Case Name:
M v. M

Between
M. M., Applicant/Responding Party, and
V. M., Respondent/Moving Party

[2012] O.J. No. 5203

2012 ONSC 6271

Court File No. 34723/12

Ontario Superior Court of Justice

D.K. Gray J.

Heard: October 31, 2012.
Judgment: November 5, 2012.

(69 paras.)

Family law -- Custody and access -- Practice and procedure -- Orders -- Motion by husband to set aside order dismissed -- Order related to custody, access and child support was made at uncontested trial after husband failed to respond to wife's application -- Family Law Rules did not authorize court to set aside order, Rule 19.08 of Rules of Civil Procedure could not be applied and there was no manifest injustice.

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Motion by the husband to set aside an order. The wife served the husband with an application after he ignored her attempts to address matters related to custody, access and child support in accordance with their separation agreement. The order was made at an uncontested trial after the husband failed to respond to the application.

HELD: Motion dismissed. The Family Law Rules did not authorize the court to set aside the order. Rule 19.08 of the Rules of Civil Procedure could not be applied by analogy. There was no manifest injustice. The husband had notice of the proceedings, but chose not to participate. There was a need to change the custody and access arrangements once the children started school, given the length of the commute from his residence. He had every opportunity to provide financial information that might have affected his imputed income.

Statutes, Regulations and Rules Cited:

Child Support Guidelines,

Family Law Rules, Rule 1(7), Rule 10(5), Rule 25(19)

Rules of Civil Procedure, Rule 19.08

Counsel:

Steven Benmor, for the Applicant/Responding Party.

Olena Brusentsova, for the Respondent/Moving Party.

REASONS FOR JUDGMENT

1 **D.K. GRAY J.**:-- The respondent moves to set aside an order of Justice Donohue made at an uncontested trial, and for an order granting him leave to now file an answer and financial statement.

2 For the reasons that follow, the motion is dismissed.

Background

3 Ordinarily, the Court is reluctant to deprive a party of an opportunity to have his or her rights determined at a trial. In view of the result I have reached on this motion, it is necessary to set out the background to the matter in some detail.

4 This application was commenced on May 22, 2012. However, long before the commencement of the application, a number of events occurred that are relevant to the disposition of this motion.

5 The parties are parents of twin boys, now six years old. They were born on October XX 2006.

6 The parties were married on November 25, 2000. They separated on January 1, 2009.

7 The parties executed a separation agreement on May 24, 2009. At that time, the children were two years old and in daycare. The parties did not have independent legal advice when they signed the agreement, but they each agreed that they had had the opportunity of obtaining independent legal counsel. They also agreed that they had read and

understood the agreement, and they agreed that they signed the agreement without any pressure, influence, or intimidation.

8 In the agreement, the parties acknowledged that it constituted a final settlement of their respective rights to property; that their assets and liabilities were accurately and completely described; and that it constituted a final settlement of custody, access, guardianship and support.

9 The parties agreed that they would have joint custody of the children, and that the applicant would have primary residence of the children. The parties agreed to an access schedule, which rotated every week so that, in effect, the children spent equal time with each parent.

10 In a "personal statement" at the end of the agreement, the applicant acknowledged that from the birth of the children until October 8, 2007, both parties shared equally in providing care to the children. At the conclusion of the applicant's maternity leave, the applicant assumed and carried out the responsibility of primary caregiver until May 31, 2009. She acknowledged that the respondent's continued role and involvement in the joint custody and upbringing of the children is not diminished by his absence from the children's primary place of residence.

11 The parties agreed to a dispute resolution of issues involving parenting, as follows:

> If M. and V. are unable to resolve a parenting issue, they will mediate/arbitrate the issue with a person they agree upon. If they cannot agree upon a person, they will each name one person and the two named persons will select a mediator/arbitrator.

12 It was agreed that, in accordance with the *Child Support Guidelines*, the respondent would pay child support in the sum of $400 per month. It was agreed that no special expenses would be paid.

