VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW
INCLUDING 5 BONUS COVID-19 CASES

Volume 2, Issue 2

1. Aubin v Petrone, 2020 ABCA 13

J. Antonio, J.A.; P. Martin, J.A. (concurring); K. Feehan, J.A. (dissenting in part)

Appeals from the Judgments of R. Khullar, J.C.Q.B.A. (as she then was)

Respondent - R.M. Curtis, Q.C.; M.L. Dawson; J.A. Arsenault

Appellant, S.S.A. Petrone - D.E. Tumbach, J.S. Chu

Appellant, Quantiam Technologies Inc. - D.W. Hagg, QC

Matrimonial Property, Corporate Veil, Unjust Deprivation, Bankruptcy

The parties were married in 1993, separated in March 2014 and were divorced in September 2018. In 1998, the Husband established a research and technology company, Quantiam Technologies Inc. ("Quantiam"), of which he was the president, chief executive officer, chief research officer and majority shareholder. The Wife was a director and employee of the company from 2001 to 2017. The Husband held 84.66% of the shares in the company, the Wife held 3.99% of the shares, and 20 other minority shareholders held a combined 11.37% of shares.

The parties also owned a corporation, 1598384 Alberta Ltd. ("159 Corp"), in equal shares. 159 Corp purchased the parties' home in British Columbia (the "Nixon Road Property") and Quantiam provided the funds for the purchase and registered a mortgage on the Nixon Road Property's title.

Following the Wife's commencement of matrimonial litigation, the Husband took several actions including the following:

- He terminated the Wife's employment with Quantiam and replaced her as director with his best friend;
- He instructed Quantiam to demand payment of the loan on the Nixon Road property and initiated foreclosure against 159 Corp; and
- He refused to release share proceeds owing to the Wife from a liquidity event in 2016, citing the 159 Corp loan repayment.

The Wife commenced an oppression action that was subject to a standstill agreement during the matrimonial trial.

The matrimonial trial resulted in a comprehensive decision including an order for the sale of the matrimonial home, $7,200 per month in spousal support payable by the Husband continuing indefinitely, retroactive spousal support payable by the Husband of $67,200 and an equalization payment of $5,570,394 from the Husband to the Wife (the "Merits Decision").

To give effect to the nearly $5.6 million dollar equalization payment, the trial judge secured the money judgment by imposing a charge on the Husband's shares in Quantiam and a charge on a building owned by Quantiam, coupled with orders to the Husband and Quantiam to execute and register security agreements within ten days, placing the Wife in the position of a secured creditor (the "Remedy Decision").

Both decisions were appealed. The Husband appealed the Merits Decision with respect to the distribution of matrimonial property, spousal support and the money judgment in favour of the Wife as opposed to an *in specie* transfer of shares. The Husband and Quantiam both appealed the Remedy Decision.

The Court of Appeal unanimously dismissed the Husband's appeal of the Merits Decision.

The majority of the court (J. Antonio, J.A.; P. Martin, J.A.) dismissed the Husband's and Quantiam's appeals of the Remedy Decision. K. Feehan, J.A., in dissent, would have allowed, in part, the Husband's and Quantiam's appeals of the Remedy Decision.

The Merits Decision

The Husband submitted 17 grounds of appeal from the Merits Decision. On those grounds concerning property distribution and spousal support, the Court of Appeal found that the determinations by the trial judge were discretionary and subject to deference and no intervention was warranted.

With respect to the decision of the trial judge to order a money judgment, rather than an *in specie* transfer of shares to the Wife for the value of the equalization payment, the Court of Appeal found that the exercise of the trial judge's discretion in this regard should not be disturbed. Notably, the Court of Appeal noted the trial judge's consideration of the Unanimous Shareholders Agreement which prohibited the transfer of shares, with which the trial judge concluded she cold not override.

The Remedy Decision

With respect to Quantiam's appeal of the Remedy Decision, the main consideration before the court was how the corporate veil intersects with the principles of matrimonial property division. The court noted that, as the corporation is a separate legal entity, the assets held by the corporation typically remain behind the veil. The test to be applied in determining whether to pierce or lift the corporate veil was set out in *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co (1996)*, 1996 CanLII 7979 (ON SC) as follows: the separate identities of a parent company and its subsidiary can be disregarded if (i) there is complete control of the subsidiary, such that the subsidiary is the "*mere puppet*" of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity.

