2021 ONSC 5790
Ontario Superior Court of Justice

S. v. G.

2021 CarswellOnt 13008, 2021 ONSC 5790

A.S. (Applicant) and R.G. (Respondent)

P.J. Monahan J.

Heard: August 24, 2021
Judgment: August 30, 2021
Docket: FS-21-222820

Counsel: Michael J. Stangarone, Stephanie Timerman, for Applicant
Belinda Rossi, Bridget Bilski, for Respondent

Subject: Contracts; Family

Headnote

Family law

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Cases considered by *P.J. Monahan J.*:

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Statutes considered:

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***P.J. Monahan J.*:**

1 The Applicant Father, A.S. brings this motion on an urgent basis, seeking an order that the two children of the marriage, CGS and EGS (the "Children"), attend in-person schooling for the 2021/2022 school year at their current schools in Etobicoke, Ontario. The Respondent Mother, R.G. opposes this relief and seeks an order either that Children attend in-person schools in the Meaford, Ontario area, where she is currently residing, or that the Children be enrolled in virtual learning at their current schools in Etobicoke.

Background

2 The Applicant and the Respondent (the "Parties") were married on August 3, 2002 and separated on June 23, 2016. Their first child, CGS, was born [date omitted] and will turn 16 on [date omitted] of this year, while EGS was born [date omitted] and will turn 10 on [date omitted] this year. In September, CGS will commence grade 11 while EGS will commence grade 6.

3 The Parties entered into a separation agreement on January 18, 2019 (the Separation Agreement"). The Separation Agreement provides that the parties will jointly parent the children in accordance with a shared 2 — 2 — 3 parenting schedule. They agreed to consult with each other regularly about important issues such as the Children's education, and to make all such decisions together. The Parties also agreed that they would live near each other in Etobicoke so that the children would have frequent contact with both of them, and that the Children's residence would not move from Etobicoke until July 1, 2030 without first providing 60 days written notice and obtaining the other parent's written consent or court order.

4 In March 2019, the Respondent purchased a cottage property in Meaford, Ontario, which is approximately 150 kilometres northwest of the Applicant's residence in Etobicoke. However, the Respondent continued to reside in a rental property in Etobicoke as required by the Separation Agreement.

5 In the 2019/2020 academic year, CGS was enrolled in grade 9 at Blyth Academy ("Blyth") in Etobicoke. Blyth is a private school with approximately 100 students in total from grades 9 to 12 and is located close to the Applicant's home. CGS was enrolled at Blyth because she has special needs (as described in more detail below) and the Parties believed that the small class environment and extra in-person support provided at Blyth would be suitable to meet those needs. In that same year, EGS, who also has special needs, was enrolled in grade 5 at Sainte-Marguerite-d'Youville ("SMDY"), a French public school in Etobicoke which she has attended since kindergarten.

6 With the onset of the Covid 19 Pandemic in March 2020, the Children began virtual learning at their respective schools. In June 2020, the Respondent advised the Applicant that she intended to temporarily move to her cottage at Meaford so that she could save to purchase a property in Etobicoke by 2021. Since the Children were attending school remotely, the Respondent requested that they be permitted to reside with her in Meaford during her parenting time.

7 Given the fact that the Children were attending school virtually and this situation was expected to continue through the fall of 2020, the Applicant agreed to the Respondent's request. However, the Applicant states that he wanted to ensure that it was clearly understood and agreed that this was a temporary arrangement only. Accordingly, he requested that the Respondent enter into a formal amendment to the Separation Agreement (the "Amending Agreement") recording their understanding in this regard, to which the Respondent agreed. [1]

8 The Amending Agreement was negotiated over the next few months and eventually executed by the Applicant on October 29, 2020 and by the Respondent on November 2, 2020. The recitals to the Amending Agreement referred to the fact that the Respondent was planning to temporarily change her residence from Etobicoke to Meaford and that the parties had discussed

making "temporary changes to the parenting schedule set out in the 2019 Separation Agreement in order to accommodate [the Respondent's] move".

