2016 ONSC 809
Ontario Superior Court of Justice

L. (N.) v. M. (R.R.)

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N. L., Applicant v. R. R. M., Respondent

Perkins J.

Heard: October 30, 2015
Judgment: February 3, 2016
Docket: FS-12-375799-0001, FS-12-375799-0002

Counsel: Brigitta Tseitlin, for Applicant, Mother
Brian Ludmer, for Respondent, Father
Sharon Wilmot, for Chief of Police, Toronto Police Service
Mary Birdsell, Jesse Mark, for Children

Subject: Evidence; Family

MOTION by mother to change custody order granting full custody of parties' two sons to father; MOTION by Chief of Police to remove police enforcement provisions from order; MOTION by father to enforce custody order.

***Perkins J.*:**

Issues in the case

1 In a parental alienation case, when the alienated child is over 16 and has refused for many months to have any contact with the target parent, should the court continue a custody or access order in favour of the target parent? In such a case, is it advisable to continue an order for police enforcement of custody or access? Those are the central questions in this case.

2 This decision deals with two motions to change, and one motion to enforce, a final order for custody made by this court on February 17, 2015. The order incorporates, on consent, the terms of an arbitration award dated February 11, 2015.

3 The order provides for the father to have sole custody of the parties' two sons, who were 17 $^{1}/_{2}$ and almost 16 when the order was made. It also requires the children to attend with the father at a residential "workshop" that attempts to facilitate the restoration of parent-child relationships that have broken down. The arbitrator found as a fact that the father's relationship with his sons was seriously damaged by a campaign of parental alienation by the mother.

4 The order prohibits communication between the children and the mother, between the children and members of the mother's extended family, and between the children themselves. It also requires police, including the Toronto Police Service, to assist in enforcing the order.

5 Immediately after learning of the terms of the order, the older son refused to go with his father and refused to take part in the workshop. Shortly afterward, the younger son ran away from the father and refused to take part in the workshop. Both sons continue to reject the order and refuse all contact with the father. The police were called on to enforce the order in respect of the younger son only. They made some attempts, but did not persist.

6 The Chief of Police, Toronto Police Service, has moved to remove the police enforcement provisions from the order, on technical legal grounds and on the merits.

7 In her motion, the mother asked to change the order to provide that she would have custody of both children. She said that there was "a paradox concerning the children ... in that they refuse to be in the care of their father and yet are forbidden from having any contact with their mother."

8 The two sons were represented by a privately retained lawyer on the motions. They supported both motions to change the order and asked that there be no custody order.

9 The father brought his own motions in response to the two motions to change the custody order. One motion was to have the order enforced, and to require the Toronto Police Service to disclose all information in its possession or control about the location and contact information of the two sons. Another was to find the Toronto police in contempt for failing to enforce the order. He abandoned the contempt motion, but proceeded on his motion to enforce the order. A third motion was to require the mother to disclose all information she had about any contact she had had with the sons and about the location and contact information of the sons.

Result

10 The final custody order of this court made on February 17, 2015 is rescinded in its entirety. There will be an order that no person has rights respecting the custody of or access to either of the children under any statute or any non statutory jurisdiction of the court.

11 Costs of the motions are to be addressed initially in writing as provided below.

12 This decision and all other decisions in this case are to be published using initials only, rather than names, of the parties and children.

Family history

13 The parties were married in 1996. Their two sons were born in 1997 and 1999. Their home was tempestuous and at times violent. The arbitrator found that each parent had been verbally aggressive and physically violent.

14 The couple separated for the first time in November, 2005, when the mother told the police that the father had assaulted their six year old son. The father was charged. He was acquitted in June, 2006. The mother and father reconciled two months later, in August, 2006.

15 In January, 2012, when the sons were 14 and 12, the father was charged with an assault on the mother and was removed from the home. The mother and the two sons remained there. This was the final separation. The father was acquitted on the assault charge on May 31, 2012 and moved back into the basement of the matrimonial home, living apart from the mother.

16 The sons remained in the mother's primary care throughout the three years following the separation. After the first few months of the separation, the sons saw the father only occasionally. The mother and the sons moved away in January, 2014, without prior notice to the father. The sons have had no contact with him for at least the last year. The older son, now 18 $^{1}/_{2}$, is at university but continues to reside with the mother when he is not at school. The younger son, age almost 17, lives alone in an apartment and is completing high school.

17 Though the case began in this court as a divorce application, it appears that the parties are not yet divorced.

Litigation history

18 In 2006, the mother began a family law case against the father in this court. The parties agreed to go to arbitration rather than proceeding in court, but they reconciled instead, and the court file was closed.

19 The original application in this case was filed by the mother in February, 2012. She claimed a divorce, sole custody of the children (under the *Divorce Act*), a net family property equalization, sale of the matrimonial home, child support, and spousal support. In his answer, the father claimed sole custody, or joint custody in the alternative.

20 Counselling was arranged for the children in the spring of 2012. A motion to deal with parenting schedules was served but did not go ahead, as the parties tried to work out an arrangement without a court order.

21 The mother served a motion to compel a sale of the matrimonial home. It was heard on September 20, 2012. It succeeded, in part because the motion judge found that the situation in the home, in which both parents continued to live separate and apart, was not in the children's best interests. The father appealed, but abandoned the appeal.

22 In addition to the two criminal charges mentioned in the family history above, the mother was charged with assaulting the father in September, 2012. Two days after that charge was laid, the father was charged with an assault on the mother. The mother was convicted on the assault charge, but won an appeal from her conviction, and a new trial was ordered. The Crown chose not to proceed with the new trial. The father was acquitted of the third assault charge against him in December, 2012.

23 The first order about parenting was made on consent on December 11, 2012. It provided for the father to have reasonable access, as arranged by an independent professional.

24 On January 15, 2013, the parties agreed to, and the court ordered, temporary child and spousal support and a custody/access assessment under section 30 of the *Children's Law Reform Act*. The assessor reported on December 11, 2013. A second expert was retained in July, 2013 and reported in April, 2014. Both assessors recommended measures to try to restore the father's relationship with the sons.

25 Disagreements between the parties about the sale of the matrimonial home continued into 2013. They were ultimately resolved, the house was sold, and the proceeds paid out.

26 In November, 2013, the parenting issues and some economic issues were submitted to a senior family law specialist for mediation/arbitration. The mediation produced some consents and three interim awards in the spring and summer of 2014, but the parenting issues remained unresolved, and the children resisted any contact with the father. The arbitrator conducted a hearing in September and October, 2014, with oral evidence from the parties and the professionals who assessed the children. The hearing took 14 days, of which 12.5 days were spent on parenting issues. A 34 page arbitration award was released on January 16, 2015.

27 In his lengthy and carefully considered award, the arbitrator made the following findings and comments [1] :

> [6] ..... [The mother and father] are, in many regards, the flag bearers of high conflict separation. In fact, I can think of no family that I have been involved in during my practice, either as counsel or as mediator/arbitrator, who have engaged in this level of battle.
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> [7] What has ensued, since their separation in January 2012, has been one pitched battle after another, with each choosing their respective weapons of choice as the need arises. The evidence strongly suggests that each of them has consciously set out since separation (and perhaps before) to punish the other to the maximum extent possible. They have exacted punishment on the other using varying methods and tools — financially, through the use and misuse of the criminal justice system, through varying bullying techniques, through the destruction or retention of personal property and family heirlooms, and through the litigation process.
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> . . .

[10] Unfortunately, but predictably, their trench warfare has caused enormous harm to each of them, but also to their children .... [The children], the "innocents" in their parents' conflict, have been damaged, perhaps irretrievably, by their parents' destructive campaigns. To a great extent, their childhoods [have been] taken from them, never to be returned. They have witnessed numerous verbal and physical conflicts between their parents. They have seen, heard, read or been told a litany of truths, partial truths and complete lies about their respective parents. They have ..., in an understandable effort of self preservation, been forced to choose sides in this conflict. They have chosen to reject their father and currently have no relationship with him or his family.

. . .

[16] While past events cannot be ignored and operate to shape the landscape in which the family operated, they are not, in my view, determinative of the issue. What has happened since the parties began the litigation in 2012 and since they referred the matter to mediation/arbitration [is] far more indicative of what is happening, why it is happening and what is currently motivating the parties. [The mother's] reliance on historic events is not a defence to what she is currently doing. In fact, just the opposite is true. She is using historic events — many of which are disputed — as justification for her current actions. Her perceptions of these events have become her reality, and in turn, she has brought the children into this skewed environment.

[17] [The mother] has created a world where [the father] is evil and dangerous, both to her and [to] the children. ...

[18] It is also clear that any sort of middle-ground compromise solution is unworkable for this family. A final award that sets out a residential schedule which includes both parents will certainly fail. I base this on many facts but primarily on the recent history regarding residential schedules.

. . .

[22] In order to make some sense of this matter, it is absolutely necessary to make findings of credibility. In this case, a finding of alienation vs. estrangement turns, to a certain degree, on a finding of credibility. If I accept [the mother's] evidence, she has done everything she could possibly do to insure that the children and [the father] have a good relationship. If I accept [the father's] evidence, [the mother] has done just about everything she could possibly do to alienate the children from him.

[23] I have had the opportunity to see and listen to [the father] and [the mother] over the course of an emotionally gruelling 3 week hearing. I have seen them respond to difficult questions in cross examination. I carefully viewed their demeanour during the evidence of Barry Brown and Dr. Sol Goldstein, the two key expert witnesses on the parenting issue. I kept a close eye on each of them during the other's testimony as well.

