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PART I:
STATEMENT OF THE CASE

1. The Appellant appeals the December 19, 2015 Order of Justice Perkins, and seeks to re-instate the February 17, 2015 Order (the "Consent Order") which in turn confirmed the Arbitrator's Award of February 11, 2015. The Consent Order, among other things, granted the Appellant sole custody of D.M. and M.M. ("the Children") and required the Children to attend the family-reunification Family Bridges program ("FBP"). The Consent Order was set aside on December 19, 2015 pursuant to motions to change by the Respondent Mother and the Respondent Chief of Police.

2. The Children agree with the Order of December 19, 2015 in so far as it does not grant any person custody of or access to them; however, the Children submit that the decision erred in failing to confirm the Children's withdrawal from parental control.

3. The Children submit that an order for custody or access cannot be imposed on M.M., who is now an adult, and that D.M.'s withdrawal from parental control precludes an order for his custody. Alternatively, the Children submit that it is not in D.M.'s best interests for this Court to re-instate the Consent Order.

4. On cross-appeal, the Children submit that a child has a right to withdraw from the parental control of just one parent.

PART II:
STATEMENT OF FACTS

5. By the date set for this appeal, M.M. will be 19 years old (date of birth July 30, 1997) and D.M. will be 17½ years old (date of birth March 11, 1999). Their parents, N.L. ("Mother") and R.R.M. ("Father"), separated a second and final time in January 2012. Prior to separation, the family home was a place of turmoil with physical violence and criminal charges laid against each

of the parents. Attempts at counselling and therapy were largely unproductive. The family environment was toxic, abusive, emotionally draining, and harmful to the Children's mental health. The one mental health professional (Dr. Morris, a psychologist) with whom the Children had a trusting relationship, was ultimately forced to withdraw his services as a result of interference by the Father.

> ***L. (N.) v. M. (R.R.)*, 2016 ONSC 809 at paras 13 to 25, Respondent Children's Book of Authorities ("RCBOA") Tab 1.**
> ***Affidavits of M.M. and D.M.*, Appellant's Appeal Book and Compendium ["AABC"], Tabs 33, 34.**

6. The Arbitrator painted a grim picture of the family history and its effect on the family members: "I can think of no family that I have been involved in…who have engaged in this level of battle… their trench warfare has caused enormous harm to each of them, but also to their children." The Mother was found to have alienated the children from their father.

> ***L. (N.) v. M. (R.R.), supra*, at para 27, RCBOA Tab 1.**

7. The Arbitrator's award dated January 16, 2015 did not change the custodial arrangement, but in light of the alienation, the Father and Children were ordered to participate in the FBP. The Arbitrator noted that this was the "last opportunity for [the Father] to salvage a relationship with the children."

> ***L. (N.) v. M. (R.R.), supra,* at para 27, RCBOA Tab 1.**

8. Following the award, the FBP refused to accept the Children unless the award included specific provisions on a range of issues. A further "Final Award" was issued by the Arbitrator on February 11, 2015 that incorporated virtually all of the FBP's required provisions, including terms granting the Father sole custody, permitting the Father to control treatment for the children,

eliminating contact between the children and their family, and much more. We are advised that this Final Award was made without any submissions on behalf of the parties or the Children.

***Arbitration Award 4: Parenting Addendum,* AABC Tab 5B.**
***Arbitration Award 4: Parenting Issues Final Award,* AABC Tab 5D.**

9. The Arbitrator informed the Children of the award on February 17, 2015. On the same day, the award was incorporated into the terms of the Consent Order. The Children both immediately indicated their opposition to the award. M.M. was given choices on the issues of participating in the FBP and going with his father; he chose to do neither.

***Affidavits of D.M. and M.M.,* AABC Tabs 33 and 34.**

10. D.M. felt ambushed in that he was given no choice and was immediately escorted out of the Arbitrator's office by two private security guards. He did not know where he was being taken; he felt like he was being kidnapped. He believed he had no option but to run away, so he did. D.M. thought he would find support in his brother and his mother, but his mother took him to a police station, and the police in turn delivered D.M. to his father.

***Affidavits of D.M.,* AABC Tabs 31 and 34.**

11. On leaving the police station, D.M. was put in back seat of his father's car with the child lock doors engaged. D.M. climbed into the front seat and when he opened the door, his father sped up. When the car slowed a bit, D.M. jumped out of the moving car and ran away.

***Affidavit of D.M.,* AABC Tab 31.**

12. D.M. went into hiding for several weeks. He stopped going to school, was living "place to place", and did not have any of his belongings with him. During this time he lived in fear of being found and arrested by the police. The Toronto Police Service made numerous efforts to locate D.M.; meanwhile D.M. contacted the police to say he was safe and that he did not wish to return to

his father. He did not emerge from hiding until he was 16, and engaged his legal right to withdraw from his Father's custody.

***Affidavits of D.M.*, AABC Tabs 31 and 34.**

13. The Mother and the Toronto Chief of Police both independently brought motions to change the Consent Order. The Father also brought a motion for the police to be found in contempt.

***L. (N.) v. M. (R.R.), supra*, at paras 6-9, RCBOA Tab 1.**

14. The Children were not parties to the arbitration or the Consent Order; nor were they provided an opportunity to have their views and wishes presented. They successfully brought a motion seeking authorization for legal representation and rights to participate in the motions to change. D.M. stated adamantly in his affidavits that he had withdrawn from parental control and would not return to his father. Both D.M. and M.M. indicated their exhaustion with the family turmoil and their desire to be free from "all the craziness."

***L. (N.) v. M. (R.R.), supra*, at para 33, RCBOA Tab 1.**
***Affidavits of D.M. and M.M.*, AABC Tabs 29-34.**

15. Before the motions were heard, D.M. registered and enrolled in school as an independent minor. He lived alone in an apartment paid for by his mother. He received no support of any kind from his father. M.M. enrolled in a university program and lived at various times with his mother and in an apartment on his own.

