

CITATION: *Moussaoui v. Harkouken*, 2021 ONSC 1986
COURT FILE NO.: FC-20-1733
DATE: 2021/03/17

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mohamed Moussaoui, Applicant

AND

Douniazed Harkouken, Respondent

BEFORE: The Honourable Justice Mark P. Shelston

COUNSEL: Ms. Ford for the Applicant

Self-Represented Respondent

HEARD: March 10, 2021 (at Ottawa)

ENDORSEMENT

Overview

[1] In this case, each parent seeks a temporary order placing their only child, Zachary, in different schools. In May 2020, the parties agreed that the child would attend Manor Park Elementary School. On August 24, 2020, without any notice to the father, the mother registered the child to attend Knoxdale Public School (“Knoxdale”) near her new home.

[2] The father seeks an order that the child attend the Robert Hopkins Public School (“Robert Hopkins”) in Beacon Hill North in person now and as of September 2021. In addition, the father proposes to meet the mother halfway between the residences at the parking lot at the McDonald’s restaurant on Bronson Avenue on the mother’s parenting week in the morning. He originally offered to meet her after work at that location but changed his position requiring the mother to pick the child up at school after work.

[3] The mother seeks an order that the child remain now and as of September 2021 at Knoxdale and that the father drive the child to the school and pick him up on his weeks with the child. In the alternative, the mother submits that the child be registered to attend the Mutchmor or Devonshire elementary schools, which are halfway between both parties’ residences.

Factual Background

[4] The applicant is 40 years of age, obtained a degree in marketing in Algeria and currently works part-time, online from home, at Algonquin College and College La Cité teaching marketing,

management and trade and business management. He starts work at either 8:30 or 9 a.m. and depending on the week can finish as late as 4 p.m.

[5] The respondent is 35 years of age and since November 9, 2020 works for the Federal Department of Justice as a paralegal. She is currently working from home. When she is able to return to work in person, her office is located in downtown Ottawa. Her hours of work are 8 a.m. to 4 p.m.

[6] The parties married each other on July 10, 2010. The parties have one child, Zachary, born November 20, 2015. The parties separated in October 1, 2018.

[7] At the time of separation, the parties lived in a rented apartment on Brittany Drive near the Beechwood Cemetery. After separation, the father rented an apartment in the Beacon Hill north area while the mother remained in the apartment.

[8] Starting in June/July 2017, the parties placed the child in a daycare to allow both parents to work. The child remained in the same day care until April 2020 due to the outbreak of the pandemic.

[9] Since December 2018, the child alternates residences every Monday. Until August 2020, the father would pick the child up at the mother's apartment for his week and the mother would meet the father at the child's daycare to receive the child for her weeks. Currently the parties exchange the child for the father's week in the parking lot at the IKEA store off of Greenbank Road and exchange the child for the mother's week at the Trillium Bank parking lot off Cyrville Road. They have changed the location and time for exchanges multiple times since separation.

Which school should the child attend?

[10] The mother alleges that she attempted to discuss the issue of the child's school since September 2019. The mother alleges that as a result of the domestic violence that she endured during the marriage, which is denied by the father, communication between the parties is difficult and restricted to text messaging.

[11] On April 23, 2020, the parties agreed that the child would attend a kindergarten but did not agree on which school. On May 7, 2020, the father asked the mother what school she was going to register the child. In response the mother texted back "Manor Park" meaning the Manor Park Elementary school which was adjacent to his daycare program. The father indicated that that was a good choice because many of Zachary's friends from daycare would be attending kindergarten at Manor Park. However, the father proposed that the child attend Robert Hopkins. The mother texted back that she would look at the school.

[12] The father decided to register the child to attend kindergarten at Robert Hopkins to ensure he had a placement while the parties discussed the issue. The mother alleges she was never consulted and that the father acted unilaterally. In any event, approximately two weeks after

receiving confirmation that the child was registered in Robert Hopkins, the father was advised by the school that the child could no longer be registered because he was already registered at Manor Park. However, the evidence discloses the child was only registered in Manor Park on August 13, 2020 by the mother. This contradiction is unexplained.

