

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**FAMILY COURT**

<b>BETWEEN:</b>	)	
	)	
Ercole Derek Colasuonno	)	
	)	
Applicant	)	Michael J. Stangarone and Stephen P. Kirby, for the Applicant
	)	
<b>– and –</b>	)	
	)	
Pamela Vanessa Colasuonno	)	
	)	
Respondent	)	Stephen J. Codas, for the Respondent/Moving Party
	)	
	)	
	)	<b>HEARD:</b> In-Writing

2020 ONSC 2061 (CanLII)

**REASONS FOR DECISION**

**CHARNEY J.:**

- [1] As a result of COVID-19, regular Superior Court of Justice operations are suspended at this time as set out in the Notice to Profession, the Public and Media Regarding Civil and Family Proceedings of the Chief Justice of Ontario. See the Notice to the Profession dated March 15, 2020, as revised on April 2, 2020 available at <https://www.ontariocourts.ca/scj/covid-19-suspension-fam/> [“the March 15, 2020 Notice”].
- [2] The March 15, 2020 Notice provides that family proceedings related to the “exclusive possession of the home” may qualify as urgent proceedings.
- [3] In accordance with the March 15, 2020 Notice, the respondent mother (Vanessa) has brought this motion as an urgent matter seeking various orders relating to the exclusive possession of the matrimonial home. The Orders requested include:
  - a. An Order granting leave to bring this motion on an urgent basis and before a judicial case conference has been completed, on the basis of urgency.

- b. An Order for exclusive possession of the matrimonial home subject to the applicant father's parenting time.
- c. An Order that the children of the marriage, "shall be exclusively in the care of the Respondent Mother in the matrimonial home for 14 consecutive days".
- d. An Order that "at the conclusion of 14 days following the issuance of this Order, a temporary without prejudice Order that the children reside with the Applicant Father and the Respondent Mother in the matrimonial home pursuant to a "nesting" arrangement, with each party vacating the matrimonial home during the other's parenting time"
- e. The father's parenting time with the children will be as follows:
  - (i) every Wednesday from 9:00 a.m. until Thursday at 2:00 p.m.; and
  - (ii) every other weekend from Saturday at 9:00 a.m. until Sunday evening after he puts the children to bed.

[4] On April 8, 2020, I determined that the issues raised in the Notice of Motion met the *prima facie* test for urgency in the March 15, 2020 Notice, and set out a schedule for the filing of written materials by both parties. Determinations of *prima facie* urgency are summary in nature, and without prejudice to both parties on the hearing of the motion itself. A determination of *prima facie* urgency is a preliminary ruling, it is not intended to be a motion unto itself and is intended to be simple and expeditious: *Onuoha v. Onuoha*, 2020 ONSC 1815, at para. 14.

[5] I advised the parties that it was my intention to decide the matter on the basis of written materials only, and that I would advise them if, after receiving the written material, oral submissions were necessary. Having reviewed the affidavit material and factums filed by both sides, I am satisfied that the issues raised in this motion can be fairly adjudicated on the basis of the written material filed without oral argument.

### Urgency

[6] Under normal circumstances this motion could not proceed until after a Case Conference had been completed (Family Law Rule 14(4)). In the present case, a Case Conference was scheduled for March 17, 2020, but that was the day the Courts were closed pursuant to the March 15, 2020 Notice, and the Case Conference could not proceed.

[7] Vanessa argues that this motion is urgent because she and the children have been living with her parents since January 20, 2020, and they want to return to the matrimonial home. Vanessa contends that since both of her parents are over 55 years of age, it is not safe for her to live with her parents during the current COVID-19 pandemic, because of the risk to her parents' health. She alleges that her father "was beginning to experience respiratory issues", and that both of her parents "were actively experiencing symptoms".

