Ontario Superior Court of Justice, Family Court (London) | Court file no. F1452/18

Applicant: David Joseph Waugh
Respondent: Katherine Danielle Bowen

THIS MOTION HAVING BEEN HEARD BY TELECONFERENCE PURSUANT TO THE PROTOCOL IN PLACE DURING SUSPENSION OF NORMAL COURT OPERATIONS DUE TO THE COVID-19 OUTBREAK.

DATE: May 1, 2020

APPEARANCES:

Michael R. Nyhof for the Applicant, (participating in the teleconference)

The Respondent self-representing

ENDORSEMENT

Introduction

1. Before me is a motion, brought by the Respondent mother herein, for substantive relief that effectively would suspend agreed and court-ordered "in person" access between the Applicant father and the parties' seven-year-old son for the balance of the ongoing COVID-19 pandemic.

2. In particular, the Respondent seeks a court order directing "that, while COVID-19 remains the subject of government directions, including public safety directives and subject to further court order, the [Applicant] shall have access limited to only a virtual relationship with the child."

3. The motion was found by the triage judge to be presumptively urgent, meriting a teleconference hearing pursuant to the "Notice to the Public and Profession" issued by the Chief Justice on March 15, 2020.

Background

4. By way of further background, I begin by noting that this matter was before me, by way of an earlier urgent teleconference hearing, just nine days ago.

5. At that time, I heard and decided a motion, brought by the Applicant, for a court order addressing an interruption in the agreed and court-ordered access he was to have been enjoying with the parties' seven-year-old son Owen.

6. In particular, the Respondent had unilaterally suspended that access, in an effort to address concerns that the Applicant had not been taking the COVID-19 pandemic seriously, and could not be trusted to follow corresponding government and public health guidance and directives issued to promote health and safety.

7. A detailed presentation of the circumstances leading to that earlier motion, the general principles governing the court's approach to such disputes, my decision and the reasons for that decision are set forth my extended endorsement dated April 22, 2020. I accordingly will not repeat all that information here. This decision should instead be read together with that earlier endorsement.

8. For present purposes, I think it sufficient to summarize my earlier decision as follows:

    a. I agreed with the Respondent that acknowledged behavior by the Applicant, during a "March break" access visit, (March 18-22, 2020), created legitimate cause for concern that the Applicant had not yet grasped the seriousness of the situation posed by the global COVID-19 pandemic that clearly had reached Canada, Ontario and London, and was not yet taking appropriate measures, (recently recommended by government and public health representatives in a highly publicized manner), to mitigate the risk of the Applicant and/or Owen being infected by the virus. For example, while Owen was staying with the Applicant, the Applicant had hosted a large backyard social gathering and had also arranged for Owen to play with other children.

    b. Notwithstanding those legitimate concerns, (which in my view were reinforced by the Applicant's inappropriate initial response to the Respondent expressly raising such concerns), I noted that it was wrong for the Respondent to have resorted to unilateral self-help, effectively suspending the Applicant's court-ordered "in person" access with Owen indefinitely, without asking the court to determine, on an urgent basis, whether that was the appropriate course of action.

    c. Based on the record before me at the time of the earlier hearing, I also was satisfied, (e.g., by the detailed written and oral assurances provided to the court by the Applicant and his counsel, and the Applicant's proactive willingness to subject

himself to further terms and conditions governing his exercise of access rights during the pandemic), that the Applicant had realized and accepted:

i. that his earlier conduct had been inappropriate; and

ii. that future meticulous adherence to COVID-19 safety measures, (including social distancing, use of disinfectants and compliance with public safety directives), was essential to Owen's safety.

d. Conversely, I was not persuaded, on the record before me, that the presumed rationale for continued parent contact under the existing court order had been displaced by sufficient evidence that continued contact between Owen and his father, during the pandemic, would compromise Owen's safety and well-being.

e. In the circumstances, I accordingly directed that the existing court-ordered access should resume immediately, (without any further unilateral withholding by the Respondent), albeit subject to further court directions providing what I considered to be additional safety assurances reasonably required by the pandemic, and by the Applicant's acknowledged past failings in that regard. Full details of those directions are set forth in my earlier endorsement and order. However, amongst other things, the Applicant was ordered:

i. to meticulously adhere to COVID-19 safety measures, including social distancing, use of disinfectants and cleaning practices, and compliance with public safety directives;

ii. to not have anyone else present during his time with Owen;

iii. to provide the Respondent with a written indication of Owen's activities and corresponding safety measures taken during each access visit, and answer any of the Respondent's questions in that regard; and

iv. to notify the Respondent immediately if the Applicant or Owen showed any symptoms of having the coronavirus, and agree to a corresponding immediate suspension of access pending further party agreement or court order.

f. The imposition of further terms and conditions sought by the Respondent was denied, for reasons outlined in my earlier endorsement.

g. I directed some specified "make-up" access time between Owen and his father.

h. The Respondent also was ordered to pay the Applicant's costs of the motion, fixed in the all-inclusive amount of $1,500.00, payable within 30 days.

