TAB 1

Alienation of Children: Conflict Reduction Strategies & Ontario Legal Responses

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Nicholas Bala

I. INTRODUCTION: THE CHALLENGE OF HIGH-CONFLICT DIVORCE

Some of the most intractable and challenging cases for family law practititioners involve high conflict separations in which one the parent is attempting, consciously or unconsciously, to undermine the child's relationship with the other parent. Not infrequently both parents are engaging in alienating behaviour. These cases often involve problems with exercise and enforcement of access, though in some cases a joint custody regime may be in place. It is important for lawyers to understand the human dynamics of these cases, and to take steps to deal with them effectively and in a manner that protects the interests of children. There is a growing body of social science writing on the controversy about "parental alienation," and legal practitioners can learn much from this research. The literature on alienation must, however, be approached with some caution, as the issues are complex and some of the writing is not very balanced.

There is a range of underlying dynamics that can lead to situations in which a child is "alienated" (i.e. without good reason) or "estranged" (for good reason) from one parent, and reluctant or refusing to visit. In some cases, these difficulties arise because a child is estranged from one parent, perhaps because of a well founded fear of abuse or outbursts of anger during visits, or because the "estranged parent" is emotionally distant or ineffective during visits. However, in other cases the child may have become alienated as a result of one parent denigrating the "target" parent, and pressuring the child into joining into a "vendetta" against that parent.

While in some cases one parent will clearly bear the major responsibility for the situation, often both parents have significant responsibility for the tension and problems with access. In high conflict situations it is common for both parents to engage in alienating behaviour, for example, with each parent making derogatory comments to the child about the other. Rather than planning for and supporting access, the custodial parent may arrange activities for the child that conflict with visits, while the access parent may regularly be late for access exchanges or keep the child longer than permitted, inconveniencing the custodial parent and often upsetting the child. Access exchanges may be the site of mutual recrimination between the estranged spouses, and in some cases may present the occasions for spousal violence. Too frequently separated parents are so caught up in the emotional bitterness over the breakdown of their spousal relationship that they are unable to focus on the collateral harm which they are doing to their children.

It is important to appreicate that while in high conflict cases it is common for both parents to be engaging in alienating behaviour, many children are restitant to this type of parental behaviour and despite the tension that has been created will strive to maintain a positive relationship with both parents.

Generally, the most effective methods of dealing with issues aof aleination and access difficulties are *conflict reduction strategies,* such as parent education and counselling, mediation, access supervision or use of a parenting coordinator. These *extra-legal responses* can help both

parents to promote the best interests of their children. In some cases, however, there may need to be a *coercive judicial response* , such as finding the custodial parent in contempt of court for thwarting access rights.

A central theme of this paper is that lawyers and judges must understand the human context of a case in order to help parents deal with their problems in an appropriate way, one that promotes the best interest of their children.[1] This paper therefore begins by discussing the relationship issues that can lead to cusody and access problems, including the controversy in the social science literature over the alienation. Lawyers and judges can have a very important role in encouraging and supporting the use of a range of extra-legal responses to issues of alienation and access difficulties. Lawyers must avoid unnecessarily exacerbating feelings of hostility and should not adopt inappropriately adversarial responses to access problems, but there also need to be effective legal responses to alienation and access problems. The knowledge that there may be an effective legal response to a denial of access will often encourage the custodial parent to meaningfully engage in conflict reduction strategies and to encourage respect for access rights. Conversely, if there appears to be no effective legal response to access denial, the custodial parent may feel encouraged to thwart access, dispiriting the access parent and often emotionally harming the child.

II. HIGH-CONFLICT SEPARATIONS & ALIENATION OF CHILDREN

This section of the considers the social context of high-conflict separations that raise issues of child alienation or access enforcement. Only a brief treatment is provided here of some complex psychological issues, and readers are encouraged to consult the growing body of social science literature on these issues.[2]

High-Conflict Separation and Spousal Abuse

About 10% to 20% of post-separation parents can be characterized as having "high-conflict" separations. These are cases that take up a disproportionate amount of time for lawyers and courts.

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[1]The Commentary to the Law Society of Upper Canada, *Rules of Professional Conduct,* (Rule 4.01), provide:

> In adversary proceedings that will likely affect the health, welfare, or security of a child, a lawyer should advise the client to take into account the best interests of the child, where this can be done without prejudicing the legitimate interests of the client.

[2] An excellent summary of the controversy about alienation is found in two recent articles that take different positions: Richard Gardner, "Commentary on Kelly and Johnson's 'The Alienated Child': A Reformulation of Parental Alienation Syndrome" (2004), 42 (4) Fam. Ct. Rev. 611; Janet Johnston & Joan Kelly, " Rejoinder to Gardner's "Commentary on Kelly and Johnson's 'The Alienated Child': A Reformulation of Parental Alienation Syndrome"(2004), 42 (4) Fam. Ct. Rev. 622.