***L. (N.) v. M. (R.R.), supra*, at para 16, 48, RCBOA Tab 1.**

PART III:
STATEMENT OF ISSUES AND THE LAW

Issues Raised on Appeal

16. The Father's factum raises the following issues for response by the Children:

a. What is the appropriate standard of review?

b. Did the court have jurisdiction to make an order for D.M.'s custody or access?

c. What is in D.M.'s best interests?

d. Can the court force children into treatment without their consent?

e. Is the Family Bridges program "treatment" under the *Health Care Consent Act*?

f. Was there a material change in circumstances?

g. Did the judge err in allowing the matter to proceed without *viva voce* evidence?

h. Were the Mother and the Chief of Police in non-compliance with the Consent Order; and if so, should the court have refused to hear their motions as a result?

Issues Raised on Cross-Appeal

17. On cross-appeal, the Children raise the following issue:

i. Can a child withdraw from the parental control of one parent?

Preliminary Matter: Exclusion of M.M. from the Analysis

18. As a preliminary matter, the Children submit that there is no lawful authority for an order regarding custody of or access to M.M. M.M. is 19 years old. He is neither a minor nor is he under the charge of his parents. He is excluded from the custody provisions of the *Children's Law Reform Act* (*"CLRA"*) and the definition of "child of the marriage" under the *Divorce Act.*.

***Affidavit of M.M.*, AABC, Tab 30.**
***CLRA*, s. 18(2).**
***Divorce Act*, s. 2(1).**

Discussion of Issues

a. What is the appropriate standard of review?

19. Custody determinations are necessarily decisions of mixed law and fact. They are entitled to great deference on appeal. An appellate court may only intervene when there has been a material error, a serious misapprehension of the evidence, or an error in law. Where there is an issue of law, the standard of review is correctness. Otherwise, the decision is deserving of considerable

deference, particularly given the importance of finality in such cases. Where the appellate court intervenes, the remedy must put the children's best interests first.

> ***Van de Perre v. Edwards*, 2001 SCC 60 [*Van de Perre*], at paras 13, 50, RCBOA Tab 2.**
> ***Perron v. Perron*, 2012 ONCA 811 [*Perron*] at paras 25-26, RCBOA Tab 3.**

20. Issues b, d and i (jurisdiction to make custody order, forced treatment, and withdrawal from the control of one parent) are issues of law to be reviewed on a correctness standard. The remaining issues are questions of mixed law and fact and deserving of deference.

b. Did the court have jurisdiction to make an order for D.M.'s custody or access?

Custody and the Right to Withdraw from Parental Control

21. Custody is a "bundle of rights and obligations" known as incidents of custody. They include the right to physical care and control of the child, to determine the child's residence, to discipline the child, and to make decisions about the child's education, religion, and activities. The incidents of custody can be dealt with all together or separately.

> **Kalliokoski v. Kalliokoski, 2016 ONSC 2273, at para 27, RCBOA Tab 4.**
> ***Young v. Young*, [1993] 4 S.C.R. 3, RCBOA Tab 5.**
> ***Chou v. Chou*, [2005] O.J. No. 1374 (Ont. S.C.J.), at para 21, RCBOA Tab 6.**

22. The common law grants a child who reaches the "age of discretion" the right to withdraw from parental control; such that the child may terminate or extinguish the parent's right to control the incidents of custody. [1] The age of discretion in Canada has, over time, settled at the age of 16.

> ***Rex v. Greenhill*, 4 A. & E. 624 [*Greenhill*], at 927-928, RCBOA Tab 7.**
> ***The Queen v Howes* (1860), 3 El. & El. 332; 121 E.R. 467 [*Howes*], at 468-469, RCBOA Tab 8.**
> ***R v Redner* (1893), 6 BCR 73 (SC), at para 2, RCBOA Tab 9.**
> ***Andrews (Mary Ellen) (An Infant)*, Re 1873 L.R. 8 Q.B. 153 [*Re Andrews*], at 158-159, RCBOA Tab 10.**
> ***Glegg v Glegg*, 2016 ONSC 3582, at para 17 (Case currently under appeal), RCBOA Tab 11.**

23. The right of a parent to control a child is a diminishing right over time. Children's capacities and personal agency are constantly evolving, in particular throughout adolescence. The

[1] A helpful summary of the right to withdraw is found in Justice Perkins' decision at paras 109-110: *L. (N.) v. M. (R.R.),* 2016 ONSC 809 at paras 109-110.

right to withdraw from parental control is, in part, recognition of the effect of this growing capacity and agency on the parent-child relationship. The United Nations has commented on this evolving capacity in the following way: "The more the child… knows, has experienced, and understands, the more the parent ....will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing." It is in the best interests of children that this shift in control and responsibility and the transfer of agency to the child should occur gradually with significant milestones.

> **See for example:** ***Hewer v Bryant*** **(1970), 1 QB 357 (CA), at 10, RCBOA Tab 12.**
> ***CRC General Comment No.12, The Right of the Child to be Heard,*** **CRC/C/GC/12, July 2009, at para 84, RCBOA Tab 13.**
> ***AC v Manitoba,*** **2009 SCC 30, at paras 87-88, RCBOA Tab 14.**

24. At the age of discretion, the right of the child to withdraw from parental control is unfettered. There are no qualifications, exceptions, or preconditions. The common law further establishes that the child's ability to exercise the right does not depend on mental capacity: the only consideration is the age of the child.

> ***Howes, supra,*** **at 468, citing** ***Regina v Clarke,*** **(7 E. & B. 196, 197), RCBOA Tab 8.**
> ***Re Andrews, supra,*** **at 159, RCBOA Tab 10.**

The Inherent Conflict

25. A child's right to withdraw from parental control is inherently in conflict with a parent's custodial rights. A parent cannot continue to exercise control over the incidents of custody while the child simultaneously extinguishes that control by withdrawing from parental control. In this context it is the child's right to withdraw that prevails. This prioritization of the child's right has been codified in the applicable legislation:

- Section 2(1) of the *Divorce Act* provides that a child is only a "child of the marriage" if the child has not withdrawn from parental charge.

- Section 65 of the *CLRA* establishes that the child's right to withdraw from parental control supersedes the parent's claim for custody of or access to the child:

> Nothing in this Part abrogates the right of a child of sixteen or more years of age to withdraw from parental control. [Emphasis added]

26. In Ontario, the policy rationale for prioritization of the child's right to withdraw is further emphasized by the legal framework of the child welfare system. Upon reaching the age of 16 in Ontario, a child is no longer eligible to be taken into the care of a children's aid society. Absent the right to withdraw from parental control, a child of 16 or more years living in an untenable home situation is left without recourse. The same policy rationale extends to children living in home environments that are harmful to their education pursuits or mental health, or to children living with parents who refuse or fail to act in the children's best interests.

