

CITATION: Garrett v. Thompson, 2020 ONSC 2419
COURT FILE NO.: F230/20
DATE: 2020/04/20

**SUPERIOR COURT OF JUSTICE – ONTARIO
FAMILY COURT**

RE: Ashley Garrett, Applicant

AND:

Brandon Thompson,

Paul Thompson and

Theresa Thompson, Respondents

BEFORE: T. PRICE J.

COUNSEL: Stephanie Ouelette - Counsel for the Applicant

Leonard G. Reich - Counsel for the Respondents Paul Thompson and Theresa
Thompson

HEARD: April 17, 2020

ENDORSEMENT

**THIS MOTION WAS HEARD BY TELECONFERENCE PURSUANT TO THE
PROTOCOL IN PLACE DURING SUSPENSION OF NORMAL COURT OPERATIONS
DUE TO THE COVID-19 OUTBREAK**

Nature of Proceeding

- [1] This motion is brought by the Applicant, Ashley Garrett, seeking an interim, interim, without prejudice order that her access to her children, O., age 12 (almost 13), and P., age 10, be reinstated and that its frequency be increased over that which existed before it was stopped by the Respondents Paul and Teresa Thompson, who are the children's paternal grandparents.
- [2] The Applicant also seeks an order that the participating parties comply with governmental directions to protect against the possibility of contracting COVID-19, and an order respecting the transportation of the children at the beginning and end of access.
- [3] The other Respondent is the children's father, Brandon Thompson, who did not participate in the motion.

- [4] The motion was found by the Triage Justice, Justice Henderson, to be presumptively urgent, as it appeared to relate to the “wrongful...retention of a child”.
- [5] Having reviewed the evidence and heard the parties, I am satisfied that Justice Henderson’s presumptive conclusion as to urgency was correct, and the motion proceeded on that basis.

Materials on the Motion

- [6] The Applicant filed a single affidavit, as did the Respondent Teresa Thompson, which was filed on behalf of the paternal grandparents.
- [7] Neither affidavit had been sworn but, in accordance with the Chief Justice’s memorandum dated March 15, 2020, and with the consent of both counsel, I had both the Applicant and Teresa Thompson affirm the contents of their affidavits.

Background

- [8] There is much common ground between the parties on the facts underlying this motion.
- [9] The Applicant has a history of drug addiction. As a result, there was a period when she was incapable of parenting the children. Similarly, she was unable to maintain a stable residence, and she was involved with the Children’s Aid Society due to domestic violence perpetrated against her by Brandon Thompson while she was trying to parent.
- [10] As a result of the involvement of the Children’s Aid Society, the children have been in the care of the paternal grandparents almost continuously since 2013.
- [11] On May 9, 2017, in proceedings under the *Child and Family Services Act*, Justice Bruce Thomas made a final order pursuant to the *Children’s Law Reform Act* which provided that the paternal grandparents “shall have joint custody and joint primary care of the children.”
- [12] Both the Applicant and the grandparents consented to the order.
- [13] It appears that the parties had been unable to agree on terms of the Applicant’s access. Consequently, in his handwritten endorsement dated May 9, 2017, Justice Thomas wrote the following with respect to the Applicant’s access:

“The mother Ashley Garrett shall have access to the children as directed by the grandparents Paul and Teresa Christine Thompson. The grandparents have discretion as to location, duration, and supervision of the access. It may include forms of electronic contact. It may include supervision at the Merrymount Children’s Centre or at ANOVA, the facility where the mother is presently residing. It must take into consideration the wishes of the children.” (underlining added)

- [14] The children were represented by experienced counsel appearing on behalf of the Office of the Children’s Lawyer who, according to the handwritten endorsement of Justice

Thomas, supported both the custody order and the access provisions which provided for input by her clients.

