WARNING

THIS IS AN APPEAL UNDER THE

CHILD AND FAMILY SERVICES ACT

AND IS SUBJECT TO S. 45 OF THE ACT WHICH PROVIDES:

45(7) The court may make an order,

(a) excluding a particular media representative from all or part of a hearing;

(b) excluding all media representatives from all or a part of a hearing; or

(c) prohibiting the publication of a report of the hearing or a specified part of the hearing,

where the court is of the opinion that the presence of the media representative or representatives or the publication of the report, as the case may be, would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.

45(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

45(9) The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

COURT OF APPEAL FOR ONTARIO

CITATION: N.L. v. R.R.M., 2016 ONCA 915
DATE: 20161205
DOCKET: C61823 & C62184

Weiler, Blair and van Rensburg JJ.A.

BETWEEN

N.L.

Applicant (Respondent on Appeal)

and

R.R.M.

Respondent (Appellant)

and

D.M. and M.M.

Children (Respondents on Appeal)

and

Chief of Police
Toronto Police Services

Third Party (Respondent on Appeal)

Gary S. Joseph, Elissa H. Gamus and Meghann P. Melito, for the appellant

Michael J. Polisuk, for the respondent N.L.

Jesse L. Mark and Emily Chan, for the respondents D.M. and M.M.

Sharon C. Wilmot, for the respondent Toronto Police Services

Heard: September 22, 2016

On appeal from the order of Justice Craig Perkins of the Superior Court of Justice, dated December 19, 2015, with reasons reported at 2016 ONSC 809, 76 R.F. L. (7th) 428.

Weiler J.A.:

[1] The motions judge granted a motion to change a final custody order with respect to two boys, M.M. and D.M., born in 1997 and 1999 respectively. The appellant father appeals and asks this court to reinstate the prior final custody order granting him exclusive custody of D.M. He also appeals a related change order relieving the Toronto Police Services Board from enforcing the provisions of the custody order. By way of cross-appeal, the younger son, D.M., seeks a declaration that he has withdrawn from parental control and is therefore no longer a child of the marriage for whom a custody order can be made.

[2] For the reasons that follow, I would dismiss the appeal as well as the cross-appeal.

A. FACTS

[3] The appellant father and respondent mother were married in 1996. They initially separated in November 2005, but reconciled in August 2006. They separated finally in January 2012. The sons remained in the mother's primary care throughout the three years following the separation.

[4] The parties submitted their parenting and some economic issues to a senior family law specialist for mediation and arbitration. The arbitrator conducted a hearing in September and October 2014, which lasted 14 days, 12.5 of which were spent on parenting issues.

[5] The arbitrator found that each parent had been verbally aggressive and physically violent. Between 2005 and 2012, the father was charged with assault three times. He was acquitted on each charge. The mother was charged with assaulting the father in September 2012. She was convicted, but was successful on appeal. Although a new trial was ordered, the Crown elected not to proceed.

[6] The arbitrator found that the father's relationship with his sons was seriously damaged by a campaign of parental alienation by the mother. Relying on uncontroverted evidence from clinical psychiatrist, Dr. Goldstein, and custody assessor, Barry Brown, that the price of the boys not seeing their father is too high, he concluded that the children deserved the opportunity to have a relationship with both their parents and extended families. Thus, in his award on January 16, 2015, the arbitrator awarded custody of the children to the father. The father was to take the boys to attend the Family Bridges Program,[1] an

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[1] The Family Bridges Program, or "Family Bridges: A Workshop for Troubled and Alienated Parent-Child Relationships" is an educational and experiential program which aims to resolve issues between parents and alienated children. According to the award of the arbitrator, Herschel Fogelman, dated February 11, 2015, in this particular case, the Program was meant to assist the children in adjusting to living with their father as the custodial parent. The Program includes a workshop phase, generally lasting four days, with their protocol including an unstructured vacation following the workshop, generally five to seven days in

educational and experiential program which aims to resolve issues between parents and alienated children. Although it was unclear whether the award would have the intended result, the arbitrator held, "[I]t is my statutory duty as I see it, to take such steps as I feel are reasonable and necessary to give the relationships the best chance of success." Following the January 16, 2015 award, the arbitrator entertained further submissions on the detailed, operative terms that should be put into a further award governing the parenting arrangements during the Family Bridges Program, including no contact with the mother or any of her relatives. He released an award outlining these operative terms on February 11, 2015.

