

CITATION: Lee v. Eckenswiler, 2021 ONSC 6519
COURT FILE NO.: FS-20-000097-0000
DATE: 2021 10 01

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LINDSAY LEE

Applicant

- and -

BRENT ECKENSWILLER

Respondent

) Ethan Winterburn, for the Applicant

) Ram Shankar, for the Respondent

) **HEARD: September 16, 2021**

REASONS FOR JUDGMENT

Fowler Byrne J.

[1] There are two motions before the court.

[2] The Respondent, Brent Eckenwiler (“the Father”), seeks the following orders:

- a) That the matrimonial home, located at 563 Wheeler Street, Lucknow, Ontario (“the Property”) be immediately listed for sale;
- b) In the event that the Applicant, Lindsay Lee (“the Mother”), does not cooperate in the sale, an Order that the Father may take carriage of the sale;
- c) After payment of all appropriate expenses and debts, that the remaining proceeds of sale be released to the Father to offset carrying costs;
- d) That any other excess funds from the sale of the home be considered retroactive child support and shall also be considered a lump sum payment of child support up to and including March 30, 2022;
- e) That child support payments to the Mother recommence on April 1, 2022, at the monthly rate of \$706; and
- f) That the Father have unsupervised parenting time with the children of the marriage, as follows:
 - 1) Equally shared, or in the alternative, on alternate weekends;
 - 2) One half of the Christmas school holidays; and
 - 3) A change in parenting time in November 2021 to reflect the Father’s winter work schedule.

[3] The Mother seeks the following orders:

- a) Interim decision-making responsibility for the children of the marriage;
- b) That the Father's parenting time be supervised at a supervised access centre, one time every two weeks;
- c) Child support and a proportionate share of section 7 expenses; and
- d) The ability to move with the children of the marriage to the Municipality of Chatham-Kent or a similar location of the Mother's choosing.

I. Interim Parenting Time

[4] The parties started cohabitating in 2016 in the home of the Father's mother. The Father then purchased a home that year and the parties moved in together. They were married on September 15, 2018. There are two children of the marriage: a daughter F.E., who is two years old, and a son W.E., who is 1 year old.

[5] The parties separated in November 2020. The youngest child was only 4 months old at the time. Following a motion scheduled for December 24, 2020, the parties reached an interim parenting agreement wherein it was agreed that the children would reside primarily with the Mother and the Father would have parenting time over the Christmas holidays. No supervision was imposed. In fact, it was a term of the

agreement that the Father be the primary care giver at that time, and not his extended family.

[6] The matter was then adjourned until January 22, 2021, at which time the parties reached another agreement as to parenting time. Again, the children were to reside primarily with the Mother, but the Father was granted parenting time on every alternate Saturday and Sunday. This parenting time included an overnight visit for F.E., but only noon to 4:00 p.m. on Saturday and 8:00 a.m. to 4:00 p.m. on Sunday, for W.E. The Father also had alternate Thursdays with both children for 6 hours. The agreement contained a provision that at the end of April 2021, access with W.E. would be reviewed to determine if overnight access should commence for the weekend visits for him as well. No supervision was required.

[7] The Father maintains that the Mother would not re-engage with the Father on parenting time since April and has instead refused all parenting time with the Father since April unless she personally supervised the visits at a park. She also insists that he wears a mask and gloves. It is uncontradicted that the Father would not abide by the terms imposed by the Mother and accordingly, the Father has chosen not to see his children since April 29, 2021. The scarcity of court dates is one reason for the delay in bringing this motion.

[8] The Mother resists unsupervised access for a number of reasons.

A. Lack of Court Order

[9] The Mother believes that as of April 29, 2021, there is no court order in place addressing parenting time. She is fearful that without the protection of a court order, her children may be withheld. She claims that the paternal grandmother withheld the children in December 2020.

B. COVID-19 Concerns

[10] The Mother states that the Father has not taken the proper precautions to protect the children from COVID-19 and frequently visits his girlfriend out of town. The Mother has produced a letter from her family doctor dated May 2021, which confirms that due to W.E.'s early medical history, he would be at risk from respiratory infections, including COVID-19. The Father maintains that the child's condition has resolved, and the child is not at risk. The Father relies on the fact that the Mother travels to see her family without concern. Also, he indicates that he is fully vaccinated and takes the necessary precautions.

