

Parenting Time Issues During COVID-19 Pandemic – What is an Urgent Case?



Trudy Hopman
Harper Grey LLP

Family Courts throughout Canada will be asked to consider issues of parenting time in light of the COVID-19 pandemic in urgent cases. But what is an urgent case? There are now two Court decisions from the Ontario Superior Court that help answer that question and provide important guidance regarding how judges are likely to view applications to vary parenting orders due to COVID-19 concerns. So far it does not appear that any decisions related to COVID-19 concerns have been made in British Columbia.

On March 24, 2020, *Ribeiro v. Wright* 2020 ONSC 1829, a decision of the Ontario Superior Court of Justice, Family Court was released. Mom and Dad had joint custody of their 9-year-old son, who lived primarily with Mom, and Dad had access on alternating weekends. Mom applied to suspend Dad's access because of COVID-19, as she was concerned that he would not maintain social distancing for the child during his access. Mom did not have any proof that

Dad would be irresponsible. Mom was practicing strict social-isolation and did not want the child to leave her home for any reason, even access with the dad.

Justice A. Pazaratz was the Triage Judge, and although sympathetic to COVID-19 concerns, did not allow the matter to proceed as an urgent hearing. Justice Pazaratz noted some guidelines for families facing COVID-19 concerns to follow:

- The health, safety, and well-being of children and families remains the court's foremost consideration during COVID-19.



- There is a presumption that all orders should be respected and complied with, and there is a presumption that all existing orders reflect a determination that meaningful personal contact with both parents is in the best interests of the child.
- These are extraordinary times and daily routines and activities are being suspended for a strict policy of social distancing. This is uncharted territory for everyone, including parents and the court system.
- Children’s lives and vitally important family relationships cannot be placed “on hold” indefinitely without risking serious emotional harm and upset. A blanket policy that children should never leave their primary residence – even to visit the other parent – is inconsistent with the best interests of the child.
- In troubling and disorienting times, children need love, guidance and emotional support from both parents.
- In some cases, custodial or access parents may have to give up or change their times with a child if the parent is subject to some specific personal restriction (for example, sick, or under self isolation for a 14-day period as a result of recent travel, or exposure to illness).
- In some cases, a parent’s personal risk factors (through employment or associations, for example) may require controls with respect to their direct contact with a child.
- In some cases, if a parent’s lifestyle or behavior raises sufficient concern about parental judgment where they are demonstrably not complying with social distancing, then direct parent-child contact will have to be reconsidered, as there will be zero tolerance for any parent who recklessly exposes a child or members of the child’s household to COVID-19.
- In blended family situations, parents will need assurance that COVID-19 precautions are being maintained in relation to each person who spends any amount of time in a household – including children of former relationships as not being careful is what spreads the disease.
- For the sake of the child, we have to find *safe* ways to maintain important parental relationships.

Justice Pazaratz did not find that the Mom established a failure, inability, or refusal by the father to adhere to appropriate COVID-19 protocols and urged both parents to renew their efforts to address important health and safety issues for their child in a more conciliatory and productive manner.

On March 25, 2020 *Smith v. Seiger*, 2020 ONSC 1681, was decided by the Ontario Superior Court. An urgent motion was brought for an order for the immediate return of the parties’ child from the United States where she was enrolled in an educational program. The parties shared joint custody of the child and the urgent matter was brought to the court because of the closure of the US/Canada border and Prime Minister Trudeau’s call for Canadians to return home.

According to the decision, the parent who applied for the court’s assistance said that the parties had agreed that the child was to return to Canada, but on the condition that the applicant would then assume sole decision making on health and education issues; this arrangement was later disputed by the other parent. In its decision the court continues to give priority to the best interests of the child and granted the relief requested by the applicant in its entirety. Due to the travel, the court recommended the child be self-quarantined for 14 days in the care of the applicant until that period of isolation was completed and no further health issues arose.

The court’s decision to authorize the urgency of this matter can be distinguished from that of *Ribeiro v. Wright* on the facts. In *Ribeiro v. Wright* the application was brought due to one party’s unsubstantiated belief that the other would not obey social distancing protocol and in turn endanger the child’s health; the court did not find the respondent’s behaviour to deem the matter urgent. In contrast, in *Smith v. Seiger* the court highlights the urgency for two reasons: First, the child was not presently residing with either parent and the COVID-19 situation had yet to peak and it was in the best interests of the child to be with parents for support. It may also be worth noting that Utah (where the child was residing in the US) had recently experienced a 5.7 magnitude earthquake the likes of which the State had not felt since 1992. Second, the border was closing thus making any future travel difficult and increasing the urgency of the situation.

These two decisions of the Ontario Supreme court have shown that:

- a. the best interests of the child will continue to be prioritized by the courts. If the facts of the case indicate an actual urgency that is applied for in good faith, the court will make an order;
- b. Parents must make best efforts to communicate, show mutual respect, and to come up with realistic proposals that show parental insight and COVID-19 awareness.
- c. As is always the case in family law, the 4 “C’s” apply when considering parenting issues – Communication, Cooperation, Compromise, and Common-sense.

Trudy is Associate Counsel with Harper Grey and throughout her career has focused her practice primarily on family law and estate litigation.

Trudy Hopman

thopman@harpergrey.com
604.895.2915

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