CITATION: Bozzo v. Cartagena
COURT FILE NO.: 1728/17
DATE: 2020-04-03

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michael Bozzo, Applicant

AND:

Gicel Cartagena, Respondent

BEFORE: The Honourable Madam Justice C. Brown

COUNSEL: Mr. B. Fortino, Counsel for the Applicant

Ms. F. Sultana, Counsel for the Respondent

HEARD: April 3, 2020 - by teleconference

ENDORSEMENT -- COVID 19 PROTOCOL*

[1] **AS A RESULT OF COVID-19,** this endorsement is made pursuant to the Notice to the Profession of the Chief Justice of Ontario, available at https://www.ontariocourts.ca/scj/covid-19-suspension-fam/ ("the Chief's Notice"). Under that Notice, the regular operations of the Ontario Superior Court of Justice have been suspended since March 15, 2020, until further notice.

[2] Electronic materials were filed through the courthouse email address: Hamilton.Family.Superior.Court@ontario.ca. Upon the resumption of court operations all materials shall be duly filed by the parties in the physical record at the courthouse, with all photographs of the child to be sealed.

[3] The applicant has brought a contempt motion as against the respondent asserting that the respondent has unilaterally terminated his time with their child, John Michael Cartagena, born May 2, 2017.

[4] On March 20, 2020, Justice Lafrenière in her role as triage judge and having the benefit of the applicant's materials only, determined that the alleged unilateral termination of access was urgent. This was a preliminary triage determination and does not limit any decision that I may make with respect to urgency.

[5] This matter is being heard by teleconference. I do not have access to the physical court file or scanned copies of court documents. The only information that I have before me are the relevant materials filed by the parties.

[6] For the purposes of determining the applicant's motion, I have reviewed the following:

a. the applicant's notice of motion, dated March 4, 2020;

b. the applicant's affidavit, sworn March 4, 2020;

c. the respondent's affidavit, dated April 3, 2020 (although received by the court electronically on March 31, 2020);

d. the affidavit of Maria Barahona, dated March 30, 2020;

e. the book of authorities filed by the respondent;

f. the applicant's reply affidavit, dated April 3, 2020;

g. the affidavit of Shvone Campbell Bent, dated April 3, 2020;

h. the affidavit of Vanessa Bozzo, dated April 3, 2020; and,

i. the affidavit of Luzi-Mara Bozzo, dated April 3, 2020.

[7] Almost all of the affidavits were not sworn when filed. In the circumstances, I have treated these documents as though they were properly sworn and I attach to them all of the qualities and consequences of sworn evidence.

[8] There is a final order, dated May 30, 2019. According to this order, the applicant has gradually increasing alternate weekend access with the child and is permitted makeup time if an access visit is missed.

[9] At the present time, the final order provides for the applicant to have access on alternating weekends, with one of every two weekends to include overnight access.

[10] The applicant states that the respondent has denied him access with the child beginning on June 11, 2019 and sixteen times thereafter, not including his Christmas access which was also denied. He states that he has had no access whatsoever since mid-December 2019.

[11] In his motion, the applicant requests that the respondent be found in contempt, that his access be immediately reinstated and that he be given makeup access.

[12] For the reasons set out in my endorsement of April 1, 2020, I have found that the applicant's claims in relation to a finding of contempt and for makeup access are not urgent within the meaning of the Chief's Notice.

[13] A hearing on the applicant's motion for an immediate reinstatement of his access in accordance with the terms of the final order was heard by me today.

[14] When considering this matter, I will not go behind the final order of May 30, 2019. While the respondent suggests she was pressured into agreeing to the terms of this consent order, she signed the consent with a lawyer and she took no steps to appeal the order or otherwise set it aside before bringing a motion to change in mid-February of this year.

[15] In order to better understand the applicant's position, I will summarize the respondent's position on the motion first.

[16] The respondent is asking that the applicant's motion for a reinstatement of access be dismissed. Her position and some of her relevant evidence can be summarized as follows:

a. The applicant's motion is not urgent.

b. She brought a motion to change in mid-February 2020 seeking an end to the applicant's unsupervised access on the basis that the child is the subject of abuse and neglect during the times when he is in the applicant's care.

c. Since the final order was issued, the child has been returning from access with "unexplained injuries, diaper rashes and severe inflammation to his genitals, aggressive behavioral patterns, usage of foul language and with extreme thirst and hunger."

d. On June 15, 2019, the child returned from access with a rash and a bruise to his eye.

e. A Child Maltreatment Medical Clinic Note was prepared by Dr. Baird of the Child Maltreatment Clinic at McMaster Children's Hospital in July 2019 as a result of the child having attended at the hospital for treatment. The note indicated many concerns in relation to the applicant's access.

f. On August 24, 2019, the child returned from access upset and it looked like he had been pinched on his stomach.

