

CITATION: Amin v. Kabir, 2020 ONSC 5245
COURT FILE NO.: FS-20-96948
DATE: 2020 09 01

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: REASAT AMIN, Applicant

AND:

MINHAZUL KABIR, Respondent

BEFORE: TRIMBLE J.

COUNSEL: Alexandra Grant, Counsel for the Applicant, agrant@dkgcfamilylaw.com

Nooruddin Waliani, Counsel for the Respondent, contact@walianilaw.com

HEARD: August 25 and 26, 2020 by Zoom Videoconference

ENDORSEMENT

The Motion

[1] Originally, Ms. Ameen brought a motion on 3 June 2020 for an order that she have sole custody of the children of the marriage, Hisham Kabir (born February 20, 2013) and Eliza Arya Kabir (born August 15, 2018), that the children shall primarily reside with her, that the Respondent have supervised access with the children or at least restricted access with the children, that the Children's Lawyer be engaged to provide a clinical investigation and report pursuant to s 112 of the Courts of Justice Act, and that the local police enforce the order.

[2] On 4 June 2020, Tzimas, J. rejected Ms. Amin's motion on the basis that there was no indication that any portion of the motion was urgent or that Mr. Kabir had agreed that the motion could be heard in writing.

[3] Ms. Amin asked for the matter to be reconsidered. Daley, J., also rejected Ms. Amin's motion request holding that he was not satisfied that the issues at stake were.

[4] In her Notice of Motion dated 13 August 2020, Ms. Amin reduced her motion to one issue: that Hisham should attend Castlebridge Public School in Peel commencing 8 September 2020, and after school care at the Peel YMCA. Further, if the court granted the order with respect to school and the YMCA afterschool care program, she also seeks a necessarily ancillary order that the mother have in interim primary care of the children with unspecified access to Mr. Kabir. This pared-down motion was brought following a case conference before Dennison, J. on 16 July 2020, at which time she declared that the issue with respect to where the children would attend school was urgent.

The Consent

[5] By the time that Mr. Kabir served his responding materials late on 21 August 2020, it became clear that he consented to the invitation to the OCL to be involved, and consented that the child of the marriage should remain at Castlebridge Public School, but that he should attend school online because of the threat of Covid-19.

Issues

[6] With Mr. Kabir's concessions, there are only two issues to be decided in this motion:

1. Should Hisham attend school in person or online?
2. Should the July 17, 2020 consent order that Ms. Amin's current partner be prohibited from being involved with her access time with their son?

[7] Ms. Amin did not pursue the issue of the change in residence for Hashim.

Background

[8] Ms. Amin is a resident of Canada. She met Mr. Kabir, then living in Bangladesh, online. The couple were married in Bangladesh on 28 April 2011. She sponsored him to come to Canada in 2014.

[9] The couple have two children: Hisham Kabir, born February 20, 2013, and Eliza Arya Kabir, born August 15, 2018.

[10] It appears that the marital relationship was a stormy one. Ms. Amin alleges that Mr. Kabir was controlling and abusive. Mr. Kabir alleges that Ms. Amin has been emotionally and psychologically unstable.

[11] The couple separated on 28 November 2019, when Mr. Kabir left the family home. He returned to the matrimonial home on 30 November, where they both lived separate and apart.

[12] On 6 December 2019, Mr. Kabir executed a Form 2 under the *Mental Health Act*, which resulted in Ms. Amin being committed for an assessment of her mental health. She was discharged after her assessment as not being a danger to herself or anyone else, and not requiring institutionalization.

[13] On 8 December 2019, Mr. Kabir left the matrimonial home for the last time, leaving Ms. Amin in the matrimonial home with primary care of the children.

[14] Mr. Kabir has been charged with assaulting Ms. Amin. Apparently, there is a restraining order preventing contact between the two. Based on Mr. Kabir's complaint, he has had Ms. Amin charged with fraud. He also removed his name from the lease to the matrimonial home. At the time, Ms. Amin was on maternity leave. Mr. Kabir's failure to pay the rent resulted in Ms. Amin being evicted with the two children.

