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Date and Time: March 30, 2020 2:19:00 PM EDT

Job Number: 113565525

Document (1)

1. [Davis v. Eby, \[2020\] O.J. No. 1305](#)

Client/Matter: -None-

[Davis v. Eby, \[2020\] O.J. No. 1305](#)

Ontario Judgments

Ontario Superior Court of Justice

L.M. Walters J.

March 26, 2020.

Court File No.: FC-19-00000469-000

[2020] O.J. No. 1305 | 2020 ONSC 1876

RE: Brooke Elizabeth Davis, Applicant, and Jason Donn Robert Eby, Respondent

(43 paras.)

Counsel

M. Milczarczyk, Counsel for the Applicant.

A. Toolsie, Counsel for the Respondent.

ENDORSEMENT -- COVID 19 PROTOCOL

L.M. WALTERS J.

1 AS A RESULT OF COVID-19 which has caused the suspension of regular Superior Court of Justice operations at this time, as set out in the Notice to the Profession dated March 15 and March 24, 2020, this urgent matter was heard **by teleconference**. See the Notice to the Profession dated March 15, 2020 and March 24, 2020 available at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>

2 Electronic materials were filed through the Courthouse email address: Kitchener.Superior.Court@ontario.ca.

3 The Applicant brought a motion on March 12, 2020 which was returnable before the court on March 25, 2020. A further notice of motion dated March **19**, 2020 was filed electronically with the court in accordance with the **COVID-9** protocol. In response to the Applicant's motion, the Respondent filed a cross-motion dated March 22, 2020. All three motions were before the court on March 25, 2020 by teleconference.

4 The following affidavits were filed in support of two motions brought by the Applicant and one cross-motion brought by the Respondent.

Affidavit 1 - Affidavit of Brooke Davis sworn September 11, 2019

Affidavit 2 - Affidavit of Brooke Davis sworn March 12, 2020

Affidavit 3 - Affidavit of Jason Eby sworn March 22, 2020

5 Upon the resumption of court operations all materials will be duly filed in the physical record at the courthouse.

6 Both Ms. Davis and Mr. Eby attended the motion by teleconference. They were each represented by counsel in the teleconference. Mr. Milczarczyk made submissions for the Applicant and Mr. Toolsie made submissions for the Respondent.

7 I have received and viewed the material set out in paragraphs 3 and 4 above.

Brief Background

8 The parties commenced legal proceedings in September of 2019 as a result of their separation in August 2019.

9 On October 9, 2019 Justice Madsen made an Order on consent that provided for the following:

(a) The Respondent's parenting time be as follows:

Week 1 - from Thursday at 4:30 p.m. until Saturday at 6:00 p.m.; and

Week 2 - from Thursday at 4:30 p.m. until Sunday at 12:00 noon.

(b) That by November 30, 2019, the Respondent was to obtain and provide to the Applicant the results of testing of hair-follicles to show the presence or absence of controlled substances.

(c) That the parties shall not consume or use any controlled substances or illegal substances while in a care giving role;

10 On December 11, 2019, the parties attended a case conference before Justice Breithaupt Smith. On consent, Justice Breithaupt Smith ordered that:

(a) the grandmothers (both maternal and paternal) shall be permitted to pick up and drop off the child at the end of the child's time with the parties;

(b) the Respondent serve and file a financial statement with a print out of his year to date income by December 20, 2019;

- (c) the Respondent serve and file his income tax returns for 2016, 2017 and 2018 on or before February 14, 2020;
- (d) the Respondent deliver to the Applicant's counsel a complete copy of his record with Ontario Addiction Treatment Centre for the period of January 1, 2016 to September 12, 2019 by December 20, 2019; and
- (e) neither party will leave the child in the care of any third party who has consumed prescription drugs to the point of impairment;

The Current Urgent Issue

11 On March 8, 2020, the Respondent's cousin experienced a drug overdose in the Respondent's home while the child, Dezmond, was in the Respondent's care in that home. Both parties agree that this event occurred, and that the child was in the home at the time.

12 Upon learning about the overdose from the Respondent, the Applicant brought a motion to request an order that the Respondent's access with the child, Dezmond J. Eby, born August 22, 2018, be supervised or alternatively given the closure of supervised access centers an order that the Respondent's access be suspended pending further order of the court.

13 Both parties indicated that there were financial issues that it wished the court to consider in the motions.

14 Given the suspension of regular Superior Court of Justice operations at this time, the court advised that the only issue that would be addressed in the teleconference would be the child's access with the Respondent. All other issues would be adjourned to be argued at a later date.

The Position of the Parties

15 The Applicant's position is that the Respondent's access should be supervised or suspended. The child is only 18 months of age and the Respondent currently has access each weekend from Thursday until Saturday in week one or Thursday until Sunday in week two.

16 The Respondent's position is that access should remain as it is set out in the Order of Justice Madsen dated October 9, 2019, such that the child is with the Respondent unsupervised at his home each weekend.

17 The following facts are agreed to by both parties.

- (a) during an access visit, on March 8, 2020, the Respondent allowed a cousin to stay at his home and he overdosed on drugs while staying there. The child was present during the overdose;
- (b) the Respondent called the paternal grandmother, Patricia Eby, when he learned of the event in order to deal with the situation and ensure that there was someone else to care for the child; and

- (c) the Respondent had to administer Narcan in order to revive his cousin. The Respondent removed the cousin from the home and the ambulance attended with the police and took the cousin away.

18 The Respondent advises that the cousin is not welcome at his home and that if he were to attend, he would call the police. The Respondent further advises that this was a "one off".

19 The Applicant is concerned for the child's safety given the events on March 8, 2020. The Applicant submits that the Respondent was addicted to drugs while they were together. She relies on her affidavits dated September 11, 2019 and March 12, 2020.

20 The Applicant is also suspicious of the Respondent's recovery from drug addiction, as he has allowed the mortgage for the home they own to go into default, he has not paid any child support (including daycare costs previously ordered) and he has not complied with the court orders of Justice Madsen and Justice Breithaupt Smith. In paragraphs 7 to 12 of the Applicant's affidavit dated March 12, 2020 she sets out specifics regarding the Respondent's breach of court orders -- most notably, the Respondent has not completed the hair follicle drug test as ordered by Justice Madsen on October 9, 2019, nor has he provided copies of his medical records from the Ontario Addiction Treatment Centre as ordered by Justice Breithaupt Smith on December 11, 2019.

21 The Respondent acknowledges that he is in breach of the court orders. He explains that the reason for his breach is due in part to his inability to pay for the drug test or the medical records.

22 In the Respondent's affidavit dated March 22, 2020, in response to the Applicant's motion, he indicates that he has been unable to file his financial statements or complete his taxes because he has a learning disability and finds the task overwhelming, daunting and insurmountable for him.

23 The Respondent also argues that if the applicant will pay for the drug test he will take it. He will also provide the medical records if she will pay for those. The Respondent submits that the cost of these two items is approximately \$500 and he has no means to pay those costs. He went on to state that at the time the order was made he was not aware of how much these items would cost.

24 The Respondent advises that he is working with the Children's Aid Society. They have been to his home recently (he could not remember the actual date but indicated that it has been since the overdose in his home) and they will continue to remain involved. The Respondent advised that he is not sure to what extent they will be involved at this time as he has been told their offices are closed given the pandemic. When the Respondent inquired about getting a letter from his CAS worker for the court, he was told that would not be possible.

25 There is no evidence before the court from the Society stating their position since the overdose occurred in the Respondent's home. The only evidence before the court are two letters from the Society dated September 25, 2019 and December 5, 2019 wherein they take no

position on the custody and access issues. The court is not aware if the Society has changed its position on the Respondent's access following the overdose in his home.

26 The Respondent submitted that the Society has powers to restrict his access and they have not. Furthermore, the Respondent advises that he has had access with the child two weekends in a row since the overdose and there were no concerns. The Applicant did not dispute these submissions.

27 In the Applicant's reply it was submitted that the court can conclude that the child is at risk of harm if the child continues to go for access. The Respondent has not provided any explanation for why he had a drug in his possession to be administered in the event of an overdose. He has not complied with two previous court orders which includes providing information to support his assertion that he is no longer involved with drugs.

28 This is a very young child. It is incumbent on both parents to act in a way that protects the child from any risk of harm.

29 When the court made inquiries about current access arrangements, both parties indicated that the maternal and paternal grandparents help with exchanges.

30 When the court inquired about the possibility of the paternal grandmother supervising the Respondent's visits, the Respondent agreed, although he indicated that he would not want the supervision to go on too long.

31 The Respondent submitted that he believed that the paternal grandmother would be able to supervise his access. Although she does not live close to the Respondent's home, she does run a business that is very close to his home.

32 The paternal grandmother provided a letter to the court setting out her support of the Respondent and confirming that she was aware of the events around the overdose.

33 The Respondent agreed to his access being supervised until he could provide a drug test of his urine (those tests he indicated are free). It was the Respondent's position that once he provides a drug test, he should be able to resume unsupervised access with the child.

34 The Applicant did not indicate any opposition to the paternal grandmother supervising the Respondent's access.

35 The events of March 8, 2020 are very concerning to the court. If the Respondent is no longer involved in the drug culture, why was there an individual in his home who ended up overdosing? Furthermore, why does the Respondent have in his possession a substance that can be administered to someone who overdoses, in an effort to save their life? Although the Respondent provided brief explanation in his affidavit of March 22, 2020 to these questions, he could have responded by complying with the existing court orders. He remains in breach.

36 The Respondent is to be commended for the actions he took on March 8, 2020. He acted

quickly and protectively towards the child. It was also the Respondent who advised the Applicant of the events of that date.

37 Based on the evidence before me, I do not have any direct evidence to indicate that the child was impacted. However, the child is only 18 months of age and the court is concerned for the child's safety if any such event were to occur in the future.

38 The Respondent has not provided any evidence to the court to support his position that he is drug free. He has not provided the hair follicle test ordered by Justice Madsen, nor has he provided the medical records ordered from the Ontario Addictions Centre ordered by Justice Breithaupt Smith.

39 The Respondent acknowledges that he is in breach of the Order and suggests that the court take his word for it that this is simply a "one-off". His explanation for being in breach, at least with respect to the two items of most concern to the court, is the cost associated with it.

40 Being in breach of a court order is serious.

41 Until the Respondent provides the court with the two items requested, the court has no evidence to support the Respondent's position that there is no risk to the child. On the contrary, the most recent events support that there is risk to the child. Although the Applicant continued to send the child for access without incident, she took the appropriate steps to bring this matter back to court quickly. The Applicant must be commended for her actions.

42 The safety and well-being of the young child, who is the subject of this proceeding, must be the court's paramount concern.

43 After reviewing the material filed and hearing submissions of the parties the court orders as follows:

1. Jason Donn Robert Eby's access to the child, Dezmond J. Eby, shall continue as set out in the Order of Justice Madsen dated October 9, 2019, but it shall be supervised by the paternal grandmother, Patricia Eby.
2. Should the paternal grandmother be unavailable to supervise the Respondent father's access, his access shall be suspended pending further court order.
3. The settlement conference originally scheduled for May **19**, 2020 shall be adjourned to be spoken to on June 11, 2020 at 10:00 a.m.
4. All other issues set out in the motions returnable today shall also be adjourned to be spoken to on June 11, 2020 at 10:00 a.m.
5. Should the Respondent father obtain a hair follicle test and his medical records from the Ontario Addiction Treatment Centre before June 11, 2020, this matter may return before me on an urgent basis. These documents shall be served on the Applicant and provided to the court in advance of any hearing.

6. Upon the resumption of court operations, all materials filed for this teleconference shall be filed in the physical record at the courthouse.

L.M. WALTERS J.

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