TAB 8

Of Judicial Precedent and Hullabaloo, False Science and Law, and Parental Alienation and Children's Wishes

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Family Law - The Voice of the Child

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• OF JUDICIAL PRECEDENT AND HULLABALOO, FALSE SCIENCE AND LAW, AND PARENTAL ALIENATION AND CHILDREN'S WISHES •

Apparently endemic to the annals of family law is that of syndromes or theoretical corollaries and a resulting proposition that is elevated to science and judicial precedent at one and the same time. When a proposition of this sort is offered up in the context of dysfunctional families and it is said to have a scientific basis, we should, you would think, know by now to be wary and worried. Still, judges *qua* parents looking for solutions to repeated patterns of family self-destruction and lawyers as brokers in competition for the best thought to win the day, make this elevation of nothing more than thought into science and judicial precedent a recurring event in the family law world.

Kids had attention deficit problems long before it became the science of Attention Deficit Disorder with accompanying proponents who would have us believe, and had judges believing, that ADD was causally connected to youth crime. If we prescribed ritalin to cure the disorder, we would proscribe crime. Shaken-baby syndrome almost reached the level of a scientific rave within jurisprudence until someone finally pierced through the child-saving doctrine of expediency and discovered the fact of false diagnoses, as did the Goudge Inquiry. For a while, in Canada, family law jurists actually made Munchausen Syndrome by Proxy a determining factor in deciding which parent should have custody, or if either of them should. The most prevalent of this pattern of elevation of thought into science, and which continues today, is that of the science of bonding and attachment.

According to this thought, not science, judges in deciding with which person a child is to permanently reside are to give much, much more weight to nurture than nature. The person with whom the child has identified as his or her psychological parent (because that is the adult person with whom the child has lived for a period of time which can be as little as six months) is the person who should rear the child throughout his or her childhood, all things equal as between that person and even an available other biological natural parent. This science-into-law precedent, as it is in Canada, owes itself to the event of some goslings following around the social anthropologist Konrad Lorenz while he was tending to his garden one day. And, because of that, every day, Canadian judges make profound decisions indefinitely committing a child to persons other than his or her parents because of a theory of attachment taken from goslings and applied to humans and their children. From the courts of the local Magistrate to the distant Supreme, judges have done so to First Nation offspring without any follow-up on the consequences. Eventually, however, another judge decried it all as a form of extermination of a people[1] and legislatures responded more with common than scientific sense.

Now cometh the latest of these false sciences, "parental alienation syndrome". According to "PAS", we can rid ourselves of long-standing problems with children, especially older children who refuse to be with one parent by removing that child from the other parent. Furthermore, we ought to do this because these children, as science tells us, need to be under greater control and deserve a childhood that includes both parents. Thus, when a child has a limited or no relationship with one parent, the new disciples of science-into-law solutions gleefully espouse the words "parental alienation". Some say it's that old misogynist thing but the literature doesn't support the disease as gender-related. It may more properly belong to the discriminatory ageism arena. Those over 18 think they can control those under 18 by labeling them the victims of an ailment whereby intervention must occur, and if not, children are over-empowered to their detriment.[2]

There is nothing especially new about the problem of a child not accommodating well to both parents and the fact of a parental separation. For a long time our law has shown disdain for the parent who fails to enable a child to have a relationship with the other parent.[3] The terms "parental alienation" and "parental alienation syndrome" have also been around for some time.[4] But now, with one "Richard A." passing the conch of leadership to another "Richard A.",[5] the difference is the element or allurement of the problem as an ailment that can be cured scientifically with the right recovery medicine. But, at what cost, and are the courts engaged more in that of a hullabaloo[6] than a fair inquiry exercise?

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1 E. Kimmelman (1985) *No Quiet Place: Manitoba Review on Indian and Métis Adoptions and Placements*, Final Report to the Hon. Muriel Smith, Minister of Community Services, Winnipeg MB: Manitoba Community Services.

