodder for future disagreements between the parties, over whether the respondent was abiding by the conduct orders. The respondent is acting as a responsible and capable parent, and he must be allowed to parent without interference from the applicant.

[48] However, the parties to this litigation have to learn to communicate with each other, for the sake of their child. The record discloses failings on both their parts. The respondent should have been more open and transparent with the applicant about the measures he was taking to protect C from exposure to COVID-19, especially knowing that the applicant has good reason to be concerned given her immunocompromised state. He contributed to the confusion around whether he would be taking C to the cottage on at least two occasions in March.

[49] At the same time, the applicant overstepped when she had O.P.P. officers attend the cottage. This is not a dispute that required police involvement, especially given the presence of two young children at the cottage when the officer attended.

[50] I understand that the parties are dealing with very stressful circumstances, made even more stressful by the applicant's immunocompromised state. In these circumstances, it is hard for anyone to be at their best. The communication between the parties was strained before the pandemic, and the extra stress created by the pandemic understandably creates an additional obstacle to effective communication, even here, where the parties are both intelligent, loving parents who want the best for their child. I end by repeating the words of Pazaratz J. in *Ribeiro,* at para. 29*:* "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."

Order

[51] In summary, the applicant's motion is dismissed. This endorsement is an order of the court, enforceable by law, from the moment it is released.

Costs

[52] I invited the parties to agree on costs in advance of my addressing this motion, but they were unable to do so. The parties each provided me with their bills of costs. I also received an offer to settle, which I have not yet looked at. The parties indicated they required the opportunity to make brief submissions on the issue of costs after the motion was decided.

[53] The respondent may deliver costs submissions not to exceed two pages within three business days of the release of these reasons. The applicant may deliver costs submissions not to exceed two pages within three business days of receipt of the respondent's costs submissions. If a reply is necessary, the respondent may deliver no more than one page of submissions within two business days of receipt of the applicant's costs submissions. It is not necessary for the parties to deliver further copies of their bills of costs, or of the offer to settle, as they are already in my possession.

J. T. Akbarali J.

Date: April 30, 2020