	Court File Number
Ontario Court of Justice (Name of Court)	D53652/11
at 47 Sheppard Ave. E, Toronto, Ontario (Court office address)	**Endorsement** Justice M. Sager

Date			
December 16, 2016	Applicant:	Madani, Shirin	☐ Present
	Counsel:	Perry, Glenda	☐ Present
	:		☐ Present
	Respondent:	Mansoori, Javid	☐ Present
	Counsel:	Marks, James S.	☐ Present
	Respondent:		☐ Present
	☐ Order to go in accordance with minutes of settlement or consent filed.		

This is my decision on the Motion heard on this matter in November 24, 2016.

1. On November 24, 2016, I heard a motion brought by the Respondent (hereinafter referred to as the father) for an order setting aside the order of Justice James Nevins dated January 26, 2015, and, an order requiring the Applicant (hereinafter referred to as the mother) to "*withdraw the Iranian non-exit order against the Respondent she obtained on or about September 3, 2014 and shall not re-institute any such order*".

2. The mother opposes the relief the father is seeking subject to minor changes to the final order. The changes being requested by the mother include removing the final restraining order the mother obtained in favour of the child of the marriage, namely Parsa Mansoori born August 3, 2006 (hereinafter referred to as Parsa), such that the father may have access to the child via Skype; and, the father shall be prohibited from having any contact with the mother or come within 500 metres of her home or workplace or the child. The mother agrees to commence an Application in British Columbia to address the issues of the father's access to Parsa and the order restraining the father from having any contact with Parsa.

Brief Background of the Parties

3. The parties were married in Iran on May 30, 2003.

4. Parsa is the only child of the marriage.

5. In May 2010 the parties and Parsa moved to Toronto.

6. In September 2013 the family returned to Iran.

7. In November 2014 the parties separated in Iran and signed a Separation Agreement which addressed the parenting issues.

8. Shortly after the parties signed the Agreement the mother left Iran with Parsa and went to Turkey where they stayed for approximately one month. The mother and Parsa arrived back in Canada through Turkey in July 2014 and have been in Canada ever since. They lived in Toronto until August 2015 when they moved to British Columbia.

9. Sometime before leaving Iran the mother retained a lawyer in Iran to recover her Mahr.[1]

10. As a result of retaining counsel in Iran, the father became the subject of a non-exit order from Iran until he satisfies his debt to the mother arising out of the Mahr. The mother's evidence is that the non-exit order against the father was issued by Iranian authorities on September 3, 2014.

Background of the Litigation

11. On September 12, 2014, the mother commenced an Application in this court in which she requested the following orders:
    i) Custody and incidents of custody;
    ii) Restraining order;

[1] The Maher is a form of a marriage contract in which the wife is given an agreed-upon sum or other property to be paid or transferred by the husband to the wife either on a specified date or on the occurrence of a specified event and which legally becomes her property.

iii) Child Support; and,

iv) Costs of the Application.

12. The mother's counsel at the time was provided with an affidavit of service from Tunde Agboola sworn December 18, 2014, indicating that the father was personally served in Toronto with the mother's Application and supporting documents on November 14, 2014.

13. As the father did not respond to the Application in accordance with the *Family Law Rules* and was in default, on January 26, 2015, the mother swore a 23C Affidavit in Support of Uncontested Trial. In her affidavit the mother requested that the following final orders be made on a default basis:

    i) That she be granted final sole custody of Parsa;

    ii) That a Restraining order be granted prohibiting the father from communicating directly or indirectly with her or Parsa or from coming within 500 metres of them;

    iii) That the father pay child support based on an imputed income of $75,000.00 per year and the *Child Support Guidelines*; and,

    iv) Other orders amounting to incidents of custody.

14. On January 26, 2015, Justice Nevins granted the mother the relief she was seeking based on the affidavit of service of the individual who claimed to serve the father and the mother's Affidavit in Support of Uncontested Trial.

15. The mother's evidence is that unbeknownst to her, the person who the mother's lawyer hired to serve the Application on the father, Tunde Agboola[2], swore a false affidavit of service on December 18, 2014, claiming that on November 14, 2014, he served the father with the mother's Application personally at 1208-50 Cambridge Avenue,

[2] Paragraph 9 of the affidavit of service indicates that Tunde Agboola's relationship to, or affiliation with, any party in this case is "none".

Toronto, Ontario.[3] As the father was in Iran on this date he could not have been personally served in Toronto, Ontario.

16. The mother acknowledges that she only learned after the fact that the father was not properly served with her Application. The mother relied on her lawyer to ensure that all the necessary steps were properly taken in the proceeding to permit her to proceed to obtain a final order, as she did, on a default basis.

17. The father only learned of the orders made by Justice Nevins in July 2015. He retained counsel in September 2015. The father's evidence on the motion was that the father was delayed in bringing a motion to set aside Justice Nevins' order for several reasons including his lawyer's schedule, having to obtain a complete copy of the file from the court's filing office, gathering evidence in Iran including information about the Mahr and the non-exit order, obtaining translations of the Iranian documents, and, locating the mother[4] for service of his Motion.

18. In or around February 2016, the father learned of an Application the mother commenced in the Ontario Superior Court of Justice, from which he obtained an address for service for the mother.[5] The father then issued and served a motion in the Ontario Superior Court of Justice seeking an order setting aside Justice Nevins' order of January 26, 2015.

19. Despite father's counsel mistakenly bringing the motion in the wrong court, the motion was adjourned several times and it was not until June 20, 2016, that the motion brought in the Ontario Superior Court of Justice was dismissed.

