

CITATION: Amirzada v. Alemy, 2020 ONSC 1979
COURT FILE NO.: FS-17-419905-00
DATE: 20200331

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hameed Amirzada

AND:

Sadaf Alemy

BEFORE: J.T. Akbarali J.

COUNSEL: *Nadine Barmania*, for the Applicant

Viktoriya Terentyeva, for the Respondent

HEARD: March 27, 2020

ENDORSEMENT

Overview

[1] By her endorsement dated March 25, 2020, Shore J. designated me to conduct a telephone hearing with the parties to address the respondent mother's motion seeking urgent relief. In her motion, the mother seeks temporary sole custody and primary residence of the parties' child, Y, who is not yet three years old, and an order allowing her to travel with Y to Vancouver, B.C., where she wants to remain with her extended family for the duration of the current COVID-19 pandemic. She also seeks an order suspending the applicant father's in-person parenting time with Y until such time as a s. 30 assessment can be completed, an order directing that the father's parenting time take place by FaceTime, and a restraining order.

[2] The applicant father has brought a cross-motion seeking, among other things, an equal parenting schedule and prohibiting either party from removing the child from Ontario without written consent or a court order.

[3] In accordance with the Chief Justice's Notice to the Profession dated March 15, 2020, Justice Shore reviewed the mother's motion materials and found that the motion relates to the custody and access of a child, and that, in the circumstances, it fit the urgency requirement as set out in the Notice.

[4] Having reviewed the parties' motion materials, I agree that the matter is urgent under the terms of the Chief Justice's Notice, and warrants a hearing in advance of a case conference, which I conducted by telephone.

Background

[5] The parties married on October 24, 2013 in Vaughan, Ontario. Y was born on May 11, 2017.

[6] Throughout the marriage, the parties lived in the Toronto area. They separated and reconciled on several occasions. In 2017, the parties separated, and the mother left Toronto with Y to join her extended family in Vancouver. She began a matrimonial proceeding in British Columbia. The father began the within proceeding in Toronto in which he sought, and was granted, an order that Y be returned to Ontario.

[7] The mother returned with Y to Toronto, and the parties entered into two consent orders in October 2017 which, among other things, provided for temporary joint custody of Y and a parenting schedule that provided the father with parenting time on Sundays, Mondays, Wednesdays and Fridays. At this point in time, Y was about five months old. At some point thereafter, the parties reconciled.

[8] The father deposes that he and the mother again separated for several weeks in December 2019. At that time, he states that Y was in his care every other night.

[9] The mother has, for the most part, been a stay-at-home parent. The father works. The father states that he is an active and involved parent. The mother disputes the extent of the father's involvement in Y's life.

[10] The father's extended family lives in Vaughan. It is apparent from both parties' material that the father's extended family, and particularly his mother, have been active and involved with Y.

[11] The parties' most recent separation occurred on March 19, 2020. The mother deposes that the father physically assaulted her on that day, requiring her to seek hospital care. She states that he punched her in the face, chipping her tooth, punched her in the ribs and kicked her in the stomach. She deposes that she required an x-ray and ultrasound. She includes photographs of her injuries. She deposes that this was not the first time the father has assaulted her, and gives specific evidence, including photographic evidence, of prior assaults.

[12] The father has been charged with (i) assault choking/strangulation, (ii) assault, and (iii) utter death threat. He is subject to bail conditions that include a restraining order forbidding him from contacting the mother except through a third party for the purpose of arranging parenting time with Y. The father denies the allegations of abuse. He is now living with his mother and three of his siblings in Vaughan.

[13] The mother states that she is afraid for Y's safety while in the father's care. She does not allege that the father has ever assaulted Y, but deposes that he assaulted her while she was pregnant, and that he has assaulted her when Y was present.

[14] The mother states that it is important for her physical and emotional safety and well-being to be among her extended family, whom she states Y knows well, in B.C., for several reasons.

[15] First, the mother states that she is afraid the father will disregard the restraining order, and will physically harm her if she remains in Ontario.

