FAMLNWS 2020-12
Family Law Newsletters
March 30, 2020

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Covid-19, the Courts, and "Urgency"

"None of us have ever experienced anything like this. We are all going to have to try a bit harder - for the sake of our children."

Justice Pazaratz in *Ribeiro v. Wright*

—

We hope that you are all doing ok in this rather unprecedented time. Eventually - hopefully not before too long - things will return to normal (whatever "normal" means for matrimonial lawyers). In the meantime, we must all do everything we can to help our clients navigate through uncharted waters, and to help ensure that our already overburdened judges and court staffs do not have to deal with matters that can wait. The system must focus on true emergencies. The cases that cannot wait. The proverbial "kids in the plane on the tarmac" (to the extent that planes are flying).

While we have not yet come across any decisions from provinces other than Ontario that have dealt with COVID-19 related family law issues, we will let you know as soon as we do. We would also greatly appreciate it if you could continue to forward to us any decisions about COVID-19 you think might be of interest to family law lawyers, judges, and litigants.

We are going to comment on four cases that were released last week and that deal with the meaning of "urgency" with respect to parenting issues during the COVID-19 crisis: Justice Pazaratz's decision in *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.); Justice Madsen's decision in *Onuoha v. Onuoha*, 2020 ONSC 1815 (Ont. S.C.J.); Justice Diamond's decision in *C.Y. v. F.R.* (March 20, 2020), Doc. FS-20-16266 (Ont. S.C.J.); and Justice MacPherson's decision in *Douglas v. Douglas* (March 25, 2020), Doc. 684/19 (Ont. S.C.J.).

Although these cases are from Ontario, the principles that they set out should be helpful to those of you who work in other jurisdictions across Canada.

We will see an end to this, upon which there will be plenty of time for zealous advocacy. So, until then, be kind and cooperative, and encourage your clients to do likewise. There will be a special place in courtrooms reserved for those that try to take advantage of a crisis.

—

C.Y. v. F.R. (March 20, 2020), Doc. FS-20-16266 (Ont. S.C.J.) - Diamond J.

In *C.Y.*, Justice Diamond conducted a telephone hearing to address the mother's recently issued application and motion for urgent relief in accordance with the Chief Justice Morawetz's Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings (www.ontariocourts.ca/scj/covid-19-suspension-fam/) for COVID-19 (the "Notice to the Profession").

As the case primarily dealt with the alleged unlawful withholding of two children in the context of the current COVID-19 situation in the greater Toronto area and the rest of Canada, the triage judge concluded that the case was "presumptively urgent" for the purposes of the Notice to the Profession, and allowed it to be scheduled for a hearing.

The mother's motion materials were served on the father by email the night before the hearing and personally on the morning of the hearing. The hearing then proceeded before Justice Diamond by teleconference.

The parties were never married. In April 2012, they commenced cohabiting in a property owned by mother. They separated in July 2019, but continued to reside in the mother's property until the father moved out in mid-December 2019.

The parties had two children, aged five and three. The mother alleged that she had been the children's primary caregiver throughout their lives.

It does not appear that there was a formal agreement between the parties about the parenting schedule, but until the weekend before the motion the children had resided primarily with mother, and the father had interim access in the presence of the children's nanny. According to the mother, until the previous week the father never had access to the children on his own without the nanny being present.

The father returned to Toronto from a trip to Brazil on March 13, 2020. Upon his return, he told the mother that he was going to take the children with him to his home for the week of March 15, 2020 (the second week of the private school March break). The mother said that she never agreed to this arrangement, but when her lawyer wrote to the father's lawyer to confirm that no agreement had been reached, the father fired his lawyer, went to the mother's home, and took the children without the mother's consent - not a good start to a worldwide health scare.

Not only did the father refuse to return the children, he doubled down by suggesting that he would return the children if the mother agreed to an equal shared parenting arrangement.

There was some evidence that during the previous week, the children had been sick and had fevers. The father admitted that the children did, indeed, have fevers of approximately 101 degrees, but claimed that he had relied upon the sage advice of family and friends in the medical profession to support his view that it was "normal" for children to have fever sometimes (he treated them with regular acetaminophen. Even though the children had been ill, the father also apparently took them out in public and to visit his elderly mother.

Justice Diamond found that the matter was "sufficiently urgent to warrant the applicant's motion proceeding in the absence of a case conference", and relied on *Rosen v. Rosen*, 2005 CarswellOnt 68 (Ont. S.C.J.). In *Rosen*, Justice Wildman held that a motion can be brought before a Case Conference if it is urgent, and the moving party provides evidence that: (a) s/he has made inquiries about the availability of Case Conference dates; and (b) s/he has tried to resolve the matter outside the court process.