The test from *Transamerica* has sometimes been adapted and applied as a three-part test, stated as follows from the case of *Arsenault v Arsenault* (1998), 38 RFL (4th) 175, 1998 CarswellOnt 1488:

1. The individual exercises complete control of finances, policy, and business practices of the company;
2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights; and
3. The misconduct must be the reason for the third party's injury or loss.

The Court of Appeal noted that the stringent test from *Transamerica* is most frequently applied in a purely corporate context and that courts confronting the corporate veil in family law cases have applied the *Transamerica* test in contextually suitable terms. In *Wildman v Wildman*, 2006 CanLII 33540 (ON CA), the leading authority on this point, the court framed the central question as *"whether it is possible to disregard the separate legal personality of the corporation when it is in an individual's complete control and is being used to shield for fraudulent and improper conduct."*

The court in *Wildman* also set out that the proper focus on marital breakdown should be on *"the parties' real assets post-separation and a fair distribution of those assets"* (para 41), that piercing the veil of a company owned and controlled by one party may, in some circumstances, be *"an essential mechanism for ensuring"* that children and ex-spouses receive their financial entitlements and that the *"law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law"* (paras 41 and 49). The trial judge in *Wildman* had used the three-step version of the test set out in *Arsenault*, with which the Ontario Court of Appeal found no error.

The Court of Appeal noted that the concept of the corporate veil enters family law most frequently on questions of child support as the *Federal Child Support Guidelines* enable courts to look past the corporate veil to determine whether the parent is using a company to disguise income. This constitutes legislative authority for lifting the corporate veil. While the majority of the Court of Appeal recognized that while the Guidelines do not apply to matrimonial property division, they found that the rationales do. A company controlled by a spouse can be a major asset for a family as well as its source of income and where a spouse has complete control over the corporation, they have *"the power to manipulate the company to avoid obligations imposed by family law"*.

In this case, the Court of Appeal found the following:

1. The trial judge had found that the Husband controlled Quantiam - he had the power to draw cash from the company in any number of ways and controlled his own salary any bonuses, using that control to minimize exposure for spousal support.
2. The trial judge had found that the Husband had committed a number of *"wrongs"* as the controlling mind of Quantiam. Quantiam's argument that these wrongs did not result in a loss to the Wife that had yet been realized and therefore no remedy was available to her was not persuasive as lifting the corporate veil can be *"a responsive act as well as a preventative one"* and the trial judge had *"correctly assessed the whole of the circumstances to determine whether it revealed flagrant injustice."*

3. The presence of other shareholders in this case (as opposed to the Husband or parties being the sole shareholder(s)) is an important factor to be considered in deciding whether to lift the corporate veil, however, it does not preclude the veil from being lifted. The trial judge was alive to the interests of the minority shareholders and imposed a remedy that did not transfer assets out of Quantiam and did not secure the debt against all of Quantiam's assets, rather, she chose a more moderate remedy of using Quantiam's building as security. There was no reason to interfere with the decision in this regard.
4. Quantiam's submission that the *Matrimonial Property Act* does not permit the court to make orders respecting the property of third parties could not be accepted. To effect a property division, s. 9(2)(c) of the *Act* empowers the courts to *"declare that a spouse has an interest in property notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property."* For this section to have meaning, it must be capable of applying to non-matrimonial property in legally justifiable circumstances. The trial judge's decision was consistent with the letter and the purpose of the *Matrimonial Property Act*.
5. The Wife met the threshold of unjust deprivation justifying lifting the corporate veil. The jurisprudential references to lifting the veil in rare and exceptional cases is an expectation but not a requirement. Circumstances that cause unjust deprivation but do not meet this threshold deserve redress as the law should not shelter wrongdoers simply because their wrongdoing is commonplace. The Wife had been *"unjustly deprived of her rights and an inequity ha[d] resulted"* as the equalization payment represented 50% of the family property she was entitled to, and the Husband was withholding same.

On these bases, Quantiam's appeal of the Remedy Decision was dismissed.

The Husband's appeal was dismissed swiftly. The court found no merit to his submission that securing the equalization payment against his shares had the effect of transferring his shares to the Wife. Section 9(3)(b) and (c) of the *Matrimonial Property Act* authorizes the court to *"impose charges and to order that security be given for all or part or any payment"*. The court also found that the trial judge did not err in granting an injunction temporarily enjoining bankruptcy.

