

Superior Court of Justice

FS-20-00017282-0000

(Name of Court)

at **393 University Avenue, 10th Floor**
Toronto, ON M5G 1E6

Endorsement

(Court office address)

Date	
August 24, 2020	Applicant(s): <u>Carly Wilson</u> <input type="checkbox"/> Present
Boucher, J.	Counsel: <u>Rachel Healy</u> <input type="checkbox"/> Present <input type="checkbox"/> Duty Counsel
	Respondent(s) <u>Otis Wilson</u> <input type="checkbox"/> Present
	Counsel: <u>Anthony Macri</u> <input type="checkbox"/> Present <input type="checkbox"/> Duty Counsel
<input type="checkbox"/> Order to go in accordance with minutes of settlement or consent filed.	
<input checked="" type="checkbox"/> Factums are required on all motions (two days prior)	
<p>The applicant mother applies for an initial court order regarding the children’s residence, parenting time, and for a restraining order except for the purpose of access. The respondent father’s cross-motion asks for an order of equal parenting time and an order for in-person schooling in his residential catchment area.</p> <p>The motion was heard August 20, 2020, via Zoom.</p> <p><i>Admissible evidence</i></p> <p>The evidence and submissions in this matter consist of an initial affidavit from the mother, the father’s responding affidavit including cross-motion, the mother’s reply affidavit of July 23, the father’s family’s affidavits filed as reply to the mother’s response to cross-motion, then followed by two additional affidavits termed “reply” by the mother of August 6 and 17, as well as factums from each party.</p> <p>The respondent argues that that the applicant’s two extra reply affidavits are not proper evidence before the court because they do not conform to the normal procedure for filing evidence. The respondent suggests that the court disregard those affidavits, except to consider the admissions with them. The mother argues that the father’s family’s affidavits are not proper reply because they contained information that should have been included in his cross-motion, and that they should be disregarded.</p> <p>The applicant mother’s August 6 affidavit provides information about the children’s online schooling and homework experience. The mother’s August 17 affidavit disputes the admissibility of the father’s family’s affidavit saying that they should have been included in his original response; in the alternative, she provides a reply</p>	

those affidavits, disputing and confirming the information in those affidavits. The family affidavits dispute some of the mother's allegations found in her application and provide additional context for the family relationships and care of the children.

This court views the various affidavits filed as admissible reply. A party may file a reply after receiving a response to a motion filed in form 14: Rule 14(11.5) As I have laid out above, all of the affidavits serve a reply function at the various steps of this proceeding, expanded because of the cross-motion filed by the respondent.

Although the content of the father's family's affidavits and the mother's August 6 affidavit are a bit of a stretch for the normal function of reply to address matters raised in a response, the issues addressed in those affidavits provide direct non-hearsay evidence on the main points of the children's education, each party's ability to address the children's needs, and the credibility and reliability of the parties' assertions about the issues underlying the positions relevant to the issues. Even if it is not proper reply, the evidence would stand as necessary supplementary direct evidence on the relevant issues; there is no fairness problem because each party had an opportunity to respond to the information outlined in their various replies and in the submissions at the hearing. The court requires the affidavits to make a decision about the best interests of the children on the most complete and reliable record possible of relevant information, particularly given that the majority of the information concerning childcare and education comes from the parties themselves and centres on their individual credibility and the involvement of extended family members in the overall care and education plan.

Issue 1: Restraining order

The applicant applies under s.46 of the Family Law Act for an order that the respondent father be restrained from directly or indirectly communicating with her except through counsel or for the purpose of access.

Factual background re restraining order request

The applicant alleges a history of domestic violence. In her affidavit of July 15, 2020, she alleges that she suffered abuse over the course of the marriage. She says she does not recall all the instances of abuse but says that it has increased and escalated over time. She says there were incidents of the respondent punching holes in the wall, breaking into locked doors, throwing items, in an undefined timeframe. She specifically noted these incidents:

- The first incident was described as having occurred over 10 years ago and involved choking;
- She described attacks in her closet, multiple times, during an undefined timeframe. The suggestion was that these incidents were physical, though the descriptions seem to mainly involve verbal interactions. One incident prior to September 10, 2016, is said to have involved punches to left arm. She says she went to the doctor, and that the doctor ordered an x-ray. The x-ray was filed as an exhibit, though there was no evidence as to the medical findings in

that regard. The applicant says she told them she had fallen off her bike. She says it took several weeks to heal;