13 It was also agreed that each party would provide the other with a complete copy of his or her income tax return and any notice of assessment on or before June 30th of each year. In the event that a party had not filed an income tax return for the previous year, that party was to provide the other with copies of his or her T4, T4A and all other relevant tax slips and statements disclosing any and all sources of income, including self-employment income.

14 It was agreed that neither party would pay spousal support.

15 The agreement contains some rather detailed provisions regarding division of the parties' assets and liabilities. It was agreed that there would be no equalization payment required. Among other things, the respondent agreed to accept sole and exclusive liability for an unsecured line of credit at the CIBC.

16 The circumstances leading up to the application commenced by the applicant, and ultimately the undefended trial, are set out in detail, and not contradicted by the respondent, in an affidavit sworn by the applicant on October 26, 2012. Rather than paraphrase, I will simply set out the relevant parts of her affidavit, without exhibits, as follows:

13. When the Separation Agreement was executed, the children were 2 years old and in daycare.
14. The access schedule at that time was based on the children not being in school.
15. This changed in September 2010, when the children began school.
16. When the children began school, I communicated the need to change the access schedule to the Respondent.
17. He ignored me.
18. I reminded the Respondent that, according to the Separation Agreement, the access schedule was supposed to be reviewed each year and, if we could not agree to a new schedule, that we were to retain a mediator/arbitrator.
19. The Respondent still ignored me.
20. The access schedule in the Separation Agreement had the children with the Respondent from Sunday at 6:00 p.m. to Tuesday morning (drop-off at school) and then again from school on Friday. The exact schedule is in the back of the Separation Agreement where there are a few monthly calendars.
21. The reason that the access schedule became a serious problem was because the children were moved 3 times during every school week between our homes. That is, they were with the Respondent in Toronto. When school started on Monday morning, he would drive them to Milton on Monday morning during rush hour, then to be picked up by him in Milton after school on Monday and then driven to his home in Toronto during rush hour on Monday afternoon. The same would occur on Tuesday morning.
22. The children were spending over 2 hours in the car on Monday to get to and from school and then again another hour Tuesday morning to get to school.
23. By Tuesday afternoon, the children were visibly exhausted after 2 days of commuting this distance.
24. By Friday after school, they would have spent 1 1/2 days with the Respondent, the 3 days with me and then back with the Respondent at the end of school on Friday.
25. I had tried to explain this problem to the Respondent. He simply would not listen. He completely ignored me and the children's needs.
26. One year ago, on November 22, 2011, I contacted the Respondent and asked him to join me in meeting with a parenting mediator to help us develop a more suitable plan.
27. I spoke with the mediator's office and then asked the Respondent to contact her.
28. I continued to follow up with him daily until January 25, 2012 with no success.
29. The Respondent refused to cooperate.
30. I then retained Mr. Benmor in March 2012.

31. By letter from Mr. Benmor to the Respondent dated March 12, 2012, Mr. Benmor stated:

"Please be advised that I have been retained by Ms. M.M. in regard to issues stemming from your Separation Agreement dated January 1, 2009.

I have reviewed the terms of your Separation Agreement with Ms. M. There are 3 categories that must be addressed.

...

The parenting terms of the Separation Agreement must be amended to reflect the best interests of the children. When the Separation Agreement was executed, the children were 2 years old and were in daycare. However, at the present time, the children are 5 1/2 years old and are in kindergarten at E. V. P. School in Milton which is located near my client's residence. The existing parenting schedule must be changed to reduce the amount of time that the children spend in transportation during the school week. In this regard, my client will agree to share in the cost of a parenting mediator to revise the children's parenting schedule and to create a more child-centric plan. As you know, the Separation Agreement requires that you resolve any such dispute in Mediation/Arbitration so that the schedule may be corrected:

Howard Hurwitz

Linda Popalarcziak

Jacquie Vanbeltlehem

Christine Kim

Please Confirm by email or fax on or before March 19, 2012 that you agree to proceed with the Mediation/Arbitration to resolve the parenting plan and also advise which candidate you select. In the event that we do not secure your agreement in this regard, we shall proceed with a court Application to resolve this matter. This letter will then be presented to the court to demonstrate that we made efforts to resolve this matter and that you did not cooperate.