- [8] Vanessa alleges that she and the children have been “sequestered” in “certain parts” of her parents’ home to avoid exposing her children to her parents. She alleges that on or around March 13, 2020, one of the children began to exhibit “flu symptoms”, including a severe cough.
- [9] Derek is currently living by himself in the matrimonial home. Vanessa wants Derek to leave the matrimonial home so that she can live with the children in the matrimonial home. She has suggested that Derek can live with his parents.
- [10] As the March 17, 2020 Case Conference was cancelled, the parties proceeded to a one-half day private mediation on April 7, 2020, but the mediation did not yield any resolution.
- [11] Derek disputes the urgency of the motion. He argues that the mother and the children have been living comfortably in her parents’ four bedroom house since January 20, 2020, and there is no urgency to have the exclusive possession motion heard. He argues that he would prefer to have a Case Conference prior to the hearing of the motion. He notes that case conferences can now be scheduled pursuant to the Central East Protocols for Family Matters, released on April 2, 2020.
- [12] While Case Conferences can now be scheduled pursuant to the Central East Protocols, these Conferences are generally limited to 30 minutes duration. Given the fact that the March 17, 2020 Case Conference was cancelled by the Court, and the parties have engaged in a half-day private mediation without success, I am sceptical that there is anything to be gained by forcing the parties to participate in a 30 minute Case Conference at this point. I am satisfied that, in the present circumstances, the mother’s motion for exclusive possession is sufficiently urgent that it should be dealt with as an urgent matter in accordance with Rule 14 (4.2) and the March 15, 2020 Notice, and should proceed at this time.

### **Background Facts**

- [13] The parties were married on September 15, 2012. They have two children, ages 6 and 3.5.
- [14] Derek operates a salon and spa business, which has been closed since March 24, 2020 due to the COVID-19 emergency regulations closing all non-essential businesses.
- [15] Vanessa has operated her own business as a part-time beauty esthetician since January 2019. That business has also been put on hold during the pandemic.
- [16] The parties dispute their date of separation. Vanessa alleges that the parties separated in June, 2019. Derek alleges that the parties separated on December 25, 2019.
- [17] While not relevant to the motion before me, the date of separation is significant to the parties because the parties agreed to a marriage contract that granted Derek the first option to purchase Vanessa’s interest in the matrimonial home if he gave written notice within 30 days of the breakdown of the relationship. Derek alleges that he has been trying

to exercise this option since January 6, 2020. If Vanessa's date of separation is accepted, Derek missed the 30 day notice period. If Derek's date of separation is accepted, Derek provided timely notice.

- [18] The marriage contract was signed by both parties with independent legal advice the week before their marriage. In the contract, the parties acknowledge that they are financially independent, and waive spousal support and equalization of property.
- [19] The marriage contract acknowledges that on the date of marriage the matrimonial home was owned solely by Derek, and, on marriage, Vanessa purchased a one-half interest in the matrimonial home at fair market value set out in the marriage contract. Pursuant to the marriage contract, title to the property was transferred to the sole name of Vanessa, who holds title as the sole holder as tenant in common of a one-half interest in the home, and holds the other one-half interest in trust for Derek, as tenant in common.
- [20] Neither party disputes the validity of the marriage contract.
- [21] Vanessa's unsworn financial statement indicates that she currently has over \$500,000 in a savings account. Vanessa has indicated that she wants to buy out Derek's interest in the matrimonial home, although if her date of separation is accepted she did not provide notice within the time provided by the marriage contract (between 30 and 60 days after separation).
- [22] Both parties spent considerable portions of their respective affidavits dealing with the date of separation. The date of separation is not an issue that I have to decide on this motion, and I offer no opinion in that regard.

### **Moving Party's Position**

- [23] Vanessa argues that the separation began when she took the children to Italy for a summer vacation in June of 2019. On her return, she and Derek began to live separate and apart in the matrimonial home in "the Fall of 2019". She alleges that, following "an outburst" by Derek at the younger child's birthday party, she no longer felt safe staying in the matrimonial home and was concerned about the level of conflict in front of the children. Since Derek would not leave the home, she took the children to temporarily reside at her parents' home on December 1, 2019. Vanessa's parents' home is 25 minutes from the matrimonial home. They remained there until December 21, 2019, when she moved back to the matrimonial home for Christmas.
- [24] Vanessa alleges that on the evening of December 24, 2019, Derek "began incessantly sending text messages about our marriage", and began to argue with her about their relationship while they were walking back from visiting Derek's parents on December 25, 2019. That evening, she alleges, Derek "began initiating arguments" with her and became "increasingly hostile and angry". Derek's father came to the home.

