

CITATION: Blythe v. Blythe 2020 ONSC 2871
COURT FILE NO.: 1308/18
DATE: 2020-05-06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Lavourne Caroline Blythe, Applicant

AND:
Johnathan Gareth Blythe, Respondent

BEFORE: The Honourable Madam Justice Deborah L. Chappel, via teleconference

COUNSEL: Sean Heeley, for the Applicant
Vivian Ese James, for the Respondent

PARTICIPANTS: Mr. S. Heeley, for the Applicant
Ms. V. James, for the Respondent
Lavourne Caroline Blythe
Johnathan Gareth Blythe, briefly to affirm his affidavits

HEARD: May 5, 2020, via teleconference

REASONS FOR JUDGMENT

I. INTRODUCTION AND ASSESSMENT OF URGENCY

- [1] This was the hearing of a motion commenced by the Respondent on April 25, 2020, to address issues respecting his parenting time with the children of the parties' relationship, namely Abigail Blythe, born March 26, 2013 ("Abigail") and Naomi Blythe, born April 7, 2016 ("Naomi"). During the hearing, I granted the Applicant leave to bring an oral cross motion seeking relief relating to parenting time with the children.
- [2] These motions became necessary as a result of a disruption in the Respondent's parenting time with Abigail and Naomi due to issues and concerns relating to the COVID-19 pandemic. Specifically, the concerns related to the Respondent's full-time employment as a bus driver with the City of Hamilton, his potential exposure to the COVID-19 virus as a result of his regular contact with members of the public through his employment, and the risk that these factors may pose for the children, the Applicant and the Applicant's elderly and medically fragile parents, with whom the Applicant and the children reside.
- [3] This matter was heard by teleconference as a result of the COVID-19 pandemic, and further to:
- a) The Notice to the Profession dated March 18, 2020, which can be found at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>, and which

suspended the regular operations of the Superior Court of Justice of Ontario pending further notice;

- b) The Central South Region Notice to the Profession dated April 2, 2020; and
- c) The Central South Region Protocol Regarding Family and Child Protection Matters dated April 7, 2020.

- [4] Electronic materials were filed through the Courthouse email address, Hamilton.Family.Superior.Court@ontario.ca. Upon the resumption of court operations, all materials will be duly filed in the physical record at the Ontario Superior Court of Justice, Family Court Branch in Hamilton.
- [5] Pursuant to the Notice to the Profession dated March 18, 2020, only motions of an urgent nature can be dealt with at this time without the usual case management steps that are required pursuant to the *Family Law Rules*. Pazaratz J. triaged the Respondent's motion on April 29, 2020 and made a preliminary determination that the motion satisfied the test of urgency for the matter to proceed.
- [6] I reviewed the following materials in support of the motions:
1. Notice of Motion of the Respondent dated April 25, 2020;
 2. Affidavit of the Respondent dated April 25, 2020, which the Respondent affirmed to be true during the hearing;
 3. Responding affidavit of the Applicant, which the Applicant affirmed to be true during the hearing; and
 4. Reply affidavit of the Respondent dated May 3, 2020, which the Respondent affirmed to be true during the hearing.
- [7] The hearing was recorded and began at approximately 10:00 a.m.
- [8] Counsel for the Applicant objected to the admissibility of the Respondent's reply affidavit on the basis that it did not comply with the two-page limit which Pazaratz J. had set in his triage endorsement dated April 29, 2020. I dealt with this preliminary issue during the motion, and for oral reasons given, I allowed the reply affidavit but excluded Exhibit A except for pages 1, 2, part of p. 3 (a text message from the Applicant dated March 19, 2020), 4, and 10.
- [9] As I discuss in further detail below, the existing parenting arrangement was set out in temporary orders dated November 15, 2018 and December 13, 2019. Abigail and Naomi reside primarily with the Applicant, and they have time with the Respondent father every Tuesday and Thursday from approximately 3:30 p.m. until 7:00 p.m., and on alternate weekends from Friday at approximately 3:30 p.m. until Sunday at 6:30 p.m. For reasons set out below, the Respondent has not had face-to-face contact with the children since

March 15, 2020, but he has had telephone and video contact with them. The Respondent seeks an order granting him two consecutive weeks of make-up time with the children immediately, and thereafter requests parenting time every weekend from Friday until Sunday evening. He also requests daily video contact with the children when they are not in his care. The Applicant initially requested that the existing order be varied to limit the Respondent's parenting time to telephone and video contact. However, during the hearing, her counsel indicated that as an alternative position, she would agree to shorter periods of parenting time for the Respondent, in an outdoor setting either at his home or at a park when park areas re-open, with appropriate conditions regarding safety precautions including the use of masks by the Respondent and the children and appropriate sanitization measures. The Respondent did not advance any alternative proposals.

