CITATION: Chase v. Chase, 2020 ONSC 5083
NEWMARKET COURT FILE NO.: FC-20-1025-00
DATE: 20200825

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jennifer Chase, Applicant

AND:

John Chase, Respondent

BEFORE: A. Himel, J.

COUNSEL: Melanie O'Neill, Counsel for the Applicant

Respondent, Self-Represented

HEARD: August 25, 2020, In Chambers

ENDORSEMENT

Relief Sought

[1] The Applicant Mother (the "Mother") brings an urgent motion, on notice, for sole decision-making ability for educational decisions respecting the child, W.C., born February 28, 2011 ("W.C."), as well as costs.

[2] In particular, the Mother seeks an order that W.C. shall attend S.E.S.C.E School, in person, commencing September 8, 2020, and that he shall be registered for this option beforehand, if required.

[3] The Respondent Father (the "Father") seeks an order that W.C. shall remain at home until such time that the York Catholic District School Board's ("YCDS") safety protocols are proven successful and that leading health experts are able to offer more certainty, having data obtained from when children have been attending school and not just in isolation.

[4] On August 18, 2020, I made an Order that the motion proceed in writing, and I provided timelines.

Decision

[5] For the reasons that follow, W.C. shall be registered and shall attend S.E.S.C. E. School, in-person, commencing when school opens in September 2020.

[6] W.C. shall be registered for in-person attendance by the Mother.

[7] This temporary Order shall continue until otherwise ordered by the Court or agreed to by the parties.

Background Facts

[8] The parties were married in 2004, separated in 2016 and were divorced in 2017.

[9] The Mother is an account manager for Shopify and works from her home in Newmarket.

[10] The Father is a software developer for IBM Canada who, since the onset of the pandemic ("Covid-19"), has worked from his home in Keswick. The earliest date at which he may be required to return to the workplace is January 2021. His wife, Virginia, is an essential worker who has continued to work in the community throughout the pandemic.

[11] There are no other adults or children, aside from W.C., in either party's home.

[12] As per the parties' Separation Agreement dated January 6, 2017 (the "Separation Agreement"), which has been amended a few times, W.C. resides with each parent equally on a 2/2/5/5 schedule, as well as shared vacations and holidays. The parties have joint custody.

[13] W.C. attends S.E.S.C.E. School in Newmarket and is enrolled in a grade 4 French immersion program. He has been at that school since junior kindergarten.

[14] Both parties agree that no one in either of their households has any underlying medical condition that makes any of them more susceptible to adverse effects of Covid-19. Virginia is awaiting a date for surgery relating to a broken ankle, which has yet to be scheduled, but will take place after September 15, 2020.

[15] The parties attempted mediation regarding W.C.'s holiday and summer schedule in early 2020, however, the mediation terminated without an agreement in March.

[16] The Father attests that the parties are working with counsel to address these issues. A meeting that was scheduled to take place on August 10, 2020, was cancelled by the Mother upon serving the Application and urgent motion. The Father's lawyer suggested that the meeting proceed, however, the Mother refused. She also declined to mediate (as is required by the Separation Agreement). The Mother does not dispute these facts in her reply affidavit.

[17] The Mother's first affidavit contains an email setting out the Father's recent settlement proposal. He correctly notes that this was for settlement purposes and should not be included in the evidence or motion materials. As per the Father's request, I am disregarding the email and the impugned paragraph of the Mother's affidavit.

Issues and Analysis

The Law on Urgency

[18] Rule 14 of the *Family Law Rules* O. reg 114/99 (the "*FLR*"), reads as follows:

> **NO MOTION BEFORE CASE CONFERENCE ON SUBSTANTIVE ISSUES COMPLETED**
>
> (4) No notice of motion or supporting evidence may be served and no motion may be heard before a conference dealing with the substantive issues in the case has been completed. O. Reg. 89/04, s. 6 (3); O. Reg. 383/11, s. 3 (1).
>
> **URGENCY, HARDSHIP ETC.**
>
> (4.2) Subrule (4) does not apply if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.