[13] Despite not advising the mother that he agreed with Manor Park, the father made arrangements to have the child registered in the before/after daycare program and applied for a subsidy. On August 22, 2020, the subsidy was confirmed.

[14] Sometime before June 12, 2020, the mother was advised by her landlord that she would have to vacate the apartment as it had been listed for sale. By email dated June 12, 2020, the mother asked her real estate agent to look for accommodations and specifically stated “the area is around the Nepean or Gloucester or Greenbelt not very far from my ex. He is living around Jasmine Area”.

[15] At the time that the mother was looking for accommodations, she was working from home, for the Canadian Food Inspection Agency. Pre-COVID, the mother would travel to her office in Nepean.

[16] On July 30, 2020, the father received a letter dated July 27, 2020 from a lawyer representing the mother indicating the mother’s intention to negotiate with the father a separation agreement regarding the child, child support and equalization of the net family property. Further, the letter requested financial disclosure and required a response by August 10, 2020.

[17] On August 7, 2020, the father replied by email that he had received the letter, was in the process of retaining counsel and indicated that he was eager to formalize a separation agreement to serve the best interests of their son.

[18] On August 13, 2020, the mother registered the child to attend Manor Park.

[19] Unbeknownst to the father, on August 15, 2020, the mother purchased a condominium located on Banner Road in Nepean with the closing date set for October 29, 2020. This condominium was less than 6 kilometers from the mother’s employment.

[20] On August 24, 2020, the mother, without notice and without the father’s consent, registered the child to attend online the senior kindergarten program at the Knoxdale effective September 2020. The next day, on August 25, 2020, she called and cancelled the child’s registration at Manor Park.

[21] On September 1, 2020, the father called Manor Park to inquire about the kindergarten program. The father was advised that because he was not listed as a contact person, the school could not provide him with any information. The same day, the father texted the mother asking why he wasn’t listed as the father. He sent a few more texts without response. Finally, the respondent replied but only to indicate that the school reentry had been postponed to September 14, 2020. The mother did not advise the father that the child was registered at Knoxdale rather than Manor Park.

[22] The father indicates that he found out from Zachary that he was registered at Knoxdale. On September 2, 2020, the father contacted Knoxdale but he was advised that he was not listed as the father and the school could not provide him with any information.

[23] On September 3, 2020, the father received the second letter from the mother's counsel where she advised the following:

- a. the mother's apartment was being sold.
- b. the mother had purchased a condo closing on October 29, 2020 (and provided the address) and that as of that date the child would reside with the mother during her parenting time.
- c. proposed that once she has moved, the parties would meet at a public location halfway between the residences to exchange the child.
- d. advised the father that she had registered the child in the Knoxdale Public School in a French immersion program online effective September 18, 2020.

[24] On September 11, 2020, the father emailed the mother's counsel indicating he was not in agreement with her unilateral decisions and explained why. Further he advised that he had registered the child at Robert Hopkins to ensure that the child had a spot with the school this year. He indicated that he would like to come to an immediate agreement on this issue with the mother.

[25] The father went to Legal Aid to seek assistance. The father alleges, and the mother does not deny, that she attempted to have his entitlement to Legal Aid denied. He was originally denied eligibility and then subsequently granted it.

[26] On October 5, 2020, the father emailed the mother's counsel indicating that before he took any further steps, he wanted to discuss with the mother the current and future education possibilities for the child. There was no response. The same day, the father emailed the lawyer that the child had been granted a place at Robert Hopkins as of October 13, 2020 and that he was still interested in arriving at an agreement. There was no reply.

[27] On November 4, 2020, the applicant commenced proceedings seeking an order for joint decision-making, maintaining the alternating week about schedule and seeking an order that the child be registered to attend Robert Hopkins or Manor Park located close to the father's residence on Jasmine Crescent, Ottawa.

