

Ontario Supreme Court
Orszak v. Orszak
Date: 2000-05-05

Alison Orszak, Petitioner (Wife)

and

Erik Orszak, Respondent (Husband)

Ontario Superior Court of Justice Himel J.

Heard: March 22-24 and 31, 2000

Judgment: May 5, 2000

Docket: 97-FP-234664

Reginald M. McLean, for Petitioner/Wife.

Erik Orszak for himself.

Himel J.:

[1] Following a divorce judgment granted two years ago, the parties have now had their corollary relief proceeding involving support and custody and access of the children.

Factual Background:

[2] The parties were married on August 18, 1985 in Winnipeg, Manitoba. There are two children of the marriage: Corey, born on April 17, 1991 and Samantha, born on September 13, 1994. The parties separated on November 1, 1996. There have been numerous legal proceedings over the years and a variety of interim orders have been made dealing mainly with access. While a final divorce judgment was granted in January, 1998, the corollary relief issues have remained unresolved. They are the subject of this trial. Ms. Orszak, who has had previous lawyers, is now represented by Mr. McLean and Mr. Orszak is representing himself.

[3] The children reside with their mother in Toronto, Ontario. The husband now resides in Montreal, Quebec with his new wife, their two year old child and his wife's ten year old daughter.

Prior Legal Proceedings:

[4] The parties received a divorce judgment on January 30, 1998. Prior to that, there was an interim order of access by the husband on alternate weekends with a condition that the

husband abstain from the use of alcohol and drugs during access. At the time of the divorce, O'Connell J. ordered that the husband pay \$1500 in child support based upon an imputed income of \$125,000. There were never any orders of interim spousal support and no claim was pursued. On April 23, 1998, Wright J. ordered that an assessment take place pursuant to section 30 of the *Children's Law Reform Act* and that the husband have supervised access on alternate weekends. A referral was also made to the Office of the Children's Lawyer which declined the referral because the children were already undergoing an assessment.

[5] Following receipt of the report of Dr. Sol Goldstein, psychiatrist, in 1998, the court made an order of specified access between the father and children. The father maintained throughout that access was being denied by the wife. Various motions for contempt were brought. On July 20, 1999, Kiteley J. dismissed a motion for contempt brought against Ms. Orszak. However, she ordered that if the parties were not able to agree themselves, she specified access on four weekends from July to September, 1999 with pick up and delivery at 32 Division of the Metropolitan Toronto Police. The case was referred to a case conference for consideration of telephone and overnight access.

[6] On September 15, 1999, the parties appeared before O'Connell J. and he ordered access to the father every second weekend during a two month period. At a case conference scheduled for November 17, 1999, these issues were discussed but no further order was made. The matter was set for trial. The parties attended a trial management conference on March 15, 2000 before Benotto J. during which she ordered disclosure by the husband of certain financial information prior to trial.

[7] The trial took place over three and one half days before me. The parties each testified but called no other witnesses.

The Evidence:

[8] The evidence called at trial focused on two main areas: support and custody and access of the children. Division of property had taken place for the most part following separation. Mr. Orszak does request to have a few personal items returned to him. At the time of the divorce, there were no major assets. The parties did not own a house and the leased car driven by Ms. Orszak at the time of separation, was returned to the leasing company in 1997. Although Ms. Orszak had not pursued a claim for spousal support, at trial, she was seeking a

lump sum payment to reimburse her for monies that she claims she loaned to Mr. Orszak and for an amount of money that would enable her to obtain a car for herself and the children as well as one year of ongoing spousal support.

(1) *Financial Issues:*

[9] During the marriage, Mr. Orszak was the primary supporter of the family. He has a Grade 8 education and has worked for many years. He worked initially for Premier Shipping as a salesperson in importing and exporting. During those years, he travelled extensively to Europe and the United States. In 1987, he established his own company and brought his brother and a few employees into the business of cross-border trading of goods. There was a great deal of travel to New York and ultimately, the parties moved to New York. Ms. Orszak, who has worked off and on during the marriage, resumed her studies at that time. Mr. Orszak was involved in working for a number of companies including Intertrans, Beaver Trading, Canadian Gateway Shipping, Lep International and Fleet Shipping Lines Inc. where he continued in international trade. While Mr. Orszak's income was sometimes \$150,000 to \$200,000 per year, he says that was a gross figure and that he spent a great deal on travel and other expenses which reduced his income. When they returned to Toronto, Mr. Orszak continued in the business of shipping goods. He also decided to invest in a restaurant business. Ms. Orszak contributed \$23,000 which she claims was a short term loan only.