9. Access between the Owen and the Applicant resumed one week ago; i.e., with a week-end access visit commencing on Friday, April 24, 2020.

10. However, developments occurring over the course of that week-end access visit, (brought to the attention of the Respondent through personal observations, "Face-Time" communications between Owen and his mother, and the required post-visit written report supplied by the Applicant to the Respondent), renewed the Respondent's concerns about the Applicant's understanding of the novel coronavirus, his following of applicable safety guidelines and protocols, and his compliance with the provisions of my order.

11. The concerns raised and emphasized by the Respondent are described in detail in her motion material, but generally fall into the following three categories:

i. the Applicant's inappropriate use of personal protective equipment, or "PPE";

ii. the Applicant allowing other children to join in a walk the Applicant and Owen made around their neighborhood; and

iii. the Applicant allowing Owen to play a form of street soccer with several other children.[1]

12. In relation to the PPE concern:

a. According to the Respondent, when the Applicant picked Owen up for the start of the relevant access visit on Friday, April 24, 2020, the Applicant was wearing a medical mask and gloves but seemed to lack an understanding of the proper use of such personal protective equipment to minimize possible risks to Owen and himself. In particular, to the extent use of a mask and gloves is intended to trap and thereby prevent air-born and surface traces of the virus from reaching the face and hands,

[1] In the motion materials, there are indications that Owen also exhibited some coughing when he woke on the morning of Saturday, April 24, 2020, and that the coughing was not reported to the Respondent until the Applicant supplied his post-visit written report on Sunday, April 25, 2020. However, the coughing did not persist, was not noticed by the Applicant during the remainder of the week-end, and it seems no coughing by Owen was noted by the Respondent following Owen's return from the relevant access visit. The coughing and its reporting were highlighted by the Respondent only in her Reply material, and mentioned only in passing during the course of the teleconference hearing. It seemed to me that, by the time of the hearing at least, the parties did not regard the fleeting instance of non-sustained coughing by Owen as a symptom of COVID-19 infection, nor a significant concern. In my view, they were right to do so.

the Applicant unfortunately brought Owen immediately into contact or close proximity to those protective items by physically picking Owen up and raising Owen's face close to the Applicant's mask. The Applicant then risked exposing himself to the virus by using his gloved hands to remove his mask improperly.[2]

b. In his responding motion material, the Respondent acknowledged wearing the described PPE when he picked Owen up for the access visit, and acknowledges that he then physically raised Owen, but denies that Owen came into contact with the exterior of his protective mask. In any event, the Applicant acknowledged and expressed his gratitude for the additional PPE information and instructions supplied by the Respondent, and indicated his intention to follow those instructions in the future.

13. In relation to the concerns about other children joining the Applicant and Owen for a walk around the Applicant's neighborhood:

a. In a late afternoon "Face-Time" conversation between Owen and his mother on Friday, April 24, 2020, Owen indicated that, (from his perspective at least), he and the Applicant had taken a trip by walking around the Applicant's neighborhood, during which they had been joined by three other children from two other households.

b. In his post-visit written report of activities provided to the Respondent, the Applicant included a description of going "around the block" with Owen, (along a particularly described route), with Owen using his "hoverboard". The Applicant indicated that, during that outing, which took place on Friday, April 24, 2020, he and Owen had maintained a minimum distance of six feet "from all other pedestrians out for walks", (e.g., "moving on the grass to allow others to pass"), but said nothing of other children being involved.

c. In his responding motion material, the Responded indicated that he and Owen went "around the neighborhood" not only on the aforesaid Friday afternoon, but also at "other times during [their] weekend together". The Applicant once again emphasized that he and Owen had remained six feet away from others at all times during those outings. The Applicant acknowledged that other children were seen "along the way", and that there was an occasion when three particular children, who were friends of Owen, followed on hoverboards and a bike. However, the Applicant says those three children followed at a distance of 10-15 feet.

[2] In her motion material, the Respondent included the relatively simple and straightforward instructional material, circulated by the World Health Organization, explaining and demonstrating the proper and improper use of protective masks.