. . .

[27] ... My conclusion is that both parties have credibility issues and neither, frankly, comes to this hearing with entirely clean hands. That being said, I find that although [the father] may have engaged in some highly questionable litigation tactics, his oral evidence, for the most part, was given fairly and truthfully. I cannot say the same for [the mother].

[28] What stands out for me particularly is that I have no way to reconcile her out of hearing actions — where she clearly indicates her disdain for the relationship between [the father] and the boys — and her oral evidence where she says that she wants a relationship to happen. ...

. . .

[31] For the reasons set out herein, I find that [the mother] has embarked on a conscious effort to alienate the children from their father. Whether that alienation can be corrected is another matter.

> [32] In order to determine if the alienation is reversible, [the father] and the children shall participate in the Family Bridges program at the first opportunity, and on the terms set out herein. ... I find that this program is the last opportunity for [the father] to salvage a relationship with the children. [The father] shall fund the cost of this program.
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> [33] I appreciate the fact that [the older son] is of an age where he cannot be compelled to attend the program, but I am extending my award to him in light of the evidence of Dr. Goldstein that his participation may be critical to the success of the program as it relates to [the younger son]. During the currency of the program the children, or [the younger son] if he is the only participant, will have no contact with [the mother], or any member of her family. If only [the younger son] attends, that no contact principle will extend to [the older son] as well.
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> [34] At the conclusion of the program, a recommendation from the facilitators regarding when and how communication with [the mother] should be reinstated shall be obtained. If there are disputes regarding that, they shall be referred to me or to a court of competent jurisdiction.
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> . . .
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> [36] I will also need to hear from counsel regarding how this award is to be implemented, how it will be communicated to the children and so on. A conference call regarding this issue shall be held on [date] ... and a decision regarding that will be made at that time. Until that call is held neither party is to communicate the terms of this award to the children. This term MUST be followed. ... I note in other alienation cases, judges have compelled the exchange of the children at the court house. ...

28 The arbitrator weighed the testimony of the parties and the expert witnesses, particularly on the question whether the boys should be forced to have contact with the father in a residential reunification program. He considered the risks of such an approach as against the risks of not trying to restore a relationship with the father. He concluded (at para [212] of the January 16 award), "that the price of not seeing their father is too high for these boys. There is no evidence that either child would be harmed by participation in the Family Bridges [residential workshop] program." The award provided for both children to attend the workshop in the company of the father and for a period of no contact with the mother. However, it did not provide for who should have custody of the children, but rather left the parents' underlying joint custody intact.

29 Following release of the January 16 award, the arbitrator entertained submissions on the detailed, operative terms that should be put into a further award governing the parenting arrangements. He then released another award on February 11, 2015 that set out the terms that now form part of the order of this court dated February 17, 2015, including the provision for sole custody in favour of the father. The terms came in large part from a suggested form of order provided by the residential workshop's organizers.

30 Neither party appealed from the arbitrator's awards or sought judicial review. The awards are accordingly taken to be correct and the parties are bound by the arbitrator's findings.

31 The order incorporating the February 11 award was made on consent of the parties, without an appearance in court. The order was given to the police on the day it was made, February 17. The Chief of Police's motion was filed on February 23, just six days after the court order was made and 12 days after the second arbitration award. Those were eventful days, and they are discussed below.

32 The parties continued with the arbitrator in the spring of 2015 to deal with financial issues. I understand that he made a child support award and that it is not being paid. The financial issues are not before me and thus far are not before the court, but I am told they have not been resolved.

33 The custody and access issues became active in this court in May, 2015, after the father concluded that the police were not enforcing and would not enforce the custody order. The court appointed a case management judge, who held several conferences in June and July with the parties, the lawyers, and the children. The case did not settle and was set down for hearing on October 30, 2015. A motion for an order under rule 4(7) to appoint a lawyer to represent the children was granted, largely unopposed. (The father consented to the lawyer's appointment for the limited purpose of expressing the children's wishes and preferences, but the court declined to limit the lawyer's role.)

34 When the motions came before me, I was presented with a motion by the father to have oral testimony from the Toronto Police Service detectives who had been involved in the attempts to enforce the father's custodial rights under the February 17 order, as well as the testimony of a private investigator who had been engaged by the mother. I declined to hear those witnesses because the affidavit record was sufficient to deal with the legal and factual issues before me. Further, I concluded that the police testimony sought by the father, which seemed to be aimed at demonstrating a negative attitude by members of the Toronto Police Service, as well as the private investigator's oral evidence, would not be helpful for my determination of the issues.

35 The motions were fully argued on October 30. The two parties, the Chief of Police, and the children were all represented. I reserved my decision, but I made a temporary order staying the police enforcement clause in the order of February 17, 2015 pending the release of my decision.

36 On December 19, 2015, at the start of the school vacation, I released my decision on the motions in a very short endorsement, with reasons to follow. These are the reasons.

37 Because the Chief of Police's motion was served first, I address it first, even though it is a narrow issue in comparison with whether there should continue to be a custody order. There appears to be a need to address issues respecting police enforcement orders generally, regardless of the outcome on the merits of the custody issue.

Evidence on the motions

38 The evidence consisted of affidavits from each party, a member of the Toronto Police Service, both of the sons, one of the custody assessors, and a clinician who had worked with one of the sons. None of the deponents was questioned outside court. Many of the facts were not seriously contested, but some key facts were. Controversial factual issues are discussed below. In the end, the factual controversies do not affect the result.

39 The first arbitration award (January 16, 2015) directed the parties not to inform the children of the arbitrator's decision. The arbitrator and the parties' lawyers held conference calls to discuss the detailed terms that would govern how the children would be informed of the award and how the attendance of the children at the Family Bridges workshop would be brought about. The arbitrator determined that the children should be brought to his office, that he would inform them of the award, and that immediately afterward, the children would be placed in the father's care and taken by him to the location where the workshop would take place.

40 The children came to the arbitrator's office on February 17, 2015. The father said that they did not appear to be surprised by the arbitrator's decision. The mother denied that she had told the children the terms of the January 16 award. She said she dropped the children off at the arbitrator's office and left immediately. The affidavits of the two sons do not say whether they knew the result of the arbitration before it was communicated to them on February 17. The mother said that if anything tipped the children off about the result of the arbitration, it was the father's action in cancelling an appointment for the boys to meet with a psychologist as scheduled for that week.

41 The arbitrator told the older son, who was then over the age of 16, that the arbitrator wanted him to attend the residential workshop, but he could not be compelled to go. When the older son made "unhelpful" comments — he admitted he yelled and swore — the arbitrator had him leave the room. The father said that as the younger son was leaving the building with the father to head to the workshop, the older son said to his younger brother, "Remember the

plan," and told him to hide until he turned 16 in a few weeks, saying, "You know where to go." Neither of the sons denied this. The mother, who was not present at the time the statement was made, denied that there was any "plot" to defeat the arbitration award. She also pointed out that if there was a plan to thwart the arbitrator's award, it made no sense for the children to show up at the arbitrator's office as they did.

42 On leaving the building, the younger son ran off and disappeared. He went to his brother's apartment. The mother went there, picked him up, and drove him to a police station. He told the police officers he did not want to return to the father. The father came to the police station and showed the police the court order, which had been made and signed that day. They turned the younger son over to the father. The two got into the father's car to begin the journey to the location of the workshop. The son got out of the car when it stopped at a red light (according to the father), or when it "slowed down a bit" (according to the son), and again ran away and disappeared. He again went to his older brother's apartment. The mother saw him there. She deposed that she told him he had to go back to his father, but he refused, saying he "would rather live on the street" than be with his father, and he ran away again.

43 The father filed a missing person report with the Toronto and Durham police. On February 20, the younger son phoned the Toronto police and said he was not missing, declared he did not want to live with his father, and refused to give them contact information.

44 For the next few weeks, the father tried to enlist the help of Toronto and Durham police, as well as other persons, in locating the younger son. Both police forces appeared to be trying to find him. However, some members of the Toronto Police Service commented that it was not their job to enforce family court orders, and the Toronto Police Service's lawyer filed the motion to remove the police enforcement clause from the order only six days after it was made.

45 Throughout March and April, the father received conflicting information from the two police forces about which force was leading the investigation into the younger son's whereabouts, what steps were being taken, and what was known about his location.

46 The Toronto police received another call from the younger son on April 22, 2015, again assuring them he was safe and refusing to provide contact information. He agreed to meet police officers in person and did so on May 6. They did not apprehend him or attempt to turn him over to the father. They made a note stating they were concerned for his safety if they enforced the custody order and closed their missing person investigation.

47 The mother's affidavit of April 24, 2015 says, "Since the evening of February 17, 2015 I have not seen or heard from [the younger son]." However, on April 23, she learned from Toronto police that he had contacted them to advise he was safe. She also said that he had dropped out of school, he was a runaway living underground, and she had no idea where he was staying or how he was paying for necessities such as food. Her October 20 affidavit said she had absolutely no idea where the younger son was until May, when she learned that he would be living with his older brother.

48 The father noted at the motion hearing that the mother's affidavits were "entirely silent" about how the children were being funded. He said that he was not providing them with funds (though there is an outstanding child support order, which is not being paid). He said it was "only logical" that the mother was providing the children with money. The mother admitted, when I asked a question at the hearing before me, that the younger son was living in an apartment rented in her name, and said she had made the apartment available rather than having him be on the street.