Dissent

Justice Feehan, dissenting in part, would have allowed the appeal as it pertains to enjoining the Husband from accessing federal legislative protection, piercing the corporate veil, granting a security interest with respect to the Quantiam building and enjoining Quantiam from adversely affecting the building and declaring bankruptcy.

On the issue of piercing the veil, Justice Feehan found that there were no grounds sufficient to disregard the separate legal entity of Quantiam. In particular, he found that the Wife's situation did not present a rare and exceptional circumstance where she had been unjustly deprived of her rights and such remedy implicated a number of third parties, the minority shareholders. The remedy of piercing should not be expanded simply because this is a family law case.

On the issue of the interim injunction enjoining Quantiam from accessing bankruptcy legislation, Justice Feehan opined that such a determination should be left to the determination of a future application with full evidence.

Practical Implications: Piercing the corporate veil may be appropriate where one party has been deprived of their matrimonial property or support even if the circumstances of such deprivation are not rare and exceptional. In these cases, counsel should be mindful of the possibility of the corporate-controlling spouse filing for bankruptcy or otherwise manipulating events to deprive the other spouse of their legal entitlement and should seek a remedy prohibiting same.

2. Allen v Renouf, 2020 ABQB 98

C.S. Brooker, J.C.Q.B.A.

Applicant - T.L. Allen (Self-Represented)

Defendant - W.E. Best, Q.C.

Arbitration Award, Costs, Natural Justice

The parties married in 1986, separated in 2015, and entered into a Mediation/Arbitration Agreement to settle the issues of division of matrimonial property, spousal support, child support, and costs. In May 2017, the arbitrator issued a comprehensive Arbitration Award with the issue of costs left to be determined. Nine months later the arbitrator issued an Arbitration Award on costs awarding $75,000 in costs against the Wife ("Costs Award").

Between the dates of these two awards, the arbitrator made approximately 30 further directions, ancillary awards, or orders. The Wife was granted two extensions by the arbitrator, over two months total, from the original deadline to file her reply submissions on costs, but she failed to do so. The arbitration process was

prolonged, difficult, and at times acrimonious.

The Wife applied to set aside the Costs Award pursuant to subsection 45(1)(f) of the *Arbitration Act*, claiming she was treated unfairly and denied natural justice as the arbitrator refused to grant her a further extension to file her written submissions on costs and subsequently issued the Costs Award without hearing from her.

In the alternative, the Wife sought leave to appeal the Costs Award pursuant to subsections 44(2) and (2.1)(a)-(b) of the *Arbitration Act* on the basis that the arbitrator erred by considering the Husband's settlement offers in awarding costs or, in the alternative, failing to consider the Wife's settlement offers, and that there was no legal basis to award enhanced costs against her exceeding the amount set out in the Husband's bill of costs.

Application to Set Aside

The Court of Queen's Bench dismissed this Wife's application to set aside the costs award finding no breach of subsection 45(1)(f) of the *Arbitration Act.* This subsection states that the court may set aside an award on the grounds that the applicant:

"was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator."

The court held that the Wife was not treated manifestly unfairly or unequally, and that she was given every opportunity to present her case. The issue of costs was a discretionary matter and was not a critical issue central to the arbitration as a whole. The court found that the Wife could have submitted a reply on the issue of costs, but she made no attempt to do so within the deadline imposed by the arbitrator, nor did she attempt to get an extension for her reply.

Application for Permission to Appeal

The court also dismissed the Wife's application for permission to appeal, finding that she had not met the requirements of subsections 44(2) and (2.1)(a)-(b) of the *Arbitration Act*. These subsections state that if an arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law only if the court is satisfied that:

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) the determination of the question of law at issue will significantly affect the rights of the parties.

The Mediation/Arbitration Agreement between the parties did not contain any provision relating to appeals and therefore subsections 44(2) and (2.1)(a)-(b) applied. Accordingly, the court had to first consider whether the Wife had raised a question of law. If so, the court had to consider whether the conditions set out in subsections 44(2.1)(a)-(b) were satisfied.

On the first issue, the court found that the Wife had failed to demonstrate an error in law with respect to the Costs Award. The court found that it was not an error in law to refer to settlement proposals made before trial in determining who was the more successful party in litigation and that the Arbitrator did not fail to consider the Wife's offers. The court further found that there was no error of law in the awarding of enhanced costs as the Arbitrator had exercised his discretion having taken all the circumstances into consideration. The Wife's application therefore failed at the first step of the analysis.

