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

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COVID-19 Update

The *Epstein Cole COVID-19 Case Chart*, which you can access in FamilySource on *Westlaw*, now has summaries of almost 60 family law cases from across Canada that have dealt with COVID-19, the issue of "urgency" and litigant conduct in a time of crisis. This week, however, we want to highlight three recent cases that are not yet on the chart, of which you should definitely be aware: *SAS v. LMS*, 2020 CarswellAlta 778 (Q.B.) by Justice Graesser; *Chahine v. Martins*, 2020 CarswellOnt 5347 (S.C.J.) by Justice Faieta; and *Matus v. Gruszczynska*, 2020 CarswellOnt 5273 (S.C.J.) by Justice McGee.

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SAS v. LMS, 2020 CarswellAlta 778 (Q.B.) - Graesser J.

SAS v. LMS involved a dispute between a father who did not appear to be taking COVID-19 seriously, and a mother who unilaterally decided to not comply with the parties' court-ordered parenting schedule.

During oral argument, counsel for one of the parties advised Justice Graesser that there was "no written decision from an Alberta court as yet on COVID-19 issues with parenting time and many families are being impacted in similar ways to this situation", and "encouraged [his Honour] write on the subject[.]"

His Honour took up counsel's suggestion, and set out a succinct 9-point roadmap for lawyers, judges, and parents in both Alberta and throughout Canada to follow when dealing with COVID-19 related parenting issues:

> 1. **Parents are expected to address COVID-19 issues and concerns with each other before taking any action** (including applying for variations or relief from the Court) to resolve these issues and concerns in good faith and to act reasonably in exploring strategies that will first and foremost ensure the health and safety of their children.
>
> 2. Where face to face access or parenting time presents different risks in the different households, the **parties should consider strategies that have the children in the less risky environment but in a manner that maximizes virtual contact** between the children and the other parent.
>
> 3. **Court orders are meant to be followed. There should be no unilateral withholding of access or parenting time except in true emergency situations** as described above where there is imminent risk to a child's health or safety;
>
> 4. Whether under the Divorce Act or the Family Law Act, **varying existing court orders requires a change in circumstances** and will be determined on the basis of the best interests of the child or children. **COVID-19 is not an**

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> **automatic change in circumstances**; the party seeking a variation must establish that their family circumstances have been impacted in a way that warrants a temporary change in the order;
>
> 5. **The burden or onus of proof is on the parent seeking a change in the status quo or the existing court-ordered parenting**. It is not satisfied by suspicion or speculation, but as with any matter involving circumstantial evidence, it may be satisfied by logical and reasonable inferences from conduct;
>
> 6. If an application cannot be made because of the urgency of the situation, **an application by the defaulting party must be made as soon as possible after learning of the emergency**;
>
> 7. **Applications based on speculation, mistrust, or fear without credible evidence of material non-compliance posing unacceptable risks to the children are unlikely to get permission to proceed** as an emergency application, let alone be successful; and
>
> 8. **Respondents must be prepared to unequivocally commit that he or she will meticulously comply with all COVID-19 safety measures**; and
>
> 9. **Non-compliant parents can expect no second chances**. [emphasis added]

Although Justice Graesser disagreed with the mother's decision to unilaterally overhold the children without even trying to bring a motion to deal with the matter, he was concerned enough about the father's conduct that he refused to grant the father's request to reinstate his parenting time. Instead, his Honour adjourned the father's motion to give the parties an opportunity to resolve the matter based on principles that are set out above. He also warned both of the parties that:

> [84] 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**.
>
> [85] Additionally, **[the mother] should keep in mind that she should have sought leave for an emergency application to vary the existing court order, rather than force SAS to do so in the face of her breach**. That will undoubtedly arise if the parties must come back to Court if they cannot resolve things between themselves. As well, at some state, the parties will have to address the make-up time to which [the father] appears to be entitled. [emphasis added]

—

Chahine v. Martins, 2020 CarswellOnt 5347 (S.C.J.) - Faieta J.

As we discussed in the April 13, 2020 edition of *TWFL* (*volume* 2020-14), in *Wang v. 2426483 Ontario Limited*, 2020 CarswellOnt 4540 (S.C.J.), Justice Myers determined that in the civil context: (a) whether a matter is urgent enough to be heard right now is not a "legal determination" or "a new front for parties to battle"; and (b) once the court has decided to schedule a matter for a hearing, "there is no basis for further submissions to be delivered on the issue of urgency".

In *Chahine v. Martins*, Justice Faieta confirmed that Justice Myers' reasoning in *Wang* also applies in the family law context.

