

FAMILY LAW

Parenting Time Issues During COVID-19 Pandemic: A Precedent for Unprecedented Times



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In these unprecedented times, the courts strive to provide parents and lawyers with a precedent to guide those engaged in co-parenting conflict over parenting time during this COVID-19 pandemic. The BC courts have now contributed to the scant few cases on this topic in *S.R. v. M.G.* 2020 BCPC 57, adding COVID-19 specific considerations to those listed “best interests of the child” set out in s.37 of the *Family Law Act* (the “Best Interests Test”).

On April 7, 2020, Justice Bond of the BC Provincial Court issued the decision after a teleconference hearing with the self-represented parents. The mother is a health care worker who had treated a patient with COVID-19, while the father runs a demolition company. They both continued to work outside the home. The court notes that both parents did so while adhering to the measures recommended to reduce the risk of exposure to the infection, with each parent having different risks by degree. At the outset, it appeared as if the parents could cooperate in adjusting their parenting schedule, but as the pandemic situation worsened, the father simply refused to return the child, and instead offered to

bring the child to see and speak to the mother from the deck of her condo for “distanced contact”, and to keep in touch with the child by phone.

The urgency of this parenting time refusal led to the court hearing this matter, albeit apparently a week after the issue arose. Justice Bond issued an immediate return of the child to the mother (within 2 hours of the hearing), on the assessment that the mother posed no current risk since the mother’s last exposure through work was two weeks prior. The court then issued its full decision and reasons the next day, setting out the **new** and additional criteria to the Best Interests Test, as follows:

- (a) whether the child is at an elevated risk of suffering the more severe consequences of the virus;
- (b) whether either party, or those in the household are at an elevated risk of suffering the more severe consequences of the virus;
- (c) each party’s exposure to the risk of contracting the virus
- (d) steps taken by each party to mitigate the risk of exposure;

(e) all of the relevant factors listed under s.37 of the Family Law Act....¹

Neither the child nor the household family members were at an elevated risk. Each parent was at risk of exposure to the virus. While the father's exposure was substantially reduced by the time of the hearing, since he stated that he was the only person physically in the office, this did not affect the overall assessment of the matter. While there was some risk that the mother could contract the virus, "she was abiding by the precautions for nurses 'and then some', she says".² Justice Bond captured the elusiveness of assessing all risk in an environment of almost immeasurable risk of exposure:

"On the other hand, now that the virus is spreading in the community, we are exposing ourselves to the risk of contracting the virus by accessing any services, whatsoever. This includes receiving the newspaper or mail, purchasing groceries, attending at a bank, or going for a walk."³

While the parents' reasonable measures to avoid the risk of exposure was important, the elevated risk of suffering the more consequences was an overriding concern. Justice Bond notes that even if the mother decided not to return to work, which she offered to do if it meant she could continue to parent the child, the court would still not be inclined to expose a child or other household members with an elevated risk of the more consequences of the virus (or the "vulnerable") to the potential risk.

Justice Bond concluded the analysis of the above factors with an acknowledgement of the importance of health care workers and other essential workers, such as this business owner and worker. There can be no doubt that we need to support essential workers, implicitly extended to their parent-child relationships in this case. However, sacrifices might need to be made if this might expose risk to those who are more



vulnerable. Indeed, the court comments that "(a)part from the risk of exposure to the virus, some of those workers are choosing not to return home to their

families when they live with particularly vulnerable partners, children and parents".⁴ Fortunately for the parents, no such vulnerability existed and the court ordered a parenting schedule that had the child stay with the father during the days the mother was working, as so suggested by her.

As in the Ontario Supreme Court decision of *Ribeiro v. Wright* 2020 ONSC 1829⁵, the consistency of the primary supports to the child was recognized, but the regularity of the parenting schedule was not the focus of the discussion. The BC provincial case of *S.R. v. M.G.*⁶ adds to the guidance from the two preceding Ontario cases, reviewed by Ms. Hopman in her article "Parenting Time Issues During COVID-19 Pandemic - What is An Urgent Case"⁷. This BC case adds to the learnings from those cases (listed here as factors a through c), giving us a framework for the risk analysis when deciding whether and how to change parenting arrangements during the COVID-19 Pandemic:

- 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.

¹ *S.R. v. M.G.* 2020 BCPC 57 at para. 22.

² *S.R. v. M.G.*, *supra*, at para. 27.

³ *S.R. v. M.G.*, *supra*, at para. 20.

⁴ *S.R. v. M.G.*, *supra*, at para. 24.

⁵ *Ribeiro v. Wright* 2020 ONSC 1829.

⁶ <https://www.harpergrey.com/app/uploads/2020/03/2020-T.-Hopman-Parenting-Time-Issues-During-COVID-19-Pandemic.pdf>

⁷ <https://www.harpergrey.com/app/uploads/2020/03/2020-T.-Hopman-Parenting-Time-Issues-During-COVID-19-Pandemic.pdf> [page 2]

b. Parents must make best efforts to communicate, show mutual respect, and 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.

d. Risk of exposure to COVID-19 is a separate and additional test to the Best Interests Test. The degree of exposure to risk is directly correlated to the

vulnerability of the child and household members. Vulnerable individuals may need protection that disrupts parenting schedule and contact.

The long-term implications of protecting vulnerable children or household members counterposed against parent-child relationships and routines was not addressed, nor how the dilemma will be resolved between households. Parents are still in much need of guidance, which will no doubt come to fruition as we continue to find ourselves in the grips of what may be a new reality for a considerable time going forward.

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