32. The letter addressed a number of other issues. This letter is attached hereto and marked as **Exhibit "C".**
33. Mr. Benmor advises me and I believe that he had delivered this letter to the Respondent by email and by regular mail.

34. Four (4) days later, on March 16, 2012, the Respondent responded to Mr. Benmor in an email that stated:

    Mr Benmor,

    I have informed your client that I am seeking my own counsel with regard to addressing the issue(s) at hand.

    Regards,

    V.

35. Attached hereto and marked as **Exhibit "D"** is a true copy of this email.
36. On the same day as the Respondent's email, Mr. Benmor responded with an email to him that stated:

    Sir

    We will require a prompt reply.

37. Attached hereto and marked as **Exhibit "E"** is a true copy of this email.
38. The Respondent did not reply.
39. Then, on March 20, 2012, Mr. Benmor sent the Respondent another email that stated:

    Mr. M.:

    On March 12, 2012, I emailed you the attached letter.

    I received a reply from you on March 16, 2012.

    Today is March 20.

    We require an immediate and clear response to our letter with your precise position on each point. Specifically, we need to know:

    1. Will you pay off the CIBC Unsecured Personal Line of Credit account number 4202583967, as you had undertaken to do on page 6 of the Separation Agreement?
    2. Will you agree to resolve the children's parenting schedule with one of the following parenting mediators in Mediation/Arbitration (Howard Hurwitz, Linda Popalarcziak, Jacquie Vanbetlehem or Christine Kim)?

3. Will you comply with your financial disclosure obligation set out at page 3 of the Separation Agreement and deliver to me your last 3 Income Tax Returns with all Schedules and attachments, last 3 Notices of Assessment and last 3 paystubs of this year so that we may assess what the correct sum of child support is that you should be paying?

I had asked for these answers and information by March 19, 2012.

You have failed to reply.

If I do not have your agreement and reply by noon tomorrow, we shall be issuing an Application in the Superior Court of Justice.

40. Attached hereto and marked as **Exhibit "F"** is a true copy of this email.
41. The next day, the Respondent replied with an email to Mr. Benmor that stated:

Mr Benmor,

With all due respect, I feel that you do not have all of the necessary and relevant facts with regard to the separation agreement and the circumstances surround it as present to you by our client.

When I informed you that I am seeking legal counsel, I did indeed set an appointment with an individual for Tuesday, March 27. That was the earliest date available but if an opening presents itself sooner, I was told that I would be informed of that opportunity.

As I have indicated to your client, I am in the process of paying off and will pay off the CIBC Line of Credit. I have not made any representation to the contrary.

As to the parenting schedule, once I have spoken with my counsel and know how best to proceed, then I will certain address all pertinent issues including any counter-claims should that be necessary.

Please note: The separation agreement also does not mention any "expiry" dates or clauses for any reconsideration of the parenting schedule in favour of either parent.

I am in the process of completing my tax returns and will forward the necessary information to your client.

> Furthermore, I have not seen any prior mention of deadline dates and I feel your claim to March 19, 2012 is incorrect.
>
> The separation agreement also does not mention any "expiry" dates or clauses for any reconsideration of the parenting schedule in favour of either parent.
>
> Cordially,
>
> V. M.

42. Attached hereto and marked as **Exhibit "G"** is a true copy of this email.
43. The Respondent never did reply to Mr. Benmor, nor did the Respondent retain counsel.
44. Months passed and there was no word from the Respondent - just as he ignored me for the many months before I retained counsel.
45. On May 22, 2012, I issued an Application in court.
46. The respondent was personally served on May 24, 2012.