- [15] On November 30, 2017, Justice Thomas signed an order, also dated May 9, 2017, which included the custodial provisions of the order originally dated May 9, 2017 plus, with minor changes, the terms of his handwritten endorsement concerning the Applicant's access.
- [16] The Applicant's post-order access began with six months of supervised access at Merrymount. The parties then agreed, in April 2018, to move to the Applicant having unsupervised access every Sunday for between five and seven hours. There were also times when the children would have an overnight visit with the Applicant, although they would occur at the home of the Applicant's mother.
- [17] The parties agree that P. has been attending the access visits more frequently than O. The Applicant and the paternal grandmother differ, however, on the reason for O.'s more sporadic attendance.
- [18] In her affidavit, the Applicant enumerated the actions she has taken to overcome her addiction and improve her life since May 2017. Those actions include: attending Narcotics Anonymous; completing the Building Families program at Merrymount; receiving counselling through CMHA; completing residential rehabilitation at Westover; progressing through a series of supervised residences to, ultimately, reside in a three bedroom townhome as of January 2020; and, securing employment one year ago at Canadian Tire.
- [19] In her responding affidavit, the paternal grandmother simply states, with respect to the Applicant's assertions of progress, that she "cannot confirm or deny the completion of the progress that Ms. Garrett has made."
- [20] Both parties agree that their relationship is strained and that they do not have much direct contact.
- [21] According to the Applicant, she has a "positive and loving relationship" with the children. She further deposes that she has made several requests for additional access since 2017 but that the grandparents have typically responded that the children do not want additional access. The Applicant deposes that the children, P. in particular, have told her otherwise.
- [22] Without providing specifics, the paternal grandmother deposes that the Applicant has turned down some offers of additional access.

Events Precipitating the Motion

- [23] On March 3, 2020, the Applicant commenced an Application. In it, she seeks custody of the children.
- [24] Apparently in the alternative, although not stated as such, she also seeks greater parenting time with the children and expanded participation in their lives.

- [25] One change sought, in particular, is the elimination of the clause in Justice Thomas' order which requires that the wishes of the children about the Applicant's access with them be taken into consideration.
- [26] In essence, therefore, the Application seeks an order varying the May 9, 2017 order of Justice Thomas.
- [27] When I asked, I was informed that the Application was served on the grandparents on or about March 10, 2020.
- [28] The parties agree that P. had an access visit with the Applicant on March 15, 2020, after service of the Application on her grandparents. No further in-person access visits have occurred since then.
- [29] According to the Applicant, she was asked by the grandparents on March 15, 2020 if she was following the public health guidelines pertaining to protection against the spread of COVID-19. She deposes that the grandparents expressed concern that if the paternal grandfather were to contract the virus, "he would not make it."
- [30] Later in her affidavit the Applicant further deposes that, on an unspecified date, but presumably later than March 15, O. told her that the paternal grandmother told him directly that his grandfather "will not make it" if he contracts the virus. That allegation is denied by the paternal grandmother.
- [31] The paternal grandmother deposes that the children overheard her conversation of March 15, 2020 with the Applicant. The reference to the paternal grandfather not making it, according to the paternal grandmother, relates to the fact that he has "lung disease".
- [32] In any event, access appears to have not occurred on March 22, 29 or April 5, 2020. The Applicant deposes that when she attempted to contact the grandparents on April 6, 2020 about reinstating access, she was directed to speak to their lawyer.
- [33] She relates that her lawyer informed her, following a conversation with the grandparents' lawyer, that she was only being offered phone contact with the children, which was in accordance with their wishes, as provided for in the order of Justice Thomas.
- [34] The Applicant deposes that she has since had some "Facetime" access with P., which she finds to be "not sufficient."
- [35] Without expressly saying so, the Applicant appears to attribute the interruption of her access to the grandparents' fears of the paternal grandfather becoming infected with COVID-19 if access were to continue.
- [36] The paternal grandparents, on the other hand, attribute the interruption of the Applicant's access to the children's desire to avoid the risk of infecting their paternal grandfather and to their emotional distress at learning that the Applicant is seeking custody of them.

