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General

The editors-in-chief of the Ontario Family Law Monthly (OFLM) are David Frenkel and David Tobin.

The articles in the OFLM are offered to educate, engage and inspire.

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Bridging the distance: long-distance and remote parenting

Samantha Rich

Overview

Realistically, it is not always possible to co-parent in the same neighborhood, city or even the same country. Long-distance parenting is innately challenging, and parties have to be creative and flexible when drafting parenting plans to facilitate long-distance parenting. The main goal is that the parenting plan be child-focused to ensure that despite long-distance parenting, parents and children are able to have regular and meaningful parenting time together. Parties need to ensure that together with making an effort to ensure that there is sufficient in-person parenting time, parenting time should also be supplemented with remote parenting time, i.e. virtual. The parenting plan will have to be drafted considering the needs and circumstances of the specific child and family, as well as practical aspects such as affordability. Long-distance parenting is most successful when the parties are able to communicate effectively and work together in the best interests of the child.

AFCC-Ontario Parenting Plan Guide

The *AFCC-Ontario Parenting Plan Guide* ("*AFCC-O Guide*") has been prepared by the Ontario Chapter of the Association of Family and Conciliation Courts to provide guidance and assist parents and their lawyers in developing child-focused, realistic parenting plans. The *AFCC-O Guide* provided the following guidance regarding drafting long-distance parenting plans:

> Children benefit when parents reside within a reasonable distance of one another in order to ensure regular contact between the children and both parents. Long distance parenting is challenging and requires both parents to plan, be creative and be flexible to lessen the impact of the distance on the parent-child relationship.

> When parents live a significant distance apart, children (at least those attending school) will inevitably have a primary residence where they attend school, but they should also generally have significant time in the care of the other parent.
>
> The nature of the parenting schedule in these situations will depend on many factors, including the age of the children, the children's temperament, the financial resources of the parents, and the distance between the parents' homes. To the extent possible, parenting time at the other parent's home should be at times that don't significantly interfere with a child's school and important activities. Despite the distance between homes, and to the extent it is financially feasible, visits and parenting time should occur in both locales so the parent who does not have the child's primary residence can be involved with a child's extracurricular activities and school life.
>
> Opportunities for virtual parenting can help the parent without primary residence have regular meaningful contact with the child, assist in establishing routines, and enable relationship-building activities such as reading stories, singing songs and playing games. For older children, internet-based communication may allow a distant parent to assist with homework and discuss daily activities with the child. When one parent lives at a distance, it is important for the primary residential parent to not only facilitate this type of contact with the other parent, but also to send regular updates about the child's school performance, activities and development. When these types of contacts occur, it would be beneficial for the child to have adequate privacy to meaningfully engage with the other parent (unless supervision is considered necessary due to safety concerns). (*AFCC-Ontario Parenting Plan Guide*, at pg. 25)

In following the *AFFC-O Guide*, Justice Shore held that, "While I do not feel bound by the Guide, I too find it contains helpful information in understanding a child's developmental stage and schedules" (*Czyzewski v. Fabro*, 2022 ONSC 4883, at para. 15).

Justice McGee has held that, "the parenting plan guide produced by the Association of Family and Conciliation Courts – Ontario ("AFCC-O") is of great assistance in determining parenting schedules that are in a child's best interests, particularly when clinical evidence of a specific child's age and stage of development is unavailable" (*Bansal v. Kelly*, 2022 ONSC 7049, at para. 34).

Lack of community roots

It appears that where parties are capable of residing within a reasonable distance of one another in order to ensure regular and consistent parenting time between the child and both parents, the court appears to be less willing to promote a long-distance parenting plan. Justice Robertson in *T.K.W. v. S.R.W.*, held that:

> Neither parent has a job, a partner or other reason that prevents them from moving. Their choice to prefer a city near their own parents and extended families does not override their child's need to develop a fluid and frequent relationship with her own two parents and to have friends in her community that she continues to see outside of school periods. They are both asking a lot from this child. Neither of their families gave any indication that their personal or financial support of their child and grandchild was conditional upon geography. While long distance parenting can work, it certainly has not worked well here. (*T.K.W. v. S.R.W.*, 2024 ONSC 2800, at para. 121)

The court seems to suggest that if parents are able to move to live near the child's primary residence to facilitate regular and consistent in-person parenting time, they should.

