

Post-Separation Parenting in the Spring of 2020: Pandexit and Family Justice: Transitioning Out of the Crisis

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Send questions to Q & A

AFCC-O Webinar, May 7, 2020, 2pm – 4pm

Lawyers can count this as 2 hours CPD



Parenting Plan Guide



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Topics

- Framework for Urgent, Without Notice Motions
- Agreements Made Before and During Covid-19 –Compliance Considerations and Finality
- Make-Up Access ?
- Take-aways from the Covid-19 caselaw
- Motions to Change – The Test, Timing, Factors and Best Interest Considerations
- Domestic Violence – The Fallout Post-Covid-19
- When Children’s Views and Preferences No Longer Align With the “Regular” Schedule
- Special Considerations for Children With Exceptionalities
- What is the New Normal for Children and the Internet, Social Media, Virtual Access ?



Wise Words From Michelle Obama

Q: How do you feel transitioning back to your “normal life” after a huge bump in the road?

A: What I have learned is: Get back on what track?

It is a whole new track. It is not getting back on track. It’s just all different. It is different forever. So its not getting back on track but it is creating my next track.

Becoming trailer, Netflix – April 2020



Framework for Urgent, Without Notice Motions

The *Rules of Professional Conduct*

- Rule 5.1– a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

The *Rules of Civil Procedure*

Rule 39.01(6):

- Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient grounds for setting aside any order obtained on the motion or application.

Practice Tip

- Judges don't have the Court file. Help them help your client and you. Provide an old-fashioned motion record.



Negotiating Agreements During Covid-19

- Considerations:

- “ First, do no harm” – Hippocrates

- Rules of Professional Conduct

- Rule 21-1: A lawyer has a duty to practice law honourably and with integrity

- Rule 3.1-1 In this rule,

- "competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including:

- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

- (c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills...

- (k) otherwise adapting to changing professional requirements, standards, techniques, and practices.

- *Rule 3.1-2* A lawyer shall perform legal services to the standard of a competent lawyer

- *Rule 3.2-4* A lawyer shall encourage the client to settle *whenever possible to do so on a reasonable basis*

- Standard of care – no different during Covid-19 than before or after the pandemic



Divorce Act Amendments s.7.7(2)

- Divorce Act Amendments s.7.7(2)
 - Legal advisors must inform clients(parents) of their duties under the Act:
 - Avoid Conflict
 - Focus on the best interests of child, including supporting relationship with other parent
 - Obey court orders (and follow agreements)



s. 56(4) of the *Family Law Act*

Setting aside domestic contract pursuant to the *Family Law Act*

- S. 56 (4) A court may, on application, set aside a domestic contract or a provision in it,
 - (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
 - (b) if a party did not understand the nature or consequences of the domestic contract; or
 - (c) otherwise in accordance with the law of contract.
(unconscionability, duress, uncertainty, undue influence)
- INCREASED UNCERTAINTY + A LACK OF FORESIGHT into the impact of an agreement on the parents and children may =



Unconscionability and Duress

- The question to be answered in determining unconscionability is whether there is inequality between the parties, or a preying of one upon the other, that places an onus on the stronger party to act with scrupulous care for the welfare and interests of the vulnerable. *Rosen v. Rosen*, [1994] O.J. No. 1160 (C.A.)
- At paragraph 13 the Court of Appeal notes it is:

"not the ability of one party to make a better bargain that counts. Seldom are contracting parties equal. It is the taking advantage of that ability to prey upon the other party that produces the unconscionability"
- "Duress involves a coercion of the will or a situation in which one party has no realistic alternative but to submit to pressure. There can be no duress without evidence of an attempt by one party to dominate the will of the other at the time of the execution of the contract. To prove duress, the applicant must show that she was compelled to enter into the marriage contract out of fear of actual or threatened harm of some kind. There must be something more than stress associated with a potential breakdown in familial relations. There must be credible evidence demonstrating that the complaining party was subject to intimidation or illegitimate pressure to sign the agreement." *Ludmer v. Ludmer*, [2013 ONSC 784](#) (S.C.J.), paragraph 53.

Application of Principles

- Final, temporary, without-prejudice, sunset clauses in agreements & orders?
- “The focus should be on facilitating the preservation of the rights of the parties until a further agreement or decision can be made on a full evidentiary record according to an unimpeachable process”. Maxine Kerr
- The risks:
- For parents, ongoing conflict once the dust settles
- Court applications to set aside agreements & motions to change
- For lawyers, reports to Law Pro & the Law Society
- For mediators and mental health professionals, reports to the Colleges



Protocol for Negotiating and Completing Agreements

- Use checklists for:
 - intimate partner violence and power imbalance
 - providing legal advice and for meetings
- Include detailed recitals in your temporary, without prejudice agreements, the focus of which is getting parties through.



