

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Neave v. Lai*,
2020 BCSC 1688

Date: 20200921
Docket: E171300
Registry: Vancouver

Between:

Kendall Anderson Neave, also known as Ken Neave

Claimant

And

Natalie Lai, also known as Natalie Chow

Respondent

Before: The Honourable Mr. Justice Davies
(appearing by teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant
(appearing by teleconference):

C.E. Drake

The Respondent, Appearing in Person
(by teleconference):

N. Lai

Place and Date of Trial/Hearing:

Vancouver, B.C.
September 21, 2020

Place and Date of Judgment:

Vancouver, B.C.
September 21, 2020

[1] **THE COURT:** I have before me an application by the father of these two children, Kate and Roger, to have them attend in-person schooling. That application is opposed by their mother, who wishes to home school the children during the pandemic, at least to the extent of a transition period that is available in the North Vancouver school district.

[2] Roger is eight years old and is going into Grade 3. Kate is four and she is commencing kindergarten.

[3] I start by saying that I believe that both parents in this case are acting in what they each believe to be the best interests of these two children.

[4] There is little authority, if any, in British Columbia as how to determine schooling issues during the pandemic if the parents do not agree.

[5] There is, however, useful authority in the provinces of both Quebec and Ontario.

[6] In British Columbia, when the best interests of children is involved the primary focus of such an application is s. 49 and s. 37 of the *Family Law Act*, S.B.C. 2011, c. 25. Ontario and Quebec legislation is to the same effect.

[7] Although there may be some differences in the school-opening procedures and policies in those provinces as compared to those in British Columbia, the decision of Justice Akbarali in *Zinati v. Spence*, 2020 ONSC 5231 is of particular assistance.

[8] In *Zinati* at para. 27, Justice Akbarali stated:

[27] In my view, and having regard to available jurisprudence on this new and evolving issue, determinations about whether children should attend in-person learning or online learning should be guided by the following factors:

- a. It is not the role of a court tasked with making determinations of education plans for individual families or children to determine whether, writ large, the government return to school plans are safe or effective. The government has access to public health and

educational expertise that is not available to the court. The court is not in a position, especially without expert evidence, to second-guess the government's decision-making. The situation and the science around the pandemic are constantly evolving. Government and public health authorities are responding as new information is discovered. The court should proceed on the basis that the government's plan is reasonable in the circumstances for most people, and that it will be modified as circumstances require, or as new information becomes known.

- b. When determining what educational plan is in a child's best interest, it is not realistic to expect or require a guarantee of safety for children who return to school during a pandemic. There is no guarantee of safety for children who learn from home during a pandemic either. No one alive today is immune from at least some risk as a result of the pandemic. The pandemic is only over for those who did not survive it.
- c. When deciding what educational plan is appropriate for a child, the court must ask the familiar question – what is in the best interest of this child? Relevant factors to consider in determining the education plan in the best interests of the child include, but are not limited to:
 - i. The risk of exposure to COVID-19 that the child will face if she or he is in school, or is 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.

[9] I adopt and will apply that analysis and will be guided by those factors in determining the issues raised in this case.

[10] By way of background, it is important to note when the schools in British Columbia were previously closed between March and June 2020 at the beginning of the pandemic, the mother home schooled the children at those times when she had primary parenting responsibilities.

[11] It is also important to note that the father works and would be unable to maintain a home school regimen if the children are not able to attend school in person.

[12] The children have not yet returned to school, because the mother has opposed any return to in-person learning. Roger has therefore been out of the regular school system since March and Kate has never been in the public school system.

[13] Applying the principles derived from *Zinati* to which I have referred, I agree that it is not the court's task to make determinations about education plans for children.

[14] In British Columbia that is the task of the Ministry of Education with the assistance of the Public Health Officer.

[15] Return to school plans have now been in the works for a number of months and are under constant revision.

[16] The British Columbia government chose to shut the school system down for a period in early March 2020 and reopen it in June 2020 without making attendance mandatory. Subject to extraordinary circumstances it is now, however, mandatory for children to attend school in person.

[17] I also agree with Justice Akbarali that there is no guarantee of safety for children who learn from home as opposed to at school.

[18] There are far too many interactions in the population generally for any such guarantees to exist.

[19] Unless there are exceptional circumstances to the contrary, we must leave it to government and to the medical and science community to determine the best interests of children generally. Eighty percent or more of the children in this province are now going to school.

[20] This pandemic is an ongoing problem. It is not a four-month problem as the mother in this case seeks to assert by having the children enter into the proposed transition program.

[21] The risks of spread of the virus will continue during as well as after that four-month transition period.

[22] I next turn to the best interests of these two children.

[23] There is obviously a risk of exposure to COVID-19 if the children go to school. There is also, however, a risk of exposure if they stay home and are home schooled.

[24] The transition option sought by the mother will only be an option for a short period of time and I do not wish to risk the children's development in the school system by keeping them out of school for a further four-month period.

[25] Also the proposed transition program, states that it is critical for children to maintain social connections during the transition period.

[26] It is important for these two very young children to maintain such connections for their developmental well-being.

[27] That is particularly so with Roger, who has had some social difficulties in the past that would, in my view, be exacerbated by a longer period away from the regular school system.

[28] I do not believe that it would be in Roger's best interests for him to not attend school, because not doing so would negatively impact his mental health, social and academic development, and his psychological well-being. The proposed transition

period would only delay those issues for four months. It would not answer those concerns.

[29] As to whether these children or a member of their family would be at increased risk from public schooling as a result of health conditions or other risk factors, I acknowledge that there is some potential additional risk to the mother's own mother because of her health if the children were in regular school.

[30] However, in my view, such risks do not trump the importance of social developmental for these children. This is, after all, about the best interests of the children, not the best interests of others.

[31] Also, more specifically with respect to the health of those who are not living in the same home as the children, social distancing and FaceTime or Zoom communication can accommodate such interaction, if necessary.

[32] I do not, in any way criticize the efforts which have been made by the mother in her home schooling to date, but I do note that those efforts can continue in addition to a regular school program.

[33] Finally, as to the ability of the parents with whom the children will be residing to support at home learning, it is significant that the father in this case works and is unable to support at home learning.

[34] Although it may not be the intent of the mother's opposition to a return to school by primarily home schooling the children to do so would likely, result in a substantial change of the parenting schedule. That is not something which should occur on an application such as this.

[35] I accordingly find that it is in the best interests of both of these children that they commence attending school in person at the earliest possible moment at the school in which they are enrolled.

[36] With respect to the mechanics of that happening, I will appreciate there being cooperation between the parents, but I am not going to in any way alter the present parenting arrangements in place pursuant to the existing parenting order.

[37] I will not order costs in this matter, it being to some extent a test case in British Columbia. Each party will bear their own costs.

“Davies J.”