

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
J.N.)	Lyna Perelman/Philip Viator, Counsel for
)	the Applicant
)	
Applicant)	
)	
– AND –)	
)	
)	
A.S.)	Natacha Leite, Counsel for the Respondent
)	
Respondent)	
)	
)	HEARD: September 3, 2020

A.J. HIMEL J.:

Relief Sought

- [1] Both parties bring 14B urgent motions respecting K.N. born June 13, 2016 (age 4). The Respondent (the “Mother”) served her 14B on August 14, 2020. She seeks an order that K.N. attend junior kindergarten at E. Private School (“E. School”) for the upcoming school year, or a motion date to address same. The Applicant (the “Father”) served his 14B on August 19, 2020, seeking a motion date to argue in favour of homeschooling, increased parenting time and other relief.

- [2] On August 21, 2020, I Ordered that an urgent motion proceed on the following issues: (1) K.N.’s attendance at E. School or an online program; and (2) The parenting time schedule. I found that the Father’s materials violated the spirit of the York Region Practice Direction dated June 26, 2020, and I directed him to reduce and refile same. I Ordered both parties to provide affidavit evidence respecting school attendance and the parenting schedule within specified page limitations.

- [3] The Mother seeks an order that the child attend E. School, which was agreed to by the parties before the onset of the Covid-19 pandemic (“Covid-19”). In the alternative, she seeks an order that the child attend a local Catholic school in her catchment area, and then opt for the online program. Irrespective of the decision on schooling, the Mother seeks a continuation of the current parenting time schedule, such that K.N. will be in the Father’s care on alternate

days from 10:00 a.m. to 6:00 p.m. (or 3:30 p.m. to 6:00 p.m. on weekdays and one weekend day if she is at school).

- [4] The Father seeks an order that the child be homeschooled, and he has engaged Ms. H-F. (the “Tutor”), who is a qualified teacher and tutor. His alternate plan is for the child to attend public school online. Irrespective of the decision on schooling, the Father proposes that that current parenting schedule be changed to an equal time-sharing arrangement in the form of a 2/2/5/5 or 2/2/3 schedule.

Decision

- [5] K.N. shall be registered at E. School and shall attend in-person, commencing as soon as school opens in September 2020.
- [1] K.N. shall be registered by the Mother for in-person attendance.
- [2] There shall be a graduated increase in the Father’s parenting time as set out at the end of this Ruling.
- [3] This temporary Order shall continue until otherwise ordered by the Court or agreed to by the parties.

Overview and Background Facts

- [4] The parties started living together in July 2012, were married in December 2012.
- [5] They separated in December 2016, when K.N. was six (6) months of age.
- [6] The Father is 54 years old and he is a self-employed day trader and a bookkeeper.
- [7] The Mother is 34 years old and she is employed as a real estate agent and a mortgage broker.
- [8] The Father sponsored the Mother’s immigration to Canada. It is unclear from the record whether they were involved in a relationship (or how well they knew one another) prior to her arrival in Canada. The Mother describes a volatile and abusive relationship, which the Father denies. The Mother states that the marriage was particularly difficult as a divorce within the first four (4) years of marriage would have necessitated a return to her country of origin. The Father states he was devastated by the Mother’s decision to end the marriage shortly after obtaining immigration status.
- [9] The Mother is now engaged to and resides with a new partner, N., with whom she has been involved for several years.
- [10] The Father lives alone.
- [11] When K.N. is in the Mother’s care they reside in Toronto. When K.N. is in the Father’s care they reside in the former matrimonial home in Woodbridge.
- [12] The Father commenced an Application on June 19, 2019.

