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

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Contents

COVID-19 Update

The courts have been starting to hear non-urgent matters in recent weeks, and we have been seeing a real push by the judiciary to encourage or require litigants to move cases forward, either virtually or in writing. And, in most of the reported decisions we have seen, judges have consistently rejected requests by a party to put a case "on hold" until it can be dealt with in person. These are both very welcome developments.

The first three cases that are discussed below (Justice Lema's decision in *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, Judge Porter's decision in *CSSD v. C.C. & J.B.*, and Justice Riley's decision in *C.G.R. v. J.L.R.*), provide examples of courts refusing requests to put off trials, motions, and examinations until they can be dealt with in person, and ordering that they proceed either by phone, videoconference, or in writing. In *Sandhu*, Justice Lema also provided some helpful guidance with respect to how virtual examinations should be conducted.

The other two cases, Justice McGee's decision in *Clemente v. O'Brien* and Justice Jarvis' decision in *Surdyka v. Surdyka*, come from parts of Ontario that are not yet offering Case Conferences and motions on demand, but which have started to relax the threshold for hearing a matter from "urgent" to "pressing". These cases also consider and analyse what the term "pressing" actually means in the context of a pandemic.

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***Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta*, 2020 CarswellAlta 1032 (Q.B.) - Lema J.**

Although not a family law case, *Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta* is an important case to know because it sets out some of the factors that courts should consider when deciding whether an out-of-court examination should take place by videoconference, or whether it should be delayed until it can be conducted in person.

The parties could not agree whether out-of-court examinations should proceed by video-conference. While the Applicant wanted to proceed by video-conference, the Respondent took the position that virtual out-of-court examinations "will be difficult or impractical" because of:

• "[T]the large number of people involved - up to five members of the executive committee, the two lawyers, a (Punjabi-English) translator, a court reporter, and the applicant;" and

• Some of the parties were "in their 60s and 70s and not necessarily up to speed with technology, and the additional complication of translation[.]"

After thoroughly reviewing the relevant *Alberta Rules of Court* and a number of cases that have dealt with virtual examinations (including Justice Myers' decision in *Arconti v. Smith*, 2020 CarswellOnt 6163 (S.C.J.) that we discussed in the May 11, 2020 edition of *TWFL*), Justice Lema concluded that he had jurisdiction to order that examinations proceed by video-conference:

> [30] Based on:
>
> 1. the Court of Appeal having endorsed remote questioning on affidavits as far back as 2000 (in *Alberta Central Airways*), when Rule 261.1 was the operative, or most analogous, rule;
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> 2. the expansive interpretation accorded that rule by L. Jones J. in *De Carhalvo* (green-lighting "by video" discoveries);
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> 3. the absence of any new-era (2010 onwards) rule expressly barring or restricting remote questioning on affidavits or otherwise casting a shadow on such questioning generally;
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> 4. no signal, even implicit, in the 2010 remodeling of the Court's rules that the pre-2010 acceptance of video-form questioning was off-base;
>
> 5. the "new" Rule's express recognition (in R. 6.10) of "electronic hearings", whether occurring by the parties' agreement or by order, during which all manner of questioning, including cross-examination, may occur via video- or audio-link;
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> 6. the Court's new-era decisions (noted above) reflecting the possibility, and fact, of remote questioning;
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> 7. the Court's own increasing acceptance, since mid-March of this year, of remote (video or audio) proceedings (as reflected in various Covid-19-related "master orders");
>
> 8. the overall improvement in video-link technology over the last twenty years (i.e. since Alberta Central Airways);
>
> 9. growing recognition of the utility of remote evidence-giving and -questioning; and
>
> 10. the foundational-rule imperatives to apply, and as necessary augment, the rules to ensure the fair, just and timely resolution of parties' claims,
>
> I find that, through the combined effect of Rules 1.2(1) and (2), 1.4(1) and (2)(c), 1.7(2), and 6.10, the Court has the authority to direct remote questioning on affidavits.