- [25] Vanessa alleges that she was frightened and called the police, who asked Derek to stay elsewhere. Derek agreed to go to his parents' house, and remained there for over two weeks.
- [26] Over the next couple of weeks, the parties continued to argue about parenting time. Derek wanted a 50/50 parenting schedule, and Vanessa wanted Derek's parenting time limited to one day a week (Wednesdays from 9:00 a.m. until bed time) and every other weekend from Saturday at 6:00 p.m. (when Derek finished work) until Sunday at 2:00 p.m.
- [27] Vanessa alleges that Derek attended the matrimonial home on January 19 and 20, 2020 with a recording device and began recording his interaction with Vanessa and the children. On January 20, 2020 Vanessa asked Derek to leave the house, and when he refused she took the children to her parents' home, where they have resided ever since.
- [28] Vanessa takes the position that she cannot continue to live in the matrimonial home with Derek. She argues: "Given the high level of conflict between us, I did not (and still do not) believe that this was in the children's best interests and I did not want to confuse them by having us living in the same house again." She also argues: "Given our history there is too much potential for further conflict and confrontation in front of the children, especially as none of us are supposed to leave the home...in light of the current pandemic."
- [29] Vanessa's proposed order seeks a nesting arrangement with Derek. This arrangement would permit Derek to remain in the matrimonial home on his Wednesday parenting time and every other weekend overnight. On all other nights he would reside with his parents at their home. When it is Derek's parenting time Vanessa would reside with her parents. This arrangement would continue for six weeks, and could then be revisited, and if it has been successful, Derek's parenting time could be expanded.
- [30] Vanessa contends that Derek's parents live less than a two minute drive from the matrimonial home, and their house has a fully finished basement with its own separate entrance through the garage. Vanessa argues that Derek's parents, who are both in their 70s, are healthy and are not at risk from COVID-19 if Derek resides with them when he is not at the matrimonial home.
- [31] Vanessa also alleges that Derek has declined any parenting time unless Vanessa picks up and drops off the children as he claims he does not have access to a car. Vanessa alleges that this is not true. As a result, the children have barely had any in-person time with their father since December 2019.
- [32] As indicated above, Vanessa contends that since both of her parents are over 55 years of age, it is not safe for her and her children to live with her parents during the current COVID-19 pandemic. Her first affidavit alleged that her father "was beginning to experience respiratory issues", and that both of her parents "were actively experiencing symptoms". Her first affidavit did not include any medical evidence to support these

allegations. Her reply affidavit, however, includes a “To Whom It May Concern” letter from her father’s physician, dated April 15, 2020, which states that her father:

[H]as multiple medical issues that along with his age make him very high risk for complications with the COVID-19 coronavirus. He has known heart condition, diabetes, is over 50 and gets recurrent bronchitis. He should be minimizing exposure to any outside contact as much as possible.

- [33] Derek objects to the admissibility of this letter, pointing out, quite correctly, that it is not proper reply evidence. This is a valid objection, but, given the exigencies of the current situation, I am prepared, for the purposes of this motion, to accept the letter at face value.
- [34] As indicated, Vanessa alleges that she and the children have been “sequestered” in “certain parts” of her parents’ home to avoid exposing her children to her parents. She and the two children have been sleeping together in one bedroom in a queen size bed. She alleges that on or around March 13, 2020, one of the children began to exhibit “flu symptoms”, including a severe cough. She was advised by her doctor “to simply stay at home to monitor him”. She continued, however, to reside in her parents’ home throughout this period, and states that “the period of isolation recently ended”.

### **Responding Party’s Position**

- [35] Derek takes the position that the motion for exclusive possession should be dismissed. He argues that the parties can continue to live separate and apart in the matrimonial home. He will live in the basement, and Vanessa can continue to live upstairs with the children. Derek is prepared to purchase a mattress for himself to sleep in the basement, and to continue to use the basement refrigerator for his food. He would have to leave the basement in order to use the bathroom.
- [36] He argues that Vanessa has exaggerated the conflict between them, and that she has routinely returned to the matrimonial home for various reasons since moving out in January 2020.
- [37] Derek states that since their separation, he has continued to pay the expenses associated with the matrimonial home, even though the home is owned jointly. Due to the closure of his business on March 24, 2020, he currently has no income.
- [38] Derek acknowledges that he brought the recording device to the matrimonial home on January 19, 2020, but argues that he did so because Vanessa had called the police on December 25, 2019, and he wanted to record their interaction in case the police were called again.
- [39] Derek is prepared to agree to a nesting arrangement, but only if he is permitted to reside in the basement of the matrimonial home throughout the week. He cannot reside at his parents’ home, because they will not permit him to live with them during the COVID-19

emergency. He states that he has not been to his parents' home or seen either of his parents since March 7, 2020.