[19] Kurz, J. recently explained the usual process for bringing a motion before the Court, and the interplay of urgency. As set out in *Thomas* v. *Wohlaber,* 2020 ONSC 1965 (CanLII):

> "[26] Ordinarily, a party seeking to bring a family law motion must meet a number of preconditions:
>
> 1. The motion must be preceded by a family conference on the substantive issues in the case (r. 14(4). However, under r. 14(4.1), the court can dispense with that condition if it finds that there is hardship or urgency.
>
> 2. The parties must first attend a Mandatory Information Conference in cases dealing with net family property, the matrimonial home, support and a restraining order (r. 8.1 (1), (4), and (7)). However, the court can obviate that requirement if it finds "… urgency or hardship or for some other reason in the interest of justice." (r. 8.1(8)).
>
> 3. The motion materials must be served on all other parties to the motion at least six days prior to the date that the motion is to be heard (r. 14(11)(a)). The parties to the motion must also confer or attempt to confer orally or in writing about the issues in dispute in the motion (r. 14(11)(c)).

Urgency as a Self-fulfilling Prophesy

[20] This is the first of several urgent motions to be filed with the Court since August 17, 2020 and, without a doubt, there will more forthcoming. There has been no case conference, no attendance at a Mandatory Information Program (as is required by Rule 8.1 of the *FLR),* and it is unclear what attempts have been made by the parents to confer about the disputed issue.

[21] There is a common theme to all of the cases currently before the Court; parents disagree about whether their child should attend school in-person, or online. The upcoming school

year will begin in the next two to three weeks and school boards expect that choice to be made imminently.

[22] School attendance in the midst of a pandemic is a challenging issue for many parents. Unfortunately, for some separated and divorced parents this is another battleground; one more arena where their child may become the prisoners of the war.

[23] The need for a court to address this issue on an urgent basis is a self-fulfilling prophesy. Merely fail to resolve the issue from March to August 2020 and, voila, "the test for urgency is met". In the normal course this approach would not be tolerated. However, notwithstanding that the parents create the problem, jump the queue and should not have their matter heard without following the usual processes, I accept that it is the Court's duty to deal with these cases expeditiously. The child has a right to know the plan for the upcoming school year, and the parents need time to prepare for it.

[24] A better approach is to engage in mediation with a professional or third-party trusted family member or friend. I note some of the creative ways to resolve the school attendance dispute: (1) Enrol the child at the commencement of the school year, and review the plan at Thanksgiving, following an outbreak at the school, or at the first opportunity provided by the school board to re-consider the choice; (2) Delay in-person school attendance and review the decision when specific criteria are met; (3) Create a small pod of children who can learn remotely together with the assistance of a parent(s) and/or tutor; or, (4) Explore whether the child may attend school in-person during the morning, (leaving before lunch) and participate remotely in the afternoon.

[25] Some of these cases would resolve with the benefit of an urgent case conference, if sufficient time and resources were available. While court-based mediation services are readily available (and are free or subsidized), a review of the various motion materials before me suggests that none of the parents attempted mediation, and all of the litigants waited until mid-August 2020 to bring this matter to the Court.

[26] The backlog caused by the Covid-19, and the move to virtual court attendances have placed a tremendous burden on the family justice system. As noted by the Ontario Divisional Court recently, the Newmarket Court is, "one of the busiest family law jurisdictions in Canada" *(Justice for Children and Youth* v. *J.G.*, 2020 ONSC 4716 at para. 78). Resources must be used judiciously and proportionate to the issues.

[27] For these reasons, notwithstanding that the parties create the urgency, most often these cases will proceed by way of a motion. At this juncture there is insufficient time and insufficient resources (as a second judge would be required to deal with the motion in the event of a stalemate) to proceed with a court conference. In keeping with current practices these motions will often proceed in chambers on the written evidentiary record.

[28] I note that in this case (and in all others currently before the Court) the Mother and Father have delegated the authority to make the decision respecting their child's in-person versus online attendance at school to me, a judge who has never met the parents and who will

likely never meet the child. I would encourage the parents to return to mediation as this is a process that empowers them to make these important decisions.

The Law on Custody and Access

[29] The claims in respect of custody and access are made under both the *Divorce Act* and the *Children's Law Reform Act.*

Custody/Access – *Divorce Act*

[30] In assessing custody and access issues, section 16 of the *Divorce Act*, [R.S.C. 1985 c. 3 (2nd Supp) provides direction to the Court. Section 16 reads:

> ***Interim order for custody***
>
> 16(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.

Custody/Access – *Children's Law Reform Act*

[31] In assessing custody and access issues under the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended (the "*CLRA*"), Section 21(1) provides that a parent of a child or any other person may apply to a court for an Order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

[32] Section 24 of the *CLRA* reads 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). 2006, c. 1, s. 3 (1).
>
> ***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 necessaries 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. 2006, c. 1, s. 3 (1); 2009, c. 11, s. 10; 2016, c. 23, s. 7 (1, 2); 2016, c. 28, s. 2.