[10] I concur with the preliminary assessment of Pazaratz J. that this situation meets the test of urgency and should be dealt with at this time. I have considered the following factors which Kurz J. outlined in *Thomas v. Wohleber*, 2020 ONSC 1965 (S.C.J.) to assist the courts in assessing urgency during the COVID-19 pandemic:

1. The concern must be immediate; that is one that cannot await resolution at a later date;
2. The concern must be serious in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;
3. The concern must be a definite and material one rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical; and
4. It must be one that has been clearly particularized in evidence and examples that describe the manner in which the concern reaches the level of urgency.

[11] In this case, there has been a parenting status quo in effect since at least November 2018 under which the Respondent father has enjoyed regular and meaningful time with Abigail and Naomi. The Applicant has unilaterally stopped his face-to-face contact with the children over his strong objections, due to concerns relating to the current global health crisis. I am satisfied based on the evidence before me that the children have benefitted greatly from their time with their father and that they have experienced distress about not being able to see him in person or face-to-face when video contact has not been successful. There has been no in-person contact between the Respondent and the children for 7 weeks now, and the indications from government authorities at this point are that the COVID-19 situation will not be resolved for many weeks, if not months. The children are being negatively affected by the lack of contact with their father. As McGee J. stressed in the recent decision of *Matus v. Gruszczynska*, 2020 ONSC 2353 (S.C.J.), at para. 21, decisions of this court since March 15, 2020 have affirmed the importance of children maintaining contact with both parents during this health crisis, and "young children in the attachment phase of development are particularly vulnerable to the

harmful effects of removing a caregiving parent.” On the other hand, the Applicant has raised what I consider to be very legitimate and pressing concerns about continuing with the existing court-ordered parenting arrangement. The children’s best interests require that the issues be addressed and resolved now.

- [12] For the reasons set out below, I have determined that it is in the best interests of the children to vary the existing temporary order dated December 13, 2019 to provide that for the time being, the Respondent’s parenting time with Abigail and Naomi should be reduced to daytime visits for limited periods of time, in an outdoor setting with some very limited exceptions, and subject to a number of conditions regarding safety precautions to maximize the protection and safety of the children, their immediate family and their extended family members. I wish to emphasize that this decision has not been taken lightly, is a temporary measure only, and is not intended in any way to reflect upon the Respondent’s love and commitment to his children or his general parenting abilities during the time that he has had with them. I emphasize that from this court’s perspective, the Respondent is one of the many heroes of this tragic pandemic: an essential worker who has demonstrated a strong sense of civic duty by continuing to serve members of the public who are in need during an exceedingly difficult time. It is one of the very sad ironies of this situation that courageous essential workers like the Respondent are finding themselves caught in the middle of challenging parenting dilemmas such as the one that I have been asked to resolve, on top of all of the onerous responsibilities that they are shouldering to ease everyone’s way through this difficult time. However, all parents and the court must nonetheless remain focused on the best interests of children in dealing with these types of situations, and this will unfortunately at times necessitate that parents make sacrifices regarding the nature and extent of their time with their children for the overall benefit of the children. As other judges have emphasized, solutions that are implemented during this period will in many cases be intended as short-term measures to address unique challenges that none of us have had to confront during our lifetimes. The courts must not view such temporary solutions as creating new “status quos” as we emerge on the other side of COVID-19. Such is the situation in this case

II. BACKGROUND

- [13] By way of general background, the parties were married on September 24, 2011 and separated on September 22, 2018, when the Applicant left the home. The Applicant attempted to leave the matrimonial home with both children on that date, but the Respondent kept Naomi in his care. Accordingly, the children were separated for a period of time, with Abigail being in the Applicant’s primary care and Naomi being in the Respondent’s primary care. The Applicant brought an urgent motion to address time-sharing on October 12, 2018. Eventually, on November 15, 2018, Lafrenière J. made a temporary order providing for both children to be in the Applicant’s primary care, and for the Respondent to have parenting time every Tuesday and Thursday from after school until 7:00 p.m. and on alternate weekends from Friday until Sunday. The Office of the Children’s Lawyer was requested to intervene, and on March 29, 2019, a clinician completed a s. 112 report in this matter. Although the report was not introduced as

evidence on the motions, I was advised that the recommendation was that the parenting arrangements set out in the November 15, 2018 order continue.