For useful reviews of social science literature on issues related to access, high-conflict separations and alienation, see Rhonda Freeman & Gary Freeman, *Managing Contact Difficulties: A Child-Centered Approach* (Ottawa: Department of Justice Canada, 2003); Pauline O'Connor, *Child Access in Canada: Legal Approaches and Program Supports* (Ottawa: Department of Justice, 2002); and Glenn A. Gilmour, *High-conflict Separation and Divorce: Options for Consideration* (Ottawa: Justice Canada, 2004), available on line at http://canada.justice.gc.ca/en/ps/pad/reports/index.html

There are a range of factors and a continuum of problems that characterize high-conflict post-separation relationships. Common characteristics are poor communication between the parents and difficulty in mutual problem solving. These relationships are characterized as being "so conflicted that they routinely go back to court to solve what should be relatively simple problems."[3] A further common feature is that one or both parents feel self-justified in their behaviour – they tend to view their actions as being motivated by a concern for the best interests of their children despite professional advice to the contrary. For these relationships, negotiation and mediation may not work; there may be a win/lose mentality to the relationship which can only be satisfied by a clash in the courtroom.

At the same time, the adversarial arena of the court system may feed what American psychologist Philip Stahl suggests is one of the main motivators of the behaviour of high-conflict parents – fear.[4] This fear can commonly be traced to issues of control – losing or having to give up control to the other parent. This often translates into one or both of the parents taking rigid positions. The conflict ends up as an argument over positions, yet, when "more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties."[5] If an agreement is reached, it is likely to be just an effort to split the differences between the parties' positions, leaving neither party satisfied, and making it difficult for access to succeed. If the parent, in particular the custodial parent, is dissatisfied with the arrangements made, she may be less likely to facilitate or support access by the non-custodial parent.

There are many different ways in which access can cause difficulties for parents in high conflict cases. A custodial parent may frustrate access between the children and the non-custodial parent, for example by canceling visits at the last minute, ensuring the children are "unavailable" (i.e. by scheduling them in extra-curricular activities), claiming the children are sick, not having the children ready or available on time for visits. In many of these cases the custodial parent will also be engaging in behaviour that attempts to undermine the child's psychological attachment to the access parent, for example by denigrating that parent or a new partner.

Access parents may also frustrate custodial parents by not arriving on time for access, or not coming at all, or by failing to return the children at the time scheduled, or keeping clothes or toys that the children brought with them from the othe parent. While high-conflict separations are challenging, these relationships are not static and can change over time. With appropriate intervention and support, conflict may be reduced and the relationship may improve. One of the sad realities of some high-conflict cases, however, is that, without appropriate intervention, at some point, the more reasonable and healthier parent may decide to give in to the demands of the other, more unreasonable parent, even if this resolution does not advance the best interests of their children. This may, for example, result in a non-custodial father acceding to the unreasonable restrictions that a mother may place on visitation, or even deciding that it is better for his children not to see him at

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[3] P.M. Stahl, "Personality Traits of Parents and Developmental Needs of Children in High-Conflict Families" at 1; paper excerpted from P. Stahl, *Complex Issues in Child Custody Evaluations* (Sage Publications, 1999).

[4] *Ibid.*

[5] R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin Books, 1991) at 5.

all.[6] Or an abused woman may decide that she will give her former husband unsupervised access to their children, even though she has legitimate fears for the safety of the children.

Although some feminist scholars argue that virtually all cases of access difficulties arise because of mothers' concerns about their own safety or their safety of children during access visits,[7] describing parents as having a "high-conflict"separation does not necessarily mean that are spousal violence concerns. Many high-conflict cases are characterized by a degree of violence during cohabitation, though many relationships which are characterized by violence while the parties are living together may not be high-conflict after separation. While in many of these cases involving physical violence there is some degree of interactive or mutual abuse, the male is usually the more physically aggressive and stronger partner, and men are much more likely to intimidate their partners through violence. In a majority of cases of spousal violence during cohabitation, there are no further assaults after separation, though arguing and verbal harassment may continue even after separation.

Although in most cases the risk of violence decreases after separation, in cases where violence is used to maintain control (almost always by men); the risk of homicide actually increases after separation, as these are cases in which abusers may feel the greatest threat to their loss of control.[8] In cases where there have been repeated cycles of violence perpetrated against the female partner during cohabitation, or an escalation in threats after separation, mothers and their children may have a reasonably grounded fear of the father, with the potential for abduction of the children or even homicide. If there are escalating threats or acts of violence after separation, counsel for the victim should attempt to terminate access or at least require supervision of access. [9] If there are issues of violence, counsel and the courts should be prepared to investigate and address them, attempting to ascertain what happened, even if the issues only arise at the enforcement stage.

Children of High-Conflict Parents

While the parents' mutual hostility is directed at each other, children from high-conflict separations suffer more from parental separation than other children: children from high conflict

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[6]Research studies suggest that higher levels of inter-parental conflict results in less frequent visitation and involvement of non-custodial fathers; see M.K. Pruett et al, "Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children" (2003), 17 J. Fam. Psych 169

[7] Helen Rhoades, "The 'No Contact Mother': Reconstructions of Motherhood in the Era of the 'New Father," (2002), 16 Inter. J. L. Policy & Fam. 71 who reports on her Australian study of 100 cases with problems of visitation, concluding that in only two "fit the 'no contact mother' stereotype," while almost two-thirds of the cases involved abused women who were reluctant to give abusive men unhindered access to their children. While the distinction between high-conflict and violent relationships is generally accepted, it has been argued by others that many high-conflict divorces are "actually the manifestations of stalking behaviