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— Franks & Zalev - This Week in Family Law

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***Erratum*: In last week's edition of the *Newsletter*, we stated that the father in *C.Y. v. F.R.* had treated the parties' children "with regular acetaminophen, which, anecdotally, may actually make the Covid-19 virus worse". It is actually ibuprofen, and not acetaminophen, that anecdotally may exacerbate symptoms. Thank you to Cheryl Goldhart for pointing this out.**

COVID-19 Update

There has now been a mini-deluge of decisions about what is, and is not, "urgent" for the purposes of being heard by the courts during the COVID-19 crisis. We are not going to comment on all of the cases as most of them turn on their own particular facts or simply rely on already-summarized cases. Most seem to be following the principles that Justice Pazaratz set out in *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.) that we commented on last week. To help you stay up to date, our students, Erica Morassutti and Victoria Ourumis, have helped us prepare a chart that summarizes the cases that have dealt with COVID-19 thus far, and that will be updated regularly as this unusual situation unfolds. You can access the chart by going to the link named *The Epstein Cole COVID-19 Case Chart* just below the link to the latest *Newsletter* on the Family Source home page.

We are optimistic that all of the substantial efforts that are being made by judges and court staff across the country will soon render any further debate about the meaning of "urgency" moot (see e.g. Chief Justice Morzwetz's March 27, 2020 Memo to the Profession: www.ontariocourts.ca/scj/notices-and-orders-covid-19/memo-to-the-profession/.

Nevertheless, we want to make sure you are aware of three of the more important decisions about urgency that have been released since last week's edition of the *Newsletter*: Justice Kurz's decision in *Thomas v. Wohleber*, 2020 ONSC 1965 (Ont. S.C.J.); Justice Conlan's decision in *Le v. Norris*, 2020 CarswellOnt 4116 (Ont. S.C.J.); and Justice Smith's decision *Johansson v. Janssen*, 2020 CarswellBC 770 (B.C. S.C.) (one of the only non-Ontario cases that has come to our attention to date).

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In ***Thomas v. Wohleber***, 2020 ONSC 1965 (Ont. S.C.J.), Justice Kurz reviewed some of the cases that have considered the meaning of "urgent" under Chief Justice Morawetz's Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings for COVID-19 (www.ontariocourts.ca/scj/covid-19-suspension-fam/), and set out a list of factors for the courts to consider when deciding whether a motion is "urgent" such that it should be allowed to proceed right now:

> [33] Rather than speculate whether the present test of urgency is even higher than the one [for bringing a motion prior to a Case Conference] already set out in *Hood* and *Rosen*, **it is important to emphasize the scrupulousness with which the urgency standard must presently be enforced. That may even mean that some issues that may have been heard on**

> **an urgent basis because the test of urgency was not strictly applied in a non-pandemic world will not meet the high threshold set by the Notice**. It may mean that some issues in a motion are urgent while others are not.
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> . . . . .
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> [38] In considering the dictionary definition of the term, urgent, the circumstances of urgency set out in the Notice, the examples of urgency offered in *Hood* and *Rosen*, and the cases cited above that apply the Notice's test of urgency, I find that **the following factors are necessary in order to meet the Notice's requirement of urgency**:
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> 1. **The concern must be immediate**; that is one that cannot await resolution at a later date;
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> 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;
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> **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;
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> 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.
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> [39] **The court's adoption of the test of urgency in this time of pandemic requires all participants in the justice system, judges, lawyers and spouses/parents, to shoulder greater responsibility than they usually are required to assume in family litigation**. They must assume this mantle of responsibility in order to ensure that the most urgent cases can continue be adjudicated by the court in these days of crisis. As Pazaratz J. pointed out in *Ribeiro v. Wright*, 2020 ONSC 1829 (Ont. S.C.J.):
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> Right now, families need more cooperation. And less litigation.

This is an enormously helpful list from Justice Kurz, and we anticipate that future cases will recite his test.

