

CITATION: Zeitoun v. Abdallah, 2020 ONSC 2770
COURT FILE NO.: FC-20-597
DATE: 2020/05/04

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Sahar Zeitoun, Applicant

AND

Hassan Abdallah, Respondent

BEFORE: J. Mackinnon J.

COUNSEL: Karla Policelli, for the Applicant

Wade Smith, for the Respondent

HEARD: April 29, 2020

ENDORSEMENT

[1] This motion comes to the court following a case conference conducted by MacEachern J. and the order she made on April 21, 2020 determining the motion urgent under the court's COVID-19 scheduling protocol. The applicant mother is the moving party. She asks for a temporary without prejudice order that the three children of the marriage reside in her primary residential care and reside with their father during alternate Tuesdays at 6 p.m. until Thursday at 6 p.m., and from Saturday at 9 a.m. to Monday at 9 a.m. in the other weeks. The respondent father opposes the motion. His position is that the children should reside with him during the week, subject to a midweek overnight with their mother, and should reside with her during every weekend.

[2] The mother also requests additional relief which has been agreed to. An order will go on consent as asked in paragraph 7 of her Notice of Motion. An order will also go on consent as asked in paragraphs 8, 9 and 10 of her Notice of Motion with the amendment that these provisions shall apply mutually to the parties.

Overview

[3] The parties were married July 22, 2008 and have lived apart since early February, 2020. They have three children who are now 10, 5 and 3 years of age. The mother left the home with the children on either February 7 or 8, taking the children with her to her parents' home. She says she told the father what she was doing and where she was taking the children, and that she needed some time apart given their marital difficulties which she says were well known to them both. He says she gave no notice that she was leaving, was taking the children with her, or where she was going.

[4] The father says he was only able to locate the mother at her parents' home after he attended at the police station on February 10. He says he went to file a missing person's report for the children. She says he told the police she had abducted the children. The police occurrence report was not in evidence. The police called the maternal grandparents. The father says the mother then agreed to return the children to him at the matrimonial home. She says that through a third party they arranged for the father to pick the children up from school that day which he did. Later that evening the mother was asked to take their daughter to swimming. When she returned with the child, the mother attempted to enter the house to discuss parenting arrangements with the father. She says he would not let her in, shoved her; the police were called, and in the result, she returned to her parents' home with the children.

[5] The father describes these events differently. He says she tried to barge in, that she called the police and falsely claimed he had hit her, and that the officer persuaded him to let her take the children back to her parents' home.

[6] The mother sets out in her affidavit efforts made to arrange visits between the father and the children after February 10. She says he saw the children pursuant to his wishes. He asked for them for February 16 and 17, however did not come for them and did not answer his phone or call. He did have the children February 18 to 20, and February 22 for a day visit. She says an attempt was made for him to have the children overnight on March 4, but he did not take them. He was also to have them March 15 to 17. She dropped the children off for him the morning of March 15, but he called her later to say he had to work on March 16 and could not keep them

overnight. They arranged for her to pick up the children at a Tim Horton's, but he did not return one of their two sons until March 17.

[7] The father does not address what contact he had with the children after February 10 up until March 17/18. His affidavit states that he had the two boys with him on March 17 and that the mother asked him to bring them back to her. He also says that she offered him the children from March 18 for a week. The father states that when he arrived to get the children, she refused to hand them over unless he agreed to all her terms of custody and access, which he could not do because he disagreed, they were in the children's best interests. He received a letter from her lawyer dated March 24 setting out the mother's proposal for his parenting time. The letter said she was not agreeable to him having parenting time until a schedule was confirmed in writing. The father relies on this to demonstrate that the mother was the parent who first withheld the children from the other parent. He submits that her conduct started a "tug of war" between them over the children.

[8] The mother describes in detail the events in April that gave rise to this motion. She deposes that she and the father agreed he would have all the children with him from April 2 until April 4. He picked them up on April 2. The mother goes on to state that on April 4 rather than return the children as agreed the father told her he was keeping them for a week. Then, on April 6 she says he told her he would only return them after she signed a written agreement for equal parenting time. Despite that, he dropped their daughter off at the mother's, unannounced, on April 9. The mother says the two boys have remained with their father since April 2, and that she has only been allowed limited telephone contact with them. Nor have the children seen each other since April 9.