2 See, for example: R.A. Gardner, "The Empowerment of Children in the Development of the Parental Alienation Syndrome" (2002) Am. J. Forensic Psychology, 20(2):5-29.

3 In *Tremblay*, [1987] A.J. No. 875 (QL) (Q.B.) the denial of a child's relationship with a parent was described as a form of child abuse.

4 Two earlier Canadian cases citing parental alienation are *Stuart-Mills v. Cher*, unreported, February 15, 1991, *per* Gomery J. (Que. S.C.), and *Ifrah*, unreported, April 7, 1989, *per* Sirois J. (Ont. H.C.J.), cited in *Wilson On Children and the Law* at §2.32.

5 See Google and "Parental Alienation Syndrome References" and the late "Richard A. Gardner" and the contemporary "Richard A. Warshak".

6 From the Penguin Dictionary, revised 2003: hullabaloo: *noun* (pl hullabaloos) *informal* a confused noise; uproar [perhaps from HALLO + Scots *balloo* (interj) used to hush children].

This question may, in part, be answered by considering the factor of the wishes of the children when, as is currently in vogue, our courts are incorporating parental alienation "science-as-solution" into judicial precedent.

Much has recently been written on the matter of children's wishes.[7] This commentary does not intend to repeat that which is readily available. The references in the footnote are intended to give the reader all that is needed to be known about the conventional jurisprudence on the topic and those to hold accountable under Canadian (mainly Ontario) law: some who are said to listen too much to children and some too little.

Not so available is a two-part article entitled "Annals of Science [:] A Silent Childhood" by Russ Rymer. It is found in the April 20 and April 27, 1992 issues of *The New Yorker*. In the April 20th issue, investigative journalist, Russ Rymer hones in on the life of a girl who had been tied up in her bedroom until she was 13 years old and then discovered. In the April 27th issue, the story shifts to the life of the 13-year old, now discovered, and with her life turned over to mental health professionals and an appointed litigation guardian who purports to be her best interests guardian while serving her up to the devouring appetite of science and the study of linguistics. It may be worth a read and Ontario Family Law *REPORTER* will gladly send out a copy to any of our subscribers who cannot otherwise locate the reading on-line or at a public library. It may provide an anecdotal foundation for the concern of what can happen when the wishes of a child are severely diminished as a factor of importance, which is precisely the point of this commentary and the questions posed within it.

Under our legislation, specific direction exists for the consideration of the children's views and preferences.[8] There is an enabling provision for a judge to interview a child.[9] Furthermore, the court's rules appear to contemplate that a child who is not a party — as is a child in any custody/access dispute — whose interests may be affected — as is the case with a child caught in the middle of a high conflict dispute — may be entitled to a lawyer and thus achieve party status and with it the presumed capacity to issue instructions.[10]

Notwithstanding these provisions, the general deference given to the child's wishes in this jurisdiction is limited by the following factors:

(a) An assumption — largely untested but deeply felt, that children are harmed by any connection to a court proceeding.[11] In other words, the process of battling parents in the exercise of their respective rights does not mean the child ought to have the same right to do court battle.[12] The legislation does not make the child a party. The legislative wisdom reflects the fact that adults do many things children do not and should not, and this is, as well, one of them.
(b) Even if one were to consider their wishes, this may not be an especially helpful exercise because children, different from adults, often have quite fluid changes in their views, and the snapshot process of a court case concerning with which parent they will live (and love) and their long-term best interests is not conducive to assessing their genuine wishes. Children often want to live with both parents and should not be placed in the position of having to choose.

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7 Daniel L. Goldberg of the Office of the Children's Lawyer did a fine paper on the topic of Receiving Evidence From Children. Private practitioner Carolyn J. Jones also submitted a quite comprehensive review on the topic of "Evidentiary Issues in Child Protection Proceedings [:] Children's Evidence [:] Views and Wishes". Another important paper is that of "Developmentally Appropriate Questions for Child Witnesses" by Dr. Kang Lee and co-authored by our co-chair Professor Bala and Toronto counsel, John Philippe Schuman. See also J. Wilson, *Wilson on Children and the Law* (Markham, ON.: LexisNexis, 1986), Chapter Six: "The Child and the Court Room" which John Philippe Schuman will begin editing in September of 2009. The text reviews the different models in Canada for the representation of children.