- [13] Child support is being paid by the Father in the amount of \$3,000 per month (as per the Application).
- [14] The parties have engaged in high conflict litigation since the commencement of the Application. Merely 14 months after the start of this litigation there are seven volumes in the continuing record including seven motions/requests for leave to bring motions.
- [15] Each party alleges withholding and bad behaviour on the part of the other. Neither party acknowledges the impact of the conflict on their young child. Both parties appear to be using time with the child as a tool to achieve other goals.
- [16] There has been frequent involvement of the York Region Children's Aid Society (the "Society") and the police. Each party has made various complaints to the Society. Counsel advise that all investigations have closed.
- [17] According to a CPIN case-note filed on this motion and dated October 29, 2019, the Society is concerned about the conflict between the parents and the child's risk of emotional harm. Recently the Society advised the parties to obtain a final parenting schedule from the Court.
- [18] When the child was merely three years of age the Society recommended that supports be put in place with Families in Transition, once she attained the minimum age (4) for that program. K.N. is now four years old. It is unclear what steps, if any, either parent has taken to comply with this recommendation. What is clear is that the parties have focussed considerable time and attention to this litigation, to the detriment of their child.
- [19] The above is very concerning to the Court.
- [20] The parties' approach to one another and to the conflict resembles high stakes poker: It is an all or nothing, no holds barred, take no prisoners game. For parents who clearly adore K.N. it is unfathomable that the Court needs to advise them that this is not a game: their daughter's emotional and developmental well-being that is at stake, and they are holding their child prisoner to their conflict.
- [21] This matter calls out for single judge case management, which has been a challenge in part due to the repeated attempts to bring the case before the Court including the seven notices of motion or requests for a motion, (some under the guise of urgency), and given the impact on the Court of Covid-19.

Preliminary Matter

- [22] The Mother's first argument is that the Father is attempting to circumvent a long motion on the parenting schedule which was served in 2019 but was never heard. That motion contains over 1,500 pages of materials. Since my August 21, 2020 Order provides strict limits on the materials that could be filed, the Mother takes the position that only the school attendance issue should proceed.
- [23] My response is as follows. The issue of school attendance and the parenting plan are appropriately heard together and within the timeframe of a regular motion (one hour). In

fact, these issues should be heard together since the current schedule limits the Father's time to daytime hours and K.N. will not be available if she is attending school. The in-person versus homeschool attendance issue has effectively created a situation where the parenting time schedule needs to be reviewed now, not at some unknown date down the road. The child deserves a parenting time schedule that is developmentally appropriate given her age and stage of development. The absence of same is causing an unnecessary amount of contact between the parties (every other day at 10:00 a.m. and 6:00 p.m.), and constant conflict.

- [24] On August 21, 2020 the parties were put on notice that both issues would be before the Court, and they each provided affidavits respecting same. While the Mother advises that there is considerably more evidence than what could be included, I note that the materials filed by each party (using small fonts and providing little spacing,) effectively violated my Order. They have provided more materials than I authorized. Both affidavits contain many unfounded allegations and inflammatory statements, which is not helpful. Notwithstanding the irrelevant and/or spurious claims I have sufficient appropriate evidence upon which to decide these two distinct but interrelated issues.
- [25] This matter does not require a long motion date. In any event, long motions are delayed until the trial sittings resume, likely in May 2021. The other issues contained in the parties' long motion do not meet the test of urgency. Moreover, at this juncture a long motion is not an effective use of the limited judicial resources that are available given the impact of the pandemic and the backlog it has created.
- [26] What the parties need, as identified by the Society, is for the Court to make parenting-related decisions without further delay. In May or November 2021, (depending on the parties' readiness for trial and how cases are prioritized), this matter should move forward to trial. For the sake of their child, this litigation must end.
- [27] Prior to the commencement of oral arguments, I confirmed that I would not rely on a reply affidavit filed by the Father or a brief of authorities. These materials were filed in breach of my Order which states that only the authorized materials would be considered by the Court, and no further materials could be filed.

Issues and Analysis

The Law

- [28] 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

- [29] 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 or access

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

[30] 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.

[31] 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 necessities 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 K.N.'s Best Interests Served by Attending School In-Person or Through Online/Homeschooling Learning?

[32] I rely on test the set out in *Chase v. Chase*, 2020 ONSC 5083. Both parties were provided this case in advance of the hearing and they appropriately fashioned their arguments in light of same.

