

**CITATION:** Zinati v. Spence, 2020 ONSC 5231  
**COURT FILE NO.:** FS-20-17778  
**DATE:** 20200902

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** John Zinati

**AND:**

Stephanie Alyssa Spence

**BEFORE:** J.T. Akbarali J.

**COUNSEL:** *Kulbir K. Rahal Vaid*, for the Applicant

*Lesley Burke and Brigitte Barsalou*, for the Respondent

**HEARD:** September 1, 2020

**ENDORSEMENT**

**Overview**

[1] In this motion, I am asked to determine whether the parties' six-year-old child, N., should return to in-person learning at school, or whether she should be registered for online learning, because of the COVID-19 pandemic.

**Background**

[2] The applicant father, Mr. Zinati, and the applicant mother, Ms. Spence, agree that they exercise *de facto* joint decision-making for N.

[3] N was a student at a Montessori school until she began senior kindergarten in September 2019. At that time, the parties agreed to register N at the Island Public/Natural Science School, on Toronto Island. Like all other schoolchildren in Ontario, N's learning went online in March 2020, after the provincial government closed schools in response to the COVID-19 pandemic.

[4] The Island School, like all other schools in Ontario, is scheduled to recommence in-person learning in September 2020. However, parents are offered the choice whether to send their child to school, or to continue their child's learning online. Ms. Spence wants N to return to the classroom for in-person learning. Mr. Zinati wants her to continue to learn at home.

**Issue**

[5] The sole issue before me is to determine whether it is in N’s best interest to return to in-person learning at her school, or to continue with online learning for the time being.

[6] For the reasons below, I have determined that N shall commence school in person when school reopens, currently anticipated to be September 15, 2020.

## **Analysis**

### *The Relevant Statutory Framework*

[7] Because the parties were never married, this motion must be determined pursuant to the *Children’s Law Reform Act*, R.S.O. 1990, c. C.12, (“*CLRA*”). Under s. 21 of the *CLRA*, a parent of a child may apply to a court for any order determining any aspect of the incidents of custody of the child. There is no dispute that the incidents of custody include educational decisions affecting the child.

[8] By s. 24(1) of the *CLRA*, the merits of such an application shall be determined on the basis of the best interests of the child.

[9] Section 24(2) of the *CLRA* provides that the court must consider all the child’s needs and circumstances when determining an application for custody or access in the child’s best interests, including, of particular note here, the child’s views and preferences, if they can reasonably be ascertained, and the plan proposed by each person applying for custody or access. In this case, the plan is better understood as the educational plan proposed by each parent.

### *The Relevant Jurisprudence*

[10] There is very little available case law on the question of when it is in a child’s best interest to be educated online or in person during the current pandemic.

[11] In *Chase v. Chase*, 2020 ONSC 5083, released on August 25, 2020, Himel J. considered whether a child should return to in-person learning or continue to learn online. In the course of her reasons, she reviewed the only two decisions on the issue that were then reported in Canada. Both of those decisions came from Quebec courts. In one - *Droit de la famille - 20682*, 2020 QCCS 1547 - the Quebec Superior Court declined to order the children’s return to school because a family member was at high risk from the virus due to an auto-immune disorder.

[12] In the second decision – *Droit de la famille – 20641*, 2020 QCCS 1462, the Superior Court of Quebec concluded, at paras. 8-10, that it was not for the courts, but rather for the competent government authorities, to assess the potential risks of contamination of the population during the pandemic, and to take the necessary measures to limit the spread of the virus. The court held that, when the government decides to permit primary education to resume, the court need not question that decision, unless one of the parties demonstrates that it would be contrary to the particular interests of their children to resume attending school in person.

[13] Himel J. found the reasoning of the court in *Droit de la famille – 20641* to be persuasive. She wrote, at para. 42:

The Ontario government is in a better position than the courts to assess and address school attendance risks. The decision to re-open the schools was made with the benefit of medical expert advisers and in consultation with Ontario school boards. The teachers' unions and others have provided their input as well as their concerns.

[14] Justice Himel noted, at para. 42, that the parties spent considerable time addressing a recently released report by the Toronto Hospital for Sick Children, but she declined to consider it, finding that it was within the purview of the Ontario government to make the decision to re-open schools and determine the steps being taken to protect children and staff.

[15] Justice Himel also noted, at para. 45, the consensus between the Ontario government and medical experts that, at this juncture, it is not 100% safe for children to return to school. However, the risks of catching COVID-19 must be balanced against the mental health, psychological, academic and social interests of the children, and the parents' need for childcare. She wrote, "[t]he Ontario government has determined that September 2020 is an appropriate time to move on to a 'new normal' which includes a return to school".