[28] In her answer dated December 2, 2020, the respondent seeks an order that she be granted sole custody of the child with alternative relief seeking joint custody, that the parenting schedule be determined by the court and that the child attend the Knoxdale Public School on-line education program.

Legislative and Jurisprudential Framework

[29] The applicant commenced this application for divorce seeking corollary relief on November 4, 2020. On March 1, 2021, the [Divorce Act](#) was amended. Section 35.3 of the [Divorce Act](#) provides that a proceeding commenced under this Act before the day on which the section comes into force and not finally disposed of before that day shall be dealt with and disposed of in accordance with this Act as it reads as of that day.

[30] As this proceeding was not disposed of before March 1, 2021, the transitional provisions of the amended [Divorce Act](#) direct the court to adjudicate this case under the new provisions.

[31] [Section 16\(1\)](#) of the [Divorce Act](#) states that the court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

[32] [Section 16\(2\)](#) of the [Divorce Act](#) states that when considering the factors refer to in subsection (3) the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

[33] [Section 16 \(3\)](#) of the [Divorce Act](#) states that in determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- a. the child's needs, given the child's age and stage of development, such as the child's need for stability;
- b. the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- c. each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- d. the history of care of the child;
- e. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- f. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including indigenous upbringing and heritage;
- g. any plans for the child's care;
- h. the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- i. the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

- j. any family violence and its impact on, among other things,
 - i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - ii. the appropriateness of making an order that would require persons in respect of whom the order would apply cooperate on issues affecting the child; and
- k. any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

[34] Section 16.1(1) provides that a court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

- (a) either or both spouses; or
- (b) a person, other than a spouse, who is the parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

[35] Section 16.1(2) provides that the court may make an interim parenting order in respect of the child, pending the determination of an application made under that sub-section.

[36] The child's best interests are not merely "paramount" – they are the only consideration in this analysis: *Gordon v. Goertz*, [1996 CanLII 191](#) (SCC), [1996] 2 S.C.R. 27 at para. [28](#); *Mattina v. Mattina*, [2018 ONCA 641](#).

[37] The court must ascertain a child's best interests from the perspective of the child rather than that of the parents: *Gordon v. Goertz*, [1996 CanLII 191 \(SCC\)](#), [1996] 2 S.C.R. 27.

[38] In *Thomas v. Oikia*, [2018 ONSC 3769](#), Audet, J. provides an excellent summary of the various principles to be considered in determining which school a child would attend:

a. Sub-section 28(1)(b) of the *Children's Law Reform Act* specifically empowers the court to determine any matter incidental to custody rights. The issue of a child's enrollment in a school program must be considered as being incidental to or ancillary to the rights of custody (*Deschenes v. Medwayosh*, [2016 ONCJ 567](#));

b. It is implicit that a parent's plan for the child's education, and his or her capacity and commitment to carry out the plan are important elements affecting a child's best interests. In developing a child's educational plan, the unique needs, circumstances, aptitudes and

attributes of the child, must be taken into account (*Bandas v. Demirdache*, [2013 ONCJ 679](#) (Ont. C.J.));

c. When considering school placement, one factor to be considered is the ability of the parent to assist the child with homework and the degree to which the parent can participate in the child's educational program (*Deschenes v. Medwayosh*, [2016 ONCJ 567](#));

d. The emphasis must be placed on the interests of the child, and not on the interests or rights of the parents (*Gordon v. Goertz*, [1996 CanLII 191 \(SCC\)](#), [1996] S.C.J. No. 52 (S.C.C.));

e. The importance of a school placement or educational program will promote and maintain a child's cultural and linguistic heritage (*Perron v. Perron*, [2012 ONCA 811](#) (Ont. C.A.));

f. Factors which may be taken into account by the court in determining the best interests of the child include assessing any impact on the stability of the child. This may include examining whether there is any prospect of one of the parties moving in the near future; where the child was born and raised; whether a move will mean new child care providers or other unsettling features (*Askalan v. Taleb*, [2012 ONSC 4746](#) (Ont. S.C.J.));

