JUDICIAL CONFERENCE ON FAMILY LAW

AUGUST 26-29, 1981

A C C E S S

The Hon. Madam Justice C.R. Glube
Supreme Court of Nova Scotia

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I approach the topic of access with considerable trepidation. I read chapters in texts, papers[1] and decisions and my worst fears appear to be confirmed. To write a paper on access would result in trying to reinvent the wheel. In one form or another, it has all been said before. My thoughts produced no revelations, no new approaches, no new ideas - someone else had always been there first.

As I continued to think and read about the topic, I felt it was worthwhile to bring forward some basic thoughts as reminders to all those involved in family cases - lawyers, psychologists, psychiatrists, social workers, judges, parents and, above all, children.

That is the key. The question of access involves real people - mother, father and child - not just legal principles and a computerized system of processing the matter through the court. It involves adults who sometimes do not act as such and children who have sometimes grown up before their time as a result of

being caught in the middle of a divorce.

As a result, this paper will cover areas that have been well documented with an attempt to discuss the aspects of access as viewed from the bench. The views expressed are mine alone and not necessarily shared by other members of the court.

One of the first difficulties faced in Nova Scotia is that cases under the Divorce Act[2] are heard by judges of the supreme court without the benefit of support staff. We have no unified family court; we have no professional staff as part of a team.

When a judge is scheduled for a contested divorce or interim application, the file is provided in advance, if requested. If a number of areas are in issue, particularly division of assets[3], a pre-trial conference is held usually by the judge assigned to hear the case. All this really accomplishes is having the lawyers in the case sit down with the judge to set forth the contentious issues and, by the very presence of the judge, most lawyers begin to discuss and sometimes put forward their clients' positions. This may eventually result in settlement. It may only clear the air as to what the issues are. In fact, on crucial issues, no firm commitments or agreements can be reached as the parties to the divorce

are not present. A pre-trial usually takes place a week or less before the trial. At this stage, under the system we have, the judge really does nothing but listen, encourage both sides to put forward their positions and hope that, when they return to their clients, some or all of the areas will be resolved.

The judge can do little or nothing on the paramount issues of custody and access. We have no regularized system for receiving or ordering home study reports. This only occurs if the judge requests a report from the Department of Social Services. Depending upon the residence of the parents, a report may involve two social workers. Because of shortages of staff and the fact that this aspect of the department's work is not seen as a priority, the home study usually consists of one home visit and contacts by mail, telephone or sometimes personally with names provided by each spouse as references. The end result is often of limited value containing a mass of hearsay and often takes two to six months before it is completed and forwarded to the judge. I do not condemn the department or the social workers involved; they are not geared to responding to such requests. It is really not one of their prime functions or responsibilities. As a result, it is rarely used. Many lawyers do not even know that such studies may be available.

Finally, by their very nature, they very often avail the judge of only a bit more information than is available in court. This is not a condemnation of the people involved, it is a statement of fact and perhaps a plea for review and change.

Divorce procedure, at least in Nova Scotia, is clearly inadequate. From the moment a person goes to a lawyer to discuss divorce, there should be a back-up system in place which is immediately brought into the process. As it presently exists, if one person has the financial ability and perceives the need for psychological or psychiatric evaluation to assist them in presenting their side on the issue of custody and access, it may occur but rarely. If one side does follow this route, it puts pressure on the other spouse to obtain their own professional evaluations. We are back to the injury cases where both sides present experts but, in matrimonial cases, the cost can be astronomical and the value of the results is questionable.

As a judge in Nova Scotia hearing cases involving custody and access, I arrive in court with a feeling of frustration and concern. I am dealing with the lives of people without adequate information for evaluation and must base my decisions on a few moments or hours of

testimony which is naturally given by people under stress. Many of the people have never been inside a courtroom before and being a party or a witness is extremely nerve-wracking. The decision rendered will normally be reasonable, but the future effects on the lives of the people involved, particularly the children, is unknown. Unfortunately, all a judge can do is go on to the next case.

Disputes over access do not occur as frequently as custody but, when they do, they present many of the same difficulties in their resolution. Often times children get caught up in the maelstrom and, from the parents' viewpoint, the children's welfare and needs are secondary. From the court's viewpoint, children's futures are the primary concern. Anything the courts can do to ensure the semblance of normality for a totally abnormal situation in the life of a child must be done. Two adults (!) arguing over a divorce and money will possibly come out of the process somewhat scarred, but they are adults and in most cases they will pick up their lives and go on from there once the court renders a decision.