[15] Since 4 January 2020, at Mr. Kabir's unilateral insistence, he has had primary care of and residence with Hisham (now seven) and Ms. Amin has had primary care of, and residence with their daughter, Eliza. Mr. Kabir has permitted only very restricted and sporadic access between Ms. Amin and the son, supervised by Mr. Kabir's sister, who relocated from Edmonton to a home in Ajax, where Mr. Kabir lived with the son and his sister.

Schooling

[16] While the parties addressed the issue about Hisham attending school in person or online, in addition, they argued the question of Hisham's attending the YMCA afterschool care program. Therefore, I have treated these questions together.

[17] Hisham attended Castlebridge Public School in Peel Region for Junior Kindergarten and grade 1. He is about to go into grade 2 and is enrolled in the French immersion program at

Castlebridge. Because Ms. Amin's maternity leave is complete, she has arranged for Hisham to attend the YMCA afterschool care program, also in Peel region.

[18] On 29 December 2019, Mr. Kabir told Ms. Amin that he was registering Hisham at Cadarackque Public School in Ajax. He maintained this position until the delivery of his response affidavit served 21 August.

[19] In his affidavit, Mr. Kabir says that it is in Hisham's best interest that he attends Castleberry public school but do so online. Both in his submissions and in his Affidavit he says:

1. Hisham has a weakened immune system and is prone to illness. This is evident by the medical evidence and the number of days he has missed school.
2. Everybody knows that schools will become breeding grounds for Covid-19 and its transmission. This is been proven in other countries once schools reopened.
3. Ms. Amin also wants to enroll Hisham in after school care at the local YMCA which, is also a breeding ground for Covid-19 and its transmission.

[20] Ms. Amin says:

1. Hisham has deep connections with Castlebridge Public School. He is going into his first year there, having completed Junior kindergarten, Senior kindergarten, and grade one at the school. The teachers know him by name, and he knows all the teachers. Most of his friends are there.
2. Online learning will not expose him to his friends or support he will need with his work.
3. The child lost 30 days of school between the beginning of school and the March 17, 2020 shutdown of school, almost all of which was due to the father's failure to take him, with no medical reason given for his absences, according to the school records. This shows that Mr. Kabir will not support the child in online learning.

4. Hisham is enrolled in the French immersion stream at school. Mr. Kabir speaks no French and will not be able to help with online lessons.

The Law

[21] Audet, J., in *Thomas v. Osika*, 2018 ONSC 2712 at para 37, summarized the criteria for judges to consider in a "choice of school" case:

The decision as to the choice of school that a child should attend, when the parents disagree, is ultimately a matter of judicial discretion. However, a number of general principles have emerged from the caselaw to assist the decision-maker in making the decision in the child's best interests. They can be summarized as follows:

- a. Sub-section 28(1)(b) of the Children's Law Reform Act specifically empowers the court to determine any matter incidental to custody rights. The issue of a child's enrollment in a school program must be considered as being incidental to or ancillary to the rights of custody (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.));
- b. It is implicit that a parent's plan for the child's education, and his or her capacity and commitment to carry out the plan are important elements affecting a child's best interests. In developing a child's education plan, the unique needs, circumstances, aptitudes and attributes of the child, must be taken into account (*Bandas v. Demirdache*, 2013 ONCJ 679 (Ont. C.J.));
- c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which Respondent/Father's Factum (page 8) Court File Number FS-18-93522 the parent can participate in the child's educational program (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. C.J.));
- d. The emphasis must be placed on the interests of the child, and not on the interests or rights of the parents (*Gordon v. Goertz*, [1996] SO No. 52 (SCC));
- e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron v. Perron*, 2012 ONCA 811 (ONCA));
- f. Factors which may be taken into account by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new child care providers or other unsettling features (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. SCJ));
- g. The court will also look to any decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. SCJ));

h. Any problems with the proposed schools will be considered (*Askalan v. Taleb*, 2012 ONSC 4746 (Ont. SCJ));

i. A decision as to the choice of school should be made on its own merits and based, in part, on the resources of one parent or the other, or the convenience that his attendance at the nearest school would entail (*Wilson v. Wilson*, 2015 ONSC 479 (Ont. SCJ));