Affordability

The nature of the parenting plan will depend on many factors, including practical factors such as the financial resources of the parents, and the distance between the parents' homes. The court may assess whether the parties are able to realistically afford the travel proposed needed to facilitate the long-distance parenting time. That being said, the overarching objective is the best interests of the child. Justice Robertson in *T.K.W. v. S.R.W.*, held that:

> Currently, the parents' career paths and personal lives are portable. Neither owns property or at this stage, even has a job ... The uncontradicted evidence is that neither parent has the financial ability to facilitate the travel they propose to maintain frequent contact between the child and the other parent. In addition to financial cost, is the toll it will take on this young child and her

> parents to travel long distances. (*T.K.W. v. S.R.W.*, 2024 ONSC 2800, at para. 210)

However, cost alone may not necessarily be a barrier to an award of long-distance parenting time by the court. Justice Minnema in *Childs v. Kolodziej*, held that:

> I appreciate that the every weekend visits may be difficult for the father given the travel involved, but **he needs to put in that time for his relationship with Atlas** and it is only for a short duration.
>
> Also, in my view the Saturday to Sunday overnights will be impractical for the father and uncomfortable for the child to have in Orangeville, and as such I have required them to be in Napanee or Kingston. **This will mean that the father will have to pay for accommodation (Airbnb, hotel, motel, etc.) but that is a cost that cannot be avoided**. (*Childs v. Kolodziej*, 2023 ONSC 7275, at paras. 106-107) (own emphasis added)

Ultimately, the best interests of the child prevail, and the main goal advanced will be that parents spend regular meaningful parenting time with the child.

Existing tensions & ability to communicate

The court appears to be hesitant to allow long-distance parenting where there is a concern that a proposed relocation resulting in long-distance parenting may exacerbate any existing tensions between the parties. Justice Nieckarz in *B.S. v. K.S.*, did not allow a relocation as there was a concern that the necessity of navigating innate challenges relating to long-distance parenting would only fuel conflict between the parties:

> There is also a concern that a relocation will exacerbate the existing tensions between the parties. The Father, perhaps justifiably, is concerned that if the children relocate, his parenting time will not be prioritized. I am concerned that the necessity of navigating parenting time travel, changes to the schedule for illness or weather conditions, and other incidents of long- distance parenting time will only fuel conflict between the parties to which the children are subjected. This is not in their best interests. I find that both parents being able to actively parent the children in the same community will offer the best hope

> for a harmonious relationship between the parents, which is what the children want and need more than anything else... (*B.S. v. K.S.*, 2023 ONSC 3366, at para. 78)

Where a party has a track record of denying consistent in-person parenting time between a child and the other parent, the court may not likely limit parenting time to long-distance parenting time. Justice Stewart in *Ruhil v. Ruhil*, held that:

> I find that it is in the best interests of Pia to return to Ontario. She has been denied any consistent in person parenting time with her father since February, 2022, over half of her short life. Ms. Ruhil has not established, on a balance of probabilities, that parenting should be limited to long distance parenting. Even if that conclusion is incorrect, Ms. Ruhil has failed to meet the evidentiary standard because her actions were extreme and violated Pia's right to a relationship with both of her parents… (*Ruhil v. Ruhil*, 2024 ONSC 2828, at para. 32).

Clearly, where there is a history of tension and conflict between the parties, the court may not find the parties to be good candidates for successful long-distance parenting.

Conversely, where parties are able to illustrate that they are able to communicate effectively in a child-focused manner, the court may likely find the parties to be good candidates for long-distance parenting. Justice Nieckarz in *J.J. v. T.H.*, held that:

> I was pleased to hear that despite their inability to reach terms of a parenting time order, the parties have significantly improved their communication with each other since the trial. This is an extremely positive step. Since the trial, **the parties have adopted a more child focused approach to their communications with each other, and in scheduling and rescheduling parenting time. Such positive communication will be vital to navigating the inevitable challenges associated with long-distance parenting arrangements**. (*J.J. v. T.H.*, 2023 ONSC 4076, at para. 4) (own emphasis added)

In order for parties to successfully co-parent from a distance, they will need to ensure that they exercise flexibility and communicate with each other in a child-focused manner. The *AFCC-O Guide* recommends that it is important for the primary

residential parent to send regular updates about the child's school performance, activities and development to the long-distance parent. This will ensure that the long-distance parent is actively involved and can participate in the child's life.

