In the Provincial Court of Alberta

Citation: Lima v Holloway, 2020 ABPC 157

Date: 20200908
Docket: FF029002492
Registry: Red Deer

Between:

Aurea Lima

Applicant

- and -

Benjamin Holloway

Respondent

Decision of the Honourable Judge J.A. Glass

Summary

[1] This is an application to determine whether a child should return to school in person or attend virtually. Unfortunately the parents did not deal with the issue in a timely or effective way, leaving the Court in the position of having to make a decision upon incomplete information. The Government of Alberta in consultation with its medical experts determined that children should return to school, provided its protocols were followed. There was no evidence to suggest that the protocols were not being followed, the child expressed a desire to return to in person schooling, and Ms. Lima's concern that the child may expose members of her family who suffered from asthma was unsupported by any evidence as to the level of risk they may be subject to. The child had been going back and forth between the parents' residences for the past 3 months without any issue.

[2] The child was directed to attend school on an interim basis with leave to the parents to return to court should there by a change in circumstances.

Background

[3] Ms. Lima filed an application in May 2020 to vary a parenting order as it relates to Aayla Aurea Lima-Holloway, born November 5, 2007 ("the child"). At that time, the child had her

primary residence with Mr. Holloway and Ms. Lima had specified parenting time. Allegations were made by both parents regarding the other parent's failure to abide by the existing order, denial of parenting time, failure to abide by COVID-19 protocols and general neglect. Not surprisingly, each parent denies the allegations made by the other. What the parties do agree upon is that the child has been in Mr. Holloway's primary care for approximately the last ten years and Ms. Lima has had various forms of parenting time.

[4] On the first return date on June 5, 2020, I granted an Order that permitted the child to reside for a week on and week off with either parent. This was ostensibly with the parents' consent and as a result of the child being able to do her schooling remotely. This remains the parenting arrangement currently.

[5] This matter came back before the court because the parties could not agree on what the parenting should look like as the Province moves to reopen schools this September.

[6] Ms. Lima proposes that the child continue to attend school remotely and that the current parent regime not change. She remains concerned over the safety protocols in place for personal attendance and she is concerned because her husband and son suffer from asthma and could be placed at risk should the child go back to personal attendance at school.

[7] Mr. Holloway proposes that the child reattend school in person as that is her wish and desire. He is confident that the protocols will provide the necessary level of protection to all parties.

[8] The matter was spoken to on August 21, 2020, prior to the commencement of in person school, however no decision was made. The parties did agree that it would be appropriate for a lawyer to be appointed for the child and that the parties proceed with a Practice Note 7, voice of the child report. The matter was further adjourned to September 4, 2020 to be spoken to further. I suspect all the parties were hopeful that either the child's counsel would be present or the Practice Note 7 report might be available. Unfortunately, neither were available.

[9] Despite the shared parenting and decision-making order that was made on June 5, 2020, Mr. Holloway unilaterally decided to enroll the child for in person schooling and by the time the parties appeared before me, she had already been to two days of school.

[10] I was advised by both parties that the school requires that parents decide on either in person attendance at school or remote attendance at school. Some form of hybrid is not available.

[11] The parties also acknowledge that should the current parenting regime remain in place, the child could continue with remote schooling. Should, however, I decide that in person schooling is in the child's best interest, then effectively the parenting order has to change.

The Law on Parenting Time

[12] Parenting applications are governed by the *Family Law Act* and the court in particular considers the following provisions:

> s. 34 **(1)** In this section, "variation order" means an order made under subsection (2) or (5).

(2) The court may, on application by one or more of the guardians, make an order varying, suspending or terminating a parenting order or any part of that order.

(3) Before the court makes a variation order in respect of a parenting order, the court shall satisfy itself that a change in the needs or circumstances of the child has occurred since the making of the parenting order or the last variation order made in respect of that order, and in making the variation order, the court shall consider only the best interests of the child, as required by section 18 and as determined by reference to that change.

(4) The court may include in a variation order any provision that could have been included in the parenting order in respect of which the variation order is sought.

(5) The court may, on application by the child or a person who has the care and control of the child, make an order varying, suspending or terminating a parenting order referred to in section 22(6) or any part of that order.

. . .

s. 18 **(1)** In all proceedings under this Part except proceedings under section 20, the court shall take into consideration only the best interests of the child.

