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10 Themes from the COVID-19 Parenting Case Law

"Parenting During a Pandemic – What Family Lawyers Should Know"
(CBA, May 11, 2020)

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I. Context: COVID-19-related Worries are Understandable

1. The leading case of *Ribeiro v. Wright* ("*Ribeiro*") set the tone for dealing with parenting issues in the time of COVID-19:

> "Parents are understandably confused and worried about what to do. Similarly, this is uncharted territory for our court system. We all have to work together to show flexibility, creativity and common sense – to promote both the physical and emotional well-being of children.
>
> …
>
> Every member of this community is struggling with similar, overwhelming COVID-19 issues multiple times each day.
>
> a. The disruption of our lives is anxiety producing for everyone.
>
> b. It is even more confusing for children who may have a difficult time understanding.
>
> c. In scary times, children need all of the adults in their lives to behave in a cooperative, responsible and mature manner.

d. Vulnerable children need reassurance that everything is going to be ok. It's up to the adults to provide that reassurance.

e. Right now, families need more cooperation. And less litigation.[1]

2. Courts have followed the direction in *Ribeiro* that COVID-19, by itself, is ***not*** a reason to keep a child away from a parent.[2] For example, the court has subsequently noted that, "It is clear that the pandemic, standing alone, is not a reason to suspend parental access, particularly where there is evidence to indicate that appropriate precautions are being taken to avoid exposure to infection."[3]

II. Continued Best Practices: Communicate and Cooperate; Do *Not* Create Conflict

3. Courts have emphasized the increased importance of respectful and cooperative communications during these unprecedented times, where our daily routines and lives are in a state of upheaval. This approach is illustrated by the comments of Justice Nishikawa of the Ontario Superior Court of Justice:

> At the hearing, I emphasized the necessity for parents to behave in a responsible, reasonable and cooperative manner. This is expected at all times of parents with shared parenting responsibilities, but especially during a pandemic when cooperation is necessary to minimize risks to the child's, and others', health and safety. Now is not the time to be evasive, confrontational or strategic; what is needed is flexibility, transparency and compassion.[4]

4. Three weeks later, Justice Nishikawa went even further in referring to an "enhanced" responsibility to "behave in a responsible, reasonable and cooperative manner" during the pandemic. Further, "it is inexcusable for parents to add to the children's

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[1] *Ribeiro v. Wright,* 2020 ONSC 1829, at paras. 9 & 27, Pazaratz J. (March 24, 2020).

[2] *Ribeiro v. Wright,* 2020 ONSC 1829, at para. 20, Pazaratz J. (March 24, 2020) (parents "should not presume that the existence of the COVID-19 crisis will automatically result in suspension of in-person parenting time" or that "raising COVID-19 considerations will necessarily result in an urgent hearing.").

[3] *Thibert v. Thibert*, 2020 ONSC 2409, at para. 2, Windsor J. (April 8, 2020).

[4] *Herman v. Kideckel*, 2020 ONSC 2021, at para. 16, Nishikawa J. (April 2, 2020). See also *T.C. v. R.E.*, 2020 BCPC 65, at para. 17, Bond J. (April 9, 2020).

stress and anxiety at a time when they should be providing a comforting and secure environment to alleviate that stress."[5]

5. For example, "(r)esponding to a parent's inquiries respecting the welfare of one's child while in the other's care with a comment such as 'I don't answer to you' is wholly unproductive."[6]

6. Justice Pazaratz has also added that, where the parties consented to a "joint custody" designation, this is "not an empty label. It means both parties are presumed to have made a commitment to child-focussed creative problem-solving. *Which is exactly what COVID-19 requires.*"[7]

7. In one of the few reported COVID-19 parenting decisions from Alberta, Justice Graesser in *SAS v. LMS* followed the good faith communication language from *Ribeiro*, while also recognizing limits that may be imposed by a restraining/protective order. His Honour provided further guidance as follows:

> *"Reasonably" is a criterion for these discussions.* Maximizing a child's safety could be interpreted as placing the child in a sealed sterile bubble with no direct contact with any human. When parents are together, they generally agree on the level of risk they consider to be appropriate within their family. *What is "acceptable" to one family may not be acceptable to another. When parents have separated and have joint guardianship and decision-making, they must come to agreement or have the courts make the decision for them. The decision will likely be made on the basis of what is reasonable in the context of that family with its history, as best as can be gleaned in a hurried, brief application.* [emphasis added][8]

[5] *Peerenboom v. Peerenboom*, 2020 ONSC 2533, at para. 23, Nishikawa J. (April 23, 2020).

[6] *McNulty v. Graham*, 2020 ONSC 2264, at paras. 29-32, Fraser J. (April 9, 2020).

[7] *Wallegham v. Spigelski*, 2020 ONSC 2663, at para. 13 f. (April 28, 2020). See also joint custody but problematic communication case of *Blaskavitch v. Smith*, 2020 ONSC 2506, at paras. 42-43 & 46-48, Trusdale J. (father failed to give information about his partner's work in a long-term care home; mother failed to tell father she had a roommate).

[8] *SAS v. LMS*, 2020 ABQB 287, at paras. 38-42 & 44 (1.), Graesser J. (April 22, 2020).

8. A parent's actions are often judged through the lens of communication and transparency with the other parent. As just one example, in *Grossman v. Kline*, the father had "given extensive evidence about his behaviour and the prudent steps he is taking to guard against the risk of exposure to COVID-19." The court held that the father's actions were thus distinguishable from the actions of the father in *Guerin v. Guerin*, who "was not transparent about his compliance with COVID-19 protective measures, and the mother had reason to believe he was not being forthright with her. He would not even confirm whether he had washed his hands."[9]

9. An informative case for high-conflict families is *Ivens v. Ivens*, where Justice Kurz colourfully concluded as follows:

> As great as the danger of COVID-19 undoubtedly is, another great danger here, as it is for many families before this court, is the *virus of conflict*. Putting children in the middle of conflict, demonstrating that fighting and arguing is how adults manage their disputes, making children take sides in a lose-lose game, all corrode a child's emotional equilibrium. *Children have no special mask or protective gear that can shield them from this type of virus.*
>
> Times like this must bring out the best, not the worst in parents. *They must learn, to paraphrase former Israeli prime minister, Golda Meir, to love their children more than they hate each other.* [emphasis added][10]

III. Court Relief: Urgency Based on Evidence, Not Speculation

Court Notices Related to Urgency

10. Initially, to get a court to intervene while regular operations were first suspended as a result of COVID-19, the party seeking to have a matter heard had to show that the

[9] *Grossman v. Kline*, 2020 ONSC 2714, at paras. 36-37, Akbarali J. (April 30, 2020), citing *Guerin v. Guerin*, 2020 ONSC 2016, Doyle J. (March 31, 2020).

[10] *Ivens v. Ivens*, 2020 ONSC 2194, at paras. 127-128 (April 9, 2020: long-standing high conflict case where a previous judge had previously not found "alienation" *per se*, but did find evidence that the mother was not supporting the children's relationship with the father (there was a previous contempt finding made against the mother, etc.).

matter was "urgent" (although sometimes slightly different wording was used).

11. For example, the Ontario Superior Court of Justice's March 15, 2020 Notice[11] referred to "urgent" family law matters and set out non-exhaustive examples. This was supplemented by an April 2, 2020 Notice[12], which expanded by Region the scope of matters it will hear effective April 6, 2020.

12. In contrast, the Nova Scotia Supreme Court's March 19, 2020 measure[13] announced that the courts would operate under an emergency services model that continued any trial currently underway, but otherwise required proceedings to meet the threshold of "urgent or essential"; subsequent measures[14] have expanded services (including non-urgent motions by correspondence and consent orders).

13. The Court of Queen's Bench of Alberta's COVID-19 Pandemic Operations[15] refers to "emergency and urgent matters".

14. It is important to check the latest information for your specific court.

The Process to Determine Urgency

15. Each court has its own process to determine urgency. In general, there are two stages: (i) a triage stage to determine initial urgency; and, if urgency is found, (ii) a motion. The Ontario Superior Court of Justice case of *Onuoha v. Onuoha* commented on this summary process as follows:

> (a) The determination of urgency is intended to be simple and expeditious. It is not intended to create a motion unto itself. In this case, I have made the determination regarding urgency based on the emails of counsel,

[11] https://www.ontariocourts.ca/scj/covid-19-suspension-fam/

[12] https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update/

[13] https://www.courts.ns.ca/News_of_Courts/documents/NSSC_Essential_Services_Model_03_19_20.pdf

[14] https://www.courts.ns.ca/News_of_Courts/COVID19_Preventative_Measures.htm

[15] https://albertacourts.ca/qb/court-operations-schedules/pandemic-operations

> and with knowledge of the file from several appearances before me. Given the volume of urgent family matters coming before the courts at this unprecedented time, this is the only practical way forward.
>
> (b) This determination is without prejudice to either party on the substance of the motion when heard. That I have determined the matter to not presently be urgent is not in any way to prejudge the strength or weakness of either party's case on the motion itself. …
>
> (c) The process for hearing urgent motions contemplates limited materials before the court, recognizing that judges do not presently have access to the physical files and that there is as yet no electronic storage of family court files. The Chief's Notice states that "The Court expects parties will submit only brief materials to allow for a fair, timely, and summary disposition. Emailed filings cannot exceed 10MB. … Every effort must be made… to limit filed materials to 10 MB." … [emphasis in original][16]

16. Courts have also cautioned against "piggy-backing" non-urgent claims onto a genuinely urgent issue. Each claim is to be separately considered on its own merits to determine whether it meets the urgency threshold.[17]

Case Law on the Meaning of Urgency

17. In *Thomas v. Wohleber*, Justice Kurz carefully considered the meaning of "urgent" by reviewing the Ontario *Family Law Rules*, the Oxford Canadian Dictionary definition of "urgency", and previous Ontario case law that sets out when a matter is urgent such that it can be heard on a motion prior to the hearing of a case conference.[18]

18. His Honour also reviewed the applicable Ontario Superior Court of Justice's March 15, 2020 Notice[19]. The "test of urgency" is "a large step removed from simple importance to the parties." The Notice's test of urgency "must be strictly enforced

[16] *Onuoha v. Onuoha*, 2020 ONSC 1815, at para. 14, Madsen J. (March 24, 2020).

[17] *Berube v. Berube*, 2020 ONSC 2591, Howard J. (April 24, 2020), at paras. 30-33, citing various cases.

[18] *Thomas v. Wohleber*, 2020 ONSC 1965, at paras. 25-29.

[19] https://www.ontariocourts.ca/scj/covid-19-suspension-fam/

in order to ensure that the court's limited administrative resources are available to deal with the most serious and urgent of cases."[20]

19. After considering all of these matters, in addition to case law applying the Notice's test of urgency (*Ribeiro* and *Onuoha v. Onuoha*), Justice Kurz found that the following four factors were needed to meet the Notice's requirement of urgency:

> 1. The concern must be ***immediate***; that is one that cannot await resolution at a later date;
> 2. The concern must be ***serious*** in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;
> 3. The concern must be a ***definite and material*** rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical;
> 4. It must be one that has been ***clearly particularized in evidence and examples*** that describes the manner in which the concern reaches the level of urgency. [emphasis added][21]

20. *Thomas v. Wohleber* involved a request for urgent financial relief, but this test has been applied to numerous parenting motion cases. It has also been applied:

a) to cases decided under the Ontario Court of Justice's March 28, 2020 Notice;[22]

[20] *Thomas v. Wohleber*, 2020 ONSC 1965, at para. 30. Followed in, e.g., *Giller v. Hitchcock*, 2020 ONSC 2338, at para. 22, Howard J. (April 17, 2020; distinguishes "very important" from "urgent" and refers to "high threshold required by the *Notice to the Profession*").

[21] *Thomas v. Wohleber*, 2020 ONSC 1965, at paras. 38.