Virtual parenting time

Virtual parenting time is an ideal way for the parent without primary residence to have regular meaningful contact with the child to supplement in-person parenting time. The court will assess whether the long-distance parenting time has allowed the parent and child to, "establish and maintain a meaningful relationship". The court encourages the use of virtual parenting time to "supplement" in-person parenting time (*Childs v. Kolodziej*, 2023 ONSC 7275, at paras. 99-100).

Justice Minnema in *Childs v. Kolodziej*, held that, "… if the child is sick, if there is a weather event or the father has car troubles etc., the order still requires that a virtual visit take place. If it is a three day weekend visit, there would be three virtual visits." (*Childs v. Kolodziej*, 2023 ONSC 7275, at para. 108).

Justice Tranquilli in *LaBonte v. Godin*, recognized that virtual parenting time was not a replacement for in-person parenting time, however, it did serve to enhance the quality of remote parenting time:

> …The question is how to best fashion a parenting plan in the circumstances of the parties' lives that addresses the best interests of the child. **The court recognizes that virtual parenting time is not a replacement; however, it does serve to enhance the quality of remote parenting time**. The parties and their child are clearly accustomed to making the online environment part of their regular lives. (*LaBonte v. Godin*, 2023 ONSC 2767, at para. 132) (own emphasis added)

In order for long-distance parenting to be successful, parties need to make an effort to ensure that there is sufficient in-person parenting time, which is supplemented by meaningful remote, i.e. virtual parenting time. The *AFCC-O Guide* suggests that for younger children, parents should do relationship-building activities with the child

such as reading stories, singing songs and playing games. For older children, parents can assist the child virtually with homework and maintain consistent communication regarding their daily activities.

Supervised virtual parenting time

Where there is a concern that one parent will use the virtual parenting time with the child to harass the other parent, the court may award supervised virtual parenting time to mitigate any risk of harassment. Justice Sherr in *Al-Hadad v. Al-Harash*, held that:

> The mother proposed that the father arrange virtual parenting time two times each week and contact the child directly on his I-pad. She wants no contact with the father. The court does not view this as a good parenting time plan for the child. The child is too young to be placed in this position with the father.
>
> **The court is also very concerned that the father would use virtual parenting time with the child as an opportunity to harass the mother or demean the mother to the child.** The court accepts that the mother stopped the virtual parenting time between the father and the child because the father was acting inappropriately on his virtual calls. Based on the father's attitude towards the mother at trial nothing has changed since the virtual calls ended in April 2022. The father remains very angry at the mother.
>
> **At this time, it is in the child's best interests to have the virtual parenting time with his father supervised by a professional parenting time agency to ensure that it is a positive experience for the child.** APCO offers this service. The court will make an order that both parents register with APCO in order that it may supervise virtual parenting time.
>
> The court will require the father to pay the costs of any professional parenting time service. (*Al-Hadad v. Al-Harash*, 2023 ONCJ 463, at paras. 94-97) (own emphasis added)

Supervised virtual parenting time ensures that the child is able to maintain a relationship with a long-distance parent while protecting the other parent from potential instances of harassment.

Cooperation to facilitate virtual parenting time

Justice Somji in *Kim v. McIntosh* emphasized that it is incumbent upon parents to facilitate virtual parenting time. She did not find the mother's explanations regarding internet or other technological challenges preventing her from facilitating virtual parenting time convincing:

> While the father could organize his calls with the eldest child, he clearly needed the mother's cooperation to facilitate the virtual calls with the other children. The children live with the mother and she is best aware of their school and other commitments. If the mother was having internet or other technological problems, it was incumbent upon her to communicate those concerns with the father and to make alternative arrangements to access the internet in public spaces or the homes of friends and family. In fact, it is clear from the correspondence filed by the father that when the mother raised technological challenges, the father offered effective solutions. **Given the father resides in Australia and the importance of him being able to have regular communication with his children, I do not find the mother's personal challenges as a reasonable explanation for her failure to facilitate the father's weekly virtual parenting time** for such an extensive period following the issuance of the Parenting Order. (*Kim v. McIntosh*, 2023 ONSC 5121, at para. 66) (own emphasis added)

The *AFCC-O Guide* recommends that when one parent lives at a distance, it is important for the primary residential parent to facilitate contact with the child.