The Lack of Existing Jurisprudence in the Custody Context

27. The existing jurisprudence regarding the right to withdraw from parental control has generally considered this right in the context of parental support obligations. Neither section 65 of the *CLRA* nor the term "withdrawn from their charge" in the *Divorce Act* has been considered by the courts in the context of a claim for custody or access. In light of this novel issue, the Children submit that the appropriate approach should be informed by the common law history and the existing statutory protections of the right to withdraw; and that the absolute nature of the right and its prioritization over a parent's right to custody should be recognized.

***L. (N.) v. M. (R.R.), supra,* at para 122-126, RCBOA Tab 1.**

The Analysis in Custody/Access Matters is to be Distinguished from the Approach in Support Matters

28. A child may withdraw from parental control voluntarily or involuntarily. Where a child's withdrawal is voluntary, both the rights and support obligations of the custodial parent are extinguished: section 31(2) of the *Family Law Act* and the courts' interpretation of the definition of

"child of the marriage" under the *Divorce Act* both create a defence for a parent such that the parent's obligation to provide child support is extinguished upon a child's voluntary withdrawal.

> ***Stodart v Stodart,*** **[2008] O.J. No. 5011, [2009] W.D.F.L. 2761, at para 22, RCBOA Tab 15.**
> ***Belanger v Belanger,*** **[2005] W.D.F.L. 3583, [2005] O.J. No. 3033, at para 22, RCBOA Tab 16.**
> ***Family Law Act,*** **s. 31(2).**
> ***Divorce Act,*** **ss.15.1(1).**

29. However, where a child's withdrawal is involuntary, the parental support obligation remains intact. In the context of support obligations, involuntary withdrawal may in some ways be understood as analogous to what happens when a court orders "sole custody" in favour of one parent. In those cases the sole custodial parent is granted control over all the incidents of custody, but the non-custodial parent's obligation to provide support is not extinguished. In the same way, when a child withdraws from parental control involuntarily, the child takes control over the incidents of custody, but the parental obligation to provide support is not extinguished.

30. In a claim for child support by the child, the court undertakes a two-stage analysis regarding withdrawal from parental control: first, the court determines whether the child has withdrawn from parental control; if so, at the second stage the onus is on the child to establish the involuntariness of the withdrawal in order to qualify for support. The second stage acts as a balance to the court's task to ensure that a parent is not unfairly saddled with the obligation to provide support for a child who is voluntarily not living with the parent while guarding against parents who seek to escape the responsibility of supporting children who are involuntarily not living at home.

> ***Ball v Broger,*** **2010 ONCJ 557, at paras 34 – 35, RCBOA Tab 17.**
> ***Edwards v Edwards,*** **[1998] O.J. No. 492, 77 A.C.W.S. (3d) 816, at para 15, RCBOA Tab 18.**

31. The Children submit that a similar approach can be applied in the context of custody claims, however, the second stage of the analysis (the in/voluntariness determination) is

superfluous because the possibility of continuing the parental support obligation is not at issue. The only issue in a custody claim is who holds control of the incidents of custody. Contrastingly, in a support claim, the court must not only determine who controls the incidents of custody (stage 1), but must also determine whether a parent's obligation to provide support remains (stage 2). Where a child is found to have withdrawn from parental control, the child controls the incidents of custody. The first stage of the analysis completely determines the relevant issue.

32. The absolute right of a child to withdraw from parental control sets a low bar for determining withdrawal from parental control in a claim for custody. Factors indicating whether a child has taken control of the incidents of custody might include, but are not be limited to, the child's intentions and declarations as expressed to the court and others, control over their place of residence, educational choices, religious affiliations, and their finances.

> ***Broger, supra,* at para 31, RCBOA Tab 17.**
> ***KAB v Ontario (Registrar General),* 2013 ONCJ 684 at para 12, RCBOA Tab 19.**

33. Whereas a child's claim for child support may require the court to rule on the issue of voluntariness (stage 2), outside of a claim for support a child may exercise the right to withdraw unilaterally without involving the court. This is because the child's own declaration of withdrawal is all that is needed for the child to access the subsidiary rights that flow from withdrawal.[2] This unilateral right to extinguish another person's rights without court endorsement is not novel. Other examples include an employee's right to quit and a parent's right to refuse to take custody of a child.

34. Significantly, the Children's approach as described above does not preclude a court from making custody orders for children 16 years or older. Indeed it is not unusual for a child of 16

[2] Some examples of statutes in Ontario that create subsidiary rights flowing from the withdrawal from parental control include the following: the *Family Law Act* (section 31(2)); the *Education Act* (in particular sections 21(5), 300.3, 308, 309, 311, 311.1, and 311.3); the *Human Rights Code* (section 4), the *Succession Law Reform Act* (section 62(1)(q)); and the *Child and Family Services Act* (sections 137 and 146).

years or more to accept a court's order regarding custody, and there are cases where 16 year olds actively ask the court to grant custody to a particular parent. These situations are not affected by the approach and analysis proffered by the Children, which is only necessary when custodial rights conflict with the child's right to withdraw.

Distinguishing Control and Support

35. The Children submit that the Court should recognize the distinction between the provision of parental support (advice and other assistance) and the exercise of control (management and direction) over a child's choices. A child may withdraw from parental control while still seeking to have support and other relational connections with the parent. For example, where a child withdraws involuntarily and obtains an order for child support, the child is deemed to have withdrawn from parental control but is nonetheless dependent on the ongoing child support. In other words, a child may have withdrawn from parental control, but may continue to receive financial and other kinds of support (moral, emotional, etc.) from a parent or from other supportive adults. The relevant factor is the degree of control exercised by the child.

Incompatibility of a "No Custody" Order with a Finding that a Child has Not Withdrawn

36. The Children submit that a court cannot simultaneously find that a child has not withdrawn from parental control and find that no person has custody of the child. Combining such findings creates unworkable and bizarre outcomes. For example, the *Education Act* provides that a child may only register for school in the school zone where the parent lives unless the child has withdrawn from parental control. In the present case, if D.M. chooses to live in an area away from one of his parents D he would be legally unable to register for school. Similarly, the *Human Rights Code* does not protect a minor from discrimination in housing unless the minor has withdrawn

from parental control. D.M. is not protected, yet his parents have no obligation to provide housing for him.

