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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

We are continuing to update the *Epstein Cole COVID-19 Case Chart*, which you can access in FamilySource on *Westlaw*. The chart now includes more than 40 family law cases that have dealt with COVID-19 related issues, and we are adding more cases as quickly as we can.

But if you only have time to read one COVID-19 case right now, we suggest that you look at Justice Lee's decision in *J.W v. C.H.*, 2020 CarswellBC 833 (B.C. Prov. Ct.), where he synthesized and summarized many of the important principles that have been established in the cases that have dealt with COVID-19 so far, including:

• *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (S.C.J.), where Justice Pazaratz determined that "in most situations there should be a presumption that existing parenting arrangements and schedules should continue", and that parents "should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time" or "that raising COVID-19 considerations will necessarily result in an urgent hearing." Specific evidence and examples are required.

• *Onuoha v. Onuoha*, 2020 CarswellOnt 4103 (S.C.J.), and *Reitzel v. Reitzel*, 2020 CarswellOnt 4269 (S.C.J.), where Justice Madsen confirmed that applications to determine whether a matter is urgent "are intended to be simple and expeditious." They are not meant to open another front of battle.

• *Thomas v. Wohleber*, 2020 CarswellOnt 4494 (S.C.J.), where Justice Kurz set out a list of factors to be considered when deciding whether a matter is urgent.

• *Johansson v. Janssen*, 2020 CarswellBC 770 (S.C.), where Justice Smith determined that "[a] matter is not urgent if the order sought has no immediate consequence."

• *Smith v. Sieger*, 2020 CarswellOnt 3965 (S.C.J.), where Justice Kaufmann confirmed that "[t]he overriding principle of the child's best interests remains and that includes any health concerns for the child[.]"

• *Le v. Norris*, 2020 CarswellOnt 4116 (S.C.J.), where Justice Conlan determined that "[a] child should not be exposed to unreasonable risk but at the same time, COVID-19 is not an excuse to deny a person from having scheduled time with a child when there is no reasonable basis for doing so[.]"

For those who practice child protection law, we also want to make sure that you are aware of Justice Pawagi's decision in *Children's Aid Society of Toronto v. T.F*, 2020 CarswellOnt 4532 (C.J.). Her Honour refused to let the Children's Aid Society proceed with a motion to suspend the mother's in-person access, because the motion was based solely on the Society's general policy as set out in the COVID-19 Pandemic Response that it released on March 18, 2020 of "suspending all in-person access visits until further notice in cases where access is in the discretion of the society, and seeking orders varying access to be at the society's discretion in cases where there are specified access terms."

In determining that the Society's motion was not urgent and should be dismissed, Justice Pawagi confirmed that Justice Pazaratz's conclusion in *Ribeiro v. Wright*, 2020 ONSC 1829 (S.C.J.) that "[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" and also applies to the child protection context:

> [10] I agree with and adopt his analysis. Pazaratz, J. notes that COVID-19 concerns are of grave importance, but what must also be considered is the importance to a child of maintaining parental relationships. He concludes, at para. 20 of his decision, that there is no presumption that the existence of the COVID-19 crisis automatically results in the suspension of in-person parenting time, and furthermore, there is not even a presumption that raising the COVID-19 crisis will automatically result in an urgent hearing.
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> [11] The society here is relying solely on its blanket policy and presumptions. The society provides no specific evidence of behaviour by the mother that is inconsistent with government COVID-19 protocols.
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> [12] The society's 14B motion is dismissed.
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> [13] This order is without prejudice to the society's ability to bring a further 14B motion should specific COVID-19 problems arise.

Finally, before moving on to some non-COVID-19 cases, we want to draw your attention to Justice Kurz's recent statement in *Ivens v. Ivens*, 2020 CarswellOnt 4836 (S.C.J.), that even though the courts are currently limiting their operations, they are still ready, willing, and able to help ensure that parents cannot use COVID-19 to try to "seize the sole right to parent their children":

> [1] During this COVID-19 pandemic, the courts are beginning to see a situation that approaches a crisis of its own: parents using the urgency of the moment to seize the sole right to parent their children, contrary to court orders. The suspension and limited administrative capabilities of this court have necessarily led it to be very strict in determining the level of urgency necessary to allow an audience with a judge. But that rigour does not mean that we should ignore blatant breaches of custody and access orders or the unilateral usurpation of parental roles under the guise of COVID-19 protection. Such a state of affairs would, in itself, create a situation of harm for children.