- [14] The Applicant brought a further motion in December 13, 2019 to address parenting issues, alleging that the Respondent was not taking the children to their medical and tutoring appointments during his time with them. On that date, Lococo J. made a further order providing for the children to reside primarily with the Applicant, continuing the Respondent's parenting time every Tuesday and Thursday from after school until 7:00 p.m. and on alternate weekends, from after school on Friday until Sunday at 6:30 p.m., and granting the Respondent specified Christmas access. The order also required the Respondent to ensure that the children attend all of their medical and tutoring appointments during his parenting time.
- [15] The Applicant is a registered nurse employed with LHIN Homecare as a case manager at Juravinski Hospital. In January 2020, she began a one year educational leave to complete her Master's degree in Nursing and to become a designated Nurse Practitioner. She has been residing with her parents, Joan Cook (69 years of age) and Lenroy Simpson (73 years of age) ("the maternal grandparents") at their residence in the Hamilton area. Ms. Cook and Mr. Simpson both have significant health issues. Specifically, Ms. Cook suffers from serious asthma and hypertension and Mr. Simpson suffers from cardiac comorbidities. The Applicant has remained isolated at home during the pandemic, with the exception of necessary outings to obtain basic necessities.
- [16] The Respondent works for the Hamilton Street Railway as a bus driver for the City of Hamilton. He is considered an essential worker and has continued to work on a full-time basis during the COVID-19 pandemic to serve the public. He has been residing with his mother at her residence in Guelph. The paternal grandmother also has some health difficulties, the specifics of which were not provided to me.
- [17] Although the matrimonial home has been sold, the parties have not reached an agreement respecting property issues, and the net proceeds of sale have therefore remained in trust. Neither party is able to secure their own residence until the property issues are resolved and the proceeds of sale are released.
- [18] While the Respondent alleges that there have been some difficulties in exercising his parenting time with Abigail and Naomi, his time with the children generally continued in accordance with the November 15, 2018 and December 13, 2019 orders until Sunday March 15, 2020. He has not seen Abigail and Naomi in person since that time. On March 17, 2020, the Applicant texted him to advise him that she had a cough, headache and fever, and expressed concern that the children had caught the flu or the COVID-19 virus from the church where he had taken them during his recent weekend visit. She indicated that she intended to isolate with the children at her home due to these concerns. I find that the Respondent objected to this plan and requested that his visits continue, but that the Applicant remained firm that she would be isolating with the children for two weeks. The Respondent had been having video contact with the children through WhatsApp for several months, and the parties made efforts to continue that form of

contact. There were some difficulties in implementing video contact, and the parties disagree about the reasons for those problems. The evidence indicates that the challenges related both to connection issues with the WhatsApp platform and issues relating to the Applicant's privacy in her home. It is unclear how much video contact the Respondent had during the two week isolation period, but he did have telephone contact with the children.

- [19] The initial two week isolation period that the Applicant had requested ended on March 29, 2020. However, on March 27, 2020, the Applicant relayed that her father Mr. Simpson had finally been able to return home from Jamaica on March 25, 2020, after being detained there due to the COVID-19 pandemic, and that he had received direction from Public Health authorities that he and the members of his household should self isolate for two weeks. The Applicant relayed this information to the Respondent, who was understandably upset about this situation and again objected to a suspension of his parenting time. He relayed to the Applicant his understanding that Mr. Simpson was required by government authorities to isolate, but that the Applicant and the children were not. The parties clearly had a different understanding of the government and Public Health directives at that time. Accordingly, the Applicant continued to isolate with the children in her home. Regular telephone contact between the father and the children continued, and it appears that some video contact through WhatsApp also occurred.
- [20] The second two-week isolation period was to end on April 8, 2020. The Applicant's evidence is that the COVID-19 situation in Canada had by that time evolved and worsened to the point that new concerns had developed regarding face-to-face contact between the children and the Respondent. Specifically, given the Respondent's full-time work as a bus driver and his regular contact with members of the public, she and the maternal grandparents had developed serious concerns about the children becoming exposed to the COVID-19 virus through visits, and thereby putting the Applicant as well as the medically fragile maternal grandparents at serious risk as well. Accordingly, the Applicant advised that she intended to remain isolated with the children in her home, but that she would facilitate ongoing telephone and video contact between the children and the father.