g. On September 8, 2019, the child returned from access with a swollen thumb. The applicant subsequently failed to treat the thumb as directed and it became infected.

h. On September 22, 2019, the child returned from access with bruises.

i. The child sustained a scalp abrasion while in the applicant's care on December 14, 2019. The incident was reported to the police and to the CAS on December 29, 2019.

j. On December 28, 2019, the applicant failed to provide proper footwear for the child and he returned from access with red feet.

k. The child returns from access visits with a swollen face due to excessive crying and displays "extreme hunger and thirst."

l. Her mother has corroborated her concerns.

m. All incidents have been reported to the police and to the CAS.

n. The CAS has declined to become involved because the applicant's girlfriend works there and so they are inherently biased.

o. In the time since the final order was granted, there has been increased conflict at access exchanges "inflicted by" the applicant, his girlfriend, his mother and his sister.

p. The child presents as very fearful before access exchanges.

q. Since access stopped in December 2019, the child's demeanor has improved significantly.

[17] The applicant's position and some of his relevant evidence can be summarized as follows:

a. The allegations that he has abused and/or neglected the child are entirely false.

b. He is never rude or aggressive during access exchanges and he does not allow this behaviour from others. Any conflict at exchanges is as a result of the respondent's behaviour or that of her mother.

c. He has made his best efforts to shield the child from adult conflict.

d. The child is happy and comfortable in his care.

e. The child is never fearful in his care or around his family.

f. His partner does not work for the CAS. She is a social worker at a women's shelter. She is always appropriate with the child and the child is fond of her and always happy to see her.

g. The child does not cry during visits and his face is not swollen at the end of visits.

h. The child is not left hungry, thirsty or in disarray during access visits and he changes the child as frequently as needed.

i. On June 15, 2019, the child tripped while running at the park. He did not cry and there was no sign of a bruise. The CAS had no concerns and the doctor who examined him also had no concerns.

j. The Child Maltreatment Medical Clinic Note prepared by Dr. Baird of the Child Maltreatment Clinic at McMaster Children's Hospital in July 2019 was based solely on input from the respondent and since that input was false, the resulting note is not accurate.

k. The allegation that he pinched the child during access in August 2019 is not true. He has never pinched the child or caused the child to bruise.

l. The injury to the child's thumb in September 2019 did not occur while the child was in his care and he has followed through with all required treatments for the infection.

m. The child was not injured or bruised during access on September 22, 2019, did not act as though he were in pain and was happy and cheerful.

n. The child did not complain of an injury to his head during access on December 14, 2019 and the medical report refers to a minor abrasion not requiring medication or treatment.

o. The child does not wear inappropriate footwear during access.

p. The respondent has made many reports to the CAS regarding his care of the child. That agency has not expressed any concerns save and except for a potential risk in relation to adult conflict.

q. The CAS has confirmed as recently as January 30, 2020 that the allegations made by the respondent in relation to the applicant's care of the child do not warrant a protection investigation by their agency.

r. The CAS confirmed on February 12, 2020 that they are not taking a position in relation to this matter.

s. His girlfriend, mother and sister corroborate his version of events.

[18] The Chief's Notice does not define urgency in family law matters but is described to include requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home) and urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child.

[19] Having considered the developing caselaw, Justice Kurz made an attempt in *Thomas v. Wohleber,* 2020 ONSC 1965 (Ont. S.C.J.) to establish certain factors that might be considered by the court when determining whether a matter is truly urgent within the context of the Chief's Notice. His comments are as follows:

> *In considering the dictionary definition of the term, urgent, the circumstances of urgency set out in the Notice, the examples of urgency offered in Hood and Rosen, and the cases cited above that apply the Notice's test of urgency, I find that the following factors are necessary in order to meet the Notice's requirement of urgency:*
>
> 1. *The concern must be immediate; that is one that cannot await resolution at a later date;*
> 2. *The concern must be serious in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;*
> 3. *The concern must be a definite and material rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical;*
> 4. *It must be one that has been clearly particularized in evidence and examples that describes the manner in which the concern reaches the level of urgency.*

[20] In his recent decision in *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.), Justice Pazaratz commented on a situation where a parent was withholding access, contrary to the terms of an order. He said:

> *There is a presumption that all orders should be respected and complied with. More to the point, there is a presumption that the existing order reflects a*

> *determination that meaningful personal contact with both parents is in the best interests of the child.*

[21] I agree with Justice Pazaratz. If, because of the circumstances the court presently finds itself in, a litigant is free to unilaterally disobey the access provisions contained within an order without any recourse by the access parent, court orders would have no meaning. This cannot be the case, even now.

[22] For the reasons that follow, I find that the issue of the applicant's access with the child is urgent within the meaning of the Chief's Notice.

