CITATION: Jackman v. Doyle
COURT FILE NO.: FS-20-16266
DATE: 20200320

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CANDIDA OLIVIA (TRINITY) JACKMAN	)	*Harold Niman, Christopher A, Mamo and Rachel Hill* lawyers for the applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
MARCUS DOYLE	)	Self-represented and acting in person
Respondent	)	
	)	
	)	

HEARD: March 20, 2020

ENDORSEMENT

DIAMOND J.:

Overview

[1] By Endorsement dated March 19, 2020 of Justice Shore, I was designated to conduct a telephone hearing with the parties to address the applicant's recently issued application and motion seeking urgent relief. In accordance with the Chief Justice's Notice to the Profession dated March 15, 2020 ("the Notice"), Justice Shore reviewed the applicant's motion materials and found that since the matter related to, *inter alia*, the alleged unlawful withholding of two children (especially in light of the current COVID-19 situation in the greater Toronto area and the rest of Canada), the motion fit the "urgency requirement" as set out in the Notice.

[2] Having now (i) reviewed the applicant's motion materials and the respondent's email and attachments (as described below), and (ii) conducted the telephone hearing with the parties this morning, I share Justice Shore's view and agree that the applicant's motion is indeed presumptively urgent and warrants interim relief from the Court for the reasons which follow.

[3] Of note, the applicant's motion materials were served upon the respondent by email yesterday, and personally this morning. Apart from providing the Court with screenshot copies of three text message exchanges between the parties, the respondent has not had a chance to deliver a substantive response to the applicant's allegations. That said, I did offer the respondent a fulsome opportunity during the telephone hearing to share "his side of the story" with the Court, and set out his responding positions to the issues raised by the applicant in her motion materials. I listened to the respondent and considered his submissions in light of the applicant's material already filed with the Court.

Summary of Key Facts

[4] The parties were never married. In April 2012, they commenced cohabiting in a property owned by the applicant. They separated in July 2019 but continued to reside in the applicant's property until mid-December 2019 when the respondent moved out into another property ("the rental property") which the applicant agreed to rent for him. The applicant alleges that their relationship from July to December 2019 was quite volatile as the respondent would closely monitor the applicant both physically and through her phone. The applicant further alleges that the respondent has successfully extorted money from her in exchange for several broken promises that he would move out of her property earlier.

[5] The parties have two children: [redacted] and [redacted] who are currently five and three years of age respectively. The applicant alleges that she has been the children's primary caregiver throughout their lives, and although the respondent loves the children, he would typically spend much more time out of the property relying on the applicant and their nanny to watch and care for the children.

[6] The parties have participated in several attempts at mediation since they separated. From my review of the record, despite the respondent's submissions, there appears to be no formal agreement between them dealing with parenting issues, including parenting time. Until last weekend, the children resided with the applicant at her property with the respondent apparently having interim access to them in the presence of their nanny as agreed between the parties. According to the applicant, until the events of the last seven days, the respondent never had access to the children on his own without their nanny being present.

[7] The applicant states that upon the respondent's return to Toronto from a trip to Brazil on March 13, 2020, he told her that he was going to take the children with him to the rental property for the week of March 15, 2020 (ie. the second week of the private school March break). The applicant submits that she never agreed to any such arrangement, and instructed her counsel to write to the respondent's counsel to confirm the lack of any such agreement. In response, the respondent terminated his counsel's services, attended the applicant's property and removed the children without the applicant's consent.

[8] Since then, the applicant (through her counsel) has attempted to secure the return of the children to her property, but without success as the respondent maintained that the parties had agreed that he could have the children for the week of March 15, 2020. In addition, a review of email correspondence exchanged over the last several days between the applicant's counsel and the response discloses that the respondent appears to take the position that the children would be returned to the applicant upon her consenting to 50/50 parenting time agreement, although the respondent did state during the telephone hearing that he would return the children to the applicant on Monday, March 23, 2020 as long as there was interim access provided to him (which presumably would be without the nanny).

[9] There are additional facts which must be mentioned. There is evidence in the applicant's motion materials that during this past week, the children fell ill and they experienced fever. During the telephone hearing, the respondent confirmed that the children did indeed have a fever this past week (approximately 101 degrees), but he relied upon the advice of family/friends in the medical

profession in support of his position that it was "normal" for children to have fever sometimes and he treated them with regular acetaminophen. The respondent stated that the children's fever had since subsided and he videotaped the taking of their respective temperatures to confirm same. Notwithstanding the fact that the children had been ill this week, the respondent apparently took them to public places including stores, and drove with them to Sarnia yesterday to visit his elderly mother. This would normally be some cause for concern, but in light of the current COVID-19 situation, the applicant is understandably extremely concerned for the children's well-being, and argues that the respondent's entire decision-making has been called into serious question.

Decision

[10] To begin, I find that the matter before me is sufficiently urgent to warrant the applicant's motion proceeding in the absence of a case conference. In *Rosen v Rosen* 2005 CanLII 480 (ONSC) Justice Wildman held that in addition to a matter being urgent, a motion shall proceed in the absence of a case conference if the moving party provides evidence (a) that he/she has made inquiries about the availability of case conference dates, and (b) of his/her efforts to settle the matter outside the court process. The applicant has satisfied both elements of this test. The Superior Court of Justice's operations are suspended as per the Notice, and the applicant has attempted on several occasions to negotiate a return of the children.

[11] It is in the children's best interests to maintain the *status quo* and shield them from the impact of family litigation. Until the events of this past week, the children's *status quo* was found and maintained at the applicant's property. The children's lives were at the applicant's property both before and after separation. The respondent points to three text exchanges as evidence that (a) the parties have already agreed "months ago" that they would share 50/50 parenting time and (b) the applicant agreed that the respondent could have the children for this past week. In my view, those text exchanges do not support the respondent's position, as they do not amount on their own to any agreement in law. While the respondent may have more evidence to proffer on these issues, on the record before me I do not find the presence of any such agreements.

[12] Further, when the respondent was asked why he waited until last week to take the children when his position is that the parties agreed upon a 50/50 parenting time agreement some months ago, he stated that the rental property "wasn't ready at the time" and that he also had to deal with the death of a family pet which was traumatic for all involved. Even though the respondent has yet to deliver responding materials, his answer seemed to lack an air of reality, as armed with an alleged agreement one would have expected him to implement the terms of that agreement much closer to when it was originally made.

[13] Thus, and again on the record before me, I find that the children's *status quo* was unilaterally altered by the respondent's actions, and it is in the children's best interests to make an interim order returning the children to the applicant's care and control at her property. In terms of access, I make no order at this time and the parties are free to negotiate that issue. If they cannot reach an agreement, the issue can be raised at the next telephone hearing in one week's time (as set out below).

Summary of Interim Order

[14] In summary, I make the following interim Order:

a) Leave is granted to the applicant to bring her interim motion in advance of a case conference.

b) The respondent may be served with court documents by email [redacted].

c) The respondent shall return the children [redacted]) and [redacted] to the applicant's care and control forthwith.

d) If necessary, the applicant may enlist the assistance of the Toronto Regional Police, the Ontario Provincial Police, the Royal Canadian Mounted Police, who shall all assist, as required, with the enforcement of the provisions of this Order, and shall specifically take all such action as is required to locate, apprehend and deliver the children to the applicant, including the power of search and entry at any time.

e) As per the terms of the Justice Shore's Endorsement dated March 19, 2020, this Endorsement is an Order of the Court enforceable by law from the moment it is released.

f) The applicant's motion is adjourned to a telephone hearing before me on March 27, 2020 at 10:00 am. The Family Scheduling Office will provide the parties with the call-in particulars.

g) The respondent shall serve and file his responding motion materials by 4:00 pm on March 24, 2020.

h) The applicant shall serve and file any reply motion materials by 4:00 pm on March 26, 2020.

i) Costs of today are reserved to me as the presiding judge on March 27, 2020.

Diamond J.

Released: March 20, 2020

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