[10] Upon separation, Mr. Orszak provided Ms. Orszak with \$6,000 per month support paid through his brother and their company. That continued from November, 1996 to May, 1997. In May, the amount of support was reduced to \$3,500 and then to \$2,500. In January, 1998, pursuant to O'Connell J.'s order, he began to pay \$1,500 a month. For 1999, he paid support only through the first part of the year. A Statement of Arrears dated March 1, 2000 from the Family Responsibility Office was filed as evidence and states that \$9,000 is owing.

[11] Ms. Orszak has not had a car since July, 1997 which she claims presents a real hardship to her and the children. Over the years, she has worked part-time while attending school. At the present time, she earns a modest amount from part-time teaching on Friday afternoons and Saturdays and lives on an Ontario Student Assistance Program grant and loan. The children attend public school and subsidized day care. There are certain babysitting expenses for an evening or weekends when she is working or attending school as a graduate student at the Ontario Institute for Studies in Education. While Ms. Orszak hopes to complete

her doctorate in education, there is no clear timeframe in mind and no evidence on the prospects of employment. She says that she requires child support and claims a lump sum as spousal support for repayment of the loan of \$23,000 which she made to a company in which she and Mr. Orszak had an interest for the operation of the restaurant. That venture was not successful and the loan was never repaid to Ms. Orszak. Ms. Orszak also says she has accumulated debts of \$63,000 to O.S.A.P. during her continued education.

[12] Mr. Orszak's evidence is that there were financial problems throughout the marriage. He was involved in international trade, importing and exporting goods between Canada, United States, Mexico and Europe. That work involved a great deal of travel. While it was lucrative at times, Mr. Orszak says that the expenses, particularly the cost of travel, were significant. No financial statements of his companies for 1994, 1995, 1996, or 1997 were filed with the court. In 1998, his wife filed an income tax return claiming Mr. Orszak as a dependant and without income and in 1999, Mr. Orszak filed his own income tax return showing an annual income of \$45,000. He testified that he worked with his brother until October, 1996 but no longer does so. However, he continues to drive a car leased by his brother's company. He also says that he tried a number of ventures after moving back to Montreal including selling products from Mexico but that he is now out of the international trading business and instead, is working in a business which sells cookies and chocolates.

[13] Although Mr. Orszak was ordered by Benotto J. to file an up-to-date financial statement in the proper form with income tax returns for the past three years and 1999 T4 slips, Mr. Orszak produced only his wife's 1998 return and his 1999 return and T4 slip. He claims to have not filed tax returns previously and does not have financial statements from his businesses.

(2) Custody and Access Issues:

[14] The children are now eight and five years of age. Corey is in Grade 3 at Rockford Road Public School. Samantha is in kindergarten and in a local day care program. The mother has been the primary caretaker throughout and has had *de facto* custody of the children since separation. It was not clear from the materials filed and the evidence whether she had ever received an interim custody order in her favour. There were a variety of interim access orders obtained by the father, some of which are detailed above.

[15] During their marriage, the parties lived in Winnipeg, Toronto and New York. Ms. Orszak returned from New York to Toronto and they separated in November, 1996. The marriage was characterized as a tumultuous relationship. Ms. Orszak claimed that Mr. Orszak had a serious drug and alcohol addiction problem. Furthermore, there was financial instability during the marriage and Mr. Orszak spent much of his time out of the country on business. After separation, Mr. Orszak moved back to Montreal where he was born. He continues to reside there with his wife and children.

[16] Since separation, Ms. Orszak says that Mr. Orszak has had a sporadic and “minimal” relationship with the children. She says that he has not been reliable, has not telephoned regularly and has seen the children on an infrequent basis so that they, at times, do not want to go with him on visits. Although she testified about Mr. Orszak having a drug and alcohol addiction during the marriage, she did not express concerns about that issue with reference to access at the present time. Mr. Orszak testified that upon separation, he attempted regular access. In 1997, visits were every second weekend. In the fall, however, there were problems which resulted in Mr. Orszak entering into a peace bond. In 1998, until April, pick up for access was done at the arena where Corey played hockey. However, sometimes, at the last minute, the location would be changed. In July, 1999, of the four visits ordered by Kiteley J. only two took place. Ms. Orszak refused to allow access on September 10 because of the Jewish High Holiday. On the September 25 visit, Mr. Orszak became concerned about a confrontation with Ms. Orszak and left without the children. For the October 8, 1999 visit, he was to attend at the children’s school, but they were not at school that day. As at the date of trial, Mr. Orszak had not seen his children since October of 1999. Mr. Orszak also claims that when he has purchased clothing for the children, he never sees the clothing again and when he has sent gifts, there is a delay before they get them. He says access has been denied often and that the children are influenced by their mother in their views about access. He described his former wife as a controlling person who wishes to control his relationship with the children and has stood in the way of any normalized relationship with them.