8 The *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 24(2)(*b*) includes within the definition of "best interests of child", "the child's views and preferences, if they can be reasonably ascertained". Section 64(1) requires the court, wherever possible, to "... take into consideration the views and preferences of the child to the extent that the child is able to express them". The *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) does not use the words "views" or "preferences", but in making an order that it is in "the best interests of the child", the court is to reference the "conditions, means, needs and other circumstances of a child": s. 16(8).

9 *Children's Law Reform Act*, s. 64(3).

10 *Family Law Rules*, O. Reg. 114/99, s. 4(7) provides:

> **4.(7) Lawyer for a child** — In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child had the rights of a party, unless the court orders otherwise.

11 See *M.E.S. v. D.A.S.*, [2001] A.J. No. 1521 (QL) (Q.B.) where the court found it had jurisdiction to exclude a child from the courtroom in a custody case, citing its inherent jurisdiction to protect children.

12 In *Sherman*, [2007] O.J. No. 3922 (QL) (C.J.), at para. 3 where the court said this about the involvement of a 17-year-old son in the parents' litigation:

> Unfortunately, Shane has taken a role in this litigation, filing an inappropriate affidavit in support of his father and coming to court with his dad on several occasions. Although at his age Shane has a right to take on such a role, his decision to do so should have been actively discouraged, not facilitated by his father. Even at age 16, children have a right to expect that their parents will act together to the benefit of the children without placing the children in the middle.

Added to this are the fallibilities associated with lawyers ill-equipped to communicate with the child, "manage" the child as a client, and judges ill-trained at interviewing children.

(c) A more honest conceptual application of children's rights is not that their rights imitate those of adults; rather, their rights must be responsive to their needs, and their needs are unique to their age. A humanist perspective of legal emancipation for women is not that of a model that imitates men. The same is true of children in opposition to non-children. Thus, although an adult may be able to choose to have nothing to do with another family member, the same may not be true for a child. The child's best interests may lie with being required to have a relationship with both parents.[13]

These considerations impel the current state of the law where:

(i) Children do not typically come to court in custody-access disputes.[14]

(ii) In our jurisdiction, judges rarely even consider interviewing children and one judge who has recently opined a willingness to do so has prompted voiced opposition from the Office of the Children's Lawyer in Ontario, an office that prides itself on a tradition of experience and sensitivity to children in such disputes.

(iii) One judge, a jurist with a criminal law "liberty rights" background, has recently endorsed the view that children need not be heard when a family court is deciding their fate, that their wishes need not be advanced by their counsel when those wishes, as viewed by their counsel, are the product of another's influence.[15]

(iv) Another judge decided that the court need not hear from an 18-year-old brother who wanted to participate in the court's decision-making process pertaining to his younger 14 and 12-year-old brothers.[16]

(v) His younger brothers who refused parental alienation recovery therapy were committed[17] to a mental health ward of a hospital and then placed in foster care as a result, and with appointed legal counsel doing nothing to stop this, because their wishes to refuse therapy, refuse foster care and instead live with their father, considered "toxic" by their counsel, were overridden by their counsel's views of their best interests.[18]

This landscape therefore produces a number of interesting paths for those willing to walk them.

Consider:

(1) What is the available remedy to a child who believes in their wishes, who wants what she wishes? Is it to achieve a degree of obstinacy that ultimately frustrates the court and perhaps their own lawyers by voting with their feet?[19] Does such voting with their own feet expose them to a potential contempt citation?[20]

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[13] And a trial judge who regrettably observes as to the "inability of the court to control and manage the day-to-day results of a forcible removal of a child from a close parental bond" so as to effect an opportunity for a 10-year-old child to have a relationship with both parents may commit a reviewable error because that *status quo* is sufficiently detrimental as to require a court-ordered change of custody and a transfer at the courthouse from the favoured parent to the rejected parent via a child care worker from the Ministry of Child, Family and Community Services: *A. (A.) v. A. (S.N.)*, [2007] B.C.J. No. 1475 (QL) (C.A.).