g. The court will also look to any decisions that were made by the parents prior to the separation or at the time of separation with respect to schooling (*Askalan v. Taleb*, [2012 ONSC 4746](#) (Ont. S.C.J.));

h. Any problems with the proposed schools will be considered (*Askalan v. Taleb*, [2012 ONSC 4746](#) (Ont. S.C.J.));

i. A decision as to the choice of school should be made on its own merits and based, in part, on the resources that each school offered in relation to a child's needs, rather than on their proximity to the residence of one parent or the other, or the convenience that his attendance at the nearest school would entail (*Wilson v. Wilson*, [2015 ONSC 479](#));

j. Third party ranking systems, such as the Fraser Institute's, should not factor into a Court's decision. These systems of ranking do not take into consideration the best interest of the particular child in a family law context (*Wilson v. Wilson*, [2015 ONSC 479](#));

k. If an aspect of a child's life, such as school placement, is to be disrupted by an order of the court, there must be good reason for the court to do so. Thus, before a court will order a child to transfer

schools, there must be convincing evidence that a change of schools is in the child's best interests (*Perron v. Perron*, [2012 ONCA 811](#) (Ont. C.A.);

l. Custodial parents should be entrusted with making the decision as to which school children should attend. When a sole custodial parent has always acted in the best interest of a child, there should be no reason to doubt that this parent will act in the best interest of the child when deciding on a school (*Adams v. Adams*, [2016 ONCJ 431](#));

m. Those cases are very fact-driven. The courts are not pronouncing on what is best for all children in a general sense but rather deciding what is in the best interests of this child before the court (*Deschenes v. Medwayosh*, [2016 ONCJ 567](#)).

Analysis

[39] The purpose of this decision is to make a temporary order to address the child's schooling. I have reviewed the two affidavits with exhibits filed by the father and one affidavit filed by the mother with her attached exhibits totaling approximately 480 pages. There has been no cross-examination on the affidavit material.

[40] Both parties seek to maintain the alternating weekly schedule with the exchanges on Monday. Neither party questions the parenting capacity of the other.

[41] Since the parties separated, they have made important decisions jointly with respect to Zachary. They agreed on his daycare and agreed that he would attend the Manor Park School in September 2020. They have attended to the child's medical needs and followed medical advice.

[42] The mother has raised allegations of domestic violence which are denied by the father. In support of her claim, the mother filed a medical record from the emergency department from 2015, a letter from the mother's brother-in-law dated November 5, 2020, a letter to from Eastern Ontario Resource Centre which provides counselling for victims of domestic violence and text messages exchanged between the parties. At this point of the litigation without hearing the viva voce evidence of the parties, the parties being cross-examined and third-party witnesses coming forward, I cannot make findings as requested by the mother. These issues are best left to a trial judge.

[43] Despite the parties having the child equally and making decisions jointly, the mother has acted unilaterally before with respect to the schooling for the child. On September 16, 2019, she texted the father to advise him that she had registered the child to start in the Manor Park junior kindergarten bilingual program effective October 2019. She did not consult or advise the father before she undertook such a decision. The father did not agree because he thought the child was too young but did not stop the child from attending. In any event, the father agreed that the child attend the program.

[44] I accept that the mother had to move her residence as a result of the apartment being listed for sale. I accept that she instructed a real estate agent to look for locations in the Nepean, Gloucester and near the father's home. There is insufficient evidence for me to conclude that the mother actively looked for accommodations near the father as she has alleged. This issue should be left to the trial judge.

[45] The mother alleges that she finally decided on her current residence after consulting friends about the best French immersion school that was also close to her place of employment. The father alleges that the mother moved to be closer to her boyfriend. The mother denies this allegation and on the evidence before me, I cannot determine the truth. This is another issue for the trial judge.

