CITATION: Streppel v. Smit, 2021 ONSC 5162
COURT FILE NO.: 153/21
DATE: 2021-07-22

ONTARIO

SUPERIOR COURT OF JUSTICE

FAMILY COURT

BETWEEN:	)	
Theodore Emerson Streppel	)	Jennifer Eenslid, Counsel for the Applicant
Applicant	)	
– and –	)	
Lauren Grace Smit	)	Keith R. Newell, for the Counsel for the Respondent
Respondent	)	
	)	**HEARD:** June 22, 2021

THE HONOURABLE JUSTICE J. W. SCOTT

DECISION ON MOTION

[1] The motion before the court relates to temporary parenting arrangements concerning the child Emery Rose Streppel who was born on November 8, 2018. She is the daughter of the applicant, Theodore Emerson Streppel, and the respondent, Lauren Grace Smit. Currently she is living with her mother in Nova Scotia.

Position of the Parties

[2] The motion filed by the applicant requests the court to order that the respondent immediately return with the child to St. Catharines pursuant to s. 36(1) of the *Children's Law Reform Act* or, in the alternative, that the court order that the applicant be able to retrieve the child from Nova Scotia and return her to the City of Cambridge. The respondent does not agree with

that request and asks that the court permit the child to stay with her in Nova Scotia. She proposes that Emery see the applicant for two weeks every second month and that either she or her fiancée, Matthew Beasant, be responsible for transporting the child back to Ontario for this parenting time.

Background

[3] This is a young couple. The applicant is 21 years of age and the respondent is 20. Emery Rose is their only child and neither party has any other children. Their relationship began in December of 2016 and ended in July or August of 2020, although they only lived together from March of 2019 (after their daughter was born) until July of 2020.

[4] Affidavits from both parties suggest that their relationship was difficult and violent at times. Both parties have been criminally charged with respect to a domestic violence incident that was resolved with them each being placed on a peace bond. Both parties completed the PAR programme as a consequence of the bond. The applicant acknowledges in his material that he did have an addiction problem but indicates that he successfully completed a 60-day residential rehab programme between October 11 and December 10, 2020 and offers that he is now in a much better position personally. He continues with post-residential services, including counselling, to assist him.

[5] Following the separation of the parties in the summer of 2020, the respondent met someone new through a dating website. His name is Matthew Beasant and he is 31 years of age. Although when they met he was working and living in Toronto, his roots are in Nova Scotia where his family resides. In or around November of 2020, the respondent advised the applicant's father that she and the child were going on a vacation to Nova Scotia. The material is not clear as to whether she advised that they would be accompanying her new boyfriend on this trip. On January 22, 2021 the respondent emailed the applicant's father that she and the child would be remaining in Halifax, that she was engaged to Mr. Beasant and that they were expecting a baby in August of 2021. The email also indicated that she had informed the applicant of this same information. Within five days of that announcement the applicant's counsel corresponded by email to the respondent to advise that Mr. Streppel was not consenting to this permanent relocation to Nova Scotia. Counsel also requested that the respondent provide the address where she and the child were and a firm timeline for when they would be returning. The following day the respondent replied to that letter indicating that she would not be returning with the child to Ontario. She stated that she had been the child's primary caregiver throughout and that the applicant had been unresponsive and inconsistent with the online contact she had offered. She added that because of the "violent behaviour" on the part of the applicant she would not agree to anything other than supervised visitation.

[6] As a result of that response, the applicant then filed the current application before the court and requested a date for a motion to address jurisdiction and temporary parenting arrangements. Around this same time the respondent contacted the police in Cambridge and raised with them

allegations of violence that had occurred on the part of the applicant towards her in early 2020, prior to their separation. As a result of this information charges have now been laid against the applicant and he is currently subject to an undertaking issued out of the Ontario Court of Justice. Pursuant to that undertaking, amongst other conditions, the applicant is not to communicate with the respondent and not to have any contact with the child except as approved by Family and Children's Services or in accordance with a court order made after February 18, 2021.