[9] The father does not address these specific events in his affidavit.

[10] The parents also disagree with respect to their parenting history. In addition to deposing that he took the children to school the father says he took them to their activities and helped them with their homework. He says both are good parents and equally able to look after the children. The father provides no details as to what his hours of work were.

[11] The father also relies on the fact that the mother has recently returned to work and continues to work remotely. He has been laid off during the COVID-19 crisis. The father submits that his proposed residential schedule takes advantage of his current greater availability to the children, thereby addressing the maximum contact principle more effectively than the mother's proposal. When he returns to work, he expects flexible hours and believes an equal residential schedule would be best.

[12] The mother remained home after the birth of the youngest child in 2016. She returned to work this February 24 and is currently working remotely from home. She maintains that she was the primary parent during the intervening years. She agrees that the father was involved with the children but points out that his employment responsibilities limited his availability to them. She says he worked long hours as a finance/insurance manager at a car dealership, often returning home during the children's bedtime routine or even after they were in bed, and also worked Saturdays. She disagrees that he took the children to school. She says this happened rarely; the older children walked to school, and he had to be at his work by 9 a.m. which was a 45-minute drive away. The mother describes her morning routine with the children in detail, noting that the youngest remained with her all day and that she arranged and participated in activities for him.

[13] The mother also relies on a Separation Agreement entered in to between the parties in 2018 during a previous period of separation. It provided the mother with primary residential care of the children and provided the father with parenting time akin to what she is now proposing.

Analysis

[14] Both parties made submissions as to the credibility of the other party. Credibility is important to the determination of this motion.

[15] There are a number of serious credibility issues with the father's evidence.

[16] He deposes that the mother left with the children on February 7 without notice or indication of where she was taking them. He maintains he was very worried that she had left Ottawa with the children. Yet the only steps he describes taking to locate her were telephone calls to her which were not returned, one telephone call to his sister in law and another to an

uncle. No explanation was given for not calling her parents or making the five-minute drive to their house to check for his family. Two days passed before he contacted the police to report his children missing.

[17] This testimony does not ring true. I do not accept it. I find it more probable that the mother did tell the father she was taking the children to her parents' home for a few days.

[18] After making the phone calls the father says he immediately went on line and discovered that the mother had transferred \$10,000 out of the "family bank account" to a man he now understands is her boyfriend. Despite averring to this the father did not exhibit any documentary proof of any such account or transfer. The mother states that there is no joint bank account, denies taking any money belonging to him and says she does not have a boyfriend. In an exhibit to her affidavit she attaches an email the father sent to a relative claiming the total amount of transfers was \$20,000. Attached to the email are three transfers totaling \$1,700 from an account which appears to be in the mother's sole name.

[19] The father has not established these allegations. He has made inconsistent statements with respect to them. Nor does he explain how he accessed the mother's banking information.

[20] The father provides no evidence with respect to the parenting time he had with the children after February 10 and up until March 17. He did not reply to the detailed description the mother provided with respect to the arrangements made in February and early March for the father to have the children, or to the occasions when he did not show up as expected, returned the children early or only returned two rather than all of them. I infer from his silence that her account is accurate. His silence also supports another inference: he did not respond to her account of his parenting time because it is inconsistent with his overall theory that the mother is using litigation tactics to wrongfully keep the children from him.

[21] The father submits the mother misled the court when she deposed that when he refused to return the children to her on April 8, he texted her to say he would not do so until there was a written agreement. Her statement is accurate. The father says it is misleading because she was first to withhold the children from him, whereas her implication is that he was first to do so. He

bases his submission on a statement he alleges she made on March 17 or 18, and on her lawyer's, letter dated March 24.

[22] I reject this submission. First, I do not accept his account of what he says she said in March. In her affidavit she says she wanted confirmation from him of when he would return the children which he refused to provide. This was a reasonable request.

[23] Second, despite the wording of her lawyer's letter (my client is not agreeable to him having parenting time until a schedule is confirmed in writing) the fact is the mother did not withhold the children. She did arrange for him to have the children from April 2 to April 4.

