

CITATION: Alsawwah v. Afifi, 2020 ONSC 2883

COURT FILE NO.: 42447/19

DATE: 2020-05-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Marwa Mohamed Azmi Ali ALSAWWAH, Applicant

AND:

Mohamed Afifi Abdelkhalek AFIFI, Respondent

BEFORE: Kurz J.

COUNSEL: Mina Ghanrayal and S. Assaad, for the Applicant

Fadwa Yehia, for the Respondent

HEARD: by audioconference

ENDORSEMENT

Introduction

1. The famous American trial lawyer, Louis Nizer, once wrote that "[w]hen a man points a finger at someone else, he should remember that four of his fingers are pointing at himself." This aphorism, pointing to the ubiquity of human foible, is one that more lawyers who pride themselves on their aggressive family law advocacy, should take to heart. I recommend it in this case.
2. This is a motion for only one head of relief: exclusive possession of a matrimonial home, where the party out of possession has all three of the parties' children in his *de facto* care. Yet one party has chosen to attack the other's character and drag collateral issues into the case with a rhetorical fierceness that one would expect of a mixed martial arts cage match. The other party, who originally desisted from such conduct, felt it necessary to engage, albeit to a lesser degree, in the same advocacy in his reply materials.
3. Much of the oratory in the materials before me, particularly but not exclusively those of the Applicant, is unnecessary, excessive, distracting, and unhelpful to the resolution of the sole issue in this motion. I offer a few directions below in the hope of assisting the parties, their counsel and the profession.

COVID-19 Protocols

4. The regular operations of the Superior Court of Justice have been suspended until further notice as a result of the serious health risks posed by COVID-19. At this time of pandemic, only the most urgent matters, consent matters, and where the parties agree, case conferences and motions in writing, can be heard. These requirements are set out in:
 - this court’s March 15, 2020 Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings, issued to explain and direct the suspension, <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/>(“the Notice”),and
 - The April 2, 2020 addendum to that Notice as it applies to the Central West Region Central West Region, <https://www.ontariocourts.ca/scj/notice-to-the-profession-cw/> (“the Addendum).

This Motion

5. This is a motion by the Respondent father, Mohamed Afifi Abdelkhalek (“the father”), for exclusive possession of the parties’ four bedroom matrimonial home (“the home”). With first the consent and then the ongoing acquiescence of the Applicant mother (“the mother”), the parties’ three children have been in the father’s *de facto* care since February 25, 2020. However, the father lives in a one-bedroom basement apartment while the mother continues to reside in the four bedroom home. The father proposes switching residences with the mother or at least moving with the children back into the home. The mother wishes to remain in the home. The father’s bail terms prevent him from being within 500 meters of the mother.
6. When this motion originally came before the court, Conlan J. found that “a threshold finding of urgency is made, subject to the determination of the hearing Judge.” He ordered that this motion be heard in writing. However, in reviewing the highly contentious materials, I realized that I should orally hear the motion. I have now done so.
7. For the reasons that follow, I find that the children’s best interests tip the balance of factors in the test for exclusive possession in the father’s favour. I generally set out the terms for the reversal of possession of the home below and adjourn this motion to allow the parties time to carry out those terms.

Background

8. The parties married on September 14, 2004 and separated on October 15, 2018. They have three children, N, who will soon be 15, H, who is 13, and A, who is 8.¹ The separation occurred when the police arrested the father, charging him with assault against the mother and mischief to property. His bail terms prohibited him from residing in the matrimonial home or coming within 500 meters of that home. Those terms have recently been amended to allow the father to move back into the home if he is granted exclusive possession of the home. The father's trial commenced in December 2018. It was due to continue until the operation of the courts were suspended by the pandemic.
9. Immediately following the parties' separation, the children resided with the mother. The father found himself a one-bedroom basement apartment within the children's school district. Since then, all three children have come to live with the father, although not at the same time. While the details of that migration are unclear from the materials, it appears that the oldest child, N, came to live with the father first. At some point, the youngest child, A, came to live with the father. That arrangement continued until January 2020, when the parents agreed that A will live equally with each of them. H lived exclusively with the mother until February 25, 2020, when both she and A came to live exclusively with the father. They have been in his care ever since.
10. The children's move into the father's care arose out of a serious incident between the mother and H that took place on February 25, 2020. On that day, both H and A were in the care of the mother. A had a soccer game. There is conflict between the parties as to who was required to take A to that game. Each parent claims that the other was responsible. In any event, neither parent was able to take A, claiming work commitments.
11. At some point a physical conflict arose between the mother and H in A's presence. The father's account of the incident, which he says was presented to him by H, is that the mother got into a physical fight with H over her unwillingness to take A to his soccer game. based on H's reporting, the father alleges that the mother assaulted H by pulling her hair, kicking her, taking both H and A by the collar, and then forcibly removing them from the matrimonial home.
12. In the father's account, H became so distraught at her treatment by her mother, that when she and A regained entry to the home, she took a knife to her stomach and

¹ I use only each child's first initial to identify him or her in order to protect the children's privacy.

spoke of committing suicide. A intervened and contacted the father. The father deposes:

On February 25, 2020 at approximately 6:30PM I received a frantic call from [A] who was screaming and crying as [H] had a knife to her stomach and was threatening to kill herself after an argument with the Applicant. I could hear [H] wailing and she told me that she wanted to die because the Applicant had physically assaulted [H] and then left the home telling both [H] and [A] to leave and that she never wanted to see them again.

13. The mother offers a completely different narrative. But curiously, she has nothing to say about H's suicide attempt. She admits to the physical altercation with H but paints herself as the victim of the father's instigation and her daughter's aggression. She claims that the father incited H to violence during his call with the child. However her evidence of what the father allegedly told H is hearsay and not admissible as she fails to offer the source of her alleged information, contrary to r. 14(18) and (19) of the *Family Law Rules*. I will have more to say about the finding below.