[46] Neither party had the right to make a unilateral decision regarding the best interests of their child. The decision to register the child in school had been agreed to by the parties. The mother followed that agreement by registering the child at Manor Park. However, she then unilaterally registered this child at Knoxdale even though she was not moving until October 29, 2020. The mother justifies the registration because she wanted the child registered somewhere while the parties negotiated the school issue. However, the child was already registered at Manor Park. There was no need to register the child for September at Knoxdale.

[47] The court does not condone self-help remedy by parties. Acting unilaterally and then requesting that the court confirm such unilateral action is misguided. The mother had a lawyer as evidenced by the two letters sent to the father. She should have commenced an application and brought an urgent motion to address the issue of the child's school. She was only moving on October 29, 2020. She did not.

[48] On the other hand, despite receiving a letter on September 3, 2020 that the child was registered at Knoxdale, the father did not commence proceedings until November 4, 2020. The father indicates that he had difficulty obtaining Legal Aid but from the record, he was corresponding with the mother as late as October 5, 2020. He was denied an urgent motion and attended an urgent case conference on December 4, 2020. Both parties were granted leave to bring urgent motions. For some unexplained reason, the father did not file his notice of motion until February 17, 2021, almost 10 weeks later, returnable March 2, 2021. I am troubled by the lack of urgency undertaken by the father with respect to having the issue of Zachary's school reviewed.

[49] I cannot find that the father did not have the resources to move closer to the child's school. The father has failed to provide any evidence as to what the rental cost would be if he did so. He simply says that he cannot afford it without any financial statement or evidence as to the cost for rental units near the school. This will be another issue at trial.

[50] The mother indicated that she could have her hours of work changed to accommodate dropping Zachary off at Knoxdale. However, there is no corroborative evidence from her employer filed in support of this proposition.

[51] The only two options that I have considered are the Robert Hopkins and the Knoxdale. Since neither party lives in the catchment area of Manor Park, that option is not available. I have not considered the Muchmor or Devonshire schools because there is no evidence that the school

boards would allow the child to be registered in a school were neither party lives in the catchment area. Further, it was not pursued by the mother at the motion.

[52] The mother's position at the motion is that when the child is in the father's care, he will be required to drive the child to and pick up the child from the Knoxville School which starts at 8 a.m. and finishes at 2:30 p.m. each day. The mother's position differs from her initial position set out in her lawyer's letter dated September 3, 2020 where she proposed to meet the father halfway to exchange the child. The mother does not explain why she has changed her position.

[53] In her affidavit dated February 24, 2021, the mother proposes that since the father lives close to the Blair exit of the Queensway, that the father travel and then exit the Queensway at the Greenbank Road exit and travel south on Greenbank Road to the school. She indicates that the travel time would be between 16 to 26 minutes and this is reasonable because children on school buses also have to commute to school. Further, she indicates that there is a before/after school daycare program and that she is prepared to register the child in that program.

[54] The mother is opposed to dropping the child off at Robert Hopkins and picking him up in the evening being as it is impractical for her as she works downtown. The mother states that she has the option of dropping the child off before and after school with this school program or with friends of Zachary in the neighbourhood. She rejects the father's offer to meet midway at the McDonald's restaurant because it is too long to commute in traffic with Zachary, that the communication between the parties is not good and that there may be a need for the parties to communicate if one or the other was delayed as a result of the traffic.

[55] The father's initial position was that he offered to meet the mother before and after school at the McDonald's restaurant on Bronson Avenue. In the father's reply affidavit, he has changed his position and proposes that he meet the mother at her convenience in the morning of the week that she has Zachary and that he would then take the child to school. He no longer proposes to meet her after work. Further, he indicates there is a before and after school program at Robert Hopkins that starts at 7 a.m. which would permit the mother to drop the child off and be at work by 8 a.m. The program closes at 6 p.m. which would allow sufficient time for the mother to retrieve the child after work.

[56] The mother indicates that the school is an eight-minute walk from her house and that adjacent to the school are soccer fields, tennis courts and a community skating rink. The school allows children to attend until sixth grade after which they attend the local high school.

