

CITATION: Cirinna v. Cirinna, 2018 ONSC 4831

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Giovanni Antonio Paolo Cirinna, Applicant

AND:

Angela Maria Cirinna, Respondent

BEFORE: Madam Justice Kristjanson

COUNSEL: Andrea di Battista, for the Applicant

Respondent, Self-represented

HEARD: August 9, 2018

ENDORSEMENT

[1] This is the fourth motion brought by the father in three months dealing with access. Ms. Cirinna has unilaterally denied access by Mr. Cirinna to their seven year old son GC. The mother has flagrantly disobeyed numerous court orders on access, including consent orders. It is in GC's best interests to have a full relationship with his father, which Ms. Cirinna is determined to thwart. GC has significant behavioural problems which are exacerbated by the continuing conflict between the mother and the father. The mother's defiance of court orders and unilateral withholding of GC, with the associated conflict, are harming GC and have the potential to cause long-term harm. This family must recognize that GC needs his parents to cease this litigation and to focus on their son. I exercise my discretion to change GC's principal residence from the mother to the father, expand the father's access, and set a schedule for an urgent trial on custody and access issues.

Background facts

[2] GC was born in 2011 and is now seven years old, entering Grade 2 in September. Mr. and Mrs. Cirinna separated in July, 2014. After separation, the father had regular access to the child on a daily basis and whenever he wished to see his child. On May 31, 2017, the mother unilaterally decided to cease granting Mr. Cirinna access to GC. The father commenced an application in July, 2017 seeking joint custody and access. In September, 2017 Justice Stewart made a consent order for parenting time. The Office of the Children's Lawyer ("OCL") became involved in November, 2017. Ms. Cirinna began again unilaterally withholding access to GC in December, 2017, and did not allow Mr. Cirinna to see or speak to GC until a court order was made on the father's motion in May, 2018.

[3] In a detailed endorsement on the May 9, 2018 motion, Justice Akbarali made the following findings which I have paraphrased unless surrounded by quotation marks:

- (a) The OCL report indicated that both parents love GC. The father agreed that the mother is a loving parent. The report indicated that the father and GC has a positive relationship and the father is an affectionate parent.
- (b) The OCL report indicates that GC wanted to see his father more, and he missed him and loves him. He denied feeling fear or worry about spending time at his father's house.
- (c) GC and his father have a loving relationship.
- (d) The mother took a number of videos of GC. In the videos, "the mother probes GC for information about the father, and attempts to provoke him into saying negative things about the father.... The manner in which the mother seeks out the information from GC suggests that he may be trying to please her with his answers."
- (e) "I have grave concerns about the mother's repeated behaviour in videoing GC. She does not appear to appreciate that it is completely inappropriate to involve GC in the parental conflict by trying to get him to say negative things about his father. That she videos these interactions exacerbates the risk to GC from her behaviour."
- (f) The OCL report documents that GC is inappropriately involved in the conflict between the parties.
- (g) "The mother's lack of respect for the father and his role in GC's life is also apparent in statements she made that were documented by the OCL clinician, including her belief that there was not much value in what the father could offer to a relationship with GC."
- (h) GC is struggling; the school states he had reached a "state of crisis". He has significant social and behavioural issues and has been repeatedly suspended from school.
- (i) The mother alleged that the father had been abusive towards her and GC; the Catholic Children's Aid Society investigated, and in April, 2018 found that the allegations of abuse were not verified.
- (j) "GC is struggling, is at risk and is in need of significant support... Among the factors contributing to GC's behaviour, the [OCL] clinician identifies GC's exposure to adult conflict and hostility from both parents directed at the other. I agree with the clinician's observations. The conflict between the mother and the father is apparent. The mother's willingness to involve the child and the conflict is concerning, and includes her willingness to video him. In my view, she is attempting to alienate GC from his father, and this is having a negative impact on GC."

- (k) The father to has displayed some very poor decision-making, including disparaging the mother in front of GC.
- (l) “[It] is time for the parents to stop focusing on their conflict with each other and start focusing on their child. They must each take a hard look at the role they have each played in creating the stress and difficulty that is so obviously burdening this small boy.”
- (m) The mother has significant problems trusting anyone other than herself to look after GC properly. The mother agrees that she has been oppositional towards GC school. She has been frank that she does not trust the father to look after GC peer properly. She resisted supervised access because she did not trust any supervised access centres and continued to state before Justice Akbarali that she did not trust Brayden supervision.
- (n) The father was seeking a supervised access order for the initial period of four weeks because of the mother’s expressed concerns and complaints, with an intention to seek a variation in access if the mother was not willing to consent to further expanded access following the initial period of supervision.

