

**CITATION:** Morley v. Doucette, 2020 ONSC 3180  
**COURT FILE NO.:** F352/20  
**DATE:** May 21, 2020

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

**RE:** Ruth Ann Morley and Codie Louis Joseph Morley, applicants

**AND:**

Mikayla Madisone Leanne Doucette, respondent

**BEFORE:** MITROW J.

**COUNSEL:** Stephanie Ouellette for the applicant, Ruth Ann Morley

David Wwinner for the applicant, Codie Louis Joseph Morley

Alexander Hodder for the respondent, Mikayla Madisone Leanne Doucette

**HEARD:** May 20, 2020

**ENDORSEMENT**

- [1] This is an urgent motion seeking return of the child, Luca, age two (“the child”), and other relief, brought by the paternal grandmother, Ruth Ann Morley (“the paternal grandmother”). She is the co-applicant, along with her son, Codie Louise Joseph Morley, who is the child’s father (“the father”).
- [2] The respondent, Mikayla Madisone Leanne Doucette, is the child’s mother (“the mother”). The mother brings her own motion seeking interim custody and other relief.
- [3] This urgent motion was precipitated by the mother’s very recent and sudden departure with the child from London, Ontario to Prince Edward Island (PEI).
- [4] I find there is urgency within the meaning of the notice that was posted on this court’s website dated March 15, 2020 following the suspension of normal court operations as a result of COVID-19.
- [5] The motion was conducted by teleconference with all counsel and all parties participating. All three parties were affirmed during the hearing of the motion to permit them to attest as to the truth of their respective unsigned affidavits: for the mother, this consisted of her responding affidavit and her affidavit in support of her claim for custody and access (form 35.1 affidavit); and for the paternal grandmother and father, this consisted of the reply affidavit served by each of them.

- [6] I find that the motions are best dealt with in stages.
- [7] For reasons that follow, the mother is ordered to return the child to London, Ontario by the deadline set out in the order below and the balance of the motions are adjourned before me for further submissions and interim orders.

### **THE CURRENT PROCEEDING**

- [8] The application was issued May 11, 2020. In that document, the applicants seek joint custody of the child or, alternatively, custody to the paternal grandmother. The motion on behalf of the applicants was filed by the paternal grandmother and seeks, among other relief, an interim interim without prejudice order that the applicants have joint custody of the child, with the child to reside with the paternal grandmother.
- [9] The initial return date of the motion as ordered by the triage judge was May 19, 2020. On that date, I acceded to the mother's request for a brief adjournment to allow her to complete her affidavit. The motion was adjourned one day to May 20.
- [10] In her material, the mother seeks an order for interim custody and that the child reside with the mother in PEI.

### **THE RELEVANT BACKGROUND**

- [11] The applicants present a united front in their affidavit material, which conflicts substantially with the mother's evidence. At this juncture, the primary focus of fact finding will be on facts that are not in dispute.
- [12] Although the father was raised in London, Ontario, he resided away from London during periods of time, including residing in PEI. The mother and father began cohabiting, in PEI, in 2017. The child was born in January 2018. The father and mother currently are ages 25 and 21, respectively. When the child was born, the mother was age 19 and the father was age 23.
- [13] In 2018, the father, mother and child moved from PEI to London, Ontario. The paternal grandmother deposes that the mother had a difficult upbringing as a child and that both the father, and in particular the mother, continued to struggle in PEI in trying to raise their child. The paternal grandmother suggested that the parents should move to London and that she was prepared to provide them with ongoing support in caring for the child.
- [14] The paternal grandmother describes herself as a retired teacher with the Thames Valley District School Board with 32 years experience. The paternal grandmother remains on the occasional teachers' list; she is a home instructor for the school board for students with special needs and she continues to be a volunteer tutor with the Children's Aid Society of London and Middlesex.

- [15] The paternal grandmother deposes that she “suggested” that the parents move to London. However, the mother recasts that evidence, somewhat, deposing that the move was intended to be temporary and that she reluctantly agreed to move to London.
- [16] There is no dispute that the parents and child did move to London in September 2018. In order to facilitate the move, the paternal grandmother and two other family members went to PEI to assist in getting the parents ready for the move. On their arrival in London in or about mid-September 2018, the parents and child stayed with the paternal grandmother’s father until late December 2018. The paternal grandmother assisted the parents in finding an apartment for January 2019 and the paternal grandmother co-signed the lease.
- [17] The paternal grandmother gave a detailed account characterizing herself as an active participant in the child’s life, including having him in her care a minimum of two days per week. It is her evidence that she has taken the child to his doctor’s appointments, that she found a pediatrician and that she took the child to all his dental appointments.
- [18] The paternal grandmother deposes that the child at 27 months is non-verbal and that she ensured that the child was enrolled in tykeTALK at the Thames Valley Children’s Centre.
- [19] The report from Thames Valley Children’s Centre, which is titled “Speech/Language Initial Assessment Summary” attached to the paternal grandmother’s affidavit, notes that the child demonstrated a delay in his receptive and expressive language skills. The report contains a number of recommendations to assist the child.
- [20] For her part, the mother minimizes the role of the paternal grandmother in relation to the child’s medical care, although the mother does not deny all the paternal grandmother’s evidence in that regard. The mother acknowledges that the child has had trouble meeting developmental milestones in the past, but she disagrees that the child is non-verbal. The mother attended only two tykeTALK appointments, deposing that at the time she was attending school at Wheable. However, the mother does not deny that the paternal grandmother ensured the child’s attendance at tykeTALK. Also, the report from tykeTALK consistently refers to the assessor’s interactions with “Codie and Ruth-Ann,” being the father and paternal grandmother, with no reference being made in the report to the mother’s participation in the assessment process. There is no dispute that the child has been referred to a therapist for his language. The paternal grandmother deposes further that the language therapist has initiated a referral for the child’s sensory needs.
- [21] There is much evidence tendered in the applicants’ material, particularly the paternal grandmother’s affidavits, regarding the mother’s deficits as to her parenting skills, her inability to manage money, the mother’s failure to follow-through on recommended treatment for her mental health issues and generally the mother’s inability to parent without proper support.
- [22] For her part, the mother presents in her material a bold denial of many of the allegations made against her by the applicants. The mother asserts that she is well able to parent the

child. While the mother agrees that the paternal grandmother has had a role in the child's care, the mother minimizes the extent of the paternal grandmother's involvement and the mother levies her own criticisms of the paternal grandmother, denied by the latter in her reply affidavit.

- [23] The mother is most critical of the father and his lack of involvement in caring for the child during cohabitation. The mother deposes that she was a fulltime stay-at-home parent and that she was responsible for the child's care and parenting. The mother describes past episodes accusing the father of drug use and being physically abusive towards her, much of it denied by the father, who levies his own allegations of abusive conduct against the mother.
- [24] The father deposes that he was a primary caregiver to the child since birth. His evidence is that his mother (the paternal grandmother) cared for the child every weekend for over a year.
- [25] Not in dispute, however, is that the parents had an altercation on April 26, 2020, as a result of which the father was charged with assaulting the mother. The father currently is bound by an undertaking in the criminal proceeding not to communicate directly or indirectly with the mother, not to attend at the apartment where the parents resided and not to be within 25 metres of the mother.
- [26] The mother deposes that, following the altercation, she stayed with persons that she describes as friends of the father. The child, in the meantime, stayed with the paternal grandmother for two to three days, after which the mother picked up the child.
- [27] Thereafter, according to the mother, she called her parents in PEI to discuss returning there with the child. The mother deposes further that her grandparents offered for her and the child to stay at their residence where there are two empty bedrooms for their use. That is where the mother and child currently reside.
- [28] The father deposes that the maternal grandparents' residence is a one bedroom trailer, which he claims he knows well having done work there in the past.
- [29] The mother admits that she left London with the child on May 2 to travel to her grandparents' home in PEI. The mother's evidence appears deliberately vague, with no indication as to mode of travel or to what extent she was assisted by friends or family.

## **DISCUSSION**

- [30] Despite the conflict in the evidence, there can be no doubt, on the balance of probabilities, that the mother has engaged in a self-help remedy. I find on the evidentiary record that the mother acted surreptitiously in taking the child to PEI without the knowledge of either of the applicants. There is no credible evidence from the mother to explain why she failed to seek the approval of the court in London prior to unilaterally changing the child's habitual place of residence which, on the evidence, is London.

- [31] Further, there is no credible evidence to explain why the mother failed to return to her apartment after the father was charged. The father was prevented by the criminal undertaking from attending at the apartment. The paternal grandmother, in her reply, deposed that she obtained a key from the father (as he was prevented from attending at the apartment) and cleaned up the apartment after the mother had gone to PEI. The pictures appended as exhibits to the paternal grandmother's reply affidavit corroborate the paternal grandmother's narrative in her affidavit as to the degree of filth and squalor she observed when she entered the apartment.
- [32] There is uncontradicted evidence that this apartment is paid for and available until June 30, 2020. The photographs appended to the paternal grandmother's affidavit also corroborate her evidence that the apartment has been cleaned.
- [33] The paternal grandmother relies on a decision of Marshman J. in *Plumley v. Plumley*, 1999 CarswellOnt 3503 (Ont. S.C.J.), a leading and often-cited decision on the issue of interim mobility. The test is formulated at para. 7:

7 It appears to me that the following factors are or ought to be important in deciding the mobility issue on an interim basis:

1. A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.
  2. There can be compelling circumstances which might dictate that a justice ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.
  3. Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial.
- [34] Applying the factors cited in *Plumley*, the status quo in the present case is that the child has a relationship with all three parties and is habitually resident in London. The evidence demonstrates that there is a genuine issue for trial. Regarding the second factor, there are no compelling circumstances described by the mother that can justify allowing the child's move to PEI on an interim basis. In relation to the third factor, I find that there is no strong probability that the mother's position will prevail at trial considering the many facts in dispute. Furthermore, even assuming that a trial judge awards primary care of the child to the mother, the evidence thus far falls well below "a strong probability" that the mother would be permitted to change the child's residence to PEI.
- [35] The overarching consideration is the child's best interests. The evidence establishes that the child does have a relationship with the paternal grandmother, although the mother seeks to minimize the extent of that relationship. The parents disagree completely as to which parent is the child's primary caregiver.

- [36] The mother's plan on an interim basis would undermine significantly the child's relationship with the paternal grandmother and the father.
- [37] I find it is in the child's best interests on an interim basis to remain in London pending the final disposition of this case.
- [38] At this point, the court is not in a position to make an order regarding an interim parenting plan. It is unknown whether the mother will elect to resume her residence in London.
- [39] Further, the mother should be given an opportunity to return the child to London prior to a consideration of any enforcement measures.
- [40] Accordingly, the issue of the interim parenting plan is deferred briefly pending the return of the child to London.
- [41] This court fully expects the mother to comply promptly with the order below. Any failure by the mother to comply will lead immediately to further necessary orders in the child's best interests, including enforcement.
- [42] I agree with the paternal grandmother and I do not accept the mother's submission that the paternal grandmother's failure to comply fully at this time with ss. 21.1 and 21.2 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 should result in a dismissal of the paternal grandmother's motion. A reasonable interpretation of those sections is that a non-parent litigant needs time to obtain the information required. Section 21.2, for example, allows a society 30 days to respond to a request for records.
- [43] It is important that steps are taken on the issuance of the application to comply with those sections. I find, in the present case, that the paternal grandmother is not prevented from seeking an interim order while compliance with ss. 21.1 and 21.2 is pending. Also, I take judicial notice that delays may arise because of COVID-19.
- [44] An approved draft order may be forwarded to the trial coordinator for digital signature.

### **ORDER**

- [45] I make the following interim order:
1. The motions are adjourned before me to be heard by teleconference on May 29, 2020 at 11 a.m. The trial coordinator shall email to the parties the teleconference call-in details and, if necessary, the trial coordinator may change the time that the motion is heard.
  2. By no later than 4 p.m. May 27, 2020, the mother shall return the child to London, Ontario.

3. By no later than 4 p.m. May 27, 2020, the mother shall deliver the child to the paternal grandmother and the paternal grandmother shall have care of the child pending the return of the motions on May 29, 2020. The father may arrange with the paternal grandmother to visit the child during this period.
4. If the mother returns with the child to London, Ontario prior to 4 p.m. May 27, 2020, then the child may remain in the mother's care until that time.
5. On May 29, 2020, submissions shall be heard as to any further order to be made by the court, including an interim parenting order.
6. Each party shall serve the other parties and forward to the trial coordinator a draft copy of the proposed order sought by that party by 4 p.m. May 28, 2020. By that same date, each party also may serve the other parties and forward via email to the trial coordinator one affidavit, limited to three typed pages, double-spaced, restricted to relevant events that have occurred since the hearing of the motions on May 20, 2020.
7. The mother forthwith shall advise the other parties in writing through counsel as to her plans to return the child to London, Ontario, including mode of travel, date of departure, expected date of arrival and who, if anyone, will be accompanying the mother and the child.
8. The paternal grandmother is at liberty to offer any assistance regarding travel that the paternal grandmother deems appropriate, but this provision does not relieve the mother of her responsibility to comply with this order.
9. The paternal grandmother within 30 days shall provide proof to the other parties as to all steps she has taken to comply with ss. 21.1 and 21.2 of the *Children's Law Reform Act*.
10. Pending the return of the motions, the applicants shall have access to the child via videoconference every second day to be arranged between counsel.
11. This order is made pursuant to the *Children's Law Reform Act*.
12. Costs are reserved to the judge dealing with the motions on a final basis.



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Justice Victor Mitrow

**Date:** May 21, 2020