- [40] In addition, since his business is currently closed and he has no income, he is unable to rent another place to live in the short term.
- [41] Derek's parents are both 74 years of age, and have numerous age-related medical conditions, including high blood pressure, high cholesterol, kidney issues, thyroid complications and heart issues. Contrary to Vanessa's allegations, Derek states that his parents live in a small bungalow, and there is no separate entrance to the basement.
- [42] Derek's automobile is a TransAm, and he alleges that it cannot accommodate the children. There are two other "family cars", but both are in Vanessa's name, and, pursuant to the terms of the marriage contract, she takes the position that both are her property and she will not consent to Derek using them, even on a without prejudice basis.
- [43] While Derek has no objection to living separate and apart in the matrimonial home with Vanessa, he argues that, if this is not acceptable to Vanessa, Vanessa can continue to live comfortably in her parents' four bedroom home. While Vanessa alleges that her father must be isolated from her children, Derek alleges that Vanessa's father has been driving Vanessa and the children to the matrimonial home. Derek notes that Vanessa's affidavit acknowledges that her mother has been driving with the children, and there is no suggestion that Vanessa's mother has been isolated from her father.
- [44] Derek's parents have each signed affidavits confirming their health issues and providing supporting documents (eg. prescriptions and medical appointments with specialists). They also confirm that they have not seen Derek since March 7, 2020. They state that while there is a finished basement in their bungalow, it has a shared open entrance with the upstairs, and there is no door closing off the basement from the rest of the home. There is no kitchen in the basement.

### **Legislative Framework**

- [45] Section 19(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 provides:

19 (1) Both spouses have an equal right to possession of a matrimonial home.

- [46] Section 24(1)(b) of the FLA provides:

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,

(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;

[47] Sections 24(3) and (4) of the FLA provide:

(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.

#### **Best interests of child**

(4) In determining the best interests of a child, the court shall 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.

#### **Analysis**

[48] Section 19 of the FLA gives both spouses an equal right to possession of the matrimonial home. The onus is therefore on the spouse seeking exclusive possession to demonstrate that continued co-habitation in the home is impractical or, where there are children of the marriage, that the well-being of a child is threatened. Continued shared use must be more than unpleasant or inconvenient. The balancing of factors set out in s. 24(3) of the FLA must favour the party seeking exclusive possession: *Gore v. Gore*, 2016 ONSC 6831, at para. 6 and cases cited therein; *Mignault v. Lauzon*, 2018 ONSC 5442, at para. 24 and cases cited therein.

[49] In *Menchella v. Menchella*, 2012 ONSC 1861, McGee J. stated, at paras. 15 and 16:

An order for exclusive possession is dramatic in effect, and highly prejudicial to the dispossessed spouse. An order for exclusive possession should not be made on a motion where there is conflicting evidence that requires findings of credibility that are only available at trial.

...The statutory exception to continued possession of a home arises primarily in circumstances in which continued joint occupation is a potential or real threat to the safety or wellbeing of a child or a spouse.

[50] In *Hollinger v. Wang*, 2019 ONSC 4807, at para. 29, I stated:

Unpleasantness, inconvenience and even some tension are expected, perhaps inevitable, consequences of living separate and apart under one roof, but s. 24(3) does not include any of these considerations as stand-alone factors.

[51] See also: *E.S. v. A.S.*, 2020 ONSC 824, at paras. 40 and 46.

[52] This is clearly a case where there is conflicting affidavit evidence. There has been no cross-examination, and the Court must therefore proceed with some caution. As Jarvis J. stated in *Naccarato v. Naccarato*, 2017 ONSC 6641, at para. 5:

It is axiomatic that any order for possession of the matrimonial home should focus on the children's well-being and stability and remove them as much as possible from their parents' conflict. Perpetuating a conflict-filled environment cannot be best for children. The court must be cautious though that allegations of conflict are not made on specious grounds or purposed to misrepresent the facts so as to enable a party to "win".

