

Family

Emancipation of a child: Cases

By Barb Cotton and Christine Silverberg



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(December 9, 2020, 2:17 PM EST) -- It seems that one method for an older child to obtain a court determination of his or her emancipation is to apply for a declaration that she or he has withdrawn from parental charge. This was the situation in the Ontario Court of Appeal decision of *R.G. v. K.G.* 136 O.R. (3d) 689.

There, the court clarified that "there is a distinction between the fact of withdrawing from parental control and an application to court for a declaration that a child has withdrawn from parental control. The former is a right that is exercised unilaterally. The latter engages the court's jurisdiction with respect to declaratory relief" (at para. 46).

As summarized in the book by Ned Lecic and Marvin Zuker, *The Law is (Not) for Kids: A Legal Rights Guide for Canadian Children and Teens:*



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[In *R.G. v. K.G.*], a 17-year-old girl whose parents had divorced many years earlier succeeded in withdrawing from her father's control against his wishes. Her father, with whom she had been living, had been behaving in a domineering manner and was trying to prevent her from seeing her mother and from enrolling at a university in Florida, where her mother (who had remarried) now lived. The girl argued that her father's controlling nature and his arbitrary rules made living in his home unbearable and that her withdrawal was therefore involuntary, in which case she was still entitled to support. [Both the lower court and the Ontario Court of Appeal agreed]: her request for an official declaration of withdrawal was granted, and she was able to get a court order for parental support during her studies.

As explained by Justice Mary Lou Benotto in *R.G. v. K.G.*, in Ontario, once a child declares an intention to withdraw from parental control, her independence may be recognized by the police and schools. There is no formal court process for a child to withdraw. If declaratory relief is sought, however, the court should inquire into the reasons why the relief is sought and whether the declaration would resolve the issue between the parties (presumably the child and her parents or guardians). "A declaration can only be granted if it will have practical utility in settling a 'live controversy' between the parties."

An example of a "live controversy" is an Alberta case, *C.(J.S.) v. Wren (Alta. C.A.)* [1986] A.J. No. 1166, where the 16-year-old girl, who had become pregnant while living at home with her parents, sought to have an abortion over the objections of her parents. The parents sought an injunction and raised the question of whether the girl had given informed consent to the procedure. Justice Roger Philip Kerans held that the girl was of the age and level of understanding that she had the capacity to consent to the abortion.

In the interesting Alberta case of *MacKinnon v. Harrison* [2011] A.J. No. 1061, a 16-year-old girl explicitly asked the court for a "Declaration of Emancipation," which was, in substance, granted. The girl had lived with her mother all of her life, and her father had had access rights since she was an infant. The girl became very resistant to seeing her father, however, and he sued for custody. She had developed a real passion for dancing.

A parenting expert was appointed to conduct a bilateral custody assessment, and she recommended that the girl finish her remaining two years of high school in a boarding school in British Columbia with a performing arts focus. The assessment was implemented in a June 2011 court order. The girl "voted with her feet," however, and went to live with her stepbrother at the end of summer rather than attend the boarding school or live in her father's home.

The mother appealed the court order on the basis that the girl should be allowed to continue to live with her, in the home she was used to and with her established friends. It was in this context that the girl sought her "Declaration of Emancipation." The father conceded and did not contest the appeal.

In the result the appellate court allowed the girl to return to her mother's home with primary residential care and control of the child to the mother, with the child to determine for herself when she would visit with her father. The appellate court concluded: "In our view the court should exercise restraint when interfering with the wishes of this normal 16 year old."

A review of the law therefore indicates that provinces vary regarding at what age emancipation might occur, with the only real guidance being a "child voluntarily withdrawing from parent's charge and living an independent lifestyle" (Alberta); "special circumstances where there are serious reasons for the request" (Quebec); "age of discretion at sixteen" (Ontario); and perhaps at any age subject to the court's declaratory judgment.

Before seeking declaratory judgment, careful consideration will need to be given to factors such as age, maturity and circumstances, including whether a "live controversy" between the parties can be settled.

This is part two of a two-part series. Part one: Emancipation of a child.

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