Are W.C.s' Best Interests Served by Attending School In-Person or Through Online Learning?

The Quebec Case Law

[33] There are only two decisions reported in Canada respecting attendance following the reopening of schools during the pandemic. Both are decisions of the Quebec Superior Court from May 7, 2020, when some schools reopened there. In Droit de la famille — 20682, 2020 QCCS 1547 (CanLII), L'Honorable Claudia P. Prémont, J.C.S., declined to order the children's return to school as a family member suffered from an auto-immune disease making them high-risk, which would have limited contact.

[34] The second decision, Droit de la famille — 20641, 2020 QCCS 1462 (CanLII), while not binding on this Court, is instructive. L'Honorable Claude Villeneuve, J.C.S., ordered the two children (ages 9 and 11) return to school. I include the relevant reasons (translated from French) below:

> [8] First, it is not for the courts, but rather for the competent government authorities, to assess the potential risks of contamination of the population in a pandemic situation and to take the necessary measures to limit the spread of the disease. a virus.

[9] The adoption of numerous recent ministerial orders shows that the government is taking the necessary measures as the situation evolves.

[10] When the government decides to partially lift the containment measures linked to Covid-19 in order to allow, among other things, the resumption of academic activities at the primary level, there is no need for the Court to question this decision, unless one or the other of the parties demonstrates, by a preponderant evidence, that it would be contrary to the particular interests of their children to resume attending school, for example because of their condition health.

[11] This proof has not been made.

[12] Second, it should be remembered that decisions concerning a child must be taken in his interest and respect for his rights (article 33 C.c.Q.), and not in the sole interest of his parents.

[13] However, under sections 1 and 14 of the Education Act [3], each child residing in Quebec not only has the right to receive educational services [4], but also has the right to receive educational services. obligation to attend a school [5], from the first day of the school calendar of the school year following that in which he reached the age of 6 until the last day of the school calendar of the school year during which he reached the age of 16 [6].

[14] Parents, for their part, must take the necessary measures to ensure that their child fulfills his obligation to attend school. It is only in exceptional circumstances that a child will be exempt from this obligation.

[15] The pandemic linked to the Covid-19 outbreak is certainly an extraordinary situation leading to exceptional measures.

[16] But these are only temporary measures which do not have the effect of modifying the provisions of the Education Act (which provide for the child's right and the requirement to attend school).

[17] It is correct that the government has decreed that the return to school as of May 11, 2020 was not "mandatory". However, this does not necessarily take away the right of children to receive educational services.

[18] When the two parents judge, by mutual agreement, that it is more appropriate for their child to continue his education at home (while benefiting from a distance educational supervision), they must take the means necessary to achieve it.

[19] If one of the parents cannot, in a context of shared custody, offer his child home schooling for acceptable and reasonable reasons, there is no reason to deprive the child of his right to attend his school when it is possible for him to do so.

[20] In addition, we must avoid changing the terms of custody unless the situation of the children and the parties requires such a change, which is not the

> case in the present case because the children are developing well, in general, in shared custody.
>
> [21] Third, in the context where X asks to return to school, it would even be contrary to her interests not to attend school until next September when she wishes to improve her knowledge in certain subjects in which she is having difficulty.
>
> [22] She will soon be 12 years old and her request is absolutely not unreasonable, especially if she is anxious about entering high school.
>
> [23] It is up to both parents to support it.
>
> [24] As for Y, while it is true that he does not show any interest in school, the Court does not see how an absence from school for almost 4 additional months will improve the situation or his need for socialize more.
>
> [25] In his case, we must prevent the situation from deteriorating.
>
> [26] It is up to both parties to support and motivate the children for their early return to school.
>
> [27] Fourth, the current situation is unlikely to be much different next September.
>
> [28] Therefore, although the way of teaching with social distancing measures can very likely be very different from what was done before, there is no reason not to trust teachers and teachers. educational institutions.