[4] Justice Akbarali concluded:

In my view, it is in GC’s best interest to have parenting time with his father. I accept that GC and his father have a loving and affectionate relationship. Although GC is not of an age where his wishes are paramount, I accept that he has expressed a desire to see his father more. I also accept that the father can calmly and affectionately parent GC.

[5] Justice Akbarali directed access on Saturdays and Sundays, plus one evening a week, to be supervised by Brayden Supervision Services (“Brayden”). The mother was ordered to submit the Brayden forms within three business days. Justice Akbarali directed that immediately on release of the reasons, the father would be entitled to nightly telephone access with GC. She ordered that the mother pay costs of \$2,500 inclusive of HST and disbursements. On May 10, Justice Akbarali ordered that the father be given phone access at 7 p.m.

[6] The Mother did not fill out the Brayden forms for supervised access within three days as ordered. On May 15, 2018 the mother wrote to counsel for the father informing counsel that the mother was refusing to sign the Brayden Supervision forms, stating:

I have made the attempt to allow the centre to be used but unfortunately, I am going to have to politely decline as this does not appear to be a child focused centre and they do not appear to meet the needss of a family in distress... Please review again with Mr. Ciranna and inform him that I will not be going forward on agreeing to use services from Brayden’s. [Emphasis added]

[7] Once the Court Order was made on May 9, Ms. Ciranna did not have the option of “politely declining” to use Brayden Supervision. Justice Akbarali had ruled on this very point. This was

not a consent order. As importantly, once a consent order is entered into it is binding; a party may not "withdraw" consent; it can only be amended by agreement or further court order.

[8] In addition to the failure to complete the Brayden forms and cooperate in providing supervised access at Brayden, the mother failed to comply with the May 9 Order by not granting daily telephone access at 7 pm, and failing to pay \$2,500.00 in costs as ordered.

[9] As a result of failure to comply with the May 9 Order, the father brought a motion on May 29, 2018. The mother, assisted by duty counsel, asked that the motion be adjourned to retain counsel, which was partially granted. The mother agreed, however, to a consent order of Justice Moore which: (a) directed the mother to submit the forms to Brayden supervision and facilitate access as ordered on May 9, and (b) directed that the father could bring a motion on issues of custody, primary residence and access on 7 days notice if the mother failed to comply with the May 9 Order of Justice Akbarali, or the May 29 Order of Justice Moore.

[10] Supervised access pursuant to the May 9 and May 29 Orders commenced the week of June 3. Brayden supervised access took place in the community, including the father's home, on June 7, 9, 10, 16, 17, 22, 24, 29 and 30. The Brayden Supervision notes are very positive, indicating a warm and loving relationship between GC and his father, and good parenting skills by the father. Following the successful supervised visits, the father moved for unsupervised access.

[11] At a motion on July 3, 2018 Justice Moore issued a consent order for unsupervised access by the father with Tuesday and Wednesday overnights commencing on July 10, alternate weekends commencing July 13, a week of summer vacation July 20 and a further week August 24. The Consent Order directed telephone access nightly at 7 p.m., and directed that the parents may communicate in writing only and only with respect to issues concerning GC by text or email.

[12] The Mother did not comply with the July 3 consent order of Justice Moore. Commencing July 16, 2017 the mother unilaterally terminated all access, including the mid-week overnights, alternating weekends, the week of uninterrupted vacation commencing July 20, 2018 and telephone access.

[13] The father was hospitalized for tonsils July 16 to 18. The mother refused to provide access without a medical letter indicating that he could properly care for GC. While this is not required and the mother had no right to make such request, the father obtained the medical letter and provided it to the mother on July 18. The mother did not respond. The father was denied his week of vacation starting July 20, which had been set out in the July 3 court order. The father has not seen or spoken to GC since July 16, due to the mother's withholding.

[14] It appears that sometime in July or early August, the mother made yet another allegation to the Catholic Children's Aid Society ("CCAS") which the father denies. Given the history of the file, including the mother's past unverified allegations to the CCAS, the OCL report, and the mother's failure to file responding materials, I have no basis to find that there is any merit to any allegation made against the father.

[15] The evidence before me is also that the mother fails to keep the father informed as to issues with GC. This is consistent with her attempts to prevent GC and his father from having a relationship.