9 The key operative provisions of the Amending Agreement included the following:

i. the 50-50 joint custody with a shared parenting schedule for the Children as set out in the Separation Agreement continued in place;

ii. the Children would remain enrolled in their respective schools in Etobicoke for the 2020/21 academic year. It was specifically provided that CGS would attend school online for terms 1 and 2 and that the parties would reevaluate whether CGS should return to daily in-class schooling for terms 3 and 4;

iii. in order to reduce travel time for the children to and from the Respondent's temporary residence in Meaford, the 2 — 2 — 3 parenting schedule set out in the Separation Agreement would be modified to a week about schedule. All transitions would take place at the Applicant's home in Etobicoke and the Respondent would be responsible for driving the children to and from Toronto;

iv. the Children's permanent residence for their school and medical records would be the Applicant's home in Etobicoke;

v. once in-class schooling resumed, the Respondent would ensure that the Children are dropped off at their respective schools in Etobicoke prior to the start of school on days they reside with her;

vi. all decisions regarding the Children would continue to require full consent from both parents and mutual agreement;

vii. except to the extent that they are expressly amended, the terms of the original Separation Agreement were ratified; and

viii. the Amending Agreement would terminate on December 31, 2021, at which time the original Separation Agreement would return into effect.

10 Despite the fact that the Amending Agreement stated that the Respondent's move to Meaford was to be temporary, on April 6, 2021 counsel for the Respondent wrote to the Applicant advising him that the Respondent had decided to make Meaford her permanent home, and that she intended to enroll the Children at schools in the Meaford area starting in September 2021.

11 On April 19, 2021, counsel for the Applicant wrote to counsel for the Respondent advising that he had issued an application seeking enforcement of the Separation Agreement and Amending Agreement, and that the Children continue to attend their current schools in Etobicoke in person commencing September 2021.

12 Although the April 6, 2021 correspondence from her counsel indicated that the Respondent intended to enroll the Children in schools in the Meaford area commencing September 2021, on May 17, 2021 the Respondent confirmed with SMDY that ESG would attend there in person commencing in September 2021. Accordingly, ESG is currently enrolled at SMDY and is expected to commence grade 6 there on September 7, 2021. The Respondent has not confirmed CSG's attendance at Blyth for 2021/22 and thus CSG is not yet enrolled in school for this September.

The Special Needs of the Children

13 The parties are agreed that both Children have special educational and social needs that need to be taken into account in the design of their educational programs.

14 With respect to their younger daughter, ESG, over a number of years her teachers reported significant issues with her reading, writing and holding her attention in class. Following an assessment, ESG was given a diagnosis of attention deficit hyperactivity disorder ("ADHD"). That diagnosis noted that classroom accommodations are warranted to allow ESG to achieve her academic potential, including working with a resource teacher in a quiet environment with minimal distractions. It was also

suggested that ESG should have a seating arrangement in class that minimized visual and auditory distractions, and be permitted to take brief energy breaks throughout the day.

15 In the 2020/2021 academic year, ESG was referred for a psychoeducational assessment due to increasing concerns with respect to her academic progress. Rating forms completed by her parents indicated that ESG continued to struggle significantly with modulation of attention and activity, and ESG's teachers confirmed the parents' concerns. The April 2021 assessment found that her performance in all academic areas was falling significantly below age-level expectations and ESG's intellectual potential.

16 CSG was diagnosed with ADHD in [date omitted] when she was nine years old. She was subsequently assessed and diagnosed with Autism Spectrum Disorder ("ASD"). A May 2018 report from a psychologist found that, taken together, her impairments related to ASD and ADHD have had a major negative impact on CSG's ability to execute the mental functions necessary for life at an age-appropriate level. In addition, the psychologist reported that CSG is severely limited in her ability to initiate and respond to social interaction with peers, exhibits marketed sensitivity to noise, and prefers to spend free time alone rather than interacting with peers. As noted above, it was precisely because of these concerns that the Parties decided to enroll CSG at Blyth when she commenced high school in September 2019, in the hopes that the small class sizes and additional resources available at Blyth would enable CSG to successfully deal with these challenges.

Relief Sought

17 The Applicant seeks the following relief on this motion:

i. an order that CGS be enrolled at Blyth for in-person learning for the 2021/2022 school year;

ii. an order that EGS shall remain enrolled at SMDY for in-person learning for the 2021/2022 school year; and

iii. in the event that the Respondent does not relocate to the Etobicoke/Toronto area for the 2021/2022 school year, an order that the children reside primarily with the Applicant, and with the Respondent for three or four weekends from Friday after school until Sunday evening at 8 PM.