[22] *Sezin v. Sheikh*, 2020 ONCJ 187, at paras. 33-37, Zisman J. (April 15, 2020). The court does not find the matter should proceed as an urgent motion as it did "not affect the safety or well-being of the child." However, it says the Ont. Ct. J. has been able to schedule urgent case conferences and thus orders a case conference by telephone. The issues were: access to the father to a newborn, child support for the mother, and a restraining/no-contact order (where the father was already subject to bail terms).

b) to cases decided under the Ontario Superior Court of Justice's supplemental April 2, 2020 Notice, which expanded, by Region, the scope of matters it would hear effective April 6, 2020);[23] and

c) in the child protection context.[24]

21. The availability of case conferences in some jurisdictions also appears to have expanded what a court will consider urgent. For example, the court has determined that a dispute about an appropriate access exchange supervisor is urgent enough to warrant an urgent case conference. On this issue, Justice McDermot stated, "I disagree that nothing can, or should be, done as soon as possible with respect to facilitating access. That requires *both* parties' participation."[25]

22. The BC Provincial Court case of *J.W. v. C.H.* also listed the four factors from *Thomas v. Wohleber,* and then added the following guidance:

> To be considered urgent, there must be some issue of immediate concern. Examples of this may include:
>
> a) An imminent plan to relocate with a child or to remove a child.
>
> b) An imminent or recent threat of family violence against a family member.
>
> c) An imminent threat that a party may be arrested or committed to jail.
>
> d) An imminent risk of irreparable harm, including undue financial loss, if an application is not heard at this time.
>
> A matter is not urgent if the order sought has no immediate consequence. For instance, an order involving international travel cannot be implemented at this time due to international travel restrictions, and therefore an

[23] See, e.g., *Haaksma v. Taylor*, 2020 ONSC 2656, at para. 10, Kurz J. (April 28, 2020), which found the motion was not urgent but ordered a case conference. Note: the applicable April 2, 2020 Central West Region Notice refers to all parties wishing to proceed to a case conference on "one or two urgent or pressing issues". See also *Yeates v. Yeates*, 2020 ONSC 2548, at para. 4, Jarvis J. (April 23, 2020: motion not urgent in light of no-contact order already in place, encouraging conferences now that court has increased capacity). Note: the applicable April 17, 2020 Central East Region Notice refers to case conferences "on the basis of **urgency**" [emphasis in original].

[24] *Children's Aid Society of Toronto v. O.O.*, 2020 ONCJ 179, at paras. 59-60, Zisman J. (April 14, 2020).

[25] *Natale v. Crupi*, 2020 ONSC 2735, at paras. 5-6, McDermot J. (April 28, 2020).

> application for such an order is not urgent: *Johansson v. Janssen*, 2020 BCSC 469 (B.C. S.C.).
>
> As set out in s. 37 of the *Family Law Act*, the parties and the court must always consider the best interests of the child. A matter may be urgent if it would be contrary to the best interests of the child if an application were delayed.[26]

23. In the Court of Queen's Bench of Alberta case of *Hasham v. Kanji*, Justice Jeffrey reviewed the list of matters that were automatically considered urgent (without requiring a triage application). The father's request for different terms of access (he had only virtual access and did not agree with the mother's imposed terms for in-person access) was not included in this list, and thus he had to convince the court to exercise its "discretion to hear urgent matters other than those listed". Justice Jeffrey found that his request was ***not*** urgent, and expanded on the urgency test as follows:

> …the test (to hear urgent matters other than those listed) is not whether the Applicant has an indisputable case, a strong *prima facie* case, or even a merely sympathetic case. It is whether there is sufficient urgency to the application to warrant an exception being made to the province-wide public health containment efforts. Also, a determination must be made of its *relative* urgency. That is, the triage process necessitates a comparison between it and the various other individual requests vying for limited available court times. [emphasis in original][27]

24. In the Saskatchewan Court of Queen's Bench case of *K.B. v. K.K.*, Justice Torchor reviewed the Court Directive that refers to "only urgent or emergency matters" being heard, with a non-exhaustive list of matters that would be considered urgent. A previous Saskatchewan case interpreted "urgent" as including matters that are pressing or critical in nature. Consistent with the case law from other provinces, and citing *Ribeiro*, the court found the matter was not urgent as there was no evidence

[26] *J.W. v. C.H.*, 2020 BCPC 52, at paras. 10-13, Lee J. (April 2, 2020).

[27] *Hasham v. Kanji*, 2020 ABQB 276, at paras. 9-14, Jeffrey J. (April 20, 2020: father had no in-person access for two months to 7-month child; access terms unilaterally dictated by mother, but "appear to be designed to suit the child's current daily routine and to minimize his risk of exposure to COVID 19"; father's lack of access was "of his own choosing").

that the mother was acting contrary to COVID-19 precautions. Simply raising COVID-19 concerns was not enough to establish urgency. Pursuant to a court order, the children had their primary residence with the mother and access with their father.[28]

IV. Common-Sense: Follow COVID-19 Protocols

25. In *Ribeiro*, Justice Pazaratz held that: "Judges won't need convincing that COVID-19 is extremely serious, and that meaningful precautions are required to protect children and families."[29]

26. Further, Justice Pazaratz emphasized that COVID-parenting issues should be decided on a *case-by-case basis*, while providing the following guidance:

> a. The parent initiating an urgent motion on this topic will be required to provide specific evidence or examples of behavior or plans by the other parent which are inconsistent with COVID-19 protocols.
>
> b. The parent responding to such an urgent motion will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to – including social distancing; use of disinfectants; compliance with public safety directives; etc.
>
> c. Both parents will be required to provide very specific and realistic time-sharing proposals which fully address all COVID-19 considerations, in a child-focused manner.
>
> d. Judges will likely take judicial notice of the fact that social distancing is now becoming both commonplace and accepted, given the number of public facilities which have now been closed. This is a very good time for both custodial and access parents to spend time with their child *at home.* [italics in original; underlining added][30]

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[28] *K.K. v. K.B.*, 2020 SKQB 86, at paras. 15-17 & 22-25, Torchor J. (March 31, 2020: the father also implied drug and alcohol abuse but there was no evidence of imminent harm or danger; the mother had also moved in with her parents, which the father sought to cast in a negative light, but this move provided additional support to the mother and moved her closer to the father such that his access was more convenient).

[29] *Ribeiro v. Wright,* 2020 ONSC 1829, at para. 23. Followed in numerous cases, including the child protection context, e.g. *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONCJ 209, at para. 26, and in BC in *CKM v. LOS*, 2020 BCPC 75, at para. 24.

[30] *Ribeiro v. Wright,* 2020 ONSC 1829, at para. 21.

27. This specific paragraph has been noted with approval in case law from BC and Alberta.[31]

Judicial Notice of Social Distancing and Other COVID-19 Safety Precautions

28. Simply stated, judicial notice is the acceptance of fact without proof.[32] The test for judicial notice is strict, as explain by the SCC in *R. v. Find*:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.[33]

29. Shortly after Justice Pazaratz's comment in *Ribeiro* that judges will ***likely*** take judicial notice of social distancing, several judges ***have*** taken judicial notice of various facts related to COVID-19:

> a) "…On March 11, 2020 the World Health Organization's Director General made an assessment that COVID 19 is a pandemic. On March 17, 2020 the BC Provincial Health Officer declared a public health emergency. On March 20, 2020 the BC Provincial Health Officer ordered all dine-in food services prohibited. The BC Provincial Health Officer has repeatedly emphasized the need for all members of the public to act responsibly and practice social distancing for the foreseeable future. Although the current public health state of emergency and guidelines are not before the Court, in my view, and particularly under the exigent and evolving circumstances that we all

[31] See *N.J.B. v. S.F.*, 2020 BCPC 53, at para. 31, McQuillan J. (April 1, 2020); *J.W. v. C.H.*, 2020 BCPC 52, at para. 16, Lee J. (April 2, 2020; note also that Lee J. held that "what is 'urgent' is a question that the court must deal with on a case-by-case basis" and then quotes further from *Ribeiro*: at paras. 7-8); *C.K.M. v. L.O.S.*, 2020 BCPC 75, at para. 24, Ferriss J. (April 20, 2020); *SAS v LMS*, 2020 ABQB 287, at para. 31, Graesser J. (April 22, 2020; note also that Graesser J. refers to the *Ribeiro* decision as being "a model of clarity and common sense": at para. 29).

[32] *R. v. Ronald*, 2016 ONSC 3147, at para. 13.

[33] *R. v. Find*, 2001 SCC 32, at para. 48. Re-affirmed in *R. v. Spence*, 2005 SCC 71, at paras. 54 & 60-61 (also clarified that the permissible scope of judicial notice should vary according to the nature of the issue under consideration; the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter criteria).

currently face, I am able to take judicial notice of the current health care emergency and the public health guidelines."[34]

b) "Although I did not have the benefit of any evidence as to the potential duration of this pandemic (the mother sought a 3-week suspension of access, followed by an automatic review), I find it appropriate to take judicial notice that historically pandemics have gone on far longer than three weeks. 'None of us knows how long this crisis is going to last': see *Ribeiro*, at para 10."[35]

c) "I take judicial notice of the fact that at the present time social distancing and Covid-19 awareness and safety precautions are both commonplace and critically necessary to ensure our individual and collective safety."[36]

d) "Counsel for the society submits that in view of COVID-19, the society cannot provide the level of supervision that it might otherwise have been able to provide. Many of their staff are working remotely. The society is not conducting home visits and only checking on families by telephone or using technology. The society is only responding in person to urgent and emergency calls.

As the schools and daycares are closed there are no third parties that can oversee the well-being of children that are under the society's supervision. There are no community services available to assist caregivers.

I am prepared to take judicial notice of these facts."[37]

30. On the other hand, the court has declined to take judicial notice of more specific facts where the source is not of indisputable accuracy (e.g., risks allegedly related to car travel based on anecdotal news reports)."[38]

General Parenting Recommendations

31. In the BC case of *N.J.B. v. S.F.*, McQuillan J. refers to general parenting recommendations drafted by Dr. Elterman, "a psychologist with considerable

[34] *A.J.H. v. J.K.H.*, 2020 BCPC 74, at para. 29, Mundstock J. (April 7, 2020 decision but hearing completed March 4, 2020; not a COVID-19 urgency case; primarily about religious and spiritual upbringing of the children, ages 2, 4, and 5, who were in primary care of the mother on consent).

[35] *Vasilodimitrakis v. Homme* 2020 ONSC 2084, at para. 23, Bondy J. (April 7, 2020).

[36] *Children's Aid Society of Oxford County v. C.L.*, 2020 ONCJ 183, at para. 23, Paull J. (April 14, 2020). Followed in *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONSC 209, at para. 37, Sullivan J. (April 23, 2010).

[37] Children's Aid Society of Toronto v. S.S., 2020 ONCJ 170, at paras. 125-127, Zisman J. (April 2, 2020).

[38] *V.C.S. v. T.S.*, 2020 BCPC 60, at para. 15, Malfair J. (April 1, 2020).

expertise in child related matters and is well known to this Court". The court summarized these recommendations, viewed them as reasonable and consistent with public health official recommendations, and took judicial notice of public health guidelines as follows:

> Dr. Elterman describes a variety of common parenting decisions that may increase risks for both the child and the community, and should form part of decisions regarding parenting arrangements. They include:
>
> (1) If a parent has had contact with an infected party, they should disclose this immediately to the other parent.
>
> (2) If the parent is infected or even ill with symptoms or needed to be tested for Covid-19, they should not take the child.
>
> (3) If the parent is in a home with older family members or friends or with individuals who are immune-compromised, the child should not be in that home.
>
> (4) There should be no play dates and the child should not be taken to family or social gatherings.
>
> (5) If parenting time is to occur in a public place such as a community centre, a mall or a restaurant, then it should be suspended.
>
> (6) If a supervisor is required and who is not the spouse of the parent and living in the home, then the parenting time should be suspended.
>
> (7) If either parent or anyone in the household is in an Essential Service or still working with the public, eg. doctors, nurses, at a supermarket or pharmacy, flight attendant, etc.) then this can represent an increased risk to the child.
>
> In my view, these are all reasonable recommendations, and consistent with what I understand to be the recommendations of public health officials, at this time. Although public health guidelines are not technically before the Court, in my view, and particularly under the exigent and evolving circumstances that we all currently face, I am able to take judicial notice of those guidelines, which include social distancing, frequent washing of hands and avoiding non-essential travel.[39]

[39] *N.J.B. v. S.F.*, 2020 BCPC 53, at para. 29, McQuillan J. (April 1, 2020). See also *S.F.D. v. A.L.B.*, 2020 BCPC 76, at para. 119, Brown J. (April 14, 2020; "We are also in the midst of the COVID-19 crisis. The parents have to take appropriate precautions, and I recommend they follow the guidelines set out by psychologist, Dr. Elterman, which are attached as Appendix A to my Reasons.")

V. Presumptions: Children's Lives Cannot be Put on Hold & Blanket Policy Not Consistent with Best Interests Test

32. The most common urgent motion scenarios have been: (a) one parent seeking to eliminate or severely restrict parenting time due to COVID-19 concerns, or (b) one parent seeking to reinstate parenting time after the other parent withholds or overholds the child (discussed further in "**VI. Withholding/Overholding/Self-Help"**, below). *Ribeiro* provides guidance on both scenarios:

> None of us know how long this crisis is going to last. In many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. *But children's lives – and vitally important family relationships – cannot be placed "on hold" indefinitely without risking serious emotional harm and upset. A blanket policy that children should never leave their primary residence – even to visit their other parent – is inconsistent with a comprehensive analysis of the best interests of the child.* In troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever.
>
> *In most situations there should be a presumption that existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to – including strict social distancing.* [emphasis added][40]

Consent COVID-19 Modifications

33. Consistent with Justice Pazaratz's call for flexibility, creativity, and common-sense, courts have encouraged parents to agree to temporarily vary parenting provisions where the parents are acting in the best interests of the children and not for selfish or ulterior purposes.[41]

34. Counsel should think about child-focused "temporary temporary without prejudice" agreements, which could include when it ends, if a review is appropriate and what factors should be re-assessed on a review (e.g., whether

[40] *Ribeiro v. Wright,* 2020 ONSC 1829, at paras. 10-11, Pazaratz J. (March 24, 2020).