[17] Ms. Orszak lives with the children in a three bedroom apartment in the Bathurst/Finch area in North York, Ontario. She describes a modest lifestyle where she must travel by public transportation and is unable to afford extracurricular activities for the children. This in contrast to a much more extravagant lifestyle during the marriage as described by Ms. Orszak that

included renting a large apartment or house, driving two cars, and enrolling the children at private school.

[18] In 1998, Dr. Sol Goldstein conducted a court-ordered assessment which recommended access to the father. Access had been irregular and only on occasion, was it overnight. Sometimes access took place in hotel rooms; sometimes it took place at Mr. Orszak's brother's home. In the summer of 1999, access was ordered on specified dates and pick up and drop off was to take place at the police station. Ms. Orszak testified that the involvement of the police was desirable in that it provided a record of access but that it was not convenient for her and the children. Mr. Orszak testified that, even with access exchange taking place at 32 Division, there were occasions when Ms. Orszak did not show up and he travelled all the way from Montreal to learn that the children were not coming. The involvement of the police in access exchange was discontinued by O'Connell J.

[19] Since the fall of 1999, there have been a few brief visits between the father and the children. He has attended at their school and has telephoned the children infrequently.

The Positions of the Parties:

[20] The petitioner seeks an order of custody of the children with limited access to the respondent. She opposes overnight access and access outside of the province. She submits that supervised access is desirable and that an access regime should be introduced gradually. She disagrees with the recommendations of Dr. Goldstein. Ms. Orszak does not have a suggestion of an adult friend or relative who could supervise access or even the access exchange. She opposes overnight visits at Mr. Orszak's brother's house because of his brother's religious beliefs. Ms. Orszak suggests Mr. Orszak pay for a separate phone line to call the children and that he be required to give 48 hours notice of any daytime visits with the children. On the financial issues, she seeks spousal support in the nature of a lump sum representing the repayment of the \$23,000 loan and an amount for a car. She submits that the court should impute income of \$125,000 and disregard the financial statement in which Mr. Orszak swears that he earns \$45,000. In accordance with the *Child Support Guidelines*, she says that Mr. Orszak should pay child support in the amount of \$1,500. She also seeks payment of \$9,000 for arrears owing since October, 1999.

[21] The Respondent opposes the order of custody in favour of Ms. Orszak because she has prevented his access with the children and he offers to provide a home for them in Montreal. He believes his wife's motive has been to punish him for ending the marriage. Realistically, he seems to accept that Ms. Orszak has been the primary caretaker of the children and has been a devoted mother to them subject to the concerns he has about her efforts to control the children's relationship with their father. He would like extensive overnight visits with the children including taking them to Montreal in the summer for a vacation period. He is hoping for one month in the summer and some other long weekends. He would like access every second weekend from Friday after school to Sunday at 3:00 p.m. He seeks frequent telephone access and suggests daily calls every morning before school. On the financial issues, he claims that he is unable to pay support at the rate of \$1,500 per month and maintains that his income is only \$45,000. He cannot pay the arrears owing at this time, and can perhaps pay only \$500 or \$600 per month as child support. He cannot afford to purchase a car for Ms. Orszak. He believes that it is her fault that she returned the car to the dealer in 1997, when they had equity in the car and it could have been purchased at a reasonable price. He also disputes that he owes \$23,000 and says those monies were contributed to the business and, unfortunately, the investment was unsuccessful. He takes the position that Ms. Orszak is capable of working and has chosen to take a number of years to complete her Ph.D. He says he tried to help her become a teacher but she has changed what she is doing every few years and has not endeavoured to obtain better employment to support herself and the children as well.

[22] Mr. Orszak lives in a duplex in Montreal which was purchased by his new wife and he lives there with their new baby and his step-daughter. He says he received very little furniture when he separated from Ms. Orszak and would like certain paintings and a rug back from her.

Decision:

1. Financial Issues:

[23] The Federal *Child Support Guidelines* set out the rules to be applied in determining child support. There is a presumption that the amount of support for children under the age of majority is the amount set out in the *Guidelines* table with some additional amount for special or extraordinary expenses, where appropriate. The income of the payor is the foundation for determining the amount of child support payable. The court will look at the annual income

using the sources of income on the income tax return adjusted in accordance with Schedule III of the *Guidelines*. The court may consider the three most recent taxation years and average them (section 17). Where the spouse is a shareholder, director or officer of a corporation, section 18 provides that where the court is of the view that the spouse's annual income as determined under the T1 General form does not reflect all the money available to the spouse, it may determine the annual income to include all or part of the pre-tax income of the corporation or an amount commensurate with the services the spouse provides to the corporation. Certain salaries, wages or management fees or other benefits to or on behalf of persons not at arm's length must be added to the pre-tax income unless they can be shown to be reasonable in the circumstances.

