CITATION: Lee v. Lee, 2020 ONSC 2044
COURT FILE NO.: FS-19-008784
DATE: 20200403

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
YOUNGKYOUNG (NIKITA) LEE	)	*Reginald M. McLean* lawyer for the applicant
Applicant	)	
	)	
– and –	)	
	)	
JONG SOO (DAN) LEE	)	
Respondent	)	*Israel Apter* lawyer for the respondent
	)	
	)	

HEARD: April 2, 2020

ENDORSEMENT

DIAMOND J.:

Overview

[1] After the release of my Endorsement dated March 27, 2020, the parties exchanged and filed responding and reply materials in accordance with the timetable set out in my Endorsement.

[2] The respondent's motion was argued by telephone conference before me on April 2, 2020, and the scope of the relief sought by the respondent has somewhat narrowed since the filing of his original Notice of Motion. As the evidence of the parties was received and reviewed by each of them respectively over the last week, the real focus of the respondent's motion became when, and not whether, the respondent's parenting time should resume with the parties' son.

[3] As a result of the facts set out in greater detail below, the respondent argues that his parenting time should restart immediately, while the applicant submits that the respondent's parenting time ought not to restart until at least Monday April 6, 2020 (which would be 14 days after the respondent commenced his self-isolation in accordance with the current COVID-19 protocols in place).

[4] In addition, the respondent seeks make-up parenting time for any time missed from March 13, 2020 until his parenting time with the parties' son resumes.

Summary of Relevant Facts

[5] The parties filed relatively extensive affidavits. I will summarize what I find to be the salient facts needed to decide this motion.

[6] On or about November 20, 2019, the parties entered into Minutes of Settlement which, *inter alia*, set out an agreed upon parenting schedule for their son who is currently 20 months old.

[7] In early March 2020, the applicant shared a news story with the respondent about an individual testing positive for COVID-19 in the same building where the respondent worked. The applicant gave evidence that the respondent downplayed and ignored her concerns.

[8] In any event, the parties continued to adhere to their parenting schedule until mid-March 2020. To begin, the respondent asked for the schedule to be adjusted on March 11 and 13, 2020 due to, respectively, (a) his work schedule and (b) him falling ill with a stomach bug (but no fever).

[9] Around the same time, the parties' son fell ill with a virus. Given the timing of their son's symptoms, the applicant took their son to Sick Kids Hospital on March 13, 2020 where he was tested for COVID-19. Fortunately, that test came back negative. The applicant gave evidence that their son was still too sick for the respondent's access to resume that week.

[10] The respondent testified that despite his inquiries, the applicant did not inform him of their son's negative COVID-19 test results until March 17, 2020. The respondent then asked the applicant for his parenting time to resume on Friday, March 20, 2020 as per the agreed schedule.

[11] No response was forthcoming from the applicant until Tuesday March 24, 2020. On that date, the applicant advised the respondent that she had learned that one of the respondent's co-workers had tested positive for COVID-19. The applicant was very concerned about the respondent potentially being exposed to COVID-19 and felt that the respondent had hidden this information from her.

[12] The respondent gave evidence that his co-worker works and is stationed in a different department "very far from his" (a floor plan was attached as an exhibit to his reply affidavit), and that he first learned of his co-worker's diagnosis through a letter dated March 24, 2020 from his employer. In that letter, the respondent's employer further advised that the co-worker had in fact not been at work since March 13, 2020.

[13] The respondent's employer had closed its doors as of March 23, 2020. The respondent testified that he has been following the provincial and municipal health protocols, practicing social distancing, and staying home in self-isolation since March 23, 2020.

[14] Approximately two months ago, and prior to the onset of the COVID-19 pandemic, the respondent had agreed to house three students (between 13-16 years of age, and the children of his close friend in South Korea) who are in Toronto on an exchange program. The students were and remain under the respondent's care and control, and according to the respondent have been following the same provincial and municipal health protocols with him since March 23, 2020.

Position of the Parties

[15] The respondent submits that since his co-worker had not been at work since March 13, 2020, it has now been over three weeks since the respondent could have been exposed to his co-worker, and since he and the three students continue to practice social distancing and self-isolation, the respondent's access to the parties' son should resume immediately.

[16] The applicant is content for the respondent's access to their son to resume, but only after 14 days since the respondent and the students began their social distancing and self-isolation, and on the condition that none of them show signs or symptoms of COVID-19 until the 14 day period expires (ie April 6, 2020).

Decision

[17] As stated above, the exchange of motion materials has narrowed the scope, and arguably the tone, of the relief sought on this motion. The applicant's original positions, while arguably understandable given the unknown and daily changes associated with the COVID-19 pandemic, have now shifted. At the same time, the respondent's frustrations with the seemingly unilateral decisions originally made by the applicant in response to a situation beyond the respondent's control are substantiated.