14. In the absence of cross-examination it is difficult for a motion judge to make a finding regarding the responsibility of each parent for the physical altercation between the mother and H. However I can say the following:

1. The failure of the mother to respond to the accusation that H attempted to take her life while in the mother's care and as a result of their physical confrontation is telling. The allegation is so serious that a response is required. Instead, the mother's silence must be seen, at the very least, as confirmation of the father evidence of H's suicide attempt.
2. The mother's explanation for her refusal to take A to his soccer game, the ostensible spark for the physical altercation with H is most peculiar. She originally stated that she had to work as an Uber driver at the time of the game. She asserted that the father was responsible for taking the children to the match even though they were in her care. That assertion, on its face, does not appear to be plausible
3. However, that was not the end of her description of her motivation for not taking the children. She swore:

I informed the children that I will not be able to take them to their activities that day **in order to make the Respondent accountable for his promises** with the children. [Emphasis added]

Of course this that statement belies two of the mother's key contentions: that she was unable to take the children to an activity because of her work, and that it was the father who lit the match that led to her altercation with H. In her own words she told the children that A was not taken to the soccer game for a reason that had nothing to do with them: holding the father "accountable".

4. Even though the mother claims that it was the father's conduct that led to her fight with H, when the police arrived, she asked them to take the children to the father's home. IN fact, that appears to have been her idea. She stated:

On February 25, 2020, I requested from the police officer who attended to my matrimonial home that I would prefer to keep the children with the father for a short period of time as I was aware that the Respondent planned to make false allegations against me and attempt to have me criminally charged. I strongly believe that the conduct of [H] on that day was as per the instructions of the Respondent.

5. Again, it is hard to square this explanation within the broader scope of the mother's narrative of the father's abuse and control. She claims to believe that H acted as the father's puppet and that he intended to coach the child to make false allegations against her. That being the case, why did she choose to send H to stay with the father? By her reckoning, that would only have given the father a further opportunity to use H to spin a web of lies against her. Yet that is just what the mother did. That narrative makes little logical sense.
6. There is no evidence that the mother ever sought the return of either H or A to her care. While faced with a motion by the father before the court's operations were suspended and then in this urgent motion, she did not seek an order for their return. She did not even seek access. This forbearance is notable in that the mother correctly states that the father has granted her any access with the children.
7. The father has referred in his materials to his adherence to COVID-19 safety steps. The mother does not dispute them.
8. All of this can only lead to the conclusion that the mother has consent to and continues to acquiesce to the present state of affairs that has seen all three children in the father's sole *de facto* care since February 25, 2020.

Law**Test for Exclusive Possession**

15. Under s. 19 of the *Family Law Act* (“FLA”), “[b]oth spouses have an equal right to possession of a matrimonial home.” However under s. 24(1), the court can grant one of the spouses exclusive possession of that home. The relevant provisions state:

Order for possession of matrimonial home

24 (1) Regardless of the ownership of a matrimonial home and its contents, and despite section 19 (spouse’s right of possession), the court may on application, by order,

(a) provide for the delivering up, safekeeping and preservation of the matrimonial home and its contents;

(b) direct that one spouse be given exclusive possession of the matrimonial home or part of it for the period that the court directs and release other property that is a matrimonial home from the application of this Part;

(c) direct a spouse to whom exclusive possession of the matrimonial home is given to make periodic payments to the other spouse;

(d) direct that the contents of the matrimonial home, or any part of them,

- (i) remain in the home for the use of the spouse given possession,
- or
- (ii) be removed from the home for the use of a spouse or child;

...

16. Under s. 24(2), the court can make any of the s. 24(1) orders set out above on an interim basis.

17. The criteria for making that order are found in s. 24(3), as follows:

Order for exclusive possession: criteria

(3) In determining whether to make an order for exclusive possession, the court shall consider,

- (a) the best interests of the children affected;
- (b) any existing orders under Part I (Family Property) and any existing support orders or other enforceable support obligations;
- (c) the financial position of both spouses;
- (d) any written agreement between the parties;
- (e) the availability of other suitable and affordable accommodation; and
- (f) any violence committed by a spouse against the other spouse or the children.

18. Factors (b) and (d) are irrelevant to the determination of this motion as there are no existing orders or written agreements between the parties. Those two factors will not be further considered in this decision.

19. In determining the best interests of a child, s. 24(4) requires the court to consider:

- (a) the possible disruptive effects on the child of a move to other accommodation;
and
- (b) the child's views and preferences, if they can reasonably be ascertained.

These two factors are child-centric in that they look at the effect of the order from a child's point of view. However they are not the only best interests factors that a court may consider.

20. Both parties refer me to the decision of McGee J. on *Menchella v. Menchella*, 2012 ONSC 6304. This is the second decision by McGee J. regarding interim exclusive possession in the same Menchella proceeding. In this decision, the court determined that the definition of violence for the purpose of s. 24(3)(f) was not limited to physical violence. It could also include verbal abuse, threats, and intimidation. As McGee J. stated:

27 There can be no doubt that the vitriolic communications constitute "violence" as intended within Section 24(3) (f) of the *Family Law Act*. They are threatening, intimidating and were intended to be taken seriously.

21. McGee J. relied on the decision in *Hill v. Hill*, 1987 CarswellOnt 238 (Ont. Dist. Ct.), where FitzGerald J. offered a statement almost 32 years ago that remains true today, that:

Violence in my view includes psychological assault upon the sensibilities of the other spouse to a degree which renders continued sharing of the matrimonial dwelling impractical. Where, as here, the conduct of the husband in written and spoken communication to the wife is calculated to produce and does in fact produce an anxiety state which puts the wife in fear of her husband's behaviour and impinges on her mental and physical health, violence has been done to her emotional equilibrium as surely as if she had been struck by a physical blow.