[24] Section 19 of the *Guidelines* provides the court with the authority to impute income to a spouse in certain circumstances which include where it considers a spouse to be intentionally under-employed or unemployed, where it appears that income has been diverted, where the spouse has failed to provide income information when under a legal obligation to do so or where a spouse unreasonably deducts expenses from income: section 19.(1)(a), (d), (f) and (g). The reasonableness of a deduction for expenses is *not* determined solely by whether the *Income Tax Act* permits the deduction: s.19(2).

[25] It is the obligation of the payor to file income tax returns for the three most recent years, notices of assessment, statements of earnings where the payor is an employee and where self-employed, financial statements of the business for the last three years including a breakdown of salaries, wages, payments or other benefits. Where the payor controls a corporation, the payor is to provide financial statements of the corporation for the past three years. If a parent fails to provide the required information, the other parent may make application to the court for certain relief: s.22(1).

[26] In determining the amount of child support, the court must consider the financial information provided, predict annual income based on current income with necessary adjustments, consider historic patterns of income over the last three years and total the sources of income to get the total income. The court then has the authority to decide that the income for *Guidelines* purposes should be more than the total income and may impute income. That involves assessing the payer's earning capacity, considering financial benefits received by that parent and deciding when a parent is avoiding child support obligations.

Historical data and evidence on current income are to be considered in predicting future income. In *Bryant v. Bryant* (March 4, 1999), Doc. D-611-97 (Ont. Gen. Div.), the court used the term “future achievable income” to describe “imputed income”.

[27] In s.2(1) of the *Divorce Act*, a corollary relief proceeding is defined as a proceeding in a court in which a former spouse may seek a support order or a custody order or both. This allows the parties to divorce at an earlier stage and deal with corollary relief issues at a later date. Where there is significant delay between the two hearings, the applicant may have the onus of demonstrating why the claim was not made at an earlier date.

[28] The objectives of a spousal support order are set out in s. 15.2 of the *Divorce Act*. They shift away from the former means and needs test to a broader inquiry which looks at the effect of the marriage in impairing or improving each party’s economic prospects, a fair and equitable distribution of resources to alleviate the economic consequences of marriage or marriage breakdown of both spouses and promoting economic self-sufficiency of each spouse in a reasonable period of time. A reasonable standard of living relative to the marital standard of living is a relevant factor. The economic value of caring for the children and managing the household and the economic disadvantages from being out of the workforce for a period of time must also be considered: *Linton v. Linton* (1990), 1 O.R. (3d) 1 (Ont. C.A.); *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.). In *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.), the court reviewed three models of support: the contractual model which is based upon agreements or arrangements between the parties, the compensatory model where the court must consider support as compensation for foregone careers or missed opportunities and other economic hardship during the marriage as well as the needs, means and other circumstances of the parties to determine if support should be awarded and the non-compensatory model which is also based on the statutory provision and requires the court to look at the actual situation of the parties and consider economic hardship at the time of the application. Even where a spouse has not foregone career opportunities or been disadvantaged by the marriage, the spouse may be entitled to support particularly where the spouse has made efforts but is unable to provide support for himself or herself.

[29] Three relevant issues relating to spousal support are entitlement, quantum and duration. Although the majority of spousal support orders are done through periodic support payments, the court may order a lump sum payment. Some appropriate circumstances may

be where there has been consistent default, where there has been a marriage of short duration and where the parties need some finality.

[30] In *Valiquette v. Durante* (May 18, 1988), Brossard J., Gendreau J.A., Vallerand J.A. (Que. C.A.), the Quebec Court of Appeal upheld an award of a lump sum for the wife to purchase a car as it was considered a necessity in the circumstances. In *Nowakowski v. Nowakowski* (1996), 20 R.F.L. (4th) 281 (Alta. Q.B.), the court held that an award of \$25,000 lump sum was appropriate as spousal support to cover the wife's expenses while re-training. In *MacNaughton v. MacNaughton* (1991), 32 R.F.L. (3d) 312 (N.S. C.A.), the Nova Scotia Court of Appeal wrote: "The state of the law is that lump sum maintenance is justified if there are specific or immediate needs" and awarded the wife lump sum maintenance for a new motor for her car, repairs to the home and expenses for professional upgrading. A lump sum is appropriate as financial recognition of the economic disadvantage caused by the wife assuming parental responsibilities and to assist in promoting an independent lifestyle. It represents retroactive compensation and is an appropriate award under s. 15.2(6) of the Divorce Act: *Francis v. Baker* (1998), 34 R.F.L. (4th) 317 (Ont. C.A.)

