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— BT LEGAL —

## **Family Law Litigation and the Impact of COVID-19**

In light of the current COVID-19 pandemic, the court system has suspended many of the matters that are normally dealt with in the regular course of family law litigation, in efforts to protect the health and safety of court staff, legal practitioners and litigants. For the most part, courts are restricted to hearing only matters which fall within the category of “urgent,” as defined by the Chief Justice of the Superior Court in his Notice to the Profession, dated March 15, 2020.<sup>1</sup>

Specifically, the following four circumstances are contemplated within the Notice to Profession to fall within the scope of an urgent matter:

- (a) Requests for urgent relief relating to the safety of a child or parent (e.g., a restraining order, other restrictions on contact between the parties or a party and a child, or exclusive possession of the home);
- (b) urgent issues that must be determined relating to the well-being of a child including essential medical decisions or issues relating to the wrongful removal or retention of a child;
- (c) dire issues regarding the parties’ financial circumstances including for example the need for a non-depletion order;
- (d) in a child protection case, all urgent or statutorily mandated events including the initial hearing after a child has been brought to a place of safety, and any other urgent motions or hearings.

As government mandated protocols continue to become more onerous to deal with the pandemic, understandably, the anxiety and needs of family law litigants continue to rise. For example, social distancing and other COVID-19 measures have led to many questions regarding appropriate access and parenting time between parties. Further, the economic impact of the pandemic has raised significant concerns regarding property division and ongoing child and spousal support obligations.

While these concerns are important, the ultimate question remains, will it be viewed as urgent by the court?

### **Overview for Determining Urgency**

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<sup>1</sup> For access to the Notice to the Profession: <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>. Further, as of April 6, 2020, additional matters will be able to be scheduled to be heard through a remote hearing in addition to urgent matters. The scope of the matters now available to be heard will vary by region and still remain quite restricted.

As a starting point, family law litigants are being urged by the courts to use every reasonable and good faith effort to communicate, negotiate and resolve their issues outside of the court system, in order to preserve the limited judicial resources during this time for the most urgent matters.<sup>2</sup>

Should this fail, the recent jurisprudence has highlighted that the case-law developed prior to the COVID-19 crisis remains a key consideration in determining urgency. Namely, a party bringing an urgent motion must show the court, (1) the availability of case conference dates for the matter have been canvassed; and (2) some form of settlement discussions have occurred before bringing the matter to court.<sup>3</sup>

Further, in the recent decision, *Thomas v Wohleber*, the court distilled the following key factors required for a matter to be heard as an urgent motion as provided in the Notice to the Profession:<sup>4</sup>

- (1) The concern must be immediate; that is one that cannot await resolution at a later date;
- (2) The concern must be serious in the sense that it significantly affects the health, safety or economic well-being of parties and/or their children;
- (3) The concern must be a definite and material rather than speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical;
- (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.

### **Urgent Custody, Access and Parenting Time Disputes**

Child issues relating to custody, access and parenting time are all areas that potentially give rise to urgent concerns regarding a child's safety and/or well-being. Recent matters which have been found to meet the threshold for urgency include:

- matters dealing with allegations of child abuse by a parent or parent's partner;<sup>5</sup>
- matters dealing with the removal of a child from a parent's care as a negotiation tactic in obtaining more parenting time;<sup>6</sup> and
- matters dealing with child safety, where the child was repeatedly running away from a parent's home and seeking police assistance;<sup>7</sup>

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<sup>2</sup> *Scharafanowicz v DeMerchant*, 2020 ONSC 1916 (Hamilton).

<sup>3</sup> *Rosen v Rosen*, 2005 CanLII 480. *Skuce v Skuce*, 2020 ONSC 1881. *Jackman v Doyle*, 2020 ONSC 1875. Note: given the current court closures, courts have found that the first requirement will be met, as it is unclear when a case conference can next be scheduled.

<sup>4</sup> *Thomas v Wohleber*, 2020 ONSC 1965.

<sup>5</sup> *Phipps v Petts*, 2020 ONSC 1999.

<sup>6</sup> *Jackman v Doyle*, 2020 ONSC 1875.

<sup>7</sup> *SWP v SP*, 2020 ONSC 1913.

In light of the pandemic, current parenting arrangements and exchanges have become a big concern for families living separate and apart, given the risk of exposure for the child. The recent decision, *Ribeiro v Wright*, has confirmed, despite these concerns, there is a presumption in favour of maintaining pre-existing court orders, agreements or arrangements<sup>8</sup> for parenting, subject to any necessary modifications to ensure COVID-19 precautions are met.