The Parties' Perspectives on W.C.'s Best Interests

[35] The Mother takes the position that it is in W.C.'s best interests to return to school in September 2020 for the following reasons:

1. Neither parent is bilingual, and they speak very little French. It is difficult to assist W.C. with his homework in French;

2. W.C. struggles with learning independently, self-regulation, executive functioning, distractiabity and other "soft" learning skills. His report card supports some of the struggles he has experienced, and she believes that in-class learning will be more successful and productive;

3. Home isolation has been difficult for W.C., as he has limited contact to friends and did not attend the usual camps or programs. He is a social child and will benefit from being with the peers in his cohort. Playdates with peers have been limited to two close friends, F. and O., who are both returning to S.E.S.C.E. School (along with a third best friend, N.);

4. The Mother works full-time from the home. While she was able to support W.C.'s homeschooling in the spring, and to micro-manage the virtual learning, it was not easy for either of them. In a reply affidavit the Mother confirms that

she has reviewed the expectations for the grade 4 French immersion online learning program at the YCDSB. She attests that the expectations will increase materially, and the demands are not manageable for her (and may not be manageable for the Father). She further attests that parental assistance will be necessary throughout the online classes in order for W.C. to focus and pay attention, particularly since he struggles with independent work, self-regulation and collaboration;

5. Online schooling will necessitate considerable screen time, including school work and other online activities to enable the Mother to work; and

6. W.C.'s need for physical activity can be better met at school where there are three recess periods and gym classes. It is more likely that W.C. will participate in exercise consistently at school than if he is at home with either parent.

[36] The Father agrees that in non-pandemic times attending school in-person is preferable for W.C.'s academic, social, emotional, physical and psychological needs rather than learning from home. He does not dispute that a return to school will meet many of these needs. However, the Father believes that the health risks to W.C. and to others is significant, that W.C. may experience emotional and psychological harm and he is worried about some adverse effects on W.C.s' academics. The Father believes that challenges can be avoided through online learning.

[37] In his responding affidavit the Father provides the plan that he believes is in W.C.'s best interests, and which is the same plan that proved successful in spring 2020. It includes the following elements:

1. Online learning provided by the school, and additional time that that the Father intends to spend teaching his son;

2. A level of exercise that will be fairly comparable to what W.C. would receive at school including biking, rollerblading or hockey in the driveway and unsupervised outdoor play in the neighbourhood. The Father acknowledges that he cannot offer W.C. the group experiences that are available in a gym class;

3. The Father will continue to use Google Translate and a dictionary as well as his knowledge of French to assist W.C. with assignments; and,

4. The Father recognizes the concern about screen time. Aside from the virtual school-work W.C. will be restricted to two hours of technology per day (although I note that the online classes will increase in duration as compared to spring 2020, which suggests that there will be more time on screens).

[38] There are significant problems associated with the Father's plan when viewed from the lens of W.C.s' best interests.

[39] The Father is fortunate to have a flexible working schedule and a second adult in the household. The Mother has neither. The Father's plan fails to address how the Mother will be able to implement his plan, nor does it address the Mother's concerns respecting the constraints on her ability to work if W.C. is enrolled in the online education program. This plan may necessitate a dramatic change to the current parenting schedule or may result in two diverse approaches to online learning and the rules respecting technology in the respective homes. Either outcome may well be a recipe for further conflict between the parties.

[40] The Father acknowledges that home isolation has been hard on W.C. (and on every child, teen and adult). He also recognizes that W.C. misses his friends and is disappointed that he has not seen them. The Father's plan fails to address W.C.'s social needs after six months in isolation, nor does it address the impact of seeing his peers together at school in their cohort while he continues to study alone. The Mother queries whether the Father will take steps to restrict W.C. from playing with F., O. and N. since they will be attending in-person school. Given that W.C. currently has playdates with F. and O. (when he resides at the Mother's home), this would create further social isolation.

[41] The Father justifies his support for W.C.'s ongoing isolation on the basis that his son accepts the isolation and Covid-19 restrictions as they have kept him and his loved ones safe. He does not address how W.C. may react, or the potential impact on his mental health, once the majority of his peers return to school and W.C. continues to be in self-isolation.

A Child-focussed Approach to the School Attendance Issue

[42] I adopt the reasoning set out in Droit de la famille — 20641, 2020 QCCS 1462 (CanLII). The Ontario government is in a better position than the courts to assess and address school attendance risks. The decision to re-open the schools was made with the benefit of medical expert advisers and in consultation with Ontario school boards. The teachers' unions and others have provided their input as well as their concerns. While the parties spent considerable time addressing a recently released report by the Toronto Hospital for Sick Children, I decline to consider same. There are experts on all sides of the Covid-19 debate, however, the decision to re-open schools and the steps being taken to protect children and staff fall within the purview of the Ontario government.

[43] Both parents agree that in non-pandemic times it is in W.C.s' best interests to attend school on an in-person basis. Moreover, in "normal" times it is his parents' obligation to ensure that he attends school regularly.