22. In the mix of factors relevant to the determination of an order for exclusive possession, the child's best interests are the paramount consideration (*Menchella* at para. 33).
23. The risk of a child even contemplating suicide can be a best interests factor that tips the scales in favour of an order of exclusive possession (*Leckman v. Ortaaslan*, 2013 ONSC 3324, 2013).
24. At the same time, the court must consider that an order for exclusive possession can have what McGee J. described as a "dramatic" and "highly prejudicial" effect on the dispossessed spouse. Where the decision must be based on findings of credibility only available at trial, the order should not be made. (*Menchella v. Menchella*, 2012 ONSC 1861²).

Test for Urgency

25. In *Thomas v. Wohleber*, 2020 ONSC 1965, I reviewed this court's test for urgency both before its suspension and at the present time. I wrote at para. 33 that

... it is important to emphasize the scrupulousness with which the urgency standard must presently be enforced. That may even mean that some issues that may have been heard on an urgent basis because the test of urgency was not strictly applied in a non-pandemic world will not meet the high threshold set by the Notice. It may mean that some issues in a motion are urgent while others are not.

² This is an earlier decision in the same *Menchella* proceeding that led to McGee's decision on the motion cited above and at 2012 ONSC 6304.

26. I set out the factors necessary to meet the present test of urgency as follows:

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 or safety or economic well-being of parties and/or their children;
3. The concern must be a definite and material rather than a 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.

27. As I recently stated in *Haaksma v. Taylor*, 2020 ONSC 2656,

11 The court's preliminary determination of urgency for the purpose of the Notice is an administrative rather than substantive one. (*Wang v. 2426483 Ontario Limited*, 2020 ONSC 2040). That determination is not a motion in itself (*Grant v. Grant*, 2020 ONSC 2455 at para 3). The Notice and the Addendum do not overturn the requirements of any statute or the *Family Law Rules*.

12 Thus, any preliminary determination of facts for the purposes of the determination of urgency under the Notice and the Addendum do not amount to a finding of facts on the merits of the anticipated motion. Any such finding is without prejudice to any position that either party may take or any finding that the presiding judge may make at the return of the requested motion.

Arguments Regarding Exclusive Possession

28. The father's arguments for exclusive possession centre on two factors: the children's best interests in returning to live in their larger former home during this pandemic and his alleged financial inability to maintain two homes.

29. The mother makes two key arguments of her own. First, she asserts that the father's motion is not urgent in that the issues that he raises are not new. Second, the father fails to meet the *FLA* test for exclusive possession. Many of her contentions on her second point are rhetorical. She claims that the father is many

terrible things: abusive, both physically and economically, a liar, a cheater and a malicious man. Despite conceding two of the father's key facts in his motion, H's suicide attempt in her care and her acquiescence to the father's subsequent exclusive parenting of the children, she asks the court to find that he has no credibility. Under the fig leaf of credibility, she relies on a number of irrelevant collateral arguments.

Issues

30. This case raises the following issues:

1. Is this motion urgent?
2. Should the father be granted exclusive possession of the matrimonial home?
3. If so, under which conditions?

Father's Arguments

31. The father has been out of the matrimonial home for over a year and a half. After he was ousted from the home due to his bail conditions, he rented a one-bedroom basement apartment ("the apartment"). The apartment is in the children's school district. It is close to the home but in accord with the father's bail terms (which require him to keep a 500 meter distance from the home).
32. Since February 25, 2020, the three male inhabitants of the apartment have been sleeping in makeshift beds on the floor of the father's apartment, while H has occupied the sole bedroom.
33. The father states that the living conditions for the four of them in their crowded basement apartment have worsened since the advent of the pandemic. The children have no school to attend. He works at home. They are all crowded together, with little privacy or room to play. Even H, with her bedroom occupancy, has had insufficient privacy, in the face of her three closest male relatives, to recover from her suicide attempt. It is difficult to even speak to her counsellors in that apartment.
34. On the other hand, the matrimonial home is spacious enough for each of the children to have their own bedroom, complete with all of their possessions. They can have more than enough privacy plus the availability of a backyard in which to

play while their physical distancing is constrained by the pandemic. The privacy will also assist H in speaking to her therapist.

35. Since the parties' separation, the father has been paying all of the expenses of both the home and the apartment. Until the mother obtained employment at Uber earlier this year, he was paying her a further \$750 per month, again tax free, as a form of support. He unilaterally terminated those payments when he learned of her employment, which appears to have paid her the gross amount of \$1,000 per month, pre-COVID. As I set out below, the father asks the court to find that the mother has other sources of income as well.
36. The father works at SNC Lavalin and earned \$188,886 last year. Over the past three years he earned an average of about \$200,000 per year. He claims that his income has been reduced by 10% from his 2019 figure. He claims housing expenses of \$6,750.02 per month, of which \$1,250 per month was for his basement apartment. That works out to \$81,000.24 in annual after-tax housing expenses. Even for a man with his income, that amounts to 43% of his gross income for housing, and a far higher percentage of his net income. He states that he has been forced to deplete an investment to pay the mortgage on the home.
37. In essence, the father argues that he cannot afford to maintain the two homes, especially when four of the five family members are residing in a small basement apartment, and the mother is the only one living in the four bedroom home.

