CITATION: Juergens v. Tackabury, 2020 ONSC 2852
COURT FILE NO.: F1294/17
DATE: May 8, 2020

SUPERIOR COURT OF JUSTICE – ONTARIO
FAMILY COURT

RE: Kurt John Juergens, applicant

AND:

Leslie Kim Tackabury, respondent

BEFORE: MITROW J.

COUNSEL: Kurt John Juergens in person

Kelsey Long for the respondent

HEARD: May 5, 2020

ENDORSEMENT

[1] This urgent motion heard via teleconference was brought by the applicant father, who claims that the respondent mother was denying him access to the parties' five-year-old child, as stipulated in the final order of Korpan J. dated March 7, 2018 ("the final order"). I am satisfied that there is urgency within the meaning of the notice dated March 15, 2020 posted on this court's website dealing with the suspension of normal court operations due to COVID-19.

[2] The respondent's counsel at the outset indicated that the applicant's reply affidavit had not been received; however, the respondent elected to proceed with the hearing of the motion after being given an opportunity to have the affidavit emailed (by the applicant) and then discussing same with her counsel.

[3] The applicant filed two unsigned affidavits. During the motion hearing, the applicant was sworn and attested to the truth of the contents of both affidavits.

[4] The applicant's motion requested ongoing access as set out in the final order; also, the applicant's motion includes a request for an interim police assistance order.

[5] The respondent submits that the applicant's in-person access should be "at least" two hours of face-to-face parenting time with the child each day but only after the applicant self-isolates for 14 days as a minimum and with the face-to-face parenting time to be exercised in the respondent's backyard. The respondent further submits that the applicant cannot rely on the existing final order because the parties had not been following the parenting plan set out in that order.

[6] For reasons that follow, the final order is declared to be in full force and effect, the applicant's request for an interim police assistance order is dismissed and the order provides for directions as to the filing of pleadings.

BACKGROUND

A. The Final Order Dated March 7, 2018

[7] The relevant portions of the final order are as follows:

(a) the respondent has custody of the child;

(b) the respondent is required to consult with the applicant prior to making significant decisions related to education, medical, dental, extracurricular activities and the religion of the child;

(c) the order provides for a regular schedule of equal parenting time;

(d) the child is with each parent on alternating weekends from Friday at 4 p.m. to Monday at 9 a.m.; and

(e) every week, the child is with the applicant from Wednesday at 9 a.m. to Friday at 4 p.m. and with the respondent every week from Monday at 9 a.m. to Wednesday at 9 a.m.

B. Relevant Facts

[8] The respondent has instituted a strict COVID-19 protocol. The respondent is a college student. Since post-secondary and elementary schools have been closed, the respondent deposes that she stays home with the child, that she has not ventured outside her home since March 13, 2020 except on two occasions as described in her affidavit. The respondent further deposes that she has her groceries delivered and that, since the schools have been closed, that she has not allowed the child to have direct contact with anyone other than herself and the respondent.

[9] The applicant lives very close to the respondent – less than a minute down the street according to the respondent. The applicant works for a friend, whose garage business happens to be directly across the street from the respondent's residence.

[10] The applicant deposes that he has not worked much in the last year and a half as a result of a car accident.

[11] There is no dispute between the parties that the applicant works part-time and that this part-time work does not include working in the garage. The respondent's evidence is that the applicant works for his friend completing renovations and doing odd "handyman" jobs.

[12] The respondent's evidence is that she fears for the safety of the child if face-to-face access was to occur with the applicant because of COVID-19.

[13] According to the respondent, the applicant comes into contact with a large number of customers and individuals, and the applicant regularly drives two vehicles owned by his friend in circumstances where other persons drive those vehicles and the vehicles are not sanitized completely in between use by others.

[14] The respondent further deposes that the applicant socializes unnecessarily with others. The respondent claims to have witnessed the applicant socializing with employees at the garage. The respondent deposes further that the applicant fails to take proper sanitizing and handwashing precautions.

[15] The applicant does dispute a number of the respondent's allegations. The applicant's evidence is: that he has been following local health guidelines for the last six to seven weeks and, in particular, the applicant deposes he has been following the guidelines of the Middlesex-London Health Unit; that he does not share his tools with others; that for over two months, the only houses he has been to are his own and the respondent's. The applicant adds that there are currently three employees working at his friend's garage and that none of those employees drive the two vehicles driven by the applicant.