j. Third party ranking systems, such as the Fraser Institute's, should not factor into a Court's decision. These systems of ranking do not take into consideration the best interest of the particular child in a family law context (**Wilson v. Wilson**, 2015 ONSC 479 (Ont. SCJ));

k. If an aspect of a child's life, such as school placement is to be disrupted by an order of the court, there must be good reason for the court to do so. Thus, before a court will order a child to transfer schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, 2012 ONCA 811 (Ont. CA));

l. Custodial parents should be entrusted with making the decision as to which school children should attend. When a sole custodial parent has always acted in the best interest of a child, there is no reason to doubt that this parent will act in the best interest of the child when deciding on a school (*Adams v. Adams*, 2016 ONCJ 431 (Ont. O.));

m. Those cases are very fact-driven. The courts are not pronouncing on what is best for all children in a general sense but what is in the best interests of this child before the court (*Deschenes v. Medwayosh*, 2016 ONCJ 567 (Ont. CJ)).

[22] In this case, I must be guided by the best interests of the child. In addition, I must be guided by evidence, not polemic, hyperbole, a lay litigant's opinion, or broad statements of what amount to be the contents of newspaper headlines.

[23] The return to school of children in the middle of a pandemic is worrisome for parents and challenging. Two loving parents putting what they view as the best interests of their child forward as their controlling concern, can come to different positions. However, return to school in the middle of a pandemic has created between these parents yet another battleground on which to fight. Given the evidence and positions taken in this motion, it is clear that their view of Hashim's best interests is fettered by their view of each other.

[24] Neither parent gave me caselaw that dealt specifically with the return to school following the reopening of schools during the pandemic. While I was in the process of writing these reasons,

I became aware of Himel, J.'s decision in *Chase v. Chase*, 2020 ONSC 5083. On 26 August, I wrote to the parties and asked for their comments on the case.

[25] What does *Chase* say?:

1. The courts are not the best place to decide issues such as where a child goes to school during the middle of a pandemic. However, it falls to the court to make these decisions when parents cannot.
2. A better approach for parents is to engage in mediation with a professional or third-party trusted family member or friend and find creative ways to resolve the school did attendance dispute such as a) enrolling the child at the beginning of the school year, reviewing the plan at Thanksgiving, or following an outbreak at school or a second provincewide wave, or at the first opportunity provided by the school board to reconsider the choice; b) delaying in person school attendance and reviewing the decision when specific criteria are met; c) create a small part of children who could learn remotely together with the assistance of parents or tutors; or four) explore in person attendance for part of the day and in home learning for the balance.
3. The burden imposed by Covid-19 on family law cases is tremendous, and the move to virtual court attendances has placed tremendous strain on the family law system. Resources must be used carefully and proportionately by the court.
4. Generally, even absent the Covid-19 pandemic, “where should our child go to school” disputes arise on the eve of the children’s return to school, because the parents have allowed that to happen. They create an urgency through their lack of attention, indifference, inability to talk and compromise, and stubbornness. It is a false urgency. Since the children suffer, it falls to the court to solve the question.
5. In effect, the parents abandon to the court their obligation to make a decision with respect to their child’s well-being, leaving that decision to a judge they have never met, whom they may only meet virtually during the argument of the motion, and who would never likely meet the child.

[26] From the decision, it appears that Himel, J, had much more evidence than I had with respect to what schools are doing to protect children during the pandemic and the return to school.

[27] Himel, J. also had the benefit of two cases out of the Québec Superior Court, whose approach, she adopted. In *Droit de la famille — 20682*, 2020 QCCS 1547 (CanLII), L’Honorable Claudia P. Prémont, J.C.S., declined to order the children’s return to school as a family member

suffered from an auto-immune disease making them high-risk, which would have limited contact. In *Droit de la famille — 20641*, 2020 QCCS 1462 (CanLII), L'Honorable Claude Villeneuve, J.C.S., ordered the two children (ages 9 and 11) return to school.

