

2016 ONSC 776  
Ontario Superior Court of Justice

D'Souza v. D'Souza

2016 CarswellOnt 1555, 2016 ONSC 776, [2016] W.D.F.L. 2073, [2016] W.D.F.L. 2077,  
[2016] W.D.F.L. 2108, [2016] W.D.F.L. 2129, [2016] W.D.F.L. 2134, 263 A.C.W.S. (3d) 699

**Finian D'Souza, Applicant and Veronica D'Souza, Respondent**

Barnes J.

Heard: June 2, 2015  
Judgment: January 29, 2016  
Docket: FS-10-69848-01

Counsel: Shawn M. Philbert, for Applicant  
Lata Menon, D. Singh, for Respondent  
Fayal Rashid, for Children

Subject: Contracts; Evidence; Family

**Table of Authorities**

**Cases considered by *Barnes J.*:**

*Boisvert v. Boisvert* (2007), 2007 CarswellOnt 4153, 40 R.F.L. (6th) 158 (Ont. S.C.J.) — referred to

*Chrintz v. Chrintz* (1998), 1998 CarswellOnt 3333, 41 R.F.L. (4th) 219, 73 O.T.C. 100 (Ont. Gen. Div.) — referred to

*G. (C.) v. N. (C.)* (2009), 2009 CarswellOnt 2524, 2009 ONCJ 187 (Ont. C.J.) — referred to

*Gordon v. Goertz* (1996), [1996] 5 W.W.R. 457, 19 R.F.L. (4th) 177, 196 N.R. 321, 134 D.L.R. (4th) 321, 141 Sask. R. 241, 114 W.A.C. 241, [1996] 2 S.C.R. 27, (sub nom. *Goertz c. Gordon*) [1996] R.D.F. 209, 1996 CarswellSask 199, 1996 CarswellSask 199F (S.C.C.) — referred to

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*Stefureak v. Chambers* (2005), 2005 CarswellOnt 1076 (Ont. S.C.J.) — referred to

*Willick v. Willick* (1994), 6 R.F.L. (4th) 161, 119 D.L.R. (4th) 405, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, [1994] 3 S.C.R. 670, [1994] R.D.F. 617, 1994 CarswellSask 48, 1994 CarswellSask 450 (S.C.C.) — referred to

**Statutes considered:**

*Children's Law Reform Act*, R.S.O. 1990, c. C.12

s. 24 — considered

s. 29 — referred to

**Rules considered:**

*Family Law Rules*, O. Reg. 114/99

R. 11(3) — considered

**Regulations considered:**

*Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)

*Federal Child Support Guidelines*, SOR/97-175

s. 7 — considered

s. 25(1)(a) — considered

TRIAL of application by father to vary final order with respect to custody and child support.

***Barnes J.:***

**Introduction**

1 The Applicant, Finian D'Souza ("the father") and the Respondent, Veronica D'Souza ("the mother") ended their marriage. The parties have three children, all daughters. The parties came to an agreement on how to handle their affairs that included the issue of their children's custody.

2 On May 9, 2011, Justice Lemon issued an order ("the final order") in accordance with the parties' agreement. A central component of this agreement was that the couple have equal shared parenting of their three daughters. The issues raised at this trial stem from the Applicant's application to vary the final order and award him sole custody of the children.

3 In October 2015, I awarded the father sole custody of the children; I ordered the mother access to the children according to a schedule. I reserved on issues relating to child support and s. 7 expenses. These are my reasons on all issues.

**Background Facts**

4 The parties were separated in August 2010 and they are now divorced. There are three children of the marriage. Valarie Rose Ann D'Souza ("Valarie"), born April 15, 1999, Vanessa Isabelle D'Souza ("Vanessa"), born December 25, 2000 and Victoria Fiona D'Souza ("Victoria"), born January 2, 2004. At the time of the trial, Valarie was 16, Vanessa was 14 and Victoria was 11 years-old.

5 The parties came to an agreement to settle their affairs. They agreed to the following arrangements:

- (a) shared custody of the children;
- (b) equal access to the children,
- (c) that the children's mailing address was to be the father's residence;
- (d) an equal shared parenting schedule;
- (e) that each parent was responsible for expenses related to the children while the children were in their custody;
- (f) that no child support would be payable from one parent to the other; and
- (g) that there were no s. 7 expenses payable from one parent to the other.

6 On May 9, 2011, Justice Lemon issued the final order in accordance with the parties' agreement.

7 On August 21, 2012, the father brought a motion to change. He requested sole custody of the children and a reduction in the children's access with their mother. At trial, I granted the father leave to amend his motion to seek retroactive child support and s. 7 expenses.

8 On October 15, 2012, the mother filed her response to the father's motion. The mother raised allegations of parental alienation and inappropriate sexual behavior on the part of father. The mother requested the involvement of the Office of the Children's Lawyer ("OCL") to investigate these allegations.