[7] For her part, the respondent retained a lawyer in Nova Scotia with a view to commencing a custody application. With the Ontario court now having assumed jurisdiction (with the consent of the respondent), the application in Nova Scotia did not proceed.

[8] Currently the respondent is living in Nova Scotia with Emery and with Mr. Beasant. She is not working but being supported by Mr. Beasant and his family.

[9] As a result of an order made by this court on May 20, 2021, Emery had parenting time with her father, in person, from June 7, 2021 until June 18, 2021 at the paternal grandparents' home in Cambridge where the applicant also resides. The respondent was responsible for the transportation, by car, which she and Mr. Beasant handled together. It should be noted that according to the evidence of the applicant, the respondent does not have a driver's licence so she does depend on others to assist her in this area. In addition, the order provided for FaceTime between the child and her father Tuesdays through Saturdays. The material filed also confirmed that when the child was with the applicant in Cambridge, the parties did arrange for FaceTime between Emery and her mother. There is no indication that there were any difficulties with the parenting time arrangements.

The Law

[10] When the *Children's Law Reform Act* was amended effective March 1, 2021, no transitional provisions were included to address those matters filed with the court prior to that date but not addressed until after March 1, 2021. While I am aware of some cases that have focused on this issue, they have been with respect to trials and not temporary motions. Nonetheless, some of the conclusions in those cases are equally applicable for consideration on a temporary parenting motion. The cases appear to stand for the proposition that the amendments can be considered.

[11] *L.B. v. P.E.*, 2021 ONCJ 114, a decision of Sherr J., following a trial, applied the amendments. While Sherr J. indicated that he was employing this approach, he emphasized that it was specific to the case before him as he was only dealing with best interests in a parenting order and relocation was not an issue. At para. 43 of his reasons, he sets out why in his view it was appropriate for the court to take into account the new legislation:

> a) **The result in this case would be exactly the same - no matter whether the court applied the best interests considerations set out in subsections 24 (2) (3) and (4) of the Act, as it read before March**

> **1, 2021, or the best interests considerations set out in the amendments.**
>
> **b) The best interests criteria in the Act, as it read before March 1, 2021, and those set out in the amendments are non-exhaustive – all relevant factors concerning a child's best interests have been and will continue to be considered by courts. There is nothing that precludes the court from considering the best interests considerations set out in the amendments....**
>
> **c) The amendments modernize the best interests language and are much clearer than some of the clunky and confusing terminology used under subsections 24 (2) (3) and (4) of the Act, before the amendments came into force.**
>
> **d) The amendments reflect the government's intention of what is now in a child's best interests. There is a strong argument that the determination of a child's best interests after March 1, 2021 should not be decided differently just because the case was started earlier than March 1, 2021.**
>
> **e) The amendments, to a large extent, codify the existing jurisprudence about a child's best interests....**
>
> **f) The amendments provide a comprehensive and useful definition of family violence. They also set out best interests factors relating to family violence. These are reflective of much of the jurisprudence about domestic violence....**

[12] In situations where a parent has removed a child from where he or she ordinarily resides, the court must initially deal with whether that move should be permitted to stand on a temporary basis. It is particularly troublesome when the move was without notice to the other parent.

[13] It was noted in *M.K. v. J.K.*, 2020 ONCJ 386 that temporary mobility cases are among the most challenging a court faces. As stated at para. 33 of that decision:

> **One of the aspects that make these cases a particular challenge is not only the significant impact *any* order will have on the family and possibly the final result of the litigation, but that decisions on interim and urgent motions are often on a limited evidentiary record comprised of untested affidavit material. This is the case here and I do not have the benefit of viva voce evidence or even cross examination on the parties' affidavits, or any independent evidence including by way of an OCL report.**

[14] Although the amended legislation does have a section on "relocation" (s. 39.3), it is my view that technically the notice provision cannot be applied to those situations where the move took place prior to the section being in force. However, that does not take away from the case law that has evolved over the years on this issue which has frowned on a parent unilaterally removing a child from the child's ordinary residence without any consultation or discussion with the other parent. When the other parent has voiced his or her objection as soon as the move has come to his or her attention, it is obvious that no acquiescence has occurred and consequently a court must determine, as part of the parenting order, in what jurisdiction the child will reside.