C. Family Violence

[11] The Mother maintains that she has concerns about the children's safety if access is not supervised. She alleges physical, verbal and emotional abuse at the hands of the Father throughout the relationship and in the presence of the children.

[12] A number of criminal charges have been laid against the Father, as a result of the Mother's statements to the police.

[13] The first charge, for assault, was laid with respect to an event on November 2, 2020. Although they disagree as to why, both parties agree this charge was withdrawn by the Crown.

[14] The Mother then made further allegations to the police that resulted in additional charges being laid against the Father on July 29, 2021. These charges are for 9 counts of spousal assault, 2 counts of spousal assault with a weapon and 3 counts of mischief. The Mother indicates that the charge of assault with a weapon was with respect to the Father stabbing her with a knife. She claims there are medical records and doctor's notes attesting to this. No such records were attached to her affidavit. She also alleges that the Father threw crutches at her head. She alleges that both incidents occurred when she was pregnant. The adjudication of these charges is at the early stages and nothing has been proven. Very little detail has been provided with respect to any of the allegations of violence.

[15] The Father maintains that these charges were retaliatory because in the weeks prior to the charges being laid, he told the Mother that the matrimonial home needed to be sold. The Mother denies this and states that these charges are a result of her discussions with the police as of April of this year, which will be verified in the police records which the Father should have access to. Neither party filed any of the documents from the criminal proceedings, save and accept the Father's Undertaking upon his release. The Father is now subject to a number of conditions, which include a prohibition from communicating with the Mother, except through counsel or for

arranging parenting time, a prohibition from attending at the matrimonial home, and a prohibition from coming within 500 metres of the Mother and anywhere she lives, works, or frequently attends.

[16] The Bruce Grey Children's Aid Society ("CAS") has been involved with this family for a number of months. In a letter addressed to both parties, dated May 26, 2021, the CAS indicates that they have no concerns that the children would be unsafe while in the care of either parent and they support both parties having parenting time with the children. That being said, the CAS was very concerned about the exposure of the children to the conflict between the parties.

D. Mental Health of Mother

[17] The Father also has his concerns.

[18] The Father denies that the children are at risk when with him. He maintains that the children are more at risk with the Mother, who suffers from mental health issues, for which she will not seek help or take regular medication. He claims that at times she is suicidal. He claims her mental health makes her act irrationally and she is not able to properly care for the children. He blames her poor mental health as the reason she has filed criminal charges against him.

[19] The Mother admits to having post-partum depression following her last pregnancy, which she says is resolved. She also acknowledges a diagnosis of ADHD,

but states that she continues to take her medication and it does not cause mood swings as alleged by the Father.

[20] The Mother has provided a psychiatrist's letter indicating that the Mother reports experiencing a great deal of stress and anxiety regarding violence in the relationship, the end of the relationship and the ongoing court proceedings. Dr. Hidvegi indicated that it would be beneficial for the Mother to relocate to the Chatham-Kent area where she has the support of family and friends.

E. The Law

[21] When determining parenting time, the court shall first and foremost take into account the best interests of the child. In so doing, the court shall consider all of the factors related to the circumstances of the child, but shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being: *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s.24(1), (2) ("CLRA").

[22] Supervised access is a great intrusion into the relationship between a child and parent and its continued imposition must be justified: *Young v. Hanson*, 2019 ONSC 1245, at para. 32, also cited in *G. v. F.*, 2021 ONSC 1362, at para. 47. The intrusion is less striking when supervision is by a family member in a home setting, but nonetheless, it is not a long-term solution. Supervised access is designed to provide a temporary and time-limited measure, to resolve a parental impasse over access, rather

than provide a long-time solution: *M. (B.P.) v. M. (B.L.D.E.)*, 97 D.L.R. (4th) 437, at para. 33.