9 On December 12, 2012, Justice Mossip requested the involvement of the OCL. The OCL appointed Ms. F. Rashid to represent the children. Jacqueline Iafrate was appointed as a clinical investigator to assist Ms. Rashid. On the same date, the father brought a motion citing grave concerns about the safety of the children while in the mother's custody. He relied on a report prepared by his Psychiatrist, Dr. Flynn.

10 On January 8, 2013, Justice Price, by an interim order, varied the parenting schedule; the mother's access was supervised and limited to two hours per week.

11 The OCL recommended reintegration therapy for the mother and the children. On August 9, 2013, Justice Snowie ordered reintegration therapy, varied the supervised access order. Her Honour granted the mother unsupervised access and increased access every Saturday from 11:00 a.m. to 9:00 p.m.

12 The OCL completed their investigation and reported that it was the children's wish to live with their father and have reduced visits with their mother. The children's wishes remained the same at the time of trial. No evidence of parental alienation by the father was found by the OCL. Family reintegration therapy sessions between the mother and the children were unsuccessful.

### Issues

13 There are five issues raised in this trial:

- a) Should the father be granted leave to amend his pleadings to seek retroactive s. 7 expenses on the eve of trial?
- b) Has there been a material change in circumstances that warrants a change in Justice Lemon's final order?
- c) Should the Court grant the father's request for sole custody and change to the access schedule?
- d) Should the father's request for ongoing and retroactive child support be granted?
- e) Should the father's request for ongoing and retroactive s. 7 expenses be granted?

14 I have concluded that the father shall be granted leave to amend his pleadings to request a retroactive s. 7 order and shall have sole custody of the children. The mother shall have access to the children. The father and mother shall pay their proportionate share of ongoing s. 7 expenses commencing February 1, 2016. These expenses shall be retroactive to June 1, 2015. The mother shall pay the father monthly table amount child support in accordance with her income commencing February 1, 2016. Child support payments shall be retroactive to January 1, 2016.

***a) Should the father be granted leave to amend his pleadings to seek retroactive s. 7 expenses on the eve of trial?***

15 The father's initial pleadings requested a change to the final order awarding him full custody of the three children. The father subsequently filed an amended Notice of Motion seeking child support, s. 7 expenses and an access schedule. The amended motion did not seek retroactive child support. On the day of trial the father brought a motion to amend his pleadings to include a claim for retroactive child support and s. 7 expenses. The father relies on Rule 11(3) of the *Family Law Rules*. O. Reg. 114/99:

(3) On motion, the court shall give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate.

16 Rule 11(3) is mandatory. It is irrelevant whether the request for an amendment comes as a surprise or raises a new issue. The request to amend shall be granted unless any prejudice or disadvantage to another party cannot be cured by a cost award or by an adjournment: *Stefureak v. Chambers*, [2005] O.J. No. 1086 (Ont. S.C.J.).

17 The mother opposes the amendment. She submits that his motion is on the eve of trial and that she is prejudiced because she cannot prepare adequately to address the issue of retroactive child support. She also submits that she would suffer financial hardship if I make a retroactive award. The mother did not articulate why any disadvantage she may suffer could not be addressed by an adjournment or a cost award.

18 This trial is scheduled for multiple days. There is no evidence before me that the mother will be prejudiced or disadvantaged by the amendment nor is there any evidence that any such prejudice or disadvantage could not be cured with a cost award or an adjournment. The effect of a retroactive award, where financial hardship is an example of such an effect, is a factor to consider in determining whether a retroactive award should be granted. Leave to amend is granted.

***b) Has there been a material change in circumstances that warrants a change in Justice Lemon's final order?***

**Law**

19 On consent the final order was made on May 9, 2011. The order instituted a shared parenting arrangement. The father seeks to change the final order. A final order may only be changed where there had been a material change in circumstances: see *Children's Law Reform Act*, R.S.O 1990, c. C.12, s. 29 (*CLRA*); *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at para. 20 ("*Willick*"); *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.), at para. 10; *Persaud v. Garcia-Persaud*, 2009 ONCA 782, [2009] O.J. No. 5940 (Ont. C.A.) at paras. 3-4.

20 A change in circumstances is "material" where the original order would have been different if the "change in circumstances" had been known to or contemplated by the court at the time the original order was made: see *Willick*, at para. 20.

**Position of the Parties**

21 The father submits that at the time the final order was made, he and the mother believed that they could co-parent. The father explains that since the final order was made, the parties have been unable to agree on parenting issues. He further submits that the children have expressed a clear desire to reside with the father and reduce access visits with their mother. These factors constitute a material change in circumstances and support a variation of the final order.

22 The mother submits that there has not been a "material" change in circumstances to warrant a change in the final order. She seeks a reinstatement of the final order which institutes a shared parenting arrangement.