The Mother's Arguments

38. The mother disputes few of the facts asserted above. Nonetheless, she questions the urgency of the motion in that the father has lived in the apartment for the past year and a half. Further both N and A have been living in that apartment, either full or part time for some time. All three children have been residing there now for the past 2 ½ months. In the face of those facts, she asks where the urgency can be found.
39. The mother's arguments about the test for exclusive possession centre on three main arguments: best interests, the financial disparity between the parties, and abuse.
40. The mother argues that the father has failed to prove that living in the matrimonial home rather than a one-bedroom basement apartment is in the children's best interests. Her response to the father's argument that occupying the matrimonial

home during this pandemic would be in the children's best interests is a claim that the father is not interested in the children's best interests. The proof in that alleged pudding comes from the following contentions:

1. She has historically been the children's primary caregiver.
 2. The father's was historically not interested in the children's activities. This is proven by his failure to pay for certain activities in which she had enrolled them.
 3. The father engaged in conflict with her.
 4. He acted in "bad faith" by paying for all of the home's expenses but not any further support after she started to work for Uber;
 5. He threatened to not take the children to any further activities on February 25, 2020;
 6. He removed the insurance on her car (a claim belied by evidence of an insurance policy attached to his reply affidavit);
 7. If the father were interested in the children's best interests, he would get a more expensive apartment. As it stands, he pays more in car lease than apartment rental payments.
 8. The court should not determine exclusive possession because it has not yet determined "...what is truly in the best interest of the children, including custody and access ...". She makes this argument even though she is not contested whether the present residential arrangements are in the children's best interests. She does complain that the father has not allowed her to see or speak to the children since H's suicide attempt.
41. The mother's second argument points to the obvious financial disparity between the parties. She describes herself as the historical primary caregiver of the three children. While she does not overtly say so, her implication is that she was a traditional stay at home mother throughout the marriage. For now, she only has her low paying Uber driving job and the child tax credit. The father had paid the mother \$750 per month in addition to covering all house expenses until she started her UBER job. But he then decided to cut that payment. During the argument of this motion it was pointed out without objection that she also receives the Canadian government's pandemic CERB³ benefit of \$500 per week. For those reasons, the father should be able to obtain his own alternate accommodation without ousting her from the home.

³ Canada Emergency Response Benefit

42. The mother's other arguments center on two things: abuse and character. She asserts that the father has a history of abusing her and the children. While she can point to no corroborating evidence of the abuse, she can fairly point out that in October 2018, the father was charged with assaulting her and mischief to property. However she offers few details of the alleged assault and mischief charges.

43. Her narrative is that on September 29, 2018, the father became angry at her for failing to prepare his breakfast. He "... started to smash all glass appliances in the matrimonial home that were purchased by me." She then changed and began to leave the home. He "... confronted me in a very hostile manner and took the car keys and the house key from me, as well as cut my bank card and threatened me not to come back." He then "cut" her cell phone line. She "...eventually found the courage to report his endless abuse to the Milton Police on September 29th, 2018." From this narrative the manner in which he allegedly assaulted her that day is not clear. She offers no particulars. Nor is it clear what "glass appliances" he smashed.

44. The mother ties the issues of abuse and character together in a circular way: the fact that he does not admit his guilt to the assault charge proves that he is of bad character. She deposes:

64. The Respondent states that he is facing criminal charges of assault as well mischief under \$5,000, because of false allegations raised by me. The Respondent was unmistakably charged due to his own actions. **The simple fact that the Respondent cannot take ownership of his appalling conduct is a clear demonstration of his character and how easy it is for him to fabricate information and to devise a story.** Unfortunately, this was the only criminal report made against the Respondent throughout my years of abuse with him.
[Emphasis added]

45. The remainder of the mother's allegations point to the father's alleged "bad faith" and "abusive" character. She refers to his "character" four times in her affidavit. She has little to say about him that does not include a pejorative adjective to describe him or his conduct. She refers to him as "ruthless", "conniving"(twice), malicious (eight times), and cruel (four times). She describes him as acting in "bad faith" (six times) and for "hidden motives" (four times).

46. Despite her factual concessions set out above, she refers to the father's materials as being fabricated seventeen different times, including being "entirely fabricated". She goes so far as to state that the father "... has fabricated every statement in his motion materials in order to maliciously gain exclusive possession of the home and

financially drain and abuse me.” She won’t even grant him truth of the facts in his affidavit that she confirms or concedes in her own affidavit.

47. The mother’s denial of the facts in the father’s first affidavit is not only complete, it is “vehement”. She even refers to alleged fabrications in the father’s case conference brief even though it is not and should not be before me (see r. 17(23) and *Bordynuik v. Bordynuik*, [2008] O.J. No. 3019 (S.C.J.) at para.8).

Issue No. 1: Is this Motion Urgent?

48. The mother disputes the urgency of the father’s request for exclusive possession of the home. As evidence of a lack of urgency, she points to the time since the parties’ separation, the fact that one or more of the children have lived with the father for some time, and that all three children have been living in the father’s basement apartment for over two and half months. She also refers to the father’s answer, filed many months ago, in which he asked for all three children to be placed in his primary care.

49. In considering the test of urgency set out in *Thomas v. Wohleber*, set out above, I reject the mother’s argument that this motion is not urgent for the following reasons:

1. In the past, the father has only had one or two children living in his apartment at a time. Only after February 25, 2020 have there been three children and a total of four people living in his apartment.
2. The father’s accommodations have left two of the children essentially bunking out on the floor of the apartment with the father.
3. The COVID-19 crisis has further circumscribed the radius of the children’s lives, bound as they are to the rules of “social” distancing.
4. H is still dealing with the aftereffects of her altercation with her mother and her suicide attempt. She is receiving therapy from a psychologist with ROCK (Reach Out Center for Children).
5. Having gone through a great deal of stress and change in recent months, the children require as much stability as possible. The issue of whether a return to the home will help provide that stability is an immediately compelling one.

6. Despite the fact that the father earns a substantial income, he pays a significant portion of his salary to maintain the matrimonial home. That is why he chose to rent a small one bedroom apartment after his arrest.
7. The fact that the father's pleadings sought primary care of the three children when he did not have it does nothing to detract from the urgency of the present situation.
8. In short, the issues raised by the father meet the test of *Thomas v. Wohleber*. They are immediate, serious (in the sense that the issues raised significantly affect the health or safety or economic well-being of parties and/or their children), definite and material, as well as clearly particularized.