Conclusion

It is important that the over-arching goal of the long-distance parenting plan is to ensure that a child has sufficient and consistent in-person parenting time with both parents, as well as meaningful remote parenting time to supplement the in-person parenting time.

Both parents need to be willing to make long-distance parenting work. The parent who has primary residence of the child will need to actively assist to facilitate meaningful parenting time with the long-distance parent.

It is clear that parties who wish to successfully co-parent and navigate the innate challenges relating to long-distance parenting, will need to work together to exercise creativity, flexibility and have open lines of child-focused communication.

Surviving spouses and elections under the *Family Law Act*

Christina Hinds

Overview

In *Castiglione v. Akram*, 2024 CanLII 85293 (ON SC), Justice McGee considered a surviving spouse's motion to extend the limitation period for a spousal election under section 6(1) of the *Family Law Act*.

A surviving spouse can elect between taking under their deceased's spouse's will or receiving an equalization of their net family properties (calculated as of the date of the spouse's death). The time period to make an election is within six months after the spouse's death. However, this period may be extended on motion if the test at section 2(8) of the *Family Law Act* is met.

In *Castiglione*, the wife died leaving behind her husband of 15 years. The husband was entitled to an equalization payment as the wife's net family property was higher than his. The wife died with a purported Will which left nothing to the husband. The husband disputed the validity of the Will. If the Will was found not valid, the wife would have died intestate, and the husband could seek a preferential share of $200,000 from the wife's estate under Part II of the *Succession Law Reform Act*.

Justice McGee found that the husband met the test and granted the extension.

Spousal Election Under the Family Law Act

Under section 5(2) of the *Family Law Act*, when a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between the respective net family properties – an equalization payment.

Under section 6(1) of the *Family Law Act*, when a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5 of the *Family Law Act*.

Under section 6(2), when a spouse dies intestate, the surviving spouse shall elect to receive the entitlement under Part II of the *Succession Law Reform Act* or to receive the entitlement under section 5 of the *Family Law Act*.

Under section 6(3), when a spouse dies testate as to some property and intestate as to other property, the surviving spouse shall elect to take under the will and to receive the entitlement under Part II of the *Succession Law Reform Act*, or to receive the entitlement under section 5 of the *Family Law Act*.

Limitation Period

The surviving spouse must make an election within six months of their spouse's death (section 6(10) of the *FLA*). In addition to filing an election, the surviving spouse must also bring an application for an equalization of net family properties within six months (section 7(3)(c) of the *FLA*).

Facts

In *Castiglione v. Akram,* at the time of the wife's death, she lived with her husband of 15 years. There was a purported one-page Will stating "[m]y souse is financially self sufficient; I am not leaving anything further to my husband." (at para. 3). The purported Will left everything to the wife's brother who was named the executor of the Estate, to split between himself and his two children.

Both the husband and the wife's brother retained lawyers. The wife's brother filed an Application for a Certificate of Estate Trustee with a Will and the husband filed a Notice of Objection.

As the six-month limitation period approached, the husband requested an extension so that the parties could continue settlement discussions. The wife's brother provided

consent for an extension of 60 days after the granting of a Certificate of Appointment of Estate Trustee.

At the time of hearing the motion, a Certificate had not been granted, and the matter had been converted to an Action.

Limitation Period and Extension of Time under section 2(8)

The six-month time period for a spouse's election can be extended under section 2(8) of the *Family Law Act*, which provides:

> The court may, on motion, extend a time prescribed by this Act if it is satisfied that,
>
> (a) there are apparent grounds for relief;
>
> (b) relief is unavailable because of delay that has been incurred in good faith; and
>
> (c) no person will suffer substantial prejudice by reason of the delay.

(a) There are apparent grounds for relief

While Justice McGee noted that the husband had "clear grounds" for relief, "a surviving spouse does not need to provide a right to an equalization payment in order to obtain an extension because disclosure may not yet be complete." (at para. 19).

In *Trezzi v. Trezzi* (2019 ONCA 978), at paragraph 50 the Court of Appeal stated that the "relief" in issue is not the right to an equalization payment, but rather the right to elect for an equalization of net family property:

> […] The "relief" in issue for purposes of s. 2(8) of the FLA is not the right to the equalization payment itself, but rather the right to elect for an equalization of net family property […] To require a surviving spouse to prove a right to an equalization payment in order to obtain an extension under s. 2(8) to make an election would defeat the remedial purpose of the FLA: it would deprive a surviving spouse of the right to choose the more favourable financial outcome as between a will and under the FLA

simply because they lack information necessary to make an informed choice between the two.