23 The mother explains that the father produced no evidence to support his "grave concerns" about the children's safety while in the mother's custody. These concerns formed the basis for Justice Price's temporary order limiting the mother's access to the children. She submits that the father has taken no action to encourage access between the mother and children. In fact, the father has taken steps to alienate the children from their mother; it is the father who has deliberately taken steps to frustrate communication between the father and the mother. It is this alienation that accounts for the children's views and, therefore, the children's views are not reliable. The current circumstances are of the father's own making and he should not benefit from his uncooperative actions. She asserts that the father has defied the order of this court to pay the children's GIC's into court. Overall the relationship between the mother and the children has significantly improved. For all these reasons, the changes are not material and the reinstatement of the final order provisions is in the best interests of the children.

### **Discussion and Analysis**

24 The children's views are clear and unequivocal. They do not want to live with their mother; they prefer to live with their father and they want their access time with their mother reduced.

25 Ms. Iafrate is an OCL clinical investigator. She conducted interviews with the mother, father and the children. Ms. Iafrate met and spoke to the father on March 22, 2013. She met with the mother on March 22 and 25, 2013.

26 On April 17, 2013, Ms. Iafrate visited the children at the father's home. She was with OCL counsel Ms. Rashid when she did so. The children were friendly and talkative. Vanessa asked, "Can you change the visits with my mom to every other week?" The visit provided Ms. Iafrate with an opportunity to talk to the children about school, upcoming events and their sleeping arrangements. There were no concerns with the children at the father's home.

27 On April 30, 2013, Ms. Iafrate had a subsequent meeting with the children. She met them each separately. Valarie described her father as a good, responsible person who took good care of them. She said that her father was easy to talk to and he listened to her. She described her mother as less responsible than her father. Valarie said that she and her sisters did not really speak to their mother much and she described long periods of silence during the supervised visits with her mother.

28 Vanessa described the emotional pain she suffered as a result of her parents' separation. She said her parents had periods of verbal and physical conflict which, on occasion, required police intervention. She said she saw her mother push her father down. She said sometimes her mother would yell at her. She did not miss her mother when she was at her father's home. Vanessa said that she did not enjoy spending time with her mother and that she wanted her access visits with her mother reduced.

29 Victoria said she was surprised that her parents were separating. Ms. Iafrate said it was difficult for Victoria to talk about the mother but easy for her to talk about her father.

30 Victoria said she liked the food during the supervised visits with her mother at Swiss Chalet. She said she wished she had a magic wand so that her mother would stop yelling at her.

31 Ms. Iafrate's next visit with the children was on July 9, 2013. During this visit, Valarie said she was having a really good summer. She said that she did not want to attend the supervised visits with her mother at Swiss Chalet but that her father forced her to attend. She complained that her mother has not rearranged access visits when they conflicted with activities she wanted to attend. Valarie spoke of an instance when her mother did not rearrange an access visit that conflicted with the 50<sup>th</sup> wedding anniversary party of her paternal grandparents. Valarie said that her mother does not usually take her and her sister on outings.

32 Vanessa complained that her mother's friend Florence has come to her mother's apartment and disciplined her and her sisters. Vanessa said that Valarie and her mother had a disagreement one night because Valarie wanted to call their father while visiting their mother. Vanessa said she wanted to reduce her access visits with her mother. Victoria told Ms. Iafrate that her mother's friend Florence would come into the mother's apartment and yell at them. Victoria said that her mother did a lot of yelling while they were at her house and that her mother did not like to try new activities with them.

33 Ms. Iafrate said that Valarie and Vanessa allege that there was an occasion ("the bathroom incident") where the mother held Valarie by the neck and choked her because Valarie wanted to call her father during her access visit with the mother. Vanessa did not witness this event. The mother testified that this never happened. The father said Valarie told him about this incident.

34 After Valarie disclosed the bathroom incident to the father, the father's Psychiatrist, Dr. Flynn, began to see the children. Dr. Flynn prepared a report expressing grave safety concerns for the children when in the presence of the mother. For this reason, the court reduced the mother's access to her children and ordered that the mother's access visits shall be supervised.

35 Ms. Iafrate said that pursuant to an order of this court, the children and their mother participated in reintegration therapy with a family reintegration therapist. The sessions were unsuccessful. On March 12, 2015, the father had a meeting with Ms. Iafrate where he reiterated that he was seeking sole custody of the children.

36 On March 26, 2015, Ms. Iafrate met with the mother. Ms. Iafrate noted that the mother had moved into a town house with sufficient space for the children. Each child had their own room. Ironically, Victoria said she did not have any place to sleep in her mother's home even though she had her own room. The mother's activities with the children had improved. Ms. Iafrate described the mother as less emotional and more positive.

37 On March 28, 2015, Ms. Iafrate observed interactions between the children and their mother. Ms. Iafrate said there were improvements in the relationship between the mother and children. Victoria appeared more comfortable. Vanessa said her mother had been trying lately. Victoria and Valarie did not want to sleep over at their mother's house.

38 On April 22, 2015, just under two months before the trial began, Ms. Iafrate had a meeting with the children. The children's views remain that they love their mother, they want to reduce the frequency and duration of their access visits with her and they want to live with their father.