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In ***Le v. Norris***, 2020 CarswellOnt 4116 (Ont. S.C.J.), Justice Conlan noted that the courts expect parties to deal with COVID-19 through what he referred to as "responsible adherence to the existing Court Order": [1]

> [13] Finally, what do I mean by "responsible adherence to the existing Court Order"? I mean 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.

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Finally, ***Johansson v. Janssen***, 2020 CarswellBC 770 (B.C. S.C.), is the first non-Ontario case that we have come across that deals with the meaning of "urgency" *vis-à-vis* COVID-19. The father moved to Sweden in 2017, but returned to British Columbia several times to see the parties' young children. In late January 2020, the mother took the children to Germany for what was supposed to be a temporary trip so that she could renew her Canadian visitors visa, but it is unclear from the decision whether and when she actually intended to return to Canada. Even though the father was living in Sweden, in March 2020, he brought an urgent motion in B.C. to require the mother to return the children to B.C. once the international travel restrictions related to COVID-19 were lifted. The mother responded by claiming that B.C. did not have jurisdiction, or should decline to exercise it on the basis that Germany was the more convenient forum.

In dismissing the father's motion, Justice Smith summarized the process that is in place for determining whether a motion is urgent enough to be dealt with during the COVID-19 crisis, and concluded that the father's motion was ***not*** urgent because it could not be implemented until some unknown point in the future (this dovetails nicely with Justice Kurz's criteria, above). He was also concerned that it would not be possible to decide the jurisdictional issues based on the limited record before him:

> [14] On March 18, 2020, the Chief Justice of British Columbia Supreme Court announced a suspension of all regular court operations due to the COVID-19 emergency, with only essential and urgent matters to be heard (the "March 18 Direction"). **Applicants seeking to have matters heard must submit an online form to request an urgent hearing. That form and related materials are reviewed by a judge to determine if an urgent hearing is required**.
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> . . . . .
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> [16] **The authorization of a hearing under the [Request for Urgent Hearing] process does not constitute a final determination that a matter is urgent. It remains for the judge or master hearing the application to determine whether it is in fact urgent and can be appropriately decided during the current state of emergency**. Issues to be considered on the question of appropriateness may include the practical utility of any order, difficulties faced by parties in obtaining necessary evidence, and the possibility of changing circumstances as the emergency situation evolves.
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> [17] **I have concluded this matter is not urgent. An order requiring return of the children to British Columbia would have no immediate practical consequences**. The claimant recognizes that it could not be implemented until current international travel restrictions are lifted and no one knows when that may be.
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> [18] It appears from the respondent's stated intention at the time of her departure that she may voluntary return to Canada with the children after travel restrictions have been lifted. Whether she is ordered to return or wishes to return voluntarily, her ability to do so will still be subject to her obtaining the appropriate visa. Even if the children were old enough to be put on an airplane unaccompanied, which they are not, there is no parent here to meet them. The claimant is still in Sweden and gives no evidence of when he may be able to return to Canada.
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> [19] I also find that it would not be appropriate to decide the threshold question of jurisdiction at this point. I have been given sufficient evidence and authorities to decide whether the children were ordinarily resident in or have a real and substantial connection with British Columbia. But **a decision that this court has jurisdiction — if that is what I find — would have no practical meaning without a determination of whether British Columbia or Germany is appropriate forum. That issue may be subject to additional or changed facts by the time current travel restrictions are lifted**. [emphasis added]

And now, since we're sure that everyone needs a break from "all COVID-19 all-the-time" - back to our regularly scheduled programming.

Voice of the Child (Or Not)

Irwin v. Irwin, 2019 CarswellNS 942 (N.S. S.C.) - O'Neil, A.C.J.S.C.

The parties were the parents of two children, aged 12-1/2 and 11.

A year before the instant hearing, Justice O'Neil dismissed the mother's request to vary the parenting arrangements because she had not established a material change in circumstances.