[16] In the result, Himel J. concluded that it was in the child's best interest to return to in-person learning because his learning, social, and physical activity needs were better met at school, and the evidence that the demands of supporting the child's learning online were not manageable for the mother in view of her other obligations.

[17] Mr. Zinati referred me to *Wilson v. Wilson*, unreported, August 24, 2020, FS-20-17282, in which Boucher J. was asked to determine whether it was in the best interests of the parties' two children, one of whom has asthma, to return to in-person schooling or to continue to learn online.

[18] Boucher J. held that there was insufficient evidence to establish that in-person schooling would be safe enough for the children, particularly given the medical condition of one of the children. She wrote:

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.

[19] Boucher J. thus ordered that the parents temporarily enroll the children in online rather than in person schooling.

[20] The decisions of both, Boucher J. and Himel J., make reference to the Sick Kids' report, which was also filed in evidence before me.

[21] The "Sick Kids' report" refers to a report prepared by the Hospital for Sick Children in Toronto, entitled "COVID-19: Guidance for School Reopening", dated July 29, 2020. The report indicates it was prepared in partnership with other respected children's health hospitals and organizations, including CHEO and McMaster Children's Hospital, among others. The very first sentence of the report sets out its objective as "to advocate for the safe return of children and youth to school by emphasizing the importance of school reopening for broader child health, balanced against the potential and important risks of coronavirus disease (COVID-19)".

[22] The Sick Kids report is gaining a lot of traction among family litigants. More and more often, parents are attaching the Sick Kids report to their affidavits or case conference briefs to argue in support of, for example, in-person learning for children, or to argue that risk to children from COVID-19 is small.

[23] In response, the other parent will then cite and attach newspaper articles in which medical or public health experts raise criticisms about the Sick Kids report, to support that parent's argument for online learning, or the observation of stricter COVID-19 protocols.

[24] The problem is that the parties making these arguments are unlikely to be experts, and there is no expert evidence offered to explain or contextualize any of the allegations being made. Even leaving aside the hearsay concerns, without expert evidence, the court is not in a position to evaluate whether the Sick Kids report is correct on any given point, or whether an expert quoted in a newspaper article in opposition to the conclusions reached by Sick Kids is correct, or if neither are. Justice Boucher wrestled with this in her decision, when she noted that it was unclear whether the in-person education plan conformed with expert reports on how to keep children safe during COVID-19. In *Chase*, as I have already noted, Himel J. declined to consider the Sick Kids Report, writing that "there are experts on all sides of the Covid-19 debate, however, the decision to re-open schools and the steps being taken to protect children and staff fall within the purview of the Ontario government".

[25] I also noted the difficulty with the court making use of the Sick Kids report in a different context in *A.T. v. V.S.*, 2020 ONSC 4198, at para. 32, where I noted the absence of expert evidence about the report, and the significant concerns that were raised about the report in the media attention that the report received.

[26] Courts do not function in a vacuum. Judges are aware, as Himel J. noted, that there are experts with competing views. Litigants should not expect the Sick Kids report to be taken as gospel when it comes to children and COVID-19. In this case, like Himel J., I decline to consider the Sick Kids report.

[27] In my view, and having regard to available jurisprudence on this new and evolving issue, determinations about whether children should attend in-person learning or online learning should be guided by the following factors:

- a. It is not the role of a court tasked with making determinations of education plans for individual families or children to determine whether, writ large, the government return to school plans are safe or effective. The government has access to public health and educational expertise that is not available to the court. The court is not in a position, especially without expert evidence, to second-guess the government's decision-making. The situation and the science around the pandemic are constantly evolving. Government and public health authorities are responding as new information is discovered. The court should proceed on the basis that the government's plan is reasonable in the circumstances for most people, and that it will be modified as circumstances require, or as new information becomes known.
- b. When determining what educational plan is in a child's best interest, it is not realistic to expect or require a guarantee of safety for children who return to school during a pandemic. There is no guarantee of safety for children who learn from home during a pandemic either. No one alive today is immune from at least some risk as a result of the pandemic. The pandemic is only over for those who did not survive it.
- c. When deciding what educational plan is appropriate for a child, the court must ask the familiar question – what is in the best interest of this child? Relevant factors to consider in determining the education plan in the best interests of the child include, but are not limited to:
  - i. The risk of exposure to COVID-19 that the child will face if she or he is in school, or is not in school;
  - ii. Whether the child, or a member of the child's family, is at increased risk from COVID-19 as a result of health conditions or other risk factors;
  - iii. The risk the child faces to their mental health, social development, academic development or psychological well-being from learning online;
  - iv. Any proposed or planned measures to alleviate any of the risks noted above;
  - v. The child's wishes, if they can be reasonably ascertained; and
  - vi. The ability of the parent or parents with whom the child will be residing during school days to support online learning, including competing demands of the parent or parents' work, or caregiving responsibilities, or other demands.