20. On July 4, 2016, the father requested a motion date in this court to allow him to request an order setting aside Justice Nevins' order. That motion was finally argued before me on November 24, 2016.

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[3] This residence was owned by the father's sister until June 2014.
[4] The mother had moved with Parsa from Ontario to British Columbia.
[5] The mother argues that the father had several ways in which to serve her including through her lawyer in Iran.

21. The father's argument with respect to setting aside the order is simple; he was not served with the mother's Application and as such had no knowledge of the proceeding. The mother's argument is that she did not know that her lawyer's process server filed a false affidavit and she acted in good faith and as such the order should not be interfered with. She also argues that there has been an unreasonable delay by the father in pursuing this relief which he ought to have pursued many months ago.

The Law

22. Rules 25(19) of the Family Law Rules governs the court on the relief being sought by the father. It reads as follows:

    The court may, on motion, change an order that,

    (a) Was obtained by fraud;

    (b) Contains a mistake;

    (c) Needs to be changed to deal with a matter that was before the court but that it did not decide;

    (d) Was made without notice; or

    (e) Was made with notice, if an affected party was not present when the order was made because the notice was inadequate or the party was unable, for a reason satisfactory to the court, to be present.

23. The jurisprudence sets out the test for setting aside an order made on default. The person seeking to set aside the order must demonstrate that the motion was brought promptly, there is a plausible explanation for the party's default in complying with the Rules and, the facts establish an arguable defence (*Watkins v. Sosnowski*, 2012 ONSC 3836 (Ont. S.C.J.).

24. In *Rajasekaram v. Nagularajah*, 2010 ONSC 533 (Ont. S.C.J.), Justice Allen reasoned that since the defendants were not properly served and had no notice of the plaintiff's action, the defendant was not required to satisfy the third part of the test, that they had arguable case on the merits.

25. A core principle of the judicial system is that parties must be served personally with an originating proceeding. They must be given proper notice that a claim has been made against them and they must be given adequate time to respond and put their position before the court.

26. In some circumstances courts will grant orders for substitutional service by means other than personal service and in very rare circumstances may dispense with service altogether. This is not the case here. In this case Justice Nevins made final orders on the basis that father was served personally with the mother's Application when in fact he was not served at all.

27. The integrity of the administration of justice would be irreparably damaged if a final order made in these circumstances was not set aside. The father has the right to answer the case against him. He was not given that fundamental right.

28. The delay in bringing the motion to set aside the final order in the proper court was due to various factors and is not sufficient reason to override the basic principal that a party must be properly served with notice of a proceeding against them and that a final order based on a false affidavit of service cannot stand.

29. As it is admitted by the mother that the father was not served with her Application, it is not necessary to consider whether the father has an arguable case on the merits.

30. An order will follow setting aside the final order of Justice Nevins dated January 26, 2016.

What if any temporary orders should be made?

31. Parsa has been in his mother's primary care since 2014. Parsa has special needs. The mother and Parsa have lived in British Columbia for over a year where the mother has arranged for services to meet Parsa's needs.

32. While Parsa was physically present in Ontario at the time of the original Application, he is no longer in Ontario and this court does not have jurisdiction over Parsa on a go forward basis. In the circumstances and pursuant to section 40(b) of the *Children's Law Reform Act*, I find that it is in Parsa' best interest that there be a temporary order granting the mother custody of Parsa to enable her to continue to meet Parsa's needs.

33. The evidence is that the father is having Skype access to Parsa and the mother agrees that there should be an order for such access to continue. Therefore, an order will follow granting the father Skype access to Parsa.

34. The mother states in her material that she will commence an action in British Columbia to address the issues of access and a restraining order. As the final order of Justice Nevins will be set aside, an order will follow pursuant to section 40(b) of the *Children's Law Reform Act* staying this Application to allow the mother to commence an Application in the jurisdiction in which she currently resides.

35. The father's request for an order instructing the mother to lift the non-exit order she obtained in Iran against the father shall be dismissed for want of jurisdiction to do so.

Order to go as follows:

1. The final order of Justice Nevins dated January 26, 2015 is set aside.
2. The Applicant mother shall have temporary custody of the child of the marriage namely Parsa Mansoori, born August 3, 2006.
3. The father shall have temporary Skype access to Parsa at least once per week until further order of the court in British Columbia.
4. The mother's Application in this court shall be stayed subject to the following conditions:

   i) Within 60 days of the date of this motion, the mother shall commence a proceeding to address the issues raised in her Application commenced in this court in the appropriate court in British Columbia;

   ii) Evidence of the commencement of this proceeding as well as an affidavit of service on the Respondent father shall be provided to this court within 75 days of the date of this order;

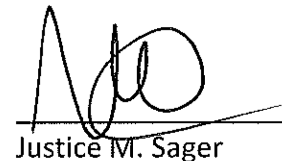
iii) If the mother does not commence a proceeding in British Columbia pursuant to sub paragraphs (i) and (ii) above, the Application in this court will be dismissed and the temporary order will terminate.

5. The mother shall be permitted to serve the Application commenced in British Columbia on the father's lawyer of record in this proceeding.

6. This file will be transferred to the court in which the mother commences her Application in British Columbia upon compliance with sub paragraph 4(ii) above.

7. The father's request for an order instructing the mother to lift the non-exit order she obtained in Iran against the father is dismissed for want of jurisdiction to grant such relief.

8. If either party seeks an order for costs of the motion, they shall serve and file their submissions with the court through the trial coordinator's office by December 30, 2016. Any reply submissions shall be served and filed through the trial coordinator's office by January 10, 2017



Justice M. Sager