[16] Second, the mother has a history of anxiety, and states that she is without supports in Ontario. She deposes that she is afraid that if she gets ill with COVID-19 in Ontario, there will be no one to assist her.

[17] The mother states she will take all precautions when travelling to Vancouver with Y. She states that she is practicing physical distancing¹ and will continue to do so. She states that her family in B.C. is also practicing physical distancing. She alleges that the father's family is not practicing physical distancing, and notes in particular that one of the father's sisters may have to leave the house for work. Thus, she argues that Y's well-being will be safeguarded better in B.C. with her family. She states that the father can have daily parenting time with Y over FaceTime.

[18] The father argues that travelling to Vancouver is not in Y's best interests given the risks of contracting COVID-19 during travel, and the advisory from the federal government to avoid all non-essential travel. He notes that Nova Scotia has prohibited inter-provincial travel, and states other provinces may follow. He is worried about being able to travel to Vancouver to get Y if it becomes necessary to do so. He is also concerned that the mother plans to relocate permanently to Vancouver, and that the order she seeks - permitting her to go to Vancouver until the end of the COVID-19 pandemic - is vague and uncertain.

[19] The father states that he and his family are practicing physical distancing, but alleges that the mother's family is not.

[20] The father argues that it is in Y's interest to maintain his relationship with both his parents, especially now, in this time of uncertainty. He states Y is an active little boy, and parenting time cannot meaningfully occur over FaceTime.

Issues

[21] I must determine the following issues:

- a. What parenting orders are in Y's best interests? The parties have placed in issue custody, primary residence, parenting time, and whether Y should temporarily be allowed to travel to Vancouver.

¹ In their evidence, the parties use the term "social distancing". I am using "physical distancing" in accordance with the latest language adopted by public health officials, to indicate that while physical distancing is required at this time, people should make use of technology to keep their social connections.

- b. Should a referral be made to the Office of the Children’s Lawyer? This request was raised at the hearing of the motion. It is not in the parties’ Notices of Motion, although the mother’s Notice of Motion contemplates a s. 30 assessment being completed before the father would have unsupervised parenting time with Y.
- c. Should a restraining order be issued?

Parenting Orders

[22] I begin with the issues regarding parenting.

[23] Section 16(2) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) provides that a court may make an interim order respecting the custody of, or the access to a child of the marriage. By s. 16(8), in doing so, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs and other circumstances of the child.

[24] Section 16(6) allows the court to impose such other terms, conditions or restrictions in an order for custody or access as it thinks fit and just.

[25] Section 16(10) codifies the maximum contact principle, requiring the court to give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.

[26] In this case, there is already a temporary custody order in place. Section 17(b) of the *Divorce Act* allows a court to vary, rescind or suspend a custody order. Neither party argued material change in circumstances. However, given that the parties reconciled after the consent orders of Moore J. were entered into, and have now separated again, I am satisfied that a material change in circumstances has occurred that may justify a variation of Moore J.’s orders. In addition, Y is now almost three, no longer an infant. And, of course, we are facing a public health crisis which is part of the reason the mother wishes to travel to Vancouver, to be with her family for support.

[27] In *Ribeiro v. Wright*, 2020 ONSC 1829, Pasaratz J. gave some helpful guidance on regulating parenting differences in the time of COVID-19. Considering the extraordinary circumstances of our society today, Pasaratz J. highlighted the need for children to remain connected to their parents, at para. 10: “In troubling and disorienting times, children need the love, guidance and emotional support of *both* parents, now more than ever”.

[28] Consistent with the maximum contact principle, Pasaratz J. went on to say, at para. 18, “...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.”

[29] I also note para. 14, where Pasaratz J., having noted the seriousness of the COVID-19 crisis, wrote “[t]here will be zero tolerance for any parent who recklessly exposes a child (or members of the child’s household) to any COVID-19 risk.”

[30] I fully endorse Pasaratz J.'s comments. In my view, they are helpful when considering how to ensure Y's best interests are met in the difficult circumstances in which the parties are.

