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: April 22, 2020

APPEARANCES:

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

The Respondent self-representing

ENDORSEMENT

Overview

1. The Applicant father herein has brought a motion, (found by the triage judge to be presumptively urgent and meriting a teleconference hearing pursuant to the "Notice to the Public and Profession" issued by the Chief Justice on March 15, 2020), to address an interruption in the agreed and court-ordered access he was enjoying with the parties' son prior to the onset of the current COVID-19 pandemic.

2. The interruption stems from the strongly held view of the Respondent mother that continuation of the "normal" access arrangements presents an unacceptable risk of harm to the child during the pandemic. In particular, the Respondent feels strongly, based on alleged behavior of the Applicant in the past, that he simply cannot be trusted to adhere to government and public health guidance and directives that have issued to promote public health and safety during the pandemic.

3. The Applicant says he can be trusted in that regard, that he is willing to abide by further court directives to address such concerns, and that his access should be restored accordingly, with provision for additional access to "make up" for scheduled access that has been frustrated and denied.

Background

4. Although the competing underlying affidavits affirmed by the parties were relatively brief, (presumably in compliance with the directions of the triage judge), they effectively presented me with a good deal of information, particularly through their numerous attached exhibits.

5. I will not attempt to outline all that information in exhaustive detail here, as much of it seems peripheral to the parties' immediate dispute.

6. In particular, although I can appreciate why the Respondent's position has prompted her to describe and/or provide examples of alleged irresponsible and/or improper behavior and communications by the Applicant in the past, (i.e., to explain why she feels his assurances cannot and should not be trusted now), this clearly is not an occasion to revisit, in detail, past disagreements which the parties apparently were able to surmount, or at least tolerate without the court's assistance and intervention.

7. Moreover, this matter was granted an urgent hearing because it concerned denial of child access for reasons related to the COVID-19 pandemic, and that accordingly remains my primary focus.

8. For present purposes, the background to the present impasse may be summarized as follows:

    a. The parties were involved in a relationship that produced one child; i.e., their son Owen, who is currently seven years old.

    b. The parties concluded prior litigation by entering into minutes of settlement, the substantive terms of which were incorporated into a final court made by Justice Mitchell on November 20, 2018. The order has extensive provisions relating to parenting, residence and access, but they include the following:

        i. Owen is to reside primarily with the Respondent.

        ii. Subject to review and extension as Owen grows older, he is to enjoy access with his father:

            1. every other week-end from Friday at 3:30pm to Sunday at 6:30pm, with provisions extending the start and end times of that week-end access to 3:30pm on Thursday and/or 6:30pm on Monday in cases where either

the Friday or Monday bracketing such a week-end happens to be a statutory holiday;

2. each Wednesday evening from 3:30pm to 7:30pm, with the Applicant to pick Owen up and drop Owen off ; and

3. during additional specified holiday access time, (extending and/or overriding the above weekly arrangements), with provisions essentially specifying which parent Owen will be with during March break and summer vacations, and during other specified holidays throughout the year.

iii. The Applicant and the Respondent are each given the right to telephone and communicate by email with Owen on a daily basis, and Owen has the right to telephone or email the Applicant and the Respondent when he wishes.

c. The material filed by the Respondent, (including copies of several text exchanges), makes it clear that relations and communications between the parties have continued to be strained and difficult at times, with each attributing such difficulties to the other parent being unreasonable. For example, the Applicant feels the Respondent has attempted to frustrate his access by being overly rigid and controlling, and by not accommodating requests for variations. From her perspective, the Respondent feels that the Applicant is frequently non-responsive and/or abusive when the parties are communicating about Owen, and that he is the party guilty of controlling behavior; e.g., by delaying or threatening to delay Owen's return to the Respondent in contravention of the court ordered arrangements.

d. For the most part, however, it seems that the Applicant generally has exercised access with Owen pursuant to the court order, from the time of the order being made up until March 24, 2020.

e. Since March 24, 2020, the Respondent has taken the position, noted above, that Owen's in-person access with the Applicant effectively should be suspended during the current COVID-19 pandemic, as she believes that carrying on with the normal arrangements in the current environment would present an unacceptable health risk to Owen, and accordingly not be in his best interests. The Respondent nevertheless has made efforts to continue and augment "virtual access" between Owen and the Applicant through increased telephone, video and online gaming arrangements.