While the mother in this case clearly satisfied both elements of that test, and while the facts of this situation present something akin to a judicial "no brainer" given the father's conduct, there is some question as to whether *Rosen* is the proper test. Arguably, the test to have a motion heard pursuant to the Notice to the Profession should be higher than the test to bring a motion before a Case Conference. However, this was one of the first decisions to deal with the issue of urgency in the COVID-19 context, and *Rosen* was certainly a justifiable starting point. As the other cases that are discussed below show, the ground seems to have shifted since *C.Y.*, and the test for urgency now appears to be somewhat higher.

Justice Diamond determined it would be in the children's best interests to maintain the *status quo* and shield them from the impact of family litigation. As the father had unilaterally and unacceptably tried to alter the *status quo*, his Honour ordered that the children were to be returned to the mother forthwith and, if necessary, with the assistance of the police. He also scheduled a further telephone hearing for March 27, 2019, in case the parties could not agree on an access schedule.

—

Ribeiro v. Wright, 2020 ONSC 1829 (Ont. S.C.J.) - Pazaratz J.

We have all been wondering what courts were going to do with the situation where Parent A wants to temporarily suspend Parent B's access because Parent A has a general concern, but no evidence, that access would increase the risk of exposing the child and the other members of Parent A's household to the COVID-19 virus. In *Ribeiro*, Justice Pazaratz has provided family law lawyers, judges, and litigants with an incredibly helpful roadmap for dealing with these types of situations.

The parties in *Ribeiro* had joint custody of their 9-year-old son. He lived primarily with his mother, but had regular access with his father.

The mother tried to bring an "urgent" motion to suspend the father's access because she was concerned that the father would not maintain social distancing for the child, and she wanted the child to remain in isolation and not leave her home under any circumstances. However, the mother did not have any evidence to even remotely suggest that the father was not taking appropriate precautions to deal with the COVID-19 situation.

In considering the mother's request to bring an urgent motion, Justice Pazaratz set out some general principles for courts to consider when deciding whether a parenting motion to deal with COVID-19 related concerns needs to be heard on an urgent basis:

> [10] 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.
>
> [11] **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.
>
> [12] **In some cases, custodial or access parents may have to forego their times with a child, if the parent is subject to some specific personal restriction** (for example, under self-isolation for a 14 day period as a result of recent travel; personal illness; or exposure to illness).
>
> [13] **In some cases, a parent's personal risk factors** (through employment or associations, for example) **may require controls with respect to their direct contact with a child**.
>
> [14] And sadly, **in some cases a parent's lifestyle or behaviour in the face of COVID-19** (for example, failing to comply with social distancing; or failing to take reasonable health-precautions) may raise sufficient concerns about parental judgment that direct parent-child contact will have to be reconsidered. There will be zero tolerance for any parent who recklessly exposes a child (or members of the child's household) to any COVID-19 risk.
>
> . . . . .
>
> [20] If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion - but **they should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time**. They should not even presume that raising COVID-19 considerations will necessarily result in an urgent hearing.
>
> [21] **We will deal with COVID-19 parenting issues on a case-by-case basis**.

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.

[emphasis added]

His Honour also called upon parents to try to set aside their differences to deal with the unprecedented situation that we are currently faced with as maturely and responsibly as possible:

[22] Everyone should be clear about expectations during this crisis. Parents want judges to protect their children. But with limited judicial resources and a rapidly changing landscape, **we need parents to act responsibly and try to attempt some simple problem-solving before they initiate urgent court proceedings**.

[23] Judges won't need convincing that COVID-19 is extremely serious, and that meaningful precautions are required to protect children and families. We know there's a problem. **What we're looking for is realistic solutions. We will be looking to see if parents have made good faith efforts to communicate; to show mutual respect; and to come up with creative and realistic proposals which demonstrate both parental insight and COVID-19 awareness**.

[24] In family court we are used to dealing with parenting disputes. But right now it's not "business as usual" for any of us. **The court system will always be here to deal with truly urgent matters, especially involving children. But that means there will be little time or tolerance for people who don't take parenting responsibilities or COVID-19 seriously**.

. . . . .

[27] 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.

—

Onuoha v. Onuoha, 2020 ONSC 1815 (Ont. S.C.J.) - Madsen J.

The family lived in Nigeria, but in October 2019, the mother brought the parties' two children to Ontario and refused to return them. As a result, the father commenced an Application in Ontario to have the children returned to Nigeria.

On March 15, 2020, the Ontario Superior Court of Justice suspended regular operations, and the father's Application was adjourned to be spoken to on June 2, 2020. When the father learned that his Application was not going be heard for a significant period of time, he contacted the court to ask that the case be allowed to proceed as it was urgent and involved an international kidnapping.

As part of deciding whether the father's Application could proceed, Justice Madsen provided family law lawyers and litigants with some further helpful guidance about the process that should be followed under the Notice to the Profession:

> (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, 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.""

