

**CITATION:** Fernandez v. Goicochea, 2020 ONSC 2910  
**COURT FILE NO.:** 402/20  
**DATE:** 2020-05-08

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Danelsy Fernandez, Applicant

**AND:**

Miguel Goicochea, Respondent

**BEFORE:** The Honourable Mr. Justice A. Pazaratz

**COUNSEL:** Mr. P. Jeejeebhov, Counsel, for the Applicant

No counsel of record for the Respondent

**HEARD:** In Chambers – Triage Decision

**ENDORSEMENT**

- [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] For the moment, the court is prioritizing “urgent” matters. However, with the passage of time the court has been able to gradually increase the services available during the COVID-19 suspension, as set out in the following documents which are available online:
- a. April 2, 2020 Supplemental Notice to the Profession
  - b. April 7, 2020 Protocol Regarding Family and Child Protection Matters in Central South Region
  - c. April 28, 2020 Notice to the Profession in Central South Region
- [3] This motion was referred to me as Triage Judge for a preliminary determination of urgency and of how this matter should proceed. Determinations of urgency are summary in nature, and wholly without prejudice to both parties on the hearing of the motion itself.
- [4] Electronic materials were filed through the Courthouse email address: [Hamilton.Family.Superior.Court@ontario.ca](mailto:Hamilton.Family.Superior.Court@ontario.ca). Upon the resumption of court operations all materials will be duly filed in the physical record at the courthouse.
- [5] I have received and reviewed the following materials on behalf of the Applicant mother:

- a. Application issued May 7, 2020.
- b. Mother's section 35.1 Affidavit sworn May 7, 2020.
- c. Mother's Notice of Motion dated May 7, 2020.
- d. Mother's Affidavit in Support of Motion sworn May 7, 2020.
- e. Affidavit of Service setting out that the Respondent father was served with the Motion documents (but not the Application) by e-mail on May 7, 2020 at 12:39 p.m. Insofar as these were originating documents, it is unclear whether proper service has occurred. For the moment I will presume that the father has been made aware of the motion. Hopefully this will soon be confirmed.

[6] Obviously the father has not had an opportunity to respond. It is vitally important that the court receive his version of events as quickly as possible. Given the fact that the mother has raised serious issues in relation to the three children of this unmarried relationship (ages 9, 7 and 3) hopefully the father will be able to respond immediately.

[7] From the mother's materials, I get the impression that this is one of those cases where the parties got along without any court order for a number of years. Then recently an incident arose which created a great deal of upheaval for the parties and their children. Hopefully we can help these parties get back to a more stable and calm parenting regime as quickly as possible.

[8] The mother's materials are excessively long and include a lot of needless background information. However, she characterizes this as an urgent motion based on the following narrative

- a. The three children have resided with the mother continuously since the parties separated in 2017.
- b. There has never been an order dealing with custody, access or support.
- c. The mother has three older children from a former relationship. She is not making any claims against this father in relation to those children.
- d. The father has five other children of three women. Two of his sons live with him in Mississauga.
- e. The Applicant resides in Hamilton with her partner Wilfredo. She describes Wilfredo as a positive influence in the children's lives.
- f. The mother operates a cleaning business and works evenings, to allow her to be available for the children during the daytime.

- g. The father works in construction in Mississauga. He resides in a residence provided by his employer. Other employees also reside in the residence. The mother has concerns about overcrowding and COVID-19 relating to the number of people in that household. But that's not the primary basis of her motion.
- h. She says following separation the father generally saw the children every Sunday, with occasional sleepovers. About a month ago he started having the children on alternate weekends, Friday to Sunday evening. She has described no real concerns about this arrangement.
- i. The mother says on Friday April 24, 2020 the father picked the children up for his weekend visit. A few minutes later he returned to her residence in an agitated state and confronted Wilfredo because the nine year old daughter told the father that Wilfredo bit her. The mother denies that Wilfredo bit the child. She says they were "roughhousing", there was no bite, but that Wilfredo apologized if he was too rough.
- j. The mother says since April 24, 2020 the father has refused to return the three children to her.
- k. He contacted the police and CAS.
- l. The mother has attached to her materials an e-mail from the police advising that their investigation has been completed and no charges or further action will result. From a police perspective there are no child protection issues.
- m. Hamilton CAS has also become involved. The mother says the father has stated he won't return the children until CAS gives approval. The mother says she spoke to CAS on Friday May 1, 2020 "and was advised that the children could be returned to me."
- n. However, the mother attaches a letter from CAS dated May 7, 2020. The letter is not so clear with respect to returning the children to the mother. It says the Society has no knowledge of a family court order "preventing (the mother) from having access..." The letter confirms that there is an open investigation relating to "disclosures made by the children" and the Society takes no position with respect to custody and access.
- o. Clearly some sort of incident happened. It's too soon to speculate as to whether there is justification for a major disruption of a long-standing parenting arrangement. I suspect not, but it will be important to receive not only the father's responding materials/position, but also an update from Hamilton CAS.

[9] The mother seeks an emergency order that the children be returned to her immediately, with the father to have access on alternate Sundays from 12:00 noon until 5:00 p.m.

- [10] In the circumstances, I find that the custody/access issues are *potentially urgent*. This is a preliminary determination, without prejudice to either party on the ultimate hearing of the motion. The child support issue is important but not urgent. And as an aside I would question why the mother is proposing that the father's access be limited to five hours on alternate Sundays – when by her own materials full weekend access has been proceeding without issue.
- [11] The father shall be allowed until Tuesday May 12, 2020 to serve and file any responding materials. His materials should be no longer than the mother's.
- [12] The mother may serve and file a reply affidavit (no more than two pages long, excluding any updating letter from CAS) by Wednesday May 13, 2020 at 2:00 p.m.
- [13] Each party shall serve and file documents by e-mail.
- [14] The matter will be scheduled to be dealt with by a Judge on or after Thursday May 14, 2020.
- a. The Judge may decide to conduct a hearing by teleconference. In that event, the parties will be advised by the court as to the date and time of the teleconference.
  - b. However, after reviewing the file, the Judge may determine that it is more appropriate to deal with the matter based solely on the written materials, without a teleconference. In that event, the parties will be forwarded a copy of the Judge's written decision.
  - c. The judge dealing with the matter will make a formal determination as to whether the materials filed – *and any responding materials* – raise any issues which meet the threshold of being “urgent”, as required in the Notice to the Profession. If urgency has been established, the Judge will make any necessary orders.
- [15] While Hamilton CAS does not have the authority to decide the issues of custody and access, in a case like this the court is extremely reliant on (and grateful for) any update or clarification the Society can provide with respect to the status of an ongoing investigation, and any position the Society may have on the issues of custody and access.
- [16] Both parties should attempt to obtain an updating letter from CAS no later than May 14, 2020 at 10:00 a.m. The mother's lawyer should forward a copy of this endorsement to Hamilton CAS (by e-mail or fax) forthwith.
- [17] I suspect that if CAS identifies that there is no a safety concern in the mother's household which cannot be addressed, it is more likely that the status quo will be reinstated. I make this comment partly in light of the father's apparent work schedule; his lack of private housing; and the fact that these three children have three half-siblings in the mother's house.

- [18] The father should obtain legal advice as quickly as possible, and in any event before any hearing by teleconference. The Court has been advised that legal information may be available to individuals who qualify, through the Law Society of Ontario at the following phone numbers: Toll-free: 1-800-268-7568; General: 416-947-3310. If the parties qualify, they may also wish to contact the Client Service Centre of Legal Aid Ontario at 1-800-668-8258.



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Pazaratz J.

**Date:** May 8, 2020