> ***Education Act,* s. 36.**
> ***Human Rights Code,* s. 4**

37. As demonstrated by the examples above, Justice Perkins erred in finding that that D.M. has not withdrawn from parental control and at the same time, making an order that no person has custody of him. The legal consequence of these conflicting findings is that neither D.M. nor his parents are legally entitled to act on certain matters that may require action.

> ***L. (N.) v. M. (R.R.), supra,* at para 127, RCBOA Tab 1.**

Application to the Present Case

38. The Children submit that D.M. has withdrawn from parental control. The Mother's and Father's rights to custody of D.M. have been extinguished and the court had no jurisdiction to grant custody over D.M. This is demonstrated by D.M.'s active steps to take control over his custody and its incidents: following the Consent Order, D.M. lived without a known address for some time, living from "place to place" against the stated wishes of his parents; he never returned to living in either of his parents' homes; while D.M.'s mother paid the rent on the condo where he lived, she did not live there nor did she exercise any control over his choice of residence; he persisted in his withdrawal from control with no request for or expectation of financial support; D.M. independently made arrangements to register and return to school; he refused to provide consent to the school to share his information with his father; and D.M. expressed to the court in very clear terms that it was his intention to withdraw from parental control.

c. What is in D.M.'s best interests?

39. Should this Honourable Court disagree with the foregoing analysis, the Children submit that Justice Perkins' decision to not grant custody or access rights to anyone was in D.M.'s best interests; and an order re-instating the Consent Order would be contrary to D.M.'s best interests.

The best interests determination is an issue of mixed law and fact and the findings of a lower court must be provided considerable deference. Further, any intervention on appeal must be made in D.M.'s best interest.

***Perron, supra,* at paras 25-26, RCBOA Tab 3.**

40. The Children substantially agree with the following findings of Justice Perkins regarding their best interests: their wishes are strong, consistent, and long lasting; their wishes are deserving of serious consideration; the opportunity for court-imposed reconciliation has been missed; re-instating the Consent Order could disrupt and potentially ruin D.M.'s educational prospects and career options, which is not in his best interests; the Consent Order has the effect of isolating the Children from their family, which is not in their best interests; mandating an exclusive relationship with the Father will not work; and; re-instating the Order would not result in reconciliation with the Father but may actually strengthen the Children's resolve to not reconcile.

***L. (N.) v. M. (R.R.), supra,* at paras 137-144, RCBOA Tab 1.**

41. A child's views and preferences are an integral consideration in matters of custody and access. Under s. 24(2) of the *CLRA* they are a mandatory consideration. The case law under the *Divorce Act* conforms to this.

***B. (A.C.) v. B. (R.),* 2010 ONCA 714 at para 18, RCBOA Tab 20.**

42. The importance of the Children's views is emphasized by the United Nations *Convention on the Rights of the Child* (the "*CRC*"). The Supreme Court has repeatedly found that the values reflected in international human rights law inform the approaches taken in Canadian courts. Article 12(1) of the *CRC* states:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, <u>the views of the child being given due weight in accordance with the age and maturity of the child</u>. [Emphasis added]

***Convention on the Rights of the Child, 1989,* C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25, RCBOA Tab 21.**
***G. (B.J.) v. G. (D.L.),* 2010 YKSC 44, [2010] Y.J. No. 119, [2011] W.D.F.L. 993, RCBOA Tab 22.**

43. The Father asks that the Children's views be ignored or discounted based on their lack of maturity because "findings in the field of neuroscience" establish "that the teenaged brain does not fully mature until approximately age 24." The Children submit that this is a gross oversimplification of the neuroscience, and in any event there is no evidence before the Court, or jurisprudential foundation to support the position that brain development science suggests that teenaged views are unworthy of consideration.

***Appellant's Factum*, at para 63.**

44. It is trite law that a child's views will be considered in family law matters. For example, as young as 7 years old a child's consent is required before an adoption can be approved under the *Child and Family Services Act.* Canadian courts consistently uphold the principle that the older and more mature a child is, the more weight his or her views should be afforded and in some cases a mature child's wishes will become the controlling factor. By the time this appeal is heard D.M. will be 17½ years old and the *CLRA* deems him capable to withdraw from parental control. His views are not only deserving of consideration, his age and level of maturity suggests that they should be the determinative factor. In the alternative, they should be afforded significant weight.

***Child and Family Services Act,* R.S.O. 1990, c. C.11, s. 137 (6).**
***AC v Manitoba, supra*, at para 87, RCBOA Tab 14.**
***Kaplanis v. Kaplanis*, [2005] W.D.F.L. 1005, 2005 CarswellOnt 266 [Kaplanis] at para 13, RCBOA Tab 23.**
***Kemp v Kemp,* [2007] OJ No 1131, [2007] W.D.F.L. 4141, at para 36, RCBOA Tab 24.**
***Dobranski v. Dobranski*, 174 A.C.W.S. (3d) 436, 2008 CarswellOnt 8315, at para 31, RCBOA Tab 25.**

45. The Father also argues that the Children's views and preferences are to be ignored or discounted because they are irreparably tainted by the alleged alienation and he offers a number of

cases claiming to support his position. The Children submit that the cases presented are distinguishable from the present case, and in any event, at least some of the cases relied on demonstrate that a child's views and preferences may be deserving of considerable weight despite findings of alienation. All but two[3] of the Father's supporting cases deal with children under 15; some with children as young as 3.

***Appellant's Factum*, at paras 62, 64-69.**

46. *MAK, infra,* is a decision of the Supreme Court of British Columbia and is distinguishable. In *MAK, supra,* the judge found that neither of the children (aged 15 and 17), "could convey any reason underpinning their animosity for their mother" and could not articulate rational reasons for not wanting to be placed in the custody of their mother. The judge had "no confidence" in the children's views. In contrast, D.M. has articulated detailed and rational reasons for not wanting to be in his father's custody.

