

CITATION: Ahmadi v. Kalashi, 2020 ONSC 2047
COURT FILE NO.: FC-19-59434-00
DATE: 20200403

SUPERIOR COURT OF JUSTICE – ONTARIO – FAMILY COURT

RE: Yahya Ahmadi, Applicant
AND:
Niloofar Kalashi, Respondent
BEFORE: The Honourable Justice H. McGee
COUNSEL: E. Mazinani, for the Applicant
S. Sarbazevatan, for the Respondent
HEARD: April 3, 2020

2020 ONSC 2047 (CanLII)

ENDORSEMENT – COVID-19 PROTOCOL

- [1] As a result of COVID-19, the regular operations of the Superior Court of Justice are suspended at this time, as set out in the Notice to the Profession dated March 15, 2020 available at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>.
- [2] On March 27, 2020 the applicant father electronically served and filed a motion to:
- (a) compel the respondent mother to facilitate access to their 17-month-old son in accordance with their consent Order of December 20, 2019;
 - (b) to expand access; and
 - (c) to release \$35,000 to each of them from the approximately \$210,000 in net sale proceeds from the March 5, 2020 sale of their jointly owned home.
- [3] Within a March 30, 2020 email exchange, counsels agreed to a timeline for service of the motion and the response. As the email string does not provide for a reply, this is my decision upon yesterday's receipt of Ms. Kalashi's April 1, 2020 response.

Order of December 2019 in Full Force and Effect

- [4] The parties entered into a consent Order for parenting time at the urgent case conference held on December 20, 2019. The mother has not moved to vary that Order. The Order is in full force and effect.
- [5] It is not contested by the mother that she is in breach of that Order.

- [6] Being in breach of an Order is a serious matter. It may prevent Ms. Kalashi from seeking further relief before the Court, see Rule 1(8) of the *Family Law Rules*. It will expose her to a claim for costs, and ultimately, it may be a factor in whether or not she is awarded final sole custody.¹
- [7] It is understandable that all parents are concerned for their children’s health and well being during this difficult time. If Ms. Kalashi has evidence that it is in their son’s best interests to terminate his face-to-face parenting time with his father, then *she* must bring a motion before the Court to vary the December 20, 2019 Order.
- [8] Ms. Kalashi is not permitted to simply engage in self help, or to interpret public health directives as a license to terminate parenting time. If she fears that the current routine may compromise their son’s well being, or her mother’s health; then she must provide specifics and an alternate form of transportation.
- [9] Justice Pazaratz’s March 24, 2020 decision in *Ribeiro v. Wright* 2020 ONSC 1829 best sets out the approach of the Court in addressing tension between public health information and Family Court Orders. His decision states at paragraph 7 that there is a presumption that all Orders should be respected and complied with, because there is a presumption that the existing Order reflects a determination that meaningful personal contact with both parents is in the best interests of the child. He goes on to state:
8. On the other hand, the well-publicized directives from government and public health officials make it clear that we are in extraordinary times; and that our daily routines and activities will for the most part have to be suspended, in favour of a strict policy of social distancing and limiting community interactions as much as possible.
 9. Parents are understandably confused and worried about what to do. Similarly, this is uncharted territory for our court system. We all have to work together to show flexibility, creativity and common sense – to promote both the physical and emotional well-being of children.
 10. 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.
- [10] On the materials before me, if Ms. Kalashi were to bring a motion to terminate face-to-face parenting time, she would be unsuccessful. Her historical concerns with Mr. Ahmadi

¹ After July 1, 2020, final decision making per the amendment to the *Divorce Act*.

are not relevant because they predate the December 20, 2019 consent Order, and the current COVID-19 crisis. Her reasons for terminating access are generalized and are assuaged by the statements within Mr. Ahmadi’s affidavit as to his efforts and care to protect their son during this period.

- [11] Courts do not make Orders that a party must obey an Order. An Order is an Order. Courts do make Orders when a party breaches an Order, and as stated by Justice MacPherson in *Douglas v. Douglas* (March 25, 2020 ONSC) “all counsel and parties must be aware that actions taken in these unusual circumstances, may very well be judged once court operations resume, as not being appropriate nor in the best interests of their children.”

Expansion of Access

- [12] I am not prepared to determine an expansion of access at this time, as it does not meet the standard of urgency. However, I give leave to the parties to reschedule their April 7, 2020 Case Conference before Justice Jarvis electronically, in accordance with Court protocol,² and; I strongly encourage the parties to act reasonably and, in their son’s best interests in proposing and accepting further forms of parenting contact, such a video conferencing.
- [13] As concluded by Justice Pazaratz in *Ribeiro v. Wright*, “we are all going to have to try a bit harder – for the sake of our children.”

Advance from Sale Proceeds

- [14] Mr. Ahmadi’s proposal that each party take an advance of \$35,000 from the sale proceeds, leaving approximately \$150,000 in trust is reasonable. I do consider this an appropriate request on motion, as it corresponds with the court’s list of permissible urgent matters.
- [15] Ms. Kalashi’s statements that her former spouse is irresponsible with finances is unresponsive to the motion for an advance distribution. A former spouse’s facility with finances does not disentitle him or her to an equal share of the equity acquired during marriage. Ms. Kalashi does not contest the applicant’s submission that she is the spouse who will owe an equalization payment.
- [16] Order to issue per paragraph 3 and 4 of the March 27, 2020 Notice of Motion.

Costs

- [17] Mr. Ahmadi is the successful party on this motion and is entitled to his costs, per *Rule* 24(1). If the parties cannot agree to an amount of costs, his submissions are to be filed to my attention by April 24, 2020. Response is due May 8, 2020 with reply by May 15, 2020.

² The Conference can be conducted with audio only, or through Zoom.

- [18] I am deferring the applicant's costs submissions for a period of three weeks to encourage settlement, and to provide a period in which Ms. Kalashi may demonstrate compliance with the December 20, 2019 Order. An unremedied breach of a court Order is unreasonable litigation conduct. Unreasonable litigation conduct per *Rule 24* is a significant consideration in an award of costs.
- [19] Costs submissions are limited to three pages, exclusive of a Bill of Costs and any Offers to Settle.

The Honourable Justice H. McGee

Date: April 3, 2020