18 The Respondent's cross-motion seeks the following relief:

i. an order that EGS be enrolled for in-person learning at both l'ecole Catholique Notre-Dame-de-la-Huronie ("Notre Dame") and at Blue Mountain's WILD SCHOOL (the "WILD SCHOOL") for the commencement of the 2021/2022 school year;

ii. in the alternative, an order that ESG be enrolled in virtual learning at SMDY for the commencement of the 2021/2022 school year;

iii. an order that CGS be enrolled for in-person learning at Georgian Bay Community School in Meaford, Ontario ("Georgian Bay") for the commencement of the 2021/2022 school year;

iv. in the alternative, an order that CGS be enrolled at Blyth for virtual learning for the commencement of the 2021/2022 school year;

v. in the event that the court makes changes to the parenting schedule in the Parenting Agreements, an order that the Applicant shall have parenting time with the Children every second weekend from Friday after school until Sunday at 8 PM, with the children otherwise residing with the Respondent; alternatively the Children shall continue with the week about schedule set out in the Amending Agreement..

Positions of the Parties

19 The Applicant takes the position that it is in the Children's best interests to attend in-person schooling for the 2021/2022 school year at their respective schools in Etobicoke where they are habitually resident. The Children were born and raised in Etobicoke and have resided there their entire lives. The Parties have negotiated and executed two valid Parenting Agreements confirming the Parties' 50/50 shared parenting arrangement, and that the Children's habitual residence is not to be changed from Etobicoke Ontario without both of their consent. In violation of those Parenting Agreements, as well as the relocation requirements of the *Divorce Act*, the Respondent has unilaterally changed her residence and is in effect advancing a mobility claim in the guise of a motion to change schools.

20 Moreover, the Applicant contends that the Respondent has failed to produce credible evidence to support her position that the new schools in her jurisdiction are better suited to address the Children's special needs than their current schools. The Respondent is proposing that CSG, who has sensory and tactile sensitivities, attend a school with capacity for 1000 students, with no evidence of supports that might be available to her, when she currently attends a small private high school in Etobicoke of 100 high school students, with 8 students to a class and additional supports available to her. The Respondent is also proposing that ESG, who has academic challenges and an IEP at her current school in Etobicoke, attend two schools at the same time (part-time each) in two separate languages (French and English) The alternative option proposed of continuing in virtual learning for another year is not in the best interests of the children and is being proposed merely to accommodate the Respondent's own convenience.

21 The Respondent's position is that, given that both Children have special needs that require careful attention, they require a tailored school and home environment to allow them to thrive. In her view, the Parenting Agreements that were entered into in 2019 and 2020 no longer meet the Children's best interest. The Amending Agreement requires the Respondent and the children to relocate to the Greater Toronto Area from her current residence, a 45-acre property in Meaford, Ontario which features dogs, rabbits, chickens, a forested area and a pond. Following a week-on, week-off parenting schedule during the pandemic and attending online schooling was extremely beneficial to the Children's well-being, given their significant special needs. The children are now fully enmeshed in the Meaford community, which offers superior educational programs to meet their unique needs over the previous schools in Etobicoke. In any event, the Respondent cannot afford to move back to Toronto since she is stretched incredibly thin financially, while trying to do her best to support the children and meet their significant needs.

22 With respect to CSG, the Respondent reports that having CSG attend class online over the past 18 months has led to a drastic reduction in her anxiety and an improvement in her sleeping patterns. CSG no longer battles the social anxiety of attending school in-person each day and she has improved her academic performance through virtual learning. CSG has also adamantly expressed her opposition to returning to Blyth and wishes to attend Georgian Bay, as she has made friends in the surrounding area who will be attending there. The Applicant has refused the Respondent's request to undertake a s. 30 assessment or a Voice of the Child Report for CSG. The unfortunate result of the Applicant's opposition in this regard is that CSG has been deprived of having her views and preferences directly put before the court.

23 With respect to ESG, the Respondent is proposing that she attend Notre Dame part-time three days a week to continue her studies in French, in combination with two days per week at the WILD SCHOOL. Notre Dame is a Francophone school near to the Respondent's home in Meaford, where the Respondent knows the principal and teachers. ESG has already met the resource teacher there and has a good relationship with her. Notre Dame has only 120 students compared to over 500 students at her current school in Etobicoke. The WILD SCHOOL is an excellent part-time option for ESG, because it will give her an opportunity to experience hands-on outdoor learning, which is in line with the results of her psychoeducational assessment.