What of the children? Many judges never see the children. Some are too young to be involved, sometimes the parents are adamant that the judge should not talk to the children. Some judges do not want to talk to the children and do so with great reluctance or refuse

the opportunity.

Personally, I consider a meeting with a child involved in a contested custody and access case is essential if they are of an age where a meeting is meaningful. I may discuss nothing more than their hobbies and their schoolwork, but I am no longer dealing with just a name. I now know there is a person involved.

Recently I handled a divorce where the question of access and money were the key issues. Custody had been agreed to reluctantly. The two older children, fifteen and sixteen, went with their father who was living common-law. The reason?, they refused to live with their mother. The two younger children ages four and twelve remained with their mother. I talked with the three older children individually and they were open and free in their discussions giving me an insight into their feelings. What I thought would be a few minutes' discussion with each child stretched into an hour or more. I am always conscious of the immaturity of children's feelings even when outward appearances seem to exhibit great maturity. What they talked about gave me some understanding of their views. It did not alter my final decision, but I was at least aware in some small way of how it would affect these children. Perhaps that is the reason why some judges refuse to talk to the children - they do

not want to know the real people who are affected by the words they pronounce.

Subconsciously, judges breath a sigh of relief when they are advised that custody and access are not in dispute. We readily accept the word of counsel and the parties, award custody to one parent and to the other 'reasonable access upon reasonable notice for reasonable periods of time'. Judges under pressure of time may be considered lax in failing to question this stock request. Is it practical to do otherwise? Probably not. We must be able to rely on the word of counsel, that they have dealt with these issues with their clients and that a mature, rational decision has been reached. Nine times out of ten our acceptance of the litigants' agreement will be correct. What of the tenth time? Fortunately, the parties may return to court at all times when children are involved[4]. Should a judge be faulted for failing to pick up nuances and delve further into custody and access? Should the child be separately represented in court? Based on my previous description of the system in Nova Scotia, these questions remain unanswered.

Dealing specifically with access, what is our role as judges? Sometimes, due to difficult financial issues, the view of the parties and lawyers become blurred where the needs of the children are involved. Based on

the evidence, the judge will incorporate into the standard access statement the restriction, 'provided that the (respondent/petitioner) shall not be under the influence of alcohol or non-prescription drugs when (he/she) arranges for or exercises access'. These situations tend to be obvious and properly dealt with by the judge. One sometimes wonders why neither the lawyer nor the client have felt it necessary or important enough to make the request themselves. It is no doubt a pure oversight, but reminds one that the people involved (the children) must be protected. Enforcement of such a pronouncement may well be difficult, but its inclusion in the decree nisi may carry some weight.

The 'best interests of the child' are as important in dealing with access as they are in determining custody. It has been stated that -

> "... access does not entitle the 'access parent' to interfere with the child's upbringing by attempting to change or alter the child's mode of life or conduct. ..."(5)

However, common sense might lead us to a different conclusion. Unless the access is extremely restricted, one just has to stop and think to realize that, when the access parent has the child for any period of time such as overnight or longer, all the conditions of custody exist, at least in the eyes of the 'access' parent no matter what the case law and legal writings say. Practically,

the 'sole, care, custody and control' has shifted for the period of access. As long as all concerned are conscious of the practicalities of this, it may well be that no harm emerges but, just as in custody, the court should consider the conduct, means and nature of the 'access' parent and how it will affect the emotional and physical stability of the child. The more obvious situations involve drug or alcohol abuse, criminal behaviour, or serious mental disorders and can be appropriately covered by the court. Not so obvious may be the 'access' parent's behaviour and attitude toward the child, both before and after the marriage breakdown; the age of the child and the child's attitude toward the 'access' parent; different religious beliefs of the parties; the physical facilities for visits; the maturity and attitude of the 'access' parent; and a myriad of considerations which may or may not evolve from the facts presented in court.

Given the custody cases where the balance between the parties is relatively even and the judge must award custody to one (without the consideration of joint custody), then the access awarded to the other should be very liberal. Children need the love and affection and the companionship of each of their parents. They deserve to be treated as people and their emotional needs should not be denied.