49 On May 21, 2015, the father learned the younger son had been in touch with a Toronto secondary school with a view to registering there. The Toronto District School Board declined to provide any information because the boy (then over 16) had refused permission to do so.

50 The father filed a number of lengthy, detailed, and argumentative affidavits on the motions before me. They contained much material about the lack of communication and cooperation he experienced from the Toronto police, as well as many facts and statements from which he inferred that the mother, her family, and the older son all knew where the younger son was at all times and were in regular contact with him, despite the terms of the court order prohibiting

contact. It is clear from the evidence that the father is correct in saying the mother, the older son, and other members of the mother's family have been in at least indirect, if not direct, contact with the younger son, though it is not clear by what means or at whose instigation.

51 The younger son swore an affidavit on October 16, 2015, by which time he was 16 $^{1}/_{2}$ years old. In it, he complained about his voice not being heard in the arbitration and in this court case. He said he thought his wishes should be the deciding factor in where and with whom he lives, he had the right at age 16 to withdraw from parental control and to enrol in school as an independent minor, he had the right to consent to or refuse treatment, he had exercised these rights, and he wished to continue to do so. He said he was unwilling to live with his father, or to go to the residential program ordered by the arbitrator, he was anxious and concerned for his safety when in his father's presence, and his relationship with his father negatively impacted his physical and mental health and wellbeing. He also wanted to be able to be with his older brother. "I just want this whole thing settled. I just want to be able to focus on school and doing well. I have withdrawn from parental control."

52 The older son swore an affidavit on October 16, 2015, when he was over 18. It related his concerns about the process he and his brother had experienced with the arbitration and the police involvement in carrying out the court order. Like his younger brother, he declared his unwillingness to live with the father or to go to the residential workshop. He too wanted to be able to have "access" to his brother.

53 Each of the sons swore a second affidavit on October 22, 2015. These affidavits amplified on the October 16 affidavits. The older son, in his second affidavit, said, "I just want to be free of the whole thing. I do not want the order to apply to me at all. I want the fighting to stop, and I want my parents to act in a responsible adult way. I do not want to try to repair the relationship with my father." He also said he wanted to be free to have a close relationship with his younger brother. The younger son said, in his October 22 affidavit, "The law says that I can withdraw from parental control, which makes sense to me because I feel that at this point I should be able to walk away from all the craziness, and make a real life for myself." He said that he wanted to be able to spend time with his mother, his extended family, and his older brother.

54 The affidavit of the custody assessor stated:

> 5. ... In my professional opinion, only a specialist psycho-educational program such as Family Bridges or Dr. Reay's BC program (Family Reflections) offers any hope of solving the issues between [the father and the younger son]. Based on my previous involvement in this case, unless this program, and its related after-care locally, is pursued and completed on an urgent basis, there will be no hope or expectation of any relationship between [the younger son] and his father.
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> 6. I remain of this view, despite the age of the child. It is broadly accepted in the mental health community, given the findings in neuroscience over the past decade, that the "teenaged brain" does not fully mature until approximately age 24, and the frontal cortex, which integrates cognitive and primal and emotional processes, is the last part to physically mature.
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> 7. In my testimony in the case [before the arbitrator], I adverted to the significant long-term psychological damage that will likely result from a failure to repair the relationship between [the younger son] and his father on an urgent basis.

55 The clinician who had previously worked with the younger son agreed that "for any progress to be made in reconciling [the younger son] with his father, a specialist residential psycho-educational program is required in conjunction with a period of non-contact with his mother."

56 In her last affidavit filed on her motion, the mother said that "the situation that has unfolded regarding [the two sons] since the release of the [arbitration] award is catastrophic for the children and their emotional wellbeing."

Initials for the parties and the children

57 The unfortunate circumstances of this case make it appropriate to shield the children and the parties from publication of their names. Enough emotional damage has been done already. This is a matter of the inherent jurisdiction of the court. Though the application here is made under the *Divorce Act*, the provisions of section 70 of the *Children's Law Reform Act* are a useful guide, and I have considered them.

58 To be clear, I do not order that the court file or any portion of it should be sealed. I merely require that publication of this and any other decision in this case must use initials for the names of the parties and children.

Chief of Police's motion — the police enforcement clause

Technical defects

59 There are two technical problems with the motion brought by the Chief of Police.

60 First, the motion purports to be brought by the Toronto Police Service, but there is no such legal entity. The parties agree that the proper moving party is the Chief of Police, and the case proceeded accordingly, without objection.

61 Second, the motion was brought as a motion to change a final order under rule 15 of the Family Law Rules. However, rule 15(3) allows only for "a party who wants the court to change a final order" to make a motion under rule 15, and the Chief was not and is not a party to the case. It was agreed that the Chief should have proceeded either under rule 14(1)-(2) on a motion for directions brought by "a person with an interest in the case", or under rule 25(19)(d) on a motion to change an order made without notice to the Chief, or both. The case proceeded as if the proper procedure had been used, but the father did not concede that the Chief had standing.

Terms of the order and the relevant statutes

62 The order of February 17, 2015 contains the following paragraph 1 v):

> Pursuant to section 141 of the Courts of Justice Act, R.S.O. 1990, Chap. C.43, and section 36(2) of the Children's Law Reform Act, the Sheriff of this jurisdiction, the Toronto Police Services, the Ontario Provincial police, the Royal Canadian Mounted Police, and all enforcement officials to whose attention this order is brought, shall assist as required, for enforcing the provisions of this order, and shall specifically take all such action as is required to locate, apprehend and deliver the children to the respondent, including the power of search and entry at any time.

63 Section 141 of the *Courts of Justice Act* reads:

> **Civil orders directed to sheriffs**
>
> 141. (1) Unless an Act provides otherwise, orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement.
>
> **Police to assist sheriff**
>
> (2) A sheriff who believes that the execution of an order may give rise to a breach of the peace may require a police officer to accompany the sheriff and assist in the execution of the order.

64 Section 141 is not engaged in this case. The order was never put into the hands of a sheriff for enforcement, and no sheriff or sheriff's officer requested the assistance of police.

65 Section 36 of the *Children's Law Reform Act* provides:

Order where child unlawfully withheld

36. (1) Where a court is satisfied upon application by a person in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his or her behalf to apprehend the child for the purpose of giving effect to the rights of the applicant to custody or access, as the case may be.

Order to locate and take child

(2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,

(a) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child;

(b) that a person who is prohibited by court order or separation agreement from removing a child from Ontario proposes to remove the child or have the child removed from Ontario; or

(c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from Ontario and that the child is not likely to return,

the court by order may direct a police force, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

Application without notice

(3) An order may be made under subsection (2) upon an application without notice where the court is satisfied that it is necessary that action be taken without delay.

Duty to act

(4) The police force directed to act by an order under subsection (2) shall do all things reasonably able to be done to locate, apprehend and deliver the child in accordance with the order.

Entry and search

(5) For the purpose of locating and apprehending a child in accordance with an order under subsection (2), a member of a police force may enter and search any place where he or she has reasonable and probable grounds for believing that the child may be with such assistance and such force as are reasonable in the circumstances.

Time

(6) An entry or a search referred to in subsection (5) shall be made only between 6 a.m. and 9 p.m. standard time unless the court, in the order, authorizes entry and search at another time.

Expiration of order

(7) An order made under subsection (2) shall name a date on which it expires, which shall be a date not later than six months after it is made unless the court is satisfied that a longer period of time is necessary in the circumstances.

When application may be made

(8) An application under subsection (1) or (2) may be made in an application for custody or access or at any other time.

Grounds argued by the parties

66 In the Chief of Police's change information form, Form 15A under the *Family Law Rules*, the deponent gave three reasons why the order should have the police enforcement clause removed. First, the order had no expiry date for police enforcement, as required by *CLRA* section 36(7), reproduced above. Second, "officers have raised serious public safety concerns with returning a youth to the custody of the respondent where the officers have formed reasonable grounds to believe that the youth may risk his own safety to escape custody." Third, "There are further concerns regarding the long term role of the police in continuously and indefinitely monitoring the final order regarding custody and apprehending the child and returning him to the custody of the respondent." The factum filed on behalf of the Chief of Police asserted four other grounds for removing the police enforcement clause from the order: no person was unlawfully withholding the child from a person entitled to custody; no notice was given to the Toronto Police Service before the order was made; the order is "vague, overly broad and unclear"; and "the provision [for police enforcement] is not in the best interests of the youth and presents a safety issue if he is to be returned."

67 The father's response raised three objections to the Chief of Police's motion: 1. The Chief was not a party and had no standing; 2. There had not been a material change in circumstances; 3. The requested change would not be in the children's best interests. His factum responded to the grounds raised by the Chief and added a concern relating to respect for the administration of justice. The father submitted that the police enforcement clause could have applied to both children, as they were under age 18 when the order was made and were "children of the marriage" within the meaning of the *Divorce Act*, but he focused his attention and his submissions on the appropriateness of maintaining the police involvement in respect of the younger son.

68 The mother and the children did not advance any additional points and took little part in the oral argument of this issue.

69 The police enforcement clause in the order was included by consent of the parties, but without notice to or discussion with any police force, including the Toronto police, who were expected to have the primary responsibility for enforcement.