[15] Great caution should be exercised before permitting the move at the temporary stage of an application. The moving party bears the burden of convincing the court that there are compelling reasons to permit the move. (*M.K. v. J.K.*, 2020 ONCJ 386 at para. 34)

[16] The legal principles applicable to interim motions on mobility are outlined in *Plumley v. Plumley*, 1999 CanLII 13990 (ON SC) where the court stated at para. 7:

> **It appears to me that the following factors are or ought to be important in deciding the mobility issue on an interim basis:**
>
> 1. **A court will be more reluctant to upset the status quo on an interim basis and permit the move when there is a genuine issue for trial.**
>
> 2. **There can be compelling circumstances that might dictate that a judge ought to allow the move. For example, the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial or the best interests of the children might dictate that they commence school at a new location.**
>
> 3. **Although there may be a genuine issue for trial, the move may be permitted on an interim basis if there is a strong probability that the custodial parent's position will prevail at a trial.**

[17] However, despite the factors identified in *Plumley*, the over-riding consideration remains, as always, the best interests of the child, not the interests of the parents.

Discussion and Order

[18] At the outset, let me say that I do not accept the applicant's argument that is based on the *Hague Convention*. That legislation is in place to deal with international borders, not provincial ones and it is simply not necessary to go down that road, even as a parallel, when we are dealing with provincial borders. The case law under the *Children's Law Reform Act* and the legislation itself are sufficient to address the current matter.

[19] As appears to be acknowledged by all, from Emery's standpoint the habitual residence of the child is Ontario. Even though at this point she has been in Nova Scotia for about eight months with the respondent, that factor alone does not result in her habitual residence being changed and should not be seen as the status quo at this point, particularly when we factor in how she came to be in Nova Scotia.

[20] In addressing the move to Nova Scotia there appears to be at least two possible scenarios for how that came to be, neither of which are helpful to the respondent in her request for a temporary order permitting the child to stay with her in Nova Scotia now.

[21] The first scenario is that she was planning, or at least aware, all along that she was going to move to Nova Scotia and take Emery with her and determined not to share that information in advance of her trip there. If that is the case, the court would be extremely concerned by her actions. Aside from the deception, it simply pays no regard to the fact that Emery had a relationship with family in Ontario; and despite the child living with her, it was inconsiderate of the rights of the child and her best interests to simply move her unilaterally to Nova Scotia without prior discussions with the applicant or an application to the court.

[22] The second scenario is that things did unfold as she and Mr. Beasant have attested to in their affidavits, that they had planned to stay for only three or four weeks but changed their minds after arriving in Nova Scotia. Certainly, the pregnancy and engagement may have impacted on that decision. Again, however, I am concerned that they simply made this decision without taking into account that there were affairs to get in order in Ontario with respect to Emery that needed to be addressed first. If this second scenario is what actually occurred, the focus seems to be entirely on the respondent, Mr. Beasant and their relationship, with little insight reflected on how this might impact on Emery on both an immediate and long-term basis.

[23] This plan to have Emery reside in Nova Scotia is a genuine issue requiring trial. There are many questions that cannot be answered by untested affidavits at an interim stage. As was noted by Sherr J. in *Cox and Cox v. Darling*, 2008 ONCJ 91:

> **Courts need to be very cautious in permitting temporary moves in mobility cases because the child-focused inquiry required under *Gordon v. Goertz*, *supra*, is very difficult, if not impossible, to accomplish on the conflicting affidavits that one receives in these cases.**