III. POSITIONS OF THE PARTIES

- [21] As I have indicated, in his motion, the Respondent requests an order granting him two weeks of uninterrupted parenting time with Abigail and Naomi effective immediately. Thereafter, he seeks parenting time every weekend from Friday at 3:30 p.m. until Sunday at 7:00 p.m. In addition, he requests daily video contact with Abigail and Naomi when they are not in his care, from 6:00 p.m. until 7:00 p.m. His position is that there were no reasonable grounds for changing the existing parenting arrangements, and that the Applicant conjured up a series of unfounded excuses to keep the children in her sole care since March 15, 2020 with the ultimate objective of trying to gain an advantage in this litigation. His evidence is that the City of Hamilton has taken steps to ensure the safety of transit users and bus drivers, including the installation of a barrier to keep passengers in the rear part of the bus and requiring passengers to use only the rear doors, so that they

are able to remain a safe distance away from the drivers. He indicated that there is no charge for the bus, so there is no exchange of money or bus tickets from users and the drivers. In addition, he noted that he has been following all appropriate sanitization measures, including regular hand washing and regularly sanitizing all major surfaces and doorknobs in his home. The Respondent has arranged to take two weeks off work so that he can have make-up time with Abigail and Naomi, and indicated that he was prepared to take more time off work if necessary in order to resume his regular time with the children.

- [22] The Applicant denies that she fabricated unfounded excuses for keeping the children in her care for the purposes of advancing her position in this case. She has serious concerns about exposing the children, herself and her parents to COVID-19, and indicated that at every stage of this unfolding situation, her focus was to safeguard the best interests of the children and follow the directives of government and Public Health officials. She has concerns that the Respondent comes into contact with many members of the public on a daily basis through his work, and that this places the children, herself and her parents at an unacceptable level of risk of being exposed to this virus. She is extremely concerned about her elderly parents, who have serious health issues that render them particularly vulnerable to the virus. Furthermore, she explained that her parents are not willing to have the children return to their home after extended time in their father's care and home unless she and the children quarantine themselves elsewhere for a two week period before returning. Her evidence is that she has nowhere else to go with the children, and cannot afford to obtain her own housing due to the deadlock between the parties about the property issues and the distribution of the net proceeds from the sale of the former matrimonial home. She emphasized that she finds herself essentially in a "catch-22" situation, and that the practical outcome of resuming the existing parenting arrangements would be that the children would have to remain in the Respondent's full-time care. Counsel for the Applicant submitted that the Respondent has not provided evidence that he is able to take an extended leave of absence to care for the children, that he is not in a position to do so when he is working, and that in any event, it would not be in the children's best interests to be in his primary care.

IV. ANALYSIS

- [23] The issues on this motion are governed by the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), as amended. The starting point for the analysis is Section 16 of the Act, the relevant portions of which provide as follows:

Order for custody

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

.....

Terms and conditions

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

.....

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

Past conduct

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

(10) In making an order under this section, the court shall 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 and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[21] The general test for determining custody and access issues under the *Divorce Act* is the best interests of the child, “as determined by reference to the condition, means, needs and other circumstances of the child.” the *Divorce Act* does not spell out a lengthy list of factors for the court to consider in assessing the best interests of the child. The factors that the court should reflect upon in carrying out the best interests assessment, and the weight that should be accorded to each factor, will vary depending on the unique features of every child and case. In carrying out the analysis, the court may seek guidance from

the considerations which provincial and territorial custody statutes enumerate as being relevant to the best interests analysis (*T. (K.A.) v. T. (J.)* (1989), 23 R.F.L. (3d) 214 (Ont. U.F.C.); *K.C.W.V. v. K.L.P.*, 2010 NBCA 70 (C.A.); *Allen v. Wu*, 2011 ONSC 6813 (S.C.J.); *Scott v. Chenier*, 2015 ONSC 7866 (S.C.J.)). The relevant statutory provision in Ontario is section 24 of the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended, the relevant portions of which provides as follows:

Merits of application for custody or access

24 (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).