The Parties' Perspectives on K.N.'s Best Interests and a Child-focussed Approach

[33] The Mother proposes a school that was agreed to by the Father before the onset of Covid-19. There are six children in the class and educators. There are thirty-seven children at the school (which has four rooms) and nine educators. The school has provided a manual confirming various initiatives that are being implemented to protect children, including: increased handwashing, cleaning and sanitizing, increased outdoor time, personal protective equipment for teachers, cohorts of less than 15 students and physical distancing during class, snack/lunch and nap time.

[34] The Mother attests that this is the best plan for the child as she is familiar with the school (she attended daycare there last year on her parenting time) and she knows the kindergarten teacher. K.N.'s friends are registered to attend kindergarten. The child has no siblings and the structured program will support her development. K.N. will benefit from the opportunity to develop skills in the areas of self-regulation and to manage her own reactions while playing with other children. The school also provides programming in Russian (the Mother's first language). E. school does not currently offer an online option (although one may be available soon and/or in the event that the Ontario government suspends in-person school).

[35] Notwithstanding the Mother's claims I recognize that K.N. may not have strong recollections of the teachers, students or the school given the early termination of the daycare school year in March. The Court attributes little weight to the Father's pre-Covid-19 commitment to E. Private School, as the landscape is vastly different today than in January 2020. However, returning to a familiar place may ease the transition to junior kindergarten and has other benefits.

[36] The Father attests that homeschooling is the best option for the child because of the health risks of Covid-19, as detailed below. Moreover, in-person school attendance is not necessary as he has hired the Tutor (as of August 2020) to attend at his home in Woodbridge for one

hour per day when the child is in his care. He reports that K.N. is doing exceptionally well in these studies. The Tutor is prepared to be in the Father's social bubble. The Father attests that the Tutor agrees to provide services in the Mother's home.

- [37] I decline to accept that the Tutor is in the Father's social bubble, since she is a part-time teacher at two or more schools in York Region and she teaches other children privately. The Tutor resides with her elderly parents (which means that 3 of the 10 person social bubble is already accounted for). There is no evidence (other than the Father's hearsay statements) that the Tutor will teach K.N. at the Mother's home given her other work commitments, the Mother's residence (which is situated in Toronto) and the repeated attempts by the Mother to fire the Tutor (as she was not consulted or informed until this motion that the Tutor was meeting with the child). Even if the Tutor makes herself available one hour per day (and takes appropriate social distancing and PPE precautions), that does not have benefits equivalent to full day school attendance, in-person or virtually. That plan does not meet the child's needs to meaningfully interact with other children in a small group and structured setting.
- [38] The Father agrees to follow online programming through the public school system (even though he prefers private to public school). However, I query whether junior kindergarten, which is a play-based program whose focus includes social skills and communication, can be effectively taught to a child sitting in front of a computer. Furthermore, it is impractical to assume that K.N. or any other four year-old child can sit in front of the computer for educational lessons lasting six hours (or perhaps even three hours).
- [39] K.N. is an only child. Neither party provided evidence of any regular contact with her peers during the pandemic. In-person attendance at school is the only option provided to the Court to address the child's social and psychological needs.
- [40] The Father also argues that K.N. has been home-schooled to date. That is untrue. According to the Mother the child has been attending daycare on her alternate weekday time (although that information was not shared with the Father until this motion). Even if the child had not previously attended daycare I would reject the argument. Elementary school commences in junior kindergarten.
- [41] The Father correctly states that K.N. is not required by law to attend school until age six. For that reason, the Court would not interfere with any agreement to withhold the child from kindergarten. However, they do not agree. In Ontario (and in many other jurisdictions) school attendance begins once the child attains the age of three-and-a half by the start of the school year. Many decades ago the Ontario government determined that this is a developmentally appropriate age to commence educating children.
- [42] In terms of in-person or online education, as stated in *Chase v. Chase, supra* the Ontario government is in the best position to make decisions about the re-opening of schools.
- [43] On the totality of the evidence I find that in-person attendance at school best meets the child's educational needs. Following *Zinati v. Spence, 2020 ONSC 5231*, I adopt Akbarali, J.'s

conclusion that in-person attendance is in K.N.'s best interests even where the parties do not need the child to attend school in order for them to work (paras. 47 to 48).

Will K.N.'s Attendance at School Cause an Unacceptable Risk of Harm?