f. The reasons for the Respondent adopting and adhering to her position are set forth in considerable detail in her preserved written communications with the Applicant

and Applicant counsel, and again in her responding motion material. I have reviewed all that information in detail, and the following summary should not suggest otherwise. However, among the major points emphasized and relied upon by the Respondent are the following:

i. The Respondent is a public health nurse employed by the Middlesex London Health Unit, who currently is working solely from home on COVID-19 case and contact management. Given the nature of the Respondent's employment, I think it fair to infer that, compared to many other members of the public, the Respondent is more keenly aware of news and information relating to the coronavirus, the current global pandemic, and measures that are being pursued to slow the spread of the virus and protect public health until a vaccine is developed to help address the corresponding dangers.

ii. The Respondent therefore reacted with understandable concern when she learned that the Applicant, while enjoying extended access with Owen during the "first half" of the annual March break vacation, (as per the court ordered arrangements), apparently was not taking the virus seriously and complying with government and public health service protocols concerning social distancing and staying at home. In particular, after the Respondent had picked Owen up on Sunday, March 22, 2020, (following a four day visit with his father, which the Applicant had asked to extend on the basis the initial virus-related closure of all public schools should be interpreted as expansion of the March break vacation to three weeks), she learned from the child that:

    1. the Applicant had hosted a social gathering around his backyard "fire pit", attended by numerous guests, on the evening of Saturday, March 21, 2020;

    2. the Applicant also had made arrangements for Owen to have "play dates" with other children; and

    3. Owen was afraid because he had felt warm and had a cough during the time spent at his father's residence, and thought he therefore might have contracted the virus.

iii. Later that day, (i.e., on Sunday, March 22, 2020), the Respondent accordingly sent the Applicant an email, expressing her concerns about what Owen had told her, emphasizing the importance of following government and public health recommendations in relation to the pandemic going forward, and indicating that Owen felt stressed when the rules regarding social distancing

"aren't followed". The Applicant responded with an email saying only this: "He said you gave him the virus. Nice try."

iv. On Tuesday, March 24, 2020, (i.e., the day before the next scheduled access visit between Owen and his father), the Respondent communicated with the Applicant again, through a series of messages exchanged via the "Family Wizard" website. In the course of the messages:

1. The Respondent indicated her view and "decision", (which she had not made "lightly" but "agonized" about), that it was in Owen's best interests to "keep him home" until the parties had "a better handle" on the virus; i.e., in light of the "current environment", and all "expert recommendations", being communicated by health officers, the Prime Minister and Ontario's Premier, that people should be staying at home and engaging in social distancing.

2. In response to initial push back by the Applicant, (e.g., "No, I'll be seeing my child"), the Respondent indicated that she was "sorry", and once again emphasized that staying at home was the "urgent recommendation", and that social distancing was a "must". She repeated her view that the Applicant "having people over" when Owen was with him, (including play dates), was not social distancing, and put Owen at risk. She also indicated her feeling that transferring Owen in the prevailing circumstances would put him at risk. Emphasizing that she now was working from home, and home-schooling Owen, the Respondent indicated that she and the child were "not leaving the house".

v. Despite his initial resistance, the Applicant responded to those further indications from the Respondent with a message saying the following: "Ok as long as that's what happens. We'll make up the missed time after then". In further reply, the Respondent indicated that was "discussion for later".

g. Despite the Applicant's initial acquiescence to a temporary suspension of his access rights, he clearly seems to have reconsidered the situation, and pressed for a resumption of the access contemplated by the court order, as the restrictions prompted by the pandemic looked set to continue for a prolonged and indefinite period. That in turn led to increasingly contentious further communications between the parties in late March and early April. Without exhaustively detailing all those communications, they included the following developments:

i. The Applicant sent the Respondent reported judicial authority, (e.g., *Ribeiro v. Wright*, 2020 ONSC 1829), in support of his request that the court-ordered access be reinstated.

ii. The Respondent repeated her concerns about the Applicant's apparent attitude towards the COVID-19 pandemic and past non-compliance with social distancing protocols, (reinforced by additional observations that the Applicant had brought his mother to pick Owen up for the last access visit), emphasized that she was making efforts to encourage and facilitate increased "FaceTime" and online gaming between Owen and the Applicant, and noted the social and physical distancing and sanitizing practices being followed in her home.

iii. The Applicant provided indications that his relevant hosting of guests had occurred in the early stages of the pandemic, (e.g., when many restaurants and bars were still open), that he and his mother were now both practicing self-isolation, that neither he nor his other recent contacts were symptomatic, and that he and Owen would not be in contact with anyone else during access visits. He urged the Respondent to reconsider her position and follow the existing court order, emphasized that her concerns were unwarranted, and suggested that the Respondent was using the pandemic to deny access, consistent with alleged past efforts on her part to achieve that goal.