[7] On February 17, 2015, Justice Goodman made an order on consent incorporating the terms of the arbitral award. The order by Justice Goodman provided that the father was to have sole custody of the parties' two sons, M.M. and D.M. It also required the children to attend the Family Bridges Program with the father and ordered the Toronto Police Services, and other police forces to "assist as required" to enforce the provisions of the order and specifically to "take all such action as is required to locate, apprehend and deliver the children to the Respondent."

[8] Neither party appealed or sought judicial review of the arbitrator's awards.

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duration. There may be follow-up counseling with an Aftercare Specialist as designated by the Family Bridges team leaders.

[9] The January 16, 2015 arbitral award directed the parties not to inform the children of the arbitrator's decision. The February 11, 2015 arbitral award reiterated this requirement. On February 17, 2015, the children came to the arbitrator's office and were informed of the decision. The father claimed the children did not appear surprised, while the mother denied she told the children the terms of the January 16 award. The father alleged that as D.M. was leaving the building with his father to head to the Family Bridges Program, M.M. said to his younger brother, "Remember the plan" and told him to hide until he turned 16. Neither of the sons denied this. The mother denied there was a plot to defeat the arbitral award.

[10] On leaving the building, D.M. ran off and disappeared. He went to his brother, M.M.'s apartment. His mother went there, picked him up, and drove him to a police station. D.M. told the police he did not want to return to the father, but the police turned him over to the father upon seeing the court order from that day.

[11] The father and D.M. got in the car to travel to the Family Bridges Program. The motions judge noted the evidence was contradictory on this point, but D.M. got out of the car at a red light or when it slowed down for it. D.M. ran away and again went to his older brother's apartment. The mother saw him there and deposed that she told him to return to his father. D.M. refused to do so, saying he "would rather live on the street" and ran away again.

[12] The father filed a missing person report with the Toronto and Durham police. D.M. called the police on February 20, 2015, saying he was not missing, did not wish to live with his father, and refused to give his contact information.

[13] On February 23, 2015, the Chief of Police filed a motion to remove the police enforcement clause from the order.

[14] Over the following months, the father received conflicting information from the two police forces about the investigation. The Toronto Police received an additional call from D.M. on April 22, 2015 and he met with police officers in person on May 6, 2015. The police made a note saying they were concerned for his safety if they enforced the custody order and closed their missing person investigation.

[15] The mother brought a motion to change the custody order by awarding custody to her or, alternatively, that there be no custody order.

[16] At the time of the motions judge's change order in December 2015, M.M. was at university but resided with the mother when he was not in school. D.M., age 16, lived alone in an apartment and was completing high school.

B. DECISION BELOW

[17] With respect to the Chief of Police's motion, the motions judge noted that there were two technical procedural problems, but the case proceeded as if proper procedure had been followed. The motions judge found that the Chief had

standing under either rule 14(1)-(2) or 25(19)(d) of the *Family Law Rules*, O. Reg. 114/99. The motions judge held that motions under those rules do not require a material change. The motions judge refused to deny the Chief a right of audience because of any reported improper actions or comments by individual members of the force.

[18] The motions judge rejected the father's arguments, made pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) and those invoking the Superior Court's *parens patriae* jurisdiction, in aid of his submission that the children were being unlawfully withheld. Instead, the motions judge concluded that the police enforcement clause should be removed from the order, noting that it was not in the children's best interests to maintain a provision for physical compulsion as it was unlikely to work and would likely make it harder for the relationship between the father and sons to be repaired.

[19] The motions judge next considered the parents' motions for custody and access. He found that both sons were "children of the marriage" within the meaning of the *Divorce Act* at the time of the final custody order and held that, although the older son was now over 18, he might still qualify as a child of the marriage, at least for some purposes.

[20] The motions judge discussed the issue of material change in circumstances, noting that this was a pre-requisite to the court's exercise of

jurisdiction to change the custody and access terms of the February 17, 2015 order.

[21] He found that there were material changes, including:

- The older son turned 18 and younger 16;
- The father effectively abandoned his effort to secure custody or control of the older son;
- The younger son physically resisted going into the father's custody;
- Almost one year has passed since the order was made and no contact had been restored between the sons and the father;
- Both sons appeared before the court to assert they cannot be compelled to go to a reunification program, or to live where they do not want to live; and
- Police were unwilling to enforce the order.