Analysis

- [37] There are two possible reasons why the children are not having access with the Applicant at this time.
- [38] The first possible reason relates to COVID-19. Either the paternal grandparents are using it, and the risk it may pose to the paternal grandfather, as a pretext to deny the Applicant access or the children are informing the grandparents that they do not wish to attend access for the same reason.
- [39] The Applicant sees it the first way; the grandparents, the second.
- [40] The second possible reason relates to the relief sought by the Applicant on her Application. Under this scenario, the children are expressing a reluctance to see their mother because they are upset that she is seeking custody of them.
- [41] The Applicant has made no allegation about this being a cause of her interrupted access, whereas the grandparents also point to it as a cause.
- [42] The one aspect common to both possible reasons for the Applicant having her access interrupted is that the views of the children are said not only to support the interruption but, also, to be the cause of it. If so, the grandparents are entitled, by Justice Thomas' order, to consider those views when deciding about the children's access with the Applicant.
- [43] While the Applicant deposes that P. has told her that she wants more access, when pressed during argument counsel for the Applicant acknowledged that it is possible that the children are not attending access because they are upset at her client's claim for custody.
- [44] On a strict reading of Justice Thomas' order, the grandparents appear to have complied with it because they "considered" the wishes of the children when stopping the Applicant's access at this time.
- [45] In practice, however, the grandparents have also, over the past three years, exercised their discretion about the children's access in such a way as to have created a status quo. It occurs every Sunday at the residence of the Applicant for seven hours and it is unsupervised. This, too, presumably takes into account the wishes of the children.
- [46] The Applicant clearly came to rely upon the grandparents exercising their discretion in the same manner moving forward.
- [47] The question then becomes: did the grandparents have sufficient reason to cease continuing to exercise their discretion as they had been prior to March 15, 2020?
- [48] That question needs to be answered in the context of each of the reasons advanced for the access not occurring.
- [49] The first reason is that related to COVID-19.

[50] In his decision in *Ribeiro v. Wright*, [2020] O.J. No. 1267, 2020 ONSC 1829, Justice Pazaratz wrote:

18 But no matter how difficult the challenge, for the sake of the child we have to find ways to maintain important parental relationships - and above all, we have to find ways to do it safely.

...

20 If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion - but they should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time. They should not even presume that raising COVID-19 considerations will necessarily result in an urgent hearing.

[51] In *Ribeiro v. Wright*, supra, Justice Pazaratz also set out the court's expectations when faced with a motion in which one parent (or party) seeks to limit another parent's (or party's) rights under a court order because of the COVID-19 pandemic.

[52] In brief, Justice Pazaratz wrote that the parent who seeks to limit the rights of the other parent:

“will be required to provide specific evidence or examples of behaviour or plans by the other parent which are inconsistent with COVID-19 protocols”,

while the parent who seeks to uphold the rights granted under the court order:

“will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to - including social distancing; use of disinfectants; compliance with public safety directives; etc.”

[53] I note that Justice Pazaratz's formulation of the evidence to which the court will have regard does not focus on the possible effects of COVID-19 on either a party, such as the grandfather in this case, or the children. That is likely because, as Justice Pazaratz wrote:

14 ...There will be zero tolerance for any parent who recklessly exposes a child (or members of the child's household) to any COVID-19 risk.

...

23 Judges won't need convincing that COVID-19 is extremely serious, and that meaningful precautions are required to protect children and families. We know there's a problem.... (underlining added)

[54] I am not satisfied, on the evidence, that the paternal grandparents have set out any “examples of behaviour or plans by [the Applicant] which are inconsistent with COVID-19 protocols.”