[41] *Ribeiro v. Wright,* 2020 ONSC 1829, at para. 9, Pazaratz J. (March 24, 2020). See also *Skuce v. Skuce*, 2020 ONSC 1881, at para. 34, Doyle J. (March 26, 2020); *SAS v. LMS*, 2020 ABQB 287, at para. 34, Graesser J. (April 22, 2020).

the child is physically in school, how the child has adjusted to the short-term change so far, each parent's work arrangement), and if special COVID-19 restrictions are appropriate. Be creative in addressing COVID-19 concerns and family violence concerns when thinking about issues such as transportation, appropriate supervisors, parenting exchanges, and safe activities for the child.

35. The court has also encouraged the parties to engage a third-party professional to help them communicate and use technology solutions (like Our Family Wizard) in the context of restricted court operations and COVID-19.[42]

36. How far a judge can go will vary largely by region. For example, the legislation in some jurisdictions (e.g., BC) gives the court the authority to order parties to participate in family dispute resolution processes outside of court, while in other jurisdictions (e.g., Ontario) judges can only encourage it.

37. In addition, the availability of some third-party professionals (e.g., to author a child's views and preferences report or assessment) depends on the availability of publicly-funded government programs and the underlying family law rules. This is discussed further at paras. 120-123, below.

Modified Video/Phone Access

38. The use of "virtual visitation" by video, e-mail, instant messaging, or phone is not a new concept, particularly in distance relationship. As technology improves, the use of virtual visits appeared to be increasing, even pre-pandemic.[43] However, it is important to recognize the limits to electronic communication between parents and children. Virtual access should be treated as an "enhancement" or "supplement" to

[42] *B.B. v. A.B.*, 2020 ONSC 260, at para. 13, Jarvis J. (April 27, 2020).

[43] Rachel Birnbaum, Virtual Parent-Child Contact Post-Separation: Hearing from Multiple Perspectives on the Risks and Rewards, (2020) 39 CFLQ 75 (WL).

in-person time, but not a "replacement".[44] Similarly, pre-pandemic case law refers to in-person access being "amplified" by electronic communication.[45] Courts were also more likely to incorporate virtual visits when the children were older.[46]

39. The COVID-19 case law also accepts that video access has significant limitations with a younger child.[47]

Supervised Access

40. Creative solutions are also required for supervised access, particularly where access centres were used and are no longer available. The court has agreed that the closure of supervised access facilities, due to the pandemic, made the father's request for alternate arrangements urgent on a preliminary basis where the parties could not make alternative arrangements easily on their own because of criminal restrictions on communications.[48] The court has also ordered, on a "*temporary temporary without prejudice*" basis, that access exchanges take place in the parking lot of a police station (instead of the previous location, inside the police station).[49]

Pre-Existing Court Orders

41. Where there is an existing court order (as there was in *Ribeiro*), there is a presumption that all orders should be respected and complied with. More to the

[44] Christine E. Doucet, "'See You on Skype!' Relocation, Access, and Virtual Parenting in the Digital Age", (2011) 27 Can. J. Fam. L. 297 (WL).

[45] *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230, at para. 51.

[46] E.g., *Templeman v. Whelan*, 2010 NLUFC 3, at para. 77 (the almost 7-year old was "now of an age at which she can fully participate in such means of communication [video conference programs such as Skype and other social networking tools].").

[47] E.g., *Tessier v. Rick*, 2020 ONSC 2391, at para. 22, McEachern J. (April 20, 2020; 3.5-year old child)

[48] *Thibert v Thibert*, 2020 ONSC 2409 (April 8, 2020)

[49] *Leach v. MacDonald*, 2020 ONSC 2178, at paras. 18-19, Madsen J. (April 8, 2020).

point, there is a presumption that the existing order reflects the best interests of the child.[50]

42. The party seeking to modify the existing order bears the onus of showing why the order should not be complied with. For example, if the order compromises the child's safety or wellbeing or requires modifications to ensure COVID-19 precautions are adhered to.[51]

43. This presumption and onus have also been applied to interim/temporary parenting orders[52] and to orders based on consents[53].

44. COVID-19 health concerns can be addressed by "responsible adherence to the existing Court Order", which means:

> …being practical and having some basic common sense. Physical distancing measures must be respected. The parties must do whatever they can to ensure that neither of them nor the child, C., contracts COVID-19. Every precautionary measure recommended by governments and health authorities in Ontario and Canada must be taken by both parties and, with their help, by C. Neither party shall do anything that will expose him/herself or C. to an increased risk of contracting the virus.[54]

45. Thus, the courts have encouraged parents to review terms that refer to parenting

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[50] *Ribeiro v. Wright*, 2020 ONSC 1829, at para. 7, Pazaratz J. (March 24, 2020). See also *Smith v. Bowen*, 2020 ONCJ 212, at paras. 35-36, O'Connell J. (April 24, 2020).

[51] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 3, McGee J. (April 17, 2020); *Tigert v. Smith*, 2020 ONSC 2220, at paras. 21-22, Tobin, J. (April 14, 2020); *Toth and Stockton*, 2020 ONSC 2187, at paras. 13-14, Fraser J. (April 9, 2020). The issue of a court's jurisdiction to make an interim variation of a final parenting order made under the *Divorce* Act, and the type of evidence required, is canvassed in *Ivens v. Ivens*, 2020 ONSC 2194, at paras. 70-77, Kurz J. (April 9, 2020).

[52] See e.g., *Smith v. Smith*, 2020 ONCJ 180, at paras. 15, 22, 24, & 27, Caspers J. (April 9, 2020)

[53] *Jeyarajah v. Jeyamathan*, 2020 ONSC 2636, at paras. 51-52, Kumaranayake J. (April 27, 2020; there is no difference between an order made after argument or based on a consent – both are orders that should be presumptively followed) & *Skuce v. Skuce*, 2020 ONSC 1881, at paras. 13-14 & 68, Doyle J. (March 26, 2020; minutes of settlement incorporated into consent interim court order; court noted that the parties had advice from their respective lawyers and, as the parents of the children, believed that on an interim basis it was in the children's best interests).

[54] *Le v. Norris*, 2020 ONSC 1932, at paras. 11 & 13, Conlan J. (March 26, 2020).

time in a public place, or which may expose a child to COVID-19. "This is an opportunity for the parties to work together in an effective way to protect the child while still fostering and encouraging the child's relationship with each of the parties. These plans require discussion between the parties, with a focus on the best interests of the child, not unilateral action."[55]

Pre-Existing Agreements

46. In most situations, the same reasoning applies to pre-existing agreements: there is a presumption that existing parenting arrangements and schedules (such as those set out in a separation agreement or parenting plan) should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to.[56]

***Status Quo* Situations**

47. Similarly, the courts have largely commented that *status quo* parenting arrangements should be adhered to, unless there are compelling reasons and evidence that satisfies the court that there should be a change. Children need and deserve stability, comfort, and predictability in their routine.[57]

48. However, *status quo* arrangements present unique evidentiary challenges. In the absence of an order or agreement, it may be unclear what the actual *status quo* is (or how long it has been in place and the surrounding circumstances). If the parties are newly separated, the reference to a *status quo* entails a look at the

[55] *J.W. v. C.H.*, 2020 BCPC 52, at para. 20, Lee J. (April 2, 2020).

[56] See *Elsaesser v. Rammeloo*, 2020 ONSC 2025, at paras. 10 a. & 14, Madsen J. (April 2, 2020; triage decision that matter urgent); rel'd to *T.E. v. M.R.*, 2020 ONSC 2348, Walters J. (April 17, 2020; substantive motion decision that father not justified in previously refusing to return children to mother in accordance with the separation agreement that provides for her to have primary residence; however parenting time changed to week-about until children return to school); *Ribeiro v. Wright*, 2020 ONSC 1829, at para. 11, Pazaratz J. (March 24, 2020).

[57] *Lovric v. Olson*, 2020 ONSC 2563, at para. 26, Braid J. (April 27, 2020: note there was a new consent timesharing schedule that was entered into after the parties signed a separation agreement).

living arrangements the child was most familiar with when the family was together. The case law has largely held that the *status quo* is ordinarily maintained until trial. A party wishing to disturb an interim *status quo* must provide cogent and compelling evidence to establish why it is no longer in the child's best interests. There is good reason for this, as the court is often dealing with conflicting affidavits and has little ability to make credibility findings.[58]

49. Where parties are newly separated, there is a real risk that some parents may use the pandemic to further entrench and lengthen how long one parent is able to unilaterally impose terms (reasonable or not) related to the other parent's contact.[59]

50. In *Douglas v. Douglas*, a March 25, 2020 decision, there was no order or agreement in place, but the mother denied access, contrary to the *status quo* arrangement of alternate weekends and alternate Thursdays. In denying the urgency of the father's request to reinstate the *status quo* arrangements, Justice MacPherson took a narrow view of the Court's Notice and held that there was no indication that the child's safety was at risk. The court denied the father's request for access to resume. [60]

51. In contrast, where the parties were recently separated in *C.K.M. v. L.O.S.*, the court found the father's request for parenting time to be urgent where: (i) he had attempted mediation but the mother had not participated; (ii) the mother was not allowing Skype time, although she agreed to do so; and (iii) it was not a case where the father was simply unhappy about the amount of parenting time, he had

[58] See *Cole v. Barrett*, 2020 ONSC 2339, at paras. 2 & 12-13, McDermot J. (April 16, 2020); *T.P. v. C.S.*, 2020 ONCJ 210, at paras. 72-76, Paull J. (April 24, 2020).

[59] *Hasham v. Kanji*, 2020 ABQB 276, at paras. 9-14, Jeffrey J. (April 20, 2020; access terms unilaterally dictated by mother, but "appear to be designed to suit the child's current daily routine and to minimize his risk of exposure to COVID 19").

[60] *Douglas v. Douglas*, 2020 ONSC 2160, at paras. 10-11, MacPherson J. (March 25, 2020).

not had ***any*** parenting time since separation and an order appeared to be the only way he would be able to see his son.[61]

52. On the other hand, the *status quo* is only one consideration in a broader best interests' analysis, and the courts need to be cautious of parents attempting to use COVID-19 as an excuse to create a dishonestly engineered, false *status quo*. See the section "**VI. Withholding/Overholding/Self-Help**", on the next page.[62]

True "No *Status Quo*" Situations

53. The only time a true "no *status quo*" situation arises is where the parties have no history of co-parenting during their relationship. For example, where the parties never had a stable relationship or separated before their first child is born. There will likely be more of these cases cropping up the longer pandemic-related restrictions continue. They may be particularly difficult if the separation is new, trust is low, and conflict is high. Guidance can be found from the *status quo* case law, while keeping in mind the best interests test and general principles encouraging cooperation and maximum contact.

Disagreements Over Agreements

54. The court may be asked to step in where there is a dispute about whether the parents actually agreed to modify parenting arrangements in light of COVID-19. The court often has a limited record on these types of disputes. and may have to review emails and texts from the parties if there is no clear written agreement.[63]

[61] *C.K.M. v. L.O.S.*, 2020 BCPC 75, at para. 23, Ferriss J. (April 20, 2020).

[62] For a recent and detailed analysis of interim parenting arrangements and the *status quo* parenting, including a synopsis of "*status quo*" principles at para. 18, see *PDB v. AJB*, 2020 ABQB 298, at paras. 5-18, Lema J. (April 26, 2020).

[63] E.g. *Gillespie v Jones*, 2020 ONSC 2558, at paras. 11-21 & 43, Diamond J. (April 27, 2020)

VI. Withholding/Overholding/Self-Help

"Parenting is an essential service." – McGee J. (Domestic Parenting Context)

55. As the pandemic continues and courts are still under restricted operations, the overwhelming trend is to treat withholding of a child from one parent as an urgent issue that requires court intervention. This is not universally true, but the courts have been dealing with these cases for almost two months and there are numerous cases to support this general proposition. Sometimes "overholding" is used interchangeably with "withholding"; but most cases involve "withholding" in the sense of a parent refusing parenting time for the other parent, as opposed to "overholding" by keeping the child for longer but eventually allowing parenting time.

56. The approach has been largely to emphasize the importance of parenting and maintaining bonds/relationships in the context of a pandemic that may require increased safety measures and creative solutions. This perspective was aptly expressed in an April 17, 2020 decision of the Ontario Superior Court of Justice, when Justice McGee said: "Parenting is an essential service."[64]

57. Justice Hebner of the same court has gone as far as holding that "the proposed motion is presumptively urgent as it involves the alleged wrongful retention of children from access contrary to a final order."[65]

58. Justice Pazaratz, acting as the triage judge in an April 28, 2020 decision, has added that "the mere fact that a long-standing time-sharing arrangement has been suspended by one of the parties, places this matter into the 'potentially urgent' category. This is a preliminary determination, without prejudice to either party on the ultimate hearing of the motion." Further, he held that, although "every case has its own ingredients", "in general terms, most cases seem to be reinforcing the view that

[64] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 15.