- An incident in the bathtub, in the summer of 2017, where he allegedly punched her in the ribs several times, related to comments she made about his eldest son. She said it took 6 weeks to heal. She said that she helped her parents move a fridge in that timeframe and that she grunted in pain. She said her parents noticed and asked her what happened.;
- In the fall of 2018 or spring of 2019, the respondent is alleged to have grabbed her head, twisted it. She said she screamed and ran out of the house without shoes. He ran after her and brought her back inside to the bath, and then called his aunt for assistance. The aunt attended and engaged in conversation while she was in the bath. The applicant says she told the aunt that he tried to kill her. The respondent is said to have explained it away. She says the aunt recommended counselling;
- Next, in November 2019, the applicant says the respondent allegedly gave her a knife and invited her to fight him. He allegedly threw a chair at her, which ended up breaking a hole in the wall. He then picked up the table and threw it to the wall, which made another hole;
- On December 28, 2019, the applicant describes being in a wrestling match with the respondent on the bed, during which she suffered multiple punches to the head. She said she had bruising and a golf-ball size goose-egg injury to the head. She said she had to wear a winter hat to cover the injury when attending a party at her mother's that evening and had to keep wearing the hat one week later at her parents; and
- On May 27, 2020, the applicant describes some type incident where the respondent threw a blanket onto the bed while angry. She says this was the triggering incident for her to leave the home and seek shelter with her parents. She says she called her mother, arranged to go with the children. She says she then "reminded" the respondent that she was going there (it seems to have been pre-arranged at some other point), but that he did not respond to her. After he left the home for the day, she packed up the kids and went to her parents.

The respondent fully disputes the allegations. He says that the parties' relationship deteriorated during the past year, and that he would work longer hours to be away from the applicant. He says they had many arguments, usually about money. He says that he only ever acted in self-defence, saying that she would push, hit and pull his hair to provoke him, and that his reaction was to pull her hands to remove them. He says that he reached out to his family members a number of times to try to calm down the applicant. He says that his family suggested he phone the police, but he did not want police involvement, and that the applicant was aware of that.

The respondent alleges the applicant uses physical discipline with the children, which he disagrees with, and says he does not do so. His niece and aunt confirmed seeing the discipline by the mother.

The respondent's niece says that the applicant effectively admitted to her that both she and the respondent engaged physically with each other, though the applicant seems to deny this. The niece attended the home in January 2020; the applicant was shouting and calling him names, and that she had been blocking the respondent from leaving the home. The dispute was about a trip he was planning to take.

The respondent points out that the applicant never reported the alleged incidents to police. There is some evidence said to be confirmatory of the allegations, the document regarding medical treatment sought was in relation to the September 2016 incident. Her father says that he saw bruises on her in the past, but he did not speak to her about it or report it. The respondent's family members, who have had extensive in person direct contact with the applicant, say that they have not seen evidence of the applicant being abused or of injury.

The respondent also blames the applicant for breaking the household items in November 2019, and that she paid to replace the table for that reason.

Factual findings re abuse

Reasonableness of grounds to fear safety of applicant or children

There is insufficient evidence to meet the threshold required under s.46 for a restraining order.

The court is not prepared on this contested record to make factual findings about any abuse. There has been no cross-examination on these allegations, and there is insufficient independent evidence that would support a finding that abuse occurred on any standard of proof such that a restraining order should issue. Every allegation of abuse is contested, except to the extent that contact is admitted for the purpose of self-defence, or that there were arguments.

Just because a case is contentious does not mean that a restraining order is unavailable. The allegations themselves may be sufficiently compelling based on their level detail or consistency with other facts, or with independent confirmation of some aspects of the narrative or the denials may be unconvincing. None of those factors are true in this situation.

Both parties' narratives are theoretically possible. However, the respondent's witnesses accounts provide important contradictions to certain aspects of the applicant's evidence, particularly regarding the tone of her version and the minimization of the role of the respondent and the extended family. Their portrayals have the benefit of conforming with the realities of the mother's own work schedule and her reliance on the family over the years for the same purpose as the respondent. While this does not directly relate to the issue of abuse, it speaks to the overall reliability of the applicant as a witness.

Even if the factual narrative is not solidly proven here on the affidavit evidence, the applicant's subjective fear alone might justify a restraining order if the fear was genuinely held and reasonable in the circumstances. It is not clear on this record however that the applicant should have a reasonable basis to fear the respondent at this point, such that a restraining order should issue.