[57] The father states that he has lived in the same area since December 2018 and that there is Splash Pool, a branch of the Ottawa Public Library, an arena and many other parks in the neighbourhood that Zachary is familiar with. Robert Hopkins is a five-minute drive and a 35-minute walk from his home. Children who graduate from Robert Hopkins transfer to Henry Munro Middle School for grades 6 to 8.

[58] The father states that many of Zachary's friends from the daycare program that he attended from 2017 until 2020 are registered at Robert Hopkins while the mother responds that many of Zachary's current friends in kindergarten will be going on to grade 1 at Knoxdale.

[59] Both parties have set out the number of teachers, educational assistants and other teachers with specializations at each school. Both parents have described the various benefits available to the child at each school.

[60] Based on information provided, I find that both schools are appropriate places of learning for Zachary. Both schools have a French immersion program and have multiple supports in place to assist the child in his education. I cannot find that one school is better than the other as alleged by both parents.

[61] Both parties have provided multiple Google maps indicating the various routes to commute between their residences and the two proposed schools including the commute time without traffic and with traffic.

[62] As this is a temporary order that will be in place until the trial of this matter, I have taken the following factors into consideration in arriving at my decision:

- a. There is no court order or written agreement giving either party sole custody or the right to make all decisions for the child.
- b. Both parties agree to maintain the alternating week about schedule with the exchanges on Monday.
- c. Both parties agreed that the child would attend Manor Park as of September 2020.
- d. Despite buying her condominium with a closure date of October 29, 2020, the mother registered the child at Knoxdale online.
- e. The mother acted unilaterally without the consent or knowledge of the father.
- f. The court cannot condone a parent to act unilaterally and attempt to eliminate one parent from the child's life. In this case, the mother failed to list the father as a contact person either at Manor Park or at Knoxdale.
- g. Both parties agree that the child should attend a French immersion program. Both schools have a French immersion program and a before/after day care program.
- h. The text messages indicate that the parties have an ability to communicate in a respectful way.
- i. Both parties have changed their positions on meeting the other at a halfway point to exchange the child. The mother's proposal requires the father to commute with the child early enough to deliver him to school by 8 a.m., drive

to either of his places of employment, then drive back to pick the child up at approximately 4:30 p.m. then return home crossing the city. The father's original plan was that he would meet the mother halfway at the McDonald's restaurant parking lot which is on the mother's way to work. The father's plan does not require that the mother deliver the child to Robert Hopkins but does require her to pick the child up from the after school daycare program.

[63] My sole focus is the best interests of the child. I have considered the various plans advanced by both parties. I am limited at this stage of the litigation as I am basing my decision of written material without the ability to assess each parties' credibility. In my view, I find it is in Zachary's best interests to continue in the current program at Knoxdale and that starting in September 2021 he attend Robert Hopkins.

Online v. In-Person Attendance

[64] The father seeks an order that the child attend school in person now. The mother proposes that the child continue to attend kindergarten online but once the COVID-19 situation is under control and Zachary is able to go to the bathroom by himself, he could go to school in person.

[65] The jurisprudence has developed various principles that are applicable in such decisions such as:

- a. if schools are open, children should attend unless there is evidence that if the child attended in person and contracted the virus, there would be an unacceptable risk of a harm to either the child or anyone in either parent's home. (*Chase v. Chase* [2020 ONSC 5083](#)).
- b. The court should consider various factors such as:
 - i. The risk of exposure to COVID-19 that the child will face if she or he is in school, or not in school;
 - ii. Whether the child, or a member of the child's family, is at increased risk from COVID-19 as a result of health conditions or other risk factors;
 - iii. The risk the child faces to their mental health, social development, academic development or psychological well-being from learning online;
 - iv. Any proposed or planned measures to alleviate any of the risks noted above;
 - v. The child's wishes, if they can be reasonably ascertained; and

- vi. The ability of the parent or parents with whom the child will be residing during school days to support online learning, including competing demands of the parent or parents' work, or caregiving responsibilities, or other demands. (*Zinati v. Spence*, [2020 ONSC 5231](#)).
- c. To meet the burden of unacceptable risk of harm to the child or a member of the child's immediate family, the courts have required current and detailed medical evidence. (*Joachim v. Joachim*, [2020 ONSC 5355](#)).
- d. If the medical evidence falls short of sufficient evidence that an unacceptable risk of harm exists, the child will be sent to school. (*Phelps v. Child*, [2020 ONSC 5901](#)).