[44] Following *Chase v. Chase, supra*, the child should be enrolled for in-person attendance at school unless the following test is met: If K.N. attends junior kindergarten at school will she, or anyone in either parent's home be at an unacceptable risk of harm?

[45] For the following reasons I am not persuaded that K.N. or anyone in either of the parent's households will be at an unacceptable risk of harm:

(a) The Father's affidavit states that K.N. is on the spectrum of being high risk due to a prior bout of bronchitis (November 2018). K.N. has used puffers for breathing in the past.

(i) The Father provides no medical evidence to support this claim. In contrast, the Mother appends to her affidavit an email from Dr. Burman (dated August 18, 2020), in response to her query about Covid-19. Dr. Berman, the principal pediatrician, responds as follows:

“If you compare (the child) to with any other child of her age, she is not at higher risk for Covid-19. Since that viral bronchitis that (the child) had in December 2018, she was never sick at all for already 1.5 years (nor any office visits). I do not feel that her risk of illness during the school attendance is much higher than any other child of her age.”

(ii) The Father now concedes that the medical evidence does not support his prior claim respecting the child's risk of harm.

(b) The Father attests that he is 54 years-old and suffers from asthma. He relies on hearsay evidence contained in the American Center for Disease Control (“CDC”) that people with moderate to severe asthma are at a higher risk of getting very sick from Covid-19. The only evidence the Father provides to support this claim are pictures of prescribed medication (Flovent and Ventolin). These photos support the conclusion that on August 25, 2020 (the date that the affidavit was due), the Father picked up these prescriptions.

(c) The Mother asks that I make an adverse inference and/or a negative credibility finding against the Father. She attests that asthma was never an issue for the Father prior to this motion. If asthma had been a problem or a concern during Covid-19, the Father would have provided pictures of prescriptions that pre-date the delivery of his affidavit.¹ For the reasons set out in *Chase v. Chase, supra*, I decline to consider the

¹ The Mother also argues that the Father obtained the prescriptions after reviewing the risk test set out *Chase v. Chase, supra*. She requests that I make an adverse inference and/or a credibility finding. (My sense is that the Mother believes that the Father has behaved improperly or is sneaky). Since I released *Chase v. Chase, supra* on August 25, 2020 at 4:15 p.m. and the Father's affidavit was served at 3:58 p.m., this allegation cannot be true. In any event, it is entirely appropriate for parties to review the relevant cases when assessing the persuasiveness of their evidence and whether the facts of their case meet the relevant legal tests. The family justice system encourages

hearsay evidence of the American CDC. I also decline to make any findings respecting the Father's asthma, other than to conclude that a doctor prescribed two medications which are in the Father's name and are dated August 25, 2020.

- (d) The Father states that the paternal grandmother, who spends most of her time with the Father, is in a high risk category (age 73) and can die. The grandmother does not reside in the Father's household. The grandmother's needs cannot trump those of the child. As stated in *Zinati v. Spence, supra* "there is no indication that appropriate distancing cannot be maintained between N. and her paternal grandmother (age 78)." The paternal grandmother is aware that the Father and the child, and the Mother and the child are out and about in the community, yet she has continued to spend considerable time at the Father's home during the pandemic.
- (e) The risk of exposure to Covid-19 to all family members already exists. The Father does not dispute that he and K.N. go to the zoo, restaurants and stores. The Tutor brings into his home whatever germs or viruses that she picks up in her day-to-day and professional life.
- (f) Finally, the Father asks for a 50/50 schedule even if I order in-person school attendance. This detracts from the argument that he is at an unacceptable risk of harm from Covid-19.

[46] What follows is my interpretation of the test for unacceptable risk of harm. I provide this test to assist these parties and others to better understand the evidence that may be persuasive to the Court.

[47] It is helpful to consider the evidentiary basis to suspend a person's face-to-face contact during Covid-19 due to a child's medical vulnerability, and apply that lens to the in-person versus online dispute. That issue, like school attendance, requires a balancing of competing interests. Both decisions have a significant impact on the child. The evidentiary requirement for suspending access is described in *C.L.B. v. A.J.N.*, 2020 ONCJ 213 at paragraph 31, per Sherr, J.:

A medical report should be provided setting out the child's medical condition, any increased vulnerability the child has with respect to the Covid-19 virus and specific recommendations about additional precautions that are required to protect the child from the virus.

