

**CITATION:** Nolet v. Nolet, 2020 ONSC 5285  
**COURT FILE NO.:** 222/19  
**DATE:** 2020/09/03

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Edyta Nolet

Applicant

**- and -**

Robert Nolet

Respondent

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) Ashley Gibson, for the Applicant  
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) Lauren M. Angle, for the Respondent  
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) **HEARD:** September 2, 2020

**The Honourable Justice D.L. Edwards**

**REASONS FOR DECISION**

**Relief Sought**

[1] The mother brings this motion on an urgent basis seeking an order that the child, Aiden, attend in-person school in September 2020 at Glendale Public School in Welland, and further that the residential arrangements for Aiden be altered so that he resides with his mother Sunday through Friday morning of each week and a minimum of one weekend per month.

[2] The father disputes this and wishes that the residential arrangements for Aiden not be altered. Further, he wants Aiden attend online school because of the risk of Aiden spreading COVID-19 to the father's mother and his girlfriend's mother.

[3] On August 18, 2020 Ramsay J. determined that the motion was sufficiently urgent to be heard without a case conference.

### **Decision**

[4] For the reasons set out below, I order that Aiden attend Glendale Public School in Welland commencing September 2020.

[5] I order that that portion of the motion with respect to the change of Aiden's residential arrangements be adjourned to a case conference to be arranged through the Trial Coordinator.

### **Background Facts**

[6] The parties entered into a Separation Agreement September 16, 2019 which settled all outstanding issues between them, including the residential arrangements for Aiden. They agreed to joint custody of Aiden, with his primary residence being with the mother, and the father to have him in his care between 30 to 42% of the time.

[7] The father is a police officer in the Niagara region and at the time of the Separation Agreement resided in Niagara. The mother is a nurse who resides in Niagara and works in Hamilton.

[8] Both parents work shift work.

[9] The mother's evidence, which is not contradicted, is that Aiden has been diagnosed with ADHD. She says that he thrives on routine and that the transition to online learning in March 2020 when in-class school was suspended was difficult.

[10] The father's evidence is that the online learning experience was a positive one for Aiden.

[11] In March of 2020 the father relocated to Mississauga. His intention is to renovate a home in Mississauga and reside there with his girlfriend. In the meantime, he resides with his girlfriend at his girlfriend's parents' home in Mississauga.

[12] His evidence is that his girlfriend's mother has severe asthma and would be particularly susceptible to COVID-19.

[13] He also states that his parents live in Niagara, and if he is working the day before he has Aiden, he will sleep at his parents' home. He says that his mother is extremely immunocompromised and could be at a heightened risk should Aiden attend in-person school.

[14] There is disagreement between the parties as to whether the mother agreed that the relocation would not impact upon the parenting arrangements for Aiden.

[15] Currently, the father picks up and drops off Aiden in Welland when Aiden is in his care. This means that Aiden, on those occasions, commutes from Mississauga to Welland or from Welland to Mississauga.

## **The Law**

[16] Both counsel agree that the best interests of the child must guide my decision (s.24(1) of the *Children's Law Reform Act*) and that s.24(2) of that *Act* describes factors that I should consider in assessing what is in the best interests of the child.

[17] Given the recent advent of COVID-19, there is very little jurisprudence on the issue of whether a child should attend school in person or attend online during these times.

[18] One decision on this issue was issued by Himel J. on August 25, 2020. She outlined in detail the law as it pertained to custody and access orders, including orders with respect to a child's schooling. She notes that ultimately the decision must be made based upon what is in the best interest of the child.

[19] Justice Himel raised a factor that she said may warrant an order for online learning, namely: If the child returns to school, will he/she, or anyone in either parent's home, be at an unacceptable risk of harm?

## **The Parties' Positions**

[20] The father submits that attendance by Aiden to in-class schooling would expose his girlfriend's mother to an unacceptable risk of harm in light of her asthma. He also notes that his mother is also particularly susceptible to COVID-19 because of her medical condition.

[21] He asserts that the issue of schooling can be re-assessed, and that Aiden could re-enter in-school attendance in mid-November, should, after assessing the risk, it is agreed that should happen.

[22] Finally, he submits that the dramatic altering of the residential arrangements should not be made without a case conference and the ability to cross-examine on affidavits.

[23] The mother submits that, particularly due to his ADHD, it is in the best interest of Aiden to attend school in person for the personal interaction and learning that one can obtain in person. She says that she has trained him to properly wear a mask and social distance. Further, he is washing his hands more frequently.

[24] She also submits that it is not in his best interest for him to be travelling between Welland and Mississauga during school days, and that she would like an order so that she has Aiden in her custody during the school days, with the father having access all weekends save for one each month.

## **Analysis**

[25] In my opinion in the current circumstances in Ontario, the presumption is that it is in the best interest of a child to attend in-person schooling, absent compelling evidence to the contrary.

[26] Based upon the evidence before me I am satisfied that Aiden, in particular, would benefit from in-class schooling. I accept that his ADHD could be better dealt with in-person and that he would benefit from in-person interactions.

[27] I have concerns that online learning would not be in his best interests. Both parents work shift work, necessitating others to be involved in his online schooling. Consistency would be virtually impossible to achieve.

[28] As well, there is no evidence that Aiden himself would be subject to an unacceptable risk of harm. I have no evidence that he has any underlying physical health issues.

[29] I accept that Aiden has been trained to properly social distance and wear a mask so as to further minimize the risk of transmission.

[30] How does the potential risk of Aiden carrying the virus back to the father's mother and his girlfriend's mother impact upon this issue?

[31] I return to the fundamental principle, namely, I must consider what is in the best interest of Aiden.

[32] I am satisfied that with proper safety measures the risk to those individuals is not an unacceptable risk of harm when compared to Aiden's best interest, which in my opinion is that he should attend in-person school.

[33] I note that both parents are first responders. They do have the risk of contracting the virus even though safety precautions are maintained.

[34] I also note that the level of the virus in Niagara, as demonstrated by known cases, has been extremely low for several weeks.

[35] For all of these reasons, I reach the conclusion that Aiden should attend school in person in September at Glendale Public School in Welland.

[36] The somewhat intertwined issue is that of residency. Although I have some concerns about an almost 8-year-old commuting between Welland and Mississauga during the school week, I am satisfied that this is not an urgent matter as interpreted by the courts and, further, the issue would benefit from a case conference. I therefore adjourn that issue to a case conference to be arranged through the Trial Coordinator.

[37] I leave the issue of costs to the judge who ultimately hears that part of the motion

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D.L. Edwards J.

**Released:** September 3, 2020

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D.L. Edwards J.

**Released:** September 3, 2020