THE LAWYER'S DAILY

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Family

To school or not to school | Gary Joseph

By **Gary Joseph**

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(August 27, 2020, 1:33 PM EDT) -- Already backed up and overburdened, now our courts and family law judges are faced with more COVID-19-driven litigation. One parent wants the child to return to school while the other parent opposes and wishes to continue with online learning. Decisions that should be made jointly by parents alone or at the very least by the parents with third party assistance are being thrown before judges for adjudication — last minute I might add. So, recently appointed Justice Andrea Himel of the Ontario Superior Court of Justice was asked to determine the return to school plan of the child W.C. in the matter of *Chase v. Chase,* 2020 ONSC 5083.

The facts of the case are not unique. Separated parents are raising the child in a 2/2/5/5 shared parenting arrangement. W.C. is enrolled in a grade four French immersion program at a school he has attended since junior kindergarten. Both parents are employed. Mother is able to work from home. Father has re-partnered and has a flexible work arrangement. Mother wishes W.C. to return to school and father wishes to wait until "safety protocols are proven successful." What's a court to do, split the child in half? Send the child to school when with mother but allow home learning while with father? Chose mother's position or that of the father? The better approach in my humble view is to lock the parents in a room with an experienced mediator and don't let them out until they agree on a plan. Sadly, mediation had been attempted without success. So….over to you, Justice Himel!

Justice Himel bemoans the fact these disputes are beginning to fill the courts and that these disputes are just "another battleground" for separated and divorced parents, "one more arena where their child may become the prisoners of war." She notes that parents create these problems by their failure to agree, they "jump the queue" and should not have the matter heard without following the usual process of a case conference preceding the motion. However, she accepts the duty of the court to deal with these matters so that the child knows what the school plan is and so the parents can plan for it.

Justice Himel takes some time in her decision to canvass and consider two decisions of the Quebec Superior Court of Justice on the very same issue. The first case considered, *Droit de la famille — 20682*, 2020 QCCS 1547, is one in which a family member had an auto immune disease raising the risk to the family of contracting COVID-19. That case is distinguishable. She reviews and quotes at length from the second decision, *Droit de la famille — 20641*, 2020 QCCS 1462, noting that while not binding, it adopts reasoning that she supports. Ultimately the child in this second Quebec case is sent back to school, the court noting that it is for the government to assess the risk in consultation with its medical and educational advisers. Once that risk is assessed and the schools opened, it will take unique circumstances for the courts not to support a return.

In the *Chase* case, both parents presented cogent reasons in support of their respective positions. However, Justice Himel finds defects in the father's plan, notes that the Ontario government has measured the risk, consulted with experts and put in place a plan that it believes minimizes the risk to children returning to school. The mother's position prevails and W. C. will return to school in September. A sensible outcome to a difficult case.

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