(b) Relief is unavailable because of delay that has been incurred in good faith

The Court of Appeal in *Trezzi* stated that the "good faith" requirement merely requires that the spouse acted with "honestly and with no ulterior motive." (at para. 55).

Justice McGee found that the husband had in good faith relied on the consent to defer his decision (at paras. 23 and 24).

(c) No person will suffer substantial prejudice by reason of the delay

Justice McGee found that neither the brother (as the estate trustee) or the estate itself would suffer prejudice as the brother was still awaiting appointment of Estate Trustee and there had been no partial distribution of the Estate (at para. 30).

Conclusion

For a number of reasons, a surviving spouse may not be able to make an election or initiate an application for equalization of net family properties within six months after their spouse's death. Fortunately, this limitation period can be extended under section 2(8) of the *Family Law Act*. For instance, a surviving spouse may require additional time to make an informed decision and determine which option is most beneficial.

Does a child's resistance of parenting time absolve a parent's obligation towards a parenting order?

Roxanna Cian

Overview

Navigating parenting orders becomes increasingly complex when the children subject to the order resist spending time with one parent. Recent case law highlights the challenges that courts face in addressing non-compliance, particularly when parents argue that older children's preference should dictate parenting arrangements. By examining the recent case of *Moran v. Helmuth*, 2024 ONSC 3196, among other relevant cases, this article will illustrate that a child's resistance to parenting time does not relieve a favoured parent of their legal obligation to adhere to the parenting terms of an order.

Case Overview

In the recent case of *Moran v. Helmuth*, 2024 ONSC 3196, a father brought a motion for a compliance order against a mother's alleged breaches of parenting terms previously ordered by the court. The court noted that despite the father's efforts, the relationships with his 16- and 18-year-old daughters had gradually deteriorated, resulting in the children resisting contact for a number of years (paras. 6, 13). In effect, the father had lost 65 of his allotted parenting sessions (at para. 45).

The mother claimed the daughters did not want to see him because of his controlling and coercive behaviour and that the legal efforts made in pursuing the relationships were motivated by vengeance rather than fatherhood (at para. 14).

However, the court found that the evidence before them suggested otherwise. The father had made meaningful efforts to attend a variety of counselling programs

directed at conflict management and coparenting in attempts to mend the relationship (at para. 18).

The mother's position was rooted in the belief that the children were old enough to decide whether they wanted to pursue a relationship with their father (at para. 45). She further suggested that she would support the children's desire to see their father but did not want to push them (at para 46).

The Law

Justice Healey swiftly dispelled this approach, finding that the mother incorrectly assumed her obligation towards the parenting order were met by simply bringing the 16-year-old to the parenting arrangement then leaving once the child refused to engage (at para. 45). Justice Healey went on to explain, "While I recognize that it may be significantly more difficult to persuade teenagers of Anna and Flora's ages to attend parenting time, in this case there is no evidence of active encouragement or withholding of privileges. There is only evidence of her active encouragement of estrangement from Mr. Helmuth" (at para. 51).

Justice Healey emphasized, "Courts have been clear that a parent must not simply leave the decision to interact with the other parent in the child's discretion, as it is an abdication of parental responsibility and a breach of that party's positive obligations under a court order" (at para. 51).

The 18-year-old

Despite the 18-year-old being legally considered an adult, Justice Healey found that she still remained a child of the marriage and thereby subject to parenting orders. In doing so, Justice Healey relied on a report prepared by a psychologist, referred to as the "Alton Report" (at para. 20).

The report suggested that her avoidance of her father was rooted in her anxious tendencies and unchallenged pattern of avoiding uncomfortable situations, that stunted her development on many fronts (at para. 24). The court exemplified her distorted thought process by referencing how the daughter described her father's parenting to the psychologist as "abusive" when referring to being sent to her room and losing privileges for disobeying rules (at para. 27).

The report commented,

> …Without a further court order requiring an increase in normal parenting time, together with ongoing multi-faceted family therapy with trained reunifications specialists, the children remain empowered to reject their father and his authority as a parent - there is no counter-balancing or corrective influence from their mother and no evidence she has sufficient insight about her role at this time… (at para 24).