24 If the court does not permit the enrolment of the Children for in-person learning in schools in the Meaford area, the Respondent proposes that they continue virtual learning for 2021/22. This is in their best interests because of their success in learning virtually during the pandemic, and the lack of response from the Applicant regarding a s. 30 assessment or a Voice of the Child Report.

Relevant Legal Framework

25 The legal principles relevant to the issues raised on this motion include the following:

a. Parenting orders must be made only in accordance with the best interests of the child

26 The *Divorce Act* specifies that when making a parenting order, a court must only take into consideration the best interests of the child, as opposed to the interests of the parents. The 'best interests' analysis includes factors that weigh the child's needs, given the child's age and stage of development, such as the child's need for stability; the nature and strength of the child's relationship with each spouse; each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse; and the child's views and preferences, giving due weight to the child's age and maturity. The primary consideration is the child's physical, emotional and psychological safety security and well-being; [2]

b. Parenting agreements are not binding on the court, but are to be given appropriate weight as reflective of what the parents considered to be in a child's best interest at the time of the relevant agreement

27 In determining the best interests of the child, a significant consideration is whether the parents have in the past entered into formal agreements dealing with the relevant issues. Parents, rather than the courts, are generally thought to be in the best position to assess the best interests of their children. Moreover the resolution of parenting issues through agreements rather than litigation should be encouraged. [3] As Kiteley J. observed in *Tumino v Tumino*, if such agreements were simply ignored, it would eliminate any incentive to use the time and resources to negotiate them. [4] Thus, while parental agreements are not binding on the court and cannot displace the court's duty to assess what is in the best interests of a child, such agreements must be given appropriate weight as reflective of what the parents believed to be in their child's best interest at the time of execution. [5]

c. A parent wishing to change a child's school has the onus of demonstrating that such a change in the child's best interest

28 Given that a child has an interest in stability and continuity, it is well established that, in the event that one parent wishes to change a child's school, that parent has the onus of demonstrating that the change would be in the child's best interest. [6] In assessing whether that onus has been met, factors to be considered include: where the child was born and raised; how long the child has attended his/her existing school; any problems with that school and how those problems might be alleviated by the new school; the ability of the respective schools at issue to meet the needs of the child; and any prior decisions made by the parents as to choice of school. The focus must be on the merits of the schools in meeting the child's interests and needs, rather than on convenience to the parents or proximity to one parent's residence. [7]

d. A parent seeking to relocate a child's residence has the burden of proving that the relocation is in the child's best interest, and courts will generally not authorize such relocation on an interim motion

29 The relocation of a child's residence is obviously a much more significant decision than a change in the child's school. For this reason, courts have repeatedly made clear that there is a need for caution and a full evidentiary record before permitting one parent to change a child's residence. [8] On an interim motion, it is difficult if not impossible in most cases to complete the extensive child-focused inquiry required, given the summary nature of the proceeding and the fact that the court is typically being asked to make a decision on the basis of conflicting, incomplete and untested affidavit evidence. It is also undesirable to change a child's residence by way of an interim order since the move may later be reversed after trial, thereby causing further disruption. In short, absent a pressing reason justifying an immediate move, the courts will generally not order the relocation of a child's residence on an interim motion.

30 This jurisprudence has been reflected in recent amendments to the *Divorce Act* which came into effect on March 1 of this year. Under those amendments, where a person seeks to relocate a child, which is defined as including "a change in the place of residence of a child... that is likely to have a significant impact on the child's relationship with a person who has parenting time... in respect of that child", the person proposing the relocation must commence a mobility claim prior to taking steps to implement the relocation. [9] Moreover, the person proposing the relocation must prove that it is in the best interests of the child to do so. [10]

e. There is a presumption that in-person attendance at school is in the child's best interest

31 There is increasing evidence that there are long-term educational and social costs associated with virtual schooling for elementary and secondary school students. This has led courts to conclude that, absent compelling evidence otherwise, it is in the best interest of a child to attend in-person schooling where such schooling has been authorized by the government and relevant educational decision-makers. [11] While potential exposure to Covid 19 is obviously a factor to be taken into account in any such assessment, the court is not in a position, especially without expert evidence, to second-guess the government's decision-making. The court should proceed on the basis that the government's plan for reopening of schools in the context of Covid 19 is reasonable in the circumstances for most people and that it will be modified as circumstances require.