[31] The parties focused primarily on whether the mother should be allowed to travel to Vancouver with Y. I thus begin by considering whether an order permitting the travel the mother seeks is in Y's best interests. In my view, it is not. I reach this conclusion for the following reasons:

- a. I accept that Y has a close and loving relationship with the mother, the father and their extended families. Much of the time, Y maintains his relationship with the mother's family through FaceTime, supplemented by visits in person. I accept that Y has regular, close contact with his paternal relatives, and in particular, his paternal grandmother. These relationships are all important and should be fostered, particularly in this time of great uncertainty.
- b. Y has recently experienced the separation of his parents. It is in his best interests that the parties maintain as much stability for him as possible. That includes continuing to reside in his usual home, and maintaining regular and meaningful contact with the father and the father's extended family who he is used to seeing in person on a regular basis. In my view, Y will not be able to maintain his relationship with the father effectively over FaceTime for an indeterminate period of time.
- c. I have no concern about Y's safety in the father's care. The CAS has become involved and indicates it takes no position on the question of the father's parenting time because it has noted no imminent safety concerns for Y while in either party's care. For purposes of this urgent motion, I accept that the mother's allegations of abuse by the father are credible, and I am greatly concerned by the content and tone of some of the father's text messages to the mother, which suggest he has acted in a controlling manner towards her. However, there is no allegation that the child has been harmed by the father, and the father resides with four other adults who have close relationships with Y. I also note that the father is subject to a restraining order in the criminal proceedings. The father's sister has volunteered to facilitate transfers between the parties. Accordingly, while I have serious concerns about the father's behaviour towards the mother, on this urgent motion, I am not concerned about the child's safety, and the existing restraining order can protect the mother.
- d. I am concerned about the risk of exposure to the SARS-CoV-2 virus to Y if Y and the mother were to travel to Vancouver. Travel at this time is against the advice of public health experts, and can only be considered when essential. Travel not only puts Y at risk, but creates public health concerns, of which we all must be cognizant as we cope with the COVID-19 crisis.

- e. I understand that the mother would benefit from the support of her extended family. However, in this time of physical distancing, to a great extent that support has to be on line anyway. The mother's family resides in more than one household in British Columbia. If the family is truly practicing physical distancing as the mother states they are, the mother will only be able to see in person the family members with whom she plans to reside in Vancouver. There is thus only limited additional support available to her by travelling to Vancouver. The mother's plan is to reside with her sister. She would thus have to continue to FaceTime with her own mother, something she can do now from Toronto.
- f. The mother has some supports available to her in Toronto, including friends and the husband's mother, who continues to be prepared to assist the mother.
- g. It is unclear how long the mother and Y would remain in Vancouver. The COVID-19 crisis could continue for some time. A child of Y's young age should not be absent from a parent for a lengthy and uncertain period of time.

[32] Accordingly, I decline to allow the mother to travel to Vancouver with Y. In my view, it is appropriate to order that neither party shall remove Y from Ontario without written consent of the other, or a court order.

[33] The father seeks a parenting schedule. In determining a schedule in Y's best interests, I note the following:

- a. As I noted above, Y has close and loving relationships with both his parents and their extended families. These relationships must be fostered.
- b. Y is not yet three years old. He requires frequent contact with both his parents.
- c. However, at this time of physical distancing, transitions must be kept to a minimum in order for Y to be at home as much as possible.
- d. The father continues to work from home. The mother is a stay-at-home parent. The father's sister has agreed to bring Y to and from his parents to facilitate parenting time exchanges. The father's sister is also working from home.
- e. I have already noted that I have no concerns about Y's safety while in the care of the father. It is thus unnecessary to order that the father's parenting time be supervised until a s. 30 assessment can be completed.

[34] Keeping in mind these factors, I order the following temporary, without prejudice parenting time schedule, to maximize regular and frequent time for Y with each parent while minimizing transfers due to the COVID-19 crisis. Y shall be in the care of the father from 6 p.m. on Thursdays until 5 p.m. on Sundays each week. To be clear, the father's sister will pick Y up from the mother's home at 6 p.m. on Thursday and return him to the mother's home at 5 p.m. on Sunday.