**Don't Let a Lack of Material Change Hit You in the Butt on the Way Out**

*D.S. v. C.S.(T)*, 2020 CarswellNB 49 (Q.B.) - Walsh J.

This case suggests that if an Order or agreement does not expressly or implicitly require a spouse to take steps to increase their income, you will probably not be able to have additional income imputed to him/her for being intentionally underemployed later on.

The parties were married in 2001 and had two children together. When they separated in 2011, the mother was working as an in-home child care provider and was earning approximately $20,000 year.

In 2014, the parties consented to an Order that provided that the father would pay the mother $1,000 a month in child support based on a straight-set-off, the father having an income for support purposes of $104,477 a year, and the mother having an income of $20,517 a year.

  

Several years after the parties' consented to the 2014 Order, the father brought a motion to reduce his child support obligations. He argued that the mother should be imputed with additional income because she was earning less than she was capable of earning. In support of his argument, the father alleged that since the mother had been able to earn $30,000 to $40,000 a year as a real estate agent during the early years of their marriage, it was unreasonable for her to now only be earning $20,000 a year as a child care provider.

In dismissing the father's motion, Justice Walsh noted that as the father had specifically consented to a support Order based on the mother's actual income as a child care provider, and as the Order did not suggest that the mother should be taking steps to increase her income or change careers, it was not then open to him to revisit that issue in the context of a variation proceeding:

> [9] Obviously, a post consent order change in income of the payor party(s) constitutes a material change of circumstances for the purposes of child support variation. But that is not the issue. **The issue is whether there is a material change in circumstances *vis a vis* the mother's earning power, warranting consideration of income imputation.**
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> [10]**In the context of an existing order, a court cannot simply embark on a *de novo* hearing to determine if income should be imputed, based on the request of the other party.** This was made clear by the Supreme Court in *M.E.L v. P.R.H.*, [2018 CarswellNB 592 (N.B. Q.B.)] *supra*. Rather, that case directed that a court have regard to the circumstances of the parties and the terms of the order to determine if there has been a change, such that, if known at the time, would likely have resulted in different terms of the Order (i.e. a material change).
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> [11] **In this case there is nothing in the terms of the Consent Order suggesting that the mother's income earning power would at some point in the future be revisited for consideration of imputation.** Nor is there anything in the actual circumstances of the parties at the time the order was made that would lead to the conclusion that the mother's later failure to give up her child care occupation for more remunerative work (if available) is something that, "if known at the time, would likely have resulted in different terms" of the Order. Quite the opposite.
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> [12] **Nothing has changed in terms of the mother's employment. It was work she did during marriage; it was the work she was doing at the time of separation; it is the same work she is doing now; and her level of renumeration (*sic*) is comparative throughout.** This can hardly be considered a material change within the meaning of the law. **The silence in the agreement as to the mother's then occupation amounts to tacit acceptance of the *status quo*.** On the other hand, were this a case of self-induced reduction in income in that occupation then a material change in circumstances could be found, warranting a consideration of whether to impute income. But, that is not the case here. [emphasis added]

So remember. To preserve the right to argue that a spouse should/could be earning more than s/he is presently earning, the Order or agreement must confirm that a spouse's failure to take appropriate steps to increase his/her income will constitute a material change in circumstances, or provide that support will be reviewed *de novo* after a certain amount of time, or a certain milestone has passed. This consideration takes on more critical importance where a recipient spouse is not earning anything at the time of the initial order or Agreement. Then a review or the specification of a material change is even more important.

**Friends With Benefits & Kids - But Not Cohabitation**

*Jackson v. Moore* (2019), 34 R.F.L. (8th) 452 (Ont. S.C.J.) - J.R. Hendersen, J.

Courts have frequently tested the high-water mark of "cohabitation" (see, for example, *Hazlewood v. Kent* (June 20, 2000), Doc. 7621/99 (Ont. S.C.J.); *McEachern v. Fry Estate*, 1993 CarswellOnt 3632 (Ont. Gen. Div.); and *Climans v. Latner* (2019), 21 R.F.L. (8th) 96 (Ont. S.C.J.). But the low-water mark is rarely tested. This is why *Jackson v. Moore* is interesting. In *Jackson*, Justice Hendersen finds no cohabitation in a situation that might otherwise have the markers of cohabitation, including two children.