The court further found that even if the issues raised by the Wife were questions of law, she had failed to satisfy either of the conditions set out in subsections 44(2.1.)(a) or (b) of the *Arbitration Act*.

Practical Implications: A party to arbitration that ignores an opportunity to present their case cannot then argue that they were treated manifestly unfairly. There is a very high threshold required for permission to appeal an Arbitration Award - counsel should be mindful of the provisions regarding the right to appeal as set out in an Arbitration Agreement.

3. DAF v SRG, 2020 ABCA 25

P. Rowbotham, J.A.; S. Greckol, J.A.; D. Pentelechuk, J.A.

Appeal from the Order of C.M. Jones, J.C.Q.B.A

Appellant - A. Hayher, E. Hanberry

Respondent - R.E. Bloomer, R. Hamilton

Practice Note 2, Hearsay, Personal Service, Supervised Access

The Appellant was father to a 5-year old child. He and the child's biological mother separated in November 2018 when the mother obtained an Emergency Protection Order ("EPO") prohibiting the father from contacting her or the child. The father subsequently pleaded guilty to a criminal charge of assault and three breaches of the EPO and was sentenced to 24 months' probation. The father's Probation Order prohibited him from contacting the mother or the child unless approved by his Probation Officer or as permitted by court order. The Mother tragically died in a car accident in August 2019.

Shortly after the mother's death, the Respondent, the mother's adult daughter from a previous relationship (the 5-year-old child's step-sister), applied for and received a Without Notice Restraining Order against the father on behalf of herself, the child, and the Respondent's two other minor siblings. The Respondent then brought an application for guardianship of the child as well as her siblings and obtained a Substitutional Service Order allowing her to serve the father with the guardianship application by text-message and email. The Respondent acknowledged that what she had *"served"* on the father was not the guardianship application but rather the Substitutional Service Order. The father denied ever receiving the guardianship application. The Respondent was granted final guardianship of the child in the Provincial Court in the absence of the father.

Upon receiving the guardianship order, the father requested a hearing before the Provincial Court Judge who granted the order to address the issues with service, which was denied. Thereafter, the father appealed the guardianship order and brought an application seeking a stay of the guardianship order pending his appeal, as well as interim supervised parenting time. The father's application for a stay and for interim supervised parenting time were dismissed in morning chambers.

The father appealed the decision denying him supervised parenting time.

Appeal

The appeal was allowed on an interim, without prejudice basis, pending a full hearing to be heard in conjunction with the appeal of the guardianship order.

The Court of Appeal held that the chambers judge erred by considering inadmissible evidence under Family Law Practice Note 2, which provides at paragraph 36:

"The court may not consider hearsay evidence contained in letters or unsworn statements authored by third parties that are appended to affidavits."

The Respondent's materials contained substantial hearsay, including two typewritten, undated letters written by the respondent's siblings, then ages 14 and 17, in which they alleged that the father had been violent toward them and the father's 5-year-old child, as well as a letter from CUPS Calgary Society. The Court of Appeal held that these letters were not properly before the chambers judge and did not find the Respondent's justification of the short notice of the father's application and need to gather evidence quickly compelling for inclusion of the hearsay evidence. The Court of Appeal ordered the letters be expunged. The Court of Appeal held that there were sound policy reasons to bar this type of evidence (para 12).

The Court of Appeal found that in light of the *"maximum contact principle"*, the chambers judge was obliged to consider and weigh the potential benefits to the child of professionally supervised access with his father against admissible evidence of physical or emotional risk to the child. On the basis of the admissible evidence, the court held that four hours of professionally supervised access per week did not pose a physical or emotional risk to the child and granted supervised access to the Appellant at his own cost on an interim, without prejudice basis. The Court of Appeal held there are very few parents who are declared unfit to the extent that they are deprived of all contact with their children (para 18).

The Court of Appeal also commented that, generally, applications to change the guardianship of a child should be personally served on interested parties.

Practical implications: Compliance with Family Law Practice Note 2 is required - third-party letters cannot be appended to Affidavits. Guardianship Applications should be personally served on interested parties. There are very few circumstances where parents should be denied or deprived of all contact with their child(ren).