[31] Applying these statutory provisions and legal principles to the evidence before me, I make the following conclusions:

[32] I find on the evidence that the parties divided their personal assets on separation by Ms. Orszak receiving the majority of personal items in the home. It is not unreasonable that Mr. Orszak receive the items he has requested. Accordingly, I order that the Persian carpet (3' x 4'), the picture from Poland, the picture entitled "Five Comrades" and the silver baby cup be returned to Mr. Orszak forthwith. Mr. Orszak shall make arrangements to pick up these items and, in any event, they shall be transferred over no later than June 1, 2000.

[33] On the issue of arrears of support, I find that while Mr. Orszak may have been generous in his support immediately upon separation and continued to pay a reasonable level of support for the children in 1997 and 1998, the fact that he has not paid *any* support during the previous nine months is completely unacceptable. On the arrears, I find that as of March 1, 2000, he owes \$9,000. That will be higher as of June 1, 2000. That amount is to be paid at the rate of \$300 per month commencing on June 1, 2000 until the arrears owing from October 1, 1999 until May 31, 2000 are retired. The rate of payment may be reviewed in

approximately six months' time and no earlier than December 1, 2000 at the request of either party.

[34] With respect to the issue of spousal support, Ms. Orszak did not pursue a claim for spousal support since separation. She has provided her own support through student loans and grants and earnings from part-time teaching. Now she seeks spousal support for a one year period and in the form of a lump sum to compensate her for what she says was a \$23,000 loan and for money to purchase a car.

[35] On the evidence, I find that Ms. Orszak's payment of \$23,000 was done as an investment in the restaurant which, unfortunately, failed. I am not satisfied on a balance of probabilities that this was a loan made to Mr. Orszak and, as a result, the claim for repayment is not made out. However, I do agree with Ms. Orszak that not having a motor vehicle is a hardship to her and the children. I order Mr. Orszak to provide a vehicle for Ms. Orszak's use for the children on a one-time basis. If it is leased, it shall be for a three year period. If it is purchased, he is to provide either the vehicle or the sum of \$15,000 for her to purchase the vehicle. This payment shall constitute a one-time provision for spousal support. It recognizes the economic hardship experienced by Ms. Orszak as a result of the marriage breakdown and it fulfills the need for some finality on this issue. The maintenance costs associated with the car shall be the responsibility of Ms. Orszak. The claim for ongoing spousal support is dismissed.

[36] The question of ongoing child support presents certain challenges. Mr. Orszak has decided to pursue a business venture where he was paid \$45,000 as income this past year. That company is owned by a trust held for his children. He operates the company and rents space from his sister's company and for which his wife had worked. He lives in a house owned by his wife. He drives a car owned by his brother. There is evidence that the family has travelled abroad. In my view, this is an appropriate case in which to impute income under s.19 of the *Guidelines*. The failure to file income tax returns and his notice of assessment, statements of earnings and financial statements of the business where Mr. Orszak controls the corporation, are all justifications for imputing income in the circumstances. By refusing to provide credible evidence as required under the *Child Support Guidelines* and as ordered by Benotto J. he has left the court with no option but to impute income. There is minimal historical data from the previous three years as Mr. Orszak has filed only his tax return for

1999 and no financial statements of his businesses. While the court can look to the pattern of income over years past, there is little evidence available other than the testimony of the parties about Mr. Orszak earning \$150,000 to \$200,000 and evidence of lifestyle.

[37] There is evidence that Mr. Orszak may be under-employed (now earning \$45,000 when he previously earned \$150,000 to \$200,000), that he has failed to provide income information although under a legal obligation to do so and that he deducts expenses from income.

[38] There was evidence at trial suggesting that assets in which Mr. Orszak may have an interest such as the new cookie and chocolate business and the upstairs apartment in the duplex where he resides are held in trust to avoid his support obligations. The capital base of a party may be considered part of his “means” in the consideration of income: *Jackson v. Jackson* (1997), 35 R.F.L. (4th) 194 (Ont. Gen. Div.), Evidence of lifestyle may be used to impute income: *Davids v. Davids* (July 3, 1998), Doc. 3550 10401/95 (Ont. Gen. Div.) upheld by (1999), 125 O.A.C. 375 (Ont. C.A.).

[39] In that the burden of proof lies upon the payor, where there is limited financial evidence, the court may draw an adverse inference and impute income in an amount it considers appropriate.