39 Ms. Iafrate had a number of visits and interviews with the parents and the children. Ms. Iafrate said that her thorough investigation revealed that the children have a close relationship with their father. The democratic parenting style of the father is more amendable to the needs of the children than the authoritarian style used by the mother. Ms. Iafrate said that there is no evidence that the father has taken any action to alienate the children from the mother.

40 A family reintegration therapist testified that it was in the best interests of the children to live solely with the father. The family reintegration therapist confirmed that it was the children's wish to live with the father.

41 Since the final order was made, the children's relationship with their mother has deteriorated and the children have consistently expressed the desire to live with their father. The OCL concluded that it is in the best interests of the children to live with their father and to reduce access visits with their mother.

42 If these circumstances had been present or contemplated at the time the final order was made, a shared parenting arrangement would not have been made. I therefore find that these circumstances are material changes.

***c) Should the Court grant the father's request for sole custody and change to the access schedule?***

43 I have concluded that the father shall have sole custody of the children, Valarie, Vanessa and Victoria.

44 Custody and access shall be exercised in accordance with the Parenting Plan stipulated in Schedule 'B'.

#### **Law**

45 Custodial arrangements for children are determined by what is in childrens' best interests. To determine the best interests of children the court shall consider all the needs and circumstances of the children. Section 24 of the *CLRA* sets out a list of useful factors to consider in such an assessment:

- (a) the love, affection and emotional ties between the child and,
  - (i) each person entitled to or claiming custody of or access to the child,
  - (ii) other members of the child's family who reside with the child, and
  - (iii) persons involved in the child's care and upbringing;
- (b) the child's views and preferences, if they can reasonably be ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- (e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live;
- (g) the ability of each person applying for custody of or access to the child to act as a parent; and
- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

46 Joint custody will not be granted in circumstances where the parents are unable or unwilling to cooperate or where children are opposed to such custodial arrangements. In all circumstances, it is reasonable to accede to the stated wishes of children where their best interests are synonymous with their wishes: see *Kaplanis v. Kaplanis*, [2005] O.J. No. 275 (Ont. C.A.) at para. 13; *Orth-Lashley v. Lashley*, [1999] O.J. No. 185 (Ont. Gen. Div.); *G. (C.) v. N. (C.)*, 2009 ONCJ 187 (Ont. C.J.).

47 In deciding whether to grant sole custody to the father and change the access schedule, I may consider a non-exhaustive list of relevant considerations including parental conduct that could inflict physical or emotional harm on children, animosity or incompatibility between parents; status quo considerations, impacts of separating siblings and any special needs of children: see *Boisvert v. Boisvert*, [2007] O.J. No. 2555 (Ont. S.C.J.) at para. 9. Each situation is fact specific driven by an assessment of what is in the best interests of each child.

#### **Position of the Parties**

48 The father submits that the OCL has determined the children's consistent and unwavering position that they live with their father and that access to the mother be reduced to alternate Saturdays from 11:00 a.m. to 9:00 p.m.

49 The father asserts that the OCL and reintegration therapist confirm that a final order in accordance with the children's wishes is in the best interests of the children. The father explains that the mother has been uncooperative in efforts to raise the children. He argues that a joint parenting arrangement will be unworkable and is not in the children's best interest.

50 The mother submits that the OCL and reintegration therapist were not objective and, consequently, their views should not be accepted by the court. The mother explains that the father is responsible for the deterioration in her relationship with the children and, therefore, the children's views are not reliable. She submits that there have been significant improvements in her relationship with the children. She further submits that all parental conflicts have been caused by the father and that he cannot rely on his own misconduct to argue that a joint parenting arrangement is unworkable. The mother argues that the shared parenting arrangement is final order that should be reinstated.

### **Discussion and Analysis**

51 There is a high degree of animosity between the father and mother marked by a number of incidents between them. These incidents include verbal and physical conflicts during marriage, involvement of the police to solve their domestic disputes, a criminal trial to resolve assault charges against the mother with the father as the complainant; a civil suit filed by the mother against the father for allegations levelled against her in the criminal charges, disputes about parenting; and allegations of parental alienation.

52 In the context of such animosity, the human frailty of embellishment cannot be ignored. I, therefore, do not accept the parties reciprocal accounts of inappropriate behavior as spouses or parents without other credible confirmatory evidence.

53 The evidence in this trial is overwhelming that both parents love their children very much. Ms. Iafrate and the family reintegration therapist described the father as having a more democratic parenting style and the mother as having a more authoritarian style.

54 Despite these different parenting styles, in May 29, 2011, the mother and father agreed to a final order that instituted a shared parenting agreement. On that date they were satisfied that it was in the best interest of the children to have equal access to each of them. In fact, the parties arranged a joint family trip to Montreal at one point.

55 In late 2012, Valarie reported the bathroom incident to her father. This changed everything. Valarie said her mother choked and pushed her against the wall because she refused to stop making a phone call to her father during an access visit with her mother. The mother testified that this never happened. This report set in motion a chain of events that dissipated any good will between the parties. This dissipation of good will leads me to the crux of my conclusion: the parents' relationship is such that they cannot co parent under a joint custody arrangement.