4. SJB v RDBB, 2020 ABCA 108

F. Schutz, J.A.; R. Khullar, J.A.; D. Pentelechuk, J.A.
Appeal from the Order of D.A. Labrenz, J.C.Q.B.A.
Appellant - D.M. Taylor
Respondent - A. Hayher

Fresh Evidence, Credibility, Familial Loans

The parties were married in 2000, had two children, and separated in 2014. High conflict and prolonged litigation culminated in a trial at the Court of Queen's Bench in late 2018 involving the issues of property, spousal support, child support, and costs. The trial judge found that the Husband lacked credibility, having been evasive in his evidence and less than forthright with the court, and found that where his evidence differed from that of the Wife or other witnesses, the evidence of the other witnesses was preferred.

The Husband appealed on issues of matrimonial property and sought to have fresh evidence admitted on the appeal. The two grounds of appeal argued by the father were that:

1. The trial judge made a reversible error in failing to characterize a purported $400,000 loan from his own mother as matrimonial debt (the Husband sought to have fresh evidence from his mother admitted on this ground of appeal); and
2. The trial judge misconstrued the law and the facts relating to the sale of matrimonial real property by failing to allow the Husband to purchase one of the matrimonial properties (the "Kerwood property") prior to ordering its sale.

Familial Loan & Fresh Evidence

On the issue of the familial loan, the Court of Appeal noted that the trial judge had reviewed in detail the Husband's evidence and found both the documentary and viva voce evidence to be insufficient to establish a loan. The trial judge applied the factors from *Dhariwal v Dhariwal*, 2015 ABQB 50 related to indicia of a family loan: (1) Are there contemporaneous documents; (2) a specified manner of repayment; (3) security held; (4) demand for payment prior to separation; (5) partial repayment; (6) expectation or likelihood of repayment. The trial justice found expressly that the Husband had not established the funds were intended as a loan at the time of transfer and therefore not a joint matrimonial debt.

Further, despite a case management order of April 2018 and the Husband's ongoing obligation to produce all relevant records, the Husband failed to produce documentation in proof of (a) a loan from his mother relating to the purchase of a property in Arizona; (b) when and how the monies were advanced or received; (c) where the money was deposited; (d) how the money was used; (e) any proof of repayment; or (f) any cheques, bank statements, or deposit slips evidencing a transfer of money from the Husband's mother to him. Lastly, the trial judge noted inconsistencies in the Husband's testimony at trial and his inability to verify the amount of total indebtedness.

The Court of Appeal held that the trial judge articulated the correct legal test by applying the *Dhariwal* factors, which is largely a fact-driven analysis, and that there were no palpable or overriding errors in the trial judge's evaluation of the evidence.

Further, the Court of Appeal held that the proposed new evidence tendered by the Husband did not meet the threshold criteria for admission as articulated by the Supreme Court of Canada in *Palmer v the Queen*. They noted that new evidence should not be admitted on appeal if by due diligence it could have been adduced at trial. The Husband had an ongoing obligation to produce all relevant records during the course of litigation, and this obligation was underlined by the case management justice in an order.

The Husband failed to produce this documentation in advance of trial. The fresh evidence tendered on appeal, which consisted of an untested statement from the Husband's mother, which was found by the Court of Appeal to not be decisive on the substantive issue, if believed. Further, the fresh evidence did not cure the trial judge's adverse credibility findings against the Husband, nor would it address the numerous issues with the purported loan documentation as identified by the trial judge.

The Court of Appeal held that both the evidence at trial and the tendered fresh evidence fell short of establishing a loan, much less a joint matrimonial debt and dismissed this ground of appeal.

The Kerwood Property

The trial judge, relying on Section 9(3)(j) of the *Matrimonial Property Act*, affirmed an earlier order of the case management judge directing the sale of the Kerwood property. The Husband did not appeal the case management order but appealed the decision of the trial judge to give it effect.

At trial, the Husband gave evidence that he was impecunious, unemployed and was no longer receiving income from his corporate entities. In light of these admissions, the Court of Appeal did not accept that the Husband had any means by which he could finance the purchase of the Kerwood Property, valued at $1,000,000. There

was no impediment to the Husband making a *bona fide* offer during the currency of the property and therefore the ground of appeal was dismissed

Practical Implications: Court of Appeal confirms *Dhariwal* as the factors to consider for a familial loan.

5. MLR v SLR, 2020 ABQB 82

M.J. Lema, J.C.Q.B.A.