[23] I must assume that when the respondent consented to the applicant having access in May 2019, she believed that access in the manner that is set out in the final order was in the child's best interests.

[24] The applicant had been sharing regular time with the child since at least May 2019.

[25] An unexplained disruption in a young child's contact with a parent may have a profound and long-lasting impact on that child. As noted by Justice Pazaratz in *Ribeiro:*

> *...children's lives – and vitally important family relationships – cannot be placed "on hold" indefinitely 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.*

[26] It is critical that the child continue to share time on a regular basis with his father.

[27] I find that the issue of the child's access with his father is a serious issue impacting the child's well-being and it cannot wait for a resolution.

[28] I am very cognizant of the allegations levelled against the applicant by the respondent in her materials.

[29] However, I would note that despite her many reports to the police and to the CAS, no action has been taken by either of them in relation to the applicant's access. In fact, the CAS has recently advised that they have no protection concerns and that they will not take a position regarding the parenting issues.

[30] There is absolutely no evidence to even remotely suggest that the CAS, an agency tasked with protecting children from harm, has failed to act as a result of some sort of bias.

[31] The respondent's materials set out in some detail all of the concerns she had with respect to the applicant's access prior to the date of the final order. Yet she still agreed to the terms of that order.

[32] The respondent's materials also set out in great detail all of the concerns she has had with the applicant's access since the date of the final order. Yet she waited nine full months to pursue a change to that order, even in the face of Dr. Baird's note from July 2019.

[33] One must assume that if her concerns were as significant as she has suggested, the respondent would have taken immediate steps to change the terms of the final order after having received Dr. Baird's note.

[34] I must also point out that for every allegation made by the respondent and her mother, there are detailed denials and responses from the respondent, his girlfriend, his mother and his sister.

[35] The respondent suggests that if the applicant believed that the issue of his access was truly urgent, he would have taken steps to enforce the final order well before he brought his motion. I would note in response that the applicant did what we hope all litigants will do and that is to attempt to negotiate a resolution via counsel prior to commencing a court proceeding. The applicant's delay in bringing his motion is not a bar to a finding of urgency.

[36] If these were normal times, the issues raised by the applicant's contempt motion and the respondent's motion to change would require a *viva voce* hearing. But these are far from normal times and such a hearing might not be possible for many months. This puts both parties at a disadvantage.

[37] In the face of competing allegations untested by cross examination, I must balance the child's need for continued, meaningful contact with his father with the serious but as yet untested allegations made by the respondent.

[38] I must also be mindful of the fact that the applicant has not had any contact with his young son for more than three months and that in these circumstances, a move to overnight access now may be too much too soon for the child.

[39] Therefore, having met the threshold of urgency, what I find to be in the child's best interests at this time is that access continue on a temporary-temporary and without prejudice basis as set out in paragraph 3(b) of the final order dated May 30, 2019, namely

alternating weekends (Saturdays from 10:00 a.m. to 8:00 p.m. and Sundays from 2:00 p.m. to 8:00 p.m.). Access shall continue in this manner until further order of the court or written agreement of the parties.

[40] I have been told that the child is ill (not COVID-19 related) at the present time, therefore the applicant's access shall resume on Saturday, April 11, 2020.

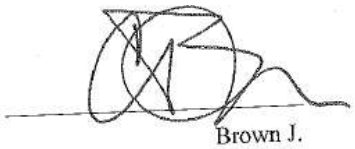
[41] In her submissions this morning, counsel for the respondent expressed her client's concerns regarding the risks to the child of continuing face to face access with the child in the face of the pandemic. I do not accept this as a valid argument. There was absolutely no evidence in the respondent's materials of any behaviour or plans by the applicant which are or which might be inconsistent with COVID-19 protocols.

[42] The parties and any third parties whom they involve are expected to conduct themselves appropriately during all access exchanges, which shall take place outside of the police station instead of inside in order to ensure social-distancing.

[43] The applicant's motion has already been adjourned to June 10, 2020 at 10:00 a.m. to be spoken to. The issue of costs is adjourned to the judge hearing the motion.

[44] Finally, I wish to leave the parties with these comments, made by Justice Pazaratz in *Ribeiro:*

> *Every member of this community is struggling with similar, overwhelming COVID-19 issues multiple times each day.*
>
> *a. The disruption of our lives is anxiety producing for everyone.*
>
> *b. It is even more confusing for children who may have a difficult time understanding.*
>
> *c. In scary times, children need all of the adults in their lives to behave in a cooperative, responsible and mature manner.*
>
> *d. Vulnerable children need reassurance that everything is going to be ok. It's up to the adults to provide that reassurance.*
>
> *e. Right now, families need more cooperation. And less litigation.*
>
> *...*
>
> *None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children.*



Brown J.

Date: April 3, 2020