Analysis

a. The Parenting Agreements demonstrate that as of November 2020, the Parties were agreed that it would be in the best interest of their children to resume in person learning at their current schools in Etobicoke once those schools reopened for in-person instruction

32 The Amending Agreement makes it clear that the Parties were temporarily modifying their parenting schedule to accommodate the Respondent, who had temporarily decided to reside at a cottage property in Meaford. This accommodation was possible because the Children were at that time attending school virtually during the pandemic. But the Amending Agreement was very clear that this temporary modification in the parenting schedule was not intended to change the Children's schools. Thus, once the Children were no longer participating in virtual leaerning, they were to resume attending in-person at their current schools in Etobicoke. This was made clear by the provision stating that the Respondent "will ensure that [the Children] are dropped off at their respective schools in Etobicoke/Toronto prior to the start of school on days when they reside with her when the children return to in-class schooling." The Respondent also expressly agreed that she would move back to a residence in the Etobicoke area before the end of 2021.

33 Significantly, at the time of the execution of the Amending Agreement on November 2, 2020, both Parties were well aware of the Children's special needs. Thus, what the Amending Agreement confirms is that as of November 2020, the Parties were both of the view that once in-person schooling resumed, the Children's special educational needs could best be accommodated at their existing schools in Etobicoke.

b. There has been no change in Children's needs or circumstance since November 2020 that would suggest that their existing schools in Etobicoke are no longer able to meet the Children's educational or other special needs

34 Neither of the Children has developed any novel or unexpected special needs that would suggest that their existing schools in Etobicoke are no longer able to accommodate those needs. I accept the Respondent's evidence that the Children have enjoyed the experience of living in a rural setting such as Meaford. But this does not in any way call into question the suitability of their existing schools to meet their educational needs. In fact, as late as March 11, 2021, the Respondent agreed in an email that the decision regarding the 2021/2022 school year "remained the same as previously discussed" and "We agreed that they [the Children] would return to in person learning."

35 The Respondent says that CSG had difficulties in her peer relationships at Blyth and that the three other girls in the class "formed friendships with one another and did not mesh with [CSG]". It appears that this difficulty with peer relationships is the major reason why, according to the Respondent, that CSG is adamant about not returning to Blyth this fall. But the Parties were well aware of the difficulties that CSG had experienced in her peer relationships at Blyth when they entered into the Amending Agreement last November. In fact, the materials filed by the Respondent confirm that this has been a long-standing challenge for CSG, one which manifested itself at her previous schools as well as at Blyth. Yet the Respondent did not raise any suggestion over the course of the negotiation and execution of the Amending Agreement in the fall of 2020 that CSG should change her school because of these difficulties with peers. It was not until April of 2021, after the Respondent had concluded that she could not afford to move back to the Greater Toronto area, that she raised for the first time the idea of CSG attending

Georgian Bay. It goes without saying that any difficulties the Respondent may have in securing accommodation in the Toronto area is not a relevant consideration in determining whether it would be in CSG's best interest to change her school from Blyth to Georgian Bay.

36 I would also point out that there is no evidence of any similar difficulties with peers on the part of ESG, or that she is opposed to resuming in-person instruction at SMDY in Etobicoke. Even assuming CSG is reluctant to return to Blyth, this cannot constitute a reason justifying a change in ESG's school. The is simply no credible evidence to suggest that SMDY is no longer able to meet ESG's educational and special needs.

c. The Respondent has failed to satisfy her burden of showing that the schools she proposes in the Meaford area would be better able than their existing schools in Etobicoke to meet the Children's needs

37 The Respondent has provided very limited evidence explaining how the schools she proposes in the Meaford area would be better able to meet the educational and social needs of the Children. The scant evidence she has provided falls far short of what would be required to justify the changes she is proposing.

38 The only information the Respondent has provided with respect to Georgian Bay is that the school "was recently built and meets the new school guidelines for interactive and sensory components", and that it has great art and outdoor programs. The Respondent claims that Georgian Bay has 350 students.

39 The Applicant disputes the size of Georgian Bay. In his responding August 20, 2021 affidavit, the Applicant attaches an article from a local community newspaper stating that Georgian Bay was built to accommodate 1000 students from Junior kindergarten to grade 12. It is described as having five kindergarten rooms, 22 elementary classrooms and seven secondary classrooms.

40 The Respondent filed a further affidavit on August 23, 2021 but did not dispute the Applicant's description of Georgian Bay. I am thus unable to determine on this record even the size of the school, much less any other aspects of its educational programming.

41 In short, I am unable to determine whether or how Georgian Bay would have the resources or capacity to accommodate the numerous special needs identified for CSG. In fact, the main reason why the Respondent proposes to enroll CSG at Georgian Bay appears to be that in the past few months she has made a number of friends in the area who will also be attending the school. The Respondent also says that CSG has told her that she wants to attend Georgian Bay.

42 As discussed above, CSG has experienced significant challenges in developing peer relationships, not only at Blyth but at her previous schools. Those challenges will no doubt continue if she were to enroll at Georgian Bay, notwithstanding the fact that she may have made a handful of friends in the area over the last few months. I have a great deal of concern about the wisdom of placing CSG in a totally new environment where there is no evidence to suggest that she would receive the supports she would need to succeed.

43 Turning to the schools proposed for ESG, the Respondent has provided very little information about Notre Dame, apart from the fact that the school offers French instruction, that the Respondent knows the principal and teachers, and that ESG has met the resource teacher there. The Respondent has also provided no information as to how enrolling part-time at two separate schools (i.e. Notre Dame on Mondays, Wednesdays and Fridays, and the WILD SCHOOL on Tuesdays and Thursdays) would be suitable for ESG. In oral argument, her counsel was unable to answer even the most basic questions as to how the academic programs at the two schools would be integrated.

44 There may well be students who would thrive enrolling part-time at two separate schools, as the Respondent suggests. But I am unable to conclude on the record before me that ESG is one of them. As ESG's April 2021 psychoeducational assessment indicates, her performance in all academic areas has been falling significantly below age-level expectations. She has recently had an IEP completed for her. I would have thought that it would be in her best interest to focus on implementing that IEP successfully, rather than to embark on a novel educational arrangement involving two schools operating in two different

languages. I am frankly troubled by the impact that the radical change in her academic programming proposed by the Respondent would have on her prospects for future academic success.

45 The Respondent bears the burden of demonstrating that the change of schools she proposes would be in the Children's best interests. I find she has failed to do so.

d. It would not be in the best interests of the Children to continue online schooling in 2021/2022

46 The Respondent claims that both Children have improved their academic performance through participation in virtual learning since March 2020. She therefore proposes that, if she is not permitted to enroll them for in-person schooling in the Meaford area, they continue in virtual learning for the 2021/2022 academic year.

47 In fact, contrary to the claims of the Respondent, the Children appear to have experienced significant disruption to their schooling over the past year and a half.

48 With respect to CSG, in oral argument it was agreed that over the past year CSG has fallen behind in her course load because of the virtual learning format. She has had to spend the summer completing these courses. If she were to continue with virtual learning once the 2021/2022 school year commences, it can be expected that she would continue to fall behind. Moreover, the uncontradicted evidence tendered by the Applicant is that in 2021/2022, the online school will be entirely separate from in-person classes. There is no hybrid model and as such CSG would have to change classes with different students if she were to switch later on. I accept that this would be incredibly disruptive to her.

49 Also relevant is the fact that CSG has had her first Covid 19 vaccine and will receive her second vaccine before the school year commences. Thus the risk to her from Covid 19 is extremely low.

50 With respect to ESG, her educational assessment indicates that she has difficulty focusing and requires hands-on learning with minimal visual and auditory distractions. Over the past year, there have been increasing concerns with respect to her academic progress. Although she is too young to receive a Covid 19 vaccine, the risk of serious illness for her age cohort is low. The uncontradicted evidence is that she has missed social interactions with her peers and is anxious to return to in-person learning.

51 I also find it telling that the Respondent's preferred option is for the Children to both attend school in-person rather than online. Virtual schooling is proposed as a fall-back option only.

52 I therefore find it would be in both of their interests to resume in-person instruction in September 2021, and not continue with virtual learning.

e. The Respondent's proposed change in schools would, in substance, amount to a relocation of the Children. There is no pressing concern that would justify such a relocation on an interim motion, nor has the Respondent complied with the requirements for a relocation set out in the Divorce Act.