Plaintiff - M.L.R. (Self-Represented)

Defendant - S.L.R. (Self-Represented)

Travel Consent, Practice Note 7

The parties had three children, ages 11, 14 and 15. The mother had previously been granted primary residence for the children with the father exercising access two weekends per month. The father brought an application for shared parenting in July 2016, and the case management judge adjourned the application *"pending the production of the file from Children's Services and… the production of [a] Forensic Assessment to be completed within [a certain] criminal matter [involving the father]"*. The case management judge also ordered a Practice Note 7 Evaluative Intervention ("PN7") of which the parties were to share the cost equally.

The PN7 did not commence for some time after it was ordered due to issues related to cost. The father continued exercising his twice-monthly access until in March of 2017 his parenting time was suspended until further order of the court, for reasons not explained in this decision.

The PN7 commenced in August 2017 and was completed a few months later in December. It contained a number of recommendations, including that the father undergo *"a particular assessment, followed by particular treatment"* prior to which the parenting arrangement in place should continue *"with the exception of some supervised contact"* for the father.

The father did not follow through with the recommendations of the PN7, but brought a parenting application in December 2019 seeking to lift a suspension of access to his three children, seeking shared parenting of the 11-year old son and an order allowing the 14- and 15-year-old daughters to decide which parent they wish to reside with. The mother contested the father's application and brought a cross-application to dispense with the father's consent for one daughter to travel to New York City.

The Father's Access

The affidavit evidence of the father before the court blamed the mother entirely for his lack of access to the children and accused her of being the *"primary abuser in their failed relationship".* He further blamed the mother for the children not receiving counselling as recommended pursuant to the PN7 as well for his supervised access failing to be scheduled. The father submitted that the children wanted a relationship with him, and to the extent that the daughters expressed otherwise, they were *"tainted"* by their mother.

The mother's evidence was that the daughters did not want access and that the father had proven incapable of civilly co-parenting. She was agreeable to supervised visits for the father and to continuing counselling for the children, which they had received at school.

PN7 Recommendations

The court found that the PN7 recommendations were reasonable in the circumstances and that the father's evidence primarily focused on the mother's behaviour, rather than explaining any progress on his part and why the PN7 should no longer apply. The court found that in the circumstances of the father not having fulfilled the PN7 recommendations, it was not satisfied that the changes to access proposed by the father were warranted. The court also noted that there was uncertainty over what information was contained in the CFS file and forensic assessment, which had been previously referred to by the case management judge but was not before the court in this application.

In consideration of the foregoing, the court ordered weekly supervised access to take place at a facility in their community. The son was obligated to attend, and the daughters were provided the option. The order allowed the father to apply to expand supervised visits after approximately 3 months time and also ordered the parties to submit copies of any CFS reports or forensic-assessment materials in their possession.

Travel Consent

The mother's cross-application concerned a five-day dance-studio trip to New York City for one of the parties' daughters. The father contested the daughter's travel on the basis of the parenting dispute being unresolved.

The court explored the grounds for dispensing with consent via a number of cases, including the following:

1. In *SJB v RDBB*, 2019 ABQB 624, the court found that the mother should have decision-making power because of the ongoing parental conflict and because the father was not always willing to act in his children's best interests, one example being when he refused to allow the children to travel because of a disputed utility bill he felt the mother should have paid;
2. In *Rodger v Rodger,* 2015 ABQB 526, the court ordered that both parties would be permitted to travel outside the province with the children during their access on the basis of the parties' inability to parent cooperatively; and
3. In *Lukan v Kohlenberg*, 2016 ABQB 392, the court dispensed with the father's consent with respect to applying for the children's passports on the basis that, notwithstanding he had consented to same via a consent order, he failed to comply and continued to refuse to do so even when the applications were handed to him in court.

Relying on the principles arising out of these cases and others, the court found that it may dispense with the parent's consent to travel where the parent is withholding same due to the parental conflict and they are *"unable to put the children's interests ahead of [their] own"*. In this case, it was clear that the father did not object to the trip on the merits of the travel but was doing so as leverage in his parenting struggle with the mother and accordingly depriving his daughter of an opportunity. Consequently, it was appropriate to dispense with the father's consent to the trip in this instance.

Practical Implications: To overcome recommendations arising from a PN7, the applicant must establish why the report is no longer applicable or relevant to the circumstances. Parental conflict and inability to cooperate is sufficient grounds to seek dispensing with a parent's consent to a child's travel.