***K.(L.D.) v K.(M.A.),* 2015 BCSC 226 [*MAK*], at paras 67, 99, RCBOA Tab 26.**
***Affidavit of D.M.*, AABC, Tab 34, at para 10; Tab 31, at para 17; Tab 34, at para 19; and Tab 34, at para 16.**

47. The court in *MAK* ordered the children to participate in a family reunification program. In response to one of the parent's queries about what would happen if these mature children acted independently to defy the court order, the court stated: "Well, we will cross that bridge when we get there... I will be available by telephone if this goes off the rails in some fashion." In the present case, the Consent Order has very much "gone off the rails," that bridge has been crossed, and as a result Justice Perkins was able to examine the sincerity and steadfastness of D.M.'s views, an option not available to the court in *MAK.*

***MAK, supra*, at paras 153-160, RCBOA Tab 26.**

[3] *K.(L.D.) v K.(M.A.),* 2015 BCSC 226 and *Perino v Perino*, 2012 ONSC 328.

48. *Perino, infra,* is entirely distinguishable as it was about the custody of a 28-year old with serious cognitive impairments. As a result the child's views and preferences required a different approach. Nonetheless, the court, being mindful of the alienation and lack of independence, stated to the child:

> 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. [Emphasis added]
> ***Perino v Perino,* 2012 ONSC 328 [*Perino*], at para 11, RCBOA Tab 27.**

49. The Children submit that, even if there were a finding of parental alienation, D.M.'s views and preferences ought to be determinative, or alternatively are deserving of serious consideration, in light of his age, maturity, and detailed articulation of his rational views. D.M. does not want to be placed into the custody of his Father or his Mother, does not want to repair the long-standing difficult relationship with his Father, does not consent to attending the Family Bridges program, wants to attend counselling on his own terms, wants to continue to live by himself, and wants to have contact with his brother, mother, and extended family.

> ***Affidavits of D.M.,* AABC Tabs 31 and 34.**

50. The Children submit that in any event the outcome D.M. desires is, on an objective basis, in his best interests. The immediate "short-term" consequences of ordering D.M. into his Father's custody will have devastating and long-lasting effects on D.M. The events following the Arbitrator's award gave the court the benefit of hindsight; as a result of the Consent Order D.M. put himself in physical danger, lived in fear, was hiding out without a stable place of residence, and sacrificed his own education and personal relationships in order to resist being forced into his Father's custody.

> ***Affidavits of D.M.,* AABC Tabs 31 and 34.**
> ***L. (N.) v. M. (R.R.), supra,* at para 141, RCBOA Tab 1.**

51. Justice Perkins reached the following conclusions regarding what would likely flow from re-instating the Consent Order: D.M. would likely go back into hiding and drop out of school; his educational prospects could be disrupted and potentially ruined; and an order for an exclusive relationship with the father will not work.

***L. (N.) v. M. (R.R.), supra*, at paras 142-143, RCBOA Tab 1.**

52. The passage of time since that time period, including the warfare-type litigation, the high levels of conflict, and the entrenched positions of all involved suggest that re-instating the Consent Order could have even more dangerous effects and induce an even more harmful set of circumstances for D.M. with lifelong consequences.

53. Further, the Arbitrator found that the FBP was the "last opportunity for [the Father] to salvage a relationship with the children." The affidavit of Dr. Sol Goldstein, an expert of the Father, stated "…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 D.M. and his father." Almost a year has passed since that statement was made and as Justice Perkins noted, "the last chance opportunity [for reconciliation] has regrettably been missed."

***L. (N.) v. M. (R.R.), supra*, at para 141, RCBOA Tab 1.**
***Arbitration Award 4*, AABC, Tab 5A, at para 32.**
***Affidavit of Sol Goldstein*, AABC, Tab 46, at para 5.**

54. The Children submit that placing the 17½-year-old D.M. in the custody of his father will fail and that it cannot be in D.M.'s best interests to force him down a path that is destined to fail.

d. Can the court force children into treatment without their consent?

55. The Children submit that a court may not order a child to obtain treatment without their informed voluntary consent. The *Health Care Consent Act* ("*HCCA*") sets the parameters regarding a person's capacity to consent to treatment and does not permit the court to force a person, including a child, to consent to treatment. Its purpose is:

> "to provide rules with respect to consent to treatment that apply consistently in all settings", "to enhance the autonomy of persons for whom treatment is proposed" and applies to all psychiatric, psychological and social work services and the practitioners who provide those services (and many others).[Emphasis added]
>
> ***Health Care Consent Act, S.O. 1996, c. 2, Sched. A [HCCA], ss. 1 - 2. Schedule 1.***
> ***O. Reg. 104/96: EVALUATORS.***
> ***Starson v Swayze*, 2003 SCC 32 [*Starson*], at paras 75-78, RCBOA Tab 28.**

56. Under the *HCCA*, a person is presumed to be capable regardless of age. Capacity is based on the person's ability to understand the treatment and appreciate the consequences of accepting or refusing treatment; treatment requires informed voluntary consent or consent given by a substitute decision maker; findings of incapacity can be challenged before the Consent and Capacity Board; a person 16 years and older may designate another person over the age of 16 to act as their "Power of Attorney for Personal Care" (or a Substitute Decision-Maker ("SDM")) should they be found to lack capacity in the future; and requires the SDM to give effect to the prior capable wishes of the person subject to the treatment.

> ***HCCA, supra*, ss. 4, 10, 11, 20(1), 21, 32, 33.**

57. The Father takes the position that a court can force children into treatment without their consent and that adult views of the children's best interests must prevail over their right to refuse treatment. The Children submit that both propositions are contrary to the *HCCA* and not supported by the legislation or cases cited by the Father.

58. The Father cites s.16(6) of the *Divorce Act* and s.28(1)(b) of the *CLRA* as permitting a court to order a child to attend counselling. These provisions do not address counselling, health care, or treatment, they do not grant courts the authority to force a child into involuntary treatment, and they do not purport to override the *HCCA*. This Honourable Court has previously found that it

is an error for a court to order counselling where the legislation does not authorize the making of such orders, and especially when such orders create practical problems requiring the cooperation of all involved.