iv. The Respondent responded by noting that a number of the Applicant's assertions were problematic or inconsistent. For example, she noted that bars and restaurants had closed by the time of the access visit when the Applicant was still hosting visitors, and his claims of self-isolation seemed at odds with his email indications that recent contacts over the previous week were not symptomatic. They also seemed inconsistent with the Applicant's indications to Owen that the Applicant was still "driving to work".

v. The Applicant acknowledged that he had some of his dates wrong, but reiterated and emphasized his essential point that information concerning the virus was still new and evolving at the time of his gathering on March 21, 2020, and that he was now self-isolating apart from necessary travel as an essential worker, (as he maintains solar energy installations that sometimes require visitation), travel to obtain groceries, and attendances with his mother who continued to be self-isolating apart from contact with her son. The Applicant also high-lighted the fact that the Respondent's partner was still working outside the home during the pandemic; i.e., suggesting that the Respondent was applying inconsistent standards in relation to acceptable pandemic-related behaviour.

vi. The Respondent, apart from addressing the concerns about her partner working outside the home, (e.g., by emphasizing precautions being taken in that regard), emphasized that Owen was doing well and that her position remained unchanged, although she was willing to "revisit" the situation on an ongoing basis "as the pandemic evolves".

h. Frustrated with the ongoing denial of access, the Applicant retained counsel. Mr Nyhof then began writing to the Respondent on April 8, 2020, providing the Respondent with recent decisions of this court addressing similar disputes, and urging the Respondent to reconsider her position and permit the resumption of physical access between Owen and his father. In that regard, it was emphasized that the Applicant now appreciated the concerns relating to COVID-19, was following the recommended risk-mitigation measures, and that the resumption of access accordingly did not represent any increased risk to Owen. The letter asked for an indication of when Owen would be permitted to see the Applicant again, and if the Respondent was planning on waiting "until the pandemic was over, perhaps in 1-2 years", before that would be permitted.

i. On April 10, 2020, the Respondent communicated with Applicant counsel by email, repeating her concerns that the Applicant had not been following recommended measures to mitigate the risk of COVID-19 transmission, and accordingly had put Owen at risk. Emphasizing that Owen's health and safety were her priority, and the steps she had taken to increase "virtual" communication between the Applicant and Owen, she repeated her intention to "revisit [the] situation on an ongoing basis as the pandemic evolves", with a hope that the regular access scheduled could be resumed "as soon as possible".

j. On April 14, 2020, Applicant counsel sent the Respondent further correspondence, emphasizing the following:

i. Although the Applicant admittedly had hosted a gathering when the concept of social distancing was new and not generally followed, he had since responded appropriately to more serious warnings, and was now following social distancing protocols and other COVID-19 related guidelines; e.g., minimizing contact with the rest of the world, working from home without interactions with others to any significant extent, following social distance protocols, washing hands regularly, and wearing a mask in public.

ii. The Applicant had been following the protocols for well over two weeks, (the apparent incubation period for the new coronavirus), and remained asymptomatic.

iii. The Applicant undertook to continue following the protocols, and not have anyone around during his time with Owen.

k. On April 15, 2020, the Respondent replied to the previous day's letter from Applicant counsel, setting out numerous public developments, (e.g., the WHO's declaration of a global pandemic, the closure of public schools, the opening of COVID-19 assessment centres, publications by the Canadian Public Health Agency emphasizing the importance of social distancing, and Ontario and London each declaring a state of emergency), which in her view should have alerted the Applicant to the importance of social distancing during Owen's March break access visit. She also highlighted perceived contradictions in the Applicant's earlier emails, and the tone of the Applicant's earlier communications, reinforcing her concerns that the Applicant could not be trusted.

l. Applicant counsel then sought and obtained leave to have the Applicant's motion herein heard on an urgent basis. Further correspondence sent to the Respondent by Applicant counsel on April 17, 2020, advising the Respondent of the intended motion and hearing, providing the Respondent with further caselaw supporting the Applicant's position, and asking "one last time" for a voluntary resumption of the court ordered access schedule, prompted no change in the Respondent's position.