[14] A 13-year-old child found to be competent to give evidence was precluded from doing so because the impact of testifying would be traumatic: *S.E.C. v. G.P.*, [2003] O.J. No. 2744 (QL) (S.C.J.).

[15] In *A.G.L. v. K.B.B.*, [2009] O.J. No. 180 (QL) (S.C.J.), the court observed:

> [150] The Office of the Children's Lawyer has taken a position different from that expressed by the children. This has been sanctioned where there is evidence that the child's views and preferences were not independent (*Boukema v. Boukema*, [1997] O.J. No. 2903 (Gen. Div.); *Reeves v. Reeves*, [2001] O.J. No. 308 (S.C.J.); *Children's Aid Society of the Regional Municipality of Waterloo v. B.A.*, [2005] O.J. No. 2844 (Ont. C.J.); *Filaber v. Filaber*, [2008] O.J. No. 4449 (S.C.J.)).

[16] See *Filaber*, [2008] O.J. No. 4449 (QL) (S.C.J.).

[17] It is not clear whether the children were "Form 2" committed, meaning placed there pursuant to a Justice of the Peace's order for a psychiatric examination (s. 16 of the *Mental Health Act*, R.S.O. 1990, c. M.7 and Form 2 of R.R.O. 1990, Reg. 741) or informally placed by their mother and the parent awarded custody and thus, with apparent authority to do so (ss. 12 and 13 of the *Mental Health Act*).

[18] *Children's Aid Society of the Region of Peel and K.F.*, unreported, Court No.: (C) FO-08-11349-00-B1.

[19] One example of this obstinacy that prevailed is in the case history of *Alexander (No. 2)*, [1986] B.C.J. No. 699 (QL), 3 R.F.L. (3d) 408 (C.A.) and *Alexander (No. 3)*, [1988] B.C.J. No. 1570 (QL), 15 R.F.L. (3d) 363 (C.A.), with the trial decision digested at [1985] W.D.F.L. 1766. De-

(2) What are we to do with those who offer safe harbor to a child who objects to rules of law over their wishes in such situations? They are non-parties. They may be interfering with the custody rights of the parent assigned the child's custody over the child's objection, but are they liable for contempt because by offering help, they are interfering with the spirit of the court order?[21] More specifically, are we going to invoke contempt or non-interference provisions of family law statutes to answer the mischief of the child who invokes e-mail, twitter or facebook entreaties for help?

(3) What do we do as lawyers if a child who has appointed counsel seeks out our help because what they want is not what their lawyer is advocating? Does privilege attach? Are we violating any ethical or professional conduct rules by seeing the child as a client and doing precisely as directed under the now largely ignored Law Society of Upper Canada's May 1981 Sub-Committee Report on the Legal Representation of Children.[22] When and if the child is the subject of a

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scribed as a "gifted child", an 11-year-old was ordered to live with his father although he wanted to stay with his mother. He kept trying and was turned down by the B.C.C.A. in August 1987 when 13 years of age. Finally, in August 1988, when he was 14 years of age, and three years after the trial decision, the B.C.C.A. yielded to his wishes deciding that there comes a point "when at near adult years a child capable of thought must now be deemed to be able to settle his own future". The same appellate court gave way to the wishes of a 13-year-old where a trial judge had agreed with the court-appointed assessor for the transfer against the child's wishes. The child had run away from the court-ordered parent on five occasions leading the appeal court to observe that "... in order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child": see *O'Connell v. McIndoe*, [1998] B.C.J. No. 2392 (QL), 42 R.F.L. (4th) 77 (C.A.), leave applied to the S.C.C. dismissed (1999), 239 N.R. 197*n*.