  

The parties were 24-years-old and 30-years-old. They met in 2012, and dated briefly. They reconnected in July 2014, and maintained a relationship until approximately May 2018. They never married, but had two children (one born in 2015, and the other in 2018).

The parties did not know each other well when the mother became pregnant with their first child, but they stayed in contact, and discussed how they would manage the birth of their child. They occasionally were sexually intimate, but the father, to the mother's knowledge, was involved in relationships with at least two other women from July to December 2014.

After the parties' first child, Skylar, was born in April 2015, the father continued living with his mother, while the mother and Skylar lived with the mother's mother.

The father began dating his new girlfriend in March 2015, just prior to Skylar's birth. The mother was aware of the father's new relationship, but continued to be intimate with him on occasion.

Shortly after Skylar's birth, the father told the mother that he wanted to take care of her and Skylar. He had received some money from an insurance settlement, and was considering purchasing an investment property. The father offered to buy a property that would be suitable for the mother to rent from him. Consequently, in November 2015, the father purchased a house on Bessey Street, and early November 2015, the mother (and Skylar) moved in as a tenant pursuant to a written lease agreement. The lease specified that the rent was $1,050 a month, but the parties had an oral agreement that Jackson would only pay $700 a month. The mother paid that amount every month that she lived at the Bessey Street property (from November 2015 to May 2018).

The mother and father continued their relationship while the mother and Skylar lived at the rental property. The father came to the rental property about once a week. He usually arrived at 5:00 p.m. or 6:00 p.m. and spent approximately two hours with Skylar until she went to bed. He then usually spent another two hours with the mother, and they often watched a movie and were intimate. After that, the father would leave the rental property and return to his own home.

The father never spent the night with the mother at the rental property, and he did not move any of his clothing or personal effects there. He continued to date other women, and in fact moved in with one of them. The mother also dated one other man during this period.

In approximately May 2018, the mother told the father that she was pregnant and that he was the father. This led to the end of their relationship and, at the father's request, the mother (and Skylar) moved out of the rental property and back in with the mother's mother.

In the mother's claim, aside from child-related relief, she claimed spousal support based on the parties' alleged cohabitation. To have standing to claim spousal support, the mother had to prove that she was a "spouse" within the meaning of Ontario's *Family Law Act* (the "*FLA*"), which is similar to the definition of "spouse" in other provincial statutes across the country. It was the mother's position that from November 2015 to May 2018, the parties "cohabited in a relationship of some permanence" while being the natural parents of a child, and that consequently she was the father's spouse within the meaning of the *FLA*. The father's position was that the mother was his tenant, that the parties were not cohabiting in a relationship of some permanence, and that the mother was not his spouse.

So - were the mother and father spouses?

Section 29 of the *FLA* defines a "spouse" for spousal support purposes as follows:

> "spouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have ***cohabited***,
>
> (a) continuously for a period of not less than three years, or

  

(b) ***in a relationship of some permanence***, if they are the parents of a child as set out in section 4 of the Children's Law Reform Act.

And, in s. 1 of the *FLA*, "cohabit" is defined as follows:

"cohabit" means to live together in a conjugal relationship, whether within or outside marriage.

While the father accepted that the parties were the parents of two children and acknowledged sexual intimacy, he did not accept that they "lived together in a conjugal relationship." According to the father, the relationship was one of "friends with benefits." (Anyone over the age of 65 can resort to Google.)

Justice Hendersen quite properly considered *M. v. H.* (1999), 46 R.F.L. (4th) 32 (S.C.C.), which lends some Supreme Court of Canada weight to the often-cited considerations regarding "cohabitation" that Justice Kurisko set out in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.):

**1. Shelter:**

a. Did the parties live under the same roof?

b. What were the sleeping arrangements?

c. Did anyone else occupy or share the available accommodation?

**2. Sexual and Personal Behaviour:**

a. Did the parties have sexual relations? If not, why not?

b. Did they maintain an attitude of fidelity to each other?

c. What were their feelings toward each other?

d. Did they communicate on a personal level?

e. Did they eat their meals together?

f. What, if anything, did they do to assist each other with problems or during illness?

g. Did they buy gifts for each other on special occasions?