Party positions

9. By the time of the teleconference hearing of the Applicant's motion, the position of the parties had been distilled a bit further. In particular:

a. Formally, the substantive relief requested in the Applicant's notice of motion was limited to orders:

i. requiring the Applicant to comply with certain conditions relating to his access with Owen, such as meticulous adherence to specified COVID-19 safety measures and prompt communication with the Respondent after each access visit, providing full disclosure of the activities that occurred and steps that were taken to keep Owen safe; and

ii. providing the Applicant with additional access, (as agreed or during the next 2-3 weekends when Owen normally would be with the Respondent), to make up for the access time that had been lost.

b. There was no express request by the Applicant, in his notice of motion, for an order directing resumption of the access mandated by the court's order dated November 20, 2020. However, in my view, that relief is implicit in the orders expressly requested by the Applicant, which clearly are premised on a resumption of access between the Applicant and Owen. Moreover, as Applicant counsel indicated and explained during the course of submissions:

   i. the Applicant should not require an order directing access that already has been ordered; and

   ii. for the time being, at least, the Applicant prefers to avoid exacerbation of an already difficult situation by requesting a finding of contempt on the part of the Respondent; i.e., hoping instead that the Respondent will simply comply with court guidance that the already ordered access should resume.

c. The Respondent brought no formal cross-motion of her own. However, consistent with the position repeated in her correspondence, she effectively asked that the existing court-ordered access be suspended, with the Applicant maintaining only "a virtual relationship" with Owen "until this pandemic is resolved". As somewhat of a "fall back" to that primary position, the Respondent argued that any resumption of access should be subject to 10 terms and conditions set forth in paragraph 15 of her affidavit, and a "police assist" order "as a preventative measure to ensure compliance". The Respondent also opposed the granting of any "make-up" access time, on the basis that Owen was now used to his new routine, (based on a reinforced understanding that everyone should be staying home during the pandemic), that he would not understand why he would be spending additional concentrated time with his father, (i.e., away from his primary home), and that changes to Owen's new routine of staying at home with the Respondent accordingly should be minimized.

d. In reply, the Applicant emphasizes his willingness to abide by additional terms and conditions while exercising access during the pandemic, but takes the position that many of the additional obligations the Respondent seeks to impose, (e.g., requiring the Applicant to provide constant disclosure of his work schedule and permit Owen's use of a tablet to facilitate communication with this mother during all access visits), are unnecessary and inappropriately intrusive/controlling.

e. As far as a "police-assist" order is concerned, the Applicant says he is the party, if any, who arguably requires such an order, based on the Respondent's unilateral "self-help" refusal to comply with the existing court order. However, the Applicant also takes the position that exposing Owen to police enforcement of a court order would not only be unnecessarily traumatizing for the child, but actually increase the risk of Owen being exposed to the virus by forcing him into contact with "front line" police officers, who necessarily continue to interact with various members of the public as part of their essential duties.

General principles

10. In the five to six weeks since regular operations of our court were suspended, and alternative measures have been put in place to hear urgent motions in relation to family law disputes during the pandemic, certain principles have evolved to guide decisions in relation to such matters. They include the following:

a. There is no presumption that the existence of the COVID-19 crisis automatically results in a suspension of "in-person" parenting time. The pandemic, standing alone, is not a reason to suspend parental access.[1]

b. To the contrary, there is a presumption that existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure COVID-19 precautions. Continued parent contact under an existing court order is presumed to be in the child's best interests, unless that rationale is displaced by cogent evidence that such continued contact would compromise the child's safety or wellbeing.[2]

c. There is no blanket policy that children should never leave their primary residence for "in-person" access. Such an approach is inherently inconsistent with a comprehensive analysis of the "best interests of the child". In particular, children's lives and vitally important family relationships cannot be placed "on hold" indefinitely, until COVID-19 is resolved, without risking serious emotional harm and upset. In troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever.[3]

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[1] See *Ribeiro v. Wright*, 2020 ONSC 1829, at paragraph 20; *Thibert v. Thibert*, 2020 CanLii 26427 (Ont.S.C.J.), at paragraph 2; and *Tigert v. Smith*, 2020 ONSC 2220, at paragraph 21.

[2] See *Ribeiro v. Wright, supra*, at paragraphs 7 and 11; *Tigert v. Smith, supra*, at paragraphs 21-22; and *Tudor Price v. Salhia*, 2020 ONSC 2271, at paragraph 9.

