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DELIVERED AT 'CELEBRATING PROFESSOR NICK BALA'

Family Law Panel

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*Question # 1:*

*In Ontario we have seen several cases recently where custody reversal is one judicial remedy, particularly in severe cases of irrational alienation. Is this as a solution more harmful than the problem? Is it a violation of children's or adolescent's rights or civil liberties to force them to live with a parent they irrationally reject or to attend counselling or an educational program, like the Rand/Warshak Family Workshop?*

First, we need to distinguish between a "pathological alienation", which is an irrational rejection of or strong resistance to one parent (and often the extended family) that child had a good relationship with previously and a "realistic estrangement" where there is a good reason (abuse, neglect, etc.) for child to reject a parent. Here we are talking about an irrational rejection.

Justice Preston speaks of the "stark dilemma". Do the long term benefits of having a relationship with the rejected and often healthier parent, outweigh the shorter term risks such as the emotional costs or the child's destructive behaviour associated with temporarily separating the child from the favoured parent? Judges have ruled on both sides of this "stark dilemma." Justice Martinson said that a separation from the favoured parent may be necessary, not only to have a relationship with the rejected parent, but also to have a healthy and better relationship with the favoured parent.

It's all about how we conceptualize alienation in terms of its impacts. If we see it as psychologically abusive, then the answer to the stark dilemma should be clear or clearer. There is a consensus that *severe* alienation is abusive to children. The negative impact of intrusive parenting and alienation on children and adults who were alienated as children is well documented. In child protection cases, children are routinely separated from abusive parents, and often times against the child's wishes. If you don't accept that irrational alienation is abusive or abusive enough, one may come to a different conclusion. We need to ask not only about the ethical issues of intervening

when children protest, but also about the ethical issues when we do not intervene to protect children from abuse.

An alienated child can transform very quickly from refusing or staunchly resisting the rejected parent to being able to show and receive love from that very parent. This switch is met by an equally swift shift back to the alienated position as soon as (or even before in anticipation) the child returns to the orbit of the favoured parent. If you have never seen it, you may find this difficult to believe. It is for this reason that an extended period (depending on the circumstances, could be 3-6 months) of no contact with the favoured parent is necessary for a solid reintegration with the rejected parent.

Indeed, there may be short-term negative impacts. These alone cannot determine that a custody reversal should not occur. Every decision must be based on all of the factors in the best interest test. It's possible that a separation from the favoured parent is not traumatic at all, but rather liberating -- the child is now able to resume what was a deep attachment to the parent they have not been free to love in the presence of the favoured parent. Amy Baker's research on adults alienated as children indicates that many secretly wished that someone called their bluff and forced them to have contact with the parent they claimed to hate. These adults spoke poignantly about wishing someone would know what they were truly feeling underneath the façade of rejection, hate and distorted perceptions.

While children's feelings and ideas are important to consider, they are not determinative. Their wishes and preferences need to be independent and in their best interests. There are good reasons why, by law, courts have the ultimate control over a child's best interests. The adolescent brain is under construction, hence their greater risk taking behaviour, poor judgment and inadequate impulse control. By law adolescents are not permitted to vote, drink alcohol, drive without a license or be truant. Children and adolescents are not permitted by their parents to refuse medical treatment. Thus, coercive measures to protect children are used by parents and the courts routinely to rectify unhealthy and dangerous situations. Why is it then that when it comes to deciding to sever ties with a parent and in many cases the entire extended family for no rational reason, some think it is okay to let our youth prevail and opt for this extreme, life changing experience?

It would be rare for a child who has been vehemently refusing or resisting contact to all of sudden say, "Okay, I agree to see my mom or dad now". Children need to be able to say "The judge made me do it!". We need to allow them to save face.

*References available upon request*