[23] The onus lies on the person seeking that parenting time be supervised, to show that such supervision is necessary. The greater the restriction on regular parenting time, the more important it is to show why the restriction is necessary: *Liu v. Xie*, 2021 ONSC 222, at para. 69, *Docherty v. Catherwood*, 2015 ONSC 5240, para. 38.

[24] When considering the best interests of the child, the new amendments to the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) specifically require that the court consider whether there was any family violence and the impact of that violence has upon the ability and willingness of any of the parties to care for and meet the needs of the children. When considering family violence, the court should consider, *inter alia*, the nature, seriousness, and frequency of the violence and whether the violence was directed towards the child or whether the child was exposed to it. Also, the court shall consider the physical, emotional and psychological harm or risk of harm to the child, the compromise of safety to the child or a family member, and any steps taken by a person who has perpetrated the violence to prevent further family violence and improve their ability to care for and meet the needs of the child: *Divorce Act*, ss. 2(1), 16(3)(j) and 16(4).

F. Analysis

[25] It is too early in these proceedings to make any determination as to whom should be making major decisions with respect to the children. The Office of the Children's Lawyer has been requested to become involved. The children are very young, and it is not anticipated that any major decisions must soon be made. If something urgent presents itself, the parties will have to try to agree (through counsel) or bring the matter before the court.

[26] With respect to parenting time, in the circumstances of this case, it is in the children's best interests that parenting time with the Father resume as soon as possible, and that it be unsupervised.

[27] While the allegations against the Father are concerning, they are not yet proven. More importantly, the Mother has provided little or no details of the allegations of family violence. It is not sufficient that the Mother simply indicate that criminal charges have been laid and assume that this will be sufficient proof of family violence, so that a supervised parenting order will be made. There are no details given as to time or location of any of these alleged acts. She does indicate that she was pregnant during two attacks, but it is not clear whether it was when she was pregnant with her first or second child. Other than this, there are no details given whatsoever with respect to the other charges. As indicated, the Mother has the onus of showing that supervised access is warranted. She has not done so here.

[28] In addition, the actions of the Mother indicate that she does not have a fear for the children's safety while with the Father. In particular, the following can be considered:

- a) The Mother agreed to unsupervised access from the time of their separation until the end of April 2021, despite the alleged assault in November 2020;
- b) The Mother states that she only agreed to unsupervised access because she believed the paternal grandmother or the paternal great-grandmother would be present at all times. This is despite the fact that the paternal grandmother works and the paternal great-grandmother is in her eighties and may be unable to assist if the children were in danger. More importantly, the Mother accuses the paternal grandmother of withholding the children and used this as a reason to suspend the Father's parenting time in May 2021;
- c) The Mother claims the children are at risk when with the Father, but she made it a term of the first interim parenting agreement that it would be the Father that was primarily responsible for the children while they were with him, and not his extended family;
- d) The Mother claims that she was fearful of the Father withholding the children without a court order, yet there was nothing prohibiting her from

obtaining a further order in April, on consent, allowing parenting time with the Father to continue, even inserting a police enforcement clause;

- e) The Mother asserts that she has been in communication with the police since April about the Father's alleged assault. Nonetheless, the letter from the CAS, dated May 26, 2021 makes no mention of the mother's concerns of family violence and states that it feels the children are safe in either home. If the Mother had mentioned her concerns about the children's safety, I assume that the CAS would have addressed it. The only concern they had was the involvement of the children in the family conflict. This can be addressed in a parenting order.

[29] Accordingly, the Mother has failed to satisfy the onus of showing that supervised access is necessary.

[30] I also do not find that the Father's concerns about the Mother's mental health are warranted. Other than his speculation, there is no evidence that the Mother has a mental health condition that would prevent her from parenting in a safe and diligent manner. There is no evidence that taking, or not taking medication for A.D.H.D. will impact the Mother's parenting ability.

[31] The Father's decision to not have any access in the meantime, was not in the children's best interests. The children are young. They need more frequent contact with the Father to ensure that they bond and set the foundation of their relationship. The

Father allowed his conflict with the Mother to interfere with his parenting time. While the Father's disagreement with supervised access was understandable, he should have kept his contact with the children consistent, albeit on terms that he was not agreeable to, until which time this matter returned to court.