- [55] The evidence about the grandfather's health is also not of much assistance to me. To simply assert, as the grandmother has, that the grandfather has "lung disease" does not provide me with sufficient reason to conclude that the children should be denied access with the Applicant because of that condition. It may, however, provide a foundation for the court, as a precautionary measure, to direct the Applicant to undertake enhanced COVID-19 safety measures.
- [56] To that end, the Applicant deposes that she socially distances herself from others and that she is "following all government protocols concerning the virus such as handwashing and limiting contact with other people."
- [57] She further deposes that she is not involved in a relationship with anyone, lives alone and is completely in control of what occurs in her residence. Additionally, as of April 5, 2020, her employer is only taking online or phone orders and the location at which she works is closed to the public.
- [58] As to those assertions by the Applicant, the grandmother neither specifically denies nor claims a lack of knowledge about the Applicant's compliance with the protocols, despite acknowledging her telephone conversation with the Applicant regarding COVID-19 protocols.
- [59] In the result, I am not satisfied that there is an evidentiary foundation for the grandparents to have denied the Applicant her access with the children due to concerns that she is not complying with COVID-19 protocols.
- [60] The children are too young to have meaningful input around whether their access should be affected by COVID-19.
- [61] There can be little doubt that the children are likely concerned about their grandfather's health. The proper way, in my view, that their concerns should have been addressed is for the grandparents and the Applicant, working together, to reassure them that the Applicant is taking every precaution to protect not only their health but also her own health and the health of their grandparents - just as the grandparents should be doing with respect to the Applicant's health.
- [62] The second reason to be examined is the Applicant's claim for custody of the children.
- [63] Only the grandparents have raised this as an issue.
- [64] As with COVID-19, the children do not have the final say on this as a reason for avoiding access. That noted, it appears that the grandparents have been giving them that control.
- [65] The paternal grandmother deposes as much when she reports that she and the paternal grandfather "have encouraged the children to attend access but, since the final order of November 2017, we have given the children the option of what their wishes are regarding attendance at access as is provided for in paragraph five of the final order..."

- [66] That is a fundamental misunderstanding of what Paragraph 5 of Justice Thomas' order requires.
- [67] Under the order, it is the grandparents who make decisions about access. The children do not have a veto. The order provides that their wishes are to be "considered" only.
- [68] This means that the children's views are to be canvassed but the decision on access remains with the grandparents.
- [69] I recognize that, while younger children can be told what they are to do, there will be times when trying to compel them to do what they do not want will be an exercise in frustration.
- [70] Instead of abdicating responsibility for deciding the issue of access and handing it off to the children, however, the grandparents must always make a meaningful effort to encourage the children to attend access with their mother.
- [71] While the paternal grandmother deposes that she and the paternal grandfather "have always encouraged access...", given the grandparents' interpretation of paragraph 5 of Justice Thomas' order since November 2017, one has to wonder how much genuine encouragement is occurring.
- [72] I do recognize that some encouragement must have been given because both children have been attending access since November 2017, at different frequencies.
- [73] Now, however, in the face of a very real prospect of conflict between the Applicant and the grandparents, is the very time that the grandparents must use their powers of persuasion with the children. They must emphasize the benefits of access between the children and their mother, instead of allowing her claim for custody to be an impediment to continuing access.
- [74] As I indicated to the parties during the motion, I can make an order that puts in place the conditions under which access should occur. What I cannot do is order the children to attend access with the Applicant. That task falls to both the Applicant, who needs to not add to the children's stress about a potential change in custody, and the grandparents, who need to actively encourage the access.

Order

- [75] Accordingly, an interim, interim order will issue as follows:
1. Paragraph 3 of the final order of Justice Thomas dated May 9, 2017 is amended to read as follows:

"The mother, Ashley Garrett, shall have access with the children as directed by the Respondents Paul and Teresa Thompson, (hereinafter, "the Respondent grandparents"), in their sole discretion as to location, duration and supervision of the access, with the exception that, subject to Paragraph 5, the Respondent Ashley

Garrett shall have unsupervised access with the children each Sunday, commencing April 26, 2020, between the hours of 11 AM and 6 PM.