[48] In *M.A. v. J.D.*, 2020 ONCJ 283 at para. 48, the Court applied this test and placed weight on a report provided by the child's family doctor dated April 28, 2020. O'Connell, J. ultimately suspended the Father's in-person access, relying on this evidence and concerns that the Father was not following the appropriate safety protocols. The family doctor reported as follows:

litigants to refer to the caselaw and consider the appropriateness of settlement options and/or further litigation as when assessing the reasonable next steps towards resolution.

This is to inform you that M. is a patient at my clinic...M. has a medical condition, she suffers from asthma and severe allergies. She exhibits symptoms of difficulty breathing and coughing due to her asthma.

Her immune system is weak, and it is not advisable for her to be outside with crowds. She needs to maintain social distancing and always wear a mask and gloves. She cannot go out for shopping sprees and have fast foods without taking extreme precautions such as proper washing and sterilizing her hands.

If M. continues to be outdoors among crowds without maintaining social distancing, her immune system may be compromised, causing her health to be at risk.

[49] Two days later the family doctor provided a second report stating that the child began showing symptoms of Covid-19 after returning from home from her father's weekend on April 26, 2020. The symptoms included shortness of breath and wheezing, sore throat and fever. It is unclear the extent to which the child was sick, however, the second report substantiates the doctor's initial conclusion the child was vulnerable to being negatively impacted by Covid-19. This supports the value of having a medical report before the Court on health-related motions.

[50] A party claiming that school attendance presents an unacceptable risk should provide a medical report that the child's attendance in-person will place him/her or a member of household at an unacceptable risk of harm, including:

(a) a diagnosis for the vulnerable person;

(b) a prognosis for the vulnerable person if he/she catches Covid-19 (if the medical practitioner can provide same);

(c) any available treatment that is relevant to the prevention and/or treatment if the vulnerable person falls ill with Covid-19; and,

(d) whether there are any precautions that can be put in place to enable the child to attend in-person school without placing the vulnerable person at an unacceptable risk of harm.

[51] No medical report was provided in this case.

[52] The Court ought not to rely upon the Father's bald statements respecting risk of harm.

[53] K.N. will be enrolled at and attend E. School commencing September 2020, for the reasons described above.

The Parenting Time Schedule

[54] Much of the litigation between the parties, and various failed attempts to engage in mediation, arises from conflict about the parenting time schedule. The Father has been

attempting to move to a 50/50 schedule since at least the commencement of this litigation when the child was three years of age.

- [55] He states that the Mother has impeded his attempts to increase his parenting time and that the child is suffering as a result. The child has been in his care overnight, but these instances are dated. Since at least spring 2019 (or perhaps as early as 2017) overnight access has been rare.
- [56] The Mother's position is that the alternate day schedule (10:00 a.m. to 6:00 p.m.) should continue, unless K.N. attends in-person school. In that scenario the Father's parenting time should be reduced to 3:30 p.m. to 6:00 p.m. on weekdays and one full day per weekend.
- [57] The Mother does not support overnight access as she alleges that the Father is immersed in a world of drugs, traffics drugs, was incarcerated and is involved in shady activities (causing him to disappear when his life was in danger). She also alleges that the Father suffers from mental illness, threatened to kill himself and uses drugs. The Mother states that during their relationship the Father was physically abusive on several occasions. The Father denies most of these allegations and provides explanations, historical context and a September 2019 drug screen test to respond to same.
- [58] The Mother has reported the above concerns to the Society, and the Father has reported his concerns as well. Each party has met with the Society and they have closed all investigations. The parties agree that the Society's concerns relate to the impact of their conflict on K.N. (as reflected in a CPIN note dated October 29, 2020). The Society will not take a position on parenting time or overnight visits. The parties have been advised to go to Court to obtain a schedule.
- [59] Having considered the Society's stated concerns, and their decision not to take any steps to intervene, I reject the Mother's argument that further time and evidence is required to assess the appropriateness of overnight parenting time. On alternate days K.N. already spends most of her waking hours in the Father's care.
- [60] I find that neither party's proposal is child-focussed or developmentally appropriate, particularly given the level of conflict between the parties.
- [61] Sherr, J. reviewed the caselaw respecting parenting time schedules in *D.G. v. A-G.-D.*, 2019 ONCJ 43 (CanLII),

