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**Family Law Newsletters**  
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— **Franks & Zalev - This Week in Family Law**

Aaron Franks and Michael Zalev

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**Breaking News: Covid-19**

Courts throughout Canada are largely closed. Although judges are still available to deal with urgent issues, including parenting issues relating to Covid-19,<sup>1</sup> we must remind our clients that they cannot use the pandemic to try to unilaterally change the court ordered or agreed upon parenting arrangements.

We must also encourage our clients to take reasonable positions during this difficult time. As Justice Myers stated last week in *Ali v. Tariq* (2020), 2020 ONSC 1695 (Ont. S.C.J.), a civil case about an urgent request to discharge a Writ of Execution so that a sale could close, "the Notice to the Profession [in Ontario that was released to address Covid-19] calls upon counsel and clients to do their part during these urgent times." Justice Myers also strongly encouraged counsel to step in and do what they could to get the case settled by noting that the urgent issues appeared "to be a matter that counsel acting in good faith ought to be able to lead their clients to settle today." People should not be seen to be taking advantage of a crisis.

At the very least, if a dispute arises that cannot be resolved despite reasonable and *bona fide* best efforts, the parties should be agreeing on an expedited process for resolving the dispute as quickly as possible such as summary arbitration to be heard in writing or with video conferencing software. Courts are not going to be impressed with a parent who acts unilaterally and then refuses to let his/her decision be reviewed by an independent and objective third party. Temporary without prejudice agreements are another option.

We are also starting to see various family courts take steps to deal with potential Covid-19 related parenting issues before they arise. For example, many standard Parenting Orders in Texas provide that if the non-residential parent has the child for spring break, s/he shall return the child to the residential parent the night before school resumes. As schools in Texas are currently closed, some non-residential parents apparently started "wondering" whether they could keep their children until the night before the schools actually reopen. The Supreme Court of Texas dealt with this question proactively by issuing an Emergency Order ([www.txcourts.gov/media/1446106/209043.pdf](http://www.txcourts.gov/media/1446106/209043.pdf)) that confirmed that the *original* school schedule would continue to apply unless the parties agreed or the court order otherwise:

2. This order applies to and clarifies possession schedules in Suits Affecting the Parent-Child Relationship. For purposes of determining a person's right to possession of and access to a child under a court-ordered possession schedule, the original published school schedule shall control in all instances. Possession and access shall not be affected by the school's closure that arises from an epidemic or pandemic, including what is commonly referred to as the COVID19 pandemic.

We will try to keep you apprised of Covid-19 related family law developments as the situation unfolds, and we would be grateful to, you, our readers, if you could let us know about any Covid-19 related family law news or cases that you come across over the coming weeks and months.

This is a time to lead by example and for consideration, client control, and cooperation.

Everyone, please take the health warnings seriously, protect yourselves, and to borrow from the best TV Police Drama ever written: Let's be careful out there. (Hill Street Blues)

Stay healthy, everyone.

Aaron and Michael

### **Grandma Can You Hear Me???**

*BM v. JM*, 2019 CarswellAlta 2715 (Alta. C.A.) - Rowbotham, O'Ferrall, and Velduis JJ.A.

This brief decision from the Alberta Court of Appeal addressed a dispute over whether and when the maternal grandparents should be able to have contact with their 11-year-old grandson. The case shows that even though courts will generally respect a parent's decision about whether and when a grandparent should be able to see a grandchild, they will also not allow a parent to capriciously terminate a longstanding positive relationship between a child and a grandparent.

The authority for a court in Alberta to make an Order for contact between a child and a non-parent is set out in s. 35 of the *Family Law Act*, S.A. 2003, c. F-4.5 (the "FLA"), which provides that:

35(5) Before the court makes a contact order, the court shall satisfy itself that contact between the child and the person for whom contact with the child is proposed is in the best interests of the child, including whether

(a) the child's physical, psychological or emotional health may be jeopardized if contact between the child and the person for whom contact with the child is proposed is denied, and

(b) the guardians' denial of contact between the child and the person for whom contact with the child is proposed is unreasonable.