56 As a result of the bathroom incident, the father asked his psychiatrist, Dr. Flynn, to meet with the children. Dr. Flynn met with the children and prepared a report citing grave concerns for the children's safety when in their mother's custody. This report formed the basis for the court's temporary sole custody order for the father and supervised access order for the mother. Evidence in support of Dr. Flynn's "grave concern" was not produced at trial. The father did not produce Dr. Flynn as a witness.

57 The children have expressed a clear preference for the father's more democratic style of parenting. The father testified that he listens to the children and, makes sure they understand that they have been heard and understood. Despite this parenting style, the children report that the father will make them go and see their mother even when they did not want to do so. This refutes the mother's claim of parental alienation and demonstrates that despite his democratic parenting style, the father will go against the children's wishes where he determines that it is in their best interest to do so. The father had taken some courses on how to parent children in high conflict situations. These courses had yielded positive dividends for him and the children.

58 The mother in her testimony revealed legitimate feelings of pain and anguish for the loss of custody of her children. She was concerned that the importance of her role as mother in the children's lives was not appreciated. She felt a sense of victimisation and frustration that her children did not listen to her. The mother is clearly frustrated that the adage "mother knows best" is not recognised or appreciated by her daughters.



59 The mother revealed a most understandable pain of a mother who felt deprived of the children she loved most dearly. The mother tried her best to please her children and to improve the relationship between her and her children. However, it is apparent that the mother has not yet appreciated the parental strategies required to parent children in a high conflict situation. As a result, her children felt that she did not really listen to them. It appears that it was not clear to the mother what "listening" to the children really meant. For example, the mother went to commendable lengths to organise a 16<sup>th</sup> birthday party for Valarie. Valarie had told both her parents that she did not want such a party. Her father listened and her mother did not.

60 This is an example of one parent's misinterpretation of how important the "no 16<sup>th</sup> birthday party request" was to Valerie. Valerie concluded that her father listened to her but her mother did not. One parent's effort to please had gone horribly wrong. I am satisfied that had the mother understood the importance and significance of Valarie's request, she would either not have held the party or arranged another celebration that took into account Valarie's reasons for not wanting the party.

61 Another example of such miscommunication is when, through her tireless efforts, the mother purchased a townhouse so that she could provide more room for her children. The children's initial pleasure at seeing the new town house was eventually replaced with a concern about having to leave their father's house and live with their mother. The mother had misjudged the impacts of this "good news" about the townhouse and the best way to communicate the news to the children.

62 During the trial, the mother had begun to seek enrollment in courses that would enhance her skills at parenting children in a high conflict environment. The father appeared to have benefited from taking these types of courses. The reintegration therapist and Ms. Iarfate described the mother's method of parenting as an authoritarian in nature, a parenting style the children did not like.

63 A series of events occurred which put the mother in a virtual "no win" situation. Valarie reported the bathroom incident to her father. In the absence of any evidence from Dr. Flynn, I find that incident and its effects on the children to be unsubstantiated at trial.

64 Dr. Flynn's report resulted in a court order varying the final shared parenting order on an interim basis. This order reduced the mother's access to supervised access of a significantly reduced duration. The order was an interim one due to the full expectation that Dr. Flynn would be produced for trial and her conclusions tested via cross examination. The expectation was that once the doctor's opinion had been tested, the trial court would be in the best position to make a final order. This never happened because the father did not produce her at trial.

65 Instead the mother's time with her children was reduced and restricted. Despite the mother's own shortcomings, these reductions and restrictions did not foster an enhanced and improved relationship between the mother and her children. It is not surprising that when the supervised access restrictions were eventually relaxed and the mother was granted more access with her children, Ms. Iarfate began to see improvements in their relationship.

66 The family reintegration therapy between the mother and her children was a good idea but, in these circumstances, it only made matters worse. I am satisfied upon a review of the evidence that the mother did not appreciate how important the bathroom incident was to the health of her relationship with the children. I am also satisfied that she blamed the father for parental alienation and felt victimised.

67 The reintegration therapist described the mother as having difficulty listening to and being empathetic to the children's perceptions. The therapist testified that the mother considered the children's concerns as an attack on her.

68 The reintegration therapist further testified that the mother was more interested in recording the sessions for litigation than for the purpose of improving her parenting skills. The mother was unable to empathize with her children

and did not really listen to the children's concerns. The therapist described the mother as a good parent who wanted to be appreciated by her children as opposed to understanding the children's needs. The mother does not accept the reintegration therapist's description.

69 Though the above circumstances were not conducive to a successful family reintegration therapy outcome, the mother was not completely at fault. During the sessions, the therapist used therapeutic strategies that admonished the mother for her parenting techniques in the presence of the very children whose trust she was trying to win. It is reasonable to conclude that such techniques were not conducive to a successful outcome. Reintegration therapy was not successful.