[127] A child should have maximum contact with both parents if it is consistent with the child's best interests. See: *Gordon v. Goertz*, 1996 CanLII 191 (SCC), [1996] 2 S.C.R. 27.

[128] There is a presumption that regular access by a non-custodial parent is in the best interests of children. The right of a child to visit with a non-custodial parent and to know and maintain or form an attachment to the non-custodial parent is a fundamental right and should only be forfeited in the most extreme and unusual circumstances. See: *Jafari v. Dadar*, [1996] N.B.J. No. 38 (NBQB).

[129] The party who seeks to reduce normal access will usually be required to provide a justification for taking such a position. The greater the restriction sought, the more important it becomes to justify that restriction. See: *M.A. v. J.D.*, 2003 CanLII 52807 (ON CJ), [2003] O.J. No. 2946 (OCJ).

[130] A starting point to assess a child's best interests when making a custody or access order is to ensure that the child will be physically and emotionally safe. It is also in a child's best interests when making an access order that his or her caregiver be physically and emotionally safe. See: *I.A. v. M.Z.*, 2016 ONCJ 615.

[131] An equal-parenting time plan requires a high level of communication and coordination between the parties, particularly when the child is very young. The parents will have to coordinate schooling, medical appointments and extra-curricular activities for the child. This should not be ordered where the evidence indicates that implementing such a plan, given the dynamics between the parties, would be an invitation to conflict and chaos, and would be destabilizing for the child (See my comments in *Bokor v. Hidas*, 2013 ONCJ 40).

- [62] I agree with the principles described above. There is no evidence to refute the following statements that are contained in the Father's affidavit, including that: (1) He has never put K.N. in harm's way or at risk of harm; (2) He has been a caring father to K.N.; (3) He has a loving relationship with K.N; (4) The Mother agrees that he is a good father (and he has many messages showing this); (5) He and K.N. have a loving bond; and, (6) The child has stayed overnight alone with the Father before and after separation.
- [63] The Mother's parenting concerns, which are contained in her reply affidavit, relate to the Father's lifestyle, mental health and involvement with drugs, their differing parenting styles, the ongoing conflict and complaints to the Society. As stated above, the Society is well-aware of her concerns.
- [64] "Normal" access for a four year-old child includes overnights. The Mother has not met the test for the continuation of reduced access. While the Society declines to take a position on overnight access, hearsay evidence contained in the Father's affidavit suggests that in August 2020, the worker contemplated that overnight access may be forthcoming. The Society has declined to intervene past the investigation stage. In keeping with their mandate, the Society is required by law to do so if they believe that the child is not emotionally or physically safe with the Father.
- [65] I also agree with a graduated increase in parenting time as provided for in *D.G. v. A-G.-D.*, 2019 ONCJ 43 (CanLII). After reviewing the above criteria, and a wide variety of allegations made against the Father, Sherr, J. expanded his access to the parties' three year-old son from six hours per week to alternate weekends and holidays. Sherr, J. declined to order an equal time-sharing arrangement having on the basis that such a plan was not in the young child's best interests.

- [66] I note that Ontario does not have a presumption of 50/50 parenting. The parenting time schedule must follow K.N.'s best interests and account for her age and stage of development, routines and other relevant factors.
- [67] Given the evidence that is before me on this motion I do not believe that an equal parenting time schedule is best for the child. This type of schedule is best suited to parents who have cooperative relationships. The required transitions between the homes (and the two sets of routines, parenting styles, etc.) can be very stressful for young children, particularly when they do not communicate productively and seem unable to put their child's needs before the conflict.
- [68] I find that it is in K.N.'s best interests to continue to have one primary home base which, in this case, is the Mother's residence.
- [69] I also find that the Father's access should be expanded to include regular overnight access. The AFCC-O Parenting Plan Guide (pages 18–19) provides helpful considerations for parents, mediators, lawyers and judges when they are developing parenting time schedules.