[22] The motions judge also considered the issue of withdrawal from parental control. He noted that the sons stated that they wanted to establish their own lives, but did 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. He further noted that 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 university courses. The motions judge concluded that the evidence

did not establish that either of the sons had withdrawn from parental control and thus they remained children of the marriage.

[23] Having found a change of circumstances, the motions judge held it was not in the children's best interests to continue the existing custody order. Given the extent of acrimonious litigation between the parents he could not make an order for joint custody. The older son was 18 and a custody order was not needed for any purpose. The younger son was almost 17, had registered in school on his own, and did not need anyone to consent to health care on his behalf. Thus, for practical purposes he did not need a custody order either. The motions judge decided to make no custody order. At para. 150 of his reasons, he stated:

> 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.

[24] The motions judge further held that the parents did not have any right to secure information from providers of medical or educational services, or from each other. Access to information about each son was entirely within D.M.'s and M.M.'s own control.

C. ISSUES

[25] The major issues in this appeal can be characterized as follows:

1. Did the motions judge err in finding a material change of circumstances?

2. Did the motions judge err in changing the custody order from Justice Goodman's February 17, 2015 custody order?
3. Should the children be ordered to attend the Family Bridges Program? Did the motions judge err in finding that the Family Bridges Program was a medical treatment under the *Health Care Consent Act, 1996,* S.O. 1996, c. 2 that required the children's consent?
4. Did the motions judge err in removing the police enforcement clause from the order?
5. Have the children withdrawn from parental control (raised on cross-appeal)?

D. ANALYSIS

(1) The motions judge did not err in finding a material change of circumstances

[26] A court cannot vary a custody or access order absent a change in the "condition, means, needs or other circumstances of the child," as required by s. 17(5) of the *Divorce Act*.

[27] The father's preliminary argument is that the trial judge erred in not ordering a full hearing. Such a hearing was required to determine whether there had been a material change in circumstances, rather than relying on conflicting affidavit evidence.

[28] It does not appear from the record that any party sought to question the other on their affidavit evidence. Moreover, there are no significant credibility findings required to be made. I would thus dismiss this preliminary argument.

[29] The father's first argument is that the trial judge erred in finding a change of circumstances. He submits that the change of circumstances found is not in accordance with the decision of the Supreme Court of Canada in *Gorden v. Goertz*, [1996] 2 S.C.R. 27, at paras. 10-13. That decision states that there are three components to a material change of circumstances: 1) a change in the condition, means, needs or circumstances of the child and/or or the ability of the parents to meet those needs; 2) the change must materially affect the child; and 3) the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[30] The father submits that it was foreseeable that the children would age, and the other factors that the trial judge mentioned all go to the ongoing conflict between the father and D.M. It was foreseeable that D.M. would resist being in the custody of his father and going into the Family Bridges Program. There was no material change in circumstances as the relationship between the father and D.M. had not changed. The trial judge did not give sufficient weight to the arbitrator's decision in finding that there had been a material change of circumstances. The arbitrator found that the relationship between the children and their father had been good at one time and that the Family Bridges

reunification program was the last opportunity to salvage the relationship. There was evidence that it was not in the long term best interests of the children not to have a relationship with their father. Self-help is not to be encouraged. Enforcement of the consent court order embodying the arbitrator's decision is essential to respect the rule of law.

[31] The father seeks to isolate the individual factors found by the trial judge which, considered as a whole, amount to a change of circumstances. In considering whether there had been a change in the condition, means, needs and circumstances of the child, the trial judge was entitled to look at the intervening circumstance, namely that the younger son ran away and went underground. What the father seeks to have us do is take a different view of the evidence that was before the trial judge. While resistance to the consent custody order was foreseeable, what was not foreseen was the extreme resistance by D.M. He put his health and safety at risk in opposing the custody order and the evidence indicated he would continue to do so. The fact that D.M. was now over 16 meant that he had a greater capacity to frustrate the consent custody order. The trial judge did not err in holding that there had been a material change of circumstances.