70 The mother has asked this court to give little weight to the family reintegration therapist's evidence because she testified as an expert without providing an expert report. The mother has been aware of the family reintegration therapist's opinion and testimony for quite some time and there is no need to give her testimony little weight on that basis. However, I am concerned that some of the reintegration therapist technique, as I have described, only served to exacerbate a difficult situation. I assess her testimony in that context.

71 The children did not express to Ms. Iafrate or the reintegration therapist that they feared for their safety when in their mother's presence. The children did express to them that they felt their mother was authoritarian and never listened to them.

72 Ms. Iafrate expressed some concern with some of Dr. Flynn's methods, specifically her failure to interview the children separately. Dr. Flynn was not called at trial to explain her conclusion that there were grave safety concerns for the children when in the mother's custody.

73 The father's failure to call any credible evidence to support the "grave safety concerns" which buttressed the interim order, means that this court will never know if those concerns were legitimate on a final basis. The damage to the mother's relationship with her children is already done.

74 I have explained how this now lost evidence set into motion a series of events that, despite the mother's own shortcomings, exacerbated the deterioration in the relationship between the mother and her children.

75 Ms. Iafrate's investigation conveyed that the children explained that their father made them go on access visits even if they did not want to. The OCL found no evidence of parental alienation by the father. I accept that evidence.

76 The children, the OCL, and the reintegration therapist all agree that sole custody with the father is in the best interests of the children. I agree. Even though I am satisfied that the reduction in access time between mother and children exacerbated the deterioration in their relationship, child custody jurisprudence is driven by the best interests of the children.

77 The mother has made significant strides. She has acquired good accommodation to meet the needs of the children, her relationship with the children has improved and she engages in more activities with them. However, the views of her teenage children and the almost teenage child Victoria are adamant: their mother has improved, they love her, they do not want to sleep over at their mother's home, they want to reduce their access time with mom and live with their father. Under all these circumstances it is in their best interests that they live with the father. In addition, the history of prior and current conflict between the mother and father makes a shared parenting arrangement unworkable.

78 The father shall have full custody of the children and the mother shall have access to the children.

***d) Should the father's request for ongoing and retroactive child support be granted?***

79 The parties agree that should the father be granted sole custody of the children, he is entitled to receive child support. The father shall be granted ongoing child support for the three children commencing February 1, 2016. The mother's income for 2014 was \$46,809.77. Based on that income, the mother shall pay the father \$895 per month for the three children's child support. This shall commence on February 1, 2016.

80 The father shall be awarded retroactive child support in the amount of \$11,635 for the period January 1, 2015 to January 1, 2016. This amount is based on the mother's 2014 income of \$46,809.77 and monthly child support amount of \$895. The payment shall be made by March 31, 2016.

### Law

81 Parents have an obligation to support their children in an amount commensurate with their income; therefore, the amount of child support paid fluctuates with the changes in the payor's income. Federal legislation has set out a needs-based analytical system to facilitate this financial arrangement.: see *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37, [2006] S.C.J. No. 37 (S.C.C.) (*S. (D.B.)*).

82 In determining whether to make a retroactive award the court should adopt a holistic view that balances the payor's need for certainty with the need for fairness to the child and flexibility. Each case must be decided on its particular circumstances.

83 Some factors to consider include past and present conduct of the payor, the needs of the children, including the children's needs at the time child support should have been paid and whether there will be any hardship if a retroactive support order is made: see *S. (D.B.)*, at paras. 99-116.

84 Once the court determines that a retroactive child support should be ordered, the date for which the award is retroactive is generally the date when effective notice was given to the payor spouse. Effective notice is given when the recipient parent indicates to the payor that child support must be paid or renegotiated. To give effective notice, the recipient spouse is not required to commence any legal action. The Recipient parent is only required to broach the topic with the payor: see *S. (D.B.)*, at paras. 118-125.

85 Section 25(1)(a) of the *Federal Child Support Guidelines*, SOR/97-175 limits a historical child support order to three years.

86 Delay in seeking child support will militate against granting a retroactive award, subject to a reasonable excuse for the delay. Lack of financial resources or emotional capacity to commence the application have been found to be a reasonable excuse: see *Chrintz v. Chrintz*, [1998] O.J. No. 3289, 41 R.F.L. (4th) 219 (Ont. Gen. Div.), at p. 245; *S. (D.B.)*, at para. 101. An arbitrary decision by the recipient parent not to apply for child support is not a reasonable excuse: see *S. (D.B.)*, at para. 101.

### Position of the Parties

87 The father seeks \$26,737 in retroactive child support from January 1, 2013, to July 1, 2015. The father explains that as of January 1, 2013, the mother was aware that the shared parenting arrangement had been varied and that the father had been given interim sole custody of the children.

88 The father submits that the mother's conduct during the litigation was inappropriate. She accused the father of parental alienation, she refused to be accountable for her role in the state of her relationship with the children, she made false allegations to the Children's Aid Society against the father, she sued the father for malicious prosecution, she refused to change the access schedule and she has failed to disclose her earnings for the 2013 and 2014 years until her document brief for trial was served.