20 One judge of the B.C.S.C. thinks so: see *Gurtins and Panton-Goyert*, [2007] B.C.J. No. 2208 (QL) (S.C.).

21 See *MacMillan v. Bloedel Ltd. v. Simpson*, [1996] S.C.J. No. 83 (QL), [1996] 2 S.C.R. 1048, at para. 27:

> Only parties are "bound" by the injunction. But anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court. Thus in *Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.), Lindley L.J. wrote (at p. 555).
>
> > A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction, is one thing; and a motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the cause, but because he is conducting himself so as to obstruct the course of justice, is another and a totally different thing.

22 Law Society of Upper Canada Professional Conduct Committee's Sub-Committee on the Legal Representation of Children (Toronto: Law Society of Upper Canada, 1981). In particular, note these excerpts from pp. 5-9:

> We have been asked to consider whether the Rules of Professional Conduct should be changed to permit counsel representing children not to follow the instructions of the child if to depart from instructions were, in counsel's opinion, in the child's "best interests". We were also asked to consider whether the Rule on solicitor/client privilege should be amended to permit disclosure when it would be in the "best interests". We were also asked to consider whether the Rule on solicitor/client privilege should be amended to permit disclosure when it would be in the "best interests" of the child.
>
> Your Sub-Committee does not recommend there be any changes to the present Rules of Professional Conduct. These Rules are applicable when there is a true solicitor/client relationship. They would not apply if the intent of s. 20 [of the *Child Welfare Act*] was to have a guardian-type of legal representation as is argued by the Official Guardian.
>
> When the child does not have the capacity to fully understand the consequences of the proceeding he or she is involved in then the relationship with his or her lawyer is not the normal solicitor/client relationship. But this is not a new problem. Our profession has confronted this problem historically in the many criminal cases in which infants have had the benefit of defence counsel. It is with a more mature child who can be said to have a capacity to instruct his or her counsel that the problem arises. When there is concern that the child may be lacking in capacity to provide instructions, the appointment of a legal guardian may be necessary. If the child is mature and responsible enough to accept the consequences of his or her acts and decisions and understands fully the nature of the proceedings and can express a preference as to its resolution, the Committee tends to favour the traditional solicitor/client approach than the guardian-type of representation. Decisions as to the capacity of the child to properly instruct counsel must be determined by the individual lawyer in the particular circumstances. One of the facts that the lawyer would take into account in making this decision would be the ability of the child to accept rationally the advice he or she is receiving. If the child stubbornly, without reason, refuses to accept the advice of counsel, it may be that the child lacks the maturity to properly instruct counsel.
>
> We have concluded that there should be no exception to the present Rule on solicitor/client privilege. The Rules now permit disclosure of confidential information to prevent a crime. Again, it would be up to the individual lawyer to decide if any breach of confidentiality is warranted in the circumstances. Obviously, the Rule only contemplates disclosure in extreme circumstances.
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> . . . . .
>
> The lawyer, in such circumstances, would have to satisfy himself as to the ability of the child to give instructions. In the absence of capacity to give instructions, the lawyer is under a duty not to accept the instructions, and to advise the court that the infant, in his opinion, is incapable of giving instructions, at which point the Official Guardian should be notified by either the lawyer or the court.

mental health committal and placed into foster care with a lawyer who does not assist, or even is the subject of forced treatment over his or her objection in contravention of governing legislation,[23] what obligation, if any, do we have if the child seeks out our help or in respect to this performance of legal representation?

(4) Is the child who refuses treatment as authorized by a judge transferring custody to a rejected parent and then the subject of a mental health committal a child at risk of harm within the meaning of child protection legislation? Do we have a duty to report this?[24] Who is the party placing the child at risk? The non-favored parent? The de-programming therapist who recommended this form of treatment? Or, the judge who made the order?[25]

. . . . .