For reasons that are not explained in the decision, it does not appear that the mother was really involved with the child. However, her parents had enjoyed significant contact with the child for almost his entire life, including for the three years between the time his parents separated and the time of the motion in the court below.

While the father was prepared to let the maternal grandparents continue having contact with the child, his position was that he would only do so, "in his presence and under his supervision". He also insisted that, "all communications between the grandparents, who were French-speaking Montrealers, and the child, who attended a Francophone school in Calgary, had to be in English." However, the father did not explain why he wanted to impose these seemingly arbitrary conditions on the grandparents' contact with the child, and this significant omission undoubtedly created serious problems for his case.

In granting an Order requiring the father to let the paternal grandparents have contact with the child, the chambers judge found that, "the conditions the father proposed with respect to contact amounted to a denial of the grandparents contact and that such denial was unreasonable." The chambers judge also found that the father had not adequately explained why he "made his sudden, unreasonable and completely irrational decision to prevent [the child] from seeing his loving grandparents."

On appeal, the father took the position that the motion judge had erred because he only had jurisdiction to make a contact Order under Alberta's *Family Law Act* if he was satisfied that there was a risk that "the child's physical, psychological, or emotional health would be jeopardized", and that the father was "unable or unwilling" to act in the child's best interests. The father also argued that since the motion judge found that there was no evidence that such a risk existed, and since he had not found that

the father was "unable or unwilling" to act in the child's best interests, the motion judge had erred by making make a contact Order against the father's wishes.

The Court of Appeal wholly rejected the father's arguments, and found that they were based on "a misapprehension of the law". Instead, it agreed with the flexible approach the Alberta courts have generally taken with respect to contact Orders (for example, see *C. (J.L.) v. L. (J.L.)*, 2016 CarswellAlta 2146 (Alta. Prov. Ct.) and *N. (D.P.) v. Toews*, 2013 CarswellAlta 1673 (Alta. Q.B.)), and confirmed that a contact Order can be made as long as the court is satisfied that it would in the child's best interests to preserve a positive relationship between the child and a non-parent who has played an important role in the child's life:

[19] . . . The making of a contact order is not a comment on the willingness or the ability of the parent to act in the child's best interests. It is simply an order designed to promote the child's best interests by preserving contact he or she had with a significant other (in this case, the grandparents) in circumstances where the person seeking contact obviously loves and enhances the quality of the child's life and where the child reciprocates that love and enjoys the enhancements.

Thus, while the father generally had the right to make decisions about who his child had contact with, the Court of Appeal was not prepared to let him effectively terminate the child's longstanding and positive relationship with his maternal grandparents for no good reason. Although the Court of Appeal did not expressly refer to *Chapman v. Chapman* (2001), 15 R.F.L. (5th) 46 (Ont. C.A.) ("*Chapman Ontario*") which is still the leading decision on grandparent access, its reasoning is entirely consistent with Justice Abella's statement in *Chapman* that:

[19] A relationship with a grandparent can - and ideally should - enhance the emotional well-being of a child. Loving and nurturing relationships with members of the extended family can be important for children. **When those positive relationships are imperiled arbitrarily, as can happen, for example, in the reorganization of a family following the separation of the parents, the court may intervene to protect the continuation of the benefit of the relationship[.]** [emphasis added]

As noted below, outside of Quebec, two of the leading cases in the area of "grandparent access" coincidentally have the same name. The first is *Chapman v. Chapman*, 1993 CarswellBC 1522 (B.C. S.C.) from the British Columbia Superior Court ("*Chapman BC*"). The second is *Chapman Ontario* from the Ontario Court of Appeal, noted above.

*Chapman Ontario* is a strong statement in favour of what has come to be called the "parental autonomy approach": in the absence of evidence that demonstrates a parent's inability to act in the best interest of his or her children, a parent's right to make a decision on his or her children's behalf with regard to contact with grandparents should be respected.

The other main approach, the so-called "pro-contact" approach, is associated with the Nova Scotia Court of Appeal decision in *Simmons v. Simmons* (2016), 89 R.F.L. (7th) 111 (N.S. C.A.).