17 As is required, the application contains on its first page the following words in bold print capital letters, as follows:

> **YOU HAVE ONLY 30 DAYS AFTER THIS APPLICATION IS SERVED ON YOU (60 DAYS IF THIS APPLICATION IS SERVED ON YOU OUTSIDE CANADA OR THE UNITED STATES) TO SERVE AND FILE AN ANSWER. IF YOU DO NOT, THE CASE WILL GO AHEAD WITHOUT YOU AND THE COURT MAY MAKE AN ORDER AND ENFORCE IT AGAINST YOU.**

18 The 30 days required to respond to the application expired on June 24, 2012. The respondent filed no response, and did not communicate with the applicant or the applicant's counsel.

19 In Milton, where a matter is undefended and an undefended trial is sought, the normal practice is that a Form 14B motion is filed, requesting that it be determined in chambers by a judge without the attendance of the parties or counsel. If the judge thinks the affidavit material is sufficient, the judge may determine the matter in chambers without any attendance. If the judge thinks the matter ought to be heard after an oral attendance, the judge may so direct.

20 In this case, counsel for the applicant filed a Form 14B motion dated July 9, 2012, supported by an affidavit for an uncontested trial sworn on July 9, 2012.

21 On July 19, 2012, Miller J. ordered that the matter be heard at an oral hearing before a judge as an uncontested trial.

22 Following the release of the endorsement of Miller J., counsel for the applicant brought an *ex parte* motion returnable September 12, 2012, supported by the same affidavit for an uncontested trial that had been sworn on July 9, 2012.

23 The matter came before Donohue J. on September 12, 2012. After hearing submissions and reviewing the material, she signed the following endorsement:

> On reviewing materials filed on an uncontested basis final order to go as drafted but amended by me. SDO to issue.

24 The amendments to the order made by Donohue J. are rather minor. She required each party to deliver to the other annual income tax returns, notices of assessment, T4 slips and paystubs, instead of the respondent only, as was proposed in the draft order.

25 The order awards sole custody to the applicant, with access to the respondent. He has access on alternating weekends from Fridays at 5:00 o'clock p.m. to Sundays at 5:00 o'clock p.m. There are detailed provisions regarding access on religious and secular holidays, Mother's and Father's Day, the children's birthday, and Halloween.

26 The order entitles each party to information regarding matters relating to the well-being of the children, including health, education, religion and extracurricular activities.

27 The order requires disputes regarding access issues to be submitted to a parenting mediator, and requires each party to pay one-half of the mediator's fees and expenses.

28 The order imputes income to the respondent in the amount of $75,000, and the respondent is ordered to pay child support in the amount of $1,105 per month, effective January 1, 2012. Each party is to pay one-half of the children's special and extraordinary expenses.

29 The respondent is ordered to pay the balance of the CIBC unsecured line of credit in the approximate amount of $16,138.09.

30 As noted earlier, the parties are each ordered to deliver annual income tax returns, notices of assessment, T4 slips and paystubs each year.

31 In his affidavit filed on the motion to set aside the order of Donohue J., the respondent asserts that when the children are in the applicant's care, they spend most of their time with the applicant's parents. He alleges that the boys do not attend any organized activities when they are in the applicant's care, other than attending a Serbian Saturday school. He asserts that the boys are watching a lot of TV while they're in the care of the applicant's parents.

32 The respondent asserts that driving between Milton and Etobicoke is not tiring for the boys. He says it is approximately 45 minutes, and he does not believe that this is too tiring for boys who are six years old.

33 The respondent now asserts that he should not have been required to pay any child support, and indeed it should have been the applicant who paid child support. He asserts that his income is not what has been imputed to him. Based on his income tax returns for 2009, 2010 and 2011 (which were disclosed for the first time as exhibits to the respondent's affidavit), he says his gross business income in 2009 was $25,245,

$8,194.04 in 2010, and $4,843.86 in 2011. He says it is getting more difficult to find clients, and he has been depressed and unable to concentrate. He says that once the Court re-calculates the obligation to pay child support, it will be clear that the applicant will be required to repay the monies withdrawn from the joint line of credit.

34 Furthermore, the respondent now asserts that the equalization payment of $25,000 he received under the separation agreement is inadequate.