The mother in *Chahine* argued that: (a) although the triage judge had already determined that the father's motion for parenting time with the parties' 4-year-old daughter was urgent and should be heard, the court should re-consider the issue because "the triage judge's finding of urgency was made on a preliminary basis"; and (b) as the child was safe in the mother's care, the father's motion was not urgent, and should never have been scheduled for a hearing in the first place.

In rejecting the mother's argument, Justice Faieta confirmed that the Court's reasoning in *Wang* does, in fact, apply in family law cases:

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> [25] In my view, **the views expressed by Justice Myers in *Wang* are equally applicable in a family law proceeding. This Court's and the parties' limited resources should be used to address the merits of the substantive relief sought on scheduled motion rather than to re-consider the administrative decision to schedule the hearing**. This approach is consistent with the primary objective of the *Family Law Rules* expressed in Rules 2(2)-(4). Accordingly, I decline to re-visit whether the Applicant's motion should have been scheduled for a hearing. [emphasis added]

Since the parties had only separated a month earlier, and as Justice Faieta was satisfied that both parties had been active and involved parents prior to separation, he concluded that it would be in the child's best interests to put in place a week-on/week-off schedule. That way, the child would be able benefit from having frequent and meaningful contact with ***both*** of her parents:

> [33] At the hearing of the motion, the Respondent suggested that [the child] was too young for a week on, week off parenting arrangement. I disagree. **[The child] has had the benefit of two parents being fully part of her life until March 13 and she should continue to benefit from the same arrangement**. The Respondent's concerns regarding COVID-19 are hollow given that **she has offered no evidence to counter the Applicant's repeated assertion that he has complied with all COVID 19 protocols** and given that she admits to visiting her parents regularly and appears to spend a considerable amount of time out of her home. In short, the Respondent's reasons for refusing to allow the Applicant to have in person contact with Mary have nothing to do with [the child's] best interests.

> [34] **Mary's best interests are served by having two parents fully participating in her life and development**. Accordingly, I accept the Applicant's request for a shared and equal parenting plan. To address any concern that Mary may wish to speak with her non-custodial parent, I order that the non-custodial parent be permit to video conference with Mary on two occasions during the week. Both parents should put Mary's interests first by supporting her during this transitional period in order to make it as smooth as possible.

—

Matus v. Gruszczynska, 2020 CarswellOnt 5273 (S.C.J.) - McGee J.

In mid-March, the mother started breaching a 2018 court Order by refusing to let the father see the parties' 3-year-old daughter. As a result, the father requested leave to bring an urgent motion.

In finding that the matter was urgent, the triage judge, Justice McGee, reminded the parties that despite COVID-19, "[t]here is a presumption that all court Orders should be respected and complied with", and that "[a] parent is not permitted to simply engage in self help, or to interpret public health directives as a licence to terminate parenting time."

Her Honour also eloquently noted that: (a) parenting, just like health care, supply chains, telecommunications, grocery stores, etc., is an "essential service" that needs to continue operating during the COVID-19 crisis; (b) children, particularly young children who are still in the attachment phase, need to be able to maintain relationships with ***both*** of their parents; and (c) a change to a parenting arrangement that is brought on by COVID-19 will ***not*** create a new status-quo or constitute a material change in circumstances once the COVID-19 crisis has abated:

> [15] **Parenting is an essential service**.

> [16] 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 up on a perceived advantage? Did they react to past patterns, or did they plan for a better future.

. . . . .

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> [20] 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.
>
> [21] Decisions of this court since the March 15 Notice to the Profession affirm the importance of children maintaining contact with both parents during the current crisis. In my view, young children in the attachment phase of development are particularly vulnerable to the harmful effects of removing a care giving parent. Young children who have already experienced disruptions in their parenting are even more vulnerable. [emphasis added]

Interestingly, however, although Justice McGee found that the matter was urgent, she ordered the parties to first attend a Case Conference with their designated Case Management Judge to try to resolve the matter before the father's motion could proceed. Since her Honour already had some familiarity with these parties (she had previously found the mother in contempt of other breaches of the parenting Order), she presumably did this because, notwithstanding the high level of conflict between the parties, she thought there was a reasonable chance that they would be able to resolve their current disagreement with some help from the Case Management Judge.

And with that said, time for some cases that have absolutely ***nothing*** to do with COVID-19.

The Start of a Long and Winding (and Bumpy) Road that Likely Leads to Ottawa

Neshkiwe v. Hare, 2019 CarswellOnt 21865 (C.J.), 2020 CarswellOnt 580 (C.J.), and 2020 CarswellOnt 4062 (C.J.) - Finlayson J.

The parties to this fascinating case are at the very beginning of what looks like it is going to be a long, arduous, and contentious legal battle about whether Provincial and Superior courts can make a custody and access Order about a child who belongs to a First Nation that has established its own rules for dealing with family law cases.