[28] In my view, applying these factors to this case, it is in N's best interest to resume in-person learning.

[29] First, N will face some risk of exposure to the coronavirus if she returns to school. She will also face some risk of exposure to the coronavirus if she learns online. N's stepmother is a front-line health care worker, who may be at increased risk of exposure to the coronavirus as a result of her work. The stepmother is managing this risk by strict adherence to COVID-19 protocols in place at the hospital at which she works. Ms. Spence raises no concerns about N's stepmother's adherence to COVID-19 protocols. The point is not that the stepmother's work is placing N at risk; rather, it is that as life returns to some kind of new normal, risk cannot be eliminated. The important thing is that appropriate steps are taken to manage it.

[30] In addition, Mr. Zinati's plan for N's online education includes playdates with some of N's friends. I will return to this later in the context of N's developmental needs, but at this point, it is sufficient to note that playdates create another potential risk of exposure. According to Ms. Spence, the friends with whom N has been playing are all returning to school, which means that N's exposure to coronavirus resulting from the resumption of in-person learning may, at best, be mitigated by learning from home, but not eliminated.<sup>1</sup>

[31] Second, N has no health issues that place her at increased risk were she to contract COVID-19.

[32] At each parent's home, N resides with a grandparent. Her maternal grandmother is 72 years old. However, Ms. Spence raises no concerns related to increased risk to her own mother, N's maternal grandmother, if N attends school. In view of her position, I decline to consider any increased risk to the maternal grandmother.

[33] N's paternal step-grandmother is 62. I accept she is at some elevated risk, due to her age. Mr. Zinati does not identify any health concerns related to N's paternal step-grandmother beyond her age. The paternal step-grandmother also lives with N's stepmother, who is the paternal step-grandmother's daughter, and who as I have noted, is a front-line health care worker. There is no other evidence about the paternal step-grandmother's exposures, such as whether she is working outside the home, or any other potential risk exposures, to allow me to better place in context whether there is an increased risk to the paternal step-grandmother by N's attendance at school.

[34] Mr. Zinati's mother, who is 78 years old, also visits frequently. However, there is no indication that appropriate distancing cannot be maintained between N and her paternal grandmother.

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<sup>1</sup> Mr. Zinati argues that I should disregard the evidence that N's friends are returning to school because their parents have not filed affidavits. At the same time, Mr. Zinati has not filed affidavit evidence detailing with whom N would have playdates if she were learning remotely, and whether those children are attending school, either in the form of affidavits from those children's parents, or even in his own affidavit. In any case, I find it reasonable to assume that, among N's friends, at least some of them will be returning to school. Certainly, there is no evidence of a plan to restrict N's playdates to only those friends not attending school.

[35] Mr. Zinati and his wife are parents to a 15-month old. Ms. Spence is about to have another baby. Ms. Spence raises no concerns about her soon-to-be-newborn and N's school attendance. Mr. Zinati does not particularize his concern about his 15-month old who, in any event, is not the age group that has been identified as being particularly at risk due to the coronavirus.

[36] On this record, the potential increased risk to N's otherwise healthy 62-year-old paternal step-grandmother is largely speculative. While I accept that she may be at some increased risk from COVID-19 due to her age, the evidence does not establish that the paternal step-grandmother's risk of catching COVID-19 will increase as a result of N attending school. Moreover, there is no evidentiary basis for me to conclude that, apart from N's paternal step-grandmother, N, or any other family member is at an increased risk of COVID-19 that cannot be managed.

[37] Third, Ms. Spence raises concerns about N's social development if she does not resume in-person learning. Ms. Spence notes that, while in Montessori school, N had a psychological consultation arising out of concerns about her inability to focus and about her social interactions. Recommendations included supporting N's social skills through a variety of methods, including reading stories to assist her in learning how to ask other children to play, how to manage conflict, how to share toys, etc. The report suggested N may benefit from support in the form of social narration to recognize social cues and facial cues in other children. The report also recommended supporting N to become more independent in her life skills, supporting her with routines, supporting her emotional development, and fostering her strengths and interests.