After satisfying himself that he had jurisdiction to order a virtual examination, Justice Lema rejected the Respondent's arguments about the number of witnesses, the ages of the parties, and the need for an interpreter, and ordered the parties to proceed with virtual examinations:

> [31] As noted earlier, the organization points to Covid-19 social-distancing requirements, plus the need for an interpreter, as reasons for standing down affidavit cross-exams until the pandemic "all clear" has been sounded. In a nutshell, the organization contends that the cross-exams cannot usefully be conducted unless done in person, in due course.
>
> [32] I disagree, and cite the reasoning of Myers J. in *Arconti v Smith*, a Covid-19-era case where a party balked at video-link examinations for discovery for similar reasons: . . .

Justice Lema also drew counsel's attention to Alberta's protocol on remote questioning, and attached it to his decision. The protocol is essential reading for anyone conducting a virtual examination and deals with all of the following topics:

> *Prior to the Questioning*
>
> • The selection of a technology platform;

- Scheduling;
- Necessary equipment;
- The setting for the examination;
- Records and documents for the examination; and
- Test meetings.

During the Questioning

- Preliminary questions for the virtual examination;
- General rules for the virtual examination;
- Oath/Affirmation and undertakings; and
- Rules of evidence and admissibility.

After the Questioning

- The reporter's certificate.

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***CSSD v. C.C. & J.B.*, 2020 CarswellNfld 135 (Prov. Ct.) - Porter Prov. J.**

In *CSSD v. C.C. & J.B.*, Judge Porter was faced with a request by one of the parents in a child protection case, CC, to adjourn the Manager of Children, Seniors and Social Development's (the "CSSD") application for continuous custody of CC's four children until it could be dealt with in person.

In refusing CC's request for an adjournment, Judge Porter found that it would be contrary to the children's interests to delay the matter indefinitely, and that the matter could be dealt with properly and fairly using a virtual court:

> [5] I need not expound in great detail on the validity of using a virtual court, in which all participants in a trial appear by video. In criminal matters (see, for example, Judge Gorman's decision in *R. v Mitchell*, 2020 CanLII 33884 (NL PC)) **we have seen that matters can be tried and adjudicated with full recognition of the rights of the parties**. And, of course, the Court of Appeal ruled that we could use a virtual court to hear matters in Gibbs, well before the pandemic had surfaced.
>
> [6] Finally, there is the Notice to the Profession issued by this Court, cited by Judge Gorman in Mitchell, which not only authorizes, but directs the hearing of matters by virtual court at the discretion of the presiding judge.
>
> [7] **I have no reservation about hearing the matter by virtual court**. [emphasis added]

Judge Porter also made it clear that it is unacceptable to put child protection cases on hold until the COVID-19 pandemic has ended, and that lawyers, parties, and courts all need to ensure that these cases can still be dealt with in a timely manner:

> [9] CC requested that the continuous custody hearing be put over until the Covid19 pandemic restrictions have been "lifted". We have no way of knowing when that might be.
>
> [10] **This matter concerns the best interests of 4 young children**, each of whom were apprehended as a child in need of protection. **They are not books, to be put away on a shelf, unread, until some unknown time in the future. They are living, breathing children, and it is in their best interests that the Court must act**.

> [11] In this context, it is important to note that counsel for CC, Mr. Shink, did not say that he did not have, or could not obtain, instructions from CC on how best to proceed. When I asked him whether it was a case where he had been unable to get instructions, Mr. Shink said that he could not disclose his discussions with CC because of the solicitor/client privilege. And he said that he had not been able to "sit down and go over with CC the banker's box of disclosure".
>
> [12] Here I note two things. First, given that the April presentation hearing took two days of docket time, clearly Mr. Shink and his client have been put on full notice of the basis of the application for continuous custody of these children. **Second, in this day and age, solicitors routinely take instructions over the telephone: the pandemic does not prevent that practice. The Covid19 pandemic restrictions may have prevented all lawyers from sitting down with their clients to physically review the disclosure, but it has not stopped the practice of law**. [emphasis added]

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***C.G.R. v. J.L.R.*, 2020 CarswellBC 1346 (S.C.) - Riley J.**

The parties in *C.G.R. v J.L.R.*, had two children together (one was eight years old and the other was six). The children had lived primarily with the mother since the parties separated in 2014.