AFCC-O Parenting *Guide* and *Template* – Potential Areas of Conflict Post Covid-19

- Regular and holiday schedule where increased time has “works” (*AA v RR* 2020 ONSC 1887 – Emergency doctor’s time increased and moved to week on week off)
- Joint vs. Sole decision-making
- Transfers of care
- Extracurricular Activities and Camps
- Childcare – Daycare vs. Family care – subsidy issues
- Make-up Time
- Virtual Time and Social Media
- Vacations and Travel
- Communication
- Relocations with and without children



Communication and Parenting Time

- Protocols contained in the *Guide* and *Template* are highly relevant
- “ A parent’s failure to communicate and meaningfully co-operate where a child’s safety and well-being are involved is a failure to parent, especially in the current environment”. Good parents will demonstrate to the other parent that they are compliant with government guidelines. (*Balbontin v. Luwawa*, 2020 ONSC 1996, cited in MannLawyers summary)
- A failure to communicate may lead to suspended access (*Balbontin*)
 - Alternately, the non-communicative parent may be ordered to provide list of activities, safety measures taken and prompt answers to any questions within two hours of the access visit (*Tigert v. Smith*, 2020 ONSC 2220, MannLawyers. See also *Brisebois v. Otim*, 2020 ONSC 2538)



Divorce Act – Relocation Amendments

- Relocation during Covid-19 denied – Example: recent separation, child needs in-person contact with both parents, mother’s family support would be on-line *Amirzada v. Aley* 2020 ONSC 1979. See also *L-AF v KVS* 2020 ONSC 1914
- Increased relocation post-Covid for financial and family support reasons?
- **Notice Provisions** – 60 days’ notice in a prescribed form and any objection within 30 days. If no objection and no pre-existing order prohibiting the move, there is an entitlement to move.
- **Additional Best Interest Criteria**
 - Reasons for the relocation;
 - Impact of the relocation;
 - Amount of time spent with the child by each person who has parenting time;
 - Whether notice was provided;
 - Orders or agreements specifying geographic area;
 - Reasonableness of the proposal; and
 - Compliance with family law obligations.



Post-Covid Schedules Where Parenting Time was Suspended or Reduced

- Factors to consider once Covid-19 rules are relaxed
 - The reasons for the suspension / reduction
 - Example - Poor communication, father's lack of car, too many transitions, virtual offered - Wednesday suspended temporarily *Tessier v. Rick 2020 ONSC 2391*
 - Has there been “bad behaviour” ? Trust issues? Poor communication?
 - Medical concerns – child or primary care parent?
 - Have any concerns been addressed
 - What do the relaxed guidelines require / allow
- Transitioning to the “regular schedule” or something new
- Increasing parenting time by step-ups or full-stop



Make-Up Access

- AFCC-O *Guide and Template* set out the pros and cons in “Normal” times
- Covid-19 - orders are being made for wrongful withholding of time, unless primary parent’s concerns were valid *Tessier v. Rick* 2020 ONSC 2391
- But likely not to be ordered when a parent needed to self-isolate
- Cases tend to adjourn the scheduling of make-up access to a later date (and it may be resolved on consent). Will it take place:
 - During Covid-19?
 - During summer? After pandemic? *Moreton v. Inthavixay*, unreported
 - Once we return to the “New Normal” and school re-starts? (unlikely)



Covid-19 Behavior and Future Parent Relationships, Negotiations and Litigation

Will bad behavior impact ongoing litigation?

- Mother granted exclusive possession and father no longer permitted to nest as he has not been forthright regarding his excursions and may not be taking proper precautions *Guerin v. Guerin* 2020 ONSC 2016
- Father overheld and used Covid-19 to his advantage where mother is a nurse. Told 6 + 7 year-old children that mother may make them sick. Mother agrees to temporary increase to a 50/50 schedule so she can work – Motion to change ongoing *Elsaesser v. Rammelo* 2020 ONSC 2348
- Mother is withholding 13 and 10 year-old children. Her motion to suspend access denied. Second unilateral refusal in a year to honour equal timesharing and joint decision-making order. Risk of harm to relationship with father. Campaign to distance children from father. “The danger here is the virus of conflict. Putting children in the middle of conflict corrodes a child’s emotional equilibrium”. *Ivens v. Ivens* 2020 ONSC 2194
- **Will generous and good behavior lead to improved relationships and better ability to resolve issues?**
 - Being a “good parent” is an ethical and statutory duty, and will help children to adjust to separation and in the event of litigation it will also advance their position as judges will consider this under Bill C-78 (Nick Bala, 2019)



Takeaways from the COVID-19 Cases

- “All counsel and parties must be aware that actions taken in these unusual circumstances, may very well be judged once court operations resume, as not being appropriate **nor in the best interests of their children.**”

Douglas v. Douglas, [2020], O.J. No. 1533 (S.C.J.), para. 15.