14. As for the concern about Owen being allowed to play soccer with other children:

a. On Saturday, April 25, 2020, Owen had another "Face-Time" conversation with his mother, during which he described playing "soccer on the road" with three other named boys, in the presence of four parents, (including the Applicant), from three different households. When Owen returned to the Respondent the following day, he provided her with a further description of playing soccer, including at least one apologetically remembered instance when he admittedly "got a little too close" to one of the other children, because they "forgot about the social distancing".

b. In the post-visit written report of activities provided by the Applicant to the Respondent, Owen was said to have played a modified form of soccer with other boys on two occasions; i.e., on Friday, April 24, 2020, and again on Saturday, April 25, 2020. The Applicant described in further detail how Owen had wanted to join friends who were playing with a soccer ball, and how a triangle of three soccer nets, each at least 20 feet from the other, accordingly had been set up in a driveway and on the nearby street. The ball used in the game was said to have been disinfected by the Applicant, using Lysol wipes. All the boys playing the game, (including Owen), were said to be "keenly aware of the social distancing rules", and therefore "very good at monitoring themselves", but they also were instructed to use only their feet and not their hands, and to stay "next to their net". Watching parents, (at least two on each occasion, including the Applicant), also gave warnings from time to time when the boys were getting close to being six feet apart. The Applicant also emphasized that he had made inquiries, before Owen participated in the relevant soccer games, to confirm that no one in the other relevant households had engaged in travel outside Canada, displayed COVID-19 symptoms over the previous 14 days, or been around anyone displaying COVID-19 symptoms over the previous 14 days.

c. In correspondence sent by Applicant counsel Mr Nyhof to the Respondent on April 27, 2020, (following receipt of an indication of the Respondent's intended motion but prior to the delivery of motion material), Mr Nyhof added that there had been an occasion when Owen touched the ball with his hands, but emphasized that his hands thereafter were immediately washed with sanitizer.

d. In his responding motion material, the Applicant repeated much of the above information about the relevant soccer activity, albeit with added detail. For example:

    i. The Applicant emphasized that Owen had seen two neighborhood boys he knew playing soccer by kicking a ball back and forth to each other across the street, and that Owen had "wanted to play too".

ii. The Applicant explained how he had retrieved a third hockey net from his home, (i.e., Owen's hockey net), to help set up the eventual "triangle" setting of the soccer game.

iii. The Applicant emphasized that the boys were instructed not to go within 10 feet of each other, and that he showed Owen how far that was.

iv. The Applicant stressed that the boys were told not to touch the ball with their hands or anything but their shoes, and "for the very large part" the boys complied with that instruction. He acknowledges that there was an occasion where Owen "touched the ball with his hand by accident", but says that Owen's hands and the ball were then "immediately washed" with Lysol disinfectant before Owen was allowed to "play some more".

v. The Applicant says that neither occasion of the soccer game being played involved a "gathering", as each of the children and parents stayed at least 10 feet away from each other except on "one occasion" when Owen "got within about six feet of another child". The Applicant says he admonished Owen on that occasion, and that it did not happen again.

Party positions

15. The respective positions of the parties may be summarized broadly as follows:

a. The Respondent emphasizes that she is sincerely and extremely worried about Owen's safety, and submits that events since the making of my order on April 22, 2020, have shown that the Applicant simply cannot be trusted to follow safety guidelines and protocols nor related court-orders during the pandemic. While recognizing that Owen's relationship with his father is important and needs to be maintained, and committing to do everything possible to facilitate a "virtual" relationship between the Applicant and Owen, she feels that Owen's best interests now require temporary suspension of the Applicant's "in person" access with Owen for the remainder of the pandemic. In her words, she feels strongly that "the Applicant was given a second chance and does not deserve a third".

b. From the Applicant's perspective, the Respondent essentially is an embittered "sore loser" who, in the wake of my order, is adopting an insincere, exaggerated and overly-protective approach to Owen's safety in an effort to frustrate the Applicant's access rights. He emphasizes the many measures he has taken to follow pandemic-related safety guidelines and protocols, (e.g., in terms of wearing PPE, use of

disinfectants, and focus on generally maintaining a six foot distance from others), and the sincerity of his concern for Owen's safety. He feels that he has managed virus-related risks appropriately, and that his willingness to allow Owen to engage in activity like the described soccer play was in accordance with Owen's expressed desire to play with others, after being isolated for so long, and a reasoned effort to strike a balance that took steps towards a return to normality while monitoring such activity to address corresponding safety risks.

General principles

16. As noted above, the general principles that have emerged and/or been emphasized in addressing such disputes were outlined at length in my earlier endorsement, and I accordingly will not repeat them here.