(2) The motions judge did not err in changing the custody order

[32] The father's second argument is that the trial judge erred in concluding that the risk to D.M. of continuing the custody order in his favour outweighed the impact on him if he did not develop a relationship with his father. He submits that parental alienation has been found to be akin to emotional abuse and is not in D.M.'s long term best interests. It was an error for the trial judge to rule based on the wishes of D.M. because his voice is that of an alienated child, not an independent voice. The father submits that the best interests of D.M. require reinstatement of the final order.

[33] In support of his submission, the father cites a number of decisions in which he argues the court ignored the child's wishes because those wishes were irreparably tainted by the alleged parental alienation. See, for example, *L. (A.G.) v. D. (K.B.)*, 93 O.R. (3d) 409 (C.J.), at paras. 143-149; *Pettenuzzo-Deschene v. Deschene*, 40 R.F.L. (6th) 381 (Ont. S.C.), at para. 55; *Tock v. Tock*, [2006] O.J. No. 5324 (Ont. S.C.), at paras. 121-123; *O. (C.) v. O. (D.)*, 2010 ONSC 6328, at para. 16; *Decaen v. Decaen*, 2013 ONCA 218, 303 O.A.C. 261, at paras. 42, 44-45.

[34] The father's submissions are in essence the same submissions he made before the motions judge. At para. 140 of his reasons, the motions judge gave his conclusions on this issue as follows:

> 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.

[35] The motions judge acknowledged that the arbitrator accepted the expert evidence that the father had one last chance, in the form of the Family Bridges residential reunification program, to rebuild a relationship with his sons. That last chance opportunity had regrettably been missed. He was convinced that D.M. would go into hiding and drop out of school again if he renewed the custody order in favour of the father. It would not be in D.M.'s best interests if his education and career options were disrupted. The motions judge also observed that the two sons were bonded to each other, the mother and her family. Were he to enforce the order the sons would have no family, not even each other (while following the Family Bridges Program). He was of the opinion that it was not in the children's best interests to maintain these barriers any longer. The motions judge was also of the opinion that renewing the existing custody order would likely only serve to strengthen the children's opposition to it.

[36] I agree with the father's submission that the jurisprudence indicates the wishes of the child and the best interests of the child are not necessarily

synonymous. However, the motions judge referred to this existing jurisprudence as well as the jurisprudence that, as a practical matter, older children will make their own residential choice: see, *Supple v. Cashman*, 2014 ONSC 3581, 45 R.F.L. (7th) 273 (S.C.), at para 17; *Ladisa v. Ladisa* (2005), 11 R.F.L. (6th) 50 (Ont. C.A.), at para 17. The motions judge carefully considered the father's submissions and gave cogent reasons for rejecting them, having regard to D.M.'s best interests. In the absence of any palpable and overriding error in the exercise of his discretion, which has not been demonstrated, this court cannot intervene in the change of the custody order.

(3) Disposition on remaining issues on appeal

[37] My decision makes it unnecessary for me to consider the issue of whether D.M.'s forced participation in the Family Bridges Program amounted to treatment and required his consent under the *Health Care Consent Act, 1996*.

[38] As the father's request to reinstate the original custody order in his favour with respect to D.M. has been dismissed, his appeal of the motion judges' decision removing the enforcement clause in the custody order at the behest of the Chief of Police's must also fail.

[39] The appeal is dismissed.

E. THE CROSS-APPEAL

(1) The motions judge's order effectively grants the relief requested

[40] Both D.M. and M.M. seek an order that no person has custody or access rights over either of them as well as an order that no person may force them to attend or participate in the Family Bridges Program. The father did not appeal the motions judge's order in respect of M.M. In dismissing the father's appeal with respect to D.M., above, this court affirmed the motions judge's order that no person has custody or access rights over him. It follows that no person has custody or access rights over D.M. or M.M. and neither can be forced to attend or participate in the Family Bridges Program. Thus, this requested relief has already in effect been granted.

(2) No additional declaration on D.M.'s withdrawal is required; the motions judge's declaration stands

[41] D.M. also seeks a declaration that he has "withdrawn from parental control and has all of the statutory and common law rights of an independent minor".

[42] Section 2(1) of the *Divorce Act* defines a "child of the marriage". For ease of reference the relevant portion is as follows:

> 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...

[43] The motions judge held at para. 127 of his reasons that, "There must be some credible evidence of withdrawal from or resistance to the authority of both parents." On the evidence before him, he was not persuaded that either of the sons had actually withdrawn from their parents' charge or from parental control. He concluded that they remained "children of the marriage".

