

Endorsement:

This is mother's motion to change a final order dated October 10, 2006, granting custody of the two children to the father. The evidence filed in this motion included a 50-page affidavit from the Office of the Children's Lawyer, with approximately 36 exhibits appended thereto.

Regrettably, this is one of those high conflict cases which are becoming all-too-common in the courts these days. And what makes this case most unfortunate is that the children have obviously been victimized by that conflict.

Over the course of two half-days, I heard argument from the mother's counsel, the father's counsel and the Office of the Children's Lawyer. The Office of the Children's Lawyer took no position on the outcome of the motion; instead, counsel was directed to providing the results of the extensive investigation by the OCL, including reports from third parties.

Mr. Benmor's comprehensive and detailed submissions were directed to persuading the court that the father had engaged in a campaign of alienating the children from the mother. And, to that end, his submissions were very effectively presented. A review of

the evidence leaves little doubt that the father strongly believes that the children would be better off were they to have little or no involvement with their mother.

Perhaps the most telling piece of evidence in this regard comes from the OCL investigative access visit between ██████ and his mother on June 29, 2009. Although mother and son had not had any visits with each other since April 2007, that visit went very well. ██████ seemed comfortable in the presence of his mother, and mother acted appropriately toward ██████. Mother gave ██████ a number of gifts, and ██████ responded positively to receiving them from mother.

However, on the following day, the OCL social worker who had supervised the visit, came into her office, and discovered that all of the gifts had been returned by ██████.

The social worker subsequently spoke with father who advised, *inter alia*:

1. he had returned the gifts because they had been acquired from "sin" money.
2. he said that mother used to play with ██████ when he was naked; and
3. mother is a bad woman and "we" cannot accept gifts from her.

At the next scheduled investigative visit, July 21, 2009, ██████ arrived at the OCL office and stated, *inter alia*:

1. he had taken the gifts from his mother because it was her wish that he do so;
2. the money mother makes is from "sin" and comes from kissing other guys, which he knows to be true because he saw it;

3. he cannot trust his mother anymore even if she says she doesn't do [dirty stuff with men];
4. mother is not a good woman and he doesn't need her anymore, wants to forget about her and start a new life;
5. his mother makes him have dirty stuff in his mind; and
6. he didn't like that she had sat beside him on the prior visit.

When mother then came into the room:

1. [redacted] said he didn't want to visit with her;
2. mother told him she loved him, but [redacted] kept his head down and repeated his wish not to visit with her, and that he did not love her, and
3. he walked to the door and left to join his father in the waiting room.

The foregoing very strongly suggests that [redacted] had been influenced by the father to sever his contact with the mother.

Both [redacted] and [redacted] have had many difficulties, first while living with their mother and then, afterwards, when father obtained custody of both children, which terminated the involvement of the Children's Aid Society. When they were in mother's care they were apprehended by the society because of mother's inability to manage the children's issues which, in turn, created a situation of high risk. Following the apprehension, mother demonstrated an inability to manage her access visits with both children together. The record is replete with many negative observations about the mother's

parenting, both while she was the custodial care-giver and, afterwards, during her access visits with the children.

Following the transfer of custody from mother to father, and the departure of the society from the lives of the family, the children continued to demonstrate their difficulties – in school, and with the law. There were allegations made by the father and the children that the mother was engaging in inappropriate sexual activity in the presence of the children, and behaving abusively toward the children, during her access visits. The police suspected that, on one occasion, ██████ had likely been coached by the father to make these allegations.

In May 2007, ██████ therapist stated that ██████ was exhibiting sexualized behaviours and masturbating in public. In July 2007, ██████ was found alone in a mall by the police. He had previously been arrested for shoplifting.

The children were both doing poorly at school while in father's care. There is some evidence in the record which suggests that the father was attempting to minimize these problems and that he had become "very angry at the school" for speaking with the OCL during the course of the OCL investigation in this matter.

Mother alleges that father was involving the children with therapists and counselling services in order to build a case against the mother that she had sexually abused and

traumatized the children during the times she was either living with the children or when the children were visiting with her.

As I noted earlier, Mr. Benmor was very thorough in his submissions, detailing the evidence which gave credence to the essence of his argument, namely, that the father was engaging in tactics designed to alienate the children from their mother.

I have no hesitation in concluding that the children have been influenced by the father to view the mother in a very negative light. However, I am not prepared to change custody, for a number of reasons.

First, I must be mindful of the legal test set out in section 29 of the Children's Law Reform Act which prohibits a court from changing custody or access unless there has been a "material change in circumstances that affects or is likely to affect the best interests of the child". Notwithstanding my conclusion that the father has engaged in alienating behaviour, the question is whether it is in the best interests of the children to be ordered to live with their mother.

██████████ will turn 17 years of age this month. Quite simply, ██████████ will live where he wants to live, and no court order will make any difference to him.

██████████, although "only" 11 and one-half years old, is nevertheless approaching the age (if he is not already there), when he too will vote with his feet. However, even if I were

to conclude that I could effectively make an order transferring custody of ~~██████~~ to the mother, on all the evidence, I have decided that the test under section 29 of the Act has not been met.

The children were apprehended from the mother, not because mother was a bad person, or because she did not love her children but, instead, because she demonstrated an inability to effectively parent her two children. And it was not simply a case of ineffective parenting but, rather, parenting which fell so far below the acceptable standard, that her children were at serious risk of harm. This included inappropriate discipline by the mother to the point of physical abuse by her.

Even after the children were no longer living with the mother, she continued to demonstrate an inability to manage her access visits with the children. That evidence comes from the society, as set out in the society's report, referred to below.

As part of the OCL's comprehensive investigation, it obtained a detailed report from the society on December 24, 2008. This report provided a comprehensive history of its involvement with the family dating back to 2002. It included the fact that while in the mother's care, the children fought frequently with one another, engaging in sibling rivalry for the affection of their mother. As I noted earlier, there was evidence that the children had been physically abused, as well.

By late 2005, when mother was seeking a return of the children to her care, the society concluded that this was not an option, stating:

While ~~XXXXXX~~ was in the society's care, she did not make any changes in her ability to parent. She did attempt to attend a parenting program at Aisling Discoveries upon ~~XXXXXX~~ admission into society care, but Aisling refused to provide her with any further services because she had already utilized their program and there were no children in her care at the time. The society was *unaware of any other efforts that she made to improve on her parenting skills.*
[my emphasis]

While mother argues that the disclosures by the children of abuse by the mother were "planted" by the father, it is difficult to accept that as entirely correct, particularly when I read the following from the BOOST report, dated May 2008:

~~XXXXXX~~ reported he remembers his mother beating him up and remembers her swearing at him. During the physical assault ~~XXXXXX~~ said 'stop it hurts, what are you doing' and his mother responded by calling him an 'asshole' and a 'dog'. ~~XXXXXX~~ also remembers the red marks that were left on his head, thighs and buttocks as a result of the assault. ~~XXXXXX~~ indicated that the pain in his head was similar to the pain when 'you get hit on your funny bone and the pain shoots up' and this pain lasted the entire time he was sleeping. ~~XXXXXX~~ indicated that following the incident he felt like he had a lump in his throat. He compared this feeling to when 'you feel guilty and you get a lump in your throat', however, ~~XXXXXX~~ advised that he did not feel guilty as a result of the assault. ~~XXXXXX~~ felt his

heart was beating fast and he had pain [sic] his stomach because his mother was stepping on it and was hitting his stomach with her heel. ██████ reported that he tried to defend himself by using his fists and was trying to get her away from him.

This kind of very detailed disclosure by the then-10 year-old child to the BOOST therapists does not suggest that the child is simply parroting something his father might have told him to say.

In the aforementioned society's report, dated December 24, 2008, there are numerous observations of negative behaviour by the mother toward the children, and in respect of her parenting abilities. At the same time, the society notes that it was the father who seemed to be moving in the right direction, obtaining therapy for the children, as required. In particular, the society noted (in or about April 2007):

Mr. ██████ was acting appropriately as he was tending his son's mental health, behavioural, and emotional needs. He appeared to be protective of his children, he provided adequate supervision of his children at home and in the community, and accessed the appropriate counselling supports to address ██████'s behavioural issues. ██████'s sexualized behaviours were a result of historical exposure to sexual acts while in the care of his mother.

Even though the children continued to remain in father's care, and notwithstanding the society's positive views of the father's parenting, problems continued. For example, in September 2007, ██████'s school contacted the society to advise that ██████ was

sexually acting out at school and that he had "targeted a young autistic girl and that he had told this child that he wanted to have sex with her".

In January 2008, the society interviewed ██████ privately and, among other things ██████ stated:

He had observed his mother in a park on a cliff rubbing a man's penis . . . [and on another occasion] when he went into his mother's bedroom she was naked from the waist up, and the man from the waist down. He then stated, 'my mom did this to me' and made a motion of his open hand going up and down.

The society's investigation was not conclusive as to sexual harm. The society closed its file in February 2008, "as Mr. ██████ was meeting the needs of his children and the children did not have any contact with their mother at this time."

One of the referral sources the father explored for the children was Aisling Discoveries.

Aisling stated (June 2009):

During this reporting period ██████ and his father have attended sessions with this therapist on a weekly basis. They appear to be very committed to the therapeutic process and engage very nicely with this therapist . . . [father] presents as a caring father who is dedicated to bringing his son on a regular basis for treatment. It is clear that his son's well-being is important to him.

There is no question that the children – and particularly ██████ – continue to require help to address their schooling and emotional problems. However, the weight of the evidence suggests that father is addressing those needs, with at least some degree of success.

So the court is left with this conundrum: What to do with a parent who is actively alienating the children from their mother while, at the same time, otherwise seemingly meeting the needs of the children. Is the father engaging in this alienating behaviour because of his hatred toward the mother? Quite likely. But alienation, by itself, cannot be a sufficient reason to change custody. The court must examine all the circumstances and decide whether such a change is warranted, in the best interests of the children.

I am unable to conclude from the weight of the evidence that the parenting deficiencies exhibited by the mother, which are so well documented in the record, have been addressed by her. As I noted earlier, those deficiencies, were so serious that the society was forced to remove the children from the mother's care. And what is missing from this equation, is evidence that the mother has now addressed those deficiencies such that it would be in ██████'s best interests to remove him from the father's home and place him in the mother's home.

I recognize that perhaps the initial reaction of a court, upon concluding that one parent has engaged in alienating behaviour, might be to "punish" the offending parent. But I

must always be mindful that any decisions I make must be in the best interests of the children.

Doubtless, the only way in which there is even some remote chance that the relationship between the mother and the children will be repaired is through some form of therapeutic intervention. However, I suspect that whatever therapy is required, must likely involve the entire family, including the father.

Counsel are to contact the trial coordinator's office and arrange to return before me within 60 days. One hour is to be set aside for this attendance, likely beginning at 2:00 o'clock p.m. Between now and the next court appearance counsel will have made the necessary investigations and will have *jointly cooperated to the extent necessary*, to enable them to make submissions on the following:

1. what options are available, either through a publicly funded agency, or through private counselling, that would enable this family to immediately begin counselling with a view to repairing the dysfunctional family dynamic, including the father's negative attitudes toward the mother, as well as the relationship between the children and the mother;
2. if there is a cost involved in any proposed counselling, how that financial responsibility ought to be borne;
3. what documents/disclosure ought to be made to the proposed counsellor;
4. the nature of mother's access, if any, pending the commencement of the counselling; and

5. the nature of mother's access once the counselling has begun, and during the counselling process.

Given my findings, as set out in this endorsement, this is not an appropriate case for posts.



Justice Robert J. Spence
November 13, 2009