*Chapman BC*, can best be characterized as a hybrid of the two. It holds:

- There is no presumption that grandparent contact is in the best interests of the child;
- The onus to establish that grandparent contact time is in the best interests of the child is on the grandparent - not on the parent to establish otherwise;
- The courts should be reluctant to interfere with a custodial parent's decision in this sort of matter and should only do so where it is in the best interest of the child; and
- While judges must be vigilant to prevent parents from alleging fictitious or imagined conflicts as a reason to deny contact time, in cases of "real conflict and hostility" between the parent and grandparent, the child's best interest will rarely be served by granting access.

Based on this decision from the Alberta Court of Appeal, Alberta now sits somewhere between the two general approaches as well.

## Who Gets the Ring? And the Dog?

*King v. Mann*, 2020 CarswellOnt 178 (Ont. S.C.J.) - Minnema, J.

Family lawyers are heaps of fun at cocktail parties. Everyone has a question. And one of the most popular questions? If an engagement is called off - who gets to keep the ring? This was one of the questions answered in *King v. Mann*.

The parties were able to settle most of their issues, but they were not able to resolve a handful of personal property issues, including bailment of a safe and its contents, ownership of an engagement ring, and ownership and residency of Copper, the dog.

The parties were not married, but had been living together since December of 2009, when the respondent moved into a house owned by the applicant. They later bought a house together as joint tenants. They agreed that the applicant would pay the bulk of the down payment, that the respondent would purchase all the major appliances, and that they would share the expenses, including mortgage payments, equally.

At some point, the applicant proposed to the respondent and "gave her" an engagement ring. The respondent accepted. A dog, Copper, joined the household as a puppy in 2015.

In early October 2015, the applicant was arrested and charged with domestic violence on the respondent. The parties tried to save their relationship, but they were ultimately not successful.

### The Engagement Ring

Justice Minnema noted that the applicant had proposed marriage to the respondent. The applicant provided an engagement ring - and, importantly, his evidence that the ring was given conditional on marriage, was not disputed. The applicant's position was that as the condition of the gift - marriage - was not fulfilled, he was entitled to have the ring returned. The respondent's position was that since it was the applicant's fault that the marriage did not take place (given the domestic assault), at law she did not have to return the ring.

While both parties wanted to get deep into the question of who to blame for the broken engagement, Justice Minnema adeptly avoided that swamp by relying on s. 33 of the *Marriage Act*, R.S.O. 1990, c. M.3, which provides as follows:

33. Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift.

Therefore, any evidence about who was to blame for the breakdown of the relationship was irrelevant (see e.g. *Newell v. Allen*, 2012 CarswellOnt 15376 (Ont. S.C.J.) at paragraph 21).

For jurisdictions without a provision similar to s. 33 of the *Marriage Act*, the common law rules are set out in *Iliopoulos v. Gettas*, 1981 CarswellOnt 1224 (Ont. Co. Ct.) at para. 15 (pardon the anachronistic language):

[15] The origins of the engagement ring and the engagement in our law was outlined in *Cohen v. Sellar*, [1926] 1 K.B. 536, by McCardie J. At p. 547, he quotes with approval the conclusions of Shearman J. in *Jacobs v. Davis*, [1917] 2 K.B. 532 at p. 533:

Though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it. Whether the ring is a pledge or a conditional gift, the result is the same. The engagement ring given by the plaintiff to the defendant was given upon the implied condition that it should be returned if the defendant (i.e., the lady) "broke off the engagement. She did break the contract, and therefore must return the ring." It seems reasonably clear that Shearman J. impliedly held that if the plaintiff himself had broken off the promise he could not get back the ring.

He concludes at pp. 547-8:

This I hold to be the correct legal view. If a woman who has received a ring refuses to fulfil the conditions of the gift she must return it. So, on the other hand, I think that if the man has, without a recognized legal justification, refused to carry out his promise of marriage, he cannot demand the return of the engagement ring. It matters not in law that the repudiation of the promise may turn out to the ultimate advantage of both parties. A judge must apply the existing law as to the limits of justification for breach.

There is also a common law requirement that there be a "timely demand" by the donor for the return of the ring: *Newell v. Allen*, 2012 CarswellOnt 15376 (Ont. S.C.J.) at para. 22 and *McArthur v. Zaduk* (2001), 21 R.F.L. (5th) 142 (Ont. S.C.J.). *McArthur* also suggests that delay in demanding the ring back changes its character from a conditional to an unconditional gift.