The mother and father have a 5-year-old daughter and 3-year-old son, and lived in Toronto for most of their relationship. When they separated in September 2019, the mother took the children to the M'Chigeeng First Nation's territory on Manitoulin Island without the father's consent, and refused to return. The mother and daughter are members of the M'Chigeeng First Nation, and the son is entitled to be registered as a member, but the father is neither a member nor entitled to become one.

The father brought an *ex-parte* motion in the Ontario Court of Justice in Toronto for an Order requiring the mother to return the children to Toronto and for police enforcement. Justice Finlayson granted the *ex-parte* Order on September 17, 2019, but the mother refused to comply with it, and the local police (the United Chiefs and Councils of Mnidoo Mnising) refused to enforce it. The M'Chigeeng First Nation also banned the father from entering its territory, which prevented him from being able to see the children. Furthermore, while the Ontario Provincial Police advised the Court that it was prepared to enforce the *ex-parte* Order, it suggested to Justice Finlayson, and his Honour agreed, that it would be a good idea to temporarily stay enforcement of the police enforcement clause until the legal questions in the case had been resolved.

When the matter returned to court, counsel for the mother and for the M'Chigeeng First Nation advised the court that they intended to challenge "the constitutional validity of the Ontario Provincial Court of Justice's jurisdiction over the parties' children" pursuant to s. 35(1) of the *Constitution Act, 1982*. More specifically, it appears they intend to argue that s. 35(1), which provides that, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed", confirms that the M'Chigeeng First Nation has the right to make its own rules about custody and access issues for its members.

The constitutional issues in this case are similar to the ones in *Beaver v. Hill* (2018), 17 R.F.L. (8th) 123 (Ont. C.A.). In that case, the Ontario Court of Appeal allowed the father, who is Haudenosaunee and a member of the Six Nations of the Grand River, to amend his pleadings to claim that he had the right under s. 35 of the *Constitution Act, 1982* to have the parties' family law issues determined through "Haudenosaunee governance processes and protocols and according to Haudenosaunee laws."

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There are, however, some important differences between *Neshkiwe* and *Beaver*. First of all, unlike in *Beaver* (where the Six Nations of the Grand River was not involved in the case), the M'Chigeeng First Nation has been added as a party and is supporting the mother's position. Interestingly, it is also being represented by a lawyer from the same firm as the lawyer for the mother. That seems a bit too close for comfort, as it is certainly foreseeable that, at some point, the interests of the mother and the M'Chigeeng First Nation may not align.

Second, while in *Beaver* the Six Nations of the Grand River has not actually passed any by-laws about family law issues, the M'Chigeeng First Nation has enacted a by-law called the "By-Law for the Care of Children of the Members of M'Chigeeng First Nation - By-Law # 001/01", which provides that, "[t]he Chief and Council shall have exclusive jurisdiction over any First Nation child custody proceeding notwithstanding the residence of the child." It also passed a resolution about this specific case that states that the "M'Chigeeng First Nation does not grant permission for the removal of the children [in this case] from the M'Chigeeng First Nation and will continue to assert jurisdiction over these children and support that the children remain together in their home with their mother, Nicole Hare in the First Nation community of M'Chigeeng First Nation."

Finally (and commendably), Justice Finlayson is doing all he can to ensure that *Neshkiwe* does not devolve into a "procedural morass", which is how the Court of Appeal described *Beaver*, and that the constitutional and parenting issues are dealt with on the merits as quickly as possible. His Honour has already set up a detailed timetable for getting the case to trial, and has appointed the Office of the Children's lawyer to represent the children. Furthermore, although neither the Government of Canada nor the Government of Ontario has committed to intervene in the case (surprisingly, the Government of Ontario apparently told his Honour that it "will not likely take a position on the validity of Canada's laws"), his Honour strongly encouraged both levels of Government to do so by stating that, "the Court wishes to make it abundantly clear to Ontario (and Canada) that it would find submissions from them to be helpful on all of the issues that are pursued", and that "this may be an appropriate case for *amicus*" if they decline to participate.

As there are a number of issues that cannot wait until the constitutional issues have been resolved, Justice Finlayson also recently heard a number of interim motions. In his detailed decision, his Honour:

- Granted the parties interim joint custody as he did not want to "empower either parent to be the sole custodial parent."
- Ordered the mother to return the children to Toronto immediately. If the mother also returned to Toronto, the parties would have a 50-50 shared parenting schedule. However, if she did not return, the children would reside primarily with the father.
- Dismissed the father's contempt motion and police enforcement motion. Although "[t]hese were close calls", and although the elements of contempt had clearly been made out, the mother had "recently consented to two, considerable visits" between the father and children in Toronto, and Justice Finlayson wanted to give her "one last chance to comply" before invoking these remedy's of "last resort." However, he also noted that "if there is non-compliance with the Court's new order being made today, then I would invite the father to bring a new motion for police enforcement and/or a contempt motion."