> ***Appellant's Factum*, at para 75.**
> ***Kaplanis v. Kaplanis*, *supra*, at paras 14-15, RCBOA Tab 23.**

59. Only two of the 14 cases[4] cited by the Father refer to the *HCCA: JKL*, *infra*, and *CMG*, *infra*. Neither *JKL* nor *CMG* refer to *Starson*, *supra*, the leading decision of the Supreme Court on the interpretation of the *HCCA*. Both cases base their decisions on analyses that are in direct contradiction to both the *HCCA* and that do not follow *Starson*, *supra*. To the extent that these cases purport to usurp a child's right to consent to or refuse treatment, they are wrongly decided.

> ***L(JK) v S(NC)*, 2008 CarswellOnt 2903, [2008] W.D.F.L. 3430 [*JKL*], RCBOA Tab 29.**
> ***CMG v DWS*, 2015 ONSC 2201 [*CMG*], RCBOA Tab 30.**

60. In *JKL*, *supra*, the court stated that it was "not ordering LS to undertake any treatment or to participate in any program" but left discretion to the mother; and found that the *HCCA* was not "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." The child in that case was 13. Neither the *HCCA* nor *Starson*, *supra*, support the notion that a parent can consent to treatment on behalf of a child. A parent, even a parent who is attempting to act in the child's best interests, is not able to override a capable child's right to consent to or refuse treatment. A child's parent may only consent to treatment on behalf of a child where the child's parent has been determined to be the SDM, which itself first requires a finding of incapacity by a health practitioner (which can be appealed). Further, where the child is over the age of 16, the parent acting as a SDM is bound to follow the

[4] Cases cited in Appellant's factum between paragraphs 62 and 69.

prior capable wishes of the child. It follows that the mother's discretion in *JKL* was wholly insufficient to permit treatment and that the consent of the child was still required.

> ***JKL, supra,* at paras 192-193, RCBOA Tab 29.**

61. In *CMG, supra,* at paragraph 52, the court stated the following:

> It is my view that medical decision making is an incident of custody unless there is evidence that the child is a mature minor. Otherwise, the capacity to make decisions with respect to medical decisions does not fall within the scheme of the *Health Care Consent Act*.

62. This finding is incorrect and disregards the clear framework of the *HCCA*. The *HCCA* does not exclude children nor does it require a child to be a "mature minor" in order to be found capable. As the Supreme Court stated in *Starson, supra,* even patients with mental disorders are presumptively entitled to make their own treatment decisions. Further, even where a child lacks capacity, the decision making of the SDM still falls within the scheme of the *HCCA*.

> ***Starson, supra,* at para 77, RCBOA Tab 28.**

e. Is the Family Bridges program "treatment" under the HCCA?

63. As noted above the defined purpose of the *HCCA* is "to provide rules with respect to consent to treatment that apply consistently in all settings", and "to enhance the autonomy of persons for whom treatment is proposed" and applies to all psychiatric, psychological and social work services and the practitioners who provide those services.

> ***Health Care Consent Act, S.O. 1996, c. 2, Sched. A [HCCA], ss. 1 - 2.***
> ***O. Reg. 104/96: EVALUATORS***

64. Additionally, the Children submit that the FBP is clearly "treatment", and that the treatment poses more than "little or no risk" of harm to D.M. The *HCCA* defines treatment broadly. This definition was affirmed by the Supreme Court in *Rasouli, infra*. The *HCCA* definition states:

> "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,

[…]

(g) a treatment that in the circumstances poses little or no risk of harm to the person, [Emphasis added]

***HCCA, supra,* s.2(1).**

***Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre*, 2013 SCC 53 at para 47, RCBOA Tab 31.**

65. The Father relies on an article entitled "Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children" (the "Warshak article"). Dr. Richard A Warshak is a Psychologist [at 80] and one of the individuals responsible for developing the FBP [at 56]. He claims that the FBP "is based on an educational model and is not psychotherapy or counselling" [at 59]. He says that the FBP teaches "concepts derived from …cognitive, social, and developmental psychology, sociology, and social neuroscience" [at 59]. The Children submit that this distinction between education and psychotherapy is, in the context, a distinction without a difference. The FBP educational concepts are not "taught" to a student simply to confer knowledge. Rather the goal is to "repair the damaged child-parent relationship" [at 57] by assisting children to "apply the new concepts to their own situation" [at 65]. Importantly, "Currently all [FBP] team members are doctoral level psychologists…" [at 63].

***Appellant's Book of Authorities*, Tab 20, at 56, 57, 59, 63, 65, 80.**

66. The Warshak article goes into notable detail regarding the legal and ethical issues involved in coercively forcing children to participate in therapy, including a child's rights to self-determination and to refuse treatment [at 53-55]. The Children submit that the author is evidently aware that should the program be determined to be therapy, the legal and ethical ramifications might be such that the courts would be unable to force the program on capable participants without their consent. Importantly, Dr. Warshak is one of the chief proponents and practitioners of the FBP, earning fees upwards of USD$20,000 for each child in the program [at 70].

67. The Children submit that in order to make a legal determination about the applicability of the *HCCA* to the FBP this Court must carefully examine the objective purposes, methods, and effects of the program, as well as the professional designations of the providers, and not simply the language of the Warshak article. The language in the article nonetheless points to the fact that the program is indeed treatment that poses more than little to no risk of harm. In addition, numerous cases have referenced the FBP, considering it "therapeutic" treatment and even finding that it constitutes the "deprogramming" of children.

See for example:

> ***W. (J.C.) v. W. (J.K.R.),* 2014 BCSC 488, at paras 38-40, RCBOA Tab 32.**
> ***Huckerby v. Paquet,* [2015] W.D.F.L. 2333, 2014 CarswellSask 899, at para 144, 240, RCBOA Tab 33.**
> ***G. (J.M.) v. G. (L.D.),* 2016 ONSC 3042, at para 169, RCBOA Tab 34.**
> ***J. (C.J.) v. J. (A.),* 2016 BCSC 676, at para 271, RCBOA Tab 35.**

68. An order for participation in the FBP includes the pre-workshop and post-workshop components, as well as the during-workshop interventions. The program's success is dependent on the careful coordination and interaction of all these components [at 63]. The Warshak article attempts to sever certain components that tend to either demonstrate that the program is therapy or reveal that the program risks harm to the children. For example, under the heading "From Courthouse to Workshop" the article states that the "prerogative to use a transportation service belongs to the parent and occurs prior to and independent of the work we do" [at 62]. Similarly the article states that during the workshop, "…if psychotherapy is needed, appropriate referrals are given…" [at 59] suggesting that the "psychotherapy" is somehow unrelated to the program.