Standing to make the motion

70 The issue of standing to bring a motion to delete or modify the police enforcement clause was contested by the father. He submitted that the police are "the statutory enforcement mechanism for the Superior Court of Justice and are not an independent third party affected by a court order." The first part of the submission is clearly incorrect — section 141 of the *Courts of Justice Act* gives the primary role in enforcement to the office of the sheriff, with the police having a secondary role only when called in. Their statutory duty under section 36 of the *Children's Law Reform Act* is an unusual provision in Ontario law and is circumscribed by a number of limits within the section, about which more will be said below.

71 Nor is there any suggestion in the rules that a person must be an "independent third party" in order to make a motion under rule 14(1)-(2) or rule 25(19)(d). It is sufficient for rule 14(1)-(2) that the motion be brought by "a person with an interest in the case", which I find the Chief of Police is, because the Toronto police are being asked to deploy resources to enforce the order in question. Rule 25(19)(d) speaks of an order made "without notice", without specifying to whom notice was not given — a party to the case, or a person with an interest? I think a fair reading of the rule would allow a person affected by the order, but not given notice in advance, to make a motion under the rule. Again, the Chief of Police would qualify.

72 I find that the Chief of Police has standing under either rule 14(1)-(2) on a motion for directions brought by "a person with an interest in the case", or under rule 24(19)(d) on a motion to change an order made without notice to the Chief, or both. See *Allen v. Grenier*, [1997] O.J. No. 1198 (Ont. Gen. Div.), at paras 11-12. Even if neither rule is directly

applicable, any court of record (not just the Superior Court) has the inherent jurisdiction to control its own process in the interests of justice, and that inherent jurisdiction can be invoked by any person with a direct, legitimate interest.

73 My determination that the Chief could and should bring the motion under rule 14(1)-(2) or 24(19)(d) disposes of the father's objection that there had not been a material change in circumstances. Motions under those rules do not require that there be a material change.

Administration of justice concerns

74 The father submitted that the Chief of Police should not be heard on this motion because members of the Toronto police had neglected or refused to enforce the order in question here and because some members of the Toronto police had made disparaging comments about family court orders and judges. I would not deny the Chief a right of audience because of any of the reported improper actions or comments of individual members of the force. There was no evidence that the actions and comments had been approved by superior officers.

75 The father argued that the police should not be able to contest which family court orders they will enforce. I agree that the police must comply with an order that directs them to enforce it, unless and until the enforcement clause is removed, but I do not see why the police should be disentitled from having a court review the legality or the appropriateness of a provision in its order that has a direct impact on the police, especially if it has been made without notice to them.

76 In this case, the police brought the motion for a review promptly. Indeed, that very promptness is a cause for complaint by the father, who says that it indicates the police never intended to comply with the order. I understand why he thinks that, in light of the events in this case and the comments some police officers made. However, it is always better for a person to move promptly to change or set aside an order made without notice. Delay in doing so can give rise to difficulties for the moving party, who must explain any delay to the court. See *Allen v Grenier*, above, at para 11, where the court said that the police "must use their best efforts to bring all affected parties before the court with reasonable dispatch." In this case, the police enforcement clause issue was not brought on for a hearing quickly because the parties and the court were all trying to achieve a consensual resolution of the larger issue of whether and how the children would have contact with the father. In hindsight, perhaps it might have been better to have the debate earlier about inclusion or deletion of the police enforcement clause.

77 The father also submitted that removal of the police enforcement clause from the order would make all the prior litigation "a costly waste of time, of money and of lives", would embolden the mother and other family law litigants to disregard the children's best interests and the court's orders, and would bring the administration of justice into disrepute. What I have to do, however, is determine whether to maintain the police enforcement clause, in the best interests of the children before the court, in the circumstances of this case as they are today. The children's best interests are the prime consideration; anything else is secondary. And I do not accept that the consequences of a decision to remove the police enforcement provision will be anything like what the father fears.

Lack of an expiry date in the order

78 The failure of the order to include a specific expiry date, as required by *CLRA* section 36(7), would be easily enough corrected by an amendment to the order to add an expiry date, but the real point of the Chief of Police's motion is that the order should not include the police enforcement clause at all. However, it is important for parties and judges to remember that any order made under *CLRA* section 36 must contain an expiry date, and the court must put its mind to what the appropriate time limit is when making any such order, even if it is unopposed.

"Unlawfully withholding"

79 Section 36(2) of *CLRA* provides for the making of an order requiring police enforcement of a custody or access order only if "any person is unlawfully withholding" a child or a person "proposes to remove the child or to have the child removed from Ontario". A proposal to remove the child from Ontario is not in issue in this case.

80 The Chief of Police submitted there was no evidence that anyone was withholding the younger son from the father, but rather the son himself was refusing to go into the father's care. The father argued that an unlawful withholding within the meaning of the section could be brought about by parental alienation, that is, by so poisoning the mind of a child against a parent that the child could not exercise any independent judgement to go or not go with the parent, with the result that any apparent refusal to go was due to control exerted by the alienating parent. Further, the father submitted that the mother's maintenance of the younger son in an apartment rented by her was tantamount to a withholding on her part.

81 The meaning of "unlawfully withholding" has not been explored in the cases. Dictionary definitions of "withhold" include hold back, restrain, or refuse to give. The father had no authority in support of his submission that the section covers constructive or indirect withholding, in the form of parental alienation. While I can certainly envision that "withholding" could be done by an agent acting on behalf or for the benefit of a parent, it is not clear to me that the influencing of a 15 or 16 year old's mind, so that the child refuses to go to a parent, is "unlawfully withholding" the child as intended by the section. It seems to me that "unlawfully withholding" does not extend to cover influencing or alienating. Even more difficult is the notion that providing an apartment in which a child can live amounts to unlawfully withholding the child. It seems to me that it would take more than providing an alternative home for a 16 year old, so that the child does not need to be in the custody of a parent, to amount to unlawfully withholding the child. I am unable to conclude that alienation of a child, so that the child voluntarily (albeit misguidedly or mistakenly) decides that the target parent is unworthy, untrustworthy, or dangerous, amounts in law to "unlawfully withholding" the child.

82 If I am wrong in this conclusion, then the circumstances at issue here would certainly be very important factors for the court to consider in the exercise of discretion under *CLRA* section 36(2) to make, extend, or revoke an order for police enforcement.

Factors to consider in deciding whether to order police enforcement

83 For an excellent review of the factors to consider in determining whether to make an order under *CLRA* section 36, and the cases on the issue in Ontario and elsewhere, see *Patterson v. Powell*, 2014 ONSC 1419 (Ont. S.C.J.). At the risk of oversimplifying Pazaratz J's very detailed and thoughtful decision, I note the following principles from it:

- Section 36 of the *Children's Law Reform Act* is available to address a present and existing problem, not a future or potential problem. (Paras 14-15)

- Section 36 does not make police enforcement available "as a long-term, multiple-use, on-demand enforcement tool." (Para 16)

- Police enforcement of custody or access may give rise to a wide range of negative emotions and consequences in the child involved. (Paras 21-22)

- Police enforcement may be essential for immediate retrieval of a child from a dangerous or inappropriate situation, but for ongoing enforcement, parties must look to less destructive and more creative alternatives. (Paras 23-24)

- Police should be served with notice, if a party proposes a broad order under section 36(4) that they "do all things reasonably able to be done". (Para 30)

- Police enforcement should be used sparingly, in exceptional circumstances, and as a last resort, and then only when it is shown to be required in the best interests of the child, after considering the risk of trauma to the child. (Paras 44-62)

• Chronic non compliance with a custody or access order is "likely ... a problem that police can't fix anyway." (Para 74)

84 I am in complete agreement with my colleague's cautionary message about the use of police enforcement clauses in custody and access orders. This is especially so where, as here, the child in question had been resisting contact with the father for some time; he was almost 16 when the order was made; he ran away not once, but twice, rather than go with the father; he went into hiding for a period of weeks, dropping out of school and taking other measures so that he would not be found; and he retained a lawyer to assert before this court his independent right to determine where and with whom he will live.

85 As Pazaratz J noted, there is a tendency to forget that section 36 requires a present, existing reality — that a person *is unlawfully withholding* a child, or that a person *proposes at the time the order is sought* to remove a child from Ontario — not a future risk or possibility that a child might not be returned or that a child might be removed. Further, section 36(3) assumes that a motion for a police enforcement clause will be made on notice, at least to the other party. The section says the order may be made without notice if "the court is satisfied that it is necessary that action be taken without delay." This is a different test from the usual one for motions without notice as articulated in rule 14(12) of the *Family Law Rules*.

86 The Chief of Police did not submit that police enforcement orders may be made only if notice is given to the police in advance. However, the Chief and the cases suggest that better, more focused orders will result if the police are consulted, and there will be less risk the police will come along later with a motion to pare down or remove a police enforcement provision.

87 In *G. (M.) v. M. (C.)* (2009), 72 R.F.L. (6th) 226 (N.S. Fam. Ct.), the court proposed (at paras 60-68) that there should be a government enforcement service for custody and access orders, so that the police would not be called on for enforcement. In Ontario, the original *Support and Custody Orders Enforcement Act, 1985*, SO 1985, c 6, section 2(2), contained just such a provision for custody orders, but it was never really put into operation and was repealed in 1996. The establishment of such a government service today seems highly unlikely. Perhaps parties can try to make creative use of section 36(1), which authorizes the appointment of someone (other than police) designated by the moving party, to apprehend a child who is being withheld.