Pursuant to the existing final order, the children had access with the father for three afternoons each week, but no overnight access. As the parties could not reach an agreement to expand the father's access, he started a proceeding to vary the final order.

After the COVID-19 pandemic started, the father brought a motion for both increased access and overnight access pending trial. The mother opposed the motion, and argued that "the matter is not suitable to be dealt with by written submissions", it was not urgent, and it would not be in the children's best interests to change the schedule at this time.

Justice Riley disagreed with the mother, and determined that there was no reason that it could not be dealt with in writing now:

> [17] I respectfully disagree with the submission that this matter is not suitable to be dealt with in writing. Urgency is not a pre-requisite under the COVID-19 Notice #14. The parties are unable to agree on parenting time and require a determination on that issue. **I see no reason why they should have to wait when the matter can be dealt with on the basis of a written record and submissions. This is a straightforward application dealing with a single, discrete issue. The affidavit evidence is focused on the point in issue. There is no particular legal or factual complexity**. [emphasis added]

Justice Riley also took the opportunity to summarize five key points that courts will consider when dealing with the impact, if any, that the COVID-19 pandemic should have on existing parenting arrangements:

> • "First, COVID-19 concerns should not be used as a justification for denying parenting time under an existing parenting order absent some specific concern that the health of the child or someone else in the child's household is at risk."
>
> • "Second, absent some specific concern, the mere fact that a child has to go from one household to another during the COVID-19 era is not a basis for refusing to comply with or even applying to vary an existing parenting order."
>
> • "Third, each parent is expected to show some flexibility by making every effort to work with the other parent and to comply with recommendations of public health officials regarding things such as self-isolation, physical distancing, and proper hygiene."
>
> • "Fourth, case-specific evidence that a particular parent is not adhering to the recommendations of public health officials regarding COVID-19 may be a basis for variation of an existing parenting order."
>
> • "Fifth and finally - and this is really my synthesis of the law rather than a point explicitly made in any of the cases - there may be situations where a child or a member of one parent's household is subject to heightened risks associated with

> COVID-19, and in such circumstances, the court must look for an arrangement that minimizes those risks to the greatest extent possible in a manner consistent with the best interests of the child."

After reviewing the affidavit evidence, Justice Riley determined that it would be in the children's best interests to allow the children to start spending every other weekend with the father. It is unusual for a court to make significant changes to a final parenting order on an interim basis and based solely on a paper record. However, it certainly made sense to do so in this case as there was absolutely no evidence to suggest that there was any basis to wait until trial for the children to start something as basic as alternate weekend access with their father.

—

***Clemente v. O'Brien*, 2020 CarswellOnt 7438 (S.C.J.) - McGee J.**

So what is "pressing" anyway?

In some parts of Ontario, courts have begun hearing virtual Case Conferences on demand. In others parts, however, parties still have to persuade a judge that a matter is "urgent" or "pressing" before a virtual Case Conference can be scheduled.

In her well-written and considered decision in *Clemente v. O'Brien*, Justice McGee considered the meaning of "pressing" for the purposes of the Central East Region's May 19, 2020 Notice to the Profession. She ultimately concluded that it is a threshold equal to the one that Justice Wildman established in *Rosen v. Rosen*, 2005 CarswellOnt 68 (S.C.J.) for allowing a party to proceed with a motion before a Case Conference during regular court operations. Her Honour also concluded that, in line with *Rosen*, as a precondition to granting leave, the court must be satisfied that the moving party has engaged in "genuine, broadly optioned and diligent settlement discussions."