On September 25, 2019, the mother commenced another variation proceeding, and requested a "Voice of the Child" Report ("VOTC Report") for both children. The father opposed the mother's request, and responded by seeking his own change in the parties' parenting arrangement.

This motion was solely about whether or not a VOTC Report should be ordered.

In Nova Scotia, the *Judicature Act*, R.S.N.S., c. 240, s. 1, s.32F provides a Court with jurisdiction to order a VOTC Report:

> 32F (1) Upon application or on the judge's own motion, a judge of the Supreme Court (Family Division) may direct a family counsellor, social worker, probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.

Justice O'Neil considered previous decisions where the Court offered principles guiding the interpretation and application of s. 32F(1), including: *P. (E.) v. P. (S.)*, 2016 CarswellNS 572 (N.S. S.C.); *Farmakoulas v. McInnis* (1996), 23 R.F.L. (4th) 235 (N.S. S.C.); *Jarvis v. Landry* (2011), 2011 CarswellNS 169 (N.S. S.C.); *MacLean v. Boylan*, 2011 CarswellNS 586 (N.S. S.C.); *John v. John* (2012), 22 R.F.L. (7th) 471 (N.S. S.C.); and *Moore v. Moore*, 2013 CarswellNS 607 (N.S. S.C.). He also considered the Voice of the Child Report Guidelines that Nova Scotia released in 2015 and that offer guidance on the purpose and scope of VOTC Reports.

After considering the above-noted cases and resources, Justice O'Neil noted that the following principles emerge:

> [26] . . . A Voice of the Child Report should be ordered when it is necessary and appropriate to the determination of the best interests of the child;
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> • Given that assessments are, by their very nature intrusive, they should not simply be ordered as a matter of course or as part of a "fishing expedition";
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> • The burden is on the party requesting the report to demonstrate that a professional opinion is needed;
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> • Reports should be ordered where there is a specific need for the type of information they generate, and the information would not otherwise be available because it falls within the special knowledge of the expert; and
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> • Special information and knowledge of the expert referred to above could include, but is not limited to, situations where there are clinical issues to be determined and/or situations where the conflict between parents makes it unlikely that the court would receive objective evidence upon which to determine the views and preferences of the child.

While the parties had extremely different views as to the behaviour, attitude, and views of the children, they agreed that the older child's time with his father was interrupted for weeks in September 2019 until the Court intervened in November.

The mother claimed that the son had refused to attend his father's home because the father and step-mother had mistreated him. She argued that the children had the right to be heard on the issue of the parenting schedule and on the issue of "mistreatment." Notably, however, the Department of Community Services had investigated the circumstances of the family in the summer of 2019, and no action was taken.

The father and step-mother vehemently denied the mother's allegations and painted a very different picture of the children's life - a life where the mother involved the children in the litigation and placed them in the middle.

The father argued that, given the pressure the mother was putting on the children, a VOTC Report would be unreliable and tainted by the mother's influence.

Justice O'Neil found it unnecessary to resolve the credibility contest. He accepted that the children were the subject of significant stress with the older child "exhibiting negative manifestations of his life's circumstances."

Justice O'Neil did not believe this to be an appropriate case for a VOTC Report. He stated:

> [30] Given the extent to which these children have already been placed in the middle, I am satisfied an order requiring such a report will undoubtedly result in the children being subjected to pressure with a view to influencing their reports to an assessor. They must be spared that circumstance.

Justice O'Neil also questioned whether the 12-1/2-year-old son was old or mature enough for the purposes of a VOTC Report, and suggested that the son was just on the lower end of the age and maturity level where the court should consider ordering a Voice of the Child Report because of the typical development and maturity of a child of that age.

While we agree with Justice O'Neil's conclusions, respectfully, we do not entirely agree with his reasons. There is no magic age above/below which a VOTC Report is/isn't appropriate. Rather, it is the combination of age, maturity, and the specific issues in the case that should govern whether a VOTC Report would be appropriate. It may be entirely appropriate for a mature 10-year-old to have a say in how s/he might want to cut their hair or what summer camp s/he wants to attend. It may be entirely *inappropriate* for an *immature* 14-year-old to have a say about whether s/he wishes to play full-contact football.