53 Enrolling the Children at schools in the Meaford area would, in substance, amount to a relocation of their residence. The Parenting Agreements provided for a shared parenting arrangement, which in turn required the Parties to live close to each other near the Children's schools in Etobicoke. If the Children begin school in Meaford the September, these parenting arrangements would obviously no longer be possible; the children would have to reside in the Meaford area during the week so that they could get to school on time and without a long commute. At most, they would only be able to spend time with the Applicant on weekends. Thus, in substance, the change in schools proposed by the Respondent amounts to a relocation of the children's residence, since it would involve "a change in the place of residence of [the Children] ...likely to have a significant impact on [their] relationship with the Applicant."

54 The Respondent appears to dispute that she is proposing a relocation of the children's residence. In oral argument, her counsel took the position that the relocation "has already happened", since the Children have been residing on a week-about schedule with the Respondent in Meaford over the past year.

55 There are two obvious difficulties with the Respondent's position. First, the Amending Agreement made it plain that the change in the parenting schedule was temporary only and was not intended to change the children's habitual residence. The Respondent acknowledges that at the time of execution of the Agreement, it was her intention to move back to the Toronto area in 2021, as was required under the Agreement. The Respondent violated the Agreement when she unilaterally decided in April 2021 that she was not moving back to Toronto. She cannot now seek to rely upon her decision to ignore her obligations under the Agreement as having established some new *status quo* in terms of the residence of the Children.

56 Second, the Amending Agreement only contemplated the Children residing with the Respondent in Meaford every second week. On the other weeks, they were to reside with the Applicant at his home in Etobicoke. For the reasons explained above, if the children commence school in Meaford, that week-about schedule is no longer feasible, and the Children will only be able to spend time at the Applicant's residence on weekends. This is implicitly recognized by the Respondent herself, as she seeks an order whereby the Children would reside primarily with her and with the Applicant only on every second weekend. Such a major change in the Children's residence would be likely to have a significant impact on their relationship with the Applicant.

57 It is precisely because of the major impact on children resulting from a relocation of their residence that the *Divorce Act* sets out a number of factors that must specifically be addressed by the person seeking to authorize a relocation. [12] Moreover, the person proposing the relocation must seek court authorization in advance of relocating their residence, not after they have already unilaterally attempted to implement the move. Because the Respondent has not recognized or acknowledged that what she is proposing is in substance a relocation of the Children, she has simply ignored these statutory requirements. On this basis alone, the relief sought by the Respondent cannot be entertained.

58 Moreover, quite apart from the fact that the proposed relocation is being attempted in contravention of the requirements of the *Divorce Act*, courts will only authorize the relocation of a child on an interim motion where there is a pressing need for the immediate change. No such pressing need has been identified in this case.

Conclusion

59 The Respondent has not provided credible evidence to support her claim that the Children's schools should be changed from their current schools in Etobicoke to the new schools she proposes in the Meaford area. Nor has she provided credible evidence to support her alternative position that the Children should attend school virtually, as opposed to in-person. In fact, her own evidence supports the conclusion that the Children require in-person learning to better support their special needs, and this is in fact her preferred option for both Children.

60 In addition, the proposed change to the Children's schools sought by the Respondent would necessarily require a change in their primary residence, and the cessation of the 50/50 shared parenting arrangements agreed to by the parties in the Parenting Agreements. The Respondent has not commenced a relocation proceeding in advance of the proposed relocation, nor has she provided evidence indicating how this change in the parenting arrangements would be in the best interests of the children, contrary to the mandatory requirements of the *Divorce Act*.

61 I therefore dismiss the Respondent's cross-motion and grant the Applicant's request for an order that CSG attend Blyth and ESG attend SMDY in Etobicoke in the 2021/2022 academic year. I also order the Respondent to forthwith execute any consents necessary to cause the Children to be enrolled at their respective schools this year.

62 The Applicant has also sought an order that, in the event that the Respondent does not return to the Etobicoke/Toronto area for the 2021/2022 school year, the Children shall reside primarily with the Applicant during the school year and with the Respondent for three or four weekends per month from Friday after school to Sunday evening at 8 PM.

63 In my view the consideration of this particular head of relief is premature at this time. Pursuant to paragraph 7 of the Amending Agreement, once in-person schooling resumed, the Respondent agreed that she will be responsible for ensuring that the Children are dropped off at their respective schools prior to the start of school on the days when they reside with her. The

Amending Agreement remains in effect and I would order the Respondent to comply with her obligations under paragraph 7 of the Amending Agreement.