In light of the report's findings, the court used its jurisdiction over the 18-year-old as a child of the marriage "in her best interests, to assist her to break down the barrier created by her mother's relentless campaign to isolate her from her father" (at para. 30).

The Order

Stopping short of finding the mother in contempt, Justice Healey explained that sanctions are beneficial when non-compliance has been deliberate, willful, intentional, lacking credible explanation, and compliance is otherwise reasonable (at para. 69).

In an attempt to motivate the mother "of modest means" to cultivate the relationship between her daughters and their father, Justice Healey imposed a $100 fine per child for each time one of them fails to attend the father's allotted parenting time. The fines were to be deducted from child support, if necessary (at para. 67).

It is clear that even when a child opposes seeing a parent, a parent cannot passively defer to a child's resistance to justify non-compliance of parenting orders. The "favoured" parent has an active obligation to make sensible efforts to ensure the child is participating in the parenting time outlined in an Order.

Other Cases to Consider

As cited in *Moran*, the leading case of *Godard v. Godard*, 2015 ONCA 568, set the standard of evaluation in assessing the role of a parent in executing parenting time with the other parent when the child opposes it.

In *Godard*, the mother argued that she had done her best to facilitate the father's parenting time, but that the 12-year-old daughter in question had persistently refused to participate. The motions judge found her in contempt of the court order, citing a failure to pursue multiple avenues, short of physical force, to motivate her unwilling daughter to partake in the parenting time ordered (at para. 14). On appeal, the mother argued that the motion judge erred in finding she had deliberately and wilfully breached the parenting order (at para. 15).

The Court of Appeal wrote,

> Parents are not required to do the impossible in order to avoid a contempt finding. They are, however, required to do all that they **reasonably** can. In this case, the motion judge inferred deliberate and wilful disobedience of the order from the appellant's failure to do all that she reasonably could: she failed to "**take concrete measures to apply normal parental authority to have the child comply with the access order**" (at para. 29) (emphasis added).

The court further cited the helpful analogy put forward by the motion judge:

> [W]hat does the mother do when this child doesn't want to go to school or doesn't want to go to the dentist? What are her mechanisms? Right? ... Does this child have an allowance? Does she have a hockey tournament that maybe she's not allowed to go to if she doesn't go to see dad before? Are there things she could do to force her to go short of the police attending at her house and physically removing her? (at para. 30).

The court found particular concern with the fact that the mother did not attempt any efforts to make the child see her father beyond verbal encouragement, despite being alerted at previous hearings that more persuasive modes of encouragement may be necessary (at para. 33). Ultimately, the court upheld the motion judge's decision that the mother had deliberately and willfully breached the court order, beyond a reasonable doubt, and thereby in contempt of the court order.

A recent application of *Godard*

Godard was more recently applied at the Court of Appeal in *Bors v. Bors*, 2021 ONCA 513. Similar to the factual background in *Moran*, the mother believed she had fulfilled her positive obligation to facilitate parenting time by bringing the children to the parenting time exchange location. She argued she could not be held accountable for the children's refusal to transition into the father's care (at para. 28). The court reinforced that, "Once a court has determined that access is in the child's best interests, a parent cannot leave the decision to comply with the access order up to the child" (at para. 28). The court also found that the mother's intense resentment of the father had transferred to the children and alienated them from him (at para. 32).

As a result, the court upheld the trial judge's reversal of decision-making and primary residence to the father, and ordered that the mother have no contact with one of the children and minimized contact with the other for a period of time (at paras. 4 and 41).

Hamid v. Hamid: a word to counsel

In *Hamid v. Hamid*, 2023 ONCJ 215, Justice Sager asked whether the children's alleged resistance to parenting time with their father excused the mother of her breach. Here, the father moved to find the mother in contempt of a parenting order. The mother claimed that the 14- and 9-year-old sons refused to see their father because of his behaviour (at para. 4).

The court considered four questions, as deployed in *Smart v. Belland*, 2021 ONSC 1124 to determine whether a parent's efforts met the *Goddard* threshold of "concrete measures" in the exercise of reasonable parental authority towards ensuring parenting time compliance:

(1) Did they discuss and determine the child's refusal with the child?
(2) Did they communicate with the other parent or others involved with the family about resolving the difficulties?
(3) Did they incentivize the child to comply with the order?
(4) Did they impose disciplinary measures for the child's refusal to comply with the order? (at para. 34).