[32] Accordingly, the Father's access will start immediately, unsupervised, but will be introduced gradually so that the children can reacquaint themselves with the Father. Given the ongoing conflict between the parties, further parenting orders are also necessary.

II. Child Support, Section 7 Expenses and the Matrimonial Home

[33] These issues shall be determined together as the financial aspect to each is inextricably intertwined.

[34] The children of the marriage reside primarily with the Mother, so the Father has a child support obligation.

[35] In the order of Van Melle J., dated January 22, 2021, the Father was ordered to pay all the current debt associated with the matrimonial home and his vehicle (which the Mother drives). It was estimated at this attendance that this would cost anywhere between \$1,500 to \$2,000 per month. Van Melle J. also indicated that these payments will be paid "in lieu of child support".

[36] The Mother would like this order changed. Given that the matrimonial home is in the Father's name, his payment of the mortgage is for his benefit alone at this time. She argues it should not be considered child support. She also wishes the Father to pay his proportionate share of section 7 expenses. She claims she has spent \$450 in dental services for the children and he has not contributed. She has provided no receipts.

[37] The Father's income in 2020 was \$59,109. Accordingly, his child support obligation for 2 children is \$901 per month. Nowhere in her materials does the Mother indicate her income or provide a copy of her tax return. It is difficult to understand how any order for section 7 expenses can be made in the absence of this evidence. That being said, the parties have no doubt been made aware by their counsel that all section 7 expenses are to be paid proportionate to their income. Generally, the parties should agree to these type of expenses.

[38] In her Order of January 22, 2021, Van Melle J. was unquestionably cognizant of the fact that it would be difficult for the Father to pay for both child support and the upkeep of the matrimonial home. Prior to paying child support, the Father had a monthly net disposable income of \$3,794. The Father claims his monthly costs associated with the home is approximately \$1,365. He claims he cannot afford to maintain the home, cover his debt (which is associated with the maintenance of the home) and the vehicle loan for his vehicle that is being driven by the Mother. The

monthly costs associated with the vehicle are approximately \$940. Even if he had no rental expenses himself, after child support, he would be left with approximately \$500 per month to eat and gas his car. This is unrealistic.

[39] Unfortunately, the Mother provided no evidence of her income or her expenses. She does refer to a child tax benefit but does not indicate how much she receives. She also indicated that she could apply for Ontario Works but needs the Father to pay less child support than what the *Federal Child Support Guidelines*, S.O.R. 97-175 indicate is appropriate. There is no evidence that she has made this application.

A. Law

[40] As the registered owner of the Property, the Father has the right to dispose of it when he wishes, subject to the Mother's rights of possession under s.19(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"). That being said, the court does have the authority under s.23(b)(iii) of the *FLA* to order the disposition of the matrimonial home if the other spouse unreasonably withholds their consent.

[41] While the Mother did not seek an order for exclusive possession, the factors that a court must consider in allowing a spouse to remain in the home are instructive. In s.24(3) and s.24(4) of the *FLA*, the court is asked to consider the best interests of the children. In particular, it states that the court should consider the possible disruptive effects on a child when moving to another accommodation, and their views and preferences, if ascertainable.

[42] To make a pre-trial order for the sale of a matrimonial home, the court must first determine whether the resisting party has established a *prima facie* case that he or she is entitled to a competing interest under the *FLA*. If not, the sale shall proceed. If a competing interest has been made out, the motion for sale will be denied unless the selling party can demonstrate that the sale would not prejudice the rights of the resisting party: *Goldman v. Kudeyla*, 2011 ONSC 2718, 5 R.F.L. (7th) 149, at para. 18.

[43] Some of the factors that favour dismissing a request for a pre-trial order for the sale of the matrimonial home include an imminent trial date, prejudice on equalization or the need to preserve the home for a vulnerable child: *Goldman*, at para. 19.