As noted by Justice Minnema, with the question of fault having been eliminated by statute, the only remaining question was the timing of the demand. The *timing* of the demand by the donor for a return of the ring was important evidence as to the nature of the gift, as a delay in requesting a return when it is clear the marriage is no longer proceeding could support a finding that the gift was meant to be unconditional. However, the conditional nature of the gift was not in issue in this case.

Of note, the law in British Columbia is similar to the law in Ontario: an engagement ring is a conditional gift that must be returned if the marriage does not take place. See *Hitchcox v. Harper*, 1996 CarswellBC 1908 (B.C. S.C. [In Chambers]); *Sperling v. Grouwstra*, 2004 CarswellBC 518 (B.C. S.C.); and *Zimmerman v. Lazare*, 2007 CarswellBC 969 (B.C. S.C.).

In this case, the engagement ring was a gift conditional on a marriage that did not take place, and there was a timely demand. Therefore, the applicant got the ring back.

### "Copper", The Dog

Although Copper was unquestionably purchased by the respondent, the applicant claimed that Copper had been a gift to him. The respondent denied the gift, claimed that Copper was always her dog, and indicated that she had no intention of sharing him or letting him go. There was no suggestion that either party ever neglected Copper, and both conceded that the other took good care of and loved the dog.

While we do not intend to fully detail the arguments regarding pet ownership, given the seeming regularity with which this issue arises, we wanted to provide a general summary, as set out by Justice Minnema:

- Notwithstanding the universal agreement in the case law that dogs, being sentient beings, are a special, important, and unique category of personal property, for the purposes of practicality and expediency the law continues to hold that disputes over dogs are to be approached in the same manner as with any other personal property, namely the relevant question is ownership: *Warnica v. Gering*, 2004 CarswellOnt 5605 (Ont. S.C.J.) at para. 28, affirmed 2007 CarswellOnt 673 (Ont. C.A.) at para. 6; *Thompson v. Thompson* (2005), 32 R.F.L. (6th) 224 (B.C. S.C.) at para. 25; *Anderson v. Antoine*, 2006 CarswellNWT 50 (N.W.T. S.C.) at para. 29; *Henderson v. Henderson*, 2016 CarswellSask 579 (Sask. Q.B.) at para. 23; *McIntosh v. Daoust*, 2016 CarswellMan 439 (Man. Q.B.) para. 17; *MacDonald v. Pearl*, 2017 CarswellINS 188 (N.S. Small Cl. Ct.) at para. 25b.; *Brown v. Larochelle*, 2017 CarswellBC 1034 (B.C. Prov. Ct.) at paras. 11 and 16; and *Baker v. Harmina* (2018), 7 R.F.L. (8th) 283 (N.L. C.A.) at para. 12.
- The sole question was whether ownership changed. While there are several ways that could happen, the applicant spending time with the dog, spending money on the dog, and/or treating the dog generally as the family pet, would not affect a change in ownership: *Warnica* at para. 28; *McIntosh* at para. 11, and *Baker* at paragraphs 13 and 27.
- The gifting analysis here would be as it would for any other property. The required elements to establish a gift are donative intent, a sufficient act of delivery, and acceptance of the gift by the donee.

- Even where a person has a "change of heart" and "falls in love" with the animal, that does not change the alleged donor's intentions. Choosing a name also does not change ownership.

In this case, the evidence was that the respondent clearly wanted a dog - and that the applicant didn't. Despite the lack of agreement, the respondent bought Copper, and brought him home without the applicant's knowledge or consent and, in fact, in the face of his clear opposition. The respondent wanted a dog, and the applicant did not.

Although upon returning home with the puppy, the respondent allegedly told the applicant, "Look what I got for you," Justice Minnema found that, objectively, in the circumstances, such a statement did not indicate an intention to gift. He found:

It was more like when one partner cooking porridge for himself says to the other who hates porridge "look what I made you". The word I think is facetious. In the context of the applicant's clear opposition, those statements do not indicate that the respondent was seriously intending to make a gift. There was no birthday, anniversary, or other occasion that would prompt the giving of a gift. It would be very odd for the respondent to buy the dog she had long wanted and then immediately give it away to someone who up to that point was clearly indicating that he did not want a dog.

