

Facts

- [6] Pursuant to the Final Order of Kaufman J., dated December 2, 2016, the parties have joint custody of their daughter. That Order specifically addresses potential disputes over education and health care. It provides that major decisions affecting the child's education shall be made by the parties in consultation with the child's teacher, guidance counsellor and school psychometrist. If the parties are unable to agree on major decisions regarding the child's education, the decision of the school personnel will prevail.
- [7] Major decisions regarding the child's medical care were to be made in consultation with the child's physician. If the parties were unable to agree on any major decision regarding the child's medical care, the decision of the physician was to prevail.

Position of the Parties

Position of the Applicant

- [8] The applicant father takes the position that S. should be registered for on-line/virtual learning because she is at high risk if she contracts COVID-19. He states that S. has contracted pneumonia in the past, and is genetically disposed to an autoimmune disorder, ankylosing spondylitis, with which he has been diagnosed. While he acknowledges that S. has not been diagnosed with this condition, he states that there is a "probability" that she carries this genetic disease.
- [9] The applicant father is concerned for both his own health and S.'s should she attend school in person.
- [10] If S. is registered for on-line learning, the applicant has established a study area in his home and provided her with the necessary computer equipment and internet access to benefit from on-line learning. He is also prepared to hire a private tutor to assist her virtually, if necessary.
- [11] The applicant relies on a letter from his own physician, which states:
- This patient (the applicant father) has an autoimmune disease (ankylosing spondylitis)...This disease may increase his risk of morbidity and mortality if he contracts the COVID-19 virus.
- Ankylosing spondylitis is also known to be partially genetically transmissible to children.
- Care should be taken to assess the benefits vs. the potential risks to self and family of returning the daughter to school.
- [12] The applicant also relies on the affidavit of his sister, whose own daughter (S.'s first cousin) has been diagnosed with an autoimmune disease, chronic uveitis, which requires intensive and frequent medical treatment. She has appended medical literature that

indicates that chronic uveitis may associated with ankylosing spondylitis. She has been advised that her daughter should not attend in-person learning because of her autoimmune disease.

Position of the Respondent

[13] The respondent mother states that S. has learning difficulties in both reading and writing skills. She has been assessed by the Special Education Resource Teacher and an Individual Education Plan (IEP) was designed for her special education needs in April, 2018. The respondent believes that given S.'s learning challenges, in-person learning will provide her with the greatest educational opportunity.

[14] She has described some of the challenges S. faced when she engaged in on-line learning after the schools were closed in March, 2020.

[15] The respondent relies on a letter from the daughter's physician that states:

I am the Family Physician for S. To the best of my knowledge, she does not have any current medical condition that would place her at an increased risk of COVID-19 complications should she contract the virus.

[16] I note that the physician who signed this letter is expressly identified as the daughter's physician in the Order of Kaufman J. of December 2, 2016. As noted above, the Order also provided that if the parties were unable to agree on any major decision regarding the child's medical care, the decision of the physician is to prevail.

Analysis

[17] I do not doubt that each party is seeking to protect S.'s best interests in this matter. Their dispute between in-person and on-line learning reflects a debate that is occurring throughout Ontario and Canada. It is an issue on which experts disagree, not least because different experts, and experts in different fields, weigh the competing risks and benefits differently.

[18] In this regard I adopt the following statement of Himel J. in *Chase v. Chase*, 2020 ONSC 5083 at paras. 42 and 45:

The Ontario government is in a better position than the courts to assess and address school attendance risks. The decision to re-open the schools was made with the benefit of medical expert advisers and in consultation with Ontario school boards...

There is a consensus between the Ontario government and medical experts that, at this juncture, it is not 100% safe for children to return to school. However, the risks of catching Covid-19 (and the typical effects of the illness) for children are being balanced against their mental health, psychological, academic and social interests, as well as many parents'

need for childcare. There is no end in sight to the pandemic and, as such, no evidence as to when it will be 100% safe for children to return to school. The Ontario government has determined that September 2020 is an appropriate time to move on to a “new normal” which includes a return to school.

- [19] These comments reflect the earlier decision from the Quebec Superior Court in *Droit de la famille — 20641*, 2020 QCCS 1462, at paras. 7 and 9 :

First, it is not for the courts, but rather for the competent government authorities, to assess the potential risks of contamination of the population in a pandemic situation and to take the necessary measures to limit the spread of the disease. a virus.

...

When the government decides to partially lift the containment measures linked to Covid-19 in order to allow, among other things, the resumption of academic activities at the primary level, there is no need for the Court to question this decision, unless one or the other of the parties demonstrates, by a preponderant evidence, that it would be contrary to the particular interests of their children to resume attending school, for example because of their condition health.

- [20] Finally, I adopt the following factors for determining whether a child should attend in-person or on-line education listed by Akbarali J. in *Zinati v. Spence*, 2020 ONSC 5231, at para. 27:

- a. It is not the role of a court tasked with making determinations of education plans for individual families or children to determine whether, writ large, the government return to school plans are safe or effective. The government has access to public health and educational expertise that is not available to the court. The court is not in a position, especially without expert evidence, to second-guess the government’s decision-making. The situation and the science around the pandemic are constantly evolving. Government and public health authorities are responding as new information is discovered. The court should proceed on the basis that the government’s plan is reasonable in the circumstances for most people, and that it will be modified as circumstances require, or as new information becomes known.
- b. When determining what educational plan is in a child’s best interest, it is not realistic to expect or require a guarantee of safety for children who return to school during a pandemic. There is no guarantee of safety for children who learn from home during a

pandemic either. No one alive today is immune from at least some risk as a result of the pandemic. The pandemic is only over for those who did not survive it.

- c. When deciding what educational plan is appropriate for a child, the court must ask the familiar question – what is in the best interest of this child? Relevant factors to consider in determining the education plan in the best interests of the child include, but are not limited to:
- i. The risk of exposure to COVID-19 that the child will face if she or he is in school, or is not in school;
 - ii. Whether the child, or a member of the child’s family, is at increased risk from COVID-19 as a result of health conditions or other risk factors;
 - iii. The risk the child faces to their mental health, social development, academic development or psychological well-being from learning online;
 - iv. Any proposed or planned measures to alleviate any of the risks noted above;
 - v. The child’s wishes, if they can be reasonably ascertained; and
 - vi. The ability of the parent or parents with whom the child will be residing during school days to support online learning, including competing demands of the parent or parents’ work, or caregiving responsibilities, or other demands.

[21] In my view, in applying these factors, it is in the child’s best interest to attend in-person learning.

[22] The evidence provided by the child’s own family physician indicates that she does not have any current medical condition that would place her at an increased risk of COVID-19 complications should she contract the virus. While I understand the applicant father’s concern that she could develop the same autoimmune disorder that he has, I must proceed on the basis of the diagnosis available at this time.

[23] I am also persuaded that in-person learning will provide the child with a superior educational experience, particularly considering her IEP and the difficulties that she had with on-line learning in the previous school term. Returning to school in person will provide the child with direct support and supervision from the educational professionals assigned to provide her with assistance.

[24] The applicant father’s plan for on-line learning, while commendable, will not provide the child with the same level of programming as in-person education. Nor does it address the

issue of social isolation if the child does not return to in-person teaching. The applicant does not indicate how S. will see her peers or have an opportunity to engage in social development.

- [25] Thus, from the child’s perspective, in-person teaching is in her best interest, notwithstanding the risks involved.
- [26] I understand that I must also consider the applicant father’s health issues, although, in my view, they are subordinate to the educational and social development of the child. That said, the letter provided from the father’s physician is not particularly helpful in weighing the additional risks to the father, and, I must say, displays some ambivalence when it concludes that “Care should be taken to assess the benefits vs. the potential risks to self and family of returning the daughter to school”.
- [27] It may be that the applicant will have to observe strict social distancing measures when he has parenting time with his daughter, and this, understandably, is less than ideal from his perspective. That said, it is one of the inconveniences that must be endured in these circumstances.
- [28] Having considered the evidence in this case, including the proposals put forward by both parties, I conclude that the benefits of S. attending in-person teaching outweigh the risks and that it is in the best interest of S. that she attend in-person teaching.
- [29] Accordingly, this court orders that the child, S., shall be registered for and shall attend in-person learning at E.A. Fairman Public School for the 2020-2021 school year.

Justice R.E. Charney

Released: September 8, 2020

CITATION: Shepstone v. Masales, 2020 ONSC 5364

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Andrew Thomas Shepstone

Applicant

– and –

Katey-Sue Marie Masales

Respondent

REASONS FOR DECISION

Justice R.E. Charney

Released: September 8, 2020