[44] An application for the sale of a jointly held property prior to trial should be deferred where there are substantial rights in relation to that jointly owned property that would be jeopardized by the sale or prejudice the rights of the opposing party: *Silva v. Silva*, 75 D.L.R. (4th) 415 (C.A.), at p. 424.

[45] In addition, the court has found it inappropriate to order the sale of a matrimonial home prior to trial when the residency of a vulnerable child is at stake because the sale would create a prejudice that could not be undone: *Fernandes v. Darrigo*, 2018 ONSC 1039, 11 R.F.L. (8th) 81, at paras. 3, 20 (Div. Ct.).

B. Analysis

[46] For the foregoing reasons, the matrimonial home should be sold, but the Mother is to be given sufficient time to find suitable alternate arrangements.

[47] I have decided this for a number of reasons. Firstly, while it is always the preference of the court to maintain stability for the children, it is not the role of the court to force a financially untenable situation on the parties. The simple reality is that the cost of supporting two separate households is more than the cost of living together in one. The current financial situation cannot continue. The Father cannot afford to keep up the home, even in lieu of child support, and the Mother has no ability to purchase the home from the Father. While the Mother may have an equalization claim, this can be preserved by the retention of the proceeds of sale until settlement or trial. The matrimonial home will have to be sold at some point in this litigation. It serves neither party to prolong the inevitable.

[48] Secondly, while it is acknowledged that the children are young, there is no evidence that a move will be particularly disruptive for them. They are too young to have formed bonds with other children in the neighbourhood. They are not yet enrolled in any school. The Mother is not working, so the location of day care is not an issue. The Mother has provided no evidence that the children are particularly vulnerable. In fact, she is agreeable to moving out of the home, but only if the Father agrees that she can move three hours away. Such a move would be more disruptive in that the children will not have ongoing contact with the paternal extended family, which existed prior to the Mother unilaterally terminating parenting time with the Father.

[49] With respect to the proceeds of sale, it would be premature to order that the Father retain the entire amount. It is acknowledged that he paid for the upkeep of the

home, but there may be an equalization payment or child support arrears that is owing to the Mother. The proceeds should be preserved, until which time all financial issues are settled or tried.

[50] In order for the Mother to have sufficient time to find alternate accommodations, steps should be taken to list the Property, but the Mother should have a minimum of 60 days before she must vacate the home. Until that time, the Father shall continue to pay for the upkeep of the home, as set forth in the Order of Van Melle J. Upon the completion of the sale, the Father shall commence payment of his child support on a monthly basis, based on his 2020 income.

III. Mobility

[51] The Mother has given the Father notice that she wishes to relocate to either the Chatham-Kent area or any other area that she may choose. In her affidavit materials, she refers to the Kingston area. She claims that she cannot afford to live in Bruce County, and cannot find affordable housing.

[52] While the Mother has not provided evidence of proper notice under the *Divorce Act*, the parties agree that her request to relocate has been known by the Father for more than 60 days.

[53] Upon reviewing the circumstances of this case, I find that it is not appropriate to allow the Mother to relocate with the children at this time. The Mother provided no evidence of the factors that the court must consider under s.16.92 of the *Divorce Act*.

While she claims she cannot afford to live in Bruce County, she has given no evidence to support this. She claims she can live more affordably in Chatham-Kent or the Kingston area, but has provided no evidence of that. She claims she needs the support of her family in the Chatham area, which her psychologist supports, but she also proposes moving to other locations where there may be no family connection. She has given no consideration to the impact of the relocation on the children. The details of the proposal are so vague that this court cannot consider the reasonableness of it, except to note that the children will be far away from all they have known to date. The Mother's proposal for make up time for the Father is insufficient.

[54] Accordingly, the mother's motion to relocate is dismissed.

Conclusion

[55] For the foregoing reasons, I make the following orders:

Parenting

- a) The children shall reside primarily with the Mother;
- b) The Father shall have parenting time with the children as follows:
 - 1) On Saturday, October 9, 2021, from 12:00 noon to 4:00 p.m.
 - 2) On Sunday, October 10, 2021, from 8:00 a.m. to 4:00 p.m.
 - 3) On Sunday, October 17, 2021 from 8:00 a.m. to 4:00 p.m.

