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COURT OF APPEAL FOR ONTARIO

**RE: KENNETH ROGERSON (Applicant/Respondent) –and- ANITA
TESSARO (Respondent/Appellant)**

BEFORE: ROSENBERG, MOLDAVER AND LANG JJ.A.

**COUNSEL: Andreus R. Snelius
for the appellant**

**Mari-Anne Saunders
for the respondent**

**HEARD &
RELEASED**

ORALLY: April 28, 2006

On appeal from the judgment of Justice Cheryl LaFreniere of the Superior Court of Justice, dated August 29, 2005.

ENDORSEMENT

[1] This appeal cannot succeed.

[2] The appellant argues that the trial judge erred in two respects: first, in failing to give sufficient weight to the status quo of de facto maternal custody and, second, in giving too much weight to s. 16(10) of the *Divorce Act*. We disagree.

[3] In comprehensive reasons, the trial judge made factual findings about the mother's conduct, which are not challenged on this appeal and which were amply supported by the evidence. She drew reasonable inferences from those findings and concluded that the appellant, while otherwise a good parent, was unable to support a relationship between the children and their father.

[4] The trial judge was alert to the persistence of the mother's conduct in attempting to alienate the father from the children. That troublesome conduct carried with it long term implications that were contrary to the best interests of the children. It included a broad range of behaviours, including such potentially serious behaviour as not telling the father about or giving him medications that were prescribed for the children.

[5] The mother's problematic conduct included the mother's decision to move the children's home to a different town on the eve of trial. As a result of that move, the children were uprooted from their school and their community. Moreover, the mother said that if the father moved to her new town, she would move again. This conduct, in addition to many other instances of alienating conduct, was properly viewed by the trial judge as evidence of the mother's inability to support the father's relationship with the children and to consider the best interests of the children.

[6] The mother's conduct persisted despite assessments and court orders stressing the importance of the relationship between the father and the children. As the trial judge noted, the mother is not persuaded by judgments of the court.

[7] In contrast, the father bonded closely with the children, took advantage of parenting courses, established himself as a capable and affectionate parent, participated fully in the children's schooling and extra-curricular activities and, finally, appreciated the importance of facilitating a relationship between the mother and the children.

[8] We recognize, as did the trial judge, that the remedy of granting custody to the father is a dramatic one. However, that remedy was supported by the expert evidence and by the mother's persistent, ingrained and deep-rooted inability to support the children's relationship with the father. We note that the trial judge carefully structured her order so that the children's transition from primary residence with the mother to primary residence with the father would be gradual and cause as little disruption as possible for the children.

[9] Since this appeal was primarily fact driven and we see no error of law, the appeal must be dismissed.

[10] The respondent is entitled to costs of the appeal, which we fix at \$2,500.00, inclusive of disbursements and GST.