5 BONUS COVID-19 CASES

There is a developing body of jurisprudence in family law as it relates to the global pandemic caused by COVID-19. Here are some recent decisions from across Canada.

1. SC v RC, 2020 ONSC 1845

P. MacEachern, J.
Applicant - R.A. Molot
Respondent - G. Terrance

Decided on March 23, 2020

Before the court closures related to COVID-19, the mother had scheduled a case conference to change the custody and access provision of an order granted on December 17, 2015 (the "2015 Order"). The 2015 Order granted sole custody and primary residence to the father, and parenting time to the mother for a minimum of six hours per week.

The mother was seeking sole custody of the children, primary residence of the children and supervised access for the father on alternating weekends. There was a history of child protection involvement in this matter and the children have a complicated relationship with their mother. The mother did not have access to the children since approximately October 2018 and she blamed the father for not supporting their relationship. A case conference took place in December 2019 and resulted in an order for 1.5 hour telephone calls between the mother and the children in order to reconnect. A Voice of the Child report indicated that the children were conflicted about having a relationship with their mother and that any access would have to be supervised. Lastly, the youngest child wrote a note in January 2020 stating that he would kill himself if he had to call or visit his mother again. The mother has not had access since this time.

Although the mother argued that the relief sought at the case conference was urgent, the Court disagreed. The mother ultimately wanted a court order for supervised access or telephone/skype access. However, the Court noted that supervised access was doubtful to happen due to COVID-19. Further, skype/ telephone access did not constitute an urgent situation in light of the 14-month period wherein the mother did not have access and the children's views expressed in the report. The father was awarded $500 in costs as a consequence to the mother for pursuing a court appearance that was not urgent.

2. Ribeiro v Wright, 2020 ONSC 1829

A. Pazaratz, J.

Appearances - None

Decided on March 24, 2020

The parties had joint custody of their son and the son's primary residence was with the mother. The father has always had regular access with the schedule at the time of the application being alternating weekends from Friday to Sunday.

The mother sought authorization to bring an *"urgent"* application to suspend the father's access with the child due to COVID-19. Her primary concern was that the father would not appropriately social isolate and she planned to keep their son from leaving her house under any circumstance.

The court denied the mother authorization to proceed with an urgent motion on a without prejudice basis as the mother did not present sufficient evidence to establish a *"failure, inability or refusal by the father to adhere to appropriate COVID-19 protocols in the future"*.

In considering the mother's application, Justice Pazaratz made the following comments for consideration:

(a.) *None of us know how long this crisis is going to last. In many respects we are going to have to put our lives "on hold" until COVID-19 is resolved. But 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 their other parent – is inconsistent with a comprehensive analysis of the best interests of the child. In troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever.*

(b.) *In most situations there should be a presumption that existing parenting arrangements and schedules should continue, subject to whatever modifications may be necessary to ensure that all COVID-19 precautions are adhered to – including strict social distancing.*

(c.)*In some cases, custodial or access parents may have to forego their times with a child, if the parent is subject to some specific personal restriction (for example, under self-isolation for a 14 day period as a result of recent travel; personal illness; or exposure to illness).*

(d.) *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.*

(e.) *And sadly, in some cases a parent's lifestyle or behaviour in the face of COVID-19 (for example, failing to comply with social distancing; or failing to take reasonable health-precautions) may raise sufficient concerns about parental judgment that direct parent-child contact will have to be reconsidered. There will be zero tolerance for any parent who recklessly exposes a child (or members of the child's household) to any COVID-19 risk.*

(f.) *If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion – but they should not presume that the existence of the COVID-19 crisis will automatically result in a suspension of in-person parenting time. They should not even presume that raising COVID-19 considerations will necessarily result in an urgent hearing.*

(g.) *We will deal with COVID-19 parenting issues on a case-by-case basis.*

a. *The parent initiating an urgent motion on this topic will be required to provide specific evidence or examples of behavior or plans by the other parent which are inconsistent with COVID-19 protocols.*

b. *The parent responding to such an urgent motion will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to – including social distancing; use of disinfectants; compliance with public safety directives; etc.*

c. *Both parents will be required to provide very specific and realistic time-sharing proposals which fully address all COVID-19 considerations, in a child-focused manner.*

d. *Judges will likely take judicial notice of the fact that social distancing is now becoming both commonplace and accepted, given the number of public facilities which have now been closed. This is a very good time for both custodial and access parents to spend time with their child at home.*

3. Le v Norris, 2020 ONSC 1932

C.J. Conlan, J.

