

CITATION: Joachim v. Joachim, 2020 ONSC 5355
COURT FILE NO.: FC-16-1122 -1
DATE: 2020/09/09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Edson Joachim, Applicant

AND:

Nastassja Joachim, Respondent (moving party)

BEFORE: D. Summers J.

COUNSEL: Applicant is self-represented

Manraj Grewal, for the Respondent

HEARD: August 24, 2020

ENDORSEMENT

[1] Due to COVID-19 and the suspension of regular court operations in the Ontario Superior Court of Justice, this motion was heard by Zoom video-conference.

[2] The respondent mother moved for leave to bring an urgent motion in the context of her Motion to Change Justice Audet's order dated December 10, 2018. She sought urgent relief under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) including an order giving her sole decision-making authority over education and an order suspending or, in the alternative, reducing the applicant father's parenting time with the children. Of immediate concern was her wish to have the children attend school virtually and not in person.

[3] The applicant father favours in-class learning. He opposed the mother's motion and denied urgency. Nevertheless, he brought a cross-motion for relief including an order suspending the mother's in-person parenting time, and an order appointing a new parenting coordinator.

[4] Justice Shelston heard the urgency request and granted leave to proceed on the school issue only. The matter then came before me. I released a brief endorsement ordering that the children attend school online from the mother's home for the 2020 fall semester with reasons to follow. These are my reasons.

Factual Context

[5] The parties began cohabiting in 2007 and married in 2011. Their relationship broke down in December 2015, but they remained under the same roof until April 2016.

[6] The parties have two daughters. The eldest, Thira, was born on May 14, 2012. Her sister, Enora, was born on August 12, 2014. The girls are 8 and 6 years of age respectively and entering grades 3 and 1. They attend the same school.

[7] The parties' parenting relationship is high conflict. Following a 9-day trial in 2018, Justice Audet made a detailed parenting order. It included equal time-sharing on a 2 day/2 day/5 day/5 day schedule during the school year that changes to alternate weeks in the summer. Decision-making is joint on all major issues except medical, dental and religion. Subject to a duty to consult the non-decision-making parent, the father has the right to make decisions over religion and dental care. The mother has sole authority over medical decisions. Education is a shared area.

[8] The mother and father are both educators. Each is fluent in French and English.

[9] The mother is an elementary school teacher qualified to teach kindergarten through grade 6. She and her common-law partner, Greg Ambroise, have been together since 2016 and lived together since the spring of 2019. He suffers from underlying medical conditions and is immunocompromised. He has not been well enough to work since December 2019.

[10] The mother and Mr. Ambroise, have a 15-month-old son, born June 3, 2019. The mother extended her maternity leave until January 29, 2021 and hopes to obtain a further extension at that time. Prior to maternity leave, she was teaching grades 3 and 4.

[11] The father is a kindergarten teacher and returns to the classroom in September 2020. He shares a house with his parents, his younger brother and his brother's girlfriend. The father's girlfriend is also considered part of the family and the household's social circle or "bubble."

[12] There are four educators in the father's household, a daycare worker, and an airline employee who has not worked in that role since March 2020.

[13] When COVID-19 hit Ontario and the government closed schools, the parties agreed to suspend their 5/5/2/2 school year parenting schedule and move to the summer schedule of alternate weeks to reduce the number of times the girls had to move between households.

The Legal Test

[14] The only test to be applied in custody and access matters is the best interests of the children. Under s. 16(8) and (10) of the *Divorce Act*, the court determines the best interests of the child by considering the condition, means, needs and other circumstances of the child. The court must also give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child.

Positions of the Parties

The Mother

[15] The mother submits it is in the children's best interests to attend school virtually, at least for the remainder of the 2020 school year. She argues that the risks involved in returning them to the classroom right now are unnecessary. Not only is she worried about them contracting the virus, she is worried about the risk it presents for her partner and their baby. The mother says if the children study online with her, they will follow the online curriculum and she will supplement it with other learning, just as she would if she were teaching in the classroom.

[16] Although not pursued in oral submissions, the mother's written materials also advanced the position that returning to in-class learning during a pandemic is more accurately seen as a medical decision rather than an educational one. She says in these circumstances, the risk involved is akin to a health assessment and thus, under Audet J.'s order, the final decision is solely hers to make.

The Father

[17] The father says he trusts the Ministry of Education, the risk analysis undertaken by the government, and the protocols put in place to keep students healthy and safe. From his perspective, the social, psychological, and developmental benefits of young children attending class in person outweigh the potential health risks. He submits that if it is safe for other children to go to school, it is safe for their children and in their best interests to attend.

[18] The father further alleges that the mother has confused the children's best interests with what she believes is best for her partner and their baby. The father states that while he does not wish Mr. Ambroise or their child any harm, they are not his concern. His priority is Thira and Enora. As he sees it, the benefit of the girls returning to the classroom and some semblance of normal life eclipses the health concerns in the mother's household. The father says if the mother cannot see that, she should not have the right to make decisions for the girls in relation to either their health or their education. Moreover, he proposes the mother's concerns could be addressed by suspending her parenting time with the girls and allowing them to live with him full-time.

Discussion

[19] I am not persuaded by the mother's contention that school attendance, during a pandemic, is a health decision that she can make alone as opposed to an educational one that she must make together with the father. Justice Audet's order distinguishes between the children's medical, dental, and psychological healthcare. The mother has final authority over non-routine medical issues and the father makes final decisions related to non-routine dental care. However, where psychological care is the issue, paragraph 19 of the order states that counselling or therapy requires the written consent of both parents. So, whether the return to school is seen as a health decision or educational decision, I find it is one the parties must make together under the terms of the order. The tension between the children returning to in-class learning and online learning involves consideration not only of their educational needs, but also of their physical and psychological health needs.