[38] N's senior kindergarten report card does not reveal any of the problems that were identified in the earlier psychological consult report. Ms. Spence argues that attendance at school, and the benefit of socializing with her peers, has been important for allowing N to make great strides in building these skills. She is of the view that in-person attendance continues to be in N's best interest to ensure she does not lose the skills she has built. Mr. Zinati is of the view that N has overcome her earlier difficulties and no longer requires in-person learning to maintain those skills. In my view, given the social developmental challenges that N has only recently overcome, she would benefit from in-person learning to continue to develop and cement those skills; conversely, online learning is a particular risk to N's continued social development.

[39] With respect to the risk to N's social development if she continues with online learning, Mr. Zinati argues that with masking, in-person attendance will not allow N to develop her ability to read facial cues anyway. I do not accept this argument. If N attends school, she will not be masked when she is at home, and will continue to have the opportunity to develop her ability to read facial cues outside of school. Moreover, improving her ability to read facial cues was only one recommendation in the psychological consult report. Whatever N loses in the opportunity to learn to read facial cues as a result of masking at school does not negate the other benefits to N of in-person learning, particularly as it relates to her social development.

[40] Fourth, I turn to the measures in place, and the proposed plans to deal with the risks to N.

[41] Beginning with the risk of N contracting coronavirus at school, I note that N's school is part of the TDSB. It is a school on Toronto Island, with smaller class sizes, which is one of the reasons the parties chose it for her. The school offers a nature and science program which includes outdoor play, exercise and learning. All students and staff will be expected to wear masks. N's class will be capped at 20 students.

[42] To transit to and from school, N will have to walk to the ferry. All passengers are required to wear masks on the ferry, which will operate at 50% capacity. N will be seated with her cohort on the ferry. She will be provided with a colour-coded tag to indicate her boarding time and seating location on the ferry. The ferry will have staggered entry and boarding times to ensure physical distancing. Travel Safety Assistants will supervise to ensure protocols are followed. After arriving on the Island, N will walk to school. If the weather does not permit walking, it appears buses, on which all people will be masked, will be available. Both the ferry and the bus will have enhanced cleaning practices.

[43] I assume that these plans, put in place in accordance with guidance and input from the provincial government, the TDSB, and the school, are reasonable in the circumstances for most people<sup>2</sup>. There is no reason to conclude that N is anything other than most people.

[44] To address the risk to N's social development from online learning, Mr. Zinati plans that he and Ms. Spence can organize playdates for N that will allow her to maintain her socialization skills.

[45] Mr. Zinati's proposal of playdates is not a specific plan. He does not indicate how often N would see her peers, or how many. Opportunities for playdates will be more limited once school resumes. There is no evidence that Mr. Zinati has spoken to the families of the children N could have playdates with to determine their willingness or ability to have regular playdates once school resumes. I am not satisfied that occasional playdates can meet N's need for time with peers over an undetermined period of time, until the pandemic comes under control.

[46] Fifth, the evidence around N's views is not consistent. Ms. Spence states that N is eager to go back to school. Mr. Zinati states that N was happy and successful while learning online. Both of these things may be true. I also note that N is only six years old. I conclude that her wishes cannot be accurately determined.

[47] Finally, I note both parents have indicated that if N learns online, they will be available to assist her. Although Mr. Zinati has his own law practice, and Ms. Spence is about to have a baby,

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<sup>2</sup> Mr. Zinati makes reference to the recent announcement that teacher unions will be contesting the safety protocols around school reopenings. At this point in time, a claim made by teachers' unions based on unknown grounds or evidence is not a sufficient basis to dissuade me from concluding that government plans for school reopenings are reasonably safe for most people. Unproven claims made in other proceedings are not evidence in this proceeding.

I accept their evidence in this regard, and note that in addition, there is a grandparent and another partner in each parent's home who is also available to support N if she learns online.

[48] Having regard to all of these factors, I conclude that the benefits of N attending school in-person outweigh the risks. I find she will be reasonably safe at school, given the lack of any health conditions that place her at particular risk, and that it is particularly important for her to have the social interaction and consequent development that only in-person learning can offer. Mr. Zinati's plan to ameliorate the risk to N's social development is not specific enough or likely to be effective. For these reasons, it is in N's best interests to begin school in person on Sept. 15, 2020.

[49] At the hearing of the motion, Mr. Zinati proposed that if I were inclined to order N to attend school in person, that I delay her attendance by a period of some weeks to allow the school time to get used to the new safety protocols, and allow the parties time to ensure the safety protocols are being followed. There is no evidence before me that the timeline Mr. Zinati proposed would be acceptable to the school, and in any event, I see no reason to delay N's return to in-person learning. The government has delayed return to school by a week to allow for time to put the safety protocols in place and complete any required training. It is unclear how the parents could monitor or evaluate the adherence to the protocols in any event, or why more time is needed for schools to be ready to open while following COVID-19 safety protocols beyond the time already provided for in the government plans. I thus decline to delay the order that N return to in-person learning.