[65] *Golevski v. Golevski*, 2020 ONSC 2553, at para. 5 (April 23, 2020).

'COVID-19 awareness' and 'meaningful timesharing' are not mutually exclusive. To the contrary, they can co-exist quite effectively and safely with just a little bit of extra work and cooperation among parents."[66]

59. The rationale is explained by Justice Kurz as follows:

> Relations between parents and children, especially young children, are built piece-by-piece through regular contact with both parents. This is why the maximum contact principle exists. Completely eliminating in-person access for an indefinite period, or substantially changing a child's routine, is an immediate concern. It is a serious concern because part of the health of the children is achieved through regular relationships with their children. It meets the test for urgency."[67]

60. Thus, the Ontario Superior Court of Justice has expanded its interpretation of the Notice's wording of "wrongful removal or retention of a child" to include a motion where one parent withholds the child from the other contrary to the pre-existing arrangements. It has also noted that the wording on the Notice is an inclusive, not exhaustive list.[68]

61. The BC Provincial Court has also commented that an alleged denial of parenting time "may constitute urgency under paragraph c) of this Court's direction, as being a wrongful retention of the child." However, where the affidavit simply stated, "The father is refusing to return the child" – further details of the denial should be provided before an emergency hearing set. For example: (i) when was the mother entitled to pick up the child? (ii) how was the refusal to comply with the order for parenting communicated?; and (iii) was any reason given for the refusal to comply with the

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[66] *Wallegham v. Spigelski,* 2020 ONSC 2663, at paras. 8 i. & 13 d.-e. (April 28, 2020).

[67] *Kostyrko v. Kostyrko*, 2020 ONSC 2190, at para. 49, LeMay J. (April 9, 2020).

[68] *Cole v. Barrett*, 2020 ONSC 2339, at para. 7, McDermot J. (April 16, 2020). See also *Kostyrko v. Kostyrko*, 2020 ONSC 2190, at para. 49, LeMay J. (April 9). But see *Douglas v. Douglas,* 2020 ONSC 2160, at paras. 10-11, MacPherson J. (March 25, 2020: where one parent was withholding child from the other contrary to a *status quo* of access on alternating weekends and alternating Thursdays, the court held that the issue was very important but not urgent and interpreted "wrongful removal or retention of a child" as purposefully mirroring the language under the *Convention on Civil Aspects of International Child Abductions (the "Hague Convention"*)).

order?[69] The Supreme Court of Newfoundland and Labrador Family Division seems to have taken a similar approach of requiring more details related to a request for access.[70]

62. Further, a parent who seeks to change parenting time and exchange protocols, due to COVID-compliance concerns, may also be granted permission to proceed with an urgent case conference as these issues fall within "a category of urgency recognized in the Notice to the Profession released by the Chief Justice of the Superior Court of Justice dated March 15, 2020 (and as further amended effective April 6, 2020)."[71]

63. On the other hand, where supervised parenting was "to be as agreed between counsel", the BC Provincial Court did not find a breach of the existing order where the mother offered (and the father exercised) telephone access because the in-person supervisor was not available (they were self-isolating). Note that the established regime was that the father had supervised, in person parenting time once a week for 2 hours. There was also a previous protection order that had restricted the father's interactions with the children and mother. The court did not agree that this was a complete denial of parenting time; the motion was not urgent and shouldn't have been brought.[72]

64. In Quebec, the court has spoken out strongly against exercising self-help, and it appears government guidance specifically allows shared parenting to continue:

> As mentioned by the Court during the hearing, the Covid-19 crisis does not obliterate a judgment of this Court nor can it be used as a pretext to cancel, one way or another, the rights of the parents and the children to maintain their close relation[9].

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[69] *J.R.K.P. v. L.A.S.*, 2020 BCPC 73, at para. 3, Skilnick J. (April 20, 2020).

[70] *Fagan v. Gushue and Mousseau-Mitchell*, Court File No. 2017 02F0209, St. John's, Supreme Court of Newfoundland and Labrador Family Division, MacDonald J. (April 1, 2020).

[71] *Allman v. Allman*, 2020 ONSC 2634, at para. 15-16, McSweeney J. (April 28, 2020).

[72] *Campbell v. Chan*, 2020 BCSC 665, at paras. 6-7, 12, & 32-33, Sharma J. (April 24, 2020).

> In fact, on April 1st, 2020, the Minister of Health and Social Services has decided to allow the parents to maintain the shared custody of their children despite the Covid-19 pandemic[10], unless one of them is exposed and infected by the virus.[73]

65. Other courts have also made strong statements condemning self-help in light of COVID-19. "During this COVID-19 pandemic, the courts are beginning to see a situation that approaches a crisis of its own: parents using the urgency of the moment to seize the sole right to parent their children, contrary to court orders."[74] "A parent is not permitted to simply engage in self help, or to interpret public health directives as a licence to terminate parenting time." [75]

66. In *SAS v. LMS*, Justice Graesser of the Court of Queen's Bench of Alberta also spoke out against self-help remedies and clarified the exceptional types of situations where limited self-help may be appropriate:

> Unilateral action, or self-help remedies can never be countenanced. They may in exceptional cases be forgiven. I give three examples to illustrate what may be an exceptional case, without purporting to create a complete list. One is where a parent is diagnosed with COVID-19 and insists on still exercising face to face access with a child. Another would be where a parent is displaying symptoms of COVID-19 but refuses to do anything about it. A third situation would be where a parent has or is about to do something involving the children that poses an immediate threat to their health or safety. In any of these cases, if there is no time to apply for permission to make an emergency application, unilateral action may be forgiven if an application is made at the earliest opportunity. [76]

Blanket Denials of Access (Child Protection Context)

67. This paper deals primarily with domestic parenting disputes between parents.

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[73] *Droit de la famille – 20578*, 2020 QCCS 1287, at paras. 14-16, Villeneuve J. (April 9, 2020).

[74] *Ivens v. Ivens*, 2020 ONSC 2194, at para. 1 (April 9, 2020: long-standing high conflict case where a previous judge had previously not found "alienation" *per se*, but did find evidence that the mother was not supporting the children's relationship with the father; there was a previous contempt finding made against the mother, etc.).

[75] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 3, McGee J. (April 17, 2020); *Smith v. Bowen*, 2020 ONCJ 212, at paras. 37, O'Connell J. (April 24, 2020).

[76] *SAS v. LMS*, 2020 ABQB 287, at para. 45, Graesser J. (April 22, 2020).

However, a few important points should be noted about access in child protection proceedings.

68. First, in contrast with the approach in *Ribeiro* that held that blanket policies are inappropriate, the child protection approach that emerged from Ontario started from basically the opposite presumption. Namely, Societies implemented blanket policies denying parents all face-to-face access even if: they were following COVID-19 guidelines, there was an existing order for access, and there were positive parent-child interactions during access.[77]

69. Courts were leaving access in the discretion of the Society, with face-to face access being re-commenced upon being deemed safe by the Society, but with no specific end date and only virtual contact permitted in the meantime.[78]

70. This is a developing area and there is a lack of reported case law from other provinces/territories. However, the more recent trend indicates that the Ontario courts have rejected the suspension of all in-person contact on the basis of a blanket policy, accepting that *Ribeiro* "is equally applicable, with modification, to child protection cases."[79]

71. Courts have thus taken a more nuanced approach and considered whether face-to-face access can safely be addressed and reinstated. The court has recognized that

[77] You can listen to the very convincing arguments made by Tammy Law, an experienced child protection lawyer, in the ON-Demand CPD "Your Family Law Practice and the COVID-19 Pandemic: What You Need to Know Right Now" (Law Society of Ontario, April 2020), available online: https://store.lso.ca/family-covid-19/. Thank you also to Tammy for reviewing a previous draft of this section of the paper.

[78] See, e.g., *Dnaagdawenmag Binnoojiiyag Child and Family Services v. B.RP,* 2020 ONSC 1988, Jain J. (March 30, 2020; return date of June 1, 2020 to set a date for a conference or another temporary care hearing). *Note: Notice of Appeal filed; may have settled.*

[79] *Children's Aid Society of Oxford County v. C.L.,* 2020 ONCJ 183, at para. 14, Paull J. (April 14, 2020; urgency not found, but further evidence required to determine access and directions made for the matter to be decided based on written materials; note comments made that virtual access might be of litle or no benefit given child's young age (10.5 months)). See also *Children's Aid Society of Toronto v. T.F.,* 2020 ONCJ 169, at para. 9-10, Pawagi J. (April 2, 2020; Society's request to suspend all in-person access to mother while child in the temporary care of father dismissed).

"the circumstances of each family is unique and the issue of whether to suspend in-person contact must be viewed in the context of the particular situation of the child and the caregivers before the court."[80]

72. However, the landscape in a child protection case is still vastly different from the domestic context.[81] As Justice Sullivan carefully noted, "It is trite to state that COVID-19 has not suspended the CYFSA (child protection legislation in Ontario) and the *Charter*. … I believe that the true test of our law and the fair administration of the law will be measured in how the most vulnerable in our society are treated and the administration of justice is dealt with in difficult times such as these."[82]

VII. Specific COVID-19 Concerns

73. The case law is fairly consistent in the general principles that apply to parenting disputes in light of COVID-19. However, it is still impossible to make blanket statements about how a court will deal with specific COVID-19 concerns as different results will be based on different facts.

74. An example of a wholistic and fact-sensitive approach is the BC case of *S.R. v. M.G.* (where the concern related to the mother being nurse). Justice Bondy provided the

[80] *Children's Aid Society of Toronto v. O.O.*, 2020 ONCJ 179, at para. 76, Zisman J. (April 9, 2020; still only virtual access ordered, "face to face visits at the grandparents' home will resume upon being deemed safe by the society"). *Note: Notice of Appeal filed.* Followed in *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONCJ 209, at para. 31, Sullivan J. (April 23, 2020; 16-month old child; video access to parents and extended family; in-person access to parents twice a week with supervision by paternal aunt, including conditions with respect to sanitation, transportation, and aunt wearing mask and gloves during exchanges).

[81] For an excellent and sensitive review, see *Catholic Children's Aid Society of Toronto v. D.A.*, 2020 ONCJ 206, at paras. 65-72, Finlayson J. (April 23, 2020; not an urgency case but sets out framework for dealing with COVID-19 concerns in the child protection context; court concludes, at para. 72: "I would not go so far as to suspend in person access because of general Covid-19 concerns in this case, in light of the evidence that I was given, from the mother in particular, about her circumstances and practices as they relate to Covid-19.").

[82] *Children's Aid Society of the Region of Peel v. M.G.*, 2020 ONCJ 167, at paras. 7 & 12, Sullivan J. (March 30, 2020).

following guidance:

> I find a constellation of factors to consider, in assessing what is in a child's best interests. In this situation, the following factors are relevant:
>
> a) Whether the child is at an elevated risk of suffering the more severe consequences of the virus;
>
> b) Whether either party, or those in their household are at an elevated risk of suffering the more severe consequences of the virus;
>
> c) Each party's exposure to the risk of contracting the virus;
>
> d) Steps taken by each party to mitigate the risk of exposure;
>
> e) All of the relevant factors listed under s. 37 of the *Family Law Act*, including:
>
> a. The child's health and emotional well-being;
>
> b. The child's views, where appropriate;
>
> c. The child's relationship with each parent;
>
> d. The history of the child's care;
>
> e. The child's need for stability, given his age and stage of development;
>
> f. Each parent's ability to exercise his or her parental responsibilities;
>
> g. The ability of each party to cooperate in parenting the child; and
>
> f) In the larger context, society's need to maintain and access resources in the community, including health care and other ventures that provide services and income for families in a safe manner over an extended period of time.[83]

75. The section below attempts to provide guidance on how the case law deals with common types of COVID-19 concerns. As advocates and trusted advisors, it remains vitally important to remember, however, to contextualize the COVID-19 concerns within the family's broader circumstances and history.

Health Care Workers

76. Doctors, nurses, and other health-care workers are generally assumed to be aware of and following COVID-19 safety protocols. Thus, raising concerns solely based

[83] *S.R. v. M.G.*, 2020 BCPC 57, at para. 27, Bond J. (April 7, 2020).

on a parent's health-care job has not been enough to show urgency, nor has it been sufficient justification on a motion for the other parent to withhold parenting time.[84]

77. The courts have been "loathed to create a precedent penalizing front-line health care professionals for simply showing up to work and doing their job or creating additional pressures and concerns to their already stressful circumstances without real and substantive evidence."[85]

78. Nevertheless, it is still best practice to provide concrete evidence and agree to abide by the applicable public health directives. For example, in *S.R. v. M.G.*, the mother was a nurse who gave evidence, accepted by the court, that she was mitigating the risk of contracting the virus by following every precaution recommended to nurses, "and then some"[86].