[66] The mother raises two concerns. Firstly, she indicates that the child does not go to the bathroom by himself and at times has to wear diapers. The mother wants the child to continue to attend school online to avoid an accident which she indicates could be traumatizing to him. She states that the child started to have accidents in November 2020 which coincided with the administration of a laxative to assist with his constipation. The mother states that when Zachary has an accident, he is embarrassed, is very mad at himself, cries and wants to change his clothes as soon as possible. The mother submits that the child needs time at home so she can properly train him and that recently he is making progress and things are looking much better.

[67] Secondly, the mother argues that she is concerned that the child will contract the COVID-19 virus and that he will become very ill. The mother stated that the child has had respiratory problems and that when he attended daycare he was constantly sick and that she was required to take the child to clinics, the Children's Hospital and to see Dr. Sharma on a regular basis. The mother has provided a medical certificate signed by Dr. Sharma, the child's doctor, dated November 17, 2020 which states as follows:

This is to confirm that Zachary has suffered from several upper and lower respiratory infections, strep throat, otitis needing several visits to walk in clinic at OUHS and CHEO ER. He has needed several antibiotic treatments. He has been homeschooling since Sept. 2020. Zachary is not potty trained and has incontinence of stool. He has not been sick since homeschooling and is recommended to homeschool to avoid risk of exposure to Covid and other respiratory infections and prevent accidents with bowel movements.

[68] In response to a letter from counsel for the father, on January 9, 2021, Dr. Sharma wrote the following:

This letter is in response to your query regarding Zachary, who has been my patient since birth.

He has recurrent respiratory infections and ear infections, requiring several visits to doctors office and Emergency rooms and has received several courses of antibiotics.

He could get a severe respiratory illness if exposed to Covid 19 based on his predisposition to bronchitis\pneumonia.

In person attendance at school will increase his risk of exposure to Covid 19.

Prognosis cannot be predicted as children exposed to Covid 19 have generally recovered well at the same time some children have had severe disease that affected multiple organs including their heart and died.

Isolation, mask, social distancing, healthy diet, vitamin D are general precautions to prevent and manage Covid 19.

There is no other advice I can offer than above. Keeping risk of exposure to the minimum can only be achieved by avoiding exposure in a high risk environment like school where outbreaks have been noted.

[69] The father argues that that upon a review the child's medical records, there is only one instance where the child has suffered from pneumonia being in January 2019. Further he argues there is no evidence that the child has been diagnosed with bronchitis and there is no diagnosis as to what respiratory illness the child suffers from. The father argues that the report from Dr. Sharma is not sufficient evidence for the court to conclude that the child's attendance at in person learning will create an unacceptable risk to his health if he contracts the virus.

[70] The father argues that Zachary should attend school in person because he would benefit from interacting with other children, would help him develop self-regulation and his interpersonal skills. The father is concerned that the child is spending too much time in front of a computer screen. Further, the father admits that he has difficulty teaching online to his students and teaching Zachary online during the day. The father does not believe that Zachary is benefiting from the online classes and that he has purchased many workbooks.

[71] The father acknowledges that the child has suffered from constipation. The father acknowledges that currently Zachary is receiving probiotics from his mother and a laxative from his father as recommended by the child's doctor. The father acknowledges that on occasion he allows a child to wear a diaper to reduce his stress associated with going to the bathroom. The mother states that the issue is much more than the father is admitting. The father advises that he has contacted Robert Hopkins and they advised that if a child has a bowel movement in their pants, child will be cleaned by wipes and a change of clothes provided by a parent.

[72] The mother advises that according to the staff at Knoxdale that if Zachary becomes upset, it is possible that the parent would have to attend at the school to take him home.