[40] I find it reasonable to conclude that \$100,000 annual income should be imputed to Mr. Orszak. Under the tables, the *Guidelines* amount for support of the two children is \$1,240 per month.

[41] I order that Mr. Orszak pay support to the two children Corey and Samantha in the amount of \$1,240 per month commencing on June 1, 2000 and on the first day of each month thereafter for so long as they are children of the marriage. Support shall be increased annually in accordance with the Consumer Price Index. The parties shall deliver to each other, no later than May 15 of each year, a copy of their income tax return and the Notice of Assessment once it is received.

2. Custody and Access Issues:

[42] Custody and access arrangements following separation and divorce sometimes pose the most difficult problems affecting the family. With the passage of time, positions become

entrenched and what may have seemed a temporary or short term solution can become the long term or *status quo* arrangement. Those arrangements may, however, not meet the test that overrides all else in these cases -- the best interests of the children. It is not too late to undo wrongs and rectify or improve situations but that must be done gradually over time, always keeping the interests of the children in the forefront.

[43] In this case, for a number of reasons the custody and access of Corey and Samantha has evolved in a rather unfortunate way. The parties separated when the children were young; Mr. Orszak had a drinking problem; Mr. Orszak travelled extensively in his work; Ms. Orszak was and remains incredibly angry at Mr. Orszak. Her feelings of hurt and abandonment have evolved to anger and resentment. She is still focused on the past and unable to move on to the future. In my view, her emotional health was and is extremely fragile. She has tried to pursue her educational goals, works on a very part-time basis and has had the full responsibility for raising the children.

[44] While the responsibility for the children may, to some extent, be attributed to the fact that Mr. Orszak lives in Montreal, still the main reason is Ms. Orszak has taken on the role because she refuses to relinquish any control and share the upbringing of the children with their father. There are ways he could be an enormous help to the children and provide relief to her if she would allow him. There are many ways in which he could have a normal, loving and meaningful relationship with the children which would be of great benefit to them.

[45] For a number of reasons, a pattern has developed over the years. The children see their father sporadically in controlled circumstances. Sometimes it has been supervised; sometimes it is not. There have been heated discussions and confrontations at access exchange. The parties have required police intervention. No adult friend or relative is willing or suitable to assist. The children hardly see or speak to their father despite a thorough custody/access assessment of a child psychiatrist expert in this field who recommended regular access. The children are clearly affected by their mother's emotional state and have difficulty adjusting to their father being in and out of their lives.

[46] 46 Given this most complex and problematic scenario, great care must be taken to resolve the custody and access of the children. As said above, any changes must be done gradually and sensitively and in an integrated way so they fit with the needs of the children, recognizing their activities and interests. Further, there must be arrangements that fit with the

ages and stages of the children and take into account their need to be with friends and pursue their schooling. Above all, any arrangements must provide a safe and secure environment for the children.

[47] 47 In a custody/access dispute, the paramount consideration is the best interests of the child which involves a host of factors including the physical and emotional well being of the child, the plans for education and upbringing as presented by the parents, the financial positions of the parents, how the proposed planning fulfills the religious, moral and ethical upbringing of the child, and the sensitivity of the parents to their role and their appreciation of the needs of the child: *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C). The wishes of the child is a significant consideration depending upon the age and maturity of the child. An assessment of the child and the family is a method by which the court may obtain an independent expert opinion to assist the court to determine best interests of the child including sometimes difficult clinical issues.

[48] 48 The court, in evaluating the best interests of the child, will look at existing custody and access arrangements and give consideration to the desirability of maintaining contact with both parents and if changes are contemplated, that they involve the least disruption to the child, (see s. 16(10) of the *Divorce Act*). The willingness of a custodial parent to foster a relationship between the child and the access parent is also relevant.

[49] 49 In this case, the existing arrangements do not fulfill some of the relevant considerations in the best interests test.

[50] 50 Ms. Orszak has had *de facto* custody of the children continuously since separation and has had the main responsibility for their upbringing and care. Mr. Orszak has had minimal contact. The children, in order to have a normalized relationship with their father, must be re-integrated with him in a gradual way, adding more frequent and intensive contact incrementally bearing in mind he lives in another Province.

[51] 51 Mr. Orszak has not seriously challenged Ms. Orszak's proposal for custody. At this time, it is in the best interests of the children that Ms. Orszak remain the custodial parent. However, that is dependent upon her emotional health being intact. It is also dependent upon her facilitating and fostering a relationship between the children and their father. If she does

not, her role as a custodial parent, may no longer be justified as being in the best interests of the children.