Public-Facing Essential Workers

Elder care workers

79. The fact that a parent lives with someone who performs elder care in a care home was ***not*** a reason to deny his parenting time. Comparing the situation to one involving health care workers, the court reasoned as follows:

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[84] See, e.g., triage case *Monette v. Monette*, 2020 ONSC 2524, at paras. 3 d. & 8, Shore J. (April 22, 2020: mother was a registered nurse). See also, e.g., withholding cases of *Herman v. Kideckel*, 2020 ONSC 2021, at para. 14, Nishikawa (April 2, 2020: mother, an allergy and immunology specialist doctor, withholding access to father, also a doctor now working from home but previously at a clinic) & *Zee v. Quon* (Toronto, Ontario Superior Court, Court File No. FS-16-412436), at para. 34 (March 27, 2020: "The Applicant is a health care professional. She and her employer are well aware of the protocols to prevent transmission of infection. If the Applicant is required to return to work, I am satisfied that she will take all necessary precautions to keep her child safe while in her care.").

[85] *Monette v. Monette*, 2020 ONSC 2524, at para. 8, Shore J. (April 22, 2020).

[86] *S.R. v. M.G.*, 2020 BCPC 57, at para. 27, Bond J. (April 7, 2020). See also *Nhau v. Obahiagbon*, 2020 ONSC 2765, at para. 10, Timms J. (not typical withholding case but "a virus-related matter" that father works as a registered practical nurse, and mother alleged he worked in more than one facility (which would be in breach of an Ontario regulation); mother was not seeking to eliminate access, thus court inferred that she was satisfied that he was taking the necessary stesp to prevent getting infected; court ordered that he "comply with any regulations issued by the Government of Ontario or any Regional or Municipal Health Authority relating to his employment or that in any way are designed to prevent the spread of the virus.").

> …the mere possibility that a person in someone's home may have been in contact with someone carrying the virus is not a valid reason for denial of parenting time. If this was the case, those health care workers directly dealing with this pandemic would not be having contact with their own children. In order for Covid-19 concerns to prevent contact between a parent and child, there must be a more substantive reason for denial of contact, supported by some form of objective medical evidence, rather than the lay opinion of one of the parties themselves.[87]

80. It remains important for parents to share information about the COVID-19 precautions a parent (and their partner or other household member, as applicable) is taking, and to advise of applicable work-related protocols.[88]

Other public-facing essential workers (fast food, grocery store, etc.)

81. The court's general approach to a parent or other family member working in an essential service or other public-facing job is comparable to the approach to health-care or elder care jobs:

> …The fact that one family member may be working outside the home is not necessarily a ground to alter a parenting arrangement absent evidence that the person working is not following recommended protocols. …
>
> There are many people who cannot work from home and who need to work to support their family. Furthermore, there are those working in essential services upon whom we all continue to rely including health care workers, transit workers and those who support the food supply chain among many others. To suggest that parenting time should be suspended simply because a member of the household works outside the home is not reasonable.[89]

82. This reasoning was followed in the child protection context, where Justice Finlayson added the following consideration:

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[87] *J.R.K.P. v. L.A.S.*, 2020 BCPC 73, at paras. 2 b) & 4, Skilnick J. (April 20, 2020; father's mother provided elder care in a care home).

[88] *Blaskavitch v. Smith*, 2020 ONSC 2506, at paras. 25 & 42-44, Trousdale J. (April 22, 2020; father's partner was a personal support worker in a long-term care facility).

[89] *S.D.B. v. R.B.B.*, 2020 ONSC 1745, at paras. 16, Fryer J. (April 9, 2020; the father's new partner's daughter worked at a fast food restaurant), also citing the unreported health-care worker decision of *Zee v. Quon* (Toronto, Ontario Superior Court, Court File No. FS-16-412436), at para. 34 (March 27, 2020).

> The Court must be careful not to judge this issue, measured through the lens of an unrealistic socio-economic yardstick. It seems unfair to me that parents of modest means, or of low income, who are forced to work in essential services during Covid-19, or to take public transit to keep grocery stores running upon which we all rely, or to care for the vulnerable, would then have to potentially jeopardize having face to face contact with their children, particularly when they are doing their best and taking all necessary precautions (in accordance with current understanding of what are necessary precautions) related to Covid-19.[90]

83. In *SAS v. LMS*, the court was concerned by evidence that the father was not following recommended protocols. Somewhat ironically, it was actually the mother ("LMS", a nurse on long-term disability and not working), who was concerned about the children's contact with their father ("SAS", an accountant but who was meeting clients in his office). Justice Graesser considered the risks to essential workers as follows:

> For some Albertans, working outside the home is essential. SAS is in one of those occupations that has been declared to be essential, such that his office has not been required to shut down. In that, SAS joins many others such as health care workers, first responders, food service workers, grocery workers, transportation workers and many others. In some respects they are fortunate because their livelihoods have not been shut down and they continue to earn a regular income. In other respects, they are challenged, because they must run greater risks as they interface with other people more frequently than people who are following the main imperative of Alberta Health Services: stay home.[91]

84. Justice Graesser then quoted from guidelines for workplaces on the Alberta Health Services (AHS) website. His Honour criticized the father for providing no information on: (i) how he deals with paperwork dropped off by clients; (ii) cleaning procedures within the office, and (iii) his compliance with the provincial guidelines. The court found that his explanation for needing to meet some clients in person rang "hollow", rather the meetings were "his choice". His Honour

[90] *Catholic Children's Aid Society of Toronto v. D.A.*, 2020 ONCJ 206, at paras. 80-88, Finlayson J. (April 23, 2020; mother works at a grocery store and part time at a hospice).

[91] *SAS v. LMS*, 2020 ABQB 287, at paras. 8, 10, 13-23, & 48, Graesser J. (April 22, 2020).

questioned why the children and mother should face additional risks because of his business choices. There were other concerns about the father not following social distancing guidelines that were required of everyone, either by ignorance or in reckless disregard of the rules. However, the court discussed, at length, that its key concerns related to: (a) scrupulous adherence to all AHS health recommendations and requirements for the workplace; and (b) and trust/communication between the parties.[92]

85. The court adjourned the father's application (to find the mother in contempt, for police enforcement, to vary the parenting order on an interim basis during COVID-19, for make-up time, and costs) to allow the parties to try to work out an acceptable solution. His Honour also concluded as follows:

> Working in an essential service should not disentitle someone from being able to be with his or her children. In non-separated situations, I venture to guess that most families remain together, glad that one of the parents is able to work and generate income. If SAS is sincere, he should be able to satisfy LMS that he will work in a fully compliant manner and ensure that his office is run in accordance with the AHS guidelines. SAS has indicated in all other areas LMS complained about that he is already compliant, or will be compliant.
>
> A guiding principle in this case should be that it is in the best interests of the children to continue with the shared parenting rotation and to be able to spend the time with their father. The ball is in his court to make sure that can happen in a way that keeps the children safe.[93]

Pre-Existing Health or Immunity Issues

86. The key issues here are: (i) the type of medical evidence led about a pre-existing condition that would make a child or parent more vulnerable if they were infected with COVID-19; and (ii) the parents' ability and willingness to cooperate and take precautions to protect the vulnerable person.

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[92] *SAS v. LMS*, 2020 ABQB 287, at paras. 49-51 & 61-68, Graesser J. (April 22, 2020).

[93] *SAS v. LMS*, 2020 ABQB 287, at paras. 82-84, Graesser J. (April 22, 2020).

87. Justice Sherr of the Ontario Court of Justice, on April 27, 2020, provides an excellent summary of the case law related to a child's alleged medical vulnerability in the domestic context:

> Medical evidence is important on these COVID-19 motions. If someone is seeking to suspend a person's face-to-face contact with a child due to the child's medical vulnerability, a medical report should be provided setting out the child's medical condition, any increased vulnerability the child has with respect to the COVID-19 virus and specific recommendations about additional precautions that are required to protect the child from the virus.
>
> In *Vasilodimitrakis v. Homme*, 2020 ONSC 2084, the child suffered from juvenile arthritis and was autoimmune compromised. At issue was whether the child could be safely transported between the two homes of the parents. The court rejected the evidence of the child's pediatric ophthalmologist concerning transportation risks, as it was beyond her area of expertise – she was neither an infectious diseases specialist nor a rheumatologist. The court preferred the evidence of the child's rheumatologist who felt that the risk of transportation to the child was minimal, provided it was done safely. The court maintained the temporary access order, finding fault with both parents in following COVID-19 health directions.
>
> In *Chrisjohn v. Hillier*, 2020 ONSC 2240, the child had a neuromuscular disorder with previous respiratory complications and was at increased risk of contracting COVID-19, as well as having serious complications if she contracted the virus. The family doctor recommended that the child should be kept at home during this time, with the exception of medical appointments. The court ordered access to continue as the medical letter filed did not state that the child should be kept in one home. The court was satisfied that the father would follow social distancing directives.
>
> In *Trudeau v. Auger*, 2020 ONCJ 197, the mother sought to suspend access alleging the child was at a higher risk due to respiratory issues. The child had been on antibiotics. The court found that the mother failed to provide medical evidence to support her allegations or which said that the child would be at risk spending a few hours each week with the father. The court reinstated access, subject to the child completing a cycle for antibiotics.
>
> In *Lyons v. Lawlor*, 2020 ONCJ 184, the court did not change an access order to a child with asthma. The court found that direct and compelling evidence from the child's doctor that more intensive distancing efforts were required to keep the child safe would have been required to support changing the order.[94]

[94] *C.L.B. v. A.J.N.*, 2020 ONCJ 213, at paras. 31-35, Sherr J. (April 27, 2020). In the child protection context, see *Children's Aid Society of the Region of Halton v. R.O.*, 2020 ONCJ 209, at paras. 56-57 (no medical

88. Applied to the facts before him, Justice Sherr considered the custodial father's request that the mother's face-to-face parenting time be suspended, to be reviewed in 30 days. The mother had not had her usual access since March 13. The father's initial evidence was supported by a March 31 letter from a registered nurse on behalf of the child's cardiologist that said that the 12-year old child had Brugada Syndrome, which placed him at an increased risk for cardiac arrhythmias. She wrote that fever is a common trigger for these arrhythmias. She said that if the child develops a fever, the family had been instructed to aggressively treat and manage his fever with antipyretics at home. On April 8, the court asked the parties to obtain a medical report from the child's treating physician. The mother obtained a report from the cardiologist, dated April 13, that clarified that the child did not meet the definition of Brugada Syndrome at this time, and provided as follows:

> d) For children being followed for risk of Brugada Syndrome, precautionary measures are advised around fevers and treating fever aggressively, as well as a yearly follow-up clinic appointment.
>
> e) The risks to the child remain very low, and he does not consider that the child should be treated any differently than normal children – there is no serious or immediate concern due to the child's predisposition to Brugada Syndrome.
>
> f) In his opinion, custody or access decisions, even in this time of the COVID-19 pandemic, should not be treated any differently for the child because of his predisposition to Brugada Syndrome than for a normal child.[95]

89. To his credit, the father acknowledged that this letter made it clear that the child did not have a Brugada Syndrome diagnosis and that he was at low risk. Justice Sherr found that the child's medical condition was not a basis to suspend his face-to-face contact with the mother. There were some concerns about the mother's ability to follow health protocols. However, they did "not rise to the level where it is in the child's best interests to radically alter the existing parenting arrangement for at least

evidence that the other child in foster home was particularly vulnerable to COVID-19, which would be require more intensive distancing efforts to keep them safe).

[95] *C.L.B. v. A.J.N.*, 2020 ONCJ 213, at paras. 1 & 38-43, Sherr J. (April 27, 2020).

another month, as suggested by the father, and prevent the child from being with the mother." The court found that it was in the child's best interests to restore the parenting order, with some modifications to address COVID-19 health issues. Given that public health directives were frequently changing, the court required the parties to follow public health directives issued by the governments of Canada, Ontario, and the City of Toronto.[96]

90. The same general principles apply to a parent with their own medical vulnerabilities, and the case law has emphasized the importance of communication related to preventative COVID-19 measures, in addition to requiring sufficient medical evidence to demonstrate a particular vulnerability.[97]

91. Going back to a child's health vulnerability, the last case to consider is the Divisional Court decision in *Vasilodimitrakis v. Homme*. Justice Mitrow heard the custodial mother's request for a stay and various other relief pending leave to appeal the earlier decision of Justice Bondy (which was reviewed by Justice Sherr at para. 87, above). Justice Bondy had ordered that alternate weekend access to the father should continue, subject to slight modifications given concerns about the autoimmune compromised 14-year old child. The main grounds raised on the

[96] *C.L.B. v. A.J.N.*, 2020 ONCJ 213, at paras. 44-45, 66-68, & 76, Sherr J. (April 27, 2020).