Exercise of parens patriae jurisdiction

88 The father submitted that *parens patriae* powers might be used in some fashion in aid of the police enforcement provisions of *CLRA* section 36. While *parens patriae* jurisdiction can be used to help fill in gaps in a legislative scheme, it can not be invoked to cut down or qualify a statutory provision, such as one requiring "unlawfully withholding" a child before police enforcement can be called for, and it can not be used to create a parallel enforcement scheme inconsistent with one articulated by statute. It appears to me that there is little if any room for *parens patriae* jurisdiction to operate as a basis for police enforcement in Ontario, in the face of the scheme set out in *CLRA* section 36.

Exercise of Divorce Act jurisdiction

89 When a court exercises jurisdiction over custody or access under the *Divorce Act*, section 16(6) of that Act authorizes the court to "impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just". The father did not invoke this provision as a source of authority to order police enforcement. I think this would be very much of a stretch.

Police discretion and proper role of police

90 The Chief of Police submitted that "police officers are independent officers who retain discretion to execute their duties in a manner that is in compliance with the law." Further, the Chief argued that it was incongruous that police be required to "take a youth from a situation that has not been shown to be unsafe, and put him in a situation where he has

demonstrated a willingness to jeopardize his own safety in order to escape," and this was "divergent with the common law duties of a police officer, which include the preservation of the peace, the prevention of crime, and the protection of life and property.".

91 I agree that police have a general discretion in how they go about their duties, and that their discretion should be informed by their general, common law duties. That discretion would logically come into play in determining what is "reasonably able to be done" in locating a child, for example (*CLRA*, section 36(4)).

92 However, where a statute and an order confer a particular duty on police — a duty to do "all things reasonably able to be done to locate, apprehend and deliver the child" — it must be only in exceptional cases that they decline to carry out that particular duty, and they must promptly seek by proper means to be relieved of that duty. It is not necessary for me to decide whether everything was done as it should have been in the days and weeks immediately following the making of the order in question before me. Certainly the police had evidence that the younger son was willing to put himself and others at physical risk, rather than acquiesce to being in his father's care. The events in this case bring to the fore how important it is for parties and courts to consider carefully before adding a police enforcement clause to a custody or access order, and to have the police enforcement provision reviewed promptly when difficulties arise.

Conclusions on this issue

93 Whether either or both of the children in this case were acting under the control or influence of the mother or were acting independently, they were acting in defiance of the custody order and were demonstrably unwilling to be delivered into the father's care. They consistently took this position over a period of many months, both before and after the February 17 order of the court. After the order was made, the father focused his attention on securing compliance by the younger son. He was handed over to the father on February 17, bolted from the father and ran away. Later that day, the police took him into their care and handed him over to the father again. Once again he ran off and disappeared, this time escaping from a car in traffic — a moving car, if the son's evidence is accepted. After that, the boy made himself difficult to find, dropping out of school, and moving from place to place, over a period of weeks. The point is not whether the son was exercising his own free will. Rather, it is the consequences of using coercion, in the form of the police, to attempt to secure compliance with the order, in these circumstances and at this time.

94 I accept the Chief of Police's factum's summary of the situation at that point:

> 60. Where the youth has continuously shown a refusal to comply, it is a fruitless exercise to continuously deliver the youth to the father, only to have him leave again. The Toronto Police Service cannot provide 24 hour monitoring of the youth, and the youth cannot be held against his will. This is particularly so where the provision [for police enforcement in the order] has an indefinite term, contrary to the statutory provision ....
>
> 63. As noted in the decision of *Patterson v Powell* [see above], where non compliance is chronic, it is likely a problem that police cannot fix. ...
>
> 64. The youth's refusal to comply with the terms of [custody] is a matter that should properly be dealt with before the court, and not through force by the police.

95 The police enforcement issue might conceivably have been resolved differently if it had been before the court for determination in March or April or even May, but after a period of several months, during which both sons have continued to refuse even to have contact with the father, it is time to look at the merits of the custody order, rather than a mechanism to have one or both of the sons delivered by police into the father's care. It is not in the children's best interests to maintain a provision for physical compulsion at this time (nor was it at the time the motion was heard), as in all likelihood it would not work, and it would likely make it harder for there ever to be any repair of the relationship between the father and the sons.

96 At this time, the police enforcement clause should be removed from the order.

Mother's and father's motions — custody and access

Applicable statutory provisions

97 The application in this case was brought for a divorce and for custody and access orders under the *Divorce Act*. The divorce has not gone ahead, but once divorce jurisdiction is invoked, the "corollary" issues are to be determined under the *Divorce Act*. The arbitrator in making his award referred to the provisions of that Act. The February 17, 2015 order of this court does not mention the applicable statute but it must have been made under the *Divorce Act*.

98 Under the *Divorce Act*, both of the sons were, at the time the order was made, "children of the marriage", as they were under the age of majority and had not withdrawn from their parents' charge. The older son is now over 18 but may still qualify as a child of the marriage, at least for some purposes. The definition in section 2(1) of the Act reads:

> ***child of the marriage*** means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

99 Section 16 of the Act empowers the court to make custody and access orders respecting children of the marriage and sets out the factors to consider in making custody or access orders:

> **Custody Orders**
>
> ***Order for custody***
>
> **16 (1)** A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> . . .
>
> ***Terms and conditions***
>
> **(6)** The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> . . .
>
> ***Factors***
>
> **(8)** In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> ***Past conduct***
>
> **(9)** In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> ***Maximum contact***
>
> **(10)** In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that

purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

100 Variation or rescission of a custody order is controlled by section 17(5)-(6) and (9):

Factors for custody order

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

Variation order

(5.1) For the purposes of subsection (5), a former spouse's terminal illness or critical condition shall be considered a change of circumstances of the child of the marriage, and the court shall make a variation order in respect of access that is in the best interests of the child.

Conduct

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

. . .

Maximum contact

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

101 Custody and access cases under the *Divorce Act* often refer to and are guided by the list of factors set out in section 24 of the *Children's Law Reform Act*, even though that Act is not directly applicable. The best interest considerations in the section are a useful checklist of factors to take into account. The section reads:

Merits of application for custody or access

24. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).

Best interests of child

(2) The court shall consider all the child's needs and circumstances, including,

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons involved in the child's care and upbringing;

(b) the child's views and preferences, if they can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;

(f) the permanence and stability of the family unit with which it is proposed that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Past conduct

(3) A person's past conduct shall be considered only,

(a) in accordance with subsection (4); or

(b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

Violence and abuse

(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

(a) his or her spouse;

(b) a parent of the child to whom the application relates;

(c) a member of the person's household; or

(d) any child.

Same

(5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

Grounds argued by the parties

102 The mother submitted that there had been a material change in circumstances since February 17, 2015 that required a change to the custody order. Further, there was no point in making an order contrary to the wishes of a child of 15 or 16. She asked the court to make a custody order in her favour for the younger son, and no order for the older son.

103 The children submitted there should be no custody order for either of them, because of their ages and because they had withdrawn from parental control. In the alternative, if there were to be an order, they asked that it be custody to the mother, or that it permit them to reside with her. In any event, they said they could not be forced to participate in therapy, counselling, or a family reunification program without their consent, which they refused, relying on the *Health Care Consent Act*.

104 The father disputed that there was any material change in circumstances or that the best interests of the children required a change to the order. He submitted that the children could be required to live with him, and to participate in a reunification workshop, under the authority conferred by the *Divorce Act* or in the exercise of *parens patriae* jurisdiction, and that the court should continue the existing order in the best interests of the children. He rejected the contention that the children had withdrawn from parental control.

Material change in circumstances

105 Neither the mother nor the children paid much attention to this point, but a material change in circumstances is a prerequisite to the court's exercise of jurisdiction to change the custody and access terms of the order of February 17, 2015. The change must materially affect the children's needs or the parents' ability to meet them, and must not have been foreseen or reasonably contemplated by the original order: see *Divorce Act*, section 17(5); *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.), at paras 10-13; *Droit de la famille - 091889*, [2011] 3 S.C.R. 775 (S.C.C.), at paras 66-67. The father submitted there was no material change: the children refused to have any contact with him before February 17 (or the dates of the arbitrator's two awards concerning custody and access), and they refused all contact when the mother served her motion, and they still refused contact.

106 I am of the view that there have been material changes that allow, indeed that require, this court to revisit the issues. The changes include: the older son has turned 18 and the younger son has turned 16, and this alters their legal rights and the attitude the courts take toward enforcing parental custodial rights (see below); the father has effectively abandoned his effort to secure custody or control of the older son; the younger son has physically resisted going into his father's custody; almost a year has passed since the order was made and no contact has been restored between the sons and the father; both sons appear before the court to assert they can not be compelled to go to a reunification program or to live where they do not want to live; the police have formed the view, quite reasonably, that they should no longer be required to assist in enforcing the order; the evidence indicates that the sons' attitude is not going to change, and the order will be impossible to carry out. The current circumstances were not foreseen or reasonably contemplated by the parties or the arbitrator, let alone the court when it approved the parties' consent to the order now sought to be varied.

The children's rights at common law and under legislation

107 The children have asserted that they have the right to determine with whom they will live and whether and on what terms to have contact with their father. They say that they have the right to withdraw from parental control, and that they have done so. They rely on section 65 of the *Children's Law Reform Act*:

> **Where child is sixteen or more years old**
>
> **65.** Nothing in this Part abrogates the right of a child of sixteen or more years of age to withdraw from parental control.