Ultimately, the question is whether the VOTC Report process offers the Court real insight into the strength, consistency, and independence of the voice of the child in a situation where the process itself does not risk harming the child. And that was Justice O'Neil's ultimate concern here.

How to Lose a Mobility Application as a Primary Parent

Kazberov v. Kotlyachkova, 2019 CarswellOnt 20922 (Ont. S.C.J.) - Breithaupt Smith, J.

This is an interesting mobility case to keep handy when you want to make sure your client understands: (a) the importance of acting reasonably when dealing with parenting issues; and (b) that even if they do not have to face any *immediate* consequences for behaving unreasonably, their behaviour can easily come back to haunt them.

The parties in this case were involved in a long-term extra-marital affair that started when the father was in his early 40's and the mother was in her early 20's. The relationship lasted for about 10 years, and a child was conceived and born towards the end of it.

When the parties' son was born in 2011, the father's wife decided to welcome the baby into her family, and encouraged the father to have a relationship with him. The mother, however, resisted the father having access and then, after the father started a proceeding, insisted that access be supervised.

After many years of litigation, by 2017, the father was able to have regular unsupervised access, and the evidence showed that the relationship was a very positive one. However, the mother's attitude to the father remained hostile, and she continued trying to marginalize his role in the child's life.

In the meantime, in late 2013, the mother met a man, Mr. Nagorny, on the Internet. He lived in Ann Arbor, Michigan, which was about a four-hour drive from the mother's home in Waterloo. They were engaged in early 2017 and, shortly thereafter, the mother amended her pleadings to ask the Court to let her relocate to Ann Arbor with the child.

There were many reasons to think that the court would have allowed, or at least seriously considered, the mother's request to move in this case, including that:

1. She had always had sole custody of the child;

2. She had been the child's primary caregiver for his entire life;

3. The child was young (he was only 8-years-old when the trial took place);

4. The mother's request to move appeared to be reasonable (i.e. she wanted to be able to live with and marry a person with whom she had been in a serious and committed relationship for many years);

5. The distance between Ann Arbor and Waterloo was short enough that it would have been possible to craft a schedule that would have ensured that the child could maintain frequent contact with the father.

Justice Breithaupt Smith, however, ultimately dismissed the mother's request to relocate, and gave a number of reasons as to why she did not think the move would be in the child's best interests, including that the child had a strong relationship with his father and step-mother, and was close to many extended families on both sides who lived in Waterloo. However, the main reason she did not allow the move was that based on the mother's past conduct, which included numerous examples of her trying to exclude the father from the child's life over many years, she did not trust the mother to ensure that the child would be able to maintain a relationship with his father if she were allowed to move:

> Mother cannot be relied upon to take a collaborative approach and to prioritize A.'s relationship with his paternal family. Consequently, the requirements for flexibility and trust inherent in Mother's plan are its downfall.

As a result, Justice Breithaupt Smith dismissed the mother's request to relocate. The result would likely have been different if the mother had acted more reasonably in her past dealings with the father. Given the close bond between the child and his father, her Honour simply saw too large a risk.

Her Honour's decision also contains a useful discussion about what constitutes a material change in circumstances in the context of a mobility case.

In 2015, the parties consented to a final Order from Justice Rogers that provided, among other things, that the child would live in Waterloo. As a result, an issue arose during the trial about whether the mother had established a material change in circumstances.

In *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.), the Supreme Court of Canada decided that: (a) before considering whether to vary an Order to allow a parent to move with a child, the court must first be satisfied that there has been a material change in circumstances; and (b) to be material, a change must be something that "was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."