[97] See *Sereacki v. Berdichevsky*, 2020 ONSC 2623, Faieta J. (April 27, 2020) (mother withholding based on her own compromised immune system, which was supported by medical evidence; court ordered that equal, shared access schedule was to continue but with additional, specified safety measures, in addition to ordering general compliance with federal, provincial and municipal governmental orders and directions related to COVID 19); *Grossman v. Kline*, 2020 ONSC 2714, Akbarali J. (April 30, 2020: shared parenting should continue where parents taking prudent measures to prevent the risk of contracting COVID-19); *Guerin v. Guerin*, 2020 ONSC 2016, Doyle J. (March 31, 2020: mother granted interim exclusive possession of the home, disrupting the "nesting arrangement", where she was immunocompromised and two of the three children had mild asthma, but the father was not transparent with his compliance with COVID-19 protective measures and would not even confirm whether he washed his hands); *Droit de la famille – 20578*, 2020 QCCS 1287, Villeneuve J. (April 9, 2020: mother provided medical evidence that she was seriously ill with ovarian cancer and had approximately 9-12 months to live; no valid reason for shared parenting not to continue for the youngest child (10 years old) where no evidence the father was not respecting government guidelines; the older child (12 years old) was temporarily suspended until the parties received an opinion from a psychologist concerning why she refused to live in shared custody).

mother's appeal related to the motion judge's alleged: (i) failure to hear from the child; (ii) failure to provide procedural fairness and natural justice in applying "a summary determination process"; (iii) error in weighing the expert evidence (the motion judge preferred the evidence of one doctor over the other); and (iv) failure to permit more time to marshal more evidence (although the judge did reconvene the motion for a third day to deal with additional medical evidence). Justice Mitrow found that the balance of convenience did not support granting a stay, but this was subject to a reconsideration/review at the discretion of the panel hearing the leave to appeal motion if leave to appeal was granted. The court also expedited the filing deadlines and hearing of the motion for leave to appeal.[98]

Blended Families / "Bubbles" / "Cohorts"

92. "A blended family situation can present special challenges in the current environment", and this is still a developing area.[99]

93. In general, the Ontario case law indicates a flexible interpretation of COVID-19 guidelines for blended family. The key appears to distinguish between behaviour that is practical, realistic, and reasonable, as opposed to behaviour that creates a "reckless" risk for which Justice Pazaratz in *Ribeiro* indicated that there would be "zero tolerance". His Honour also mentioned that, "in blended family situations, parents would require assurance that COVID-19 precautions are being maintained in relation to each person who spends any amount of time in a household – including children of former relationships."[100]

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[98] *Vasilodimitrakis v. Homme*, 2020 ONSC 2355 (Div. Ct.), at paras. 1, 8, 59-65, 82, 91, & 95, Mitrow J. (April 22, 2020); rel'd to 2020 ONSC 2084, Bondy J.

[99] *Balbontin v. Luwawa*, 2020 ONSC 2060, at para. 7, Jarvis J. (April 3, 2020; the father confirmed he was following all provincial COVID-19 precautions and that he shared custody of another child, who's mother also adhered to COVID-19 safety measures; the court accepted his assurances and that he would prioritize the child's safety and well-being).

[100] *Ribeiro v. Wright*, 2020 ONSC 1829, at paras. 14 & 16, Pazaratz J. (March 24, 2020).

94. For example, a flexible approach was taken in *Grossman v. Kline*. The dispute involved a 4-year old child where the father lived with a new partner and her own 3-year old child (who lived partly with them and partly with her own father). The father and his partner chose to self-isolate with the two children during the pandemic with his partner's parents, who were seniors, at their cottage. The father was, however, honouring the almost equal shared parenting agreement and driving the children from the cottage to the mother's home in Toronto without stopping along the way. The mother objected on the basis that the father was "offside public health guidelines because (i) he is in a group of more than five people who are not of the same household, and (ii) he is not staying at his primary residence in Toronto, but at Ms. Traub's parents' second home in Thornbury." Justice Akbarali considered the father's evidence of precautions the household was taking and found that his arrangements were reasonable, and far from what Justice Pazaratz was referring to in *Ribeiro* as behaviour that would raise "sufficient concerns about parental judgment" that would warrant ceasing direct parent-child contact.[101]

95. Her Honour also noted the need for people to get by in uncertain times, and that the father's decision to combine into a single household with his partner's parents provided benefits to all members of the household (child care support to enable him and his partner to earn income working remotely while ensuring the children's needs were met, and supporting the partners' parents to ensure the people to whom the children are close to remain a constant part of their lives).[102]

96. Justice Akbarali referred to the father and his household having "formed a bubble" and evidence that they were not having direct contact with anyone else. He was not

[101] *Grossman v. Kline*, 2020 ONSC 2714, at paras. 6-7, 9-10, 28-30, & 40, Akbarali J. (April 30, 2020).

[102] *Grossman v. Kline*, 2020 ONSC 2714, at paras. 32-34, Akbarali J. (April 30, 2020).

acting irresponsibly, or recklessly exposing the child, or by extension the mother, to the risk of COVID-19.[103]

97. Similarly, in the blended family case of *Peerenboom v. Peerenboom*, Justice Nishikawa was not convinced that parenting time with mother, her new partner, and his four children (who were in a shared custody arrangement) was such a risk to the health and safety of the parties' four children to require a term limiting contact with the new partner's children. It was in their best interests to maintain their relationships with both parents and with the partner's children. The father lived with his new partner and, at least on alternate weekends, her three children. However, he objected to the mother and her partner being categorized as a single "household" because that the mother and her partner did not live together. The court found that the fact that the mother and her new partner each had a house did not necessarily mean that they could not be considered a "household". The decision acknowledged "that in the case of a blended family, the fact that the family members are not always under the same roof does not necessarily mean that do not constitute a household."[104]

98. Given the Quebec Minister of Health and Social Services' decision to allow parents to maintain shared custody despite COVID-19, it seems likely that a blended family situation will be treated similarly in Quebec as in Ontario.[105]

99. However, the Alberta case of *SAS v. LMS* takes a stricter approach. The father said he was in a "cohort" by limiting contact to a friend/employee and her aunt. Justice Graesser referred to his own unreported Alberta decision where the father argued

[103] *Grossman v. Kline*, 2020 ONSC 2714, at para. 35, Akbarali J. (April 30, 2020).

[104] *Peerenboom v. Peerenboom*, 2020 ONSC 2533, at paras. 4, 10, 15-21 & 26, Nishikawa J. (April 23, 2020).

[105] *Droit de la famille – 20578*, 2020 QCCS 1287, at para. 16, Villeneuve J. See also https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/answers-questions-coronavirus-covid19/questions-answers-education-families-covid-19/#c52825.

that he was in a "cohort" with his sister and her family. The term "cohort" was described by Alberta's Chief Medical Officer in one of her reports. The father said they were isolating from others and he was acting like a child-care worker for his sister that had to work. However, Justice Graesser held that the father should not continue to see his sister and her children. His Honour reasoned that the father was "oblivious" to any risk he may be exposing his child to, let alone the mother (and her father, who lived in the same household). Turning back to *SAS v. LMS*, Justice Graesser thus raised the issue of a cohort again since it was brought up by the father in that case, and "is likely an issue in many households." His Honour then added the following:

> What Dr. Hinshaw (Alberta's Chief Medical Officer) said on March 26 (as reported by CTV news at https://calgary.ctvnews.ca/self-isolation-tips-for-families-from-alberta-s-dr-hinshaw-1.4869813 is:
>
> > One of her suggestions was partnering with a "cohort family", a group of close friends whom you are certain have self-isolated themselves, have not recently travelled and do not pose any risk of being infected with COVID-19.
> >
> > "By doing this, the two families would only be exposed to each other, limiting close contacts. Children would have opportunities to play in a controlled environment, and parents would have opportunities to connect."
> >
> > She added the recommendations could also work in response to situations involving children with shared custody agreements between their divorced parents.
> >
> > "We know that many families are in different situations." Hinshaw said. "Families in that situation obviously they need to think about how they are containing the number of people in total that their children and their families are in contact with."
>
> This is not a "loophole" but rather a way of expanding a family group, where everyone completely trusts everyone in the group to follow all guidelines and rules to keep everyone in the group safe.
>
> I do not see how a cohort can operate if members of the cohort regularly interact with people outside the cohort, unless the other members completely trust that the member is interacting in a completely compliant manner with people who are also compliant. Strangers to the cohort should not be exposed to the cohort, and the cohort should not be exposed to strangers.

> Dr. Hinshaw is best able to describe what she meant by cohort groups. My reading of her comments is that she was speaking of two families forming a cohort. "Family" does not mean an extended family, but rather a family unit living together in the same dwelling. Once someone has formed a cohort with his or her ex-partner for co-parenting purposes, that is it. There are now two cohorts. She did not comment on how cohorts should deal with members of the cohort who work and who are unable to stay home.
>
> Here, SAS could have formed a cohort with his employee/friend. That cohort might include the friend's aunt if she lived with the friend. It could only include his children if they lived with him full time and were essentially isolated with him, the employee/friend and possibly her aunt. That would preclude a cohort with LMS.
>
> Looking for "loopholes" or exceptions is too frequently an attempt to justify and unwillingness to comply, or an attitude of dismissiveness towards the risks acknowledged by medical professionals. Courts should be slow to permit anything that puts a person or the community in an unreasonable risk.[106]

Travel Plans

100. The court found that travel was unnecessary and reflected badly on the father's judgment where he took the child on vacation by multiple commercial flights and airports from April 7 to 17, 2020 (from Toronto, Ontario to Whistler, BC). Although there was no ban on interprovincial travel at the time, "the need to follow reasonable health precautions and comply with social distancing measures should be increased and subject to stricter judicial scrutiny when dealing with the safety of a child." The court was particularly concerned that the father misled the mother, or, more likely, chose to unilaterally revisit the issue after he appeared to agree not to travel based COVID-19 concerns. The father preferred his own best interests over those of his son. His access could continue, but with interim restrictions that he follow all COVID-19 protocols and directives, not take the son on any public transit, and that all access take place in Ontario.[107]

[106] *SAS v. LMS*, 2020 ABQB 287, at paras. 69-81, Graesser J. (April 22, 2020).

[107] *Gillespie v Jones*, 2020 ONSC 2558, at paras. 43, 48-51, 55, & 57, Diamond J. (April 27, 2020).

101. Driving trips involving a private car have been treated differently. Some courts still find the trips unnecessary where the child will need to stop to use the bathroom along the way, while others have found that this is an acceptable risk that can be minimized with precautions.

102. An example that found private car travel problematic is *Heywood v. Jallad*. The father sought to find the mother in contempt in refusing to provide March Break and alternative weekend access that required a long car ride. Daily virtual video, telephone, and online game contact was occurring with the 12-year old child. Justice Hebner expressed two primary concerns: (1) the "unreasonable" requirement for the mother to drive the child "for the access exchanges during a global pandemic", which required a 5-hour trip where it was "only reasonable to assume there will be stops where … [the mother and the child] will be at risk of exposure"; and (2) the father continuing to work on renovations with his father at his girlfriend's home. Current face-to-face access was suspended for a period of four weeks and the court declined to make a contempt finding.[108]

103. The risks were viewed as acceptable by the BC Provincial Court in *V.C.S. v. T.S.* The dispute was over the children (aged 12 and 15) driving 8-9 hours back to the father's home (their primary residence) after spending spring break with their mother. The mother refused to return the children based on concerns about them needing to eat and use the washroom during the journey. She attempted to introduce news articles about fatal COVID-19 cases involving children, although none identified transmission during a long car ride or from using a public washroom. Justice Malfair held that, "I was open to considering any relevant directives or information published by B.C. or Canadian health authorities, but could not take judicial notice of the risks of transmission of this disease based on anecdotal news reports of individual cases." Public health authorities had not considered amenities

[108] *Heywood v. Jallad*, 2020 ONSC 2336, at paras. 25-32, Hebner J. (April 16, 2020).

like rest stops and gas stations to be of sufficient risk of viral transmission to warrant their closure. The evidence did not demonstrate that there was a "measurably increased risk of the children contracting COVID-19 by using a public washroom or rest stop during a car trip." The risks of both parents driving their private vehicles and meeting half-way could be minimized with precautionary measures like packing meals, washing hands, and social distancing. There was not "a compelling basis to justify a temporary change of residence of the children." Returning the children to their primary residence was considered "essential travel".[109]

Relocations

104. Where a parent seeks the return of a child to another country, the court has found a lack of urgency in light of the current international Travel Advisory of the Government of Canada to, "Avoid non-essential travel outside of Canada until further notice." The children had been living with their mother in Canada since October 2019 and the father had been thus far unsuccessful in having the Ontario or Nigerian court to order their return to Nigeria. The court further added the following guidance with respect to international travel:

> This is not the time to hear a motion on the return of children to another jurisdiction. Indeed, were the father to be successful, any order would likely not be capable of being implemented for weeks or even months. It would be foolhardy to expose the children to international travel in the face of the Travel Advisory, risking the restrictions and complications adverted to therein. Considering the language of the Chief's Notice, the children's "safety" and "well-being" are protected, for the time being, by remaining

[109] *V.C.S. v. T.S.*, 2020 BCPC 60, at paras. 6-7 & 15-27, Malfair J. (April 1, 2020; there was a history of both parents refusing to return the children; also a 16-year old child who stayed with father over spring break). See also *Bartlett v. Loewan*, 2020 ONSC 2230, at para. 6-7 & 39-42, Diamond J. (April 14, 2020: 7-year old child lived primarily with custodial mother in Toronto, Ontario and father had access every other weekend in Gatineau, Quebec; meal and bathroom risks during car travel can be minimized; where father swears to abide by COVID-19 protocols during access, this should arguably have been enough to avoid motion, which was dismissed as not urgent).