35 Apart from stating that after being served with the application in early June or late May, 2012 he was shocked, the respondent offers no explanation as to why he did not file an answer or financial statement. He says he showed up at court to attend a case conference, but left the courthouse after being advised that applicant and her lawyer had left.

36 It should be noted that in an endorsement dated August 22, 2012, signed by MacKenzie J., the following is stated: "Matter taken off conference list for Aug. 24/12 as no briefs/confirmations filed."

Submissions

37 Ms. Brusentsova, counsel for the respondent, submits that the order of Justice Donohue should be set aside and an order should be issued granting the responding leave to file an answer and financial statement.

38 Ms. Brusentsova submits that there would be a failure of justice if the order is not set aside. For over three years, the parties operated under an access schedule that allowed each parent to have access to the children equally. Suddenly, in September, 2012, the respondent was restricted to having visits from the children every other weekend. Furthermore, income has been attributed to him at $75,000, when it is clear that his income is not close to that amount. All of this has occurred without the respondent having had an opportunity to participate in the proceeding.

39 Ms. Brusentsova acknowledges that the moving party should ordinarily be required to meet the following three criteria:

1. the motion to set aside a default judgment should be made as soon as possible after the applicant becomes aware of the judgment;
2. more importantly, the moving party's affidavit must set out the circumstances under which the default arose that give a plausible explanation for the default; and
3. the moving party must set forth facts to support the conclusion that there is at least an arguable case to present on its merits.

40 Ms. Brusentsova acknowledges that the second criterion has not been met, since the respondent's affidavit contains no explanation as to how the default arose, and there is no explanation, plausible or otherwise, for the default. However, she submits that none of the criteria, including the second one, are inviolate, and the most important, indeed overriding consideration, is the justice of the case, particularly where the interests of children are affected. She relies on the following statement by Katarynych J. in *Catholic Children's Aid Society of Toronto v. T.S.*, [2002] O.J. No. 959, at para. 51:

> It is a fundamental principle underlying the rules of court that cases should be determined on their merits, other things being equal, and not be derailed on a technicality. Mere inattention or forgetfulness and inability to give a good explanation for the failure to respond, though relevant to the exercise of the Court's discretion, is not necessarily fatal to the motion. What is deserving of particularly close scrutiny is whether the respondent has some merit in her defence, whether there is a triable issue.

41 Ms. Brusentsova submits that in this case it would be manifestly unjust to deprive the respondent of an ability to defend the case on its merits, particularly where the welfare of children is at stake. In this case, the children have been deprived of the opportunity to have equal access to both of their parents, and it would not be in the interests of the administration of justice or the interests of the children to have that issue determined on an undefended basis.

42 Mr. Benmor, counsel for the applicant, opposes the respondent's motion.

43 Mr. Benmor submits that, under the *Family Law Rules*, the Court has no jurisdiction to entertain this motion.

44 Mr. Benmor submits that *Family Law Rule* 25(19) does not apply. It authorizes the Court to change an order that was made without notice. It clearly does not authorize the Court to set aside an order, merely to change it. Further, it applies to an order obtained, "without notice". In the context of the rules as a whole, this can only apply to an order made that would otherwise require notice, but was made in circumstances where notice could not be obtained, because of urgency or some other appropriate circumstance.

45 In this case, not only was notice not required, but the respondent had no right to participate in the proceeding. Rule 10(5) provides as follows:

> 10(5) **NO ANSWER OR ANSWER STRUCK OUT** - If a respondent does not serve and file an answer as this rule requires, or if the answer is struck out by an order,
>
> (a) the respondent is not entitled to any further notice of steps in the case (except as subrule 25(13) (service of order) provides);
> (b) the respondent is not entitled to participate in the case in any way;
> (c) the court may deal with the case in the respondent's absence; and
> (d) the clerk may set a date for an uncontested trial.