[16] The father then brought the motion heard on August 9, seeking sole custody, supervised access of the mother, and primary residence.

Legal Framework

[17] The mother has defied the existing Order for access made on May 9, 2018 and the Consent Order of July 3, 2018. The father relies on Rule 1(8) of the *Family Law Rules*, O. Reg 114/99 (“*FLR*”) which states:

RULE 1 - FAILURE TO OBEY ORDER

(8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, including,

- (a) an order for costs;
- (b) an order dismissing a claim;
- (c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;
- (d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;
- (e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;
- (f) an order postponing the trial or any other step in the case; and
- (g) on motion, a contempt order. [Emphasis added]

[18] The Father also relies on Rule 14(23) of the *FLR* which provides that a party who does not obey an order that was made on a motion is not entitled to any further order of the court unless a court rules that the section does not apply, and provides that the court on motion may “make any other order that is appropriate, including an order for costs”.

[19] I also consider Rules 2(2) to 2(5) of the *FLR* which set out the primary objective: to enable courts to deal with cases justly, which includes ensuring a fair process which is efficient, proportional, and cost-effective, and represents an appropriate use of the court’s resources. Four motions in three months on the issue of access, where the mother refuses to comply with existing court orders, is not efficient, proportional or just, and represents a grossly inefficient use of the court’s resources and the resources of the father.

Best Interests of the Child

[20] The continued non-compliance by the mother, and the withholding of access, raise real concerns regarding the best interests of GC which is the central focus of concern. The mother's behaviour leads me to the conclusion that she is incapable of recognizing that a good relationship with his father is in GC's best interests, and she is incapable of putting aside her animosity and distrust to act in support of GC's best interests. Paragraphs 24(1) to (3) of the *Children's Law Reform Act*, R.S.O. 1990, C-12 state:

24. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4). 2006, c. 1, s. 3 (1).

Best interests of child

- (2) The court shall consider all the child's needs and circumstances, including,
- (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child's family who reside with the child, and
 - (iii) persons involved in the child's care and upbringing;
 - (b) the child's views and preferences, if they can reasonably be ascertained;
 - (c) the length of time the child has lived in a stable home environment;
 - (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
 - (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
 - (f) the permanence and stability of the family unit with which it is proposed that the child will live;
 - (g) the ability of each person applying for custody of or access to the child to act as a parent; and
 - (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application. 2006, c. 1, s. 3 (1); 2009, c. 11, s. 10.

Past conduct

- (3) A person's past conduct shall be considered only,
- (a) in accordance with subsection (4); or
 - (b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

[21] I have broad discretion as to the appropriate remedy pursuant to *FLR* 1(8) and 14(23), and the best interests of GC, and I must take into account all of the mother's actions in defying court orders and unilaterally terminating access for a significant period of time since December, 2017. I take into account and place great weight on the fact that Justice Akbarali in May 2018 concluded on the basis of the evidence before her that it was in GC's best interests to have a full and loving relationship with his father. She concluded at that time that the mother was engaging in alienating behaviour and expressed her concerns with the mother's attempts to manipulate GC's responses on videotape. The OCL has expressed concerns that the continuing conflict between the parents is overburdening a child with significant behavioural issues. The school has expressed concerns about GC's behaviour. The mother cannot continue to use GC to punish the father. In light of Justice Akbarali's decision of May 9, and the OCL report, the mother has been clearly informed that it is important for the father to play a role in GC's life. She consented to extensive access on July 3 only to unilaterally withdraw that access on July 16. This conduct cannot be allowed to continue.

[22] Failure to comply with the court orders is harming GC. All the court orders to date have been made in the best interests of GC. By failing to comply with the orders, the mother persists in failing to act in GC's best interests. Non-compliance with court orders must have consequences. As Justice Corbett held in *Taylor v. Taylor*, 2005 CanLII 63820 (Ont. S.C.J.) at para. 3:

When the court issues orders, it is essential that they be obeyed. Court orders are not "suggestions" for "frameworks" or "guidelines". They are mandatory. They must be obeyed. A resentful spouse is not above the law. Where a party disagrees with an order, he may seek to appeal it. In some circumstances, he may seek to vary it. But it is not an option to simply disregard the order.

[23] Ms. Cirinna is taking active steps to undermine GC's relationship with his father. She has intentionally withheld GC from access. Whether the mother agrees with the court orders or not, she is bound by them and cannot pick and choose whether or not to comply. In persistently and deliberately frustrating access rights, she is actively acting to undermine what the court has found to be in GC's best interests.