[44] The father submits that, as the motions judge held, a child cannot unilaterally withdraw from the control of one parent thereby removing the court's jurisdiction to make a custody order over him with respect to that parent. Nor can a child who is being supported by a parent be said to have withdrawn from that parent's control. The father's position is that D.M. remains a child of the marriage and the motions judge had to make a custody order. He says that he is the only person in whose favour a custody order can be made having regard to the mother's conduct in alienating D.M. from him.

[45] I disagree that the motions judge was obliged to make a custody order. Section 16(1) of the *Divorce Act* provides:

> 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. [Emphasis added.]

[46] Even assuming that D.M. continues to be a child of the marriage over whom the court has jurisdiction to make a custody order, s. 16 does not oblige the court to make an order. The use of the word "may" is indicative that the court

has a discretion which it may or may not choose to exercise. The motions judge was entitled to exercise his discretion as he did and decline to make any order as to custody. Although such orders are rare, they do exist: see, for example, *McBride v. McBride,* 2013 ONSC 938 (S.C.), *Sharpe v. Sharpe*, 14 R.F.L. 151 (Ont. S.C.).

[47] After rescinding the custody order in favour of the father, the motions judge did not simply refuse to exercise any jurisdiction that he had. Paragraph 2 of his December 19, 2015 order states:

> There shall be no order respecting the custody of or access to M.M., born July 30, 1997, and M.D., born March 11, 1999 under any statute or any non-statutory jurisdiction of this court.

[48] Thus, the presumptive custody provisions contained in s. 20 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 that apply in the absence of a court order or separation agreement have been altered by the court's order. In this regard I note that s. 20 (7) of the *Children's Law Reform Act* states:

> Any entitlement to custody or access or incidents of custody under this section is subject to alteration by an order of the court or by separation agreement.

[49] D.M. agrees with the motion judge's order insofar as it does not grant any person custody of or access to him. Nonetheless, he seeks, "A declaration that D.M. has withdrawn from parental control and has all of the statutory and common law rights of an independent minor."

[50] In support of his submission D.M. relies, in part, on the decision of Kiteley J. in *Glegg, Re*, 2016 ONSC 5292, granting similar declaratory relief. That decision is under appeal to this court and the reasons are yet to be released.

[51] Insofar as declaratory relief is concerned, I note that the jurisprudence is to the effect that the Superior Court's jurisdiction to grant declaratory relief is not to be exercised in a vacuum; a court must have a reason to exercise its discretion to grant declaratory relief; where legislation exists dealing with the subject matter, the court should consider whether a legislative gap exists that would give rise to a jurisprudential reason for exercising the court's discretion to grant declaratory relief. See, for example, *Danso-Coffey v. Ontario*, 2010 ONCA 171, 99 O.R. (3d) 401, at paras. 30-32; Donald J. M. Brown, Q.C. & the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (2016-Rel. 3), (Toronto: Thomson Reuters Canada Ltd., 2013), at p. 1-77. A declaration can only be granted if it will have practical utility in settling a "live controversy" between the parties: see *Daniels v. Canada,* 2016 SCC 12, 395 D.L.R. (4th) 381, at para. 11, *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; Brown and Evans, at p. 1-73. None of this jurisprudence was the subject of submissions before us.

[52] In any event, in my opinion, para. 2 of the motions judge's order is a declaration. It is not the precise wording that D.M. seeks. However, D.M. has not shown that the motions judge erred in principle in exercising the inherent

discretion of a Superior Court judge to make the declaratory order he did. Accordingly, I would dismiss the cross-appeal.

F. COSTS

[53] No costs were ordered by the motions judge at first instance. In the event that this court held the motions judge wrongly exercised his discretion in not awarding costs, he would have awarded the mother costs of $12,500.

[54] At the conclusion of this appeal, counsel advised the court of a wish to make submissions in writing once these reasons had been released. Accordingly, any party seeking costs shall serve costs submissions within ten days of the release of these reasons on the party from whom costs are sought. Responding submissions are to be served within a further ten days. There are to be no reply submissions. Submissions are limited to two pages not including a Bill of Costs on a partial indemnity scale which may be attached.

Released: RAB DEC 0 5 2016

K. M. Weiler J.A.

I agree R.A. Blair J.A.

I agree. K. van Rensburg J.A.