In dismissing the father's request to proceed with his Application on an urgent basis, Justice Madsen noted that while, "[a]t first blush, this case would appear to fall within the understanding of an 'urgent' matter", and while it was certainly "urgent" to the parties, the father's Application was not "urgent" for the purposes of being able to proceed with it in the midst of the COVID-19 crisis:

> [8] However, **I am unable to find that the matter is urgent at this time**. The children are currently residing with their mother in Kitchener-Waterloo, Ontario. **There is currently a global pandemic underway which has resulted in wide-spread travel restrictions, including the current international Travel Advisory of the Government of Canada**, which today reads as follows: "Official Global Travel Advisory: Avoid non-essential travel outside of Canada until further notice." The Advisory continues:
>
> > "To limit the spread of COVID-19 many countries have put in place travel or border restrictions and oilier measures such as movement restrictions and quarantines. Many airlines are suspending flights. Many airports are closing, preventing flights from leaving, Exit bans are becoming more frequent. New restrictions may be imposed with little warning. Your travel plans may be severely disrupted . . . "
>
> [9] I attach to this endorsement a copy of the Travel Advisory. It could not be more clear.
>
> [10] **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 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"***. [emphasis added]

Therefore, in this case, the test for "urgency" is arguably higher than that in the oft-cited case of *Rosen v. Rosen*, 2005 CarswellOnt 68 (Ont. S.C.J.) which, as discussed above, is used to determine whether a matter is sufficiently urgent to warrant a motion being brought before a Case Conference, and was referred to by Justice Diamond in *C.Y.*.

—

Douglas v. Douglas (March 25, 2020), Doc. 684/19 (Ont. S.C.J.) - MacPherson J.

The parties had a 6-year-old son together. There was no written agreement or court Order about the parenting arrangements, but the *status quo* had been that the child resided primarily with the mother, and resided with the father every other weekend from Friday afternoon until Monday morning, and every Thursday for 3 hours.

The child spent the weekend of March 13, 2020, to March 16, 2020, with the father. On March 18, 2020, however, the mother emailed the father that she was suspending the father's time with the child because, as in *Ribeiro*, she had "general concerns", but no specific evidence, about the father's potential exposure to COVID-19.

Unlike in *Ribeiro*, however, Justice MacPherson found that although this matter was certainly very important to the father, it was neither urgent nor an emergency for the purposes of the Notice to the Profession:

> [8] The COVID-19 pandemic is unprecedented. The situation changes daily, if not hourly. To address the risks posed by the virus, as those risks are known at any particular time, government authorities and public health officials issue directives to address the perceived risks.
>
> [9] There is no game plan for how parents should react, and many are understandably worried for themselves and their families and confused about what to do in such an atmosphere. **It is certainly expected that parents would act in the best interests of their own child which consideration must include not only the child's physical well-being, but also their emotional wellbeing. Total removal of one parent from any child's life must be exercised cautiously**.
>
> [10] This is uncharted territory for the court, as well. The safety and well-being of children and families remain the principal concerns for the court. However, **the court must take guidance from the Chief's notice that confirms that all court operations are suspended with the exception of those that are urgent and emergency matters. The Chief's notice defines such matters in the context of family files to be relative to "the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child."**
>
> [11] **The matter is understandably very important to the father. However, in my view it is not urgent nor is it an emergency. There is no indication that Hudson's safety is at risk.** While father's counsel might wish to have this court interpret the mother's actions as wrongfully retaining the child, from my perspective, the language used in the Chief's notice was done purposefully to mirror the language under the *Convention on Civil Aspects of International Child Abductions* (the "*Hague Convention*") and would not be applicable when the issue is parenting time. **It may be that there will be some limited scenarios involving an abduction of a child where relief is sought under the *Children's Law Reform Act*, and a court finds such matter to be urgent. But this is not one of those cases.**
>
> [12] **Within that context, I find that the motion is not urgent at this time.** [emphasis added]

Very respectfully, we have concerns about his Honour's conclusion that a parent unilaterally suspending all in-person contact between a parent and child without, to use the words of Justice Pazaratz in *Ribeiro*, the type of "specific evidence or examples of behavior or plans by the other parent which are inconsistent with COVID-19 protocols", is not urgent. It is essentially licence to withhold.

While we certainly understand that our already overburdened justice system is under enormous strain as a result of COVID-19, we worry that this decision will send the message to parents that they can unilaterally (perhaps indefinitely) withhold a child, with impunity. We are also concerned that this decision will make it more difficult for family law lawyers to be able to convince clients that they cannot unilaterally withhold a child from the other parent.

Justice MacPherson attempted to mitigate against these concerns by pointing out that the Notice to the Profession "called 'upon the cooperation of counsel and parties to engage in every effort to resolve matters' during the period of suspension of regular court operations", and noting that when the courts fully reopen, they may not look favourably upon lawyers and litigants who take advantage of the current situation. However, we wonder if the better way to ensure that people act reasonably during these

unprecedented times would have been to send the message that the courts are still ready, willing, and able to deal with parenting cases if one of the parents has unilaterally cut off a child's contact with the other parent without having a very good reason for doing so. An ounce of prevention is worth a pound of cure; or what we permit we promote - pick your favourite idiom.

End of Document