(2) In determining what is in the best interests of a child, the court shall

(a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and

(b) consider all the child's needs and circumstances, including

(i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,

(ii) the history of care for the child,

(iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,

(iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,

(v) any plans proposed for the child's care and upbringing,

(vi) any family violence, including its impact on

(A) the safety of the child and other family and household members,

(B) the child's general well-being,

(C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and

(D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,

(vii) the nature, strength and stability of the relationship

(A) between the child and each person residing in the child's household and any other significant person in the child's life, and

(B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

(ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

(3) In this section, "family violence" includes behaviour by a family or household member causing or attempting to cause physical harm to the child or another family or household member, including forced confinement or sexual abuse, or causing the child or another family or household member to reasonably fear for his or her safety or that of another person, but does not include

(a) the use of force against a child as a means of correction by a guardian or person who has the care and control of the child if the force does not exceed what is reasonable under the circumstances, or

(b) acts of self-protection or protection of another person.

(4) For the purpose of subsection (2)(b)(vi), the presence of family violence is to be established on a balance of probabilities.

[13] In addition, the *Provincial Court Act* provides as follows:

8**(1)** The practice and procedure of the Court shall be as provided in this Act and the regulations.

> **(2)** Where this Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may
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> (a) apply the *Alberta Rules of Court*, and
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> (b) modify the *Alberta Rules of Court* as needed.

[14] This is an important consideration as the parties have agreed upon a Practice Note 7 Intervention. Pursuant to paragraph 24 of the Practice Note and paragraph 14 of the Intervention Order, all "parties are prohibited, without leave of the Court, from making further applications or proceeding with steps in previously scheduled applications until the intervention is completed, unless the health or safety of a child is at risk or the Parenting Expert recommends an application be made."

Parties Positions Regarding the Best Interests of the Child

[15] Ms. Lima was primarily concerned about the risk of the child as a result of her perception that Mr. Holloway was not abiding by COVID-19 protocols. She also had a variety of concerns regarding the cleanliness of Mr. Holloway's home, his involving the child in parenting decisions and his not facilitating parenting time. She stated that her family was following all COVID-19 related protocols and that the child could attend school remotely.

[16] In her initial Affidavit, she did not make any reference to the concern about possible exposure of the child to COVID-19 and thereafter exposing her son and husband to the disease (who are apparently high-risk individuals due to their asthma). In addition, she did not detail any isolation that the family engaged in when the child came to her home to protect everyone despite her initial concerns. Nor did she seem to have any problems with COVID-19 concerns during the period that the parties shared parenting.

[17] In Ms. Lima's follow up Affidavits, she restates much of the same concerns contained in her original Affidavit, however, offers no new evidence. She raises some other concerns as follows:

a) She believes the child has trouble forming attachments to people. She attributes this to Mr. Holloway having numerous people in his life. No proof or concrete examples are provided to confirm this suspicion is offered by Ms. Lima;

b) She believes that all of the extracurricular activities that the child is involved in are having a negative impact on her school. No specific evidence is offered;

c) She believes that the child suffers from dyslexia and that she is not getting the supports in school that she should. She offers no evidence as to how this is affecting her school, nor what if anything she has done since June 2020 when the shared parenting regime began to address this concern;

d) She acknowledges that in the past she may not have spoken to her daughter appropriately but believes this is not a concern any longer;

e) She is concerned that Mr. Holloway has not encouraged a relationship between the child and her and inappropriately requires the child to make parenting arrangements with her mom;

f) She does state that since the shared parenting has started, that the child is happier, eating better and is thriving;

g) She attaches a page from the child's diary that purportedly was written in 2019 indicating that the child wanted to live with her mom and was threatening harming herself. She shared that information with Mr. Holloway and acknowledges that he made arrangements for the child to see a counsellor. No further incidents or concerns about this matter have been raised.

[18] It is not until Ms. Lima's most recent Affidavit that she raises the concern that her younger son and husband may be exposed to COVID-19 if the child is allowed to return to in person schooling. As a result of these concerns, she has determined that her son will not be going to in person schooling.

[19] Mr. Holloway states that he does follow all COVID-19 protocols and effectively denies all of the allegations made by Ms. Lima. He references text messages where Ms. Lima's level of frustration with the parenting regime got to the point where she stated she would not see the child anymore. It is truly unfortunate that any parent would get to that point – it highlights that both parents have much work to do to improve their communication.

[20] Mr. Holloway's last Affidavit references Ms. Lima speaking with the child continually about returning to school in person and her opposition to it. In addition, he references comments made by the child that when she is in Ms. Lima's care, COVID-19 protocols may not be strictly adhered to. Importantly, he says that the child has indicated a desire to return to in person schooling. It is primarily on this basis why he unilaterally decided to register her for in person schooling. It is unfortunate that parties utilize self help remedies in shared parenting situations.

What is in the best interests of the child?