108 In the course of argument, I asked where the rights they assert (including the right referred to in section 65) came from, and what they were. Unfortunately counsel had little help to offer me. I have had to do some research on the point.

109 Custody of children was not governed by any statute until the 19th century. At common law, the father of children generally had the right to physical custody of them. In some circumstances (such as where the father had died), the mother had the right to custody. The mother eventually received the same rights as the father by statute in the late 19th century. A parent whose child was detained by another person could issue a writ of *habeas corpus* to secure the return of the child. The courts of Chancery exercised *parens patriae* jurisdiction to protect children, especially where they had property, and also had the power to issue a writ of *habeas corpus*. A parent's right to physical custody of a child was a powerful one, viewed as an almost absolute entitlement. It generally lasted until the child married or until the child reached the age of majority (21 at common law). However, common law and Chancery courts exercised discretion to

refuse to enforce a parent's right to custody when the parent had become disqualified from calling for the child's return by virtue of immoral conduct or conduct harmful to the child, or when the child had reached the age of discretion and did not want to return to the care of a parent. The age of discretion was settled by case law at 14 for boys and 16 for girls. It did not depend on the mental capacity or maturity of the child. In the *habeas corpus* cases, the court was concerned with the child's expressed wishes, as the writ was meant to secure the release of someone who was involuntarily detained, and there could be no question of an involuntary detention if the child wanted to stay with a person other than the parent.

110 See generally Simpson, Archibald H., and Knowles, George W., *A Treatise on the Law and Practice relating to Infants* (4th ed., 1926), at 102-104; Stranger-Jones, L.I., *Eversley's Law of Domestic Relations* (6th ed., 1951), at 331-344; Ontario Law Reform Commission, *Report on Family Law, Part III, Children* (1973), at 87-89. And see *Agar-Ellis, Re* (1883), 24 Ch. D. 317 (Eng. C.A.) (father had custody of 16 year old daughter at common law; this included the right to impose restrictions on her contact with her mother, and the court would not interfere); *R. v. Redner* (1898), 6 B.C.R. 73 (B.C. S.C.) (father not able to compel 16 year old daughter to live with him, when she refused); *Coram, Re* (1886), 25 N.B.R. 404 (N.B. S.C.) (15 year old living with aunt and uncle ordered returned to father, as not yet of the age of discretion); *Marshall, Re* (1900), 33 N.S.R. 104 (N.S. C.A.) (16 year old girl could not be compelled against her will to return to her father; courts of equity would ascertain the views of a child of any reasonable age and determine what would be for the welfare of the child); *D'Andrea, Re* (1916), 37 O.L.R. 30 (Ont. H.C.) (court on *habeas corpus* will be guided by the wishes of a boy over 14 and a girl over 16); and *Hewer v. Bryant* (1969), [1970] 1 Q.B. 357 (Eng. C.A.) (15 year old boy living and working on a farm with his parents' consent was not "in the custody of" his parents, for purposes of a limitation period statute), a case in which Lord Denning spoke generally about when a parent had an enforceable right to custody of a child:

> I would get rid of the rule in *In re Agar-Ellis* and of the suggested exceptions to it. That case was decided in the year1883. It reflects the attitude of a Victorian parent towards his children. He expected unquestioning obedience to his commands. If a son disobeyed, his father would cut him off with a shilling. If a daughter had an illegitimate child, he would turn her out of the house. His power only ceased when the child became 21. I decline to accept a view so much out of date. The common law can, and should, keep pace with the times. It should declare, in conformity with the recent Report of the Committee on the Age of Majority [Cmnd. 3342, 1967], that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice. [at 369]

111 Section 65 of the *Children's Law Reform Act* has preserved the common law right of children to withdraw from parental control and live on their own or with another person, but has fixed the age of discretion for the purpose at 16 for both boys and girls. It does not purport to alter the common law or the doctrines of equity in any other fashion. However, there can be little doubt that courts today would exercise their discretion differently than 19th century courts.

112 Statute law has recognized the personal autonomy of minors at ages under 18 in various other respects. Under the *Minors Act*, RSO 1980, c 292, s 12(1), the court could not appoint a guardian for a child of 14 or older without the child's consent (but this consent requirement was not carried over into the *Children's Law Reform Act*). Students who have "withdrawn from parental control" are entitled from age 16 to make educational decisions, register in a school, and receive notices on their own, without parental involvement, under the *Education Act* (see, for example, sections 21(5), 36, 300.3, 308, 311, 311.3, 311.7). Sixteen year olds have an independent right to apply for and hold a passport (Canadian Passport Order, SI/81-86) or a driver's licence (*Highway Traffic Act* and O Reg 340/94, section 12). They can exercise the rights to access to information or to protection of their personal information under the *Freedom of Information and Protection of Privacy Act* (see section 66(c)). Under the *Substitute Decisions Act, 1992*, they are presumed to be capable of making decisions for their personal care (section 1(2)), and they can appoint a substitute decision maker or act as a substitute decision maker (sections 43-44). They can also be appointed to give or refuse consent to treatment on behalf of an incapable person under the *Health Care Consent Act, 1996* (section 33(1)-(2)).

113 Perhaps the broadest degree of personal autonomy accorded to minors is the right under the *Health Care Consent Act, 1996* to consent to or to refuse "treatment", which is defined in section 2(1) as:

> "treatment" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan, but does not include,
>
> (a) the assessment for the purpose of this Act of a person's capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the *Substitute Decisions Act, 1992* of a person's capacity to manage property or a person's capacity for personal care, or the assessment of a person's capacity for any other purpose,
>
> (b) the assessment or examination of a person to determine the general nature of the person's condition,
>
> (c) the taking of a person's health history,
>
> (d) the communication of an assessment or diagnosis,
>
> (e) the admission of a person to a hospital or other facility,
>
> (f) a personal assistance service,
>
> (g) a treatment that in the circumstances poses little or no risk of harm to the person,
>
> (h) anything prescribed by the regulations as not constituting treatment.

There are no regulations prescribing what does not constitute treatment. In this case, the father argues that the meaning of "treatment" does not include the residential program he wants the younger son to attend. This will be discussed below.

114 The right to consent or to refuse consent to treatment is found in sections 4 and 10(1):

> **Capacity**
>
> 4. (1) A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
>
> **Presumption of capacity**
>
> (2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services.
>
> **Exception**
>
> (3) A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be.
>
> . . .
>
> **No treatment without consent**

> **10.** (1) A health practitioner who proposes a treatment for a person shall not administer the treatment, and shall take reasonable steps to ensure that it is not administered, unless,
>
> (a) he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or
>
> (b) he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with this Act.

115 It is interesting that the *Health Care Consent Act, 1996* does not prescribe any minimum age at which a minor's consent or refusal to consent is to be acted on. Section 4(2) presumes capacity, regardless of age, and section 4(1) articulates a flexible test of capacity that looks for understanding of information and appreciation of foreseeable consequences.

Divorce legislation, custody, and the rights of minors

116 Until 1930 in Ontario, a divorce could only be obtained by means of a private bill passed by Parliament. The first legislation providing for judicial divorce in Ontario was the *Divorce Act (Ontario), 1930*, SC 1930, c 14. It simply adopted the law of England governing divorce and annulment of marriage as of July 15, 1870 and made that law available in Ontario (divorce was available only on the ground of adultery by the other spouse). The Act did not say anything about custody, access, child support, or spousal support. Those matters were all covered by provincial legislation such as the *Infants Act*, the *Matrimonial Causes Act*, and the *Deserted Wives' and Children's Maintenance Act*, all of which were repealed in 1978 and 1982 by the *Family Law Reform Act,1978* and the *Children's Law Reform Amendment Act, 1982*.

117 In 1968, Parliament enacted the first national divorce legislation, the *Divorce Act, 1968*, and at the same time asserted jurisdiction over custody, access, child support, and spousal support when "corollary" to a divorce. This assumption of jurisdiction over what had previously been exclusively provincial subject matters was justified as being "necessarily ancillary" to the exercise of jurisdiction over divorce: *Papp v. Papp* (1969), [1970] 1 O.R. 331 (Ont. C.A.); *Jackson v. Jackson* (1972), [1973] S.C.R. 205 (S.C.C.); *Zacks v. Zacks*, [1973] S.C.R. 891 (S.C.C.).

118 The 1968 divorce legislation was repealed and re-enacted as the *Divorce Act, 1985*, which (with some amendments) is the Act in force today. Like the 1968 Act, it covers custody, access, child support, and spousal support when "corollary" to a divorce application. It even permits parties who are already divorced to commence or continue a "corollary relief proceeding" seeking only custody, access, child support, or spousal support: see section 2(1) definition, section 4.

119 Neither the 1968 Act nor the current *Divorce Act* disturbed provincial law relating to children, except as necessary for purposes of dealing with the custody of and access to children once the parents had invoked divorce jurisdiction or obtained a divorce. For example, the current Act says nothing about the provincial law providing for joint custody of the parents, absent a court order, as set out in section 20 of the *Children's Law Reform Act*, no doubt because it was not "necessarily ancillary" to the exercise of divorce jurisdiction. As a matter of practice, parents who seek a divorce but who do not want a custody order will leave in place their underlying joint custody provided by provincial law. The *Divorce Act* expressly adopts the law of the province in which a child ordinarily resides on what is the age of majority, in the definition of "child of the marriage": see section 2(1). There is also nothing in the current Act that purports to trench on the rights of a child under provincial law to, for example, refuse to consent to treatment, or withdraw from parental control.