> Even when a child may lack the capacity to properly instruct counsel, in our view there is no place in a quasi-criminal [child welfare] proceeding for counsel representing a child to argue what is in his opinion the best interests of the child. Counsel should not be deciding whether training school would be "good" for the child. Without wishing to be placed in the role of a substantive arbiter of the law, the Sub-Committee concluded that s. 20 probably amounted to a recognition of the right of the child to counsel, and if counsel were, indeed, retained for the child, separate and independent from the provisions of s. 20, subsection 2, that counsel would unquestionably have a relationship with the child which was in accordance with the ordinary rules of conduct. His duty would be to the child, and only to the child, subject to his duty to the court. The relationship of solicitor and client would be established, and there would be a solicitor and client privilege with respect to communications between the child and the lawyer. The situation must be directly related to the retainer of a child in criminal proceedings.
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> . . . . .
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> The Sub-Committee feels that if the legislature of the Ministry of the Attorney General is of the view that some special circumstances exist in the case of infants requiring some special form of representation, that the legislature should be explicit in the wording of such legislation, and there should be no ambiguity whatsoever in such legislation. Particularly is this so where such legislation would, in the ordinary course, be entirely contrary to the traditional role of solicitor and client.

The LSUC Rules of Professional Conduct, in effect November 1, 2000, as last amended June 26, 2008 provide:

> **4.01(1)** When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. The commentary for this Rule includes:
>
> The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done. Maintaining dignity, decorum, and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.
>
> Role in Adversary Proceedings ❑ In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters derogatory to the client's case.
>
> In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

[23] *Health Care Consent Act, 1996*, S.O. 1996, c. 2, unless we read "incapable person" to mean all children under the age of 16 years, and nothing in the legislation expressly provides for that interpretation. Such an interpretation would be inconsistent with the "emancipated minor" jurisprudence that pre-dated the amending legislation: see *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3. All E.R. 402 (H.L.), at p. 421 referring to *Johnston v. Wellesley Hospital*, [1970] O.J. No. 1741 (QL), [1971] 2 O.R. 103 (H.C.J.) and see *C. (L.) v. Pinhas*, [2002] O.J. No. 5309 (QL) (S.C.J.) where a 15-year-old anorexic was found not capable regarding certain elements of a treatment plan, as determined by the Consent and Capacity Board and upheld by the reviewing court.

[24] That was certainly the view of the psychiatric team at the hospital who assessed the children in the aftermath to the decision of *Filaber*, [2008] O.J. No. 4449 (QL) (S.C.J.) which was then transformed into *Children's Aid Society of the Region of Peel v. K.F.*, unreported, Central West (Brampton), Court No.: (C) FO-08-11349-00-B1. The child protection court agreed and found sufficient reason for the children to be placed in foster care by reason of the impact of the order authorizing the forced removal and de-programming treatment, at least pending the still outstanding determination of whether or not the child were or are "in need of protection".

[25] The duty to report a child at risk of harm and the governing child protection legislation supercedes and takes priority over the custody/access proceedings that gave rise to the order of transfer and accompanying treatment: in Ontario, see *Re Catholic Children's Aid Society of Metro Toronto*, [1972] O.J. No. 1763 (QL), [1972] 2 O.R. 598 (H.C.J.); *Re Fortowsky and Essex Catholic Children's Aid Society*, [1960] O.J. No. 600

(5) Does the authority under the *Divorce Act* or *Children's Law Reform Act* enable a judge to override mental health and consent legislation so as to effect a constructive committal without the procedures provided for in respect of the latter, let alone the assistance of a lawyer who is representing his or her client's instructions?[26] Amongst other things, this means that while the legislation that is specific to the nature of forced treatment ensures that a child has counsel and is deemed to have the capacity to give instructions, the child loses that entitlement when the forced treatment is a function of a custody/access order as between his or her warring parents.[27]

(6) Who are these new experts of parental alienation? And since when is a description of a condition, as one jurist recently excerpted in her decision,[28] elevated to a science permitting expertise evidence? How is all of this new framing of the old problem with enforcing access orders and children's resistance to visitation into one of a "syndrome" or condition of "pathological child alienation" any different from that evidence of other childhood calamities thrown out as violating the rule of oath-helping?[29]

(7) What are the empirical studies that discuss the impact for a person of adolescent years who knows he or she has no voice of worth before the authorities on a matter as profound as where he or she will live? Or, what was the legislative wisdom that made it clear in this province that in child protection or child committal law the wishes of the child of this age must be heard on such a matter, and how do you reconcile the right of a child to be heard if charged with petty theft but not heard if sent away to be "therapized"? Empirical readings on adolescent eating disorders, adolescent depression, substance abuse and adolescent suicide[30] all speak to the commonality of loss of a sense of control or self-determination as a correlating factor.