[21] These are truly unprecedented times. It is unlikely that the parenting regime that existed before the June 2020 Order would have been changed prior to a trial or consent. Consent was forthcoming because of the unique ability of children to do schooling remotely due to COVID-19. Normally, a shared parenting order would not be varied prior to a hearing or consent. Given the parents inability to agree and that they have absolved their parental responsibility to deal with school, they have put the Court in a difficult position. I am being asked to decide whether the child should return to in person schooling – a child I do not even know. Worse, I have conflicting Affidavits and limited evidence about what is in her best interests.

[22] In my view, it is not in the best interests of the child to delay on making a decision regarding this issue.

[23] The Government of Alberta, in consultation with its medical experts, has seen fit to open schools for in person schooling. It has developed a protocol and has put significant resources in place for the children to return. The risk of infection and these protocols must be balance against

the impact of social isolation caused by remote learning. In this case, the child has expressed a desire to return to in person schooling. Clearly, prior to the pandemic, this was the normal that the child was used to and that the parents were acceptable of.

[24] The parents position regarding the best interests of the child focus more on the power struggle between them as opposed to providing the Court with real insight as to how a return to school may or may not be in the child's best interests. Ms. Lima does indicate in her last Affidavit that she is concerned over her young son and husband given that they have asthma. It is nothing more than that however, no medical or other evidence is provided indicating the level of risk or how they have been managing that risk up until now with the child going back and forth. In addition, neither parent spoke to the issue of isolation and its impact on the child, if any. Neither parent addressed the issue of the child having to isolate given that she has gone back to school. Surely, if the shared parenting regime were to continue, she would have to isolate prior to that occurring.

[25] I am aware that the Province has experienced an increase in COVID-19 reported cases since the relaunch, however, I note that the central region (which Red Deer is a part of) continues to maintain the lowest number of increases as compared to the rest of the Province.

[26] In considering all of the above, I am of the view that the best interests of the child support her returning to in person schooling. Withholding her from returning to school based upon speculation or that there is not a 100% guarantee is simply not reasonable.

[27] I have had the benefit of reviewing the decision of Justice Himel in ***Chase v Chase***, 2020 ONSC 5083 and echo many of his comments. In addition, the comments of Justice Graesser in ***SAS v LMS***, 2020 ABQB 287 are applicable in this case:

> [38] A precondition to a court application should be good faith attempts to communicate with the other party and good faith attempts to arrive at reasonable solutions…
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> [40] "Reasonably" is a criterion for these discussions. Maximizing a child's safety could be interpreted as placing the child in a sealed sterile bubble with no direct contact with any human. When parents are together, they generally agree on the level of risk they consider to be appropriate within their family. What is "acceptable" to one family may not be acceptable to another. When parents have separated and have joint guardianship and decision-making, they must come to agreement or have the courts make the decision for them. The decision will likely be made on the basis of what is reasonable in the context of that family with its history, as best as can be gleaned in a hurried, brief application.
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> [44] With these comments in mind, I will summarize my conclusions:
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> 1. Parents are expected to address COVID-19 issues and concerns with each other before taking any action (including applying for variations or relief from the Court) to resolve these issues and concerns in good faith and to act reasonably in

exploring strategies that will first and foremost ensure the health and safety of their children.

2. Where face to face access or parenting time presents different risks in the different households, the parties should consider strategies that have the children in the less risky environment but in a manner that maximizes virtual contact between the children and the other parent.

3. Court orders are meant to be followed. There should be no unilateral withholding of access or parenting time except in true emergency situations as described above where there is imminent risk to a child's health or safety;

[28] Accordingly, I order that:

a) the child shall continue with in person schooling at Ecole Camille J. Lerouge School;

b) the parenting order of July 17, 2020 shall be varied to provide that the child will reside with Mr. Holloway and shall have parenting time with Ms. Lima:
   i. the weekend commencing September 24, 2020 after school until September 27, 2020 at 6 pm;
   ii. the weekend commencing October 8, 2020 after school until October 12, 2020 at 6 pm;
   iii. such further and other parenting time as the parents can agree;
   iv. telephone and other video communication at all reasonable times.

c) the application is adjourned to the JDR scheduled to occur on October 21, 2020 at 1:30 pm;

d) the parties are given leave to return to court should the school depart from Scenario 1 under the Government of Alberta return to school plan or should the court otherwise permit;

e) Costs may be spoken to at the hearing of this matter.

Heard on the 4th day of September, 2020.
Dated at the City of Red Deer, Alberta this 8th day of September, 2020.

J.A. Glass
A Judge of the Provincial Court of Alberta

Appearances:

R. Spence
for the Applicant

Benjamin Holloway
Self-Represented