[18] These are indeed unprecedented times. Yet the family law focus is and should always be the best interests of the child no matter what situation in which parents may find themselves. I share, adopt and applaud the recent comments of my colleague Justice Pazaratz in *Ribeiro v. Wright* 2020 ONSC 1829 (CanLII):

> "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.
>
> 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.
>
> 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).
>
> 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.
>
> And sadly, in some cases a parent's lifestyle or behaviour in the face of COVID-19 (for example, failing to comply with social distancing; or failing to take reasonable health-precautions) 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 the child's household) to any COVID-19 risk.
>
> Transitional arrangements at exchange times may create their own issues. At every stage, the social distancing imperative will have to be safeguarded. This may result in changes to transportation, exchange locations, or any terms of supervision.
>
> And in blended family situations, parents will need assurance that COVID-19 precautions are being maintained in relation to each person who spends any amount of time in a household – including children of former relationships.
>
> Each family will have its own unique issues and complications. There will be no easy answers.
>
> 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."

[19] The facts giving rise to this motion require a balancing of the parties' needs under the overarching umbrella of their son's best interests. Parting with a child, even on an interim basis, in the face of a growing pandemic where statistics, government strategies and medical knowledge all vary by the day, is certainly not comforting and can even cause dread until care and control is returned. However, Justice Pazaratz is certainly correct in holding that, especially in the face of anxious and distressing times, any child will most benefit from the love, connection and support shared with both parents.

[20] In my view, the applicant's concerns have less to do with what she knows about the respondent's work and home life, and more to do with what she and the respondent do not know. The respondent has been adhering to government COVID-19 protocols and precautions, and there is no real evidence to the contrary. However, I am not prepared to agree with the respondent's position that there is zero chance he was exposed to COVID-19 at work for the last three weeks. While his co-worker left the office on March 13, 2020 and did not return, that in and of itself does not mean that other employees did not interact with the co-worker before and leading up to March 13, 2020. Those employees could very well have been in the same department or office space as the respondent. Since the office remained open for another 10 days (during which time the respondent was working there), there remains a possibility that the respondent unknowingly interacted with other employees who had been exposed to the co-worker prior to March 13, 2020.

[21] The possibility of the respondent having been exposed to COVID-19 appears to be small, and perhaps nominal. Yet in such uncertain times, it is preferable to avail oneself of certainties when available. Thus on the facts of this case, and with a view to reducing the risk factors to the parties' son, I find that the "self-isolation clock" for the respondent and the three students should begin to run on March 23, 2020.

[22] In coming to this decision, I am not making a finding that the respondent has done something wrong. I trust that the respondent, and for that matter the applicant, will continue to follow the government COVID-19 protocols and minimize all potential exposure to themselves and their son. In balancing the respondent's right to access with the child's best interests, I am merely adding four more days until his access potentially resumes in order to reduce the known risks to everyone involved.

[23] Therefore, on the condition that the respondent and the three students (i) continue to remain in self-isolation and practice social distancing, and (ii) display no signs or symptoms associated with COVID-19, the parenting schedule as agreed between the parties shall resume as of April 6, 2020.

[24] With respect to the respondent's request for make-up parenting time (which is a finite number of hours over the last three weeks), as agreed between counsel during the telephone hearing, in the event the parties cannot resolve this issue, counsel may address this issue in writing as part of the parties' costs submissions, which shall total no more than five pages (including a Costs Outline) and be delivered in accordance with the following schedule:

a) the applicant's costs submissions shall be served and filed within 7 business days of the release of this Endorsement; and,

b) the respondent shall thereafter have an additional 7 business days from the receipt of the applicant's costs submissions to serve and file his responding costs submissions.

Summary

[25] In summary, I make the following interim Order:

a) This Endorsement is an Order of the Court enforceable by law from the moment it is released.

b) On the condition that the respondent and the three students (i) continue to remain in self-isolation and practice social distancing, and (ii) display no signs or symptoms associated with COVID-19, the parenting schedule as agreed between the parties shall resume as of April 6, 2020.

c) In the event the parties cannot resolve the issue of make-up parenting time, counsel may address this issue in writing as part of the parties' costs submissions (totalling no more than five pages including a Costs Outline).

d) the applicant's costs submissions shall be served and filed within 7 business days of the release of this Endorsement

e) the respondent shall thereafter have an additional 7 business days from the receipt of the applicant's costs submissions to serve and file his responding costs submissions.

Diamond J.

Released: April 3, 2020

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Released: April 3, 2020