The mother was already in a serious relationship with Mr. Nagorny when she consented to the 2015 order. Accordingly, the father argued that the mother had not established a material change because it had been foreseeable in 2015 that the mother and Mr. Nagorny would eventually want to get married.

In rejecting this argument, Justice Breithaupt Smith warned that the courts should not be putting too much weight on what may have been reasonably foreseeable when parties agreed to resolve their differences by entering into a consent Order:

> [18] Having regard to the frequency with which such provisions are included in modern Minutes of Settlement, **it is important to re-contextualize the Supreme Court of Canada's third criteria, as set out above. *Gordon v. Goertz* predates the *Family Law Rules* and the conceptual shift away from the adversarial litigation approach to the resolution of family disputes**. The court now has a positive duty to manage cases, which includes the obligations to: narrow the issues; encourage parents to avail themselves of out-of-court resolution options; and help parties to settle as many of the issues as possible. It can no longer, therefore, be presumed that a Final Order is reached following a trial wherein all issues have been canvassed. **If an issue covered by a Final Order was resolved consensually and therefore was never addressed at trial, it is impossible to analyse whether it "was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order" as required by the third branch of the material change test**. We must therefore take a different approach to this third branch in the modern context. [emphasis added]

Although Justice Breithaupt Smith did not cite any cases about this issue in her decision, her reasoning does follow the reasoning in cases such as *Thie v. Thie* (2014), 47 R.F.L. (7th) 311 (Alta. C.A.) and *M.L.B. v. W.R.P.* (2019), 30 R.F.L. (8th) 305 (N.B. C.A.). These cases suggest that the mere possibility, or even likelihood, of a possible future move will not prevent a finding of a material change once the plan for the move is concrete, even if the move was *likely* at the time of the prior order or agreement.

Although this idea of material change is hard to reconcile with decisions such as *Bhupal v. Bhupal* (2008), 60 R.F.L. (6th) 68 (Ont. S.C.J.), aff'd (2009), 69 R.F.L. (6th) 43 (Ont. C.A.); *Morigeau v. Moorey* (2015), 67 R.F.L. (7th) 19 (B.C. C.A.); and

Simmons v. Simmons, 2016 CarswellAlta 1597 (Alta. Q.B.) (where the mere future prospect of an event was sufficient to rule out a material change upon the occurrence of the event), it is likely correct. The question is not (and should not be) whether a particular change was "foreseen" or "foreseeable". The question is what was within the *specific contemplation* of the parties at the time. That was the definition of material change adopted by the B.C. Court of Appeal in *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.), where it noted that "the test for material change [in mobility cases] is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement." See also *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.), which deals with foreseeability when dealing with spousal support variations, and *Thompson v. Drummond*, 2018 CarswellOnt 4783 (Ont. S.C.J.), where Justice Chappel thoroughly analyzed the foreseeability issue in the mobility context.

Since the 2015 order was made on consent, and as there was no evidence to indicate that the mother had been considering leaving Waterloo back in 2015, her Honour determined that, "regardless of whether or not the mobility issue could have been reasonably foreseeable, I am satisfied that Mother's proposed move to Michigan with [the child] constitutes a material change in circumstances and I find that the first stage of the two-part test set out at s. 29 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("CLRA"), is met."

The outcome on the material change issue might also have been different, however, if the facts had been closer to those in cases like *Elliott v. Elliott* (2009), 64 R.F.L. (6th) 1 (Ont. C.A.). In *Elliott*, the Ontario Court of Appeal upheld the trial judge's decision to dismiss the mother's request to move 250 km from Peterborough, Ontario to Cobden (near Ottawa) with the children because she had not established a material change. The evidence in *Elliott* clearly showed that the mother had already been asking to move to Cobden when the parties had consented to the Order that she now wanted to vary, and that her reasons for moving were essentially the same as they were during the initial proceeding.

Footnotes

1 Although Justice Conlan's decision only expressly referred to responsible adherence to court Orders, we suggest that his comments should equally apply to written parenting agreements and to established status quos.

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