Applicant - T.B.T. Le (Self-Represented)

Respondent - R. Norris (Self-Represented) *Decided on March 26, 2020*

The parties had a three-year-old child that primarily resided with the mother. The father was granted regular access twice per week in a December 2019 court order. The father filed an application that was determined to be *"urgent in some respects"* and this decision arises from the hearing of the issues.

The issues before the Court were whether the mother had breached an existing court order for access and whether the mother should be ordered to remain within a certain radius of the home that she resides in. The mother wrote a letter to the court indicating that the child's grandmother was moving in with her and she had no intention of moving. The Court ordered, on a temporary basis, that the mother shall not change the child's residence to any place outside of the city both parties reside in.

The letter sent by the mother made it clear that she was not following the previous order. She was not allowing the father access for various reasons including alleged harassment by the father, her not having an opportunity to have the order varied, the COVID-19 crisis, and her fragile mental health. The Court held none of the foregoing reasons were an excuse for non-compliance with a child custody and access order. With respect to COVID-19, the Court stated the following:

In addition, something direct must be said about Le's worries and anxiety about the COVID-19 health crisis. Those concerns, this Court sympathizes with and understands and can even relate to… But, at the same time, those concerns can be addressed through responsible adherence to the existing Court Order.

Lastly, the Court expanded on what *"responsible adherence to the existing Court Order"* means, finding that the parties must be practical and *"have some basic common sense"*. This includes respecting physical distancing measures and taking every precaution to ensure the parties and the child do not contract COVID-19. Parents are expected to take all precautionary measures recommended by governments and health authorities

4. Johansoon v Janssen, 2020 BCSC 469

N. Smith, J.

Claimant - M. Katsionis, M. Salfi

Respondent - K. Russ *Decided on March 30, 2020*

The parties lived together in a marriage-like relationship for approximately six years before they separated in August 2017. They have two children who are 8 and 5 years old. In January 2020, the mother took the children from British Columbia to Germany because her Canadian visitor's visa was going to expire.

The father brought an urgent application to have the children returned to British Columbia following international travel restrictions related to COVID-19. The mother filed a jurisdictional response claiming that Germany is the appropriate forum as it is her and the children's real home. While the children are Canadian citizens, their parents are not citizens or permanent residents. The mother is a citizen of Germany and the father is a citizen of Sweden. In fact, the father was in Sweden at the time of the application and had been since September 2017.

The Court concluded that the matter was not urgent and that an order requiring the return of the children to British Columbia would *"have no immediate practical consequences"*. It was significant that international travel restrictions are still in place and that there were practical issues barring the children returning to Canada. Namely, the father was not in British Columbia and the mother's return was dependent on obtaining a visa. No determination was made with respect to the threshold question of jurisdiction.

5. Reitzel v Reitzel, 2020 ONSC 1977

L. Madsen, J.

Applicant - B.T. Paquette

Respondent - E. Carroll

Decided on March 31, 2020

The parties separated in September 2019 after twenty years of marriage. They had seven children, two of whom were under the age of 18 at the time the application was before the Triage Judge. The children had lived with the mother since separation and the father had not exercised any access. The mother's affidavit stated that the father was abusive to her and the children throughout their relationship and that the children were afraid of him and did not wish to see their father. Family and Child Services had an open investigation and the mother had attached a letter from the case worker to her affidavit. The father denied the allegations in his affidavit.

The father brought an urgent application for access with the two youngest children. The Court held that the motion was *"not urgent at this time"* for the following reasons:

1. The father did not bring the application until 6 months after separation. If it had been urgent, he would have brought it earlier.
2. The Notice to the Profession indicates that matters will be found urgent where there is a question relating to the *"safety of a child or parent"*, or an urgent issue related to the child's well-being.
3. The children were at an age where their views will be an important consideration in determining parenting arrangements. It is a matter that would be appropriate for a Voice of the Child Report.
4. The involvement of Family and Child Services indicated that more evidence was required before a determination can be made about parenting arrangements.

The matter was adjourned to a case conference following the resumption of regular court operations. The Judge emphasized that the determination of urgency is *"wholly without prejudice to either party on the ultimate hearing of the motion"*.