[24] Nor does the father address the events of April 2 and following. He does not deny that the arrangement was for him to have the children from April 2 to 4, that he refused to return them as agreed, has kept the two boys since then, and has not proffered any face to face to contact to the mother or to the three children as amongst themselves. His failure to give a specific response supports the inference that she has accurately described what happened. The omission of any response also detracts from his credibility. He has not admitted salient facts that he ought to have admitted. He brushes off his own responsibility by saying "the tug of war with the children has continued and it has to end".

[25] There are some lesser issues with the mother's credibility. Even accepting as I do that, she told the father she was leaving for a few days with the children she must have known she did not have his agreement to take them with her. The court does not condone unilateral, self-help remedies. Her conduct in doing so for the intended few days is in my view outweighed by the subsequent self-help conduct the father took in overholding and withholding the children during April. The father may doubt that she would have returned in a few days. The steps he took in making allegations against her to the police on February 10, followed by changing the locks to the matrimonial home, removed any realistic prospect that she would have. But when the police took the straight forward step of contacting her father, she did provide the children to him, and later that same day he agreed for them to return with her to her parents' home.

[26] The mother could have provided more evidence in response to the allegations that she had been transferring money to a third party. To her credit she did produce the only exhibit in the

record on this issue. But she did not identify the individual or disclose whether she had transferred more than \$1,700. Her submission that these issues are not relevant to the substantive parenting issue is correct, but by holding back she missed an opportunity to provide disclosure that may impact on her credibility and will likely have to be produced in any event as relevant financial disclosure.

[27] It is also submitted that her credibility is impaired by her description of the father's brother as being in the military. The father says this is not true and she knows it. At this stage I have only her word against his and cannot decide either way.

Conclusions

[28] I conclude that the children's best interests will be best served at this time by residing in the primary residential care of the mother on a temporary without prejudice basis. I so order. The father does occupy the matrimonial home and is off work at present due to the COVID-19 business restrictions. These factors in his favour are outweighed by the serious reservations about his credibility on issues of fact touching directly on the children's best interests, and by his conduct as a parent in recent months. I find he did not facilitate arrangements for his own contact with the children in February and March, and his conduct in April when he overheld, withheld and separated the children from each other was contrary to their best interests. My conclusions on credibility also lead me to accept the mother's description of the parenting roles undertaken by each of them in the last almost four years. She was the primary caregiving parent prior to separation.

[29] I have considered the father's submission that his current greater availability to the children should result in the residential arrangement he proposes for the children now, with a different arrangement to start when the COVID-19 restrictions are lifted, and he returns to work. His proposal then would be for equal residential time. The children have already experienced considerable instability in residential arrangements since early February. It remains unknown when and how the COVID-19 restrictions applicable to his employment will be lifted, but provincial planning is ongoing. I am not persuaded that these children would benefit from living primarily with their father now and then moving to quite a different residential schedule in a

matter of months. Given the “tug of war” they have been through they will benefit from a consistent, stable schedule that continues beyond the current restrictions affecting their father’s employment.

[30] That said I do see an advantage in making a current order with two small changes to take place when the father is back at work. For now, the father’s parenting time shall be as described in paragraph 6 of the Notice of Motion with the addition in week two of a Wednesday day visit from 9a.m. to 6 p.m. When the father returns to work, the Wednesday visit will become an evening visit from the usual time school ends until 7 p.m. and the father’s alternate weekends will commence on Friday at 6 p.m. rather than the current start time of 9 a.m. on Saturday morning.

[31] The respondent shall forthwith deliver Ali Al-Rida Abdallah born on April 9, 2015, and Jawad Abdallah born on June 27, 2016 to the applicant.

Costs

[32] If the parties are unable to agree to the disposition of costs of this motion and the case conference presided by MacEachern J, I will determine the issue by written submissions. These should not exceed three pages plus attached offers and Bills of Costs. Submissions shall be delivered by the applicant by May 15, by the respondent by May 29, with a brief right of reply to the applicant by June 3, 2020.

Date: May 4, 2020

J. Mackinnon J.

CITATION: Zeitoun v. Abdallah, 2020 ONSC 2770
COURT FILE NO.: FC-20-597
DATE: 2020/05/04

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Sahar Zeitoun, Applicant

AND

Hassan Abdallah, Respondent

BEFORE: J. Mackinnon J.

COUNSEL: Karla Policelli, for the Applicant

Wade Smith, for the Respondent

ENDORSEMENT

J. Mackinnon J.

Released: May 04, 2020