[20] And so, it falls to the court to determine that which the parents are unable to decide together.

[21] The policy of the provincial government is that in-person school attendance is optional for the 2020-2021 school year. If parents decide their children should not return to the physical classroom, remote learning is available. This flexibility allows parents to make the best decision for their family. However, this model breaks down where parents have separated and are not like-minded about their children's best interests. That is the case for Thira and Enora. The result for them over the past weeks has been ambiguity and confusion about their return to school plus increased conflict between their parents on the heels of what has already been many months riddled with change and uncertainty.

[22] There can be no doubt that the school environment offers children social, psychological, and developmental advantages. The question here is whether those benefits outweigh the physical risks of returning to that environment in the context of this two-household family? I consider the following:

- a. The evidence from Mr. Ambroise's doctor that confirms he experienced two significant illnesses between October 2019 and January 2020. The first affected his lungs; the second affected his ability to fight infection. He is still undergoing tests with his medical specialists. His physician recommends extra precaution and says there is high risk of complications should Mr. Ambroise become ill with COVID-19;
- b. Mr. Ambroise has two older children who live in Montreal. He has not seen them since the pandemic hit. This is one of the additional health precautions that he has taken;
- c. The child born to the mother and Mr. Ambroise is just 15 months old and vulnerable. His immune system is still developing;
- d. There is no evidence that either Thira or Enora experience any social, developmental, or psychological obstacles;
- e. Justice Audet's order states that the parties will, subject to affordability, obtain psycho-educational assessments for the girls after each completes grade 3 to evaluate whether they are gifted. In my view, this indicates that both girls are strong students;

- f. I did not receive independent evidence of the children's views and preferences however, I did ask the parties if either child had voiced her wishes. The father offered that Thira, the eldest child, is a keen student, likes school and wants to return. The youngest, Enora, was not as keen as her older sister and was happy to stay at home. The mother did not dispute these descriptions;
- g. The father's emphasis on the benefit of the girls being exposed to a variety of perspectives within the school setting including social clubs to learn about and discuss important social issues;
- h. The parties' initial agreement and compliance with COVID-19 health and safety protocols in their respective households and the conflict that developed over the summer as the government relaxed its guidelines and the father began to relax the practices in his home;
- i. The girls' potential exposure to the virus will increase even if they do not return to in-class learning once the father and another member of his household return to the classroom. Two of the four educators in his home are college professors and will be working from home and teaching online; and
- j. The mother's plan for the girls' social, physical, and educational needs since the pandemic started has included, and continues to include, a variety of activities. Some take place virtually, others take place outside, with or without masks, and social distancing, as the circumstances require.

[23] I am most persuaded by the medical evidence regarding the risk Mr. Ambroise faces if exposed to the COVID-19 virus and the evidence of his decision to give up in-person time with his children to help minimize the risk to himself and the baby. In this regard, I take notice of the information widely repeated in the public domain that very young children are likely to be at higher risk due to their immature immune systems. A return to in-class learning brings increased risk of exposure to COVID-19 and, in turn, increased risk of transmitting the virus to vulnerable family members. It is a risk that I find unnecessary, for this family, at this time. Thira and Enora are good students and are surrounded by trained educators in both households to help them, if

needed. Their mother will be in the home every day at least until late January 2021 to guide and supplement their online learning. I am also satisfied that both parents are attentive to the girls' need for social interaction, social learning, and physical exercise.

[24] I do not accept the father's contention that somehow the children's best interests can be severed from the health and safety of their step-father and baby brother. On the contrary, I find their best interests are inextricably connected to the well-being of both households – their mother's as well as their father's. It is in the children's best interests to keep both families whole. These are the people most dear to them, that love and care for them, and that they love and depend on. I am satisfied that the risks to the health and well-being of the mother's household presently outweigh the benefits of in-class learning for the girls. For these reasons, I find it is in Thira and Enora's best interests to attend school virtually for the 2020 fall semester and to do so from their mother's home. The father is away from the home during the day and the other members of his household are working, either from home or away from the home.

[25] A final comment. As noted already, the issue before me was restricted to deciding the environment in which the children returned to school – online or in-class. Nevertheless, both parties made submissions regarding the time-sharing schedule. The mother seeks to continue the alternating week schedule for the same reason they moved to that schedule in the spring: to reduce the number of moves between households. The father seeks to enforce Justice Audet's order and return to the school year schedule of 5/5/2/2.

[26] I encourage the parties to make every effort to resolve this issue quickly and focus on reducing the conflict between them, especially as the children return to their studies and grapple with the many challenges and changes the world continues to present. I also urge the parties to consider the most sensible schedule for the children in the context of all their needs and best interests. Thira and Enora deserve nothing less.

[27] If the parties are unable to resolve the issue of costs between them, the mother may deliver her costs submission before September 18, 2020 and the father shall have until September 30th to deliver his costs submission. Neither party's submission shall exceed two pages exclusive of Offers to Settle and Bills of Costs. If needed, the mother shall have a 5 day right of reply, not to exceed one page. If either party wishes to refer me to a rule under the *Family Law Rules*, O. Reg. 114/99 or case law, they shall do so by including the hyperlink.

Justice D. Summers

Date: September 9, 2020

CITATION: Joachim v. Joachim, 2020 ONSC 5355
COURT FILE NO.: FC-16-1122 -1
DATE: 2020/09/09

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Edson Joachim, Applicant

AND:

Nastassja Joachim, Respondent (moving party)

BEFORE: D. Summers J.

COUNSEL: Applicant is self-represented

Manraj Grewal, for the Respondent

ENDORSEMENT

Justice D. Summers

Released: September 9, 2020