46 That rule clearly applies where, as here, a respondent does not serve and file an answer. The consequences are specifically set out. The respondent is not entitled to any further notice of steps in the case; he is not entitled to participate in the case in any way; the Court may deal with the case in his absence; and the clerk may set a date for an uncontested trial.

47 Mr. Benmor submits that rule 19.08 of the *Rules of Civil Procedure* cannot be applied by analogy as contemplated in *Family Law Rule* 1(7), which applies "if these rules do not cover a matter adequately". Rule 19.08 of the *Rules of Civil Procedure* provides as follows:

Setting Aside Default Judgment

19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just.

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just.

(3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03.

48 Rule 19.08 authorizes the Court to set aside or vary an order obtained by default or on motion after a party has been noted in default. It can only be concluded that the difference between Rule 19.08 of the *Rules of Civil Procedure* and rule 25(19) of the *Family Law Rules* is deliberate.

49 Assuming that rule 19.08 of the *Rules of Civil Procedure* applies by analogy, Mr. Benmor submits that the respondent cannot meet the criteria for setting aside Donohue J.'s order. Of cardinal importance, the respondent has given no explanation whatsoever for his default.

50 Indeed, Mr. Benmor submits that having regard to the background of the matter, it is likely that the respondent's default was made as a result of a deliberate decision on his part, or at the very least was part of a strategy of stonewalling.

51 Mr. Benmor points out that the respondent ignored every opportunity to respond in some meaningful way to the applicant's request to alter the access arrangements. Furthermore, he ignored his obligation to provide income tax returns, and it is clear that, in fact, he had not prepared any income tax returns and did not do so until he commenced his motion to set aside Donohue J.'s order.

52 Mr. Benmor submits that to permit the respondent to have the indulgence he now seeks would be unjust. Among other things, the respondent has made it clear that he wishes to now reopen the provisions of the separation regarding property, and it would be manifestly unjust to require the parties to now litigate, at great expense, issues that have been resolved for some time.

Analysis

53 I agree with counsel for the applicant that *Family Law Rule* 25(19) does not authorize the Court to set aside Donohue J.'s order. There is no other provision in the *Family Law Rules* that would authorize the setting aside of the order.

54 I also agree that Rule 19.08 of the *Family Law Rules* cannot be applied by analogy, as held by the Divisional Court in *Diciaula v. Mastrogiacomo* (2006), 268 D.L.R. (4th) 180 (Ont. Div. Ct.), at para. 11, and by Murray J. in *Oelbaum v. Oelbaum*, [2010] O.J. No. 3781 (S.C.J.), at paras. 23-26.

55 Even if rule 19.08 of the *Rules of Civil Procedure* could be applied by analogy, the respondent cannot meet the requirements of that rule.

56 In *Lensckis v. Roncaioli*, [1992] O.J. No. 1713 (Gen. Div.), Justice Ellen MacDonald applied the criteria set out by Misener D.C.J. in *Dealers Supply (Agriculture) Ltd. v. Tweed Farm & Garden Supplies Ltd.*, [1987] O.J. No. 2346 (Dist. Ct.), as follows:

> 1. The motion to set aside a default judgment should be made as soon as possible after the applicant becomes aware of the judgment;
> 2. More importantly, the moving party's affidavit must set out circumstances under which the default arose that give a plausible explanation for the default;
> 3. The moving party must set forth facts to support the conclusion that there is at least an arguable case to present on its merits.

57 In this case, assuming that the first and third criteria have been met, the second criterion has not been met. No explanation whatsoever has been offered for the default, and indeed in view of the background of this matter it is reasonable to conclude that the respondent's default was simply a continuation of his strategy of stonewalling the applicant. I do not agree with Katarynych J. in *Catholic Children's Aid Society of Toronto, supra*, who appears to imply that this requirement is a mere technicality, or that it can be overlooked if it appears that the moving party might have a defence on the merits. This is particularly so, in my view, where the default appears, as here, to be the result of a deliberate strategy of stonewalling.