As part of his decision, Justice Finlayson also considered, and rejected, the local police's (the United Chiefs and Councils of Mnidoo Mnising) argument that " it is not a 'police force' within the meaning of section 36(2) of the *Children's Law Reform Act*, and therefore the Court lacked the jurisdiction to have ordered it to enforce its *ex parte* Order of September 17, 2019, in the first place . . . or to order it to enforce any new orders."

Hopefully, the mother and father will be able to find a way to resolve their dispute for the sake of the children, because otherwise it is probably going to take many years and a trip to the Supreme of Canada to bring this to a conclusion. But either way, we will continue to monitor this very interesting case, and to provide updates as it moves through the system.

Severing Joint Tenancy: Where there's a Will, there's a way . . .

Marley v. Salga, 2020 CarswellOnt 1459 (C.A.), aff'g 2019 CarswellOnt 9115 (S.C.J.) - Simmons, Pepall and Trotter JJ.A.

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Regular readers of this *Newsletter* will recall the lower court decision from the July 29, 2019 edition (*volume* 2019-30) that considered whether or not a joint tenancy had been severed through a "course of dealing." But by way of reminder, Karen Marley and Leslie Salga were married for about 15 years. It was a second marriage for Mr. Salga. They owned their matrimonial home as joint tenants from the date of purchase in 2004 to the date of Mr. Salga's death - or so they thought.

When they purchased the property, their lawyer's reporting letter indicated that it was held as joint tenants and that "when title is held as joint tenants, if one owner dies, the survivor automatically becomes the sole owner of the property". No change was made to the registered title during Mr. Salga's lifetime. However, one month before his death, Mr. Salga made a new Will in which he directed the estate trustee to give Ms. Marley a life interest in the property but, upon her ceasing to use the property, to sell it and give one-half of the proceeds to each of his two daughters. The new Will was clearly inconsistent with a joint tenancy and a right of survivorship.

Mr. Salga's daughters sought an order that they were entitled, as residuary beneficiaries of the estate, to a half interest in the property.

To the surprise of real estate, estate, and family law lawyers, the lower court found that the joint tenancy had been severed after Mr. Salga's death as a result of a "course of dealing". For a refresher as to the ways to sever a joint tenancy, see *Hansen Estate v. Hansen* (2012), 9 R.F.L. (7th) 251 (Ont. C.A.). In *Hanson*, the Ontario Court of Appeal adopted the following statement:

> . . . And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, **it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested**. [emphasis added]

Therefore, in *Hanson*, the Court of Appeal confirmed that a "course of dealing" could not be a clandestine arrangement, such as a unilateral, behind-the-back changing of a Will.

That said, the lower court reviewed the evidence and found that there was, in fact, a course of dealing by the parties that severed the joint tenancy.

What was the accepted "course of dealing"?

First, the daughters relied on the new Will. However, according to *Hanson*, a testimony disposition cannot sever a joint tenancy. However, a provision in a Will is a piece of evidence that can be used to help determine a common intention to treat the joint tenancy as severed, if the provision in the Will was known to the other party.

Second, the daughters relied on a recorded conversation that was said to have taken place between the parties while the husband was essentially on his deathbed. In the conversation, which was apparently surreptitiously recorded, Mr. Salga stated his desire to leave half of the property to his daughters, but that his wife would have a life interest in it. The lower court accepted this conversation as evidence that Ms. Marley understood she was to receive a life interest in the property, and that Mr. Salga's estate would get the remaining half interest and it would ultimately go to Mr. Salga's daughters. As a result, it concluded that the joint tenancy had been severed by a "course of conduct."

As noted, this decision took many in the estate, real estate, and family law bars by surprise, and it was widely anticipated that the Court of Appeal would set aside the decision.

Not so much. The appeal was recently dismissed.

Unfortunately, the reasoning of the Court of Appeal was rather sparse. The substantive part of the judgement, in its entirety:

> [1] We reject the appellant's argument that the recording on which the application judge relied was inadmissible. The appellant did not raise this as a ground of appeal. Further, the appellant pointed to no authority to support this position. We

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> are satisfied that the recording was relevant to a material issue and admissible. In particular, it corroborated the respondents' position on the applications.
>
> [2] The application judge set out the proper test for determining whether a joint tenancy has been severed. This is a fact specific inquiry. We see no basis on which to interfere with the application judge's decision. The appeal is dismissed.

This is unfortunate. As a secretly changed Will can now be used as evidence of a "course of dealing" sufficient to sever a joint tenancy, we may see this sort of behaviour occur more in the future. What we permit, we promote.

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