[53] I note that there are parts of each party's affidavit evidence that I find to be dubious, even in the absence of cross-examination.

[54] For example, Vanessa's affidavit states that she must live in one room and sleep on one queen size bed with both children even though her parents have a four bedroom house. This is because the two unused bedrooms are "unusable" because they have "boxes of storage items" in them. She attaches photographs of these rooms to prove that there are boxes in them. She does not, however, explain why the boxes cannot simply be removed from these two bedrooms and stored elsewhere in the house.

[55] Derek states in his affidavit that he has not been able to see the children because Vanessa will not lend him one of her cars. He cannot use his own TransAm automobile to pick up the children because it cannot accommodate children. Even assuming this to be true, and assuming that the parties separated at the end of December, 2019, he does not explain why, in the ensuing months, he did not trade his car in for a car that can accommodate children.

- [56] Much of the evidence in Vanessa’s affidavit is inadmissible hearsay. For example, it includes hearsay evidence from unidentified neighbours who allege that they have seen Derek walking outside of the matrimonial home and speculate as to where Derek may have been walking. Rule 14(19) of the Family Law Rules allows a judge to admit affidavit evidence the affiant learned from someone else, but only if “the source of the information is identified by name”. The reason for this rule is obvious. Evidence from anonymous sources is easily fabricated and inherently unreliable. Opposing parties must know the identity of the source of the information so that the evidence can be verified and tested. This rule applies to family law proceedings even during the COVID-19 emergency. Accordingly, I have disregarded all evidence in Vanessa’s affidavit that is based on anonymous sources. See: *Berger v. Berger*, 2016 ONCA 884, at paras. 74 – 76.
- [57] Moreover, I adopt the statement by Pazaratz J. in *Ribeiro v Wright*, 2020 ONSC 1829 at paras. 20 – 21:

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...

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

- [58] While Vanessa’s affidavit contains much hearsay and speculation about Derek’s behaviour, she has provided no admissible evidence to support her contention that Derek has failed to comply with any relevant COVID-19 protocol promulgated by any level of government. As such, her request for an Order that the children be exclusively in her care in the matrimonial home for 14 consecutive days, and denying Derek access to the children for that 14 day period, must be dismissed.

### **Section 23(4) Factors**

- [59] Section 23(4)(f) relates to “any violence committed by a spouse against the other spouse or the children”. Vanessa relies on this factor in support of her motion. The cases confirm that violence is not limited to physical abuse, but can include emotional abuse and intimidating words or conduct: *Hill v. Hill* (1987) 10 R.F.L. (3rd) 225; *Menchella v. Menchella*, 2012 ONSC 6304, at paras. 11 – 14. That said, none of the allegations included in Vanessa’s affidavit rise to the level of violence as that word is used in s. 24(3) of the FLA.
- [60] Vanessa’s claim for exclusive possession must rest on the balancing of two factors: the best interests of the children (s. 24(3)(a)) and the availability of other suitable and affordable accommodation (s. 24(3)(e)). The Court may also take into account “the financial position of both spouses” under s. 24(3)(c) of the FLA.