Bringing the puppy home did not constitute a sufficient or clear act of delivery, and the applicant could not revive a previously rejected or incomplete gift by later accepting it. It would have to be re-offered.

### **Capacity & Special Parties**

*Jewish Family and Child Service of Greater Toronto v. E.K.B.* (2019), 34 R.F.L. (8th) 180 (Ont. S.C.J.) - Kristjanson J.

This is a useful case to have on hand when dealing with a party who may not have capacity to instruct counsel. It also addresses the test for appealing based on ineffective assistance of counsel in the civil context, a ground of appeal that is rarely raised or successful outside the criminal context.

In this case, as a result of various concerns about the mother's conduct, Jewish Family and Child Service of Greater Toronto ("JF&CS") brought a motion to have the mother declared a special party on the basis that she did not have capacity to instruct counsel.

In order to have capacity to instruct counsel, a litigant must be able to: (a) understand what s/he has asked the lawyer to do for him/her and why; (b) be able to understand and process the information, advice, and options the lawyer presents; and (c) appreciate the advantages and disadvantages and the potential consequences associated with the options s/he is presented with: *Costantino v. Costantino*, 2016 CarswellOnt 18301 (Ont. S.C.J.) at paras. 47-48.

Justice Sherr of the Ontario Court of Justice was satisfied that the mother did not have capacity to instruct counsel, and appointed the Public Guardian and Trustee (the "PGT") as her litigation guardian. The PGT then appointed counsel to represent the mother.

The mother did not appeal or try to vary Justice Sher's finding that she lacked capacity to instruct counsel.

JF&CS brought a motion for summary judgment to have the children placed in extended society care with no access to the mother. Justice Sager granted JF&CS's motion.

The mother appealed Justice Sager's decision to the Superior Court. Her primary ground of appeal was that she had capacity to instruct counsel when the summary judgment motion was heard, and she had been denied procedural fairness because she had not been allowed to retain and instruct her own lawyer. The mother also alleged that she had received ineffective assistance from the lawyer who the PGT had appointed to represent her.

In dismissing the mother's appeal, Justice Kristjanson found that the mother had waived her right to claim that she had capacity on the motion before Justice Sager because she had not raised this issue in the court below and, accordingly, could not raise it for the first time on appeal:

[65] The *Family Law Rules* do not outline the procedure to remove a representative. If the *Family Law Rules* do not cover a matter adequately, Rule 1(7) provides that the court may give directions, and the practice is to be decided by analogy to the *Family Law Rules*, other relevant statutes, and, if the court considers it appropriate, by reference to the *Rules of Civil Procedure*, R.R.O. Reg. 194.

[66] Rule 7.06 (1)(b) of the *Rules of Civil Procedure* provides that where, during a proceeding, "a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian." Thus, **if indeed EKB had capacity, she could have brought a motion, without notice, to continue the child protection proceeding without the PGT as representative.**

[67] **EKB did not bring a motion to continue the proceeding without the PGT acting as her personal representative.** If EKB contended that she was capable, as the party asserting capacity, she would have had the onus at that time to satisfy the court on a balance of probabilities that she was capable. **Having failed to bring a motion prior to the summary judgment hearing to continue the litigation without a personal representative, she has waived her rights to raise that issue, and cannot raise it now for the first time on appeal.** [emphasis added]

Although Justice Kristjanson did not cite any specific authority for the proposition that the mother had waived her right to raise a new issue for the first time on appeal, her decision is consistent with the weight of appellate decisions that have confirmed that appellate courts will generally not entertain entirely new issues on appeal. See e.g. *Loesch v. Walji* (2008), 52 R.F.L. (6th) 33 (B.C. C.A.); *Kaiman v. Graham*, 2009 CarswellOnt 378 (Ont. C.A.); and *Grosse v. Grosse* (2015), 62 R.F.L. (7th) 339 (Sask. C.A.).