[24] Frankly, although the affidavits of both the respondent and Mr. Beasant assert that they intended to return to Halifax for only a visit, I am somewhat concerned with the accuracy of that statement. Mr. Beasant apparently lived in Toronto from 2018 until 2020 and, according to him, was doing well with his business there, earning $80,000.00 annually. It is unclear to me whether he provided notice to his Toronto landlord of his intention not to return and if so when that notice

was provided. More information needs to be provided by the respondent as to when and how this current plan evolved in order to remove any concerns this was not an impetuous decision without any regard for Emery. In other words, was this a plan for the adults and their best interests and, if any thought about Emery was involved, was it something more than "she will be fine if we do this". If the move to Nova Scotia became their plan after arriving there, one wonders why they did not go back to Ontario and organize all aspects of their move, including the parenting piece for the child. The pandemic may have made things more difficult but it was not a preventative force. Ontario did not prevent people from Ontario returning there.

[25] Mr. Beasant indicates that he has become involved in a new business as of January 2021, *Wax That Tat,* and that this business merged with his prior company in hopes it would result in an overall expansion of the businesses. His evidence is that the majority of his work can be done through the computer and phone with potential clients throughout North America. There is no evidence that the business needs to be located in Nova Scotia. Consequently, it appears that from an employment standpoint there was no reason that this new couple could not have returned to Ontario. Mr. Beasant apparently could work from there and the respondent could have organized her affairs, particularly as it pertained to Emery. Work and finances in this case do not appear to be a compelling circumstance that should result in the court making a temporary order that Emery reside in Nova Scotia with the respondent.

[26] I have also considered whether the respondent's current pregnancy should result in the court ordering residency of Emery to be in Nova Scotia on a temporary basis. During the course of the motion and discussion concerning timing of the child's parenting time with the applicant in July, the Court became aware that the respondent was having some difficulties with her pregnancy such that she herself would not be involved in bringing Emery back to the applicant for that visit. Mr. Beasant was going to assume that responsibility. The arrival of another child into the Smit/Beasant household is not sufficient to result in a temporary order that Emery reside in Nova Scotia, although it might impact on timing as will be referenced later. As noted above, if Mr. Beasant is able to work from anywhere then clearly a temporary order that Emery reside with the respondent in Ontario would not result in the new child being separated from his or her father, Mr. Beasant.

[27] Another aspect that the Court has considered with respect to whether it might be a "compelling circumstance" are the allegations of domestic violence. There were obvious difficulties in the relationship between the parties when they were together. In fact, both were charged in that regard, as was mentioned previously. Although only filed this year, there are some historic allegations currently outstanding in the Ontario Court of Justice. Those matters are yet to come to any conclusion. Therefore, at this stage, aside from the charges that eventually led to the peace bonds being signed, all that is before this Court are untested allegations (from both parties) with respect to assaults and arguments between them. It does appear, so far, that some of the incidents the respondent alleged occurred took place when the applicant was heavily involved in

marijuana use and some when both parties were drinking. The final incident in or about July of 2020 did result in the respondent and Emery going to reside with the applicant's parents for about a month before they moved to Niagara to live with her father in St. Catharines. Although based on the affidavits filed it appears that the child was exposed to some of the family violence, it seems none of it was specifically directed towards the child. It is also noted that the applicant has now taken steps to improve his situation, specifically through the 60-day residential treatment programme at GreeneStone and programmes since with Cambridge Memorial Hospital (Dialectical Behavioural Therapy) and House of Friendship Addiction Services (counselling). There is no evidence at this point to conclude that the move to Nova Scotia was to escape from the applicant or ensure distance between him and the child. Her reasons were quite different from that. I do not find that the evidence with respect to family violence, at this stage, is a compelling circumstance that should result in a temporary order that Emery should reside in Nova Scotia with the respondent.

[28] While I accept that the child is safe in Nova Scotia and that currently the respondent has the support of Mr. Beasant and his friends and family, that is not the test. One needs to consider those factors related to best interests and also consider whether there is any compelling circumstance that requires, on a temporary basis, that the child remain in Nova Scotia. At this point where Emery will reside on the long term is clearly a triable issue with neither side having a clear path to victory as to their position.

[29] The applicant requests joint decision-making responsibility with the respondent with respect to the child. I do not see that as a realistic option at this juncture recognizing the current relationship between the parties and as well the Undertaking that the applicant is subject to as a result of the outstanding criminal charges. The evidence, in my view, leads one to conclude that at this time, on a temporary basis, decision-making responsibility for Emery should be with the respondent. On the evidence before the Court, Emery has been in the care of her mother since birth. The parties only resided together as a family for about 16 months and during that time the primary responsibility for the child's care rested with the respondent. There is no evidence that the child has not done well with the respondent as the primary caregiver. When the parties separated, the respondent did maintain contact with the paternal grandparents, people familiar with and supportive of Emery, to assure them that she wanted them to be part of the child's life. Additionally, despite her concerns about the applicant, she did not suggest that the child have no relationship with him. She only proposed terms surrounding the contact.

[30] To remove the child from the respondent by way of a temporary order would be unnecessarily disruptive for the child and should only be considered as an option by the Court if absolutely necessary. We are not at that stage yet.

[31] Taking into account the best interests of the child and, as well, the considerations set out in *Plumley*, I would find that the best interests of Emery would be met on a temporary basis by

ordering decision making responsibility for Emery to the respondent provided the residence of Emery shall be in Ontario, the City of St. Catharines or within 150 kilometres of that city, unless the parties otherwise agree in writing. The Court recognizes that the respondent is pregnant. In fact, she may have given birth already bearing in mind that she was having difficulties with the pregnancy. Taking that into account the order will provide that the return of Emery's residence to Ontario be within 60 days of the respondent giving birth to her second child.

[32] With respect to the applicant's parenting time, I recognize that the court is to give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child. That does not equate to equal parenting time. Again, in determining the amount of time, the court is to consider the factors as set out in the legislation, recognizing that is not an exhaustive list. This child is not yet three years of age and so it is important to have regular and consistent contact between her, her parents and other family members. On a temporary basis, unless the parties otherwise agree, the applicant shall have parenting time with the child:

(i) Before the child returns to Ontario, each Tuesday, Wednesday, Thursday, Friday and Saturday by way of FaceTime from 2:30 p.m. until 2:45 p.m. Ontario time, provided the respondent is to set up the call but not supervise the conversation (this term is consistent with the current arrangement);

(ii) Once the child returns to reside in Ontario, each Tuesday, Wednesday and Thursday by way of FaceTime from 3:30 p.m. until 3:45 p.m., provided the respondent is to set up the call but not supervise the conversation;

(iii) During the 60 days following the birth of the child's half-sibling, assuming that the child is still in Nova Scotia, for a period of two weeks, with the specific times to be arranged between the parties, through counsel and the respondent to be responsible for the transportation arrangements;

(iv) When the child returns to reside in Ontario, every second weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m.;

(v) Such other times as the parties may arrange and agree upon, including, but not limited to holidays and special events.

[33] I note that the next attendance in this matter is for a settlement conference on August 13, 2021 at 10:00 a.m. It may be that by then the respondent's new child will have been born and a more definite date for return can be defined. At this juncture, I have not included a provision that would allow the applicant to attend in Nova Scotia to pick up Emery and take her back to Ontario to reside with him, although I am not dismissing that request. In the event the respondent does not return with Emery as anticipated in this order, counsel may contact the trial coordinator and request

that the matter be returned before me for further submissions, including details of any transition to the applicant proposed.

[34] If the issue of costs is unable to be resolved between counsel, brief written submissions shall be filed within 14 days by the applicant and 21 days by the respondent. Any reply, if necessary, by the applicant to be filed within 28 days. If no submissions are received, or any consent on the issue, there will be no order on account of costs.

Scott J.

Date: July 22, 2021

CITATION: Streppel and Smit, 2021 ONSC 5162
COURT FILE NO.: 153/21
DATE: 2020-07-22

ONTARIO

SUPERIOR COURT OF JUSTICE

FAMILY COURT

BETWEEN:

Theodore Emerson Streppel

Applicant

and

Lauren Grace Smit

Respondent

DECISION ON MOTION

Scott J.

Released: July 22, 2021