

CITATION: Tantardini v. Tantardini, 2021 ONSC 6946
COURT FILE NO.: FS-21-164
MOTION HEARD: 20210824

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kristopher John Tantardini, Applicant

AND:

Tiffany Janita Tantardini, Respondent

BEFORE: MILLER J.

COUNSEL: G. Sun, for the Applicant

J. Eensild, for the Respondent

HEARD: August 24, 2021

REASONS FOR DECISION

- [1] This interim motion and cross-motion were heard on the issue of parenting time with the parties' child who has just turned six. The issues argued were whether the child should remain in the primary care of the Respondent Mother due to safety issues in relation to excessive use of alcohol by the Applicant Father and whether it is appropriate that the Respondent Father be required to use an alcohol monitoring device prior to operating a vehicle in which the child is a passenger, and in the morning and evening on any day in which the child is in his sole care, for the purpose of providing confirmation that he is sober.
- [2] The Respondent is granted abridgement of time for service and filing of her Notice of Cross Motion dated August 18, 2021.
- [3] The Applicant Father proposes that the parties shall have shared and equal parenting time with the child on alternate weekly basis from Sunday to Sunday with the exchange of the child at 5:00p.m. or a time mutually agreed to by both parties. He proposes that both parties be prohibited from consuming alcohol 12 hours prior to and during the period of time when the party is responsible for the care of the child.
- [4] The Respondent Mother seeks an order that that the child shall reside primarily with the her and that the Applicant Father shall have parenting time with the child as follows:
 - a. Every other weekend from Friday afternoon until Monday morning, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m and ending at either drop off at the child's school on Monday morning, or 9:00 a.m. on days when the child is not in school due to a holiday or professional development day;

b. Every Wednesday, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m., and ending at 6:30 p.m.;

c. Such other times upon which the parties can agree upon in advance and in writing.

The Respondent Mother proposes that the child's transitions between the parties shall occur at school, or, in the event that a transition is to occur on a date that the child is not in school, the exchange shall take place at the Tim Hortons located at 28 Wellington St. East in Guelph, Ontario.

- [5] The Respondent Mother further seeks an order that the Applicant Father shall not consume any alcohol or drugs within 12 hours prior to or during his parenting time and further that the Applicant Father shall purchase a SoberLink Breathalyzer device and maintain a SoberLink Level 1 Plus Plan for not less than 6 months. The Respondent Mother proposes to reimburse the Applicant for 50% of the cost of the device and the subscription plan.
- [6] The Respondent Mother seeks an order that the Applicant Father shall maintain the Respondent Mother as a contact with SoberLink to receive email test results in real time and shall complete an alcohol test with the SoberLink Level 1 breathalyzer device as follows:
- a. Immediately prior to operating any vehicle (cars, boats, ATVs, other recreational vehicles) in which the child is a passenger;
 - b. A test at some point between 7:00 a.m. and 8:00 a.m., on any day that the child is in the care of the Applicant Father between the hours of 7:00 a.m. and 8:00 a.m.; and,
 - c. A test at some point between 9:00 p.m. and 10:00 p.m., on any day that the child is in the care of the Applicant Father between the hours of 9:00 p.m. and 10:00 p.m.
- [7] The Respondent Mother seeks an order that in the event that any of the breathalyzer tests detect any level of alcohol, the breathalyzer detects any tamper attempt or mistaken identity, or in the event that the Applicant Father fails to take any required test, all unsupervised parenting time shall be suspended immediately and the Applicant Father shall only have parenting time with the child as can be agreed upon between the parties or as otherwise determined by this Honourable Court.
- [8] The Applicant Father indicates he does not have an alcohol problem and that the police incidents are out of character. He suggests both parties not consume alcohol within 12 hours of the child being in their care.
- [9] There is no issue that child support shall be payable, flowing from the parenting schedule as decided by this Court, based on the Applicant Father's annual income of \$15,000 and the Respondent Mother's annual income of \$119,227.34. The parties agree that if there is equal parenting time child support would be payable on a set-off basis.