- In *Colasuonno v. Colasuonno, [2020] O.J. No. 1675 (S.C.J.)*, the Court found that the only issue of urgency was the motion for exclusive possession of the matrimonial home. The question of parenting time, although important, was not urgent. The court cautioned, however, that:

“Parents should be aware that their conduct will be critically scrutinized by the court
In this regard, I adopt the comment of MacPherson J. in *Douglas v. Douglas*”.



Amendments to the *Divorce Act*, s. 16

• **Best interests of child**

16 (1) The court shall take into consideration **only the best interests of the child** of the marriage in making a parenting order or a contact order.

Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;

- (f)** the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g)** any plans for the child's care;
- (h)** the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i)** the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j)** any family violence and its impact on, among other things,
- (i)** the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii)** the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k)** any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Motions to Change

The Legislation

- S. 17(5) of the *Divorce Act* provides as follows:

“Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, **in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.**”

- S. 29 of the *Children’s Law Reform Act* (“CLRA”) provides that:

“A court shall not make an order under this Part that varies an order in respect of custody or access made by a court in Ontario unless there has been a material change in circumstances **that affects or is likely to affect the best interests of the child.**”



The Test to Be Applied

- The test to be applied when the court is asked to vary custody and/or access issues is a two-stage inquiry, established by the Supreme Court of Canada in *Gordon v. Goertz* [\[1996\] 2 SCR 27](#), appearing at paragraphs 12 and 13:
 - 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way... The question is whether the previous order might have been different had the circumstances now existing prevailed earlier... Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place" ...
 - 13 It follows that before entering on the merits of an application to vary a custody order the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
- Although *Gordon v. Goertz* was decided under the *Divorce Act*, the general principles which the court articulated apply equally to custody variation proceedings under the *CLRA*.



The Test to Be Applied, ctd.

- In *L.M.P. v. L.S.*, [\[2011\] 3 SCR 775](#), the Supreme Court of Canada reaffirmed the change must be substantial, continuing and that "if known at the time, would likely have resulted in a different order."
- Trivial or short-lived changes will not justify a variation (*Haisman; Hickey v. Hickey* [\(1999\), 46 R.F.L. \(4th\) 1](#) (S.C.C.); *Marinangeli v. Marinangeli*, [2003 CarswellOnt 2691](#) (C.A.)).
- Not every circumstance, event or mistake by a parent that affects a child will be considered a material change in circumstances for the purposes of a variation application. *Kerr v. Easson*, [2013 ONSC 2486](#) (S.C.J.), at para. 62, aff'd [2014 ONC 225](#) (C.A.).
- If the "material change in circumstances" threshold is satisfied, the court must proceed to the second stage of the analysis, which involves a determination of the custody and access regime that is in the child's best interests based on the current situation.



How Might Parents' Actions be Scrutinized

Material Change?

- If the order is not working and needs to be clarified or fine-tuned to meet a child's best interests, this can be material. This is a broad and liberal approach taken by the court.

Zolaturiuk v. Johansen, [2009 CanLII 15907 \(ONSC.\)](#)

- A party's extensive non-compliance with an existing court order may be a material change, if the breaches have a harmful effect on the child.

Roloson v. Clyde, [2017 ONSC 3642](#)

- Worsening conflict can constitute a material change in circumstance affecting the best interests of the child.

Hackett v. Sever, [2017] O.J. No. 1510 (OCJ)



Changes in Parenting May Follow Economic Changes

- Where a party suffers a significant reduction in income, is unable to remain in Toronto and maintain an adequate standard of living and must therefore relocate, such facts may constitute a material change in circumstances.
- When a parent earns a modest income, a 25% reduction in that income can have very significant negative consequences.

Hovgaard v. Delvaille, [2014] O.J. No. 4208 (O.C.J.)



Concessions Are Not an Acknowledgement of a Material Change in Circumstances

- In *Easson v. Blasé*, [2016] O.J. No. 4056 (C.A.), the parties agreed on the eve of trial to a final order regarding a parenting schedule. Less than two years later, the father sought to vary the order to provide, among other things, that the children would reside with each parent on an alternate weeks basis and to remove the mother's decision-making authority. The mother proposed that the father have parenting time from Wednesday after school until Monday morning, every other weekend. The trial judge concluded that there had not been a material change in circumstances since the making of the order, such that she was without jurisdiction to vary it. She further found that the father was hostile towards the mother and that the children had flourished in the mother's care. The Court of Appeal dismissed the father's appeal. The mother's concession was not a material change in circumstances. At paragraph 17, the Court of Appeal wrote:
“Moreover, the father's broad position that a concession of this kind is an acknowledgment of a material change in circumstances risks creating a disincentive to parents to agree to make concessions and therefore risks increasing litigation.”