- [61] Vanessa argues that granting her exclusive possession of the matrimonial home will be in the best interests of the children “given the high level of conflict between” her and Derek. She also argues that she does not want to confuse the children by living in the same house with Derek. She states: “Given our history there is too much potential for further conflict and confrontation in front of the children, especially as none of us are supposed to leave the home...in light of the current pandemic.”
- [62] In her affidavit Vanessa describes the distress that the current situation has caused to the children. That is not, in itself, surprising. The separation of parents, moving out of the matrimonial home, and witnessing any conflict between parents, is inevitably confusing and distressing for children. As Shaw J. stated in *Delongte v. Delongte*, 2019 ONSC 6954, at para. 40, such distress:
- ...can be typically expected when parties separate and then reformulate a new family unit after separation. Separation is a very dramatic and life-changing event for all involved. It means moving on from the familiar – often including the matrimonial home – to the new and unfamiliar.
- [63] Some of this confusion and distress is unavoidable, regardless of the living arrangements. Vanessa’s affidavit, however, contains the following statement, which I find very troubling:
- Following the phone call [with Derek], I tried to calm Nico down, however he started yelling at me and calling me a liar because I had continued to tell him that we would be back in the matrimonial home soon, which was not happening. The children’s displacement from the home is increasingly beginning to impact them.
- [64] This statement raises a red flag. Why is Vanessa continuing to tell her 6 year old son that they will soon be back in the matrimonial home? This statement is an acknowledgment by Vanessa that she is inappropriately discussing these proceedings with the children, and, worse, making promises that she cannot keep. Vanessa cannot use these promises – promises she never should have made - and the children’s understandable disappointment that these promises have not been kept, as a basis for obtaining exclusive possession of the matrimonial home.
- [65] All things being equal, it is usually in the best interests of the children to remain in the matrimonial home, although that is not, in itself, a sufficient basis to give one party exclusive possession of the matrimonial home.
- [66] Children may find the equal right to possession of the matrimonial home in s. 19 of the FLA to be confusing, but that is not, in itself, a sufficient basis to give one party exclusive possession of the matrimonial home. Separation is a confusing time for children, and the parents must explain any changes to their children in an age appropriate manner.

- [67] Derek’s proposal is to permit the parties to live separate and apart within the matrimonial home. While this arrangement failed in December 2019, Vanessa acknowledges that the parties did live separate and apart in the matrimonial home for some months in the autumn of 2019. Now that the parties have had some time to distance themselves from the final breakdown of their marriage, I am not convinced that the arrangement proposed by Derek will inevitably result in continued conflict.
- [68] Derek also points to the fact that s. 24(1) (b) of the FLA permits the Court to give one spouse exclusive possession “of the matrimonial home or part of it” (emphasis added). This could be an appropriate case in which to grant each spouse exclusive possession of part of the matrimonial home to reduce the opportunity for conflict between the parties. Given my final decision in this matter, that may be a solution that the parties can agree on, but there is not enough information about the floor plan of the house in the record before me to permit me to make such an order.
- [69] The second factor at play in this case is “the availability of other suitable and affordable accommodation”. This factor is complicated by the current COVID-19 pandemic. Vanessa argues that she and the children cannot continue to live with her parents because of the risk to her father. Derek argues that he cannot move in with his parents because of the risk to them.
- [70] In her affidavits, Vanessa embellishes the risks to her own parents and minimizes the risks to Derek’s parents. For example, Vanessa alleges that Derek’s 74 year old parents are not vulnerable persons because they are healthy and have been observed by unidentified neighbours gardening without masks. Putting aside the inadmissibility of this anonymous hearsay evidence, I am not aware of any health guideline issued by any government body that has suggested that persons gardening on their own property should wear masks.
- [71] Similarly, in her affidavit, Vanessa contends that since both of her parents are over 55 years of age, they fall into the category of “vulnerable populations” as defined by the Government of Canada. A quick review of the Government of Canada website dealing with COVID-19<sup>1</sup> indicates that this is not correct. The website defines vulnerable populations as persons 65 years of age or older. It states:

**Vulnerable populations**

There is an increased risk of more severe outcomes for Canadians:

- aged 65 and over
- with compromised immune systems
- with underlying medical conditions

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<sup>1</sup> <https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection.html?topic=tilelink>