Issue No. 2: Should the father be granted exclusive possession of the matrimonial home?

50. Whether to grant a party exclusive possession of a matrimonial home is a discretionary decision; one which involves a careful balancing of a number of factors. Here the task of balancing is complicated by the fact that there are serious factors on each side of the argument, as I will review below. However, in resolving them here, I must make the children's best interests my primary consideration.

Best Interests of the Children Affected

51. While the father has pointed to a number of ways that an order granting him exclusive possession of the home may enhance the children's best interests, the mother has not offered a single alternative argument. There is no question that the children's best interests are served with an expeditious return to the matrimonial home.
52. The two best interests factors set out in s. 24(4) are neither clearly answered in this case nor determinative. The first factor is the possible disruptive effects on the child of a move to other accommodations. Here, the opposite factor applies, the possible disruptive effect on the children if they are *not* returned to the matrimonial home.
53. The children remain in very cramped quarters, offering little privacy and exclusive living space. Only H has her own bedroom. Two of the children sleep on the floor. All of their circumstances are exacerbated by the COVID-19 distancing rules as well as the cancellation of their school and extracurricular activities. Add to that the fact

that the father has to work at home, meaning that four people are crowded together, almost 24/7, in cramped quarters.

54. With regard to the children's views and preferences, neither party has clearly expressed them. However, in the period since their parents have separated, these children appear to have voted with their feet, from the care of their mother to that of their father. There is no evidence that the children or even the mother presently feel otherwise. In fact, the mother presents no alternative plan to the father's exclusive care of the children.
55. In addition to the two, non-exclusive factors cited in *FLA* s. 24 (4), the court may consider the effect on the children of each set of accommodations potentially available to them. There is no question of which residence better meets their best interests. In the home, none of them will sleep on the floor. Each will have his or her own bedroom. Each will have their personal possessions around them. While constrained to remain close to their home, they will have their own back yard in which to play. The father's need to work at home will not get in their way.
56. For H, there will be a greater degree of privacy, which she can utilize to continue her counselling following her aborted suicide bid.
57. In sum, the children's best interests support the father's request for exclusive possession.

The Financial Position of Both Spouses

58. The father is clearly in the superior financial position of the parties. He has worked full time throughout the marriage, while the wife appears to have mainly been a stay-at-home wife. The father earns many times the income of the mother, whether or not the court notionally imputes income to her as the father wishes me to do.
59. As set out above, the father earned \$188,886 last year. The mother earned very little, although she may earn more this year.
60. The mother is an Uber driver. She seems to earn about \$1,000 per month from her driving, although that is a gross figure which ignores her automotive expenses. I note that Uber may be an essential service, but all transportation is presently diminished as people have few places to go. I also accept, for the limited purpose of this motion that the mother earns money from an internet business selling luxury goods online, leading to unexplained deposits to her personal bank account. The

father argues that a court should add \$750 per month from this business to its calculation of the mother's income. The records that have been produced support that assertion.

61. I also recognize that the mother has obtained the child tax credit for all three children, but will not likely be able to maintain it for long, assuming that she will be candid about the childcare arrangements with the Canadian government. There seems to be no dispute that she now receives the Canadian government's pandemic CERB⁴ benefit of \$500 per week.
62. Right now, neither parent has moved for support from the other and thus I do not have the jurisdiction to order such support. However I note that the parties were together during their marriage for over 14 years and that the mother most likely has a claim to compensatory support.
63. That being said, I do have the right to order that the spouse in possession of the home make periodic payments to the other spouse under *FLA* s. 24(1)(c). Part of the reason that I would do so is that the mother does not have available alternate accommodations from family or friends. Thus, if I grant the father exclusive possession of the home, I am called upon consider what, if anything, the father should pay to the mother as periodic payments, as a term of an exclusive possession order. But as set out in greater detail below, those payments are not support payments.

The Availability of Other Suitable and Affordable Accommodations

64. The father is already paying all of the carrying costs of both residences. His payment of the expenses of the home total \$4,988.02 per month. His rent for the apartment is \$1,250 per month. Taken together his housing costs are \$6,750.02 per month or \$81,000.24 per year. This figure is 43% of his gross income and likely 70-80% of his net income.
65. I accept that the father's financial statement shows that he has been living on a now depleted investment as well as his income to support the two households. Despite the mother's assertions, he cannot afford to simply rent a yet more expensive home for the himself and the children, leaving the mother in the expensive home. Looking realistically, the home will likely have to be sold some time in the foreseeable future.

⁴ Canada Emergency Response Benefit

66. On the other hand, the mother has only one potential alternate place of accommodation: she could choose to take over the father's basement apartment. His landlord has indicated that they would accept her as a tenant. While I cannot and would never think of ordering her to live there, the apartment was good enough for the father and the children and she does argue against them leaving that apartment to return to the matrimonial home. In other words, it is a potential affordable accommodation if the mother wishes it.

Violence Committed by a Spouse Against the other Spouse or the Children

67. The issue of spousal violence is a complex factor in this case for a number of reasons. The mother makes numerous, (albeit mostly unparticularized) allegations of abuse against the father. The police and Crown's office have felt that there were reasonable and probable grounds to charge the father with assault and mischief. That charge and its attendant bail terms have kept the father out of the matrimonial home for over a year and a half. The course of the criminal trial is uncertain.

68. Yet the mother's materials before me, in which she sets out her allegations of violence at the hands of the father, offer little reliable evidence to buttress her claims. As set out above, she offers little detail of the alleged assault of September 29, 2019, speaking more of him throwing appliances (which admittedly can be seen as violence under s. 24(3)(f)) than the alleged assault.

69. While the mother's materials allude to many other incidents of physical abuse, she only specifically refers to one further incident, which she says took place in June 2018. The mother says that at that time, she argued with the father over an allegedly violent movie that he was watching with the children. In her telling, he "... got angry and started violently hitting me." When the police arrived, she told them that they were only "shouting". She says that she lied to the police because of the father's manipulations.