### **Costs**

[50] At the hearing of the motion, I asked the parties if they were prepared to send me written submissions on costs of no more than two pages, together with their bills of costs, and any offers to settle, which I would review after writing my decision on the merits of the motion. They agreed.

[51] Subsequent to finalizing my decision on the merits of the motion, I reviewed the material the parties sent me.

[52] Mr. Zinati takes the position that, due to the novelty of the issue, the very little jurisprudence available, and the fact that the parties acted in good faith, no costs should be ordered. His bill of costs discloses that his full indemnity costs of the motion are \$6,576.60 including HST.

[53] Ms. Spence argues that *Chase* was released after the motion was brought, and should have led to Mr. Zinati agreeing that N could attend school in person, given the similarities in the circumstances between the parties in *Chase* and the parties in this case. Mr. Zinati, on the main motion, argued that the circumstances in *Chase* were different.

[54] Ms. Spence's bill of costs discloses full indemnity costs of \$12,045.80 inclusive of HST. She seeks substantial indemnity costs of \$7,227.48, relying in part on an offer to settle. Ms. Spence's offer, dated August 28, 2020 provided for N to return to in-person school, without costs

of the motion if the offer was accepted by 12 p.m. on August 31, 2020. Thereafter, Ms. Spence's offer included costs conditions.

[55] Mr. Zinati also made an offer to settle. His offer provided that N would begin school online, and that if no cases of COVID-19 occurred in her school community, N would return to school in person on October 14, 2020. Ms. Spence notes that this timing does not square with the TDSB's protocols, and based on those protocols, would have meant that the next opportunity for N to return to in-person school would be on November 23, 2020. In any event, Mr. Zinati did not obtain a result more favourable than his offer.

[56] Modern family costs rules are designed to foster four fundamental purposes: to indemnify successful litigants for the cost of litigation, to encourage settlements, to discourage and sanction inappropriate behaviour by litigants, and to ensure that cases are dealt with justly: *Mattina v. Mattina*, 2018 ONCA 867, at para. 10. The touchstone considerations of costs awards are proportionality and reasonableness: *Beaver v. Hill*, 2018 ONCA 840, at para. 12. In *Boucher v. Public Accountants Council (Ontario)*, 2004 CanLII 14579, at paras. 28-29, 37, the court held that costs must be fair and reasonable, and consistent with the reasonable expectations of the parties.

[57] Subject to the provisions of an Act or the rules of court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. By r. 24(10)(a) of the *Family Law Rules*, O. Reg. 114/99, the court is directed to make a decision on the costs of a step in the case promptly after dealing with the step, in a summary manner.

[58] Pursuant to r. 24 of the *Family Law Rules*, the successful party is presumptively entitled to costs, subject to the factors set out in r. 24: *Beaver*, at para. 10.

[59] In my view, this is an appropriate case in which to order no costs. I agree with Himel J.'s analysis on costs in *Chase*, where she found that the school attendance issue was novel, important, and an all-or-nothing issue. In *Chase*, the parties were without any Ontario law to guide them.

[60] This case is very similar. The school issue is novel, important, and all-or-nothing. Neither party acted in bad faith or took unreasonable positions. While the parties had different views on the school attendance issue, both advanced views that are reasonable in the context of the current pandemic. Both made offers to settle. In Mr. Zinati's case, the offer reasonably included an element of compromise, by offering to delay in-person learning.

[61] By the time this motion was heard, but not before it was brought, there were at least two Ontario decisions on the issue, only one of which was reported. Neither decision was binding on me, or on all fours with this case. The circumstances in *Chase* bore some similarity to this case, but also included important differences, including the fact that there are grandparents living in N's homes.

[62] In my view, it was not unreasonable for the motion to proceed, notwithstanding the two available Ontario decisions. Given the novelty of the issues, the reasonable behaviour of the parties and the importance of the issue, it is not appropriate for costs to be awarded in these circumstances.

### **Summary of Order**

[63] In conclusion, I make the following orders:

- a. Commencing September 15, 2020, on an interim basis, N shall return to school at the Island Public/Natural Science school, in person, until further agreement of the parties or court order.
- b. There shall be no costs of this motion.
- c. This endorsement is an order of the court, enforceable by law from the moment it is released.

J.T. Akbarali J.

**Date:** September 2, 2020