Costs

[24] The father seeks full recovery costs in the amount of \$6,000.00, including a three hour attendance to argue the motion which was delayed, in part, while the mother consulted duty counsel. I have reviewed the bill of costs and find the time incurred, rates and steps taken to be reasonable. In particular, the father did not pursue a contempt motion, but sought an order to

change temporary custody and access arrangements in light of persistent non-compliance with court orders, which I find to be a more constructive approach in the circumstances of this case.

[25] There is a presumption of costs payable to Mr. Cirinna, as he has been wholly successful on this motion. In *Serra v. Serra*, 2009 ONCA 395, [2009] W.D.F.L. 2707, the Ontario Court of Appeal confirmed that costs rules are designed to foster three important principles:

- a. To partially indemnify successful litigants for the cost of litigation;
- b. To encourage settlement; and
- c. To discourage and sanction inappropriate behaviour by litigants.

[26] The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case, rather than an amount fixed by the actual costs incurred by the successful litigant. Costs must be proportional to the issues and amounts in question and the outcome of the case. I have considered factors enumerated in R. 24 of the *FLR*, O. Reg. 114/99; pursuant to R. 24(11)(b), this includes the reasonableness of each party's behaviour in the case. In this case, I find the mother's behaviour to be wholly unreasonable given her failure to comply with binding court orders, including consent orders. This is the fourth motion in three months on the issue of access.

[27] The mother states that she does not have sufficient funds to pay a costs order. I have also considered ability to pay under r. 24(11)(f), which directs the court to consider "any other relevant matter" when setting the amount of costs. Parties, particularly those of modest means, must carefully consider their position in litigation and act reasonably. Ability to pay does not allow a party to evade all costs consequences: *B.(R.) v. W.(J.)*, 2012 ONCJ 799, [2012] O.J. No. 6269 at para. 45, *Parsons v. Parsons*, [2002] O.J. No. 3034 (Ont. S.C.J.) at para. 12. Family law litigants are responsible for and accountable for the positions they take in the litigation: *Heuss v. Surkos*, 2004 ONCJ 141, [2004] O.J. No. 3351.

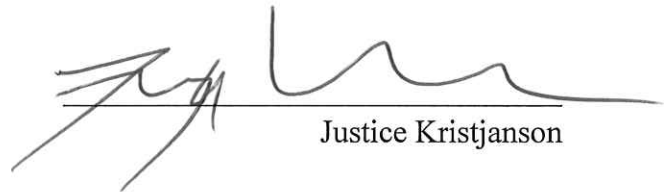
[28] Having considered all the above, I order the mother to pay full recovery costs of \$6,000.00, by 4 p.m. on August 24, 2018, when the next motion in this case will be heard. That motion will deal with costs of the two motions before Justice Moore, as the argument on costs was adjourned at the mother's request.

Order

[29] I have set a schedule which will take the parties to an urgent trial on custody and access in November 2018. I have provided the parties with a detailed Order which I find to be in GC's best interests, the key elements of which are:

1. GC shall primarily reside with the Applicant Father.
2. An access schedule which provides the father with two week-long summer vacation periods as previously agreed to, and a schedule which generally provides the mother with access on alternating weekends and one weekday overnight.

3. At all transfers, GC's favourite stuffed animal or blanket or similar security object and Health Card will be transferred.
4. The police are directed as to assist in the enforcement of this Order in accordance with s. 36 of the *Children's Law Reform Act*.
5. Neither party shall remove GC from Ontario without the written consent of the other party, or court order.
6. Detailed provisions with respect to information sharing.
7. Daily telephone access at 7 p.m. with the other parent.
8. A joint Settlement Conference/Trial Management Conference solely on the issues of custody and access is set for September 19, 2018.
9. An urgent five day trial solely on the issues of custody and access is set for the week of November 26, 2018.
10. A copy of the endorsement and this Order are to be sent to the OCL with the request that the OCL prepare an updating report of the OCL Clinician's March 9, 2018 report.
11. The Mother shall not bring any motions until the \$2,500.00 costs ordered by Justice Akbarali on May 9, 2018, and the \$6,000.00 costs ordered here are paid in full, except that leave is granted to the Mother to bring a motion on August 23, 2018 on appropriate notice and with supporting evidence, in compliance with the *FLR*, requesting a behavioural assessment of GC if no such assessment has been conducted in the past 12 months, to be heard together with the costs motions scheduled for that day.



Justice Kristjanson

Date: August 10, 2018