[28] Neither of those two decisions are binding on this Court. However, their reasoning is persuasive. As may be relevant to this case, those courts held:

1. Governments (with the assistance of Ministries of Health and Departments of Public Health), not courts, are most competent to assess the potential risks to children in a pandemic situation and to take the necessary measures to limit the spread of the virus.
2. The government's actions show that it is taking the necessary measures as the situation evolves.
3. When the government decides to allow the resumption of academic activities at the primary level, there is no need for the Court to question this decision, unless one or the other of the parties demonstrates on a balance of probabilities, through cogent evidence, that it would be contrary to the particular interests of their children to resume attending school, for example because of their health.
4. Decisions concerning a child must be taken in the child's interest and respect for his rights, and not in the sole interest of his parents.
5. Every child in Ontario has the right to receive educational services, but also has the obligation to attend a school for the year as defined by the Ministry of Education.
6. Parents must take steps to ensure that their child fulfills his obligation to attend school. It is only in exceptional circumstances that a child will be exempt from this obligation.
7. The Covid-19 pandemic is an extraordinary situation calling for exceptional measures. But these are only temporary measures which do not modify the provisions of the Education Act.
8. Even though the return to school might not be mandatory, this does not necessarily take away the right of children to receive educational services nor mandate them in one form or another.
9. The parents must establish that they have and can take the means necessary to achieve other than in class attendance. If one of the parents cannot, in a context of

shared custody, offer his child the proposed alternative to attendance at school for acceptable and reasonable reasons, there is no reason to deprive the child of his right to attend his school when it is possible for him to do so.

10. In addition, we must avoid changing the terms of custody unless the situation of the children and the parties requires such a change.
11. In the context where the child asks to return to school, it may be contrary to her interests if she does not attend school until a year from September.
12. It is up to both parties to support and motivate the children for their early return to school.
13. The current situation is unlikely to be much different next September. Therefore, although the way of teaching with social distancing measures can very likely be very different from what was done before, there is no reason not to trust teachers and teachers. educational institutions.

[29] The reasoning of the Court in the two Quebec cases is persuasive, as is the decision of Himmel, J. I adopt their reasoning.

[30] In this case, I find that Hisham should attend Castlebridge Public School and the YMCA after school program, in person. I say this for a number of reasons:

1. For a child's mental and physical well-being, it is better that they attend school, in person, where they can continue to develop good social and interpersonal habits, become socialized to other children, and their teachers, run and play.
2. To have a child learn online is the exception to the rule of in person attendance at school. Because Mr. Kabir wishes to have his child taught by the exception to the rule, he bears the onus of establishing that online learning is in the best interests of Hisham.
3. Mr. Kabir's position is that the risk of Covid-19 with his immune-compromised child is too great. Online learning is in place and is sufficient, on balance, to protect Hisham until the Covid-19 pandemic has passed or a vaccine or cure is determined.
4. Mr. Kabir, however, has no evidence to support any of his contentions. There is no evidence that Hisham is immunocompromised. Mr. Kabir was able to get two medical notes for other purposes neither of which indicate child is immunocompromised or prone to getting sick.

Mr. Kabir also argued that the school attendance records for the first part of the spring term assist him. The records are not only unhelpful to Mr. Kabir, but counterproductive. Between 6 January 2020 and 24 February 2020, Hashim missed 20 days of school, only three of which were noted at the time of the absence to be because of illness. He missed five days for vacation, and 12 days for which it was reported at the time merely “confirmed absence – parent”.

The 13 January 2020 note from the doctor that justified the absence for the previous eight school days in the first half of January was written after the fact and does not give a reason for the absence. While some leeway can be given because the couple split up at the beginning of January and Mr. Kabir took the boy to live in Ajax, the absences indicate that Mr. Kabir was less than diligent in making sure that Hashim went to school on school days.

5. Mr. Kabir in his affidavit and in argument spoke frequently about the availability and adequacy of online learning including at Castlebridge Public School. He produced no evidence that online learning was available at Castlebridge Public School or in what subjects, although he referred to that information being readily available. For example, there was no indication that the French immersion stream was being taught online.
6. I also have a concern about Mr. Kabir’s silence on one matter that is germane to the analysis. His sister relocated from Edmonton to Ajax at the time of separation, perhaps to assist Mr. Kabir in caring for Hisham. He lived with the sister and her children. Mr. Kabir now lives separately from his sister and her family. It may be that he continues to rely on her to assist with Hisham’s care. There is no evidence as to whether his sister’s children are going to school in September, and therefore, might be an exposure for Hisham.