2. The Applicant and the Respondent grandparents, or one of them, shall communicate by 10 AM each Sunday at the latest about which of the children, if either, will be attending for access that day.
3. In the event that the Applicant shall be having access with either or both of the children on any particular Sunday, unless the parties otherwise agree the Applicant shall be responsible for picking up the children at the beginning of access and the Respondent grandparents, or either of them, shall be responsible for retrieving the children at the end of the access visit.
4. The Respondent grandparents shall actively and positively encourage the children to attend access with the Applicant.
5. Neither the Applicant nor the Respondent grandparents, or either of them, shall speak disparagingly about the other party to the children or either of them, or in their presence.
6. Neither the Applicant nor the Respondent grandparents or either of them shall, at any time, speak to the children or either of them about the ongoing litigation between the parties.
7. The Applicant's access with the children is further subject to the following terms and conditions, which shall expire at such time as the Government of Ontario announces that the need to take precautionary measures to avoid infection by against COVID-19 has ended, unless extended by a further court order:
 - a. The Applicant shall take, and shall encourage the children to take, every precautionary measure to avoid infection by COVID-19 recommended by Ontario health authorities. The Applicant shall not do anything that will expose herself or the children to an increased risk of contracting COVID-19.
 - b. The Applicant and the Respondent grandparents shall reassure the children that the Applicant is taking and is required to take every reasonable precaution to protect their health and the health of their grandparents, including complying with precautionary measures to avoid infection by COVID-19 recommended by Ontario health authorities.
 - c. After retrieving the children for access, the Applicant shall transport them directly between the paternal grandparents' residence and her residence, without stopping en route for any reason.
 - d. While exercising her access with the children, the Applicant shall strictly limit any excursions with them outside of her residence, except in case of

emergency, to the immediate neighbourhood, being within a radius of 0.5 km. of her residence.

- e. The Applicant shall ensure that, while outside of her residence, she and the children each maintain a physical distance of at least six feet (6') from anyone they might encounter.
- f. The Applicant shall continue to exclude all others, except the children, from her residence.
- g. In the event that the Applicant develops symptoms of COVID-19, she shall immediately notify the Respondent grandparents. If the children, or either of them, are in her care, the child(ren) shall be returned to the Respondent grandparents forthwith and her in-person access with the children shall thereupon be suspended for a period of 18 days. It may only resume if, at the end of that period, she reports showing no further symptoms of being infected with COVID-19.
- h. In the event that the Applicant learns that a co-worker has become infected with COVID-19 and it has been recommended that she isolate herself because she is at risk of contracting COVID-19, she shall forthwith notify the Respondent grandparents. Her access with the children shall thereupon be suspended for a period of 18 days. It may only resume if, at the end of that period, she reports showing no symptoms of being infected with COVID-19.
- i. In the event that the Applicant learns that a co-worker has become infected with COVID-19, but it has been not been recommended that she isolate herself, she shall forthwith notify the Respondent grandparents. In doing so, she shall inform the Respondent grandparents of:
 - i. the full extent of her knowledge about the co-worker's infection,
 - ii. the circumstances under which it was contracted, if known, and
 - iii. whether and when she last had physically proximate contact of less than 6 feet with the infected co-worker.
- j. If, after discussion, the parties agree that the information known to the Applicant under sub-paragraph (h) has placed her in a position of possible infection by COVID-19, her in-person access with the children shall thereupon be suspended for a period of 18 days and may only resume if, at the end of that period, she reports having shown no symptoms of being infected with COVID-19.
- k. If, after discussion, the parties cannot agree on whether the information known to the Applicant under sub-paragraph (h) has placed her in a position of possible infection by COVID-19, either party may request of the Triage Justice that the issue be referred to a Justice for determination as an emergency matter.

8. The Applicant's motion is otherwise dismissed.
9. The Application is adjourned to June 4, 2020 to be spoken to.
10. There shall be no order as to costs, unless demanded, in which case the party making the demand shall, within 7 days of the date of this order, deliver to the other party and to the Trial Coordinator at London, submissions on costs not to exceed 2 pages in Times New Roman, 12-point font, plus a Bill of Costs. The other party shall deliver his or her reply, to also not exceed 2 pages in Times New Roman, 12-point font, to the other party and to the Trial Coordinator at London, within 5 days thereafter.



Justice T. Price

Date: April 20, 2020