

SUPERIOR COURT OF JUSTICE - Family Court

RE: Patricia Guerin, Applicant

AND

Hugo Guerin, Respondent

BEFORE: The Honourable A. Doyle

COUNSEL: Manraj Grewal, Counsel for the Applicant

Bruno Sharpe, Counsel for the Respondent

HEARD: March 31, 2020 by telephone conference

ENDORSEMENT

[1] The Applicant's mother's motion was deemed urgent by Justice J. Mackinnon on March 30, 2020.

[2] The mother has brought a motion for, among other things, an order for exclusive possession of the matrimonial home located at 855 Acadian Gardens, Ottawa, ON and that contact between the father and the children will be by only video chat and/or phone access.

[3] She is also requesting that the father pay the mortgage payments in lieu of child support payments. I am not prepared to deal with the financial aspects of this motion as no financial statements or financial information is before the Court.

[4] For the reasons that follow, the Court orders that on an interim without prejudice basis the mother shall have exclusive possession of the matrimonial home. The father's contact with the children shall be reasonable and generous via video-chat or other electronic means. The father will be entitled to return this matter on a date after April 17, 2020 for a review of this Order.

Background

[5] The parties commenced cohabitation on December 1, 1999, were married on July 11, 2003 and separated on August 28, 2018. They have three children Noah (11), Caleb (13) and Makhena (17).

[6] The mother, a former police officer, is on long term disability as she was diagnosed with Systemic Lupus Erythematosus in 2009. She has since been diagnosed with heart issues, Discoid Lupus, Sjorgren's syndrome and fibromyalgia and asthma. She is connected to a heart monitor. Her immune system is compromised. Her physician's letter dated March 27, 2020 confirms that she is to self-isolate as much as possible to avoid possible virus exposure and avoid contact with other people and is not to leave her home unless absolutely necessary.

[7] Since the fall of 2018, the parties were in a "nesting arrangement" where by one party remained in the matrimonial home with the three children on an alternate week basis.

[8] Since early March 2020 after the COVID-19 pandemic, the parties have stayed together in the matrimonial home. At this time, the mother is concerned that the father is leaving and coming and going without regard to the COVID-19 protocol and adhering to the health officials' directives and in particular as they relate to persons in the vulnerable category such as the mother.

[9] The mother indicates that since the declaration of the pandemic, she has remained with the children in the home and cancelled a planned trip to the Laurentians.

[10] The father indicates he has been following the COVID-19 protocol.

Positions of the parties

[11] The mother submits that the father is leaving the matrimonial home on numerous occasions without explanations. On March 20, 2020, she received a message from the father's girlfriend indicating that he had been with her at her home the day prior when the father had told her that he was just driving.

[12] He refused to respond to her question as to whether he had washed his hands. On March 21, he left again and refused to tell her where he went and he refused to wash his hands when he returned.

[13] The father has been out of the matrimonial home since March 23, 2020.

[14] She scrupulously cleans the home by cleaning surfaces with disinfectant and his unexplained absences have increased her anxiety and stress level thereby compromising her already fragile health.

[15] On the other hand, the father states that they have been participating in a nesting arrangement since November 1, 2018 and the children have been doing well.

[16] He agreed to move back into the matrimonial home on March 13, 2020, as the mother wished to self-isolate. He acknowledges the mother's health conditions and states that Joshua and Caleb have mild asthma. He is not visiting his parents (who are in their 80's) at their request.

[17] The father submits that the mother is over-reacting as he has been following the COVID-19 protocol as posted on the Government of Canada's website.

[18] He states that he has followed the Government of Canada recommendations, and will go for walks and drives and has been in contact with his partner Kim Double who is also practising social distancing.

Analysis

[19] In accordance with the *Divorce Act*, the parenting time with the children is dictated by what is in their best interests. The maximum contact principle must be adhered to as long as it is in the children's best interests.

[20] Section 24 of the *Family Law Act* grants the Court to power to make an order for exclusive possession of the matrimonial home. Subsection (3) includes the considerations that the Court must consider, which include (a) the best interests of the children affected and

(e) availability of other suitable and affordable accommodation. Subsection (4) indicates that best interests shall include (a) the possible disruptive effects on the child of a move to other accommodation and (b) the child's views and preferences, if they can be reasonably be ascertained.

[21] For the reasons that follow, the mother will be entitled on an interim and on a without prejudice basis and order for exclusive possession of the matrimonial home.

- Dr. Livingstone's letter dated March 27, 2020 confirms the mother's serious health issues that could be compromised if exposed to COVID-19 virus. He states: "She is at higher risk of contracting infectious diseases and higher risk for complications/more severe respiratory infections due to her medical conditions. Given the community spread of COVID-19 I recommend she isolate as much as possible from possible virus exposure to avoid contracting this infection. This would include avoiding contact with other people and only leaving the house when absolutely necessary until the risk of community infection and this state of emergency as (sic) subsided."
- It is in the best interests of the children that they remain in their home with a parent. I do not have their wishes and preferences at this point as this motion was filed on an urgent basis;
- The issue for determining is solely dealing with events in this family as a result of the COVID-19 pandemic. I find that the mother has satisfied the onus set out by Justice Pazaratz in *Ribeiro v. Wright* 2020 ONSC 1829, at para. 21:
 - a. 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*.

- The mother's concerns are that she has health issues which make her particularly vulnerable in this pandemic. Given her vulnerable immune system, she is going beyond the COVID-19 protocols and guidelines which are geared to the general public;
- The mother's affidavit confirms that the father has not been forthright on his excursions outside the home, e.g. he had told her that he was driving around on March 19, when the girlfriend confirms that he was with her;
- I acknowledge that it must be challenging for a separated couple to live under the same roof. Yet, although the father is not obliged to provide all details of his whereabouts, his lack of response and at times, misleading information, of where he has been places undue stress on the mother and places her health at risk. For example:
 - on March 20, 2020, he did not tell her where he was going;
 - On March 21 and 22 he left the matrimonial home on a variety of occasions;
 - On March 23, he left home mid-morning and then later left with a canoe
- The evidence indicates that despite his commitment to follow COVID19 protocol he leaves the home continuously and returns without advising her where he went or does not wash his hands upon his return to the home;
- She indicates that he went on vacation with his girlfriend and she had the children during his week;
- Even though it is not a directive that he must completely self-isolation, this is not a situation of "business as usual";

- In this particular case, although the father states that he is following the COVID-19 protocol, he is not following all measures deemed necessary given the mother's particular circumstances;
- A deterioration of her health would affect the children;
- As well, two children have asthma and although there is no medical evidence confirming their status and their vulnerabilities, certainly any health condition could possibly affect an individual's general health;
- The father has alternative accommodations including his girlfriend's home and his parents' home (if they permit him);
- His attitude to the mother in not responding to her requests as to locations and to wash his hands, has placed her and the children at risk; and
- In his materials, the father has failed to provide sufficient details and explanations for his numerous absences from the matrimonial home nor has his girlfriend provided evidence that she has been following the COVID-19 measures.

[22] For the above reasons, the mother will have temporary exclusive possession of the matrimonial home and contact by the children with their father will be by electronic means.

[23] This is a temporary solution in these exceptional times. This order is made due to the father not taking the increased risk to the mother and children seriously.

[24] He is entitled to bring this motion back no sooner than April 17 to provide the Court with details and measures he has taken to minimize the risk to the family and specifically of how he has avoided contact with others since the date of this Order.

[25] The parties are encouraged to deal with costs on consent. If they are unable to do so, the mother will file her 1 page costs submission by May 29, 2020 and the father will provide his 1 page costs submissions by June 19, 2020.

Aditya J