64 Beyond ordering compliance with paragraph 7 of the Amending Agreement, I would leave it to the Parties to consider how best to ensure implementation of this Endorsement in a manner which best serves the interest of the Children. By way of guidance to the Parties, I would note that it would clearly not in the Children's best interests for them to commute to school in Etobicoke from the Respondent's residence in Meaford. Therefore, until such time as the Respondent is able to secure suitable accommodation for herself and the Children in the Greater Toronto Area, some sort of short-term adjustment in the parenting arrangements will be necessary. For now, I leave it to the Parties to attempt to determine for themselves what adjustments would be in the Children's best interests. However, if the Parties are unable to reach agreement prior to September 7, 2021 as to how best to implement the terms of this Endorsement, they may return before me on short notice to address the matter.

65 It is evident that both R. and A. love their Children deeply and want to act in their best interests. I expect that the fall of 2021 will be a challenging time for CSG, who will be returning to in-person schooling for the first time in 18 months. It would be natural for any child to experience anxiety over returning to school after such an extended absence, but it will be all the more challenging for CSG, given her special needs as described above.

66 School starts in a week and CSG still doesn't know where she will be going to school. What CSG needs now more than anything is certainty over what school she will be attending. R. and A. have a duty to firmly and resolutely support CSG's transition back to in-person schooling at Blyth rather than prolonging uncertainty, the price for which will surely be paid by CSG. Because they love their daughter, they must now try to find a way to work together in good faith to support CSG through this difficult time. As a first step, I direct the Parties to meet as soon as possible with staff at Blyth to discuss CSG's concerns, and explore how they might be addressed and accommodated. R. and A. should involve CSG in these discussions as appropriate, so that she is given a voice in how best to transition back to in-person learning at Blyth.

Disposition

67 Order to go as follows:

a. CGS shall be enrolled at Blyth for in-person learning for the 2021/2022 school year;

b. EGS shall remain enrolled at SMDY for in-in-person learning for the 2021/2022 school year;

c. The Respondent will forthwith execute any consents necessary to enable the Children to be enrolled at these schools in the 2021/22 year;

d. the Respondent will ensure that the Children are dropped off at their respective schools in Etobicoke/Toronto prior to the start of school on days they reside with her;

e. the relief sought in paragraph five of the of the Applicant's notice of motion is dismissed, without prejudice to the right of the Applicant to seek such relief in the future if circumstances at that time would make it in the best interests of the Children;

f. the Parties will meet as soon as possible with staff at Blyth to discuss how any concerns that CSG might have regarding the return to in-person learning might be addressed and accommodated, and involve CSG in those discussions as they deem appropriate; and

g. the Respondent's cross-motion is dismissed.

68 I would invite the Parties to attempt to settle the issue of costs between themselves. In the event that they are unable to do so, the Applicant may serve and file costs submissions of no more than five pages, not including Bills of Costs and Offers to Settle, within 10 days of this Endorsement; the Respondent may serve and file responding costs submissions on a similar basis within 10 days of receiving the costs submissions of the Applicant; and the Applicant may file reply cost submissions of no more than two pages, within five days of receiving the Respondent's cost submissions.

Footnotes

1 I will refer to the Separation Agreement and the Amending Agreement collectively as the "Parenting Agreements".

2 See Divorce Act, R. S. C. 1985, c. 3 (2nd Supp.), s. 16 (1) to (3); Children's Law Reform Act, R.S.O. 1990, c. C-12, s. 24 (2) — (4).

3 Gordon v. Goertz,1996 SCJ No. 52 at para 49.

4 2002 CanLII 49526 (ONSC) at para 36.

5 Woodhouse v. Woodhouse,29 OR (3rd) 417 (CA).

6 Thomas v. Osika,2018 ONSC 2712 at para 37; Askalan v Taleb,2012 ONSC 4746 at para 33.

7 Mokhov v. Ratayeva, 2021 ONSC 5454 at para. 49.

8 Datars v. Graham, 2007 Canli 34430 (ONSC), paras 16, 18, 20 to 21; Tegart v. Westland,[2007] O.J. No. 709.

9 Divorce Act, s. 2 (1), 16.9, 16.91.

10 Divorce Act, s. 16.9, 16.91 & 16.93

11 El Haddad v. Shakur,2020 ONSC 5541 at para 14; Nolet v. Nolet,2020 ONSC 5285 at para 25; Zinatti v. Spence,2020 ONSC 5231 at para 27.

12 See Divorce Act, s. 16.92.

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