A party wishing to rebut the presumption bears the onus of presenting *specific* evidence or examples of the other party's behavior that is inconsistent with COVID-19 protocols.<sup>9</sup> General concerns regarding COVID-19 and social distancing efforts will not be sufficient to change a pre-existing parenting arrangement on an urgent basis.<sup>10</sup>

The following points summarize relevant findings with respect to urgent motions for parenting time restrictions due to the pandemic:

- the court expects parties to use creativity, fairness and diligence in proposing and following parenting time arrangements that address any COVID-19 concerns and protect the physical and emotional well-being of a child;<sup>11</sup>
- reasonable adherence to an existing court order [or arrangement], using basic common sense to follow social distancing protocols, should be sufficient in many cases, to address COVID-19 concerns;<sup>12</sup>
- it is in the best interests of a child to maintain parenting time and strong relationships with both parents, especially during the pandemic;<sup>13</sup>
- complete termination of timesharing between parents should only be a measure of last resort; and<sup>14</sup>
- unilateral actions of a parent in contravention of an existing court order involving parenting time will not be condoned and may amount to an urgent matter.<sup>15</sup>

It is important to note, where a party restricts parenting time due to COVID-19 and there is no formal court order in place, some recent decisions have concluded that the matter is not urgent, if it is demonstrated that the child is safe.<sup>16</sup>

### **Jurisdiction and Relocation Issues**

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<sup>8</sup> *Ribeiro v Wright*, 2020 ONSC 1829.

<sup>9</sup> *Ribeiro v Wright*, 2020 ONSC 1829. *Tessier v Rick*, 2020 ONSC 1886. Note: as in *Tessier v Rick*, the evidentiary requirement for demonstrating *specific* concerns of a party's behavior is not too onerous. In this case, the moving party had an unsworn affidavit and a few text messages to support her allegations.

<sup>10</sup> *Zhong v Zheung*, FC-13-043392 (ONSC).

<sup>11</sup> *Scharafanowicz v DeMerchant*, 2020 ONSC 1916 (Hamilton).

<sup>12</sup> *Le v Norris*, 2020 ONSC 1932 (Milton).

<sup>13</sup> *Ribeiro v Wright*, 2020 ONSC 1829.

<sup>14</sup> *Scharafanowicz v DeMerchant*, 2020 ONSC 1916 (Hamilton). *Zhong v Zheung*, FC-13-043392 (ONSC).

<sup>15</sup> *Skuce v Skuce*, 2020 ONSC 1881 (Ottawa). *Chrisjohn v Hillier*, F1098/18 (ONSC London). *Zee v Quon*, FS-16-412436 (ONSC).

<sup>16</sup> *Douglas v Douglas*, Court File No: 684/19 (ONSC). *Derkach v Soldatova*, 2020 ONSC 1992.

Jurisprudence has held that matters seeking the return of a child to an international jurisdiction will not be urgent at this time. In light of the pandemic and restrictions on international travel, the key concern is ensuring the child's safety and well-being in Canada. However, as noted in *Onuoha v Onuoha*, this finding should not prejudice the matter being dealt with at a future date.<sup>17</sup>

Matters seeking the return or relocation of a child to or within Canada, however, may meet the threshold urgency requirement. The following circumstances have been found to warrant an urgent motion:

- the return of a child away at school in the US, pending the country's border closure;<sup>18</sup>
- a parent's unilateral decision to remain in a different province, effectively changing custody of the child, in light of the COVID-19 outbreak;<sup>19</sup> and
- a parent's unilateral decision to relocate a child to a different city after the child showed feverish symptoms, unrelated to COVID-19.<sup>20</sup>

### **Dire Financial Circumstances**

Matters pertaining to property division and/or child or spousal support payments will be heard if they are determined to meet the threshold of a "dire financial circumstance." The types of issues that have been found to meet this threshold include:

- the unilateral removal and imminent risk of depletion of significant assets of a marriage;<sup>21</sup> and
- determining interim spousal and child support for a new matter in the court system, with no prior orders in place.<sup>22</sup>

In *Theis v Theis*, the court provided some helpful guidance on the evidentiary expectations for succeeding on a claim of dire financial circumstances as a direct result of COVID-19. In the case, the applicant requested the early release of her share of the proceeds of sale of the matrimonial home to meet her business and personal obligations. The applicant claimed she was unable to meet her current expenses because she carried on a business, which was forced to temporarily close as a result of the pandemic. The court denied the motion, outlining the following evidence was required to demonstrate dire financial circumstances:

- (a) The party's previous income before COVID-19;
- (b) The party's total income now from all sources;
- (c) The party's personal and business expenses; and

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<sup>17</sup> *Onuoha v Onuoha*, 2020 ONSC 1815.

<sup>18</sup> *Smith v Sieger*, 2020 ONSC 1681.

<sup>19</sup> *Placha v Bennet*, 2020 ONCJ 164.

<sup>20</sup> *Perkins v Macierzynska*, FC-19-876.

<sup>21</sup> *Thomas v Wohleber*, 2020 ONSC 1965.

<sup>22</sup> *LBM v MM*, 2020 ONSC 1958.

(d) The extent of the party's resources more generally.

### **Conclusion**

It is imperative during this time that family law litigants follow the direction of the courts to remain reasonable and use good faith efforts to negotiate and resolve their disputes outside of court, as much as possible. However, should a matter require judicial intervention, please consult with a lawyer to determine if the issue meets the legal threshold for urgency, prior to taking any steps in court.

This publication is intended only to provide general information. It should not be relied on as legal advice. For specific legal advice related to your family law concerns, please contact: Leanne Townsend and Michael Cochrane.