Schedules for pre-schoolers, aged 3 to 5 years: Preschoolers can tolerate longer absences from a parent, but a child's temperament and the pre-separation parenting arrangements must be considered. Transitional objects, such as a favorite toy, stuffed animal or blanket, moving between the two homes can help a preschooler manage sadness and anxiety.

If one parent was primarily responsible for the child and the other parent had limited involvement with the child's daily routine, the child should continue to reside with that parent, with a possible plan of step-up care to increase the involvement and skills of the other parent. This might start with two or three 4-hour blocks of parenting time per week, building up to one longer block (likely on a weekend) that may include an overnight. As a child becomes more comfortable moving between the two homes, one or two overnights a week might be added.

- [70] In this case the Father is an actively involved parent. Although he attributes blame to the Mother for the absence of regular overnight access to date, the current reality is that the child's overnight routine is derived solely from her experiences sleeping at the Mother's home. She needs time to transition to an overnight alternate weekend schedule. Since the three 8-hour blocks per week have proved successful, it is in the child's best interests to move to overnight access.
- [71] In consideration of the animosity between the parties, transitioning to a schedule that provides for pick ups and drop offs at school is one way to protect K.N. from further conflict. The benefits are explained in the AFCC-Ontario Parenting Plan Guide (page 19).

If the parents have difficulty in communicating in person, it may be preferable to have as many exchanges of care as possible done by having one parent drop the child at day care and the other pick up the child at the end of the day. This

would require shifting the schedule so that it starts on Monday; apart from holidays, transitions take place through daycare.

- [72] Both parents agree that parenting time exchanges are highly problematic, and they request that all pick ups and drop offs be moved from their homes to neutral third party locations. I find that a graduated parenting time schedule which provides for increased time at the Father's home, coupled with a move towards pick ups and drop off at school, complies with the parents' requests respecting transitions, and is in accordance with K.N.'s best interests.
- [73] The schedule set out below will begin on September 18, 2020 when the Father will pick up the child at E. School. Until that date, the current schedule shall continue except that the Father shall pick up the child at school on his alternate days and drop her off at the Shoppers Drug Mart (125 the Queensway) at 6:00 p.m.

Other Matters

- [74] The parties must put their love for K.N. ahead of their hatred towards each other. One step in that direction is for the parents to engage in mediation, following a screening for domestic violence and power imbalances. At a minimum, the issues that should be mediated include: (1) The parties' poor communication and the implementation of communication protocols; and, (2) The identification of areas causing the most conflict and how to address same. As I see the potential benefits of mediation, I am Ordering the parties to complete the necessary intake forms. I encourage the parents to follow through with mediation, if this is deemed an appropriate service.
- [75] I will case manage this matter with the goal of achieving trial-ready status in time for the May or November 2021 trial sittings. The parties agree that following the release of this decision there are temporary orders/agreements in place for child support, parenting time and school. The Mother advises that the next step is a case conference on the financial (and any other) issues. A review of the continuing record confirms that this is correct.
- [76] There has been divided success in this matter. The Mother is successful on the school issue and the Father, while not entirely successful, is successful in increasing his parenting time. I would encourage the parties to resolve the issue of costs payable, if any. If they are unable to do, submissions are to be limited to the costs incurred to prepare for this motion (and limited to the materials that I authorized) and to the time spent preparing and arguing same.