69. The changes to the Arbitrator's award to include virtually all the FBP's mandated requirements also reflect the interdependency of these components; these include:

> 2. That the custodial parent is authorized **to obtain treatment**/intervention for the children…;

5. That the custodial parent has the right to conceal from [the favored parent] the location of any intervention sought for the children (e.g. educational or **mental health intervention**)…;
6. …children are ordered to be brought to the court, office of the children's lawyer; same day as court judgment…;
9. That the custodial parent is authorized…to hire or designate persons to facilitate and assist with the transfer of the children to the location where any intervention will be conducted;
10. That both parents will sign any **consents to release information, as required by the intervention/treatment professionals**…;
17. The resumption, timing and nature of contact between the children and [the favored parent] will be based on the cooperation of the children and [the favored parent] with these Orders, with the Family Bridges program, and with the Aftercare specialist;
22. That the police and/or other law enforcement agencies shall enforce the terms of this Order and lend all necessary assistance to allow custodial parent to maintain sole custody of the children.
[Emphasis added]

***Arbitration Award 4,* AABC, Tab 5A, at para 32.**
***Arbitration Award 4 – Addendum*, AABC, Tab 5B, Schedule "A".**

70. While these may be considerations for possible inclusion in court orders where the issue is parental compliance, they cannot be used to override a capable child's rights under the *HCCA.*

71. The Children submit that the FBP poses a significant risk to both the physical and psychological wellbeing of children. The risk spans all components of the program, from the initial transfer to the program to the aftercare counselling. The program requires the parent to "transfer" the child to the workshop, a process that is explicitly understood to potentially include the physical apprehension and restraint by private security services or the police [at 61-62]. A child subjected to this type of deprivation of their liberty is undoubtedly exposed to a significant risk of both physical and psychological harm. In the present case, D.M. jumped out of a moving car on a public street to escape "transfer" by his father and stated that he felt ambushed and like he was being kidnapped.

***Affidavits of D.M.*, AABC Tabs 31 and 34.**
***Appellant's BOA*, Tab 20, at 61-62.**

72. During the workshop, exposure to potential harm continues. For example, the Warshak article describes how a child was "brought before a juvenile court judge," lost his physical liberty "and was sent to a residential facility" [at 63] because of his stated intentions to act violently if forced into the same room as his mother during the FBP workshop. The ensuing psychological damage is unknown.

***Appellant's BOA,* Tab 20, at 63.**

73. Further, upon completion of the workshop, the child and parent are to continue with counselling. Counselling is unquestionably "treatment" under the *HCCA*, with the potential for severe psychological harm if not provided effectively.

74. The Children submit that an examination of the entirety of the program mandates a finding that the FBP amounts to the delivery of mental health services, adapted to the individualized circumstances of the child, under the direction of a psychologist. It falls under the very broad definition of "treatment" under the *HCCA*, is "done for a therapeutic, preventive, palliative, diagnostic, … or other health-related purpose, and includes a course of treatment, plan of treatment", and it constitutes treatment that poses more than "little or no risk" of harm. A court cannot require a child to participate in treatment without his informed voluntary consent.

***HCCA, supra,* s. 2.**

75. It is important to note that at the time of the arbitration, when M.M. was the same age that D.M. will be when this appeal is heard, the Arbitrator stated, "I appreciate the fact that M.M. is of an age where he cannot be compelled to attend the program…"

***Arbitration Award 4,* AABC, Tab 5A, at para 33.**

f. Was there a material change in circumstances?

76. A material change in circumstances is required before a court can consider the merits of an application to change an order. This requires a change that, if known at the time, would likely

have resulted in different terms of the previous order. The question is whether the parties or the court actually contemplated the matter in question or took it into account in the earlier order.

> ***Gordon v Goertz*, [1996] 2 SCR 27, at paras 10-13, RCBOA Tab 36.**
> ***LMP v LS*, 2011 SCC 64, [2011] 3 SCR 775, at paras 66-67, RCBOA Tab 37.**

77. In relation to the Mother's motion to change, the relevant period during which a material change must have occurred is between February 17, 2015 (when the Consent Order was granted) and April 23, 2015 (when the Mother's motion to change was issued by the clerk of the court). The Children submit that in that period the circumstances changed materially and dramatically.

78. The change in circumstances began almost immediately after the Children were informed of the award. D.M. was distraught by the award. As a consequence he placed himself in physical and psychological danger by trying to escape his Father's custody, jumping out of a moving car, and then going into hiding, temporarily leaving school and living a life of homelessness without access to supports or family. In addition, upon re-emerging at 16 years old, D.M. exercised his right to withdraw from parental control.

> ***Affidavits of D.M.*, AABC, Tabs 31 and 34.**

79. The Children submit that D.M.'s decision to exercise his right to withdraw from parental control itself represents a material change in circumstances as this decision extinguished the custodial rights of his parents. The very foundation upon which the custodial order was made had changed. While the parties were undoubtedly aware at the time the Consent Order was issued that D.M. was on the cusp of his 16th birthday, it is evident from the absence of any language on this point in the Consent Order that they did not take into account what might happen if D.M. withdrew from parental control.

80. The Children further submit that even absent D.M.'s withdrawal from parental control, the circumstances described above demonstrate a material change in circumstances. There is no evidence that any of the parties contemplated the type of physical and psychological danger that D.M. would be exposed to following the award. Moreover, the Children submit that if the court had known that these circumstances would unfold, it would have made, and indeed would have been required to make, a different order in D.M.'s best interests.

81. With respect to the Chief of Police's Motion to Change, the Children submit that the court was correct in hearing the motion of the Chief of Police despite any technical defect, and was also correct in allowing the matter to proceed on the basis that the motion could have been filed in accordance with either Rule 14 or Rule 25 (19).