- [72] For the purposes of this case, I am satisfied that Vanessa's father and both of Derek's parents are at increased risk of more severe outcomes if they are exposed to COVID-19.
- [73] In the absence of COVID-19, I might be more inclined to accept something like Vanessa's proposed nesting arrangement (although not the limited parenting time she proposes for Derek). This would permit the children to reside full time at the matrimonial home with each parent alternating residency during their respective parenting time. In the absence of the COVID-19 pandemic, that arrangement would make a lot of sense: see *Alexopoulos v. De Caria*, 2016 ONSC 2183, at paras. 28 – 29.
- [74] Given the current pandemic, however, that alternative is not suitable because Derek cannot reside with his parents. I also accept his evidence that during this time period it would be very difficult for him to find or afford an apartment in the foreseeable future.
- [75] On the other hand, Vanessa has lived with her parents since January 20, 2020. The physician's note relied on by Vanessa does not directly address or comment on this living arrangement, and there is no indication in that note that the physician who wrote it was even aware of this current living arrangement.
- [76] If the court accepted the nesting arrangement proposed by Vanessa, Vanessa has indicated her intention to continue to reside with her parents during Derek's parenting time, even though she has more than \$500,000 in savings.
- [77] Balancing the suitable alternate accommodations available to each party, the evidence is clear that, at least during the COVID-19 pandemic, Vanessa is better able to reside elsewhere than Derek.
- [78] The refusal to grant Vanessa exclusive possession of the matrimonial home leaves her with at least two choices. She may continue to live with her parents and permit the children to have parenting time with Derek at the matrimonial home, or she can accept Derek's proposal to live separate and apart at the matrimonial home.
- [79] That is not intended to be a permanent solution. It may be that, once the current emergency passes, the availability of other suitable and affordable accommodation will be weighted differently, the balance will shift, and the nesting arrangement proposed by Vanessa will be the more appropriate solution.
- [80] It may also be that, if the parties are unable to reach an agreement regarding the purchase of the other party's interest in the matrimonial home, the home will have to be sold on the open market, and neither party will live there.

### **Parenting Time**

- [81] The only issue of urgency on this motion was the motion for exclusive possession of the matrimonial home. The question of parenting time, although important, is not, at this point, urgent.

- [82] This is not, however, an invitation to deny or suspend Derek's parenting time with the children. Continued parenting time with both parents is in the children's best interest. In *Thibert v. Thibert*, 2020 CanLII 26427 (ON SC), at para. 2, the court summarized the current case law dealing with access during the pandemic as follows:

It is clear that the pandemic, standing alone, is not a reason to suspend parental access, particularly where there is evidence to indicate that appropriate precautions are being taken to avoid exposure to infection.

- [83] As held in *Bartlett v. Loewen*, 2020 ONSC 2230, at para. 36, in the face of anxious and distressing times, any child will benefit from the love, connection and support shared with both parents so long as it is done safely.

- [84] Moving forward, both parents are required to provide very specific and realistic time-sharing proposals that fully address all COVID-19 considerations, in a child-focused manner. As Pazaratz J. stated in *Ribeiro*, at para. 21:

This is a very good time for both custodial and access parents to spend time with their child at home.

- [85] These proposals should take into account the maximum contact principle statutorily embedded in s. 16(10) of the *Divorce Act*: *Rigillo v. Rigillo*, 2019 ONCA 548.

- [86] Parents should be aware that their conduct will be critically scrutinized by the court. In this regard, I adopt the comment of MacPherson J. in *Douglas v. Douglas*, 2020 ONSC 2160, at para. 15:

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

## **Conclusion**

- [87] For the foregoing reasons, the respondent mother's motion for an Order for exclusive possession of the matrimonial home, and for an Order that the children be exclusively in her care for 14 consecutive days, and denying Derek access to the children for that 14 day period, is dismissed.

- [88] If the parties are able to reach an agreement regarding the exclusive possession of any part of the matrimonial home, or parenting time with the children, they may bring a 14B motion to my attention.

- [89] Given the submissions of the parties, I make the following Orders on consent:

- 1) Neither party shall consume any type of marijuana or non-prescription drug within 24 hours of his/her parenting time or during his/her parenting time.

- 2) Neither party shall expose the children to any negative statements about the other party or his/her family nor discuss this case with the children.
- 3) Both parties will follow all government protocols, directives and recommendations relating to physical distancing and other precautionary measures to avoid exposure to COVID-19.
- 4) This order takes effect without a formal order being signed and entered.

[90] The applicant father is presumptively entitled to costs for this motion. If the parties are unable to agree on costs, the applicant father may serve and file written submissions of no more than 3 pages plus costs outline and any offers to settle within 15 days of the release of this decision, and the respondent mother may serve and file responding submissions on the same terms within a further 10 days thereafter.

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Justice R.E. Charney

**Released:** April 20, 2020

**CITATION:** Colasuonno v. Colasuonno, 2020 ONSC 2061

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Ercole Derek Colasuonno

Applicant

**– and –**

Pamela Vanessa Colasuonno

Respondent

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**REASONS FOR DECISION**

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Justice R.E. Charney

**Released:** April 20, 2020