[3] See *Ribeiro v. Wright, supra*, at paragraph 10; and *Tudor Price v. Salhia*, *supra*, at paragraph 9.

d. While every decision will be made on a case-by-case basis, courts generally will look for the following:

    i. A parent seeking a deviation from existing parenting arrangements, based on professed COVID-19 concerns, must provide specific evidence or examples of behavior or plans by the other parent that are inconsistent with COVID-19 protocols;

    ii. A parent responding to such concerns must provide specific and absolute reassurance that there will be meticulous adherence to COVID-19 safety measures, including social distancing, use of disinfectants, and compliance with public safety directives; and

    iii. Both parents are expected to provide specific and realistic time-sharing proposals which fully address all COVID-19 considerations in a child-focused manner.[4]

e. Judges will take judicial notice of the fact that social distancing is now becoming both commonplace and accepted, given the number of public facilities which now have been closed, and that this accordingly is a very good time for both custodial and access parents to spend time with their children at home.[5]

f. Unilateral action by a parent to deny court-ordered access, based on COVID-19 concerns, should not be condoned. The entire justice system would be turned over on its head if citizens do not obey court orders. Parents accordingly are expected to proactively bring matters back before the court on an urgent basis where they feel there are pressing reasons for an access order to be changed.[6] Where a parent improperly resorts to "self-help" denial of court ordered access, and there is insufficient evidence to raise a significant concern about another parent's approach to keeping a child safe during the COVID-19 pandemic, "make-up" access time may be ordered.[7]

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[4] See *Ribeiro v. Wright, supra*, at paragraph 21; and *Tigert v. Smith, supra*, at paragraph 29.

[5] See *Ribeiro v. Wright, supra*, at paragraph 21; and *Tigert v. Smith, supra*, at paragraph 29.

[6] See *Tigert v. Smith, supra*, at paragraph 28.

[7] See *Tudor Price v. Salhia*, 2020 ONSC 2271, at paragraph 14.

11. In this case, the Applicant essentially has acknowledged that, during the early stages of the pandemic, he exposed Owen to situations that were inappropriate during the COVID-19 outbreak.

12. As the Respondent emphasizes, there had been numerous developments, in the days before and during Owen's March break access visit with the Applicant, (March 18-22, 2020), alerting anyone paying attention to current events that a global pandemic, with sweeping and serious implications not experienced in living memory, had reached Canada, Ontario and the city of London. In particular:

    a. On March 11, 2020, the World Health Organization declared the COVID-19 outbreak to be a global pandemic.

    b. On March 12, 2020, the wife of the Canadian Prime Minister tested positive for the COVID-19 virus, and the Prime Minister and his family went into self-isolation.

    c. On March 13, 2020, the Canadian government announced that it would be preparing a stimulus package to assist those who were expected to be affected by the pandemic.

    d. On March 16, 2020, the Canadian government announced that, in attempt to slow the spread of the coronavirus, new entry restrictions would be implemented shortly after midnight on March 18, 2020, primarily restricting entry into the country to Canadian citizens and their immediate families, and permanent residents, with the exception of American citizens. All Canadians were urged to return to Canada as soon as possible, and the federal public health agency emphasized the importance of physical distancing.

    e. On March 17, 2020, the Ontario government announced that the province had some evidence of community transmission of the virus and declared a state of emergency, closing bars and restaurants, (with the exception of take-out and delivery services), as well as libraries, theatres, cinemas, schools and daycare centres, and prohibited all public gatherings of more than 50 people; a number that would not be reduced to 5 people until March 28, 2020.

    f. On March 18, 2020, entry into Canada by travelers from the United States was also banned, with certain exceptions, by mutual agreement with the American government.

    g. On March 20, 2020, with the city of London's mayor in self-isolation, the Acting Mayor declared a state of emergency for the city as well, reducing its operations to minimal and essential services.

13. During Owen's last access visit to the Applicant's residence, the Applicant obviously had not grasped the seriousness of the situation, underscored by such highly publicized developments, and was not yet taking appropriate measures to mitigate the risk of he and/or Owen being infected by the virus. I accept that there was legitimate cause for concern in that regard.

14. I also agree with the Respondent that the Applicant's initial response to the concerns raised by the Respondent in that regard was quite inappropriate, and effectively reinforced such concerns instead of addressing and allaying them. In particular, instead of readily acknowledging the seriousness of the situation created by the onset of the pandemic, and the need to modify behavior and take appropriate precautions in that regard going forward, the Applicant's immediate reply to the legitimate concerns raised by the Respondent was curt, antagonistic and flippant.

15. Having regard to such realities, I accept that the Respondent withheld further physical access between Owen and the Applicant based on sincere and reasonable concerns for Owen's safety; i.e., as opposed to "using the pandemic" as a pretext to terminate unwanted access between Owen and his father. In my view, the circumstances and preserved communications between the parties, (e.g., with the Respondent providing detailed reasons for her decision, while emphasizing that the change was always intended to be temporary), along with the Respondent's efforts to augment electronic contact between Owen and the Applicant, militate strongly against any contrary inference.