70. Another serious problem with the credibility of the mother's evidence of abuse is her consistent use of hyperbolic language to describe everything that she claims that the father has done. She cannot speak of him without the use of a pejorative adjective to define his motivations or conduct; as if the facts themselves will not suffice. Her language so demonizes the father and his motivations that it is hard to see the objective truth hiding behind the thick gauze of her denigration.

71. Rather than bolster her credibility, the mother's insistence on disparaging adjectives to describe every act of the father diminishes it. It tells the court that she is so

caught up in her attacks on the father's character that she loses track of the facts that she attempts to convey.

72. I wish to add one further comment about another of the mother's claims of abuse at the hands of the father: financial abuse. The mother makes five separate allusions to the father's "financial abuse" of her in her affidavit. She goes so far as to allege that he threatened that he "...will not stop until I make you beg on the street homeless with nothing but the clothes on your back".
73. I accept that the concept of "financial abuse" exists as a form of abusive control by a financially dominant spouse to a dependant one. Yet I see little evidence of that alleged form of abuse on the facts before me. The fact that the parties do not agree on the amounts that the father should have paid to the mother after they separated is not evidence of financial abuse. Nor are the post-separation financial arrangements evidence of that abuse.
74. The fact that for the past 18-19 months, the father paid close to \$5,000 per month in after tax funds to maintain the mother, H and at times A in the home is not an example of financial abuse, especially in light of the support figures set out below. The evidence does not even show that he cancelled the mother's car insurance, as she alleges.
75. While I recognize that the father was also maintaining his joint asset when paying the various home expenses, the amounts that he has been paying since separation have been substantial. While it may not have been the exact amount that he should have paid, that issue can be determined at trial. At the end of the day, I can point to two facts about the "financial abuse" allegation: he did not leave her metaphorically out on the street after they separated, and the mother never moved for an order that he pay a greater amount.
76. While considering violence in this family, there is another side to the coin. I cannot ignore the fact that the mother engaged in a violent confrontation with 13-year-old H. The mother alternately blames the father and even the child for this fight, but three facts are certain.
77. First, she was the only adult in the room at the time of the fight. Yet, whatever occurred (the mother claims that she was essentially defending herself from her 13-year-old daughter), she failed to de-escalate it. She justified her part of the incident by stating "I was not going to stand there and have my child hit me with a shoe and for [H] to think that was appropriate for her to do."

78. Second, the mother's explanation makes no logical sense. If the argument was about taking A to his soccer game, why was the mother engaged in a confrontation with H and not A? She fails to explain this other than to claim that the father goaded H on by threatening to terminate all of the children's activities. But since the mother neither claims to have overheard the father's conversation with H or that the child told her what the father said, how does the mother know what the father told to H to goad the child on against her mother? How does she know that the father made a "... threatening and cruel statement" to his daughter? As set out above, the mother's evidence of the father's statements to the child is inadmissible as it offends r. 14(18) and (19) with regard to hearsay evidence.
79. Further, the mother claims that H, out of the blue, just grabbed a shoe and tried to hit her, while she only restrained the child by her shirt. If that is all that happened, how did H escalate to trying to harm herself and why did A have to be the one who intervened? Despite being the adult in the room and the children's caregiver, the mother fails to answer that question.
80. Third, and perhaps most relevant, the mother fails to explain the suicide attempt in her home. Not only that, she fails to even acknowledge the attempt. That being said, she does not deny it either. Her silence cannot be explained by any surprise at the allegation of a suicide attempt. It is front and centre in the affidavit to which she responded. Further, she does not deny that after the police arrived, she volunteered to send H and A to the father's home. Why do that if she had the situation in hand, or if she knew that the father would manipulate H against her? By her narrative, he had just spurred the child to violence with his "... threatening and cruel statement".
81. The mother's failure to even mention the suicide attempt, coupled with her failure to offer a compelling narrative of the events of that evening and her adjectival description of the father, taken together, all significantly diminish the credibility of her narrative.
82. In short, I am faced with two allegations of spousal violence, one by the father and the other by the mother. However there is no doubt that whatever happened between mother and daughter on February 25, 2020, H attempted to take her own life with a knife. At the *very* least, for the purpose of this motion, each allegation of spousal violence is as credible as the other.

Conclusion on Exclusive Possession

83. I recognize the presence of factors regarding exclusive possession that cut both ways in this motion. The mother refers to the father's violence and his outstanding charges. She has far less income than the husband. The father is seeking a remedy that would oust her from the home to which she has a presumptive right of possession. Unless she wishes to consider switching homes with him, she has no immediate alternate place to stay. There are significant credibility issues here. All of those factors must give a motion judge pause.
84. Yet in deciding this motion, I must hark back to the paramount concern of the children's best interests. It is clearly in their best interests to trade their cramped quarters for their former spacious home. The best interests factor acquires far greater weight when considering effects on the children of the COVID-19 pandemic "social distancing" rules and H's suicide attempt. A return to their home will give them added stability and security.
85. In a similar vein, I cannot ignore the fact that four people are living in a basement apartment while only the mother lives in the home. If most of the father's housing expenses are going to that home, shouldn't the greatest number of family members, and particularly the children, utilize it? Further, the father's basement apartment is available for the mother to use, at least in the short term, if she wishes.
86. For the reasons set out above, I am willing to grant the father exclusive possession of the matrimonial home. But before I make that order I must consider the terms by which such an order can be put into effect to protect the interests of all involved, including the spouse that I propose to oust from the home.

Issue No 3: What terms should accompany an order of exclusive possession?