89 The father submits that the mother owns a home, has stable employment and will experience no hardship if a retroactive child support award is made. He says he has had sole custody of the children since January 1, 2013, and is thus entitled to retroactive child support as of that date.

90 The mother submits that the father obtained sole custody of the children on December 12, 2012, on false pretences. The mother explains that the order for sole custody of the children was obtained on the basis of an expert report citing

grave safety concerns for the children when they are in their mother's custody. The mother submits that this was a strategic move by the father to gain advantage at trial. In support of this assertion, the mother references the fact that no expert evidence of "grave safety concerns" was presented at trial. The mother says the father's request for a retroactive child support award should be dismissed.

### **Discussion and Analysis**

91 Dr. Flynn's expert report triggered the interim sole custody award and yet, the mother is deprived of the opportunity to test her evidence by cross-examination. In effect, the basis for the change in circumstances that buttresses the request for the retroactive award was not pursued.

92 Put another way, due to the absence of Dr. Flynn's testimony, this court cannot conclude that the children face safety concerns while in the mother's custody. I conclude that it is in the best interests of the children to remain living with the father as the relationship between the mother and children has deteriorated significantly since the temporary order granting the father sole custody. However, I note that the order was temporary because of the full expectation that Dr. Flynn's opinion would be fully tested at trial by cross-examination or other means.

93 It is reasonable to expect that the children needed the mother's child support at the time the father assumed sole custody of the children. Because the mother is employed and owns a home, I am satisfied that she will be able to pay a reasonable quantum of retroactive child support.

94 Dr. Flynn's report was the triggering event which led to the interim variation of the final shared custody order. The shared custody order did not contemplate either party paying the other any child support because the children were spending equal time with each parent. The father cannot rely on a triggering event that was abandoned at trial to support a claim for a retroactive award.

95 Under all of these circumstances it would be unfair to award retroactive child support to the notice date of January 1, 2013. The father's claim for a retroactive award to January 1, 2013, is denied.

#### ***e) Should the father be awarded ongoing and retroactive s. 7 expenses?***

96 The father seeks retroactive s. 7 expenses in the amount of \$8,123.73. The father and mother shall pay their proportionate share of s. 7 expenses on an ongoing basis.

97 There is no evidence of any deleterious impacts on the children if the request for a retroactive s. 7 award is denied.

98 The father did not provide the mother with any notice of the s. 7 expenses. It was not reasonable for him to request her contribution to these expenses on the eve of trial. The father's request for s. 7 expenses is due to the variation of the shared custody final order which did not contemplate the payment of s. 7 expenses by either party. I have already concluded that the father's abandonment of Dr. Flynn's safety concerns at trial suggests that her opinion may have been utilized as a tactical advantage.

99 Under all the circumstances it would be unfair to award the father a retroactive award for s. 7 expenses. For all these reasons the father's application for retroactive s. 7 expenses is dismissed.

### **Costs**

100 The father was the successful party at trial. However, the disappearance of Dr. Flynn's expert opinion — that triggered the variation of the final order and related orders — remains a concern for this court. Both parties shall bear their own costs.

### **Schedule 'B' Parenting Plan**

### ***Sole Custody***

101 The father shall have sole custody of the children, Valarie Rose Ann D'Souza, born April 15, 1999; Vanessa Isabelle D'Souza born December 25, 2000 and Victoria Fiona D'Souza, born January 2, 2004 (collectively referred to as "the children").

102 For all legal, school, medical and other such records, the children's residence shall be recorded as the residence of the father.

103 The children shall continue to reside primarily with the father. The father shall be responsible for taking the children to the mother's home and picking up the children from the mother's home

### ***Access Schedule***

104 The children shall continue to reside primarily with the father and have access with the mother in accordance with the following plan:

- (i) alternating Saturdays from 11:00 a.m. until 9:00 p.m.;
- (ii) the children, at their discretion, shall have the option of staying overnight until Sunday at 2.00 p.m.;
- (iii) the children shall communicate this desire to both parents prior to the scheduled access visits; and
- (iv) access shall commence as ordered on August 24, 2015.

105 The parties shall share time with the children according to the regular access schedule for the following holidays below.

### ***Special Traditional Holidays***

106 The parties shall follow the regular access schedule for the following holidays: February Family Day, Victoria Day, Civic Holiday, Labour Day, Easter Weekend, Canada Day, Thanksgiving, Halloween, March Break, Summer Vacations, Christmas, School Vacations, Professional Activity Days.

### ***Mother's Day / Father's Day***

107 The parties shall follow the regular access schedule for these holidays.

### ***Child's Birthdays***

108 The parties shall follow the regular access schedule.

### ***Parent's Birthdays***

109 The parties shall follow the regular access schedule and arrange to celebrate their birthday with the children on their regularly scheduled weekend.

### ***Changes to Holiday Access Schedule***

110 The parents may make any changes to the holiday schedule, as long as they are discussed and mutually agreed upon in writing.

### ***Decision Making***

111 The father will advise the mother of major decisions affecting the children with respect to their education and health.