58 The only possible way of setting aside the order, apart from an appeal, is to rely on the residual inherent jurisdiction of the Court, as discussed by the Divisional Court in *Dici-aula, supra*, at para. 15, to set aside an order to prevent a manifest injustice. There, the Divisional Court quoted the following from the reasons of Justice Perkins in *West v. West*, [2001] O.J. No. 2149 (S.C.J.), as follows:

> The jurisdiction to set aside or change an order to prevent a miscarriage of justice is ancient. It goes back to the old common law writ of audita querela: see Holmested and Gale on the Judicature Act of Ontario and Rules of Practice, r. 529, s. 2; Blackstone, William, Commentaries on the Law of England (1765), vol. 3, pp. 405-6. It forms part of the inherent jurisdiction of the Court. The cases have laid down a fairly stringent test before it will be exercised: see cases digested in Holmested and Gale, r. 529, s. 10, and Holmested and Watson Ontario Civil Procedure, r. 59, s. 10[5]. The evidence presented on the motion must be clear and credible; it must be of such a nature that the original order would have been different if the evidence had been available; it must not have been in existence at the time the order was made or not discoverable by diligent effort by the party asking the Court to change the order; the party must have acted with diligence once the information came to light; and the evidence must establish that action is needed to prevent a miscarriage of justice.

59 It is apparent that what is discussed there has no application to this case. It applies where it is sought to set aside an order if there is evidence that could not have been discovered by the exercise of due diligence, and where the evidence is compelling. It has no application where, as here, it is sought to set aside an order where the moving party had notice of the proceedings but chose not to participate, and where the applicable rule of court gives that party no right to participate or have any further notice of the proceedings.

60 In any event, I am not persuaded that there is any manifest injustice.

61 It is obvious to me that there was a need to change the custodial and access arrangements once the children commenced school. The parties live a considerable distance apart. The respondent chose to move to Etobicoke, approximately 45 minutes away from the school. While the parties may debate whether the children will be tired after a 45 minute drive each way, to and from school, there can be little doubt that it is not in their best interests to undergo this if a reasonable alternative is available. The respondent had every opportunity to discuss reasonable alternatives, but chose to stonewall and ignore the applicant's requests.

62 Having regard to the circumstances, it cannot be said that the result of the hearing before Donohue J. is unjust, in that the children will no longer have to be subjected to 90 minutes of driving to and from school.

63 Nor do I think that it is unjust that income has been attributed to the respondent in the amount of $75,000. He did not comply with the obligation to provide the applicant, on an annual basis, with his income tax returns and notices of assessment. Indeed, it is clear from the respondent's correspondence with the applicant's counsel that, until very recently, he had not prepared any income tax returns for the year 2009, 2010 and 2011. They were produced for the first time with the respondent's affidavit filed on the motion to set aside the order of Donohue J.

64 The applicant, quite rightly, is suspicious of the respondent's claim that he has earned only $8,194.04 in 2010 and $4,843.86 in 2011. He has no real explanation for failing to pay off the CIBC line of credit as he had agreed to do.

65 In my view, there is no injustice in attributing income to the respondent when he had every opportunity to provide better information over a three year period, and did not do so, and indeed did not disclose what he says his income is until after the order of Donohue J was issued.

66 It must be observed, in any event, that this is not an ordinary default judgment. The order was obtained after what is called, in the rules, an undefended trial. It was obtained after a Superior Court judge reviewed the material and had an oral hearing. Donohue J. is presumed to understand that the best interests of the children are to govern. Full disclosure of the separation agreement, setting out the existing access schedule, was made. The respondent had an opportunity to participate in the proceedings, and effectively chose not to do so.

67 In my view, there was no manifest unfairness or injustice that would justify setting aside the order, assuming the Court has jurisdiction to do so.

Disposition

68 For the foregoing reasons, the motion is dismissed.

69 Mr. Benmor shall have five days to file written submissions with respect to costs, not to exceed three pages, together with a costs outline. Ms. Brusentsova will have five days to respond. Mr. Benmor will have three days to reply.

D.K. GRAY J.

cp/e/qljel/qlpmg/qljxh/qlpmg