16. In my view, the extensive correspondence presented by the Respondent also provides a reasonable explanation as to why she had difficulty accepting or trusting the Applicant's later assurances that he was taking the pandemic seriously and following government and public health recommendations concerning measures to mitigate the possibility of virus transmission. Without limiting the generality of the foregoing:

    a. I think it fair to say that the Applicant's past communications clearly have included indications that he is dismissive of the Respondent personally; e.g., frequently making rude and/or sarcastic comments, accusing the Respondent of being obsessed with the Applicant and having mental issues, and describing the Respondent in other unpleasant ways.

    b. Similarly, there have been indications that the Applicant's dismissive attitude towards the Respondent makes him inclined to be equally dismissive of concerns raised by the Respondent in relation to Owen's safety. The Applicant's flippant responses to the Respondent's legitimate concern about the Applicant admittedly

transporting Owen in a vehicle, without using an appropriate car seat, provides a strong example in that regard.

c. There are also documented instances of the Applicant indicating an intention to deviate from the court ordered access arrangements on occasion, despite the Respondent's express disagreement and protests. A party's willingness to deviate from specific court orders governing that party's conduct naturally gives rise to concerns about whether such a party voluntarily will comply with general non-binding recommendations issued by the government and public health authorities; e.g., to mitigate spread of the new coronavirus.

17. Having said and acknowledged all of the above, the appropriate course of action, in the circumstances, was for the Respondent to initiate court proceedings of her own to place such concerns before the court, and to ask the court for a temporary change in the court ordered access arrangements and/or further formal and binding commitments by the Applicant to follow pandemic-related guidelines and safety protocols. In particular:

a. The Respondent should not have resorted to unilateral self-help, effectively suspending the Applicant's court-ordered "in person" access indefinitely.

b. The Respondent says she was not aware the courts were still available to address such concerns. However, had she made inquiries in that regard with the same diligence apparently used to track developments and other public announcements in relation to the COVID-19 crisis, I think she certainly would have learned of the Notice to the Public and Profession issued by the Chief Justice of Ontario on March 15, 2020, and realized that it was possible to bring her urgent concerns before the court.

18. Moreover, despite the Respondent's assurances that she would reconsider the situation light of evolving circumstances, she has been noticeably reluctant to concede that the situation may have changed since March 24, 2020, in terms of the Applicant recognizing the seriousness of the pandemic situation, significantly modifying his behavior for Owen's sake, and indicating a willingness to confirm, (through court orders if and as necessary), that he must and will follow COVID-19 safety measures going forward.

19. In that regard, I think I can take a measure of judicial notice that the changes to "normal" Canadian society brought about by the pandemic evolved fairly rapidly, and that public realization of the unprecedented situation's seriousness and need for drastic behavior modification was not uniform or instantaneous. Understanding of the virus and measures appropriate to its mitigation also was uncertain and evolving even at government levels, as

reflected in the changing and progressively reduced maximum number of persons permitted to gather in any one place.

20. Given such realities, I do not think the Applicant's admitted failure to react immediately and take appropriate precautions, during Owen's March break access visit, should be fatal to his exercise of court-ordered access for the balance of the pandemic, if the situation has changed; e.g., if the Applicant has since come to understand and accept the seriousness of the situation, and is now committed to following appropriate safety protocols.

21. That is consistent with the court's obligation to make decisions regarding access based on prevailing circumstances, and what currently appears to be in the best interests of a child.

22. In this case, applying the principles noted above:

    a. There is a presumption that continuation of the access ordered by Justice Mitchell, on November 20, 2020, would be in Owen's best interest.

    b. In my view, although the Respondent has provided evidence and examples of Applicant behavior indicating that he initially was acting in a manner inconsistent with COVID-19 protocols, the situation has changed. In particular, the responding evidence filed by the Applicant satisfies me that, whatever the Applicant's views of the Respondent, he now realizes and accepts that meticulous adherence to COVID-19 safety measures, (including social distancing, use of disinfectants and compliance with public safety directives), is essential to Owen's safety. My views in that regard are reinforced by the Applicant's stated willingness to accept the imposition of additional court orders and directions in that regard; something he himself has requested.

    c. The presumed rational for continued parent contact under the existing court order accordingly has not been displaced by sufficient evidence that, as of today, such continued contact would compromise Owen's safety or wellbeing.

23. The court-ordered access therefore should be resumed immediately and continued until further order of the court, with the Respondent refraining from any further refusals or deviations in that regard, unless and until the court orders otherwise after further proceedings taken on notice to the Applicant.

24. Having said that, the existing access provisions should be supplemented by further court directions providing additional safety assurances reasonably required by the pandemic, and by the Applicant's acknowledged past failings in that regard.