What is the aim of access? It is to encourage, nurture and foster an ongoing relationship between a child and both their parents. The words are easy to say. To make it happen will not occur because a court lays down specific and detailed rules but, where access is disputed, that may be the only solution at least initially[6]. There have been many decisions where custody and access are decided by the courts, but are really exercised by the children. A teenage child and sometimes a pre-teenage child will simply not comply with rigid access requirements if they do not fit in with the child's desires and needs. It may arise as a direct result of the marriage breakdown[7]. In that situation, rigid and detailed access, although requested and required, will not be effective unless the parents eventually show understanding and maturity and consideration and acceptance of the child's wishes. (If the parties were mature at the time of divorce, the detailed access would not be required.) Strict enforcement could well destroy the child/access parent relationship which is the aim of access. Just as an example, a child who is invited to a birthday party on 'access' day will rebel and resent enforced access[8].

I recognize and admire the progress made by one parent families but, where a second parent is still available and willing, should a child be denied some at-

tempt at providing the advantages of both? Studies will no doubt produce statistical information which will uphold or reject access. However beneficial, they end up as numbers and statistics on paper and access deals with real people. Each case must be evaluated and decided using the best information available.

On the whole, the courts view access as beneficial to the child and generally will not refuse access unless serious harm or danger to the child is apprehended(9).

How can lawyers help out in the area of access? They should counsel the parent, trying to apprise them fully of the court's general view on access - what it hopes to accomplish and factors which will lead to denial of access. Lawyers should recommend counselling by appropriate persons if the 'access' parent has problems in coping with access.

What advice can be given to access parents? Some adults see access as a 'mini' trip to Disney World - every minute of their time with the child must be planned; it must be a memorable occasion. The parent with that approach will quickly lose their child's true love and affection. Both child and parent will quickly tire of this arrangement - often the parent before the child, particularly the young child. That type of access is un-

natural. It fails to nurture the desired relationship; it does not fulfill the meaning of access and may create difficulties in the daily life of a child, particularly a young child. An older child will quickly see through the facade.

There is no harm in occasional special outings. Perhaps 'special' is the wrong word - outings which would have occurred had the family unit still existed, such as a ball game, a trip to a zoo. Visits, particularly overnight or extended visits, should be kept as routine and natural as possible. Have a place where the parents can be with the child, where the child feels comfortable and where some of their toys, books, games, etc. remain.

Access parents must not force the relationship. Questions about the other parent's activities are unfair. Access parents should try to include in the child's experience the factors which they added to the family as a unit. It is not easy. It may be necessary to build up trust gradually, accepting the occasional refusal of a child to visit or participate in their plans.

I believe all judges would acknowledge that court determination of access is an imperfect system. The law has gone both ways on many of the issues. A review of the law clearly indicates that, in granting or

refusing access, laying down terms and dealing with the variety of situations that arise, each case must be decided on its own facts bearing in mind the general principles but, through it all, one thing shines through - the question of access involves people and the most important consideration is the child.

FOOTNOTES

1. I recommend the following studies be read as providing the current general philosophy relating to access:

   D. Mendes da Costa, Q.C., Studies in Canadian Family Law, (Vol.2); Power on Divorce and other Matrimonial Causes, (Vol.1); A Behavioral Science and Legal Analysis of Access to the Child in the Post Separation/ Divorce Family, Julien D. Payne, LL.D. and Kenneth L. Kallish, L.L.B., Summer Program on Family Law, Child-Custody, Access and Support (Calgary, Alberta - August 1979); Some Areas of Family Law, Prof. F.M. Fraser

2. Divorce Act, S.C. 1967-68, Ch.24 as amended

3. Matrimonial Property Act, S.N.S. 1980, Ch.9

4. Section 11(2), Divorce Act (supra)

5. Studies in Canadian Family Law (supra), p.617

6. McCabe v. Ramsey, 19 R.F.L. (2d) 70; Elbaz v. Elbaz, 16 R.F.L. (2d) 336

7. MacQuarrie v. MacQuarrie, unreported

8. McCann v. McCann, 18 R.F.L. 149

9. Ader v. McLaughlin et al., 46 D.L.R. (2d) 12; Stokes v. Stokes, 19 R.F.L. 326; Bol v. Bol, 19 R.F.L. (2d) 93