Best interests of child

(2) The court shall consider all the child's needs and circumstances, including,

- a) the love, affection and emotional ties between the child and,
 - i. each person, including a parent or grandparent, entitled to or claiming custody of or access to the child,
 - ii. other members of the child's family who reside with the child, and
 - iii. persons involved in the child's care and upbringing;
- b) the child's views and preferences, if they can reasonably be ascertained;
- c) the length of time the child has lived in a stable home environment;
- d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- f) the permanence and stability of the family unit with which it is proposed that the child will live;

- g) the ability of each person applying for custody of or access to the child to act as a parent; and
- h) any familial relationship between the child and each person who is a party to the application.

Past conduct

- (3) A person's past conduct shall be considered only,
- a) in accordance with subsection (4); or
 - b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

Violence and abuse

- (4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,
- a) his or her spouse;
 - b) a parent of the child to whom the application relates;
 - c) a member of the person's household; or
 - d) any child.

Same

- (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

[22] The best interests of the child must be ascertained from the lens of the child rather than from the parents' perspective; parental preferences and rights do not play a role in the analysis except to the extent that they are necessary to ensure the best interests of the child (*Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at paras. 74 and 202; *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.) at pp. 50, 54, 68). Although the best interests test is broad and designed to meet the particular needs of the child before the court, Parliament specifically directed in section 15(10) of the *Divorce Act* that in undertaking the analysis, courts must give effect to the principle that children should have as much contact with each parent as is consistent with the best interests of the child. However, the maximum contact principle is not an unbridled objective. As the Supreme Court of Canada noted in *Young* (at para. 40) and *Gordon* (at p. 49), maximum contact may be overtaken to the

extent that contact with a parent conflicts with the child's best interests (see also *B.V. v. P.V.*, 2012 ONCA 262 (C.A.), at para. 15; *Rigillo v. Rigillo*, 2019 ONCA 548 (C.A.), at para. 4).

- [24] In these motions, the parties both seek to vary an existing interim custody and access order made pursuant to section 16(2) of the *Divorce Act*. The legislation does not set out a specific test for variation of interim custody and access orders. Although section 17(1)(a) of the Act authorizes the court to vary a custody order, and section 17(5) enumerates the factors that the court must consider in doing so, that section only applies to final custody and access orders (*Brooks v. Brooks*, 1998 CarswellOnt 3097 (C.A.); *Lagrandeur v. Lagrandeur*, 2017 ONSC 6967 (S.C.J.), at para. 41). However, the court does have the jurisdiction to change interim custody orders made under section 16(2) of the *Divorce Act* in appropriate circumstances. The Ontario Court of Appeal has held that typically, interim custody and access orders should not be changed unless there is a "manifest change in circumstances or any important new evidence to justify a change in the status quo" (*Serruys v. Serruys*, 1982 CarswellOnt 305 (C.A.), at para. 12). It has emphasized the importance of minimizing interlocutory proceedings in custody and access matters, stating that any decision can generally be only "guess based" without the benefit of a full hearing with *viva voce* evidence and cross examination (*Serruys*, at para. 12). Accordingly, there should be sound reasons that militate in favour of taking immediate action with respect to the parenting arrangements rather than waiting for a final hearing on the issues (see also *F.(H.) v. G.(D.)*, 2006 NBCA 36 (C.A.), at para. 17).
- [25] I am satisfied that there have been significant changes in circumstances since the December 13, 2019 temporary order was made, and that there are compelling reasons for addressing the parenting arrangements respecting Abigail and Naomi at this time. We are in the midst of a major international health crisis due to a contagious and frequently deadly virus, resulting in repeated directions from government and Public Health officials to members of the public other than essential workers to isolate at home except for absolutely necessary outings. Unfortunately, the Respondent is not able to do so due to his employment as a full-time bus driver. He is required due to the important nature of his work at this time to be in enclosed buses with many members of the public on a regular basis. These circumstances place him at a much higher risk than others of being exposed to COVID-19 and to pass the virus on to the children and potentially to other members of their family with whom they reside, including their mother and the maternal grandparents. There is no dispute as to the exceedingly dangerous nature of this illness, and health authorities are learning more about it as each day passes, including its possible effects on children. Furthermore, there is no dispute that COVID-19 poses particularly high risks for elderly people with underlying health issues. These developments have also impacted the security of the Applicant's and children's housing situation. I accept the Applicant's evidence that the maternal grandparents have advised her in no uncertain terms that if the children have any extended time with the father in his home, they cannot return to the grandparents residence where the Applicant and children have been living unless they first quarantine with the Applicant in a different location for a least two weeks. The evidence also satisfies me that the Applicant has nowhere else to live or to

temporarily quarantine with Abigail and Naomi at this time. All of these considerations speak to the need for judicial intervention now.

- [26] I am not satisfied that the current parenting arrangement continues to be in the children's best interests. Rather, as I have indicated, I conclude that under the current circumstances, the children's best interests will be served by varying the temporary order to provide for regular daytime visits, in an outdoor setting with limited exceptions, and with strict terms aimed at protecting the children and their other family members from exposure to COVID-14. In my view, overnight access in the Respondent's home poses too high a risk for the children and their other family members at this time. While this case is not about the best interests of the mother and the maternal grandparents, their protection from this virus is a vitally important piece of the best interests analysis respecting Abigail and Naomi on the facts of this case. The Applicant is the children's primary caregiver, and the evidence indicates that she has carried out this role with great diligence and devotion. The children reside with the maternal grandparents, and this relationship is very important to them. I am satisfied that if the Applicant or the maternal grandparents contracted this illness, this would have serious negative implications for Abigail and Naomi. Accordingly, protecting the Applicant and the maternal grandparents from this illness means protecting the children. Unfortunately, Ms. Cook and Mr. Simpson are particularly vulnerable to the potentially dire effects of COVID-19 due to their ages and serious health issues. These considerations make this case unique and particularly challenging in attempting to balance the importance of maintaining contact between the children and their father on the one hand with the need to be vigilant in safeguarding the children from exposure to this disease.
- [27] I have considered the Respondent's evidence respecting the safety precautions that the City of Hamilton has implemented to protect bus drivers. While these measures provide some reassurance that the risk to the Respondent may be reduced, I am not satisfied based on the evidence before me that they are sufficient to alleviate the concerns that I have addressed. The fact remains that the Respondent is in an enclosed bus with many people all day on a regular basis. The Respondent assures the court that he is not exhibiting any symptoms of COVID-19. However, it is widely known that one of the particularly challenging features of this virus is that many people carry it without symptoms. There is no evidence that the Respondent has been tested to date. In any event, he faces a new risk of exposure every day that he works due to the nature of his employment.
- [28] I have also considered the Respondent's assurance that he has taken two weeks off work to have the children for make-up time, and that he would not be exposing himself to members of the public during this two week period. Again, this does not address the concern that he may have already been exposed and that he has not been tested. Moreover, it does not address how the concerns regarding his potential exposure to COVID-19, and that of the children, would be addressed under his proposal upon his return to work. The Respondent indicated that he could take more time off work, but he did not adduce clear evidence that he had been granted an extended leave of absence from his employment. I find that even if he were to obtain such an extended leave of

absence, it would be important in the unique circumstances of this case for him to isolate for a period of time, without symptoms of COVID-19, before resuming his regular access with the children.

- [29] On the facts before me at this time, the unfortunate reality is that if the children have overnight or extended daytime visits with their father in his home, they will be unable to return to their mother's care, potentially for several months. I find that this outcome would be clearly contrary to the children's best interests. While the Respondent has a loving and committed relationship with Abigail and Naomi, and the children very much enjoy their time with him, the Applicant has been their primary caregiver. Both children have significant special needs. Abigail suffers from Attention Deficit Hyperactivity Disorder and Obsessive Compulsive Disorder, and she requires an individualized learning plan and special strategies to help her cope on a daily basis. Specifically, I accept the Applicant's evidence that she needs one-on-one teaching, medication management and behaviour management practices that are consistent with her physiotherapy in order for her to remain stable and complete her school work. Naomi has speech impediment issues for which she requires individual support and attention. In addition, both children suffer from chronic constipation issues that can lead to serious problems requiring specialized medical care. The Applicant has been extremely attentive in informing herself fully of the children's needs and addressing them on a daily basis. The evidence indicates that the Respondent's involvement in these matters has been limited. He has not attended many appointments with the service providers involved with the children, and there have been occasions when he has demonstrated aggressive behaviours with professionals when he has attended sessions. The Applicant states that Abigail's psychiatrist, Dr. Francisco, has asked that the Respondent not attend any further appointments due to his intimidating conduct. The Office of the Children's Lawyer clinician and the Children's Aid Society have apparently both noted concerns regarding the Respondent's indifference at times to the children's emotional needs and challenges. The Office of the Children's Lawyer has recommended that the Respondent's parenting time be limited at this time to that set out in the existing order. As I have indicated, the Applicant brought a motion in December 2019 to address parenting time due to concerns that the Respondent was not taking the children to all of their medical and tutoring appointments during his time with them. The motion resulted in an order requiring him to do so as a condition of his parenting time with them. In light of these findings, the children's best interests are clearly best served by remaining in the Applicant's primary care. The Applicant is currently at home on a full-time basis due to her educational leave and the shut-down of in-person classes, and is available to the children on a daily basis. The challenges involved in caring for Abigail and Naomi during the COVID-19 crisis are heightened by the fact that they are home on a full-time basis. Even if the Respondent were able to obtain an extended leave from work, the evidence does not support an expansion of his time to even a full two-week period or to every weekend, as he has requested.
- [30] I have carefully considered the Respondent's suggestion that the Applicant has regularly attempted to undermine his relationship with the children and has used COVID-19 as a means to continue on this course and gain an advantage in the custody and access case. I