120 The definition of "child of the marriage" in section 2(1) does indeed contain language about a child's being "under the charge" of parents and withdrawing from their charge. I reproduce the definition again here, for convenience, with certain key words underlined:

> ***child of the marriage*** means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who **has not withdrawn from their charge**, or

(b) is the age of majority or over and **under their charge but unable**, by reason of illness, disability or other cause, **to withdraw from their charge or to obtain the necessaries of life**.

121 The definition presupposes there is a right to withdraw from parental "charge", or at least, that it may occur in fact and must be recognized.

Withdrawal from charge or control of parents

122 "Charge" is not defined in the Act. Dictionary meanings include expense, cost, pecuniary burden, obligation, management, supervision, control; and "in the charge of" has the meaning of under the care or supervision of. "Charge" has a broad scope, encompassing financial burdens and obligations, as well as care and direction, and decisions about both.

123 "Control" is also not defined in the *Children's Law Reform Act*, or in the *Family Law Act*, where the phrase "withdrawn from parental control" is used in section 31(2) to limit a parent's child support obligation. Dictionary definitions of control include power or ability to order, limit, guide, manage, or direct. "Control" seems to lack the financial component of "charge", but covers similar territory otherwise.

124 There are no cases dealing with custody or access that explore the meaning of "withdrawn from parental control". The closest case — and it is not close — is *B. (K.A.) v. Ontario (Registrar General)*, 2013 ONCJ 684 (Ont. C.J.), in which the court found that a 17 year old child of a single mother had withdrawn from parental control and was not in the mother's custody, as the child was not in the mother's physical care or control, and the child made all her own decisions about residence, education, and medical care. Accordingly, the child had the right to apply on her own, without parental consent, for a change of name.

125 There are plenty of cases dealing with the issue of parental liability for child support when a child is not living with one or both parents and has allegedly withdrawn from parental control or from the charge of the parents. The father's lawyer has given me literally dozens of them. They generally require that the child must have freely and voluntarily withdrawn from the control of both parents, and must have chosen to strike out to start an independent life free of the former family unit, before the parents will be excused from paying child support. See, for example, and for a good summary of the principles in the cases, *Ball v. Broger*, 2010 ONCJ 557 (Ont. C.J.). These cases construe section 31(2) of the *Family Law Act*, or the definition of "child of the marriage" in the *Divorce Act*, and they scrutinize the alleged withdrawal from parental control very closely, so that parents are not able to drive a child away and then escape from liability to support the child. The onus is thus on the respondent parent to show that the child in question has voluntarily withdrawn from parental control.

126 The child support cases promote the policy that parents should not too easily escape from responsibility to support children who are not living "at home", for reasons not of the child's making. In those cases, one parent is usually claiming support (sometimes it is the child claiming) and the other parent is resisting the claim. The situation I must contend with is quite different. Here, the children claim the right *not* to have a custody or access order affecting them, and the father asserts that he should be entrusted not only with custody, but also with the power to compel physical control of a child and the child's participation in a reunification program.

127 I agree with the father's submission, however, that it would be too easy for an alienating parent to persuade a child to refuse to have any contact with the target parent alone, and then assert that the child had withdrawn from parental control or from the charge of the parents. There must be some credible evidence of withdrawal from or resistance to the authority of both parents. In this case, the evidence concerning the mother's attempt to secure compliance with the order in question is thin and open to question. The sons' evidence says they want to establish their own lives, but does not show that they have set up homes of their own, struck out from the former family unit on a new path of associations, or made their own decisions about medical care, as in the case of *B. (K.A.)*, above (though there is some evidence that each of them has made educational decisions). Indeed, the younger son lives in an apartment rented by the mother, and

the older son returns to the mother's home when he is not attending his university courses. The evidence here does not persuade me that either of the sons has actually withdrawn from the parents' charge or from parental control. Thus, they remain "children of the marriage".

Is the reunification program "treatment"?

128 The children say the reunification program is "treatment". The father says it is not. In this respect, the father is not always consistent, as his materials sometimes refer to the program he has chosen as "therapeutic". So does the evidence of the experts cited by the arbitrator. The justification for ordering the children into the program has been expressed by both the arbitrator and the father in terms of one last chance at improving the relationship between father and sons, without which the sons risk lifelong, negative, psychological and emotional consequences. That sounds to me like a "therapeutic, preventive ... or other health-related purpose."

129 The father referred to the article by the program's creator, Warshak, Richard A., "Family Bridges: using insights from social science to reconnect parents and alienated children" (2010), 48 Fam Ct Rev 48, to establish that the program was merely educational, as opposed to "treatment". But the article is replete with references to psychological trauma, treatment, and the like, and the articulated goals of the program include to "facilitate, repair, and strengthen the children's ability to maintain healthy relationships with both parents", "protect children from unreasonably rejecting a parent in the future", and "strengthen the parents' skills in nurturing their children by setting and enforcing appropriate limits and avoiding psychologically intrusive interactions" [at 58]. The article claims that the workshop "is based on an educational model and is not psychotherapy or counselling" [at 59]. That may be. But the definition of "treatment" in the *Health Care Consent Act* is much broader than just psychotherapy and counselling.

Interaction of the Divorce Act, parens patriae, and provincial law of children's rights

130 Can or should the court make an order requiring a 16 year old to go into the care of a parent, and attend a program with the parent, contrary to the expressed wishes of the minor? What about an 18 year old?

131 Dealing first with *parens patriae*, I note the Court of Appeal's recent admonition in *Fiorito v. Wiggins*, 2015 ONCA 729 (Ont. C.A.), that courts are not to resort unnecessarily to *parens patriae*, particularly when a statute provides an adequate framework to deal with the issues in a case. There is very broad scope in section 16(6) of the *Divorce Act* to impose terms, conditions, and time limits on custody and access. If this scope is not broad enough to do what the father wants and the children need, it is because other statutory or common law rights stand in the way, in which case, *parens patriae* jurisdiction is not available; or else the children's best interests require otherwise, in which case, it should not be used. Even if *parens patriae* were available, it could not be used in respect of the older son, who is now 18.

132 It seems to me that the *Divorce Act* has not altered the common law about the ability of minors in Ontario to withdraw from parental control (with a uniform age of 16, set by provincial statute). At the very least, the definition of "child of the marriage" in section 2(1) recognizes that minors can and do withdraw from their parents' "charge".

133 Though it may appear that the *Divorce Act* provision for the imposition of terms of custody, section 16(6), does not touch provincial laws of general application concerning consent to, or refusal to consent to, treatment, there are cases where this court has found otherwise. There are sound policy reasons for this conclusion.

134 In *L. (J.K.) v. S. (N.C.)*, [2008] O.J. No. 2115 (Ont. S.C.J.), the court found that a 13 year old boy who had been alienated by the father from the mother could be ordered under the *Divorce Act* to take part in the same reunification program as the one the father has proposed here. In that case, the court said:

> **190** ... The expert evidence before the court is quite firm and direct. There very probably will be future significant problems experienced by L.S. if the court does not intervene, including significant personal guilt for his part in the rejection of his mother, anger towards women, and dysfunctional relationships with women. In the short-term, there is the legislative and societal recognition that contact with both loving parents ensures the well being of a child. Dr.

> Goldstein looked at me as the trial judge, and stated that this was really the last chance for L.S. in this difficult situation. In the view of this court, the easy decision would be to leave things as they are and do nothing. However, it is the view of this court that the right decision in L.S.'s best interests is to grant the remedy sought by the applicant.
>
> **191** Secondly, Mr. Wellhauser suggested that L.S. could not be forced to participate in any counselling or workshop without giving his consent. He argues that there is no remedy available in law to the applicant. I do not agree with that submission.
>
> **192** Our courts have regularly ordered children to participate in counselling. In this case, the order of the court is simply granting custody of L.S. to his mother with no access for a period of approximately four months by his father. It is not ordering L.S. to undertake any treatment or to participate in any program. It is leaving such discretion to his mother who, if the workshop program of Dr. Warshak and Dr. Rand is decided upon, is to report such participation to the court. I do not consider, as submitted by the respondent, that the Health Care Consent Act, 1996, S.O. 1996, c. 2, was intended to trump the discretion of the court under sections 16 and 17 of the Divorce Act, R.S.C. 1985, c. 3, (2nd Supp.) as am., in issues of custody and access. They have different legislative purposes.
>
> **193** In sections 1 and 20 of the Health Care Consent Act, I interpret the law to require the consent of an informed person who has attained the age of 16 to be obtained before a course of treatment is instituted. I do not think it is applicable to a child who the court has ordered to be placed in the custody of a parent, who is able to act in the best interests of the child. To accede to the submission that no treatment or counselling for L.S. and his mother can be undertaken without L.S.'s consent would effectively mean that there is no remedy in law for an alienated child in these circumstances. It would mean there is nothing the alienated parent could do to remedy the situation and the wrongdoer would be rewarded for his conduct. I do not accept that that is the law.
>
> **194** I am further reinforced in my view on this issue by the decision of the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3. In that case, the respondent who was not the custodial parent, sought to provide religious training when he had access visits with his children. The custodial parent and the children did not want such training and the court determined that in the best interests of the children, he could not impose his religious views on the children. In other words, the religious upbringing of the child must yield to the welfare of the child. McLachlin J. (as she then was) wrote, at paragraph 213, that the legislative provision for the "best interests of the child" did not violate the father's religious and expressive freedoms as provided in the Charter of Rights and Freedoms. She held that those Charter guarantees do not protect conduct which violates the best interests of children. The majority of the court concurred in the decision.
>
> **195** I find the same reasoning is applicable to the case at bar. It is inconceivable to me that that provincial legislation could be interpreted to protect conduct which a trial court determines is not in the best interests of L.S.