- 4) On Sunday, October 24, 2021 from 8:00 a.m. to 4:00 p.m.
- 5) Starting on Saturday October 30, 2021, and on every alternate weekend thereafter, from 12:00 noon on Saturday to 4:00 p.m. on Sunday;
- c) The parties shall arrange for exchanges in a manner that does not violate the Father's conditions for his release, or the parties may jointly apply for a variation of the Father's undertaking to allow the Father to collect the children from the matrimonial home or in the presence of the Mother, if she so agrees;
- d) Both parties shall take all necessary precautions to protect their children from COVID-19 infection, and follow all federal and provincial guidelines;
- e) As ordered on September 16, 2021, if the parties cannot agree on a winter parenting schedule upon the Father's working hours changing, this matter will be returnable on December 8, 2021 at 2:00 p.m.;
- f) Neither parent will denigrate or disparage the other parent or members of their extended family, either overtly or covertly, in any communication with the children of the marriage, or in their presence. Each parent will advise others, including their extended families and friends, to maintain the same standards, refraining from criticizing the other parent to or in front of the children of the marriage;

- g) The parties will not speak with the Children directly or indirectly about any issues related to this litigation;
- h) The parties will not interfere directly or indirectly into the lives, activities, or routines of the Children when they are with the other party. Unless required otherwise in any court order or with the consent of the other party, neither parent will schedule activities during the Children's time with the other parent;

Matrimonial Home

- i) The Property shall be forthwith listed for sale, which shall proceed as follows:
 - 1) Within two weeks, the Father shall provide the names of 3 real estate agents that he is content list the Property for sale; within 2 weeks thereafter, the Mother shall select one of the agents to list the home; if she does not select an agent within that two weeks, the Father shall have the right to pick which agent shall list the home;
 - 2) The Property shall be listed for sale by no later than 30 days from this date. The parties shall, before that date, agree, in consultation with the real estate agent, on an initial listing price.
 - 3) In the event of disagreement as to the selection of the listing price, the parties will follow the direction of the listing agent;

4) In consultation with the real estate agent, the parties shall take reasonable steps to ready the Property for sale. These steps shall be completed within 30 days of retaining the listing agent. The cost of these steps shall be paid by the Father, who shall be reimbursed for them from the proceeds of sale of the Property, up to the amount of \$2,500.00, unless the parties agree in advance, and in writing, to a greater amount. The payment of these costs shall be without prejudice to the rights of the parties at trial to claim a re-apportionment of responsibility for them, together with or separate from claims for occupation rent or set off of expenses relating to the Property from the date of separation to the date of trial;

5) The parties shall take all reasonable steps to facilitate and complete the process of selling the Property. If either party fails to comply with this paragraph, the other party may apply to this court to dispense with the non-cooperating party's participation in the process of selling the Property, which application may be *to me*, in writing;

6) The Mother shall not be required to vacate earlier than 60 days from the date of this order, unless the parties agree otherwise, in writing;

7) From the proceeds of sale of the Property, the following shall be paid: mortgage, property taxes, real estate commission, the loan for the windows, legal fees of the sale and the standard closing day adjustments.

The remaining proceeds shall be held in an interest-bearing trust account by the parties' real estate solicitor pending written agreement of the parties or further court order.

Child Support

- j) On the first day of the month in which the sale of the Property is to close, the Father shall pay to the Mother child support for the two children of the family, in the monthly amount of \$901;
- k) Child support shall be reviewable on June 1, 2022, and every year thereafter, by the exchange of the parties Income tax returns and Notices of assessment;

Costs

- l) The parties are encouraged to resolve the issue of costs themselves. If they are unable, the parties shall serve and file their written costs submissions, which shall not exceed two pages, single-sided and double spaced, plus their Costs Outlines, no later October 15, 2021; the parties may file written responding costs submissions, with the same size restrictions, no later than October 29, 2021;

Fowler Byrne J.

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REASONS FOR JUDGMENT

Fowler Byrne J.

Released: October 1, 2021