25. In particular, I think it appropriate to make a further order that, while COVID-19 remains the subject of government directions, (including public safety directives), and pending further order of the court:

    a. The Applicant shall meticulously adhere to COVID-19 safety measures, including social distancing, use of disinfectants and cleaning practices, (including washing of his and Owen's hands, and the cleaning of any and all surfaces Owen may touch regularly), and compliance with public safety directives;

    b. The Applicant shall not have anyone else present during his time with Owen;

    c. Within two hours of each occasion on which Owen is in the Applicant's care, the Applicant shall provide the Respondent, by text or email, with a written indication of the activities the child engaged in while the child was with the Applicant, and all steps taken to keep the child safe during that period;

    d. The Applicant shall thereafter also respond in writing to any questions the Respondent may have in that regard;

    e. The Applicant shall notify the Respondent immediately if he or Owen shows any symptoms of having the coronavirus, and agree to the immediate suspension of access pending further party agreement or court order.

26. I do not think it necessary or appropriate to impose the further terms and conditions sought by the Respondent. Without limiting the generality of the foregoing:

    a. In my view, it is neither necessary nor appropriate to make a more specific order restricting Owen's movements to certain indicated locations, (e.g., the Applicant's home and backyard), or certain activities such as walks in the surrounding neighborhood or receipt of medical services. Such restrictions are not required by the current protocols, and are unnecessary so long as social distancing, and the other steps designed to prevent transmission of the virus, are followed.

    b. I see no reason to supplement the current court-ordered arrangements with additional obligations requiring the Applicant to provide the Respondent with full details of his work schedule, and/or creating additional rights of first refusal. The Applicant currently is working from home, except when his duties as an essential worker, charged with responsibility for maintaining solar energy facilities, requires occasional personal attendance at such facilities when surfacing problems cannot be addressed remotely. An obligation that the Applicant provide a definite work

schedule seems impractical in the current circumstances, and something destined to cause needless further complications and tension between the parties.

c. I also see no reason to supplement the current court-ordered arrangements with additional specific obligations requiring the Applicant to permit Owen's retention of his "tablet" throughout the Applicant's parenting time. As noted above, the existing court order stipulates that the parties may telephone and communicate by email with Owen on a daily basis, and that Owen may telephone or email either parent when he wishes. So long as the Applicant abides by those provisions, (e.g., by making a telephone or other computer available to Owen to facilitate that required communication), I think that is sufficient. In particular, the provisions of the existing order are presumed to be in Owen's best interests, and they clearly attempt to strike a balance between inadequate and excessive communication between Owen and his absent parent while the other parent is trying to enjoy parenting time. In my view, providing Owen with a transportable communication device, capable of being in Owen's possession at all times, is likely to disrupt that balance.

d. Pickup and drop off arrangements were not the focus of this motion, and would seem to have little to do with the urgent COVID-19 concerns giving rise to this hearing. Nothing in the evidence I have reviewed indicates that the existing provisions of the order relating to transfers require modification or clarification on an urgent basis, and I decline to make such changes without further evidence and argument demonstrating why they are necessary.

e. In my view, it also would not be appropriate to make further provisions effectively requiring the Applicant to confirm, to the Respondent's satisfaction, the Applicant's agreement to comply with whatever further government or public health guidance the Respondent may forward to his attention, failing which the Respondent would be entitled to terminate continued access unless and until she receives a satisfactory acknowledgement from the Applicant in that regard. Such an arrangement would encourage and promote further unilateral action on the part of the Respondent, and resulting disputes. At all times, the court must remain the decision-maker, in relation to whether access should or should not continue. The arrangements noted above permit the Respondent to make inquiries about the child's activities and the safety measures being followed, during access visits. If the Respondent has resulting concerns that the Applicant is not adhering to updated safety guidance and protocols relating to the pandemic, she can take the appropriate measures to place those concerns before the court for a decision as to whether the court-ordered access arrangements should be varied.

f. In my view, it would be inappropriate to grant a police-assist order at this time, and in the circumstances of this case. In particular, such an order would not be in Owen's best interests. Resort to the provisions of such an order undoubtedly would cause great upset and trauma from Owen's perspective, and result in Owen having unnecessary added exposure to COVID-19 risks insofar as police officers form part of our "front line" workers who are still required to interact with many members of the public in performance of ongoing essential duties. Nothing in the history of this matter, or the conduct of the parties in relation to this motion, satisfies me that there is a likelihood of further non-compliance with court orders warranting such a step and such risks at present.

