

Family

Emancipation of a child

By **Barb Cotton and Christine Silverberg**



Barb Cotton



Christine Silverberg

(December 1, 2020, 3:14 PM EST) -- Those of us practising family law frequently see how the children suffer in a high-conflict battle between their parents. An older child may wish to determine matters such as where they will live and with whom they will live by themselves, without any involvement by the courts or an adjudicator. To this extent they wish for "emancipation."

Emancipation in the context of a relationship between a parent or guardian and a child is generally understood to mean that the minor is released from the control, support and responsibility of a parent or guardian. Is there room for the emancipation of an older and yet still minor child in Canadian law?

In Alberta, as in almost every other Canadian jurisdiction, the concept of emancipation *is not* explicitly recognized in legislation. Alberta's *Family Law Act*, SA 2003, c. F-4.5, s. 49(2)(b), recognizes the possibility, however, of a child's self-determination prior to attaining the age of majority. In particular, while the statute establishes that parents are responsible for the care, supervision, maintenance and support of their children, it also stipulates that this obligation exists in respect of a child under the age of 18 years *unless that child has voluntarily withdrawn from her parent's charge and is living an independent lifestyle.*

Quebec is the only province in Canada that explicitly allows minors to apply to the court to be emancipated from their parents; but emancipation requests are only granted in special circumstances where there are serious reasons for the request, and it appears that a minor can apply for emancipation at any age.

While Ontario does not have legislation authorizing and setting out a formal process for the emancipation of minors, s. 65 of the *Children's Law Reform Act*, RSO 1990, c. C.12, codifies a child's common law right to withdraw from parental control and has fixed the age of discretion for that purpose at 16. That said,

"[I]t has always been a rule of common law that a parent's right to custody will not be enforced against a child's will once the child has reached the "age of discretion." ... Historically, this meant that the child had the right to withdraw from parental control and the court would not force the child to return to a custodial parent, but would allow the child to live where he or she chose" (See *R.G. v. K.G.* 136 O.R. (3d) 689 at para. 43).

In fact, the courts in those jurisdictions that have turned their minds to this issue have recognized that where a teenaged child is determined to live with one parent over another, there is likely little a court can do. The child will simply "vote with their feet." As such, there has been judicial recognition of the reality 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.

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.*

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).

This is part one of a two-part series. In the second part of this series we will take a look at some cases in which a minor has applied for the declaratory relief of emancipation.

Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462 or e-mail barbc@bottomlineresearch.ca. Christine Silverberg is a Calgary-based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, christine@silverberglegal.com or through www.christinesilverberg.com.

Photo credit / DragonImages ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer’s Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.

© 2020, The Lawyer's Daily. All rights reserved.