The evidence suggested that the mother did not take any active steps to ensure the children met the terms of the parenting order (at para. 39).

Notably, the court took issue with the language used by counsel for the mother in communicating about the mother's failure to facilitate the ordered parenting time. In particular, her counsel claimed that despite the mother's attempts to encourage visitation, her failure to facilitate parenting time reflected the children's many documented complaints about the father. Counsel for the mother continued, "I suggest your client listen to the children and stop undermining their feelings. Their views and preferences matter a whole lot and minimizing them won't change how they feel" (at para. 25).

Citing the court in *McCarthy v. Murray*, 2022 ONSC 855, Justice Sager expresses,

> [C]ounsel arguing noncompliance with a court order is justified when a child does not wish to see a parent and a parent who fails to comply with a court order in that circumstance is only acting in the child's best interests "is a completely unacceptable stance to take, and it *is irresponsible for counsel to suggest* (emphasis mine) that the mother's actions are appropriate or in the best interests of the child" (at para. 41)

Further, "Counsel must ensure that parents understand that a court order for parenting time must be complied with and cannot be unilaterally changed or ignored" (at para. 42).

Although the court acknowledged multiple breaches of the order, the court found it most appropriate to convert the motion into an enforcement motion, only after which failure to comply would allow the father to bring a motion for contempt (at para. 58).

Evidently, it is clear that counsel who encourage non-compliance in such contexts risk prejudicing their client's position and perpetuating conflict. Counsel must be cautious about reinforcing unhealthy relational dynamics between children and parents and instead steer their clients towards constructive compliance.

A Summary of Potential Consequences

As seen in the cases above, there are several ways a court may tackle a parent's failure to encourage their reluctant child to engage with the other parent. The approach seems to vary depending on the extent to which alienating behaviour is involved.

As discussed in the September 2023 edition of the OFLM, in cases where parental alienation is strongly adduced by evidence, the courts may:

1. Do nothing and leave the child with the alienating parent;
2. Reverse decision-making and primary residence, and place the child with the rejected parent (as seen in *Bors*, discussed above)
3. Leave the child with the favoured parent and order therapy and counselling; or
4. Provide a neutral, transitional, placement for the child and order therapy.

MPM v. ALM, 2021 ONCA 465 at para. 36.

As seen in *Godard*, a court may also hold a parent in contempt for failing to take reasonable efforts and exercise their parental authority to ensure their child obeys the parenting order.

Other courts, like the one in *Hamid*, may give a second chance to a parent failing to successfully encourage visitation with the other parent by first suggesting an enforcement order is set in place before a motion for contempt is heard.

In recent cases from this year, two courts have been observed to exercise their discretion under 1(8) of the *Family Law Rules* to impose monetary penalties for non-compliance. As mentioned in *Moran*, the court imposed a $100 penalty for each child that failed to attend. Further, in *Cousins v. Healey*, 2024 ONSC 688, the court also attributed a $1,500 fine to a mother who failed to facilitate a relationship between the children and the father and breached the parenting order (at para. 132).

There, the court declined to accept the mother's claim that she had lack of control over the children's attitudes towards their father after she permitted them to not open his gifts, speak poorly about him, and dictate his parenting time (at para. 81). The court explained, "The purpose of the payment is to incentivize compliance with court orders and to signal to the offending party that the court will not tolerate non-compliance, in other words, to do what is necessary to achieve enforcement" (at para. 130).

This analysis highlights the court's evolving approach to cases involving parental alienation and non-compliance with parenting orders, even when the breach is alleged to be motivated by the children's desires. The range of responses, from reversing decision-making to imposing fines, demonstrates the court's increasing focus on ensuring that children maintain meaningful relationships with both parents. The varied approaches taken by the courts also underscores the need for flexible and case-specific remedies in these contexts.

Conclusion

The cases outlined above serve as a reminder that both parents are responsible for nurturing their children's relationships with one another, even in the face of a child's

resistance or opposition. Failure to do so may lead to unfavourable outcomes for the preferred parent. Notably, many of the cases above dispel the common myth that teenagers are old enough to decide who they want to spend time with. When a court determines it is in the best interest of the child to have a relationship with both parents, courts will not tolerate a parent who allows their children to skip parenting time simply because they did not want it.