Background

- [10] The parties were married on June 21, 2014 and separated on February 25, 2021.
- [11] There is one child of the marriage, born in 2015.
- [12] The Respondent has another child from her previous marriage, who is 17 and resides equally with his father and the Respondent.
- [13] The Applicant has another child from a previous relationship. He does not see this child and does not pay child support for him.
- [14] The parties resided together from the date of separation February 23, 2021 until the sale of the matrimonial home in early May of 2021. They now reside separately.
- [15] On March 31, 2017, the Applicant was involved in a serious motor vehicle accident wherein he suffered a concussion and traumatic brain injury. The Applicant was unable to be gainfully employed thereafter so he stayed home and became the primary care giver to the child since the child was 19 months old while the Respondent went to work every day outside of the home.
- [16] The Applicant is under the care of a physician for pain management and is prescribed a number of medications.
- [17] The Respondent has been the child's primary caregiver since the move to separate homes in May 2021. The Respondent has been able to be flexible with her employment schedule to be there for the child.

An alcohol monitoring device

- [18] The Respondent has given evidence that the parties' relationship began to deteriorate when the Applicant suffered a traumatic brain injury and the Applicant became dependent on pain medication and alcohol. Prior to the end of the marriage police were contacted on two occasions, November 6, 2020 and February 23, 2021, when there were alleged instances of abuse and violence.
- [19] On April 27, 2021 after receiving some disturbing text messages from the Applicant, the Respondent contacted police. Police attended the parties' home and cautioned the Applicant about the texts and noted that he was "visibly intoxicated". On April 29, 2021 the Respondent contacted police about 16 text messages sent by the Applicant to her within an hour. She was at work at the time. Police attended the parties' home and cautioned the Applicant about criminal harassment and noted that he had been drinking. Police notified Family and Children Services as the child was at that time in the Applicant's care.
- [20] The Respondent was advised by Mr. Craig Walraven, the worker with Guelph Family & Children's Services ("F&CS") that there is a safety concern present with respect to the Applicant's use of alcohol. He supported her decision to require a breathalyzer prior to commencing unsupervised parenting time between the child and the Applicant.

- [21] On June 9th, 2021, the Applicant sent a further stream of text messages. The Respondent contacted police. The Applicant was arrested and charged with Criminal Harassment. He is currently subject to a release order restricting his contact with the Respondent. Counsel advises that the order permits contact in accordance with a Family Court order.
- [22] Counsel for the Applicant submits that the separation “was a very stressful time for the Applicant so he coped with the use of alcohol during the initial traumatic period which is out of character for the Applicant.” Counsel agrees that this was an inappropriate coping mechanism but should not warrant the imposition of a term of parenting time requiring use of an alcohol monitoring device.
- [23] The Applicant has given evidence that “I have almost 15 prescribed medications I have to take each day. Some of the names of the medications include: Prednisone (to decrease inflammation due to asthma), Zopiclone (sleep aid), Baclofen (to treat muscle spasticity), Oxycocet (narcotic analgesics), Candesartan (to treat high blood pressure), Symbicort Inhaler (relax the muscles around the airways), Salbutamol (to treat asthma attacks), Nexium (to reduce stomach acid), and Pregabalin (to treat neuropathic pain).”
- [24] The Applicant is concerned that his medications may give false positive results on an alcohol monitoring device. He cites a journal article in support of this concern. "Using Asthma inhalers can give false positive results in breath tests" *BMJ*, 2020 March 30;324(7340);756. The Applicant further indicates that he tried an alcohol monitoring device owned by a neighbour after not having a drink for four days. He indicates that the device showed a false positive reading of "0.05" after he took his medications.
- [25] Counsel for the Applicant relies on *Atkinson v. Tempest*, 2020 ONSC 7891 at paragraph 25 submitting that as in that case “There is not sufficient evidence to make a finding that the father has an alcohol addiction issue or alcohol use disorder nor is there sufficient evidence to warrant an order requiring the father to use an alcohol monitoring device before and/or during his parenting time with the child.”
- [26] Unlike the *Atkinson v. Tempest* case, however, this is not simply a “he said/she said” matter without objective third-party evidence to support the mother's allegations. Here there are documented police observations of the Applicant’s use of alcohol in combination with disturbing behaviour on his part, and, in one instance, when the child was in his care.
- [27] The Respondent submits that the Applicant’s use of alcohol in conjunction with some of these medications is concerning. She further submits that the literature suggests that false positive results may occur when the breath test is administered within minutes of the taking of the medication. She submits that the Applicant can time the taking of medication to avoid the chance of any false positive. She further submits that as there is a one hour window for submitting the tests, the Applicant may wait and submit another test within the hour if he receives what he believes to be a false positive result.
- [28] Counsel for the Respondent relies on *Klymenko v Klymenko*, 2020 ONSC 5451 wherein, albeit on consent, the Court ordered the use of a SoberLink breathalyzer device, with terms of use more onerous than those proposed here.