The father brought a motion to schedule a Case Conference to deal with access issues that were *unrelated* to COVID-19. He had not seen his three-year-old son since November 2, 2019, when an altercation between the parties at the father's home resulted in him being criminally charged with a number of serious charges, including assault and uttering threats.

After the incident, the father left the country for periods of time and did not press for any access until March 2020.

In her responding materials, the mother described her history with the father, which included significant domestic violence, often in the presence of their son. There was third-party evidence of the violence and the child had been injured during the recent incident between the parties.

In his Application, issued May 19, 2020, the father sought orders for joint custody, a parenting schedule and incidents of parenting that would govern the care of their son. He alleged that the mother was "gatekeeping", engaging in "self-help", and purposefully not cooperating with access requests. He wanted alternate weekend access to resume immediately. Notably, the parties never cohabited, and there was no pre-existing access order or agreement.

Against this background, Justice McGee had to consider whether the father's request for a Case Conference was, in fact, "urgent" or "pressing".

The problem with the relief that the father had requested, found Justice McGee, was that it was based on a normalized parenting schedule for a child who has a healthy attachment to a parent and has experienced little to no trauma. Had that been true for the child in this case, Justice McGee agreed that parenting time would be an urgent issue. Indeed, in *Matus v. Gruszczynska*, 2020 CarswellOnt 5273 (S.C.J.), the Court determined that young children in the attachment phase of development are particularly vulnerable to the harmful effects of being removed from a care giving parent. *In the normal course*, it is always in the best interests of a child to have a maximized, loving relationship with both parents.

But this situation was not normal. In this case, the child did not have a healthy attachment to his father, and had been impacted by domestic violence. In focussing on what he wanted, the father was not properly focussed on what was best for the child.

Justice McGee found that the father had not met the now-frequently quoted test for a finding of urgency set out by Justice Kurz in *Thomas v. Wohleber*, 2020 CarswellOnt 4494 (S.C.J.). There were no essential decisions to be made, and there had been no unlawful withholding. The child was safe. No regular routine had been interrupted. Therefore, the proposed Case Conference did not meet the test for an "urgent" Case Conference.

The question then became - while the situation was not "urgent", was it "pressing" enough to be heard pursuant to the applicable Notice to the Profession?

In *Murphy v. Connolly*, 2020 CarswellOnt 6767 (S.C.J.), Justice Jarvis indicated that when determining whether a concern is pressing, the test for "urgency" from *Thomas v. Wohleber* should be modestly relaxed. Justice McGee agreed with Justice Jarvis, and took the opportunity to bring the test for "pressing" for the purposes of COVID-19 into line with the test for "urgency" from *Rosen* for the purposes of having a motion heard before a Case Conference during normal court operations. To quote Justice McGee:

> [25] In 2005 Justice Wildman wrote her seminal decision [in *Rosen*] that succinctly transformed "walked-in," often without notice motions into outliers in a reimagined, redesigned family court system that not only encouraged, but incentivized negotiation before litigation. There were to be no more races to the courthouse. Parties were to first reason with one another, make proposals for a resolution with or without assistance, and only then come to court.
>
> [26] And for the matters that did come to Family Court, the first event was not to be marked by impassioned arguments on "nasty affidavits" but conducted as a judge led Case Conference that identified the issues, resolved as much as possible, and then organized the evidence and processes necessary to determine the balance of the conflict.
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> . . . . .
>
> [30] Real crises - harm to a child, threats to personal security and the risk of financial ruin must have immediate access to the court. They are urgent as plainly understood by the definition of the word referenced at paragraph 4 of *Rosen*:
>
> > [Counsel] says there is very little reported caselaw on the issue of what constitutes "urgency". He refers me to the Webster Dictionary definition of "urgent", which is "Pressing; necessitating or calling for immediate action; earnestly insistent; importunate".
>
> [31] All other motions must first comply with a series of steps: to ascertain whether a Case Conference date is first available, to engage in settlement discussions and to develop positive options. I emphasize the step of settlement discussions because it is critical to best outcomes for families and essential to an effective court system.
>
> [32] **Urgency as set out in the original Notice to the Profession was a higher standard than in *Rosen*. With the May 19, 2020 expansion has come a relaxing of that initial standard; but to now set it below that of *Rosen* would in my view undercut a vision for the Family Court that we must not leave behind as we transition to a new normal**. This is a full circle worth travelling whether the test for urgency be for a motion, as it was in *Rosen v. Rosen* or for a Case Conference during a period of suspension.
>
> [33] I therefore characterize a pressing issue as set out in the May 19, 2020 Central East Notice to the Profession as **a standard no less than that required for an urgent motion during regular court operations pursuant to *Rosen v. Rosen*, 2005 CanLII 480, and that as a precondition to granting leave, the court must be satisfied that the moving party has engaged in genuine, broadly optioned and diligent settlement discussions**. [emphasis added]

In the case before her, Justice McGee determined that the father had not established that the situation was either urgent or pressing. His materials offered no compromise; he made no genuine effort to settle; and he made no effort to investigate options.

Our only concern here is the general concern we have expressed about the current state of court operations and delay.

—

***Surdyka v. Surdyka*, 2020 CarswellOnt 7620 (S.C.J.) - Jarvis J.**

Surdyka v. Surdyka is another recent case where the court dealt with whether a matter was sufficiently "pressing" to be heard.

The husband started a proceeding in 2019 to terminate his spousal support obligation. The case was supposed to have been tried in May 2020, but it had to be adjourned because of COVID-19.

Justice Jarvis agreed with Justice McGee's summary of the test for "pressing" in *Clemente v. O'Brien*, and accepted that the husband's motion met the test "given the unchallenged evidence before the court about the change in his income, his health and concerns about the wife's disclosure efforts . . . " The evidence also showed that the husband had paid spousal support to the wife in 2016 and 2017 even though she had actually earned more than the husband in those years.

After considering the test for varying a final support order on an interim basis that Justice Kurz synthesized and summarized in *Berta v. Berta* (2019), 23 R.F.L. (8th) 201 (Ont. S.C.J.) (and that we discussed in the May 11, 2020 edition of *TWFL*), Justice Jarvis suspended the husband's support payments. His Honour was satisfied that the husband had established a strong *prima facie* case, hardship, urgency, and that he had come to court with "clean hands". However, he was also clear that he was "making no determination about the ultimate merits of the husband's motion."

This was an eminently sensible result, particularly since the wife did not even respond to the motion, and it is unlikely that the husband's request to terminate his support obligations will be able to be tried anytime soon.

And now, for a case that has absolutely nothing to do with COVID-19.

As My Kindergarten Teacher Used to Say: When Engaging in Tax Planning Don't Set up Artificial Receivables in an Effort to Income Split When Separation Is on the Horizon

Lonsdale v. Evans (2020), 37 R.F.L. (8th) 251 (Sask. C.A.) - Schwann, Barrington-Foote, and Kalmakoff JJ.A.

Many family businesses engage in income splitting to reduce the family's total overall tax burden. But tax planning (and tax law in general) can often have unanticipated consequences when it intersects with family law, and in this case, it could easily end up costing the husband and his parents hundreds of thousands of dollars.

The parties' started cohabiting in late 2007 or early 2008 and had two children together.

The husband worked in his parents' hardware store in Swift Current, Saskatchewan. The husband's parents were the sole owners of the corporation that owned the hardware store (the "Corporation"), and the husband had absolutely no interest in it.