[73] The child has not attended any public school or daycare since the start of the pandemic in 2020. Since September 2020, the online education starts at 8:45 a.m. with a 90-minute break and

ends at 1 p.m. There are two 30-minute blocks during the day when the child is in class and the rest of the time the children are supposed to follow a program at home. The mother is following the program while the father does not.

[74] Zachary has been in the same kindergarten class since September 2020. The father is requesting to transfer the child in the middle of the winter semester to another school with another group of children. I am also cognizant that the child is in kindergarten which is more designed for children to interact and play with other children to provide socialization and learning skills.

[75] I am also concerned that at this time the COVID-19 virus is still a significant risk to all Canadians. While the vaccination process is ongoing, it will be months before most Canadians will be vaccinated. I accept the findings of Dr. Sharma that the child has had issues with respect to respiratory problems and according to Dr. Sharma, the child is at risk to falling ill if he contracts the virus. Further, both parents are working remotely and are exchanging the child at an agreed upon third-party location.

[76] However, I am not prepared to take a chance that Zachary attend school and contracts the virus. I accept the evidence of the family doctor that the child has had a history of respiratory infections and that according to the doctor, he is at risk if he contracts a virus. I do not find that at this time the child should attend school in person. I believe that the mother has met her burden of proof that there is an unacceptable risk of harm to the child, at this time, if he were to return to school in person.

[77] Further, I find that it is in the child's best interests to complete his kindergarten year with his fellow classmates until June 2021. Finally, waiting until September 2021 to be in class will give Zachary more time to be trained by his parents to address his incontinence issue.

Disposition

[78] I order that Zachary shall complete his French immersion senior kindergarten program online at Knoxdale Public School until June 2021.

[79] I order that Zachary shall attend Robert Hopkins public school in person as of September 2021.

[80] Until Zachary starts grade 1, I order the parties to continue to exchange the child on Mondays with the mother receiving the child at the Trillium Bank on Cyrville Road and the father receiving the child at the IKEA parking lot off Woodroffe Avenue. Currently the exchange time is approximately 12:15 pm to 12:20 p.m. I order that the parties may by mutual agreement vary the location and time for exchanging Zachary.

[81] When Zachary starts grade 1 at the Robert Hopkins Public School, I order that when the child is in the care of the mother, the father shall meet the mother at a mutually agreed-upon time in the morning and after work at the McDonald's restaurant parking lot on Bronson Avenue. I order that the parties may change the location for the exchanges upon mutual consent.

[82] I order that the father shall register Zachary in the before/after daycare program at the Robert Hopkins Public School and that the cost to the daycare for afterschool care shall be shared as a section 7 expenses pursuant to the *Federal Child Support Guidelines*.

Urgent Case Conference

[83] In my endorsement dated December 4, 2020, I ordered that after a decision had been made regarding the child's school that the parties return for a case conference to address all issues arising from this litigation. I order that the parties shall proceed to a case conference on an urgent basis before another judge/Master.

Costs

[84] There has been divided success in this matter. I urge the parties to settle the issue of costs. If they cannot, I order the applicant to provide his costs submissions by March 31, 2021 not to exceed three pages with a bill of costs and any offers to settle. I order the respondent to provide her costs submissions by April 14, 2021 not to exceed three pages plus a bill of costs and any offers to settle. All costs submissions are to be sent to SCJ.Assistants@ontario.ca to the attention of Justice Shelston.

Date: March

17,

2021



Mr. Justice Mark Shelston

CITATION: *Moussaoui v. Harkouken*, 2021 ONSC 1986

COURT FILE NO.: FC-20-1733

DATE: 2021/03/17

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Mohamed Moussaoui, Applicant

AND

Douniazed Harkouken, Respondent

BEFORE: The Honourable Justice Mark Shelston

COUNSEL: Ms. Ford for the Applicant

Self-Represented Respondent

ENDORSEMENT

Shelston J.

Released: March 17, 2021