TEMPORARY ORDER TO GO AS FOLLOWS:

- (1) The child shall be registered and shall attend E. School, in-person, commencing September 2020.
- (2) The child shall be registered for in-person attendance by the Mother.
- (3) Until otherwise ordered by the Court or agreed to by the parties, the Father's regular parenting time schedule shall be as follows:
 - (a) Commencing Friday September 18, 2020;

- (i) Every Friday (pick up at school) to Saturday at 6:00 p.m. (meet at McDonalds at Weston Rd. and Highway 401 (“McDonalds”));
 - (ii) Every Monday (pick up at school) to 6:00 p.m. (meet at Shoppers Drug Mart at 125 The Queensway (“Shoppers”)); and,
 - (iii) Every Wednesday (pick up at school) to 6:00 p.m. (Shoppers).
- (b) Commencing the Father’s first Friday access after November 15, 2020:
- (i) Every Thursday (pick up at school) to Saturday at 6:00 p.m. (McDonalds); and
 - (ii) Every Monday (pick up at school) to 6:00 p.m. (Shoppers).
- (c) Commencing the Father’s first access weekend after April 15, 2021:
- (i) Alternate weekends from Friday after school or 3:30 p.m. (Shoppers if there is no school or camp) to Monday drop off at school or camp or 9:30 a.m. (McDonalds if there is no school or camp);
 - (ii) Every Wednesday after school or camp or 9:30 a.m. (Shoppers if there is no school camp) to Thursday drop off at school or camp or 9:30 a.m. (McDonalds if there is no school or camp);
 - (iii) Alternate Mondays after the Mother’s weekend with the child from after school or camp or 9:30 a.m. (Shoppers if there is no camp if there is no school or camp) to 7:00 p.m. (McDonalds) and,
 - (iv) An additional 24 hours shall be added to the Father’s time with the child when there is a statutory holiday or school PA day that precedes or follows his alternate weekends.
- (d) If the Ontario government directs the school to shut down because of Covid-19, then the Father’s time with the child shall include the school day commencing at 9:30 a.m. (Shoppers) when he would otherwise pick up the child at the end of school. The drop off shall be the location and time as set out above.
- (e) During the transition period the holiday/vacation shall be as per the regular schedule, except that the Father’s parenting time shall be added to and/or adjusted as follows:
- (i) Christmas 2020 – From 12:00 p.m. on Christmas Day (December 25 - Shoppers) to 12:00 p.m. on Boxing Day (December 26 - McDonalds), and the child shall be in the Mother’s care from 12:00 p.m. on Christmas Eve (December 24 - McDonalds) to 12:00 p.m. on Christmas Day (December 25 - Shoppers);
 - (ii) Thanksgiving, New Year’s Eve/Day, Family Day, March Break and Easter 2020 – As per the regular schedule;
 - (iii) Mother’s Day – If the child is in the Father care his parenting time ends on Sunday at 9:30 a.m. (Shoppers);
 - (iv) Father’s Day – If the child is not otherwise in his care, Sunday from 9:30 a.m. (Shoppers) with a return to school on Monday.
- (f) Additional or alternate time as agreed to by the parties, in writing.

- [77] The parties are directed to complete mediation intake forms with Shely Polak, unless she declines to accept same. In that case they will complete intake forms with York Hills Child and Family Services.
- [78] Neither party may bring any further motions without leave granted by me. Any form 14B must be accompanied with a form 14A (maximum 6 pages, 1.5 spacing, 12 point font Times New Roman) and draft form 14 motion.
- [79] A case conference on the financial (and other) issues shall be held before me on a date in November or December as scheduled by the trial coordinator. Conference briefs shall be limited to 6 pages, 1.5 spacing, 12 font Times New Roman, as well as updated financial statements, year to date income information, 2019 Income Tax Returns and Notices of Assessment and offers to settle.
- [80] A settlement conference on all issues shall be held before me on a date in January or February 2021 as scheduled by the trial coordinator. Conference briefs shall be limited to 6 pages, 1.5 spacing, 12 font Times New Roman plus relevant attachments and offers to settle.
- [81] If the parties cannot resolve the issue of costs, the Mother may file an affidavit (3 pages, 1.5 spacing, 12 font Times New Roman) plus a Bill of Costs, any offers to settle and no other attachments within 10 days.
- [82] The Father may file an affidavit (3 pages, 1.5 spacing, 12 font Times New Roman) plus a Bill of Costs, any offers to settle and no other attachments within 10 days of receipt of the Mother's materials.
- [83] A copy of this Endorsement shall be provided to York Region Children's Aid Society by the Court.
- [84] 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.



Justice Andrea Himel

Date: September 8, 2020