The exercise of custody and access rights in the era of COVID-19: “There will be no easy answers”

April 1, 2020

Author

Caroline Harnois

Partner, Lawyer

The Ontario Superior Court of Justice refuses to suspend a father’s access rights to his child and specifies the criteria for determining the urgency to intervene in family matters

The global crisis we are going through brings its share of challenges and worries, including the protection of our loved ones. Several parents wonder about the protective measures to be taken and the advisability of maintaining the arrangements for shared custody or access with the non-custodial parent. Should these modalities be maintained despite the present crisis or, on the contrary, should they be suspended because of the social distancing requirements? The Ontario Superior Court of Justice rendered the first published Canadian judgment which sheds light on these important issues and bring guidance not only to Ontarian parents and lawyers but to those across the country, including in Quebec. Moreover, a judgment rendered recently in Quebec puts forward the principles established in the Ontario judgement.

In *Ribeiro v Wright*[1], the Ontario Superior Court of Justice was seized of an urgent motion brought by the Mother of a 9-year-old boy to suspend all in-person access with his father because of COVID-19. The mother was concerned that the father would not maintain social distancing for the child during periods of access while she and her family were practicing social isolation in their home for the duration of the COVID-19 crisis. She did not want her son leaving her house for any reason, including seeing his father.

In his judgment of March 23, 2020, Justice A. Pazaratz of the Ontario Superior Court of Justice did not authorize this matter to proceed on an urgent basis but explained his reasons in detail.

First of all, the Court insisted that the health, safety and well-being of children and families remained its foremost consideration during the COVID-19 crisis which is an extremely difficult and stressful period for everyone.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

Orders should be respected and complied with

In the above-mentioned case, the Court stressed that there was an existing custody and access judgment. Justice Pazaratz insisted that there is a presumption that all judgments should be respected and complied with even during the COVID-19 crisis and that an existing judgment granting custody or access rights to parents reflects a determination that meaningful personal contact with both parents is in the child's best interest. As a general rule, existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to, including strict social distancing.

The Court indicated that in "many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. But children's lives – and vitally important family relationships – cannot be placed "on hold" indefinitely without risking serious emotional harm and upset". In the Court's opinion, a general policy that children should never leave their primary residence, even to visit their other parent, would be inconsistent with a comprehensive analysis of the best interests of the child.

In some cases, parents may have to forego temporarily their time with their child, for example in the following cases:

When a parent is under self-isolation for a 14-day period as a result of recent travel;
Because of personal illness or exposure to illness;
Because of a parent's personal risk factors (for example through employment);

The Court insisted, however, that there would be zero tolerance for any parent who recklessly exposes a child (or members of the child's household) to any COVID-19 risk, such as failure to comply with social distancing or to take reasonable health precautions.

Justice Pazaratz acknowledged that each family will have its own unique issues and complications, that temporary changes may be required and that there will be no easy answers but "no matter how difficult the challenge, for the sake of the child we have to find ways to maintain important parental relationships – and above all, we have to find ways to do it safely."

Justice Pazaratz called upon the parents to act responsibly and try to attempt some simple problem-solving *before* they initiate urgent court proceedings. The Court mentioned that despite extremely limited resources during this crisis, it would always prioritize cases involving children. If parents have concerns that COVID-19 creates an urgent issue in relation to custody and access arrangement, they may initiate an emergency motion but should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of access or custody time nor that it will necessarily result in an urgent hearing.

The Court indicates that it will deal with COVID-19 custody and access issues on a case-by-case basis according to the following test which will be used to determine whether it is urgent for the Court to intervene:

1. The parent initiating an urgent motion on this topic will be required to provide specific evidence or examples of behavior or plans by the other parent which are inconsistent with COVID-19 protocols;
2. The parent responding to such an urgent motion will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to – including social distancing, use of disinfectants, compliance with public safety directives, etc.;
3. Both parents will be required to provide very specific and realistic time-sharing proposals which fully address all COVID-19 considerations, in a child-focused manner;
4. Judges will likely take judicial notice of the fact that social distancing is now becoming both commonplace and accepted, given the number of public facilities which have now been closed. This is a very good time for both custodial and access parents to spend time with their child *at home*.

Justice Pazaratz dismissed the mother's urgent motion as he was not satisfied that she had established a failure, inability or refusal by the father to adhere to appropriate COVID-19 protocols in the future. The judge concluded that "none of us have ever experienced anything like this. We are

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

all going to have to try a bit harder – for the sake of our children."

The Superior Court of Quebec confirms that as a general rule the status quo must be maintained

The judgment *Droit de la famille - 20474*[2] rendered on March 27, 2020, the Superior Court of Quebec applied essentially the same principles as those set out in the above-mentioned Ontario decision, namely that :

> The existing custody or access orders are maintained allowing the child to benefit from the presence of both parents;
> A parent wishing to suspend existing orders must establish:
> the urgency of his request;
> sufficient grounds;
> A parent's living environment that threatens the health or safety of the children, or presents symptoms of the disease, may constitute sufficient grounds;
> Both parents must comply with the health and safety directives;

This decision indicates that for the Superior Court of Quebec, as for the Superior Court of Ontario, existing judgments on custody and access must be maintained, except when there is a concrete risk to the child's health because of one of the parents' behaviour or living environment, which may give an opening to a modification.

Parental authority to be exercised jointly by both parents

Furthermore, it is worth noting that in Quebec parental authority allows parents to jointly take decisions relating to their child even when they no longer live together, except in the rare cases where a parent is deprived of this right by a judgment of the court. Thus, regardless of the applicable custody arrangement, both parents must consult each other on any matter of importance relating to the child, in particular with regards to his health. Before making an important decision regarding the health of a child, a parent should consult with the other parent and discuss the best options under the circumstances.

Professionals to help you see more clearly

In summary, we are living in an exceptional situation that requires flexibility and understanding on the part of each parent while complying with the directives issued with respect to COVID-19.

If you have any doubts or concerns about your child's situation, or if your discussions with the other parent prove fruitless, it may be helpful to consult with professionals to determine the best course of action in the circumstances.

Our Family, Personal and Estate Law team remains available and fully functional to assist you, advise you and take the legal steps required in the best interest of your child.

---

1. 2020 ONSC 1829, available online: http://canlii.ca/t/j60jj.
2. 2020 QCCS 1051.

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.