While I have some difficulty with the comments in para 193 that the law requires the consent of an informed person over 16, that statement does not affect the reasoning of the actual decision.

135 That case was a trial decision where the issue was addressed for the first time. I have a situation where the trial (the arbitration) took place 16 months ago, the decision was released 12 months ago, the order was made, compliance by the child was not forthcoming, and there is no reason to expect that he will comply now. Further, unlike in that case, the order in this case does require the son to take part in the reunification program. It also does not appear from the report of that case that the 13 year old had claimed the right to withdraw from parental control, had run away, or had asserted that he would not consent to participate in the program.

136 There have been alienation cases in which a 16 year old has been put in the custody of the target parent, cut off from contact with the alienating parent, and ordered to take part in a reunification program with the target parent. *B. (S.G.) v. L. (S.J.)*, 2010 ONSC 3717 (Ont. S.C.J.), was such a case. In that case, the "trial" was an arbitration. An appeal from the award resulted in the issue of the appropriate remedy being sent back for rehearing, this time by the

court. The child in question (who had an 18 year old brother) was 16 at the time of the court's decision. He had special needs, including a learning disability, and may not have been as mature as many boys his age. However, his treating psychiatrist had formed the view that the boy had the capacity to consent to psychiatric treatment on his own behalf. The court order put him in his mother's sole custody, authorized her to obtain any treatment or intervention for the son as she deemed necessary and appropriate for his best interests, and specifically authorized her to take the child to the same workshop as the father wants his younger son to attend in this case. The child moved for and obtained a stay of the trial judge's order, and also was granted intervenor status on the appeal: *B. (S.G.) v. L. (S.J.)*, 2010 ONCA 578 (Ont. C.A.). In granting the boy's motion, the Court of Appeal said:

> [16] But this is not an ordinary case. In our view, granting the intervention motion is justified for two reasons. First, J.B. is now 16 years of age. Even accepting the expert evidence at trial that he has the emotional maturity of a 13 year old, he is an intelligent young man and has reached the age where his voice is entitled to be heard by this court. Moreover, the trial judge's order has the potential to dramatically change J.B.'s life. In the light of that potential, he ought to be able to participate in the proceeding that will determine with whom and under what terms he lives, independently of either the alienating or alienated parent.
>
> [17] Second, the trial judge's order raises important and difficult issues. We think it would benefit the panel to hear J.B.'s perspective on these issues through the submissions of his own counsel. We therefore grant the motion to intervene ....

However, the appeal never proceeded to a hearing. I am told the mother gave up. Fortunately I have had the benefit of the children's evidence and submissions as intervenors on the motions before me. The situation in my case is different, with the passage of time and the events that have occurred here since the court made its order.

Best interests and children's rights

137 If it is not already apparent from the preceding pages, I will say so expressly here: I have been struggling with how to balance or reconcile the powers and duties of the court under the *Divorce Act* to make custody and access orders in the best interests of the children, on the one hand, with, on the other hand, the children's growing entitlement to personal autonomy and respect of their views and preferences. It is interesting that courts are asked to make, and do make, orders at the behest of an alienated parent that they likely could not make at the request of two parents still living together (for example, the order in *B. (S.G.)*, above, authorizing the mother to consent to treatment for a child whose doctor thought him capable of consenting to treatment). One can also think of situations involving a 16 year old, who is beyond the reach of a child protection proceeding under the *Child and Family Services Act*, but who could be apprehended and placed with someone, or enrolled in a treatment program, under a custody order.

138 It is difficult to know when to insist on what parents, or their experts, or the court, thinks is in a child's best interests, and when to leave off, letting the child assert the right to decide and, possibly, decide wrongly. Courts have recognized that older children will often make their own residential choice, regardless what the court says, and let their feet do the talking. See, for example, *Supple v. Cashman*, 2014 ONSC 3581 (Ont. S.C.J.), at para 17; *Ladisa v. Ladisa*, [2005] O.J. No. 276 (Ont. C.A.), at para 17.

139 In *Perino v. Perino*, 2012 ONSC 328 (Ont. S.C.J.), a remarkable case involving custody of a cognitively impaired young woman in her late twenties, the court in a very sensitive judgment tried to balance her best interests with her articulated wishes, which the court found had been heavily influenced by her father. The court said, in a passage addressed directly to the young woman,

> [11] I have seriously considered your views. They have made a big difference in my decision. If you had not said, clearly, that you want to continue to live with your father right now, I would have made a different order. I decided, since this is what you want, that we should give this one more try.

Conclusions on this issue

140 The wishes of an alienated child may be warped and misconceived, but they are nonetheless real. The father says that the children's wishes should be disregarded, because they are not truly the children's own wishes. At this point, does that really matter? The expressed wishes are strong, consistent, and long lasting, and they have been acted on by the children in defiance of the authority of both parents, the arbitrator, the police, and this court's order. The fact is that the current custody order in favour of the father has not worked.

141 More than a year ago, the evidence before the arbitrator indicated that the father had one last chance, in the form of a residential reunification program, to rebuild a relationship with his sons. The arbitrator accepted that evidence and made the award the experts favoured. The arbitrator felt constrained not to try to force the older son to attend the program, on the ground that he could not force a 16 year old to take part. But he did require the younger son to do so, on the eve of his 16th birthday. It was a last ditch attempt to salvage some sort of positive relationship. The father tried his best to secure compliance by the younger son. The police, on the evidence, made more than a token attempt, but gave up after a few weeks, in the face of repeated statements by the son that he would not surrender to the care of his father, and at least one dangerous act (getting out of a car in traffic, if not actually in motion). The child went into hiding and stopped going to school until after his 16th birthday. After the threat of apprehension by the police passed, he settled into his brother's apartment and resumed his school attendance. Months have passed. I think the last chance opportunity has regrettably been missed.

142 I am also convinced that the younger son would again go into hiding and drop out of school, if I were to renew and enforce the custody order in favour of the father. That could disrupt and potentially ruin his educational prospects and his career options. That would not be in his best interests.

143 The evidence indicates that the two sons are closely bonded with each other, the mother, and the mother's family. Yet the existing order puts up barriers to those contacts, attempting to isolate the sons from the maternal family while mandating an exclusive relationship with the father that has not worked and will not work in the foreseeable future. The result is that they have no family. They do not even have each other. It is not in the children's best interests to maintain these barriers any longer. The children need to have normal contacts with family.

144 I am also cognizant of the fact that the sons say they are resolutely opposed to reopening contact with the father. Renewal of the existing custody order would not help reduce their opposition and would likely only strengthen their resolve.

145 In these circumstances, I can not continue the existing custody order.

146 That being the case, what is the appropriate order?

147 The father submitted that the court should not reward the mother for successfully alienating the children by granting her custody of them. Custody is not given as a reward. Nor is it taken away as a punishment. It is given to confer authority over children on the person or persons who will best be able to exercise it in the children's best interests.

148 Before the arbitrator's award, the parents did not have a custody order or agreement in place. They were, like many separated parents, operating with the underlying joint custodial rights of parents under provincial law. If that situation was ever appropriate for these high conflict parties, it is certainly not appropriate now. They have been continuously involved in acrimonious litigation for years. They are completely at loggerheads and have been for a long time.

149 The older son is now over 18 and does not need a custody order for any purpose. The younger son is almost 17. He has registered in school on his own. He will be heading off to post secondary education later this year or next year. Under Ontario law, he does not need anyone to consent to health care on his behalf (see above). For practical purposes, he does not need a custody order either. Both the sons and the mother (as her alternative position) submit that

no custody order should be made. The father has just lost sole custody and I have already said that joint custody is not an option. That leaves only no custody order.

150 To be clear, my decision is that no person has custody or access rights over either of the sons under any statute or under any non statutory jurisdiction of the court. Each of the sons is his own master in that respect.

151 That being the case, the parents do not have any right to secure information about the sons from providers of medical or educational services or, for that matter, from each other. Access to information about each son is entirely within his own control.

Costs

152 There are four interests represented on these motions. I need counsel to confer in order to ascertain who is claiming what costs from whom. They should also try to negotiate a resolution of the costs issue.

153 If costs are not settled, then I need a written submission from each party seeking costs for each party against whom costs are claimed, and a responding submission to each claim for costs. For costs purposes, the two sons count as one party. Each submission may not exceed five pages of 12 point type, plus bill of costs, relevant offers, and cases (do not reproduce rules). Cases may be provided on a USB drive in PDF or Word instead of on paper. If desired, a party may serve a three page reply to each responding costs submission.

154 A party seeking costs must serve a costs submission not later than March 8. This time will not be extended. Service of a costs submission on a party triggers a 10 day period for response. A reply may be served within seven days. All costs submissions, including replies, must be in my hands not later than April 1. The mother is responsible for having the costs submissions sent to me when complete.

155 Any party may book an oral costs hearing for a date after the written submissions have been exchanged. The time allowed will be 30 minutes per party claiming costs, regardless of how many parties against whom the party claims costs.

Police motion granted; mother's motion granted in part.

Footnotes

1 I have made minor spelling and punctuation corrections without indicating them.

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