The parties have been separated for almost three months. The last violent incident is alleged to have occurred in December 2019. At present, the applicant is living outside the home, apart from the respondent. There is no evidence that the respondent has been communicating with applicant, apart from access issues, or trying to interact with her in any way; one family member notes that the applicant complained about the respondent not being in sufficient communications. There was one report of an aggressive communication involving her father, which seemed to have centred on a possible misunderstanding or an error or other issue related to access. There has been no need for police intervention, or any recent family intervention to address violence, or anything else suggesting a current applicable safety concern.

The applicant has cited prior cases where the person's subjective belief alone justified the issuance of a restraining order for the applicant's peace of mind, particularly where there were threats of future harm. Here, there is no evidence from the historical abuse allegations that would identify the need for an additional external control or assurance measure to keep the respondent away from the applicant or to stop him from communicating with her, such as threat to pursue her or other communications suggesting that she would be in danger for leaving. All current communications between the parties now seem to relate to access, and the parties seem to facilitate access at neutral places to minimize conflict on a consent basis. There have been no threats against the applicant, or any efforts by the respondent to prevent the separation or any conflict over the separation, or any incident identified that might suggest the applicant would continue to be at risk in her current circumstances. Any subjectively held view about the need for a restraining order would not appear to be reasonable on this evidence at present.

The request for a restraining order is denied at this time.

To protect both parties in this matter, however, given the nature of the allegations at issue, I order that the parties communicate through Our Family Wizard, as requested by the respondent. This will have the effect of documenting the communication of the parties and assisting to ensure that the tone of communication will be acceptable and non-threatening. I will also order that neither parent speak disparagingly of the other to the children or anywhere in earshot of the children to prevent the hostilities from impacting the children. They must also not share any litigation information with the children and must not discuss these legal proceedings.

Issue 2: Schooling – Online vs. in-person attendance

The parties agree that the children attend school at Centennial Road Public School. This has been the children's school to date. The children are in grades 1 and 3.

The parties do not agree whether the attendance should be online or in person. The respondent says that in person attendance would be in the children's best interests for their social development and well-being. The applicant says the risks are too great given the pandemic and that it would be too disruptive to move them in and out of in-person schooling in the event of another shut-down in future. She says the children have done well with online schooling, that one child received an award for his performance as a leader, and that the children have been engaging in IXL online learning modules for a year with great success and progress, demonstrating that they are suited to continuing with online learning. One of the children has asthma and it is thought he would be a greater risk of attending in person.

There is insufficient information before the court to establish that in-person schooling would be safe enough for the children, particularly given the medical condition of one of the children. The situation is evolving almost daily with respect to the pandemic itself, and the school board's plans for both educational formats. Although the Sick Kids report referenced by the father recommends in person attendance, it is unclear whether the in-person plan actually conforms with expert reports and appears to lack some of the recommended safeguards. It would appear that the online option provides a better physical health safety plan for the children, which suggests that online would be in their best interests given the health concerns of the child with asthma.

The court will temporarily order that the parents enrol the children in online rather than in person schooling. However, if the parents jointly agree to send the children to school in person, they may do so, if they deem it to be in the children's best interests based on the current information available to them. The parents are required to enrol the children in the Centennial Road school if the online plan is based on registration in a particular institution. The children may not be registered in a different school for in-person or online attendance unless the school board requires the children to be in a different in person or online school for spacing or other reasons, in which case they must register the children in the institution directed by the school board.

Issue 3 – Residence/parenting time

The applicant requests that the children's primary residence be with her in order to better facilitate the delivery of online schooling and to conform with the safety concerns she raised in her application for restraining order, and because she is a superior parent to the father. She asks for a parenting schedule that minimizes the father's time with the children in the school week over the course of the month.

The father asks for the children to return to his residence on a regular basis with equal parenting time because he is a capable and involved parent. He says that he is equally capable of delivering the online schooling platform to the children given the grade level of the children. He puts forward a schedule he could accommodate based on his work requirements. He also says that he could be more flexible with his timing, particularly in the winter when his summer seasonal job ends.

The mother says she has been the primary education parent for the children during the pandemic, and for some time previously. The father has had some involvement as

well, and he says that he assisted with homework before school. He says they had very little work to do, because they were in grade 1 and 3. The father acknowledges that he has some learning issues, and the mother has more education, however both parties acknowledge that the father's educational level at this stage of the children's education is not a barrier to him assisting with an online program for the children's education.

The father's request for parenting time is reasonable in the circumstances. There is no reason to restrict his contact with the children. There is no allegation of abuse against him with respect to the children. The mother's complaints of neglect are disputed, and not supported by the extended family's observations of the father's capable parenting. While the children may be doing well in Aurora with the maternal grandparents, there is no credible evidence that their normal situation a few weeks ago was problematic. The children's normal home was with the father at his residence until the mother moved out, taking them with her. All evidence suggests that the children were thriving, functioning well, doing well in school, interacting with both sides of the family on a regular basis, being fed by the family, doing their homework and generally were in good health. The mother's own plan proposed offers fairly generous unsupervised access and does not suggest any concerns for the well-being or safety of the children.