PandEXIT: What's Next ?

- Anticipate requests for changes to schedule
 - As a result of child spending more time with a parent than previously
 - Parents required to self-isolate, parents withholding or 'bad behavior', ↑ or ↓ level of parental conflict
 - Changes to parent-child relationship as a direct result of pandemic (improved/deteriorated pc relationship and co-parent relationship)
 - Ex.1 : 8 year-old child spent three uninterrupted weeks at his father's home after mother needed to go into self-isolation. Now afraid to return to his father's home for fear he won't be able to return to his mother's home.
 - Ex.2: Impaired parenting as a result of the stress created from the pandemic.
 - Ex. 3: On consent, access to 16 and 14 reinstated notwithstanding that children expressed Covid anxieties and wanted a break in access from Mother who works at a group home. *Hermanus v. Laurin*, 2020 ONCJ 190



PandEXIT: What's Next? Ctd.

- Anticipate court will be bombarded when they re-open and measures are lifted–
- Family law professionals (lawyers, mental health professionals, mediators) will need to work together to assist in most effective way possible and triage family needs.
- Anticipate increase use of services and innovative services being developed to address needs
 - Mediation (online and F2F)
 - Parent coordination (online and F2F)
 - VOC reports (online and F2F) – Ex 4. Parties should consider hiring a social worker for a virtual VOC report where case deemed urgent and child age 13 may be subjected to frequent verbal abuse. *Abesteh v. Eagle 2020 ONSC 2086*
 - OCL VOC reports will be in high demand as some matters are not proceeding.
 - Ex 5. Ages 12 and 14 – OCL is not doing VOC currently. No access since separation in 2019 and issue is not urgent. *Reizel v. Reitzel, 2020 ONSC 1977*



PandEXIT: Voice of the Child?

- Was starting to become a popular option pre-pandemic -- we can expect requests for VOC reports to increase (cost, timeliness, need to include child's voice/perspective, another dispute resolution tool)
- Items to consider
 - Ages of children
 - Feasibility of the requested schedule?
 - Is it realistic?
 - Is it based on a child reacting during a time of crisis?
 - Stress-impaired parenting - is child's request based on inappropriate parental behaviors exacerbated from the pandemic?
 - Are views independent or influenced in some way? Are children reacting to situations/concerns that were apparent during this period of crisis? Spurs new allegations (e.g. alienation).



PandEXIT: Mental Health

- Increased levels of fear, anxiety, depression, stress/trauma– how will it impact people on an individual level, interpersonal level? Can we rely on information received from a child who may still be reacting?
- Children/teens also experiencing loss and suffering – new path for them.
- ?? Perhaps we may need the professional working with child/family to assess the situation/child to see if a VOC is suitable?? Uncertain time. Reacting to crisis rather than responding.



PandEXIT: Domestic Violence

- Reach suggests that reporting rates have fallen dramatically
- Concerns that victims of abuse have no option than to reside with the abusers, and heightened risk to their emotional and physical well-being
- Controlling behavior and inequality issues
- Children are no longer under the watchful eye of teachers, medical professionals and others
- Concerns that abuse and neglect is likely increasing due to confined spaces, financial and other pressures, lack of support in caring for children



PandEXIT: Zoom/Facetime, Duo

- What will the role be for online parenting time?
 - Zoom, Facetime, Duo serving as replacement tools at the moment.
 - How will they be used in the future with respect to parenting time? Will courts be more/less inclined to order virtual time? If so, how? (replacement or adjunct?)
 - What information can we gather for further research on virtual time compared to f2f?



Closing Thoughts – Matus v. Gruszczynka, 2020 ONSC 2353, paras. 15 - 16

Justice Heather McGee

- Parenting is an essential service.
- This period of crisis will pass, and when we look back, families will have a story to tell. No one will ever forget how they spent the pandemic. Even young children will carry the residual emotions well into adulthood. There will be a time to reflect. Did parents step up to ease fear and disruption in their child's life, or were they preoccupied by their own needs? Did they take a balanced approach to their child's overall interests, or did they seize upon a perceived advantage? Did they react to patterns, or did they plan for the future?



SAVE THE DATE: AFCC-O ANNUAL MEETING AND CONFERENCE – OCTOBER 16 2020 - TORONTO





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Justice Philip Clay

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