[35] The mother also sought an order for sole custody of Y. In my view, it is appropriate to set aside the joint custody order of Moore J. dated October 10, 2017. As I have already expressed, I have serious concerns about the father's behaviour towards the mother. It is not appropriate, in view of those concerns, to maintain an order for joint custody.

[36] Nor is it appropriate to award sole custody, even on a temporary basis, to the mother at this time. The allegations made against the father are serious and before they form the basis to exclude the father from decision-making with respect to Y, they must be properly tested. Moreover, Y is young, and I have no evidence of any major decisions that must be made in the near future.

[37] Accordingly, it is not necessary to make any custody order at this time. Decision-making for Y is an issue that can be addressed in the future if it becomes necessary to do so, or at trial.

Section 30 Assessment/Office of the Children's Lawyer

[38] The mother sought an order that the father's parenting time with Y be suspended until such time as a s. 30 assessment can be completed. I have already indicated a s. 30 assessment is not necessary to determine the father's parenting time on this urgent motion. I note that the mother did not seek an order for a s. 30 assessment, and I have no evidence of a willing assessor. Accordingly, I make no order with respect to a s. 30 assessment.

[39] The mother sought a referral to the Office of the Children's Lawyer. The father argued none was necessary.

[40] I decline to refer this matter to the Office of the Children's Lawyer at this time, for several reasons. First, it will be a practical impossibility for the OCL to complete a s. 112 report at this time of physical distancing, when the child is so young. Second, this is a family in crisis. Events are unfolding quickly. Even if the OCL were to accept a referral, the timeline to completion of the report would make it of limited utility. Finally, I note that the CAS appears to be involved.

[41] Accordingly, I dismiss the request to refer this matter to the OCL, but I do so without prejudice to the request being renewed at a time when a s. 112 report could be undertaken, if circumstances warrant.

Restraining Order

[42] The mother seeks a restraining order. At this time, there is a restraining order in place in the criminal proceeding which can protect the mother. There is no indication that the charges against the father will be resolved in the near future or that the restraining order will be expiring soon. Accordingly, I dismiss this request without prejudice to the mother renewing it if it becomes necessary to do so.

Costs

[43] If the parties are unable to resolve costs, I will receive brief written submissions. The father may deliver submissions of no more than two pages, together with any offers to settle and his bill of costs, within one week. The mother may deliver responding submissions of no more than two pages, together with any offers to settle and her bill of costs, within one week of receipt of the father's submissions. The father may deliver reply submissions of no more than one page within two business days of receipt of the mother's submissions. Submissions may be filed via email to my attention in the same manner as the parties' motion materials were filed.

[44] Finally, I thank counsel for their efforts to conduct a difficult hearing in new and challenging circumstances.

Order

[45] In summary, I make the following temporary orders:

- a. The mother's motion for an order allowing her to travel to British Columbia with Y for the duration of the COVID-19 pandemic is dismissed.
- b. The temporary joint custody order set out in paragraph 1 of Moore J.'s order dated October 10, 2017 is hereby set aside.
- c. The father shall have parenting time with Y beginning at 6 p.m. on Thursdays until 5 p.m. on Sundays each week, commencing April 2, 2020. Parenting time exchanges shall be facilitated by the father's sister.
- d. Neither party shall travel with Y outside of Ontario without the written consent of the other, or a court order.
- e. The request for referral of this matter to the Office of the Children's Lawyer is dismissed, without prejudice to it being renewed once preparation of a report becomes feasible, if circumstances warrant.
- f. The mother's motion for a restraining order is dismissed, without prejudice to it being renewed, if circumstances warrant.
- g. As per the terms of the Justice Shore's Endorsement dated March 25, 2020, this Endorsement is an Order of the Court enforceable by law from the moment it is released.

J.T. Akbarali J.

Date: March 31, 2020