In conclusion to the matter of children's wishes in the context of high-conflict custody disputes, I borrow the thinking of one whose thoughts were directed at conflict on a much larger scale; namely, that which we know as the "American Revolution", the uprising of the colonies and their emancipation from Great Britain. I think of the colonies as a rebelling adolescent dealing with a parent from whom he or she needs some distance. Tom Paine, a thinker borne of that revolution, wrote, "But such is the irresistible nature of truth, that all it asks and all it wants is the liberty of appearing". When our laws work to make some within conflict non-appearing or less equally appearing, we do well to be especially vigilant, and the proselytizing of best interests of anyone, let alone children, only heightens the vigilance.

Jeffery Wilson
Editor

(QL), [1960] O.W.N. 235 (C.A.); *G. (C.) v. Catholic Children's Aid Society of Hamilton-Wentworth*, [1998] O.J. No. 2546 (QL), 40 O.R. (3d) 334 (C.A.).

26 Part VI of the same child protection legislation, *Child and Family Services Act*, R.S.O. 1990, c. C-11 provides a specific code governing the committal of a child less than 16 years of age and includes the right of the child to legal representation: s. 114(6). Under the *Mental Health Act*, R.S.O. 1990, c. M-7, a child of 12-16 years, who is an "informal patient" in a psychiatric facility (*i.e.*, admitted under the authority of her or his guardian pursuant to s. 24 of the *Health Consent Act, 1996*, S.O. 1996, c. 2, Sch. A) is placed there upon the recommendation of a physician and only where urgent or necessary: ss. 11 and 12. The *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sch. A has no age assignment for the determination of consent. The "health practitioner" who proposes a certain treatment shall take reasonable steps to ensure that it is not administered unless he or she is of the opinion that the person is capable with respect to the treatment and has given a consent, or is incapable with respect to the treatment and the person's substitute decision-maker has given consent on the person's behalf in accordance with the Act, and nothing in the legislation exempts the child from the general presumption of capacity in s. 4 (2). In *J.K.L. v. N.C.S.*, [2008] O.J. No. 3666 (QL) (S.C.J.), the court found that these legislative schemes were secondary to the operation of the *Divorce Act* and the powers of the court to award custody, and further suggested that the consent requirement for treatment of the kind contemplated by a parental alienation recovery program was not prompted until the child was 16 years of age.

27 *Mental Health Act*, R.S.O.1990, c. M.7. Section 43 provides that a person under 16 years of age is a party to a proceeding before the Consent and Capacity Board and, furthermore, "... shall be deemed to have capacity to retain and instruct counsel".

28 *A.G.L. v. K.B.D.*, [2009] O.J. No. 180 (QL) (S.C.J.), at para. 92 and the court's reliance upon "pathological child alienation".

29 That is, the purpose of the evidence is for the purpose of bolstering the evidence of the non-favoured parent as to why they did not or could not act, and does it not invite the same considerations as that in, for example, *R. v. K. (A)*, [1999] O.J. No. 3280 (QL), 137 C.C.C. (3d) 225 at p. 267 (C.A.); namely, any evidence the purpose of which is to show either directly or indirectly that the complainant (here the rejected parent) is more or less likely to be telling the truth is not the proper subject-matter of expert testimony and is inadmissible.

30 See for example only: B.D. Garfinkel, A. Foroese & J. Hood, "Suicide Attempts in Children and Adolescents" (1982) 139 Am. J. Psychiatry, 1257-1261.