[44] However, these are unprecedented times.

[45] There is a consensus between the Ontario government and medical experts that, at this juncture, it is not 100% safe for children to return to school. However, the risks of catching Covid-19 (and the typical effects of the illness) for children are being balanced against their mental health, psychological, academic and social interests, as well as many parents' need for childcare. There is no end in sight to the pandemic and, as such, no evidence as to when it will be 100% safe for children to return to school. The Ontario government has

determined that September 2020 is an appropriate time to move on to a "new normal" which includes a return to school.

[46] I note that the Ontario government did not hesitate to shut down all schools in March 2020 and has declined to re-open them until now. The Ontario government has articulated in the media that they will not hesitate to shut down schools again if the number of Covid-19 cases increase~~s~~ materially.

[47] All of the above factors weigh in favour of W.C.'s return to in-person learning in September 2020.

[48] There is, however, at least one issue that may warrant an order for online rather than in-person attendance, and it is as follows: If W.C. returns to school will he, or anyone in either parent's home, be at an unacceptable risk of harm?

[49] For the following reasons, neither W.C. nor anyone in either of the parents' household will be at an unacceptable risk of harm:

(a) None of the adults nor W.C. have any underlying medical conditions that make any of them particularly susceptible to adverse effects of Covid-19;

(b) While Virginia is scheduled to have ankle surgery at some unknown date in the future, her medical vulnerability will be relatively short-lived and can be addressed by a temporary change or suspension of the Father's in-person parenting time (and/or a change to socially distanced time in the community), with the addition of virtual access. W.C. can undergo Covid-19 testing to ensure that he is healthy prior to the return to the usual schedule;

(c) The likelihood that Virginia may need to travel to Ohio to visit her elderly mother who is in chronic poor health, and possibly return with her to Ontario, is not quantifiable. Such a plan may not be feasible given the current status of the border, the two-week quarantine and other obstacles. It is unreasonable to withhold W.C. from school, "just in case", and the paternal step-grandmother's potential needs should not trump the child's;

(d) Virginia continues to work outside of the home providing an essential service. While the Father works from home, when he is out in the community and in an indoor space, he always encounters at least one person who is non-compliant with the mandatory mask and social distancing rules. Therefore, any and all members of the Father's household could be exposed to Covid-19 in their daily lives.

(e) The Father is worried about the impact of wearing a mask at school as it may affect his son's education. A mask makes it harder to communicate clearly and read facial cues which may impede the development of W.C.s oral skills in French. However, this is not a risk that warrants online learning.

(f) The guilt W.C. may feel if he believes he has infected a family member with Covid-19 (which is another of the Father's concerns), can be addressed by the Mother, the Father and Virginia assuring him that people catch viruses from many places, and that he is not responsible; and

(g) The fear expressed by W.C. about returning to school until it is safe can be minimized through messages that support the Court's decision, coupled with reassurances that the Ontario government will continue to monitor risk and take appropriate steps to protect children.

[50] I find, on the totality of the evidence, that it is in W.C.'s best interests to return to school, in-person, in September 2020.

[51] There is no basis for a temporary order varying the joint decision-making regime that was agreed to in the Separation Agreement, and which has been meeting W.C.s' needs.

[52] This school attendance dispute presents a novel issue to the Ontario court. It is an important issue to the parties, and they did not have the benefit of any Ontario caselaw to guide them. The motion was decided on the written record without the the costs normally associated with an attendance. W.C.'s attendance at school is an all or nothing proposition. Mediation was not attempted before the motion was commenced. For these reasons this is an appropriate case for no costs.

Order to Go as Follows:

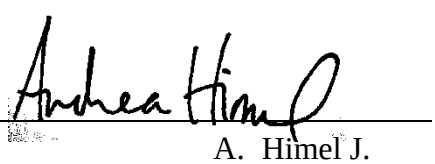
(1) W.C. shall be registered and shall attend S.E.S.C.E. School, in person, commencing when the school opens in September 2020.

(2) W.C. shall be registered for in-person attendance by the Mother.

(3) This temporary order shall continue until otherwise ordered by the Court or agreed to by the parties.

(4) There shall be no costs payable by either party.

(5) In the circumstances of the Covid-19 emergency, this Endorsement is deemed to be an Order of the Court that is operative and enforceable without any need for a signed or entered, formal, typed Order. Approval of this Order is dispensed with: either party may submit a formal Order for signing before me.



A. Himel J.

Date: August 25, 2020