[16] Both parties agree that they have not been following the final order. The applicant's evidence is that, for more than a year, both parties have been spending time with the child daily. If the child sleeps at the respondent's residence, then the applicant is there to put the child to bed prior to going home; if the child sleeps at the applicant's residence, then it is just the two of them, according to the applicant. This co-parenting model, as explained by the applicant, occurred while both parties were getting along well.

[17] The respondent's version of the *de facto* parenting plan explains that since August 2019 both parties have taken a "flexible' approach regarding access. The respondent deposes

that until COVID-19 that the applicant saw the child daily. The respondent's evidence is that these daily visits would be "sometimes for a few minutes, a few hours, or the entire day, depending on the Applicant's work schedule." The respondent explains that the access took place mostly at her residence, that the applicant has taken the child to his new apartment and that the applicant has had overnight access on "a handful of occasions since August 2019."

[18] While the parties have some disagreement as to the length of time they have not been following the order and how the actual parenting time was exercised, the essential fact remains that both parties were cooperating with each other and were implementing a parenting plan where the child had daily, or close to daily, parenting time with both parties.

[19] As a result of a dispute between the parties in February 2020, there was a period of time when the respondent did not permit the applicant into her home. This resulted in the child spending six consecutive overnights at the applicant's residence on the suggestion of the respondent.

[20] The respondent's evidence is that after COVID-19, the applicant's in-person access ceased and the access arrangements include daily telephone and text access. Further, the respondent deposes that the applicant visits the respondent's home almost every day. He speaks to the child through the front window. The applicant will sit on the porch and the child is inside the house. The respondent states these visits last anywhere between one-half hour to three hours. Also, the applicant and child have walkie-talkies to enable communication with each other. This includes the applicant being able to talk to the child from his apartment, as his walkie-talkie is in range of the walkie-talkie used by the child in the respondent's residence.

[21] The applicant does not dispute in any material way the summary of his current access. The applicant is clear that he disagrees with this access regime imposed by the respondent.

PRELIMINARY ISSUE

[22] There is no current ongoing court case between the parties. The applicant brought only a motion, form 14A, for interim orders that his access should resume as per the final order and for a police assistance order.

[23] The order being made below requires the applicant to issue an application and that the motion shall be deemed a motion made in that proceeding.

[24] The respondent did not oppose an order allowing the applicant to issue an application. This avoids a dismissal of the applicant's motion on procedural grounds, which would give the parties no guidance as to what the parenting plan should be.

DISCUSSION

[25] In the COVID-19 world, that seems to have overtaken all aspects of our society, the present case before this court is not dissimilar to other cases in this court and other courts in the past seven to eight weeks.

[26] In those cases, an "urgent" situation often is created because one parent stops in-person contact with the other parent, alleging that a child or children will be at risk because of COVID-19.

[27] In a number of those cases, there is an existing order, either interim or final, that provides both parents with regular in-person parenting time. The parent who stops the in-person parenting time with the other parent thereby contravenes the order.

[28] I start with first principles. An existing court order, whether interim or final, is just that – an order, which has been made in a child's best interests and which must be obeyed.

[29] The COVID-19 pandemic is not a "trump card" that trumps an existing court order, allowing one parent to formulate his or her own "new order" as to the parenting time for the other parent.

[30] In the COVID-19 world, no suspension of in-person parenting time should be presumed. This was stated by Pazaratz J. in *Ribeiro v. Wright*, 2020 ONSC 1829, which is one of the earliest and most quoted cases dealing with COVID-19. At para. 20, Pazaratz J. states:

> 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.

[31] I deal with the respondent's submission that the existing final order is no longer effective and should not be followed because both parties on consent have not been adhering to the order.

[32] I am unable, on the facts, to agree with this submission. The final order has not been varied. While the parties, as parents, can be flexible and consider new arrangements, the

applicant, pending any order being made in a proceeding to change the final order, should not be precluded from relying on the final order, especially in circumstances where the *de facto* arrangement has been terminated unilaterally by the respondent.

[33] The reality is that under the order, and the *de facto* arrangement, the child had regular and significant parenting time with the applicant.

[34] Although the respondent deposes that she attempted, without success, to engage the applicant in working out a plan to keep the child safe, it is also apparent that the respondent took no steps to commence a proceeding, nor did the respondent seek permission to bring an urgent motion to stay the existing final order.