[52] 52 The access arrangements by Mr. Orszak to the children must be modified considerably. In my view, the best interests of the children dictate that they have access to their father on a regular basis beginning with access during the day, increasing to overnight access and ultimately moving to extended access for holidays. The issue of whether the access exchange should be supervised is problematic. The use of the police to supervise pick up and drop off of the children is, in my view, a last resort for a number of reasons. One concern is that Ms. Orszak does not find it convenient. I am not of the view that there are safety or security risks involved that justify the intervention of police at this time. I did not see evidence of drug or alcohol addiction by Mr. Orszak at this time nor evidence of safety concerns. Ideally, a monitor of the access exchange and how the access proceeds is what is needed. But the parties have not offered anyone to perform this role and do not have the resources to pay for someone to provide this service. I am prepared at this point to give the parties an opportunity to cooperate and to facilitate access by the children with their father. Should the parties not be capable of handling access exchange on their own, then I will require the exchange to be supervised.

[53] 53 I am of the opinion that the emotional well being of the children may be affected if there is a confrontation between the parents. If that occurs, a therapeutic environment will be needed, at least initially to monitor the access exchange. Once the access is regularized, then the component of the supervision of exchange may be removed. Therefore, if either party cannot handle the access exchange without supervision, then a referral shall be made to a supervised access centre. I expect to receive reports on the progress of the supervised access exchange. It is the responsibility of Mr. Orszak to obtain the reports and file them with the court.

[54] 54 If both parties are of the view that access exchange can take place without supervision at the lobby of the apartment where Ms. Orszak and the children reside, then the access exchange may be unsupervised. Unless stated otherwise, pick up will take place at the lobby of the apartment. The children will be ready to leave from the lobby at the time set out below and will be returned to the apartment lobby at the time set out.

[55] If the parties had sufficient means, I would order the involvement of an access monitor to provide a neutral service in ensuring access takes place and meets the best interests of the children. Since the parties lack the resources to hire someone to perform this function and it is not available as a public resource, I have had to modify the access requirements accordingly. I am attempting to introduce regularized and normalized access in a more gradual way in order to overcome what may be parental alienation syndrome which has been developing over the past while.

[56] Access will, therefore, be as follows:

1. Commencing on May 15, 2000, there will be telephone access by the children to the father each morning from Monday to Friday. The father will call at 8:00 a.m. and speak briefly with each of the children. In the circumstances, given the ages of the children and the financial circumstances of the parties, I am of the view that a separate telephone line is *not* necessary. Ms. Orszak will facilitate the daily telephone calls by making the telephone available at that time. It is my expectation that the calls will take place on a daily basis and only in the rarest of exceptions will the access not occur. In that rarest circumstance, Mr. Orszak is to be notified at least 24 hours in advance, if the access by telephone cannot take place at that time on a given day. If the telephone access is missed because of some other important commitment of the child, it shall be made up at a mutually convenient time later that day. The only exception will be, on notice, if the children are out of the jurisdiction for the purpose of holidays with their mother.

2. There will be access by the children to their father every second weekend. The first visit will take place on Saturday, May 13, 2000 at 10:00. a.m. and will be until 7:00 p.m. on that date. This arrangement shall be repeated on Saturday, May 27 and Saturday, June 10, 2000. If both parties agree, pick up and drop off shall be at the lobby of the apartment where the children reside with Ms. Orszak. If the parties are unable to cooperate, a referral will be made and access exchange will be at the supervised access centre "Access for Parents and Children" located at 1125 Danforth Avenue, Toronto, Ontario. The children shall be picked up at 10:00 a.m. and dropped off at 4:00 p.m. on the dates of access.

3. Commencing on the weekend of June 16 to 18, 2000 and every second weekend thereafter, the access shall take place after school on Friday at 3:30 p.m. until Sunday at

3:00 p.m. on an overnight basis. Pick up will take place at the school of each child and drop off at the apartment. Such access must be exercised in the Province of Ontario until further order of the court.

4. As agreed, the parties shall return to court before me on Thursday, July 27, 2000 at 2:15 p.m. for an update on these issues.

5. While the mother has custody and the father has access to the children as specified above, the mother must keep the father informed as to the health, well being and educational progress of the children. The husband is entitled to receive on request medical and educational records regarding the children from the appropriate health facilities and schools.

6. The mother and father shall promote and foster a healthy relationship between the children and the other parent. That includes not criticizing the other parent, not discussing visits with the children in an adverse way, not using the children as messengers or involving the children in financial matters.

7. During the time the children are with each parent, that parent has every day decision-making over the child. For example, when the children are visiting with their father, he has the decision-making over what activities he wishes to pursue during access. The same applies to the mother.

8. The parties shall maintain a record of access by telephone and in person which shall be presented to the court on the return date of July 27th. Any deviation from the schedule outlined above requires explanation to the court.