> where they are in the care of their mother in Ontario. While the matter is very important to the parties, it is not in my view currently "urgent".[110]

105. The court may also disallow interprovincial travel. For example, in *Dias v. Ganon*, the mother sought to move from Stoney Point, Ontario to Edmonton Alberta, which the court dismissed on the basis of no compelling circumstances justifying the move on an interim basis. Justice Hebner further commented on travel in the time of COVID-19 as follows:

> I point out that this matter came before the court by way of an urgent motion to be held by telephone conference during a period of time that the court has suspended normal operations. There is a global pandemic at the present time, namely COVID-19. I take judicial notice of the pandemic. We are currently living in times when international travel is affected. There is no evidence as to how the pandemic might affect the respondent's plans to move to Edmonton or the ability of Kayden to attend school and integrate into her new community. The current rules across the country requiring social distancing and, in some cases, social isolation will most likely have a significant impact on Kayden's lifestyle following a move to Edmonton. In my view, this is a compelling circumstance to not allow the move at this point in time.[111]

106. In another case, at the triage stage, the court expressed concern over a potential move within the same province. Justice Pazaratz agreed that the father's motion was potentially urgent where: (a) the father expressed concern about the mother's home being marketed for sale, with prospective purchasers coming into the house (and likely into the child's room) to view the premises, which he worried was inconsistent with the COVID-19 "social isolation" safety precautions; and (b) the father objected to the mother's wish to move with the child about a 5-hour drive away (but to remain within the province of Ontario). On a "temporary-temporary without prejudice basis", the mother was prohibited from relocating the child's primary

[110] *Onuoha v. Onuoha*, 2020 ONSC 1815, at paras. 2, 8, & 10, Madsen J. (March 24, 2020). See also *Johansson v. Janssen*, 2020 BCSC 469, at para. 17, Smith J. (March 30, 2020).

[111] *Dias v. Gagnon*, 2020 ONSC 1716, at paras. 27-28, Hebner J. (March 20, 2020, Hebner J.).

residence and from allowing strangers into her residence for the purposes of marketing her home.[112]

VIII. "*Your reputation will outlast COVID-19.*" – Pazaratz, J.

Parents

107. Justice Pazaratz offered cautionary words to high conflict parents in his April 8, 2020 decision of *McNeil v. McGuinness*:

> *I would strongly recommend* – without ordering – that the parties continue their discussions to reach a fair, child-focussed resolution of this very narrow issue.
>
> I have no idea if a mere *recommendation* will have much impact.
>
> So perhaps I can go one step further. Perhaps I can give high conflict parents a bit of a *warning*.
>
> a. Just because a Triage judge decides an issue isn't *urgent*, it doesn't mean the issue isn't *important*. It simply means we have to prioritize which issues we currently have the resources to deal with.
>
> b. The suspension of most court activities during the COVID-19 crisis means that – temporarily -- separated parents are largely going to be on "the honour system."
>
> c. We're counting on parents to be fair and helpful with one another. To rise to the challenge and act in good faith.
>
> d. Because now more than ever, children need parents to be mature, cooperative, and mutually respectful. In these times of unspeakable stress and anxiety, children need emotional reassurance from *both parents* that everything is going to be okay.
>
> e. How parents conduct themselves during this time of crisis will speak volumes about parental insight and trustworthiness.
>
> f. *Your reputation will outlast COVID-19.*

[112] *A.F. v. K.V.S.*, 2020 ONSC 1914, at paras. 4-5 & 13, Pazaratz J. (March 30, 2020).

g. So please don't try to take advantage of the current situation.

h. In the long run, self-help will turn out to be a big mistake. [italics in original][113]

108. After noting that parenting is an essential service, Justice McGee of the Superior Court of Justice also held as follows:

> This period of crisis will pass, and when we look back, families will have a story to tell. No one will ever forget how they spent the pandemic. Even very young children will carry the residual emotions well into adulthood. There will be a time to reflect. Did parents step up to ease fear and disruption in their child's life, or were they preoccupied by their own needs? Did they take a balanced approach to their child's overall interests, or did they seize upon a perceived advantage? Did they react to past patterns, or did they plan for a better future? [emphasis added][114]

109. Justice Skilnick of the BC Provincial Court issued this warning:

> …parents who use the current pandemic as a tactic to deny parenting time to the other parent, without any other further justification for doing so, are not acting in the child's best interest. Parents who attempt to create fear in the mind of a child by suggesting that the child is at risk by being in the care of the other parent, without any objective justification for doing so are also not acting in the child's best interests. Such parents who take this approach risk jeopardizing their own position for maintaining whatever parental responsibilities they enjoy.[115]

110. Justice Graesser of the Court of Queen's Bench of Alberta held as follows:

> … Parents should not attempt to create an emergency to try to get into court by acting unreasonably. On the flip side, a parent who is attempting to communicate and is thwarted from doing so by unreasonable behavior by the other parent may be able to demonstrate that an emergency exists.
>
> A parent who refuses to communicate reasonably and in good faith and to quickly demonstrate full compliance with all required COVID-19 rules and procedures runs a real risk of having his or her access or parenting time reduced to virtual time, with the other parent having primary care during the

[113] *McNeil v. McGuinness*, 2020 ONSC 1918, at paras. 15-17. Followed in *Sereacki v. Berdichevsky*, 2020 ONSC 2623, at para. 53, Faieta J. (April 27, 2020).

[114] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 16, McGee J. (April 17, 2020).

[115] *J.R.K.P. v. L.A.S.*, 2020 BCPC 73, at para. 6, Skilnick J. (April 20, 2020).

pandemic. The health and safety of the children is the primary consideration.[116]

Lawyers

111. Remembering that your reputation will outlast COVID-19 is also good advice for lawyers. The court has held that "all counsel and parties must be aware that actions taken in these unusual circumstances, may very well be judged once court operations resume, as not being appropriate nor in the best interests of their children." The case law "emphasizes the important role of lawyers at this time in assisting separated parents to deal with the unprecedented parenting challenges which require them to balance child safety concerns against their obligation to obey existing court orders regarding parenting."[117]

112. The court expressed displeasure at both parties and their respective counsel *Haaksma v. Taylor.* Justice Kurz reviewed the duty of candour required in *ex parte* proceedings, the applicable code of conduct for lawyers (set out in the Law Society of Ontario's Rules of Professional Conduct), and a lawyer's duty to assist the court in it's triaging role as part of their duty to enable to court to deal with cases justly (pursuant to the Ontario *Family Law Rules*). The court's Notice that regular operations were suspended also called for "the cooperation of counsel and parties to engage in every effort to resolve matters." Given restricted court access, "the role of parties' counsel is more important than ever."[118]

Moving Forward: Forgiveness and Compassion

113. The pandemic case law shows parents fighting over things like sharing basic information about household practices, ski trips, horseback riding, and limited

[116] *SAS v. LMS*, 2020 ABQB 287, at paras. 38-42 & 44 (1.), Graesser J. (April 22, 2020).

[117] *Douglas v. Douglas*, 2020 ONSC 2160, at para. 15, MacPherson J. (March 25, 2020). *Allman v. Allman*, 2020 ONSC 2634, at para. 10, McSweeney J. (April 28, 2020).

[118] *Haaksma v. Taylor*, 2020 ONSC 2656, at paras. 13-34, Kurz J. (April 28, 2020).

exposure to, for example, a parent's co-worker. Not to downplay the risks of COVID-19 or the potentially serious or fatal potential outcomes, but these concerns and occasional lapses in judgement should be kept in perspective. Despite court comments that parents will be held "accountable" and the potential perceived unfairness, not ***every*** breach of a public health measure, court order/agreement, or ideal parental judgment will (or should) have legal consequences.

114. Even pre-pandemic, the case law from across the country and in the domestic and child protection context has recognized that parents are only human, and it is not realistic nor appropriate to hold parents "to a standard of perfection."[119]

115. During the pandemic, Justice Nishikawa has strongly emphasized the importance of parental conduct and communication, while at the same time recognizing the additional challenge of being in uncertain and rapidly changing times:

> Parents will inevitably have differences of opinion as to how best to protect their children's health and well-being. The current situation is especially challenging because the health and safety recommendations of public health authorities have been changing on a weekly, and sometimes daily, basis based on the best available information at the time. For example, when Ora went to work with Dr. Herman and attended the Bat Mitzvah with Dr. Kideckel, the World Health Organization had not yet declared a pandemic and public health protocols did not yet include the social distancing requirements that came into effect a few days later. Conduct that might not have seemed risky at the beginning of March is viewed differently now.[120]

116. It is appropriate to encourage parties to work together to overcome temporary lapses of judgment and imperfect communications.[121] There will be more serious cases that demand judicial intervention where the pattern is long-lasting and a parent prioritizes their distain for the other parent or their own best interests over the child's.

[119] E.g., *D.O. v. A.H.*, 2018 NLSC 107 (WL), at para. 49, Butler J.

[120] *Herman v. Kideckel*, 2020 ONSC 2021, at para. 12, Nishikawa (April 2, 2020).

[121] E.g., *Scheulderman v. Kingston*, 2020 ONSC 2615, at paras. 50-59, Trousdale J. (April 27, 2020).

XI. Other Ongoing or Post-Pandemic Issues

Make-up / Compensatory Access

117. There are now numerous COVID-19 cases where make-up / compensatory access is dealt with quite differently. In some cases, make-up access is ordered immediately[122] or the issue is adjourned[123]. In other cases, make-up access is not considered urgent[124] so not dealt with at all at the urgent motion stage.

118. I expect to continue to see varying results, somewhat dependent on the jurisdiction. In Ontario, there appears to be more variety in judicial attitudes, likely as a result of a lack of legislative guidance specifically on make-up time (it is subsumed into the general best interests test). In contrast, BC's legislation specifically deals with compensatory parenting time where there is a denial of parenting time or contact.[125]

119. The Alberta case of *SAS v. LMS* endorsed an approach that make-up access is usually not urgent, and parents should negotiate the issue:

> It should be recognized that this pandemic is expected to end at some stage, and life as we knew it before mid-March will return to some sort of normalcy. While parents may be unhappy or even devastated at not having their children with them, this is a temporary situation. Missing a few access visits, or even a few months of face to face visits is unlikely to have a major long-term impact on the child's relationship with the parent who is only able to communicate electronically over this period. Making up "missed time" is not

[122] E.g., *Feldman v. Knight,* 2020 ONSC 1971, at para. 18, Chozik J. (April 3, 2020); *C.L.B. v. A.J.N.*, 2020 ONCJ 213, at paras. 70-74, Sherr J. (April 27, 2020); *Berube v. Berube*, 2020 ONSC 2591, Howard J. (April 24, 2020),

[123] *Multani v. Rana,* 2020 ONSC 2433, at paras. 134 (3.) [partially ordered and the remaining make up access adjourned to be spoken to at the first case conference].

[124] *Tessier v. Rick*, 2020 ONSC 2391, McEachern J. (April 20, 2020); *Jeyarajah v. Jeyamathan*, 2020 ONSC 2636, at para. 20, Kumaranayake J. (April 27, 2020).

[125] *Family Law Act,* SBC 2011, c. *25, s. 61,* http://www.bclaws.ca/civix/document/id/complete/statreg/11025_04.

> an emergency and should be discussed between the parties before an application is made after the pandemic ends.[126]

Police Enforcement

120. The case law also shows mixed results on police enforcement clauses. Sometimes the court orders it, often without saying why it. Other times, the court expresses general reluctance and that a police enforcement clause is premature due to the usual concerns about negative psychological harm to children and families in addition to new concerns about exposure to more people in light of COVID-19.[127] The court may also be concerned about notice being given, which is "particularly important during a period in which police service priorities have been refocused."[128] The motion judge may also decide not to deal with it on the basis that police enforcement is not an urgent issue.[129]

Use of Mental Health Professionals

121. As indicated in some of the case law, above, an emerging issue is how to get evidence of the views and preferences of a child in the context of adjusted "regular" court processes.[130]

122. Government-funded services have no or limited capacity, although attempts to broaden the scope of services will continue as the pandemic continues.[131]

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[126] *SAS v. LMS*, 2020 ABQB 287, at paras. 38-42 & 44 (1.), Graesser J. (April 22, 2020).

[127] *E.g., Medu v. Medu*, 2020 ONSC 2582, McSweeney J., at paras. 22-23.

[128] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 4, McGee J. (April 17, 2020).

[129] *Jeyarajah v. Jeyamathan*, 2020 ONSC 2636, at para. 20, Kumaranayake J. (April 27, 2020).

[130] See paras. 90-91 for summaries of *Vasilodimitrakis v. Homme*, 2020 ONSC 2355 (Div. Ct.), Mitrow J. (April 22, 2020) & *Droit de la famille – 20578*, 2020 QCCS 1287.

[131] E.g., The Office of the Children's Lawyer (OCL) in Ontario was prioritizing limited resources to urgent matters and not providing Voice of the Child Reports until further notice: *Abesteh v. Eagle*, 2020 ONSC 2086, at paras. 7-8, Mackinnon J. (April 1, 2020); *Reitzel v. Reitzel*, 2020 ONSC 1977, at para. 11 c., Madsen J. (March 31, 2020), & the Notice of the Profession – Central East Region – Family (Amended April

123. Private services may be unaffordable. Further, in some jurisdictions, the court rules prohibit evidence related to the best interests of the children from a unilaterally retained expert. For example, relatively new (effective September 30, 2019) subrule 20.2(8) of the Ontario *Family Law Rules*, read in conjunction with the definitions set out in subrule 20.2(1), only allows a jointly-retained litigation expert to give evidence on a claim for custody of or access to a child under the *Divorce Act* or the provincial legislation, unless the court orders otherwise, or orders a court-appointed expert under subrule 20.3(1). Courts have historically discouraged unilaterally retained experts, so this rule change makes sense in normal times from a policy perspective to require a joint retainer or court order. However, while courts are still largely constrained to hearing only urgent or limited matters, this hampers the ability to move some cases towards a resolution.

124. The Ontario courts appear restricted in their ability to deal with these matters, for example by commending counsel for agreeing or suggesting that the parties agree to a jointly-retained private professional.[132]

School Closures and Summer Schedules

125. Ideally, the parents work together to determine how to manage work and child-care responsibilities in their children's best interests while children are not physically in school due to COVID-19.

126. For example, the court commented positively on the parties agreeing to a temporary, without prejudice "week about" arrangement similar to the summer holiday schedule for the time the children are not in school due to COVID-19.[133]

17, 2020). It is also my understanding that Ontario lawyers have started getting notices that the OCL will be providing "virtual" video chat observation visits and interviews in some cases.

[132] See *Dias v. Gagnon*, 2020 ONSC 1716, at para. 34, Hebner J. (March 20, 2020); *Abesteh v. Eagle*, 2020 ONSC 2086, at para. 8, Mackinnon J. (April 1, 2020).

[133] *Livingstone v. Cooper*, 2020 ONCJ 174, at paras. 23-25, O'Connell J. (April 4, 2020).

127. Thus, the court may encourage the parties to agree on this issue themselves. However, the court may find that there has been no material change in circumstances and no reason to disturb the child's regular routine even when school is not in session due to COVID-19.[134]

128. It does not appear to be safe to assume that the summer schedule should automatically apply. Several court cases do not support this interpretation. For example, the Saskatchewan Court of Queen's Bench has held that the holiday schedule should not be presumed to apply when school as an institution was proceeding as home based learning. The father had to show that a different parenting regime than the regular schedule was in the children's best interests. Until he did so, the parenting regime that applied when school was in session continued. The Ontario Superior Court of Justice has also commented that the "right answer" was for the court-ordered regular schedule to continue, and not the father's reliance on the summer schedule, subject to a new schedule being agreed upon or ordered.[135]

129. On the other hand, the wording of the existing court order or agreement, or the parties' past arrangements may change the result. A different Ontario Superior Court of Justice decision saw the issue as one of interpretation of the existing order,

[134] *Blaskavitch v. Smith*, 2020 ONSC 2506, at para. 45, Trousdale J. (April 4, 2020).

[135] See *Bevan v. Lesage* (Regina, Saskatchewan Court of Queen's Bench, Court File No. FLF 92 of 2014 - JC), at paras. 5, 17-18, & 20, Brown J. (March 25, 2020); *Officer v. Sawyer*, 2020 ONSC 2156, at paras. 10 & 13-14, Madsen J. (April 8, 2020: the mother agreed to give the father additional days given the school closure, but then the father overheld the children and the parties disagreed on whether the summer schedule applied). See also *Stewart v. Reid*, 2020 ONSC 2262, at paras. 33, MacEachern J. (April 14, 2020: court does not agree with father that, because schools are closed, the summer or other holiday schedule should apply; children were historically and continued to be homeschooled by mother; court nevertheless noted "On March 31, 2020, the OCDSB announced that effective April 6, 2020, it was moving into its second phase of "Learning At Home", which includes re-establishing teacher-led learning. Schools are not closed; they are just not taking place in the regular physical classroom"). See also *Droit de la famille – 20578*, 2020 QCCS 1287, at paras. 21-22, Villeneuve (April 9, 2020; youngest child's schedule to continue as if the child was still in school).

which said that the father had care of the almost 5-year old daughter, Q, on alternating weekends "if Q is in school that day." The court held as follows:

> In normal circumstances, the order speaks for itself and must be followed unless the parties agree otherwise. For instance, in this case, if [the almost 5-year old child] Q was attending school, there would be no issue. In the future, without agreement, the parties must follow the terms of the order. But these are not normal circumstances.
>
> It cannot be said that the child is "in school" when she will not be in such a building for the foreseeable future. While I have no evidence on the point, I do not expect that junior kindergarten will have a schedule of classes or homework that might apply to an older student.
>
> In this case, the parties have worked out a comprehensive parenting schedule that is essentially equal except while the child is in school and during the summer months.
>
> During the summer months, the order says that "Each party shall have two (2) non-consecutive weeks of holidays with Q during the summer holidays (July and August)." I do not read that term as two weeks a month but rather two weeks over July and August. Accordingly, there is a gap in what the parenting time should be during the summer months when Q is not in school. That will require a resolution at some time as well.
>
> However, as set out above, the agreement wisely adds assistance for any unforeseen difficulties:
>
> > The parties shall when possible be flexible regarding scheduling of care periods with Q.
>
> Understandably, each thinks the other is inflexible and both think they are correct. Considering all of the above, I find that both are incorrect in their view of the present order and the present circumstances.
>
> The child is not in school and the present every other weekend schedule unduly restricts the child from having time with her father.
>
> Although Q has now alternated a week about over the last three weeks, those lengthy times away from each parent cannot continue indefinitely. Shorter time intervals away from each parent are in her best interests. Given Q's age and the change from the regular pattern, I find that four days are appropriate.
>
> There is no reason that the present situation cannot be used to share the time the child spends with each parent.
>
> Given that neither parent is working, I need not concern myself with weekdays and weekends; for now, they are all the same.
>
> **Result**
>
> For those reasons, until school reopens, or Mr. Manning returns to work, paragraph 3(a) of the order dated October 21, 2019 is suspended.

> In its place, commencing Monday April 27, 2020, the child shall spend 4 days with Ms. Ross followed by 4 days with Mr. Manning.
>
> When school and/or work resume, the October 21, 2019 parenting order schedule will continue.[136]

X. Post-Pandemic Issues

Variations / Motions to Change

130. It is safe to anticipate an overwhelming amount of variation / motion to change applications. It is important to keep in mind the applicable test in the *Divorce Act*[137] or provincial/territorial legislation.

131. Further, the Supreme Court of Canada, in *Gordon v. Goertz* (1996) ("*Gordon*") set out a two-stage test in a parenting variation cases:

> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
>
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.[138]

132. For example, an increase in conflict leading to a breakdown in joint custody or the parties not working together as contemplated ***may*** result in a material change in circumstance.[139] A material change ***may*** also result from ongoing difficulties

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[136] *Manning v. Ross*, 2020 ONSC 2529, at paras. 48-60, Lemon J. (April 23, 2020).

[137] For parenting, mainly s. 17(5) of the *Divorce Act*, note the amended wording used in Bill C-78 which received Royal Assent and is still scheduled to come into effect on July 1, 2020. See https://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/royal-assent#ID0E3BAC.

[138] *Gordon v. Goertz*, [1996] 2 SCR 27, at para. 49.

[139] See e.g., *Ali v. Bashir*, 2019 ONSC 2381, at para. 163. In contrast, when conflict is chronic and not a material change, see e.g., *Dunn v. Shaw*, 2014 ONSC 1953, at paras. 45-50.

surrounding access and the current parenting arrangements proving impractical.[140]

133. The courts will need to look at each case carefully to consider how long the changes have existed, what was contemplated at the time of the earlier order or agreement, and how the changes impact on the child.

134. There is also case law indicating that, to qualify as a material change, the change must be substantial and continuing. A few judges have already offered some insight into this issue. For example, Justice McGee held as follows:

> It bears observing that although COVID-19 restrictions are dramatically upsetting the *status quo*, they do not constitute a material change in circumstances *because they are temporary*. When public health restrictions are lifted there will be no new advantage held by a withholding parent, whether or not the withholding was justified. The test will remain the best interests of the child."[141]

135. On the other hand, after reviewing the changes that that have occurred since the onset of COVID-19, and the uncertainty on how long it will last, Justice Kwolek in a parenting case concluded as follows: "The events of Covid-19 are life altering circumstances that have affected virtually every facet of our daily lives. The onset of the pandemic, the court finds, is a material change in circumstances which can potentially justify a change in the existing court order."[142]

136. Thus, it is difficult to predict how the material change issue will be treated. If social distancing and other measures are lifted soon and we don't or only experience a limited "second wave", I expect that the pandemic, in itself, will not constitute a material change, but circumstances arising from the pandemic might, depending on the facts. The longer it goes on, the more likely it will be treated as a *prima facie* material change in circumstances, but it will still require, in the parenting context,

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[140] *Dunn v. Shaw*, 2014 ONSC 1953, at para. 44.

[141] *Matus v. Gruszczynska*, 2020 ONSC 2353, at para. 22, McGee J. (April 17, 2020).

[142] *Trudeau v. Auger*, 2020 ONCJ 197, at paras. 44-47, Kwolek J. (April 27, 2020).

that a change is required to the existing order or agreement based on the best interests of the child. I also expect some regional differences across Canada.

Backlog of Court Cases

137. The courts were already facing massive backlogs before COVID-19 restricted operations. As just one example, the Court of Queen's Bench of Alberta noted as follows in April 2020: "When the system was running normally, a one week trial could not be scheduled until the fall of 2021, barring cancellations. My best guess is that the parties are probably a minimum of 18 months from trial, starting from when court resumes regular sittings."[143]

138. Besides strictly parenting disputes, there will also be an unprecedented number of support issues arising from massive job losses, industry changes, and income reductions. There will also be property implications (including bankruptcies), increased stress and trauma from family violence issues, increased mental health issues, and new separations.

139. The courts cannot afford to go backwards. To better serve the public, they need to rethink how to leverage new efficiencies. E-filing and more remote phone/video appearances are needed to move cases along safely while COVID-19 remains a concern and should be built and expanded on. I also believe court process need to be simpler so that court can be accessible to the public and resolutions can be reached in a proportionate way. Variation proceedings are a perfect area for reform, perhaps in phases to allow for simpler and then more complex cases to be streamlined and dealt with proportionately.

140. On the other hand, restricted court operations have created further opportunities for dispute resolution alternatives such as collaborative family law, mediation,

[143] *JMS v. JDS*, 2020 ABQB 272, at para. 22 (April 20, 2020 decision from Edmonton based on hearing heard in February 2020).

arbitration, and parenting coordination that have generally been able to adapt more nimbly to offer virtual and remote services. This timing aligns with new provisions in the *Divorce Act* that will require parties, to the extent that it is appropriate to do so, to try to resolve matters through a family dispute resolution process.[144] Similar duties will be imposed on legal advisors to:

> **(a)** to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
>
> **(b)** to inform the person of the family justice services known to the legal adviser that might assist the person
>
> **(i)** in resolving the matters that may be the subject of an order under this Act, and
>
> **(ii)** in complying with any order or decision made under this Act; and
>
> **(c)** to inform the person of the parties' duties under this Act.[145]

141. However, some families will always need to rely on the court system. I encourage all participants in the justice system to think about these issues and take action. One way that lawyers can help is by joining and actively participating in organizations like the CBA, provincial/territorial bar associations, interdisciplinary associations, and local initiatives. As Justice Pazaratz says in *Ribeiro*, "There will be no easy answers. … We are all going to have to try a bit harder – for the sake of our children."[146]

[144] See s. 7.3 at https://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/royal-assent#ID0E3BAC.

[145] See s. 7.7(2) at https://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/royal-assent#ID0E3BAC.

[146] *Ribeiro v. Wright,* 2020 ONSC 1829, at paras. 17 & 30, Pazaratz J. (March 24, 2020).