17. I nevertheless pause to emphasize once again that such access determinations are not determined by what may promote the respective interests of parents, or as any form of punishment for parents who may have made questionable parenting decisions.

18. At all times, the court's proper focus is on the best interests of the child, and the need to address and balance multi-faceted concerns bearing on that determination. Clearly, the physical safety and well-being of a child must be given extraordinary priority in that regard.

19. However, our courts also repeatedly have emphasized that, so long as such safety and welfare concerns are capable of being adequately addressed, maintenance of meaningful contact between a child and both of his or her parents is also extremely important.

20. In the real world, striking an appropriate balance between such competing concerns is not always easy or straightforward, or amenable to perfect solutions.

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21. In terms of the proper approach to be taken to the current situation, I start by indicating, (as I did during the course of the teleconference), that I am not persuaded by efforts to attribute malicious or other improper self-interested motives to the Respondent's current motion. To my objective eyes, the circumstances do not support such inferences. Without limiting the generality of the foregoing:

    a. The Respondent clearly respected, accepted and acted in accordance with my earlier endorsement and order. The Applicant's access with Owen was immediately reinstated, the Respondent promptly paid an initial $500.00 instalment towards satisfaction of my cost award while making arrangements for payment of the

balance, and the Respondent has dealt with renewed concern about Owen's safety by taking proper steps to bring the matter back before the court while continuing to abide by existing court orders.

b. The Respondent's written and oral submissions have been advanced in a calm, reasonable and respectful manner.

c. For the reasons outlined below, I think some of the Applicant's conduct since the making of my earlier order does give rise to further legitimate concern about the Applicant's approach to maintenance of Owen's health and safety.

22. At the same time, I also have no doubt that the Applicant loves Owen, and has taken significant steps to follow pandemic-related health and safety guidelines and protocols.

23. My concern lies in the fact that, in an effort to make Owen happy, the Applicant apparently has not learned and/or followed all such guidelines and protocols, and also has demonstrated a current willingness to approach such matters - and my court order - in a manner that "pushes the envelope" of acceptable conduct in a desire to help things "get back to normal"; i.e., instead of erring on the side of caution in terms of Owen's broader best interests.

24. In that regard, I am not persuaded that the Applicant's failure to use PPE in a completely proper manner represents a significant concern. The Applicant's use of such equipment reflects a commendable desire to proactively take precautions while engaging in necessary activity; e.g., picking Owen up for the start of an access visit. The Applicant also responded positively and gratefully to the receipt of further guidance and information from the Respondent in relation to when and how such PPE equipment should be used, and when it is not necessary.

25. I similarly am not troubled by the indications that a number of other children, who are friendly with Owen, followed the Applicant and Owen at a distance as the father and son enjoyed a walk around the Applicant's neighborhood. Without limiting the generality of the foregoing:

a. Walking outdoors while maintaining social distancing is not only a permissible activity during the pandemic, but one that promotes a recognized need to maintain physical and mental health until the current COVID-19 safety protocols and guidelines can be relaxed. The Respondent and Owen engage in similar activity when they are together.

b. The Applicant inherently has no ability to prevent other parents from allowing other neighborhood children to go outside without parental supervision, or to prevent the corresponding possibility of such other children recognizing Owen and following the Applicant and Owen at a distance as they complete their independent walk around the neighborhood.

c. If such children had attempt to come too close to Owen, the Applicant would have had a duty to intervene and take preventative action. If such attempts persisted, it may have been appropriate for the Applicant and Owen to return to the safety of the Applicant's home as soon as possible. However, the evidence before me does not indicate or suggest that the need for such actions materialized.

26. I nevertheless am troubled by the acknowledged indications that Owen was permitted to engage repeatedly in the described soccer activity, and by the Applicant's efforts to defend and justify that activity. Without limiting the generality of the foregoing:

a. As highlighted by the material filed by the Respondent, pandemic-related safety measures outlined by the government and health care agencies are not limited to recommendations and directives concerning general social distancing, use of disinfectants and cleaning practices; i.e., the specific examples highlighted in my earlier order. To the contrary, as emphasized in the prohibitions enacted by the Ontario government and circulated by the office of the provincial Premier on March 28, 2020, the current safety measures include express indications that people currently should refrain from additional specified activities, including:

i. non-essential trips outside the home;

ii. social gatherings;

iii. visiting friends;

iv. engaging in group activities or sports; and

v. play dates.

b. A clear common denominator in all such prohibitions is the importance of avoiding the health and safety risks inherent in all such desirable but unnecessary activities. The prohibitions include no suggestion that such activities may or should be taken so long as people also take additional measures to mitigate the associated risks. In my view, the message from the Ontario government is clear: people must err on the

side of caution and not voluntarily choose to run such risks, but avoid such activities altogether.

c. In my view, the acknowledged soccer play outlined in the evidence before me, and the efforts by the Applicant and Applicant counsel to defend and justify such activity, (i.e., as opposed to recognizing that it was inappropriate and committing to such activity not being permitted again), accordingly raises legitimate and serious concern. In particular:

   i. Such soccer activity and interactive play with other children was a desired but non-essential activity outside the Applicant's home. Compared to situations such as other children independently following the Applicant and Owen during a walk around the Applicant's neighborhood, this was an activity and interaction that the Applicant not only permitted but actively facilitated and encouraged; e.g., by bringing Owen's hockey net to the relevant location so that the interactive play could be expanded to include Owen.

   ii. In my view, the soccer activity clear fell within the concepts of a social gathering, visiting with friends, engaging in group activity/sport, and interactive child play. By any measure, I think, it accordingly fell within the type of activities the Ontario government currently has prohibited during the COVID-19 pandemic, and accordingly was something to be avoided rather than actively facilitated and encouraged.

   iii. I was neither impressed nor persuaded by efforts to argue that the relevant activity should not be considered a prohibited gathering, friendly visit, group activity/sport or interactive child play, or viewed as unacceptable, simply because efforts were made to have the participating children understand specified rules of engagement, (e.g., to maintain a minimum distance between each other and refrain from touching the ball with hands), respond to intermittent parental warnings, or pause play for the intermittent application of disinfectant to the children's hands and/or the ball they were using when that seemed appropriate. In my view, such an approach inherently and fundamentally runs counter to that mandated by the applicable government prohibitions. In particular, such an approach essentially attempts to manage and mitigate the risks being run by engaging in such activities, instead of avoiding such unnecessary risks altogether.

   iv. I also think it needs to be recognized and emphasized that children inherently lack the maturity, disciplined concentration and self-restraint to abide by rules and restrictions in the same manner as adults. Using the present case as an

example, seven-year-old children with a pent up desire for physical activity and a return to life before the pandemic, intent on playing soccer, and focused on tracking and dealing with a ball that may be moving in a rapid and unpredictable manner, reasonably cannot be expected to ensure that they consistently refrain from use of their hands or coming too close to other children. Owen's acknowledged failures in that regard demonstrate and underscore the point. Young children such as Owen should not be burdened with such risks and corresponding decision making. Nor do I think it a sufficient answer to argue that steps were taken to address such risks when they materialized; e.g., by verbal warnings, application of disinfectant, etc. The simple reality is that, in accordance with prohibitions issued by the Ontario government, such risks should not have been courted in the first place, especially when much about the coronavirus, and its corresponding risks, remains uncertain.

d. In my view, the Applicant's conduct also violated the provisions of my order indicating that the Applicant was not to "have anyone else present during his time with the child". In that regard, I think it is no answer to argue, in essence, that the other children playing soccer with Owen, and the other nearby parents watching and helping to supervise such activity, were not present because they were present at what was perceived to be a safe distance. The clear intent of my order was to restore access between Owen and his father, for the reasons set forth in my earlier endorsement. It was not to facilitate interaction between Owen and others, and I would have thought it clear that the provisions of my order made it clear that the Applicant was not to run the risks inherent in such broader interactions while Owen was in his care.

e. I was troubled not only by the Applicant's decision to permit such activity, (which at best reflected ignorance of the full scope of the Ontario government's pandemic prohibitions outlined above), but also by the Applicant's subsequent and ongoing attempts to defend his decisions in that regard. In particular, instead of accepting that Owen should not have been permitted to engage in the relevant soccer activity, the Applicant has persisted in offering numerous suggested justifications in that regard. For example:

    i. The Applicant has emphasized that Owen expressly asked to join in the relevant soccer activity, and very much wanted to do so as he had not seen those particular friends, or engaged in such play, for a long time. Even assuming that to be true, decisions regarding pandemic-related health and safety risks obviously cannot and should not be entrusted to a seven-year-old. The occasion was one for responsible adult decision-making on the part of the

Applicant, and in my view the Applicant responsibly should have said "no" to Owen's request, (as difficult as that may have been), providing Owen with appropriate expressions of regret along with explanations as to why that sort of activity necessarily had to be avoided for the time being.

ii. The Applicant has emphasized that, prior to allowing Owen to participate in the soccer activity, he made appropriate inquiries to determine whether anyone from the other households involved had engaged in travel outside Canada, displayed coronavirus infection symptoms within the previous 14 days, or encountered anyone else who had displayed such symptoms within the previous 14 days. At best, I think such an approach reflects an approach based on outdated COVID-19 information. For many weeks now, COVID-19 clearly has achieved the status of a global pandemic, with a widespread presence within and across Canada, such that its spread obviously is no longer dependent on international travel to and from other affected nations. It also has been recognized and widely publicized that people are capable of being infected with COVID-19 and spreading the virus without necessarily being symptomatic.

iii. During the teleconference hearing, it was suggested by and/or on behalf of the Applicant that COVID-19 presents only minimal risks to children. I was not at all impressed or persuaded by such arguments. In that regard, I believe I am entitled to take judicial notice of the reality that, while the percentage of confirmed COVID-19 cases involving children currently may be significantly lower than those involving adults, (and older adults in particular), children clearly are not immune from the virus, and the virus poses potentially lethal consequences for them as well. While much about the impact of COVID-19 on children remains uncertain, (which itself is a cause for concern), there have been widely-reported instances of children dying from the virus, including young teenagers in the United Kingdom and infants in the United States. Schools in Ontario accordingly remain closed, for very good reasons.

iv. While the Applicant suggested that Owen should be permitted to engage in such interactive soccer play activity with children from other households, in an effort to move back towards something resembling normality, in my view this clearly is not a time for individual parents to be "pushing the envelope" of acceptable activity despite the current guidance and prohibitions issued by the government and public health officials, and despite applicable court orders.

f. While it was suggested that the Respondent's current motion was unnecessary and inappropriate, insofar as the Respondent could instead have proceeded by simply expressing her concerns to the Applicant, in which case the Applicant could and would have responded accordingly, in my view the suggestion is entirely at odds with the manner in which the Applicant has responded to the Respondent's motion. Up to and during the latest teleconference hearing, the Applicant clearly still had not accepted that permitting Owen to engage in such activity was inappropriate. Nor had the Applicant committed to not permitting such activity in the future, while the pandemic-related restrictions remain in place. To the contrary, the Applicant continued to defend and justify his decisions, arguing that such activity was appropriate despite the government ongoing recommended and mandated COVID-19 safety measures, and despite the provisions of my earlier court order. In the circumstances, I think it was entirely necessary and appropriate for the Respondent to bring her current motion.

27. In my view, the question accordingly is not whether the circumstances require court intervention to address such concerns, in relation to the Applicant's exercise of access with Owen, but the form such intervention should take.

28. As noted above, the Respondent feels that the appropriate course of action is a suspension of the Applicant's "in person" child access rights, (i.e., the rights to which the Applicant otherwise is and should be entitled pursuant to the existing court orders), for the balance of the COVID-19 pandemic. In support of that requested relief, the Respondent emphasizes not only the Applicant's demonstrated failings to date, (i.e., in terms of compliance with COVID-19 safety protocols), but past experience wherein the Applicant was required to travel and enjoy only "virtual" access with Owen over the course of several months, without any apparent long-lasting detrimental impact on the relationship between father and son.

29. However, as I indicated during the course of the most recent teleconference hearing, I am not persuaded that such a Draconian outcome, (i.e., suspension of all "in person" access between Owen and his father for the duration of the pandemic), is necessary or appropriate to address Owen's best interests. In that regard, I bear in mind considerations that include the following:

a. Although the Respondent emphasizes that Owen has managed without having "in person" contact with his father for extended periods in normal times, (i.e., prior to the onset of the COVID-19 pandemic), these clearly are not normal times, and abnormality of life during the pandemic actually reinforces the desirability of maintaining a child's contact with both parents if that can be done safely. In that regard, my earlier endorsement already noted existing court authority emphasizing

that, in troubling and disorienting times, children need the love, guidance and emotional support of both parents now more than ever, and that vitally important family relationships accordingly should not be placed "on hold" indefinitely for the duration of the pandemic if such outcomes reasonably can be avoided. In Owen's case, he has no siblings at home with him during the pandemic, and currently lacks the comfort and security of regular contact with his friends, teachers and more extended relatives. In my view, completely depriving Owen of all "in person" contact with his father as well, for the duration of the pandemic, is something that should be avoided unless nothing short of such an order is capable of adequately protecting Owen's safety and well-being.

b. As also noted in my earlier endorsement, authorities have confirmed that there is a presumption that existing court-ordered parenting arrangements are in a child's best interests and should continue during the COVID-19 pandemic, subject to whatever modifications may be necessary to ensure COVID-19 precautions, unless the evidence makes it clear that continued contact with a parent will compromise a child's safety or well-being.

c. In my view, the particular situation before me does not involve a parent intent on ignoring the COVID-19 pandemic, or a parent set on deliberate defiance of pandemic-related prohibitions, restrictions and safety recommendations issued by the government, public health organizations and/or the court. The situation instead involves a parent who recognizes the need for compliance in that regard, and who has been making considerable efforts to demonstrate such compliance, who nevertheless also has demonstrated a less than adequate understanding of what the current situation requires, and the need to err on the side of caution in his approach to such matters.

30. In my view, what the situation requires is temporary suspension of the Applicant's rights of "in person" access with Owen, not as any sort of punitive measure, but:

a. to provide the Applicant with a further extended opportunity to investigate and study all aspects of current COVID-19 safety measures, including those prohibitions put in place by the Ontario government, and the reasons for those prohibitions; and

b. to make it crystal clear to the Applicant that failure to learn, understand and properly comply with such safety measures and related court orders, (e.g., by taking a strict rather than lax approach to their interpretation and application), presents unacceptable risks to Owen's health and safety, and may very well result in more extended suspension and/or complete termination of "in person" access visits between Owen and his father while the pandemic continues.

31. In the current circumstances, I think a three-week suspension would be sufficient in that regard.

32. In particular, I intend to make an order indicating that, while the provisions of the court's existing orders shall remain in place in all other respects, the rights of "in person" access between the Applicant and Owen prescribed therein shall be suspended for a three week period commencing on May 1, 2020, and ending at 3:30pm on Friday, May 22, 2020.[3]

33. To be clear, the Applicant shall still be entitled to the two week-ends of "make-up" access contemplated and directed by my earlier order, but that make-up access, to the extent it has not already been exercised, shall not take place during the three week suspension period noted above.

34. The relief described above also will be granted without prejudice to the Respondent's ability to seek further relief from the court, if the Applicant fails to demonstrate a more educated and cautious approach to such COVID-19 safety measures in the future.

35. Hopefully, such further requests for court intervention will not be necessary.

36. In particular, while my comments herein hopefully will bring the seriousness of the situation and need for strict COVID-19 safety measure understanding and compliance home to the Applicant, they also hopefully will not be viewed as an invitation by the Respondent to bring the matter back before the court immediately if there are any concerns, even of a trifling nature, in that regard.

37. To that end, I think it may be helpful to repeat the following comments expressed in *Ribeiro v. Wright*, 2020 ONSC 2220, at paragraph 23, (and echoed in subsequent cases), emphasizing the court's expectation of all parents in these challenging times:

> Judges won't need convincing that COVID-19 is extremely serious, and that meaningful precautions are required to protect children and families. We know there's a problem. What we're looking for is realistic solutions. *We will be looking to see if parents have made good faith efforts to communicate; to show mutual respect; and to come up with creative and realistic proposals*

[3] During the course of the teleconference hearing, I indicated that I would be releasing a typed endorsement with my full decision as soon as possible. However, as an interim measure, I also indicated that I would be suspending the Applicant's rights of in-person access for a time, and that Owen accordingly would not be required to attend the access visit with his father than had been scheduled to begin at 3:30pm on May 1, 2020.

which demonstrate both parental insight and COVID-19 awareness. [Emphasis added.]

Costs

38. During the teleconference hearing, I invited cost submissions based on my indicated intention to suspend the Applicant's rights of "in person" access with Owen for a time, albeit for a duration and for more extended reasons to follow in my typed endorsement.

39. As for the Respondent:

    a. In her motion material, the Respondent asked for an order reversing my cost award in relation to the Applicant's previous motion, (including provision for return of the $500.00 instalment already paid by the Respondent in that regard), and an order awarding the Respondent costs in relation to her motion.

    b. In further oral submissions, the Respondent indicated that she had incurred legal fees of $400.00, paid to professional counsel who had provided the Respondent with certain advice and guidance without going on record. Moreover, although the Respondent was a salaried employee, (and still working from home), she also was required to use up three accumulated "sick days", to which she was otherwise entitled, in order to devote appropriate time to her motion; e.g., in terms of locating and gathering appropriate exhibits, preparing her own motion material, reviewing material filed in response by the Applicant, and preparing for and participating in the relevant teleconference hearing. The relevant three "sick day" entitlement was estimated to have a value to the Respondent of $807.00, before taxes.

40. As for the Applicant:

    a. No costs were sought by the Applicant in relation to the Respondent's motion.

    b. Applicant counsel nevertheless did question whether the self-representing Respondent should be entitled to costs in the circumstances, and submitted that the amount of costs being sought by the Respondent was excessive; e.g., based on the somewhat modest length of the initial and reply affidavit material the Respondent had filed.

41. As I indicated to the Respondent during the course of the teleconference, I do not think it appropriate to reverse or vacate the cost award I made earlier, in relation to the Applicant's motion.

42. In particular, although the Respondent feels the position she initially took now has been vindicated, the outcome of the earlier motion was the appropriate one based on the existing record, for the reasons outlined at length in my earlier endorsement. The earlier cost award similarly was appropriate, having regard to the competing positions taken by the parties in relation to that motion and its outcome.

43. I nevertheless see no reason why the Respondent should not recover a measure of cost compensation in relation to her motion, in respect of which I think she clearly was the successful party. In that regard:

    a. the court has jurisdiction to award costs to a self-represented litigant;[4]

    b. in such cases, the self-represented litigant should demonstrate that he or she did work ordinarily done by a lawyer, and that he or she, as a result, lost the opportunity to engage in remunerative activity;[5] and

    c. detailed evidence is not required to prove lost opportunity costs.[6]

44. In this case, it seems clear that the self-representing Respondent, (albeit with guidance received from legal counsel who required payment), clearly assumed primary responsibility for doing the work a lawyer normally would do to prepare and argue such a motion. Again, she prepared the material filed initially and in reply, (including not only her notice of motion and affidavits but numerous exhibits that included documentation confirming current COVID-19 safety recommendations and protocols), obviously reviewed the Applicant's responding material, and then prepared for and participated in the relevant teleconference hearing of her motion.

45. Evidence of the Respondent's "opportunity cost" in that regard was somewhat vague, particularly in relation to how the three "sick days" devoted to the matter came to be assigned a particular value of $807.00 before tax. Having said that, I also have no doubt that such sick days had a real economic value from the Respondent's perspective, and accordingly represent a remunerative benefit from her employment that she was obliged to sacrifice and forego to bring her motion.

46. On the whole, bearing in mind that opportunity cost, and the legal fees the Respondent paid for professional legal assistance, I think justice will be done in this case, from a costs

[4] See *Fong v. Chen*, [1999] O.J. No. 4600 (C.A.).

[5] See *Mustang Investigations v. Ironside*, [2010] O.J. No. 3184 (Div.Ct.).

[6] See *Benarroch v. Fred Tayar & Associates P.C.*, 2019 ONCA 228.

perspective, if the Applicant is ordered to pay the Applicant the all-inclusive sum of $750.00 in costs relating to the Respondent's motion, payable within 30 days.

47. Again, that cost award is independent of the cost award I made earlier in relation to the Applicant's motion, and my formal order in relation to the Respondent's motion will reflect that reality.

48. Having said that, I note that a sensible "set off" approach would permit the Respondent to have that $750.00 cost entitlement vis-à-vis the Applicant set off against her apparently remaining $1000.00 cost obligation still owed to the Respondent.

49. In particular, if the Respondent already has paid $500.00 towards satisfaction of the earlier $1,500.00 cost award made in favour of the Applicant, (in relation to his earlier motion), it would seem that all cost obligations arising from the two motions effectively would be addressed and satisfied, (taking into account an appropriate set off of the two obligations), by the Respondent simply making a further $250.00 payment to the Applicant.

Order

50. By way of summary, a formal order shall issue, in relation to the Respondent's current motion, whereby, without prejudice to the Respondent's ability to seek further relief from the court if the Applicant fails to demonstrate a more educated and cautious approach to COVID-19 safety measures in the future:

    a. All provisions of the court's orders made herein on November 20, 2018, and April 22, 2020, shall remain in place subject to the following:

        i. The Applicant's right to "in person" access with the child otherwise specified by the aforesaid orders shall be suspended for a three-week period from May 1, 2020, to 3:30pm on Friday, May 22, 2020; and

        ii. To the extent the Applicant has not already enjoyed the two week-ends of additional "make-up" access ordered by the court on April 22, 2020, he shall retain the right to such make-up access, but it shall not be exercised during the aforesaid period during which the Applicant's rights of "in person" access with the child have been suspended.

    b. The Applicant shall pay the Respondent her costs of the motion, fixed in the all-inclusive amount of $750.00, payable within 30 days.

51. To the extent necessary, if a draft of an appropriate formal order is supplied to me in Word format via the trial co-ordinator, I will sign the order electronically and return it in PDF format to be issued, entered and circulated.

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Justice I.F. Leach