87. In her affidavit, the mother says that if she has to relinquish exclusive possession of the home, she should be provided with a \$72,000 deposit against her equalization claims in order to be sure that she suffers no further "financial abuse" from the father. She also seeks the payment of \$ 2,617 per month in support, based on her counsel's SSAG calculation of support, setting out her income as \$12,000 per year and that of the father at \$188,886 per year. That being said, she has not brought a motion for support.
88. For his part, the father does not appear to concede that anything should be paid to the mother if she were ousted from the home. He argues that the mother has failed to fully disclose her income and assets. He points to her Uber income, which he

implies is the result of intentional underemployment (although his counsel did not use the term). He says that the records that the mother has produced of her Uber work demonstrate only part-time employment when she could be working full time. He refers to her unexplained bank transfers, which show at least \$750 per month deposited into her account, which he attributes to her internet business. He finally points to the money that the mother receives from the child tax benefit (to which she is no longer entitled) and CERB. At the very least, he asks the court to impute income of \$35,000 per year to the mother.

89. Even if the father is correct, there is no question that the mother cannot, on the materials before me, simply leave the home without financial assistance. She will likely need first and last month's rent. While the father offers the mother the apartment, he offers no particulars that would help her decide whether she wishes to take it over, nor does he say how the rent would be paid.
90. For tax reasons that can benefit both parties, it would be best if the father could pay the mother spousal support rather than make payments which attract no tax benefits to him. However there is no motion before me for support. For that reason, my authority in this motion to order payments to assist the mother is limited to "periodic payments" under *FLA* s. 24(3)(c). That being said, it is open to the parties to agree that the father's payments, whatever they are, will be treated as spousal support payments for tax purposes. That could leave more money available for spousal support while saving the father money in taxes. They can do so with a written agreement or a consent to an order to that effect.
91. In the context of this motion, it is difficult for me to make an order that determines periodic payments with great precision. Perhaps the best way to determine the figure on the limited evidence before me is to look at what would be an appropriate support figure if such a motion were brought. While not requested, the mother appears entitled to spousal support and the father to child support,
92. In order to assist me in my determinations, I asked the parties to prepare SSAG calculations, based on the assumptions of the father's 2019 income and the children being in his care.
93. The mother's calculations are based on the additional assumption that her income is only \$12,000 per year. The monthly spousal support figures based on those levels of income are as follows:

Low

Medium

High

\$1,668**\$1,947****\$2,224**

In this calculation, the mother's income is so low that she is not called upon to pay child support. This calculation leaves the mother with between 19.7% - 22.7% of the parties' net disposable income ("NDI") for one person, while the father has between 80.3% - 77.3% of the NDI for four people. Like all of the spousal figures that I consider, the amounts would be taxable in the hands of the mother (who is in a relatively low tax bracket) and deductible in the hands of the father (who is in a high tax bracket).

94. The father's calculations, based on an assumed imputation of \$35,000 per year to the mother, are as follows:

Low**\$1,468****Medium****\$1,712****High****\$1,957**

In this calculation, the mother is required to pay child support of \$718 per month. This calculation leaves the mother with between 22.4% - 24.8% of the NDI for one person, while the father has between 77.6% - 75.2% of the NDI for four people.

95. I have done my own calculation based on an imputed income of \$30,000 per year for the mother. That calculation sees the father paying spousal support as follows:

Low**\$1,539****Medium****\$1,795****High****\$2,052**

In this calculation, the mother is required to pay child support of \$621 per month. As I used a basic support calculator, I am unable to determine the NDI's in this scenario. But it is not far from the one in the father's calculations.

96. In considering these figures for the purposes of *FLA* s. 24(1)(c), I am attempting to arrive at a rough figure for periodic payments that is fair to both parents. My calculation is not conducted with great precision and is not strictly based on the SSAG's. Rather, I am looking to a figure that considers the parties' reciprocal obligations and the fact that the mother is being ousted from the home.

97. I find that two periodic payments of \$2,500 per month for the months of May and June 2020 and subsequent monthly payments of \$1,250 per month would be appropriate. The May and June payments will be payable forthwith so that the mother can rent alternative accommodations and pay for a mover. The remaining

\$1,250 monthly payments will commence on July 1, 2020 and be payable on the first day of each month until further order.

98. Since the payments I am ordering are not support, they will not be paid through FRO. They are not taxable in the hands of the mother or deductible in the hands of the father. Unless the parties agree otherwise, this figure will be unallocated, but, subject to the discretion of the trial judge, the father will be given credit towards his support or equalization obligations for any payments made. They are without prejudice to any motion for support although a judge may wish to consider them in the overall calculus of need regarding spousal support.
99. If the parties agree to convert the periodic payments to support, they can agree on an increased spousal support figure based on the calculations set out above, as well as a calculation of child support. If they cannot agree on support, they may come back to argue the issues of child and spousal support, and in particular retroactive support as of March 1, 2020, when this court reopens. In light of this order it is hard to see the issue being urgent at this time.
100. I wish to offer the mother sufficient time to find alternative accommodation, including a consideration of the father's basement apartment, negotiate which furniture she will take with her from the matrimonial home and how it will be transported. The parties have agreed that if the mother were to move out of the home, she would be entitled to half of the furniture that does not belong to the children. But she would have to arrange for and pay movers.
101. Accordingly, I adjourn this motion to May 15, 2020 at 10 a.m. to allow the parties to attempt to work out the logistics of the implementation of this order. If they are unable to do so, I will decide upon the return of this motion. That determination will include the date for the father and children to commence exclusive possession of the home.
102. One final point regarding exclusive possession: as the father has stated that one of the key reasons to obtain exclusive possession of the home is to give the children stability in these difficult times. I also understand that it will likely be necessary to sell the home at some point in the foreseeable future. Of course, the market for such a sale is not optimistic at this time. With all of the above in mind, unless the parties agree otherwise, the home shall not be listed for sale nor shall a motion for partition and sale of the home be returnable before January 2, 2021.