***L. (N.) v. M. (R.R.), supra,* at para 61, RCBOA Tab 1.**

82. Under Rule 14, as a party with an interest in the case, the Chief of Police correctly sought clarity on the enforcement provisions provided for in the Order; specifically he sought guidance on how to balance the enforcement requirements with the best interests of the child (and an expiry date, which the Father concedes should have been included in the Order). The Children submit that when the police have reason to believe that their efforts to find and apprehend a child are in fact causing harm to the child, it is to be expected, and perhaps even encouraged, that the police will seek guidance from the court.

***Chief of Police, Motion to Change*, AABC, Tab 23.**
***Appellant's Factum,* at para 105.**
***Family Law Rules,* O. Reg. 114/99, r. 14.**

g. Did the judge err in allowing the matter to proceed without *viva voce* evidence?

83. The Children submit that the Father mischaracterizes the *viva voce* evidence that he sought to introduce at the hearing. The only witnesses who were subpoenaed or proposed were two Toronto Police officers and one private investigator involved in the investigation into D.M.'s

whereabouts. The Children submit that neither the police investigation nor the private investigator's actions were critical matters requiring *viva voce* evidence. The undisputed facts were that D.M. had escaped his Father's custody, was unwilling to return, and was willing to go to great lengths to ensure that he was not forcibly returned. These are the facts on which the decision ultimately turned and the nuances of the investigations were largely irrelevant.

> ***Appellant's Factum*, at para 44.**
> ***Endorsement of Kiteley J.*, AABC, Tab 11, at para 9.**

h. Were the Mother and the Chief of Police in non-compliance with the Consent Order, and if so should the court have refused to hear their motions as a result?

84. The Children submit that neither the Mother nor the Chief of Police was in non-compliance with the Consent Order. When D.M. first ran away, the Mother, at her first opportunity, took D.M. to the police station. In turn, the police turned D.M. over to the Father. The events that transpired following this were unpredictable, not within the earlier contemplation of the parties, and undoubtedly placed D.M.'s physical and psychological wellbeing into question. The Chief of Police acted promptly to ask for the court's intervention given the circumstances, and the Mother followed shortly after with her motion to change.

> ***Affidavits of D.M.*, AABC, Tabs 31 and 34.**

85. The ability of a party to comply with a court order depends on the continuation of the circumstances in which the order was made. As discussed above, the events following the release of the Arbitrator's award constituted a material change in circumstances and compliance for the parties and the Chief of Police became extraordinarily difficult or perhaps even impossible.

86. The Father has referred to "The Plan", a reference to an alleged conspiracy by the Children and the Mother to undermine the court's order. The existence of any plan is not borne out by the facts. Indeed, the first interaction between D.M. and his mother was when she took him to the

police station, which, if anything, demonstrates that D.M. and his mother were in disagreement, not conspiracy. Any suggestion that "The Plan" amounted to non-compliance is baseless.

***Appellant's Factum*, at para 99.**

i. Can a child withdraw from the parental control of one parent?

87. On Cross Appeal, if this Honourable Court finds that D.M. had not withdrawn from parental control of both parents, then the Children submit that a child is legally entitled to withdraw from the parental control of just one parent in a claim for custody and that at a minimum D.M. had withdrawn from the parental control of his Father.

88. Justice Perkins found that "[t]here must be some credible evidence of withdrawal from or resistance to the authority of both parents." The Children submit that the judge erred and that the requirement to have withdrawn from the control of both parents is a requirement limited to the child support context and is not an appropriate or applicable requirement in the quite different context of custody and access.

***L. (N.) v. M. (R.R.), supra*, at paras 126-127, RCBOA Tab 1.**

89. As discussed earlier in the Children's response to issue b), the analysis conducted in child support cases is not the same analysis that is required in a custody claim. Where a child brings a claim for child support, the child may be required to demonstrate withdrawal from both parents. As discussed above, in a child support claim the court must determine both who is in control of the incidents of custody, and whether the parental obligation to provide support continues. In a custody claim the only issue is who controls the incidents of custody. Once a child has exercised his right to withdraw, it is the child who has control.

90. The Children submit that even in child support cases, the courts have found that the child need only demonstrate withdrawal from the "relevant" parent.

***Fitzpatrick v. Karlein*, 1994 CanLII 9710, 48 A.C.W.S. (3d) 1394 , [1994] O.J. No. 1573 at para 12, RCBOA Tab 38.**

91. By its very nature, the right of the child to withdraw from parental control is in direct conflict with a parent's right to custody and its incidents. In a world with no parental custodial rights there would be no need for a right to withdraw from parental control. It follows that the right to withdraw from parental control can only be exercised against a corresponding custodial right and cannot be exercised in the abstract.

92. In the present case, the Father was the only person with the legal authority to exercise custodial control at the material time. The Consent Order granted the Father sole custody of the two children. As of that date, the Mother had no custodial control or legal right to exercise any control over the incidents of custody. It follows that the Children had no legal option (or need) to withdraw from the Mother's parental control. The only parent from whose custody they could withdraw was their Father. In determining whether or not D.M. had withdrawn from parental control, the analysis must focus exclusively on whether D.M. had withdrawn from the parental control of his father.

***Consent Order*, AABC, Tab 8.**

93. The Children submit that in the present case, D.M. has demonstrated his withdrawal from the parental control of his Father. D.M. was not living in his Father's home. He was not receiving any financial, emotional, or other support from his Father. D.M. had taken active steps to avoid his Father and had stated in multiple contexts to many people that he had no intention of maintaining a relationship of any kind with his father. Sometime later D.M. began living in an apartment rented by his Mother, in direct opposition to his Father's wishes. D.M. also registered at school and explicitly denied his Father access to any information regarding his schooling. In the particular circumstances of this case, there can be no doubt that D.M. had taken control of the incidents of custody. He had withdrawn from his Father's control.

***Affidavits of D.M.*, AABC, Tabs 31 and 34.**

PART IV:
ADDITIONAL ISSUES

94. The Children do not raise any additional issues.

PART V:
ORDER REQUESTED

95. The Children request the following declaration and orders:

i. An order dismissing the appeal;

ii. A declaration that D.M. has withdrawn from parental control and has all of the statutory and common law rights of an independent minor;

iii. An order that no person has custody or access rights over either D.M. or M.M.;

iv. An order that no person may force D.M. or M.M. to attend or participate in any stage of the Family Bridges program; and

v. Such other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF JULY, 2016 by

Mary Birdsell, Emily Chan, Jesse Mark

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