[29] The separation is still relatively new, and emotions, at least on the part of the Applicant, still raw. His inappropriate use of alcohol, especially when the child was in his care, is a serious and troubling circumstance. I find that it is in the best interests of the child that the Applicant father's parenting time, on a short-term basis, be accompanied by use of an alcohol monitoring device. I am confident that the Applicant can structure the use of his medications to minimize if not eliminate a false positive result. This period of time will operate to ensure the child's safety while in his father's care, and provide some further time for the Applicant to adjust, in a healthy way, to the emotional realities of the parties' separation.

[30] Counsel for the Applicant relies on *Lawrance v. Lawrance*, 2015 ONSC 7199 in support of her position that if alcohol monitoring is a condition of the Applicant's parenting time, there should be no automatic consequence for a positive test result or for a failure to submit a test result. In *Lawrance* at paragraph 77, the Court indicated "It is not possible, now, to fashion an effective remedy or consequence without knowing all the relevant facts surrounding any failure to attend for testing or use of alcohol."

[31] I note that the *Lawrance* decision followed a multi-day trial resulting in a final order. The proposal here is a temporary measure, to be revisited after six months. I find that the immediate safety of the child, in all of the circumstances here, has primacy over issues around the accuracy of any reading, which can be addressed once the child is in a safe place.

[32] It is ordered that the Applicant Father shall not consume any alcohol or non-prescribed drugs within 12 hours prior to or during his parenting time with the child.

[33] It is ordered that:

The Applicant Father shall purchase a SoberLink Breathalyzer device and maintain a SoberLink Level 1 Plus Plan. The Applicant Father shall maintain the plan for not less than 6 months. The Respondent Mother shall reimburse the Applicant for 50% of the cost of the device and the subscription plan. The Applicant Father shall maintain the Respondent Mother as a contact with SoberLink to receive e-mail test results in real time.

The Soberlink device and plan shall be in place before the Applicant exercises any unsupervised parenting time with the child.

The Applicant Father, shall complete an alcohol test with the SoberLink Level 1 breathalyzer device as follows:

- a. Immediately prior to operating any vehicle (cars, boats, ATVs, other recreational vehicles) in which the child is a passenger;
- b. A test at some point between 7:00 a.m. and 8:00 a.m., on any day that the child is in the care of the Applicant Father between the hours of 7:00 a.m. and 8:00 a.m.; and,
- c. A test at some point between 9:00 p.m. and 10:00 p.m., on any day that the child is in the care of the Applicant Father between the hours of 9:00 p.m. and 10:00 p.m.

[34] And further that:

In the event that any of the breathalyzer tests detect any level of alcohol, the breathalyzer detects any tamper attempt or mistaken identity, or in the event that the Applicant Father, fails to take any required test, all unsupervised parenting time shall be suspended immediately and the Applicant Father shall have such parenting time as can be agreed upon between the parties or as otherwise determined by this Honourable Court.

[35] It is ordered that in the event that the Applicant complies with all the requirements for 6 months and no alcohol or tamper attempts are detected in any of the results, the requirement for the Applicant to maintain a SoberLink level 1 Plus Plan shall terminate and the parties forthwith evaluate the potential for an increase to the Applicant's parenting time.