112 The father shall consult the mother on children's activities relating to education, extracurricular activities and all other activities falling under "extraordinary expenses".

### ***Emergency Decisions***

113 If the children require emergency medical care while with one parent, that parent shall promptly notify the other parent of the emergency.

114 The parent caring for the children at the time may consent to emergency medical treatment but must advise the other parent promptly.

### ***Therapy***

115 Any therapy for the children should be conducted with a therapist, chosen by the mother and the father, in hopes of rebuilding a relationship with the mother. The cost shall be shared equally between the parties. The number of sessions shall be determined by the therapist and the parties

### ***Information***

116 The mother and the father shall keep each other advised of their address and telephone numbers.

117 The father shall retain the children's birth certificates, passports, OHIP cards, school records and any other important documents pertaining to the children.

### ***Health Care***

118 The father shall be responsible for booking routine medical and dental appointments for the children. The father shall continue to take the children to their routine doctor and dental appointments.

119 The father shall inform the mother in advance of all medical and dental expenses in order for the mother to get reimbursed for these expenses from her employer. The father shall require the mother's approval where he seeks her contribution for the children's cosmetic dental procedures.

120 Each parent shall take responsibility for decision making with respect to routine illnesses that arise when the children are in their care.

### ***Education***

121 The parents shall each be responsible for informing themselves about the school calendar for the upcoming year.

122 Both parents will continue to attend school appointments separately.

### ***Activities***

123 The parent who has the children in their care shall be responsible for transporting the children to and from their activities, unless the parents agree otherwise.

124 Both parents may attend all extracurricular activities regardless of whether the activities take place during their regularly scheduled time with the children. Contentious issues that need to be discussed and resolved will not be done during this time. Both parties will not participate in aggressive and/or negative behaviour.

125 The parent caring for the children shall be responsible for bringing the children to and from their friends' birthday parties, sleepovers, and other outings the children may have with their friends.

### ***Communication***

126 The parents shall primarily exchange information and consult with each other about the children via email or text messaging. The parents shall telephone one another if necessary or in the case of emergency.

127 The mother and the father agree to keep their communication focused on problem solving and on the best interests of the children. If communication becomes angry or obnoxious in tone or involves yelling, disrespect, intimidation, etc., each party has the right to end the conversation and leave it for another time. The other parent shall respect that request and return to discuss the issue at a later time agreed upon by both parties.

128 The children shall be free to communicate with their parents when they wish. The parents shall facilitate such communication as requested.

129 Although the parents are free to call the children at the other parent's home, the parents shall acknowledge that the children may be unavailable to come to the phone. In this event, the parents commit to passing on the messages to the children so that the children can return the call.

### ***Travel***

130 If either parent plans a vacation out of town with the children on his or her scheduled vacation time, that parent shall give the other a detailed itinerary three weeks before it begins, which shall include the names of any flight carriers, flight times, accommodations, including addresses and telephone numbers for such accommodations, names of people traveling on the trip, and details regarding how to contact the children during the trip.

131 Should a parent wish to travel outside of Canada with the children, the non-travelling parent shall provide the travelling parent written consent, in the form of a notarized letter if required, for the purpose of satisfying customs/immigration authorities. Neither parent shall remove the children from Canada without the written consent of the other parent, such consent shall not be unreasonably withheld.

132 The parents agree that the children shall have contact with the non-travelling parent regularly on the trip. The parents shall agree on the times and days for these calls one week prior to the trip.

133 The children will not be permitted to withdraw from school for the purpose of vacation/travel.

134 The father shall take primary responsibility for renewing the children's passports and the mother shall provide timely consent and written authorization for him to do so. The passports shall be kept by the father but shall be provided to the mother for travelling with the children. The passports must be returned to the father promptly upon their return.

### ***Change of Residence***

135 If either parent changes their residence, they shall provide advance written notice to the other parent. This notice requirement is not intended to limit the parent's ability to take the children out of the jurisdiction of the court for the purposes of travel.

### ***Change of Child's name***

136 The parents agree that neither parent shall take any action to change the names of the children.

### ***New Partners***

137 The father and the mother agree that they shall ensure that their new partners do not make derogatory comments about the other parent when the children are present or within earshot.

138 The father and the mother agree that the children shall not call their new partners "mother" or "father" and that the terms "Mom/Mommy/Mama" and "Dad/Daddy/Papa" will be reserved for the biological parents only.

139 The Applicant and the Respondent agree that they shall each assume the primary parenting role in their households and new partners shall have a secondary parenting role with respect to the children.

140 In order to prevent the children from being exposed to a series of losses, the parents agree that they shall not introduce the children to anyone that they are casually dating.

***Dispute Resolution***

141 Both parties shall attempt to resolve any matters on which they disagree or which involve interpreting the Parenting Plan through the assistance of a parenting coordinator and/or mediation, prior to any court action.

142 The cost of the parenting coordinator and/or mediation will be shared between the parties equally.

*Order accordingly.*