Justice Kristjanson also rejected the mother's claim that Justice Sager had an obligation to investigate whether the mother had capacity before the motion proceeded even though the mother had not asked her to do so, and confirmed that:

- "... the motion judge's role is to adjudicate, not to investigate: *Children's Aid Society of Peel (Region) v. W. (M.J.)* (1995), 14 R.F.L. (4th) 196 (Ont. C.A.), at para. 48." [paragraph 70]
- "... a finding of special party status is intended to be for the entire duration of the litigation: *Costantino v. Costantino*, 2016 CarswellOnt 18301 (Ont. S.C.J.), at para. 56. Strategic and procedural decisions in family and child protection cases must be made throughout the proceedings." [paragraph 73]
- "While applying principles of protecting the vulnerable drawn from the *Substitute Decisions Act*, 1992 the special party rules protect the integrity of the court process and fairness for all parties: *626381 Ontario Ltd. v. Kagan, Shastri, Barristers & Solicitors* (2013), 2013 CarswellOnt 8104 (Ont. S.C.J.), at paras. 19-20." [paragraph 73]
- "Unless set aside, all parties and the court have a right to rely on the finding of special party status." [paragraph 73]
- "Once a party is declared a special party, they are incapable of instructing counsel, and therefore the onus rests on the representative to protect the best interests of the special party and conduct their litigation for them. As part of his obligation to represent the interests of the special party, as representative, the PGT may appoint counsel to represent the special party, as he did here." [paragraph 123]

Justice Kristjanson also dismissed the mother's appeal based on ineffective assistance of counsel, and provided a useful summary of the test for ineffective assistance in the civil context:

[94] The three-part test for ineffective assistance of counsel is set out in *R. v. Archer*, 2005 CarswellOnt 4964 (Ont. C.A.), at paras. 119-120, which I have adapted for the civil rather than criminal context:

- (1) When the claim is based on contested facts, **can the appellant establish the material facts on the balance of probabilities?**

(2) **Can the appellant prove that the lawyer's acts or omissions in the court below amounted to incompetence, measured against a reasonableness standard** and having regard to the circumstances as they existed when the impugned acts or omissions occurred? The reasonableness analysis must proceed upon a "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance."

(3) **Can the appellant prove that the lawyer's ineffective representation, if established, caused a miscarriage of justice?** A miscarriage of justice occurs if the appellate court is satisfied that **counsel's ineffective representation undermined the appearance of the fairness of the hearing, or the reliability of the result**. The result is rendered unreliable where the appellant proves that had counsel performed in a competent fashion, there is a reasonable possibility that the judge's decision could have been different. [emphasis added]

Although the test for ineffective assistance of counsel may appear relatively straightforward, we want to stress that appealing based on ineffective assistance is a *very* serious matter, and that, in addition to the principles that are set out in this case, counsel need to be aware that:

- "Ineffective assistance of counsel claims in civil cases are unusual and only available in the 'rarest of cases'." *8150184 Canada Corp. v. Rotisseries Mom's Express Ltd.*, 2016 CarswellOnt 1752 (Ont. C.A.) at para. 25.
- Ineffective assistance of counsel has a "very narrow application", and "is not a springboard from which an appellate court engages in a retrospective analysis of every aspect of a lawyer's conduct." *Children's Aid Society of the Regional Municipality of Waterloo v. C.T.*, 2017 CarswellOnt 19123 (Ont. C.A.) at para. 95.
- The lawyer who provided allegedly ineffective legal services will be given an opportunity to respond to the allegations against him/her. *SMTCL Canada Inc. v. Master Tech Inc.*, 2017 CarswellOnt 5019 (Ont. C.A.) at paras. 11-12.
- A party who alleges ineffective assistance automatically waives solicitor-client privilege over the former lawyer's file and communications with respect to the matters that are in dispute. *SMTCL Canada Inc. v. Master Tech Inc.*, at paras. 11-12.

#### Footnotes

- 1 See e.g. *Smith v. Sieger*, 2020 ONSC 1681, where Justice Kaufman ordered that a 16-year-old special needs child who was attending school in Utah be returned to Ontario immediately, and noted that: "The competing affidavits raise issues that would be important in normal times. Unfortunately, these are not normal times."

**Disclosure:** Epstein Cole was counsel for one of the parties in this case.