If the children are attending online schooling, it should not matter which residence they were living in; both parents agree they are able to facilitate the online learning. If the parents decide that the mother is best suited to assist with any difficulties with the curriculum during the father's parenting time, the mother may deliver assistance to the children over an online application like Facetime or Skype or Zoom or Google Classroom. There is no compelling evidence of need at this stage to have the primary residence be with the mother for the delivery of online school.

Issue 4 – Right of first refusal for childcare

The mother requests that she be given the right of first refusal for childcare in the event that the father is not available to care for the children. The mother complains that the father frequently has his extended family caring for the children while he is at work. The father says the family's actions are normal in his Jamaican culture, and that both parents agreed with this approach in the past. He says that both parents relied on the family for childcare after school until the end of the workday and that the extended family also fed them on a frequent basis.

The father's proposed access structure mirrors his time-off work, so that he would be there to care for the children the majority of the time. The father does not work in jobs that require him to travel or be absent from the city. The previous setup of involving the extended family related to the parents' work schedules in a pre-Covid19 world and may not be the same at present, in the new reality of the children not living all the time at the father's address. The father would need to actually be present during the parenting time in order to see the children. In any event, if he needed to rely on his extended family at times to assist with the children, or for transportation, there is not an obvious problem with such involvement.

The mother's request has the effect of trying to completely cut-out the father's extended family from the care relationship is somewhat unfair or unbalanced in the circumstances. The mother's plan involves extensive involvement of her own extended family, living in their home, and using her mother's educational background as a bonus in the online education situation. The family's historic extensive involvement of the father's family was a normal part of their day to day life pre-Covid19. The mother's work schedule would have been unmanageable without their assistance, by looking at her transit records of the time of leaving downtown for Scarborough. Abruptly changing the children's long-term family contact patterns would not be in the children's long-term interests for developing bonds with those family members, enjoying their love and affection, and benefiting from the cultural and religious experiences that make up the family life enjoyed with the extended family. This is not to say that the mother's extended family involvement is not also important, but rather that there is no obvious reason to exclude what seems to be important involvement of the father's family. There is no compelling evidence of neglect or problematic circumstances meriting such a change in the children's circumstances.

The mother's request for first refusal on childcare is not granted as it does not appear necessary in the children's best interests. This is not to say however that the parties should not be offering this to each other; they may do so if they wish. The court will not mandate first-refusals at this stage however, to allow the parties to re-balance the childcare routine and the involvement of both families as they see fit for the children's best interests.

Order

To conclude, the court's order is as follows.

Order:

1. The parents shall register the children in the online education option for this 2020-2021 school year. The parents shall ensure the children are registered at the Centennial Road Public School if a particular institutional registration is required. The parents may jointly decide together, at their discretion considering the overall best interests of their children, to switch to in-person attendance at the Centennial Road Public School. However, if that school is unavailable for space or enrollment reasons, the parents must register the children in the school offered by the school board as the alternative.

2. The children shall be with their parents on the following temporary parenting schedule:

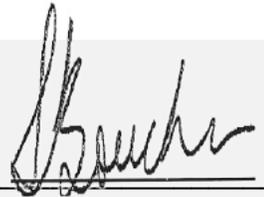
- a. The Children shall be with the Applicant Mother each Sunday from 7:30 p.m. until Tuesday at 3:30 p.m.;

- b. The Children shall reside with the Respondent Father each Tuesday from 3:30 p.m. until Thursday at 7:30 p.m.;
- c. The Children shall alternate weekends with each parent from Thursday at 7:30 p.m. until Sunday at 7:30 p.m. commencing with the Respondent Father; and
- d. The exchanges shall occur in the parking lot of the Tim Hortons at Victoria Park and Hwy 401, or at the children's school, or in the alternative at the home of the paternal grandmother at 1924 New St., Pickering.

3. The parties shall communicate through Our Family Wizard. The parties must register for the service immediately and each parent shall pay their own costs for the service.

4. Neither parent shall make any disparaging comments about the other to the children or anywhere in the vicinity of the children. The parties must not discuss the proceedings, or the issue in the litigation with the children or in earshot of the children. The parties must never leave visible any information about the proceedings such that their children might view the information.

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S. Boucher, J.