agree that there are concerns regarding the strength of the Applicant's commitment to ensuring regular video contact between the Respondent and the children. She should have made many more efforts to facilitate this form of contact during the period when she withheld the children from the Respondent. I also have concerns that she did not devote more attention to formulating other solutions to the parenting dilemmas that led to these motions. I also reject her evidence that she believed that the Respondent had agreed to her decisions to withhold the children from him. I find that she was well aware of the Respondent's strong objections, and that she inappropriately took matters into her own hands. She should have taken steps to address the issues with the court in the face of the father's objections. Having said this, I am also mindful of the many challenges involved in initiating court proceedings during the COVID-19 crisis, and this is a mitigating factor in my assessment of her overall conduct. Notwithstanding these concerns, I am not satisfied that she has used the COVID-19 pandemic as a tool to gain a litigation advantage over the Respondent. I find that she is a loving mother to Abigail and Naomi, that she generally appreciates the importance of the children's relationship with their father, and that she had sound reasons for taking the steps that she did. She found herself in an exceedingly challenging situation, during a period of heightened public panic when there were numerous directives from government and Public Health officials that were often challenging to keep up with.

- [31] In reaching my decision in this matter, I have carefully considered the positive and meaningful relationship between the children and the Respondent and the maximum contact principle. Unfortunately, maximizing the Respondent's contact with Abigail and Naomi is not consistent with the children's best interests at this juncture. However, I have given considerable weight to the importance of ensuring as much contact with the Respondent as possible, taking into consideration the need to safeguard the well-being of the children, the Applicant and extended family members, as well as the need to protect the children's primary placement with their mother and the stability of their home situation during these difficult times.
- [32] In determining the days and times of the Respondent's parenting time, I have taken into consideration the fact that the children are still engaged in school work on a full-time basis with the Applicant from Monday to Friday each week, and that the Respondent does not return home from work during the week until approximately 3:00 p.m. I have also considered the fact that the Applicant will be doing all of the transportation for the Respondent's parenting time, and that she will likely need to stay in the Guelph area during the parenting time in case visits end early due to weather or other issues. I have specifically ordered that the Respondent may have such other parenting time as may be agreed upon between the parties. Given the very structured nature of the access that I am ordering, the Applicant's educational commitments, the children's schooling and the Respondent's employment obligations, it is difficult to assess what other times may be manageable. However, I emphasize that I expect the Applicant to work in good faith with the Respondent to work out additional times, particularly if he takes the two week holiday that he had planned and once the children complete their school year.

V. TERMS OR ORDER TO ISSUE

[33] Based on the foregoing, a temporary order shall issue upon the following terms and conditions:

1. Paragraph 3 of the temporary order of Lococo J. dated December 13, 2019 is varied to provide that the Respondent's parenting time with the children Abigail Blythe, born March 26, 2013, and Naomi Blythe, born April 7, 2016 ("the children") shall be as set out in this order.
2. The Respondent shall have parenting time with the children as follows:
 - a) Friday May 8, 2020, from 4:00 p.m. until 6:00 p.m. If he is not working, the time shall be from 12:00 p.m. until 4:30 p.m.;
 - b) Every Tuesday from 4:00 p.m. until 6:00 p.m. If he is not working, the time shall be from 12:00 p.m. until 4:30 p.m.;
 - c) Every Saturday from 12:00 p.m. until 4:30 p.m.;
 - d) Every Sunday from 12:00 p.m. until 4:30 p.m.;
 - e) Such other times as can be agreed upon in advance in writing between the parties; and
 - f) Telephone or video contact with the children on days when he does not have face-to-face contact with them, from 6:30 p.m. until 7:00 p.m.
3. The Respondent's parenting time shall be subject to the following terms and conditions:
 - a) The exchange of the children shall occur at the Respondent's home.
 - b) The Applicant shall be responsible for transporting the children to and from the Respondent's home for the Respondent's parenting time.
 - c) Subject to subparagraph (d), the parenting time shall occur outdoors, either in the Respondent's backyard or in a nearby park or other outdoor area accessible by foot once parks and outdoor areas re-open.
 - d) The Respondent may permit the children to access his home for brief periods to use the washroom facilities or to address any other urgent situations. The Respondent shall ensure that the washroom facilities are thoroughly sanitized, and that fresh soap and towels are provided to the children for each visit.

- e) The Respondent shall wear a face mask and shall continue to follow all directives from government and Public Health officials regarding appropriate sanitization measures.
 - f) The Applicant shall provide the children with face masks, and the Respondent shall make all reasonable efforts to ensure that they wear them during his parenting time.
 - g) If the Applicant confirms in writing that she is not comfortable with the Respondent preparing meals or snacks for the children from his kitchen, she shall be responsible for sending meals and snacks for the children.
 - h) The Respondent shall make all reasonable efforts to minimize physical contact between himself and the children, and to comply with physical distancing measures recommended by government and Public Health officials.
 - i) The Applicant shall remain available during the Respondent's parenting time to pick the children up early in the event of inclement weather or other circumstances that render it impossible for the visit to continue outside.
 - j) The Respondent shall ensure that the paternal grandmother complies with physical distancing measures recommended by government and Public Health officials during his parenting time.
 - k) In the event that a parenting time event cannot proceed due to inclement weather, the parties shall make all reasonable efforts to make up the time within 14 days, either by adding time to another visit or arranging another visit.
 - l) The parties shall explore the various available platforms for facilitating video contact between the Respondent and the children, with the goal of ascertaining the most appropriate platform for fostering meaningful video communication with minimal connection problems. In the event that a connection problem arises during any video contact, the Applicant shall make all reasonable efforts to attempt to reconnect the children with the Respondent as quickly as possible.
4. The parties shall advise each other forthwith if they, the children or any members of their households begin to exhibit symptoms of COVID-19.
5. In the event that either party seeks costs in connection with these motions, they shall submit a written request to the Trial Coordinator within 30 days of the court resuming regular operations for a costs hearing before me. If no such request is submitted during this time-frame, there shall be no costs payable by either party.

- [34] With respect to costs, I note that neither party obtained the result that they requested at the outset of the hearing. I also impress upon the parties the importance of keeping in mind the highly unusual situation that we all find ourselves in as a result of this health crisis. I do not believe that either party has acted in bad faith; they both love their children dearly and simply wish to ensure that they remain healthy, happy and safe. In the circumstances, I strongly encourage the parties to engage in discussions about the costs question and to attempt to reach a resolution without the need for further litigation and judicial consideration.
- [35] In closing, I wish to emphasize once again for the Respondent's benefit that this order will not be carved in stone pending a final resolution of the custody and access issues. As circumstances evolve, the court may reach a different conclusion as to the parenting arrangement that best serves Abigail's and Naomi's needs and interests. For instance, if the Respondent were able to confirm that he has arranged an extended leave of absence from work, and he were to isolate for an appropriate period of time at home without showing symptoms of COVID-19, this could potentially alleviate some of the concerns that have informed my decision and result in a different outcome. Furthermore, some of the risk factors that have influenced my decision could be alleviated if the parties are able to resolve the property issues and the Applicant is able to secure a residence for her and the children. I appreciate that this result will be difficult for the Respondent to accept, but I trust that he will nonetheless respond to it with grace and with confidence that this court truly has the best interests of Abigail and Naomi in mind. Based on his clear love and devotion to them, I am confident that he will focus on making the best of his time with them, and that this temporary arrangement will not impair his relationship with them in any way.



The Honourable Madam Justice Deborah L. Chappel

Date: May 6, 2020