**3. Services:**

What was the conduct and habit of the parties in relation to:

a. Preparation of meals,

b. Washing and mending clothes,

c. Shopping,

d. Household maintenance, and

e. Any other domestic services?

**4. Social:**

  

a. Did they participate together or separately in neighbourhood and community activities?

b. What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

**5. Societal:**

What was the attitude and conduct of the community towards each of them and as a couple?

**6. Support (Economic):**

a. What were the financial arrangements between the parties regarding the provision of or contribution towards the necessaries of life (food, clothing, shelter, recreation, etc.)?

b. What were the arrangements concerning the acquisition and ownership of property?

c. Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

**7. Children:**

What was the attitude and conduct of the parties concerning children?

Upon considering these factors, Justice Henderson - correctly in our view - found very little evidence from any of the witnesses, including the mother, to support the mother's position that she and the father were spouses. Ultimately, he found the mother to be honest and forthright, but naïve about her relationship with the father.

The time that the father spent at the rental property was limited. In general, the father was only present a few hours every week and, importantly, he never stayed overnight or moved any of his clothing or personal belongings into the home.

As a result, Justice Hendersen could not find that the parties lived together under the same roof or that they shared accommodations. This *Molodowich* factor undoubtedly favoured the father.

The factor regarding sexual behaviour and fidelity also clearly favour the father. The mother knew that the father was seeing other women when she lived in the rental property. She even referred to the father having had a "girlfriend", and admitted dating another man during the period for about a month.

Regarding personal behaviour, the father did not stay for meals at the rental property, and the parties did not exchange gifts or cards or celebrate special occasions or holidays together. On one occasion, the father took the mother out for dinner on her birthday, and on Valentine's Day they often would "hang out" together. This behaviour suggested a casual dating relationship, and not a spousal relationship.

Regarding communications, in late 2015 and early 2016, the parties had exchanged text messages expressing strong feelings for each other. The father described the mother as a great mom and an amazing person. He also told her that he loved her. The mother said that she fell in love with the father after she moved into the rental property. But that was not sufficient to result in a finding of "cohabitation", as the relationship never blossomed into the one that the mother wanted.

The facts clearly showed that, while the mother may have wanted more, the father was not committed to her. In *S. (Y.) v. B. (S.)* (2006), 29 R.F.L. (6th) 183 (Ont. C.J.) (para. 61), Justice Dunn noted:

> It is not just in living together or having sexual congress or sharing expenses or providing childcare. These acts taken alone, or even together, will not unequivocally create spousal relations. . . . [F]or a spousal relationship, what is needed

  

> is a consensual acceptance by two people of each other as spouses and so declared by each person to the other by his or her words and actions.

And that was not this case.

There was no evidence of shared domestic services. While the father did extensive repairs and maintenance to the rental property, that was because he owned it, and it was a significant financial investment for him.

There was also no significant evidence of financial or economic support. The only such evidence, perhaps, was a suggestion that the father was charging the mother less than fair market rent.

Perhaps the most damning evidence was the mother's admission that she introduced the father as "Skylar's dad" at the two family events they went to together and to her friends, and not as her spouse or boyfriend.

While the mother predictably relied on *Hazlewood v. Kent* (June 20, 2000), Doc. 7621/99 (Ont. S.C.J.), and while *Hazelwood*, as noted above, has been referred to as one of the "high-water-mark" cohabitation cases, the facts in *Hazelwood* were different. In that case, the parties also never married and also had two children together. However, the father spent weekends living with the mother and the children in their home. The father had moved personal effects into the mother's home and had his own room in the home. The parties in *Hazelwood* were also faithful to each other and there was evidence of some sharing of domestic chores.

Ultimately, on a consideration of the *Molodowich* factors, Justice Henderson found that the parties had not cohabited. Essentially all of the factors favoured the father. Therefore, they were not spouses. And that was that.

Unfortunately, Justice Hendersen did not have to go further and consider the meaning of "relationship of some permanence", which is an underdeveloped part of the extended definition of "spouse". From *Hollefriend v. Cole*, 2017 CarswellOnt 152 (S.C.J.), we know that parties can be in a relationship of some permanence even without maintaining one joint residence, and that living together for a short time may *not* constitute cohabiting in a relationship of some permanence - but we could all benefit from some clarification on this point.

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