[31] Both parents have Hashim’s best interests at heart. Of that I have no doubt. However, the Court is entrusted by Statute to be the final arbiter of the best interests of the child, and it exercises its jurisdiction based on evidence.

[32] Notwithstanding that both parents’ hearts are in the right place neither has established any medical or scientific expertise to support their views of the dangers (or not) of returning to school, in person.

Access in Mr. Khan's Presence.

[33] The 17 July 2020 consent order agreed to at a Case Conference before Dennison, J., says that Ms. Amin's access with Hisham shall be conducted not in the presence of Mr. Khan, Ms. Amin's cohabiting partner, but that this prohibition was not permanent. Ms. Amin interprets this as meaning that Mr. Khan must be absent from his own home during her time with Hisham, or she must spend her time with Hisham out of the house. Accordingly, Ms. Amin wishes to amend this consent order to remove the prohibition about Mr. Khan being present during Ms. Amin's access with Hisham.

[34] The order does not prohibit the access from occurring while Mr. Khan in the same house, specifically.

[35] The order must be interpreted its entire context and background. It is clear from other admissible evidence that at the time of the Case Conference the CCAS was investigating an allegation that Mr. Khan touched Hisham inappropriately, a factor that Mr. Kabir still raises. That explains the concern about Mr. Khan's presence near Hisham. On 10 August 2020, however, the CCAS wrote to advise that it had not verified the concerns about Mr. Khan. The CCAS was not concerned enough to take any action vis a vis Hisham being exposed to Mr. Khan.

[36] As a rule, the test for altering an interim order is quite high on the theory that the order was made after a judge made a determination based on evidence, and that determination should govern until the trial. In this case, the Dennison, J.'s interim order was on consent. More important, the prohibition of Mr. Khan being in Hisham's presence is no longer a risk, it appears. Finally, given the effect of the Covid-19 Pandemic on the Courts, it is doubtful that this matter will reach a trial any time soon. For those reasons, I accept that it is appropriate to revisit the order, even only after a month of its birth.

[37] I have no evidence that supports any concern re Mr. Khan being near Hisham because of the allegations which the CCAS could not verify. I have concerns, however, that exposing a 7 year old child, in a high conflict case where the non custodial parent alleges that the custodial parent is influencing the child, may be difficult for the child. I asked the parties for their views about how, assuming I vacated the prohibition with respect to Mr. Khan, Hisham could be eased into access in Mr. Khan's presence. Neither party provided submissions.

[38] If the parties cannot agree to a timetable whereby Mr. Khan is eased into Ms. Amin's access time with Hisham, the parties may book a date at 9 am, any day I am sitting for further submissions on the subject.

Order to Go as Follows:

- (1) Hisham shall be registered and shall attend Castlebridge Public School and the Peel YMCA before and after school program, in person, commencing when the school opens in September 2020.
- (2) The prohibition against Mr. Khan being present during Ms. Amin's access time contained in Dennison, J.'s 17 July 2020 order is vacated. Mr. Khan shall not be present during Ms. Amin's access time, however, until the parties have agreed to, or the Court has imposed a schedule to introduce Mr. Khan to Hisham's access time with Ms. Amin.
- (3) This temporary order shall continue until otherwise ordered by the Court or agreed to by the parties.
- (4) This Endorsement is deemed to be an Order of the Court that is operative and enforceable without any need for a signed or entered, formal, typed Order.

Costs

[39] Unless the parties agree to who pays whom costs and in what amount, I will decide the matter in writing. Submission are limited to three double-spaced, handwritten pages not including Bills of Costs. Ms. Amin's submissions are to be served and filed by 4 pm, 14 September, and Mr. Kabir's by 4 pm, 21 September 2020.

TRIMBLE J.

Date: September 1, 2020

CITATION: Amin v. Kabir, 2020 ONSC 5245
COURT FILE NO.: FS-20-96948
DATE: 2020 09 01

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

REASAT AMIN

Applicant

- and -

MINHAZUL KABIR

Respondent

ENDORSEMENT

Trimble J.

Released: September 1, 2020