Parenting Time

[36] The Respondent proposes that on a temporary, without prejudice basis, she should have sole decision-making authority and that communication between the parties be limited to email. The Respondent further proposes that the child remain in her primary care and that the Applicant's parenting time be limited to:

- a. Every other weekend from Friday afternoon until Monday morning, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m and ending at either drop off at the child's school on Monday morning, or 9:00 a.m. on days when the child is not in school due to a holiday or professional development day;
- b. Every Wednesday, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m, and ending at 6:30 p.m.;
- c. Such other times upon which the parties can agree upon in advance and in writing.

[37] The Respondent proposes that the decision-making and the parenting may be re-evaluated after the six months during which the Applicant must comply with alcohol monitoring time with the child.

[38] The Applicant seeks to have joint-decision-making and equal parenting time on a week about basis.

[39] Counsel for the Applicant submits that the Respondent cannot rely on a *status quo* she created by withholding the child from his father's care. She relies on *Russell v. Ramcharan* 2020 ONSC 3546 at paragraph 57 wherein Petersen J. indicated that the mother had engaged in inappropriate self-help tactics.

[40] Unlike *Russell v. Ramcharan* where there was evidence both parents had engaged in tactical gamesmanship with their child as a pawn, I find that the steps taken by the Respondent here were genuinely to protect the parties' child from the Applicant's bizarre and, apparently alcohol-fueled behaviour. There are independent police observations of

the Applicant's use of alcohol while the child was in his care, resulting in Child and Family Services intervention.

[41] While I can accept that the Applicant's inappropriate use of alcohol was tied, in these instances, to the emotional upheaval related to the parties' separation, that does not alleviate concerns about the Applicant's choices around his care of the child. The parenting schedule suggested here is a temporary one, which will give the Applicant some further emotional distance from the separation and guide his choices around the care of the child in a more responsible way in future.

[42] For now, I find that it is in the child's best interests that the parenting schedule remain one wherein the child's primary residence will be with his mother. After the six months during which the Applicant's parenting time will be accompanied by alcohol monitoring, the circumstances and the amount of parenting time can be subject to further review. It is appropriate that communication between the parties be by email. I am advised that the Applicant Father's conditions of release on the criminal charges permits contact in accordance with a Family Court Order.

[43] It is ordered, on a temporary, without prejudice basis, that:

The Respondent Mother shall have sole decision-making authority for the child.

Communication between the parties shall be limited to email and shall be restricted to communications about the child's needs.

The child shall remain in the Respondent Mother's primary care.

The Applicant's parenting time shall be:

a. Every other weekend from Friday afternoon until Monday morning, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m and ending at either drop off at the child's school on Monday morning, or 9:00 a.m. on days when the child is not in school due to a holiday or professional development day;

b. Every Wednesday, commencing at either pickup at the child's school or, on days when the child is not in school due to a holiday or professional development day, 4:00 p.m, and ending at 6:30 p.m.;

c. Such other times upon which the parties can agree upon in advance and in writing.

[44] It is further ordered that decision-making and the parenting time may be re-evaluated after the six months during which the Applicant must comply with alcohol monitoring time with the child.

[45] It is ordered that the child's transitions between the parties shall occur at school, as per the above paragraphs. In the event that a transition is to occur on a date that the child is not in school, the exchange shall take place at the Tim Hortons located at 28 Wellington St. East in Guelph, Ontario.

[46] It is ordered that the Respondent Mother shall keep the child's health card within her possession, and provide the Applicant Father with a notarized copy forthwith.

[47] It is ordered that the Applicant Father shall pay the table amount of child support in the amount of \$79.00 to the Respondent Mother based on his annual income of \$15,000 pursuant to Section 9 of the Federal Child Support Guidelines commencing September 1, 2021 and on the first of each month thereafter.

[48] Support Deduction Order to issue.

Costs

[49] The parties have, subsequent to the hearing, provided to the Court their respective Offers to Settle. The Court has not yet reviewed those, but will do so, upon receipt of written submissions as to costs, to be limited to three pages, exclusive of a Bill of Costs, to be exchanged and filed no later than October 29, 2021, in the event the parties are unable to agree on costs.



MILLER J.

Date: October 19, 2021