27. As noted above, the Applicant requests a further order, granting him additional access time to "make up" for the access visits that were frustrated and denied by the Respondent's position. In that regard:

a. For the reasons noted above, I agree that the Respondent's unilateral "self-help" denial of court-ordered access cannot be condoned, and that some degree of make-up access is appropriate. Having said that, I note that the Applicant initially agreed to the suspension of access, having regard to the concerns raised by the Respondent. In that sense, not all of the access deprivation experienced by the Applicant resulted from entirely unilateral decisions made by the Respondent. In any event, however, the Applicant indicated at the time that he anticipated further "make-up" access in the future.

b. I do not accept that make-up access should be denied for reasons offered by the Respondent; i.e., her representations that Owen has adjusted to his new routine, premised on the importance of "staying home", and that Owen therefore will not understand why he nevertheless may be spending more time than usual away from his primary residence. Owen's new routine has been created by the Respondent's unilateral resort to self-help, and accordingly cannot be determinative. To date, Owen's understanding of his current situation and new routine also obviously has been influenced by the Respondent's incorrect view that the pandemic warranted a suspension of the court ordered access, and Owen's "staying home" with the Respondent. Owen's corresponding improper understanding in that regard should now be modified and informed by more accurate legal realities, reflected in this endorsement.

c. I agree with the Applicant's submission that such "make-up" access should be easier to facilitate in the present circumstances, when the Respondent is working from home; i.e., such that the Respondent currently has the ability to spend time with

Owen during the weekday hours, making her deprivation of week-end time with Owen easier to bear.

d. Having regard to all the circumstances, I am satisfied that it would be appropriate to grant the Applicant two additional week-ends of access time with Owen, with the precise week-ends to be determined by party agreement, failing which the two additional week-ends of access will occur during the next two alternating week-ends when Owen was not going to be with the Applicant, according to the existing court-ordered schedule.

Costs

28. Because I intended to reserve my decision for a short time, and deliver it by way of this typed and signed endorsement, the parties were asked during the teleconference to provide alternative cost submissions in the event of success or failure.

29. In that regard, I think it fair to say that the Applicant was the party enjoying primary success in relation to the motion, and that the Applicant and his counsel did all that reasonably could be done to resolve the present impasse without the matter having to proceed to a formal hearing and court determination.

30. I also think it appropriate to emphasize once again that the Respondent's resort to unilateral self-help, without taking proper steps to place her concerns before the court, cannot be condoned.

31. Having said all that, I am mindful of the reality that the Applicant clearly was responsible for creating legitimate initial concerns about his response to the COVID-19 pandemic, and corresponding concerns about Owen's safety. Moreover, looking at the correspondence, I think it reasonably clear that the present dispute could have been avoided had the Applicant responded in a more reasonable, polite, prompt, fulsome and direct way to address and allay the concerns raised by the Respondent.

32. On the whole, I think justice will be done if an order is made requiring the Respondent to pay the Applicant's costs of the motion, fixed in the all-inclusive amount of $1,500.00. As the Respondent apparently continues to work and earn income during the pandemic, those costs shall be payable within 30 days.

Order

33. By way of summary, a formal order shall issue whereby:

a. The child access directed by the court's order of November 20, 2018, should resume immediately and continue until further order of the court, with the Respondent refraining from any further refusals or deviations in that regard unless and until the court orders otherwise, after further proceedings taken on notice to the Applicant;

b. While COVID-19 remains the subject of government directions, (including public safety directives), and pending further order of the court:

    i. The Applicant shall meticulously adhere to COVID-19 safety measures, including social distancing, use of disinfectants and cleaning practices, (including washing of his and the child's hands, and the cleaning of any and all surfaces the child may touch regularly), and compliance with public safety directives;

    ii. The Applicant shall not have anyone else present during his time with the child;

    iii. Within two hours of each occasion on which the child is in the Applicant's care, the Applicant shall provide the Respondent, by text or email, with a written indication of the activities the child engaged in while the child was with the Applicant, and all steps taken to keep the child safe during that period;

    iv. The Applicant shall thereafter also respond in writing to any questions the Respondent may have in that regard;

    v. The Applicant shall notify the Respondent immediately if he or the child shows any symptoms of having the coronavirus, and agree to the immediate suspension of access pending further party agreement or court order.

c. The Applicant shall be granted two additional week-ends of access time with Owen, beyond that already mandated by the court's order of November 20, 2018, with the precise week-ends to be determined by party agreement, failing which the two additional week-ends of access will occur during the next two alternating week-ends when the child was not going to be with the Applicant, according to the existing court-ordered schedule.

d. The Respondent shall pay the Applicant his costs of the motion, fixed in the all-inclusive amount of $1,500.00, payable within 30 days.

34. 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