[35] The only motion before the court is the applicant's motion.

[36] A recent decision of McGee J., *Matus v. Gruszczynska*, 2020 ONSC 2353, contained some helpful discussion regarding the responsibility of parents in relation to COVID-19 and whether parents should engage in self-help remedies. At para. 3, McGee J. states, in part:

> 3 ... There is a presumption that all court Orders should be respected and complied with, see: *Tessier v. Rick*, 2020 ONSC 1886 (Ont. S.C.J.). A parent is not permitted to simply engage in self help, or to interpret public health directives as a licence to terminate parenting time.

[37] In *Matus v. Gruszczynska*, McGee J. describes parenting as "an essential service," stating, at paras. 13-15 and 21:

> 13 We are now in the fifth week of an unprecedented suspension of regular court operations that began on March 15, 2020. Public health information and directions have and can continue to shift, sometimes rapidly. Families are under stress, and parents have good reason to be anxious and cautious.
>
> 14 It is inspiring to see so many parents and family law counsel working harder, smarter and more collaboratively to make things work during this crisis; and to heed the sage advice of Justice Pazaratz in *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.) because "children's lives - and vitally important family relationships - cannot be placed 'on hold' indefinitely without risking serious emotional harm and upset." As Justice Pazaratz goes on to say, in these "troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever."

> 15 Parenting is an essential service.
>
> …
>
> 21 Decisions of this court since the March 15 Notice to the Profession affirm the importance of children maintaining contact with both parents during the current crisis. In my view, young children in the attachment phase of development are particularly vulnerable to the harmful effects of removing a care giving parent. Young children who have already experienced disruptions in their parenting are even more vulnerable.

[38] In the present case, I must consider an order that is in the child's best interests.

[39] Although there is some conflict in the evidence, it is apparent that the respondent has a stricter interpretation of the measures to be followed to deal with COVID-19.

[40] The evidence of each party is that he or she is taking appropriate measures, in his or her own view, to deal with COVID-19.

[41] This motion is not a contest as to which parent's COVID-19 precautions are better. No expert evidence was led by either party. Some of the respondent's evidence regarding the applicant's conduct is disputed. There is no basis on the evidentiary record to make a finding that the child would be at risk if the applicant has in-person parenting time. The applicant has deposed that he is following the directions of the local health unit. Further, the respondent's proposal falls far short of the regular schedule of equal parenting time described in the final order.

[42] Speaking to a child through a window, or via walkie-talkies, or being able to spend in-person parenting time for two hours or so in the other parent's backyard, represents a significant reduction of equal parenting time and represents a serious disruption of the parent-child relationship.

[43] The effect of the relief sought by the respondent would be to make an order, on the applicant's motion, to suspend the applicant's access as set out in the final order and to make a temporary order that the applicant have limited in-person parenting time, as suggested by the respondent.

[44] The evidence before the court does not support the order sought by the respondent. I find that it is in the child's best interests that the applicant's parenting time continue as set out in the final order.

[45] Implicit in the order being made below is that each party will continue to act responsibly and abide by directives from government and health authorities regarding COVID-19.

[46] The evidentiary record does not suggest that the respondent will fail to comply with the order being made. I decline to make an interim police assistance order and that request is dismissed.

[47] The respondent's counsel shall prepare a draft copy of the order in Word format and forward same to the trial coordinator so that the order can be signed digitally. Approval of the draft order by the applicant is dispensed with.

ORDER

[48] I make the following interim order:

1. A declaration is made that the final order of Korpan J. dated March 7, 2018 continues to be in full force and effect. The applicant's first weekend with the child pursuant to the final order shall commence on Friday, May 15, 2020.

2. The applicant's request for an interim police assistance order is dismissed.

3. By May 22, 2020, the applicant shall issue and serve an application that includes a request for a police assistance order on a final basis and, on the issuance of the application, the applicant's motion is deemed to have been made in the application.

4. The respondent shall have 30 days thereafter to serve her answer and, if the respondent seeks changes to the final order of Korpan J. dated March 7, 2018, then the respondent is granted leave to assert those claims in her answer.

5. The costs of the applicant's motion are reserved to the judge who deals with the application on a final basis.

"Justice Victor Mitrow"
Justice Victor Mitrow

Date: May 8, 2020