The husband earned about $65,000 a year from his job at the hardware store. However, from 2013 to 2015, the husband's parents caused the Corporation to declare more than $1,000,000 in bonuses to the husband. While the husband included the bonuses in his taxable income and the Corporation deducted the associated taxes at source, the husband did not actually receive any money from the Corporation on account of the declared bonuses.

At trial, the wife argued that "the declaration of bonuses to [the husband] represented a debt owing to him from the corporation and, as such, the value of the bonuses was family property subject to division." The trial judge disagreed, and concluded that the bonuses "were neither received as income nor a debt owing to him and, as such, were not family property subject to division." The trial judge also found that "even if the declared but unpaid bonuses had been subject to division, any claim [the husband] might have had against the corporation was statute-barred because the limitation period had expired."

The Court of Appeal disagreed with the trial judge. Among other things, although the trial judge had found that the bonuses had been part of a "tax minimization scheme", the husband had not led any evidence or made any submissions about "how declaring a bonus, with no intention of paying it, could benefit the corporation by minimizing taxes."

Courts in most provinces have consistently held that unpaid employment earnings at the time of separation are debts owing from the employer to the employee and, thus, family property subject to division: *Dembeck v. Wright* (2012), 27 R.F.L. (7th) 264 (Ont. C.A.) (termination and severance payments); *Cosentino v. Cosentino* (2015), 55 R.F.L. (7th) 117 (Ont. S.C.J.) (accrued but unpaid real estate commissions); *H. (D.) v. H. (J.E.)*, 2001 CarswellSask 801 (Q.B.) (bonus); *Greco-Wang v. Wang* (2015), 62 R.F.L. (7th) 487 (Ont. S.C.J.) (bonus); *Wouters v. Wouters*, 2002 CarswellSask 554 (Q.B.) (bonus); *Macdonald v. Macdonald* (2002), 33 R.F.L. (5th) 119 (B.C. S.C.) (bonus).

The Land of Living Skies is no different.

After confirming that, under Saskatchewan's *Family Property Act*, S.S. 1997, c. F-6.3, "amounts related to employment earnings that have not yet been paid at the time of separation are debts owing from the employer to the individual and, thus, family property subject to division", the Court of Appeal concluded that the only appropriate remedy was to order a new trial:

> [50] In my view, a new trial is required on this issue. There are factual findings that must be made, taking into account the evidence that I have found the trial judge either did not consider or mischaracterized. It is not the role of this Court to make factual findings.
>
> [51] That being so, the new trial must also deal with the issue of the limitation period. The trial judge held that, even if the amounts declared in Mr. Evans' favour as bonuses were a debt owing to him by the corporation, the debt was not enforceable because he had not pursued a claim before the expiration of the limitation period set out in s. 5 of *The Limitations Act*, SS 2004, c L-16.1. That was a finding based on discoverability that was necessarily based on the facts relating to the bonuses. Discoverability is a question of mixed fact and law, and the conclusion reached by the trial judge relating to this issue turned on findings of fact relating to the bonuses that he did not explain or may not have made. At the new trial, the judge will be required to make the necessary findings afresh. It is, accordingly, appropriate for that trial judge to determine whether the limitation period applied to any of the bonuses, and if so, with what effect.

It is hard to see how the husband will be able to prove that the more than $1,000,000 in bonuses that were declared by the Corporation but not yet paid out were somehow not owed to him when the parties separated. When the Corporation declared the bonuses and paid the husband's taxes for them, it also presumably deducted the bonuses as expenses in order to save corporate tax, and effectively issued a promissory note in the husband's favour for the remaining money that it owed him (i.e. the amount of the bonus less the associated taxes).

While the husband may not want to force the business, owned by his parents, to pay off the amounts owing , unless he can prove that they were somehow statute barred, there does not appear to be *any* question that he had the legal right to force it to do so. And, if this debt was owed to the husband when the parties separated, the husband will presumably have to share its significant value with the wife.

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