A Word or two About Rhetorical Excess in Family Litigation

103. Having been required by the exigencies of this motion to closely and frequently review the materials filed in this motion, I feel constrained to offer a few words of caution to the parties, their counsel and to the profession as a whole.
104. Family litigation is far too corrosive of once-loving relationships and far too soul destroying for emotionally scarred litigants to be exacerbated by an unnecessary war of invective. Yet far too often that is just what occurs. Litigants feel that they can leave no pejorative stone of personal attack untilled when it comes to their once loved one. Many lawyers, feeling dutybound to fearlessly advocate for their clients, end up abetting them in raising their discord to Chernobyl levels of conflict.
105. Often those parties and their lawyers forget that once the war is over, the financially and emotionally drained family still has to pick up the pieces. And the children whose best interests are ostensibly the central concern of their parents' struggle, can leave their field of battle scarred for life.
106. The role of lawyers in family law cases is a complicated one. That role involves a balancing act of duties towards the client, the administration of justice and even the child before the court.⁵
107. Beyond the balance of those duties, many capable family law lawyers realize that if the cost of victory is too great, everyone loses. Those lawyers realize that their role as advocate should often be as rational counsel not flame-throwing propagandist. Where the client wants to raise the emotional stakes with invective and personal attack, that lawyer must often counsel restraint. While many lawyers who appear before this court recognize the truth of Mr. Nizer's aphorism that began these reasons, all too many, unfortunately, fail to do so.
108. In the hopes of lowering the rhetorical temperature of the future materials of these parties and perhaps those of others who will come before the court, I repeat these essential facts, often stated by my colleagues at all levels of court, but which bear constant repetition:
1. Evidence regarding a former spouse's moral failings is rarely relevant to the issues before the court.

⁵ Many of those obligations are spelled out in the Law Society of Ontario's Rules of Professional Conduct (see. Ch. 1.1 and *Groia v. Law Society of Upper Canada*, [2018] 1 S.C.R. 772 (S.C.C.)) as well as r. 2(2)and(3) of the *Family Law Rules*).

2. Nor are we swayed by rhetoric against the other party that verges on agitprop.
3. Our decisions are not guided by concerns of marital fidelity. A (non-abusive) partner can be a terrible spouse but a good parent. Everyone is supposed to know this, but all too often I see litigants raise these issues for “context”.
4. Exaggeration is the enemy of credibility. As it is often said, one never gets a second chance to make a first impression. If that impression, arising from a parties’ materials or argument, is one of embellishment, that impression will colour everything that emanates from that party or their counsel.
5. Affidavits that read as argument rather than a recitation of facts are not persuasive. They speak to careless drafting.
6. Similarly, hearsay allegations against the other side which fail to comply with r. 14(18) or (19) are generally ignored, whether judges feel it necessary to explicitly say so or not.
7. A lawyer’s letter, whatever it says, unless it contains an admission, is not evidence of anything except the fact that it was sent. The fact that a lawyer makes allegations against the other side in a letter is usually of no evidentiary value.
8. Facts win cases. A pebble of proof is worth a mountain of innuendo or bald allegation.
9. Relevance matters. If the court is dealing with, say an issue regarding parenting, allegations of a party’s failures regarding collateral issues, say their stinginess or the paucity of their financial disclosure, are irrelevant and counter-productive. They do not reveal the dark soul of the other side or turn the court against the allegedly offending spouse. Rather, they demonstrate that the party or their counsel is unable to focus on the issue at hand. Often those materials backfire leading the court to place greater trust in the other side.
10. One key to success in family law as in other areas of law is the race to the moral high ground. Courts appreciate those parties and counsel who demonstrate their commitment to that high ground in both the framing and presentation of their case.
11. While dealing with that moral high ground, many capable counsel advise their clients against “me-too” ism. One side’s failure to obey a court order or produce necessary disclosure does not give licence to the other side to

do the same. Just because the materials of one side are incendiary or prolix, that does not mean that the other side is required to respond in kind. Judges are usually aware when a party has crossed the line. Showing that you or your client does not do the same is both the ethical and the smart thing to do.

109. None of these comments should be taken as a comment on present counsel. Nor should they be seen to minimize the kind of resolute advocacy that the court has come to expect from so many of its best lawyers. That type of advocacy is often necessary and valued. But even then, rhetorical excess is the enemy of good advocacy.

Order

110. For the reasons set out above, I order:

1. The father will be entitled to exclusive possession the home at a date to be determined upon the return of this motion.
2. The father shall pay to the mother \$2,500 per month in period payments for the months of May and June 2020. The total of \$5,000 is payable forthwith.
3. Commencing July 1, 2020 and continuing on the first day of each month thereafter until further order, the father will pay to the mother periodic payments of \$1,250 per month.
4. The periodic payments set out above are not support payments. They are not to be paid to the Family Responsibility Office.
5. Subject to the discretion of the trial judge, the father will be given credit for all periodic payments in the calculation of any financial obligations that he has to the mother.
6. The mother is entitled to take with her up to one-half of the chattel furniture in the home that is not owned by or allocated to the use of the children. If the parties are unable to agree on which furniture she is entitled to take,

each shall prepare a list of their proposed division of furniture, along with their view of the value of that furniture, for the return of this motion.

7. Either party is at liberty to apply for support when the suspension of this court's activities is lifted.
8. Unless the parties agree otherwise, the home shall not be listed for sale nor shall a motion for partition and sale of the home be returnable before January 2, 2021.
9. The balance of this motion is adjourned to May 15, 2020 at 10 a.m.

Reasons Deemed an Order

111. In the circumstances of the COVID-19 emergency, these Reasons for Decision are deemed to be an Order of the Court that is operative and enforceable from the time of their release without any need for a signed or entered, formal, typed Order.

“Marvin Kurz J.”

Electronic signature of Justice Marvin Kurz,
Original will be placed in court file

Dated: May 8, 2020