[57] My expectation is that visits shall take place between the children and their father, that the parties will both facilitate these arrangements and demonstrate respect for the other party's role in relation to the children. During access, the father and mother are to exchange telephone numbers where they can be reached in the event of an emergency.

[58] If, on the return date to court, there is evidence that there has not been compliance with this order, the court will consider whether the existing custodial arrangements will continue or whether a change in custody and access is indicated. Ideally, the entire family should be involved in therapy. However, recognizing the problems of distance and lack of resources, that issue will be deferred at this time. It may well be that therapeutic involvement and support will be made an integral part of future custody/access arrangements.

[59] I should also emphasize that the failure to permit access by a child to a parent may result in emotional harm to that child. Emotional harm has now been included in the recent amendments as one of the grounds for finding a child is in “need of protection” under the *Child and Family Services Act*, R.S.O. 1990, c. C.11 as amended (March 31, 2000). The consequences of wrongful denial of access are also the subject of enactments to s.34 of the *Children’s Law Reform Act*. Although those provisions are not yet in force as of April, 2000, they are awaiting proclamation.

Result:

[60] My judgment is summarized below:

1. Ms. Orszak shall return to Mr. Orszak the Persian carpet, the two paintings and his silver birth cup by June 1, 2000.
2. Mr. Orszak is responsible for arrears of support to May 1, 2000 which have been calculated at the rate of \$1,500 per month. Commencing on June 1, 2000, he shall pay \$300 monthly towards those arrears until the total amount owing is retired. The rate of payment may be reviewed in approximately six months’ time and no earlier than December 1, 2000 at the request of either party.
3. The claim for lump sum spousal support for a \$23,000 loan has not been proven on a balance of probabilities and is dismissed. The claim for a lump sum payment of spousal support for a car is granted. Mr. Orszak shall provide a car on a three year lease for which he is responsible no later than June 30, 2000. Alternatively, he shall purchase a car on a onetime basis for the use of Ms. Orszak and the children or provide the sum of \$15,000 to Ms. Orszak to purchase the vehicle herself. The cost of upkeep and repairs of the car are the responsibility of Ms. Orszak.
4. Commencing on June 1, 2000 and on the first day of each month thereafter, Mr. Orszak shall pay the sum of \$1,240 based on an imputed income of \$100,000 as support for the two children, Corey, born on April 17, 1991 and Samantha born on September 13, 1994, for so long as they are children of the marriage. Such support shall be increased annually in accordance with the Consumer Price Index.
5. The parties shall deliver no later than May 15 of each year, income tax returns filed annually.

6. Commencing on May 15, 2000, the children shall have daily telephone access with their father each Monday through Friday inclusive at 8:00 a.m. at their home. If the telephone call cannot take place at that time for exceptional reasons only, then it shall take place at a mutually convenient time later that day. A record shall be kept of all telephone access until the parties return to court.

7. Commencing on May 13, 2000, there will be access by the children to their father. The first visit will take place on Saturday, May 13, with pick up at 10:00 a.m. and drop off at 7:00 p.m. This shall be repeated for two further Saturdays, that is May 27, and June 10, 2000. Pick up and drop off shall take place at the apartment lobby where the children reside. If the parties are unable to co-operate on access exchange, then a referral shall be made forthwith to the supervised Access Centre, "Access for Parents and Children" located at 1125 Danforth Avenue, Toronto, Ontario. The children are to be brought there by Ms. Orszak so that they are ready to be picked up by Mr. Orszak at 10:00 a.m. and Mr. Orszak shall return the children to the access centre by 4:00 p.m. If the hours are extended by the centre, then the children are to be returned at 7:00 p.m. Mr. Orszak shall contact the centre at (416)304-1221 to make the referral and necessary arrangements. Any referral fee for service at the centre shall be paid equally by the parties. The parties shall confirm the arrangement for May 13, 2000 by telephone prior to that date.

8. Commencing on the weekend of June 16 through 18, 2000 and every second weekend thereafter, access shall take place on an overnight basis with pick up at the children's schools on Friday after school and drop off at the apartment on Sunday at 3:00 p.m. When school is over, pick up shall be at the lobby of the apartment where the children reside. Such overnight access will be exercised in the Province of Ontario until further order of the court.

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9. The details of the access and the roles and responsibilities of the parents are set out earlier in my judgment.

10. As agreed, the parties shall return to court before me on Thursday, July 27, 2000 at 2:15 p.m. for an update of these issues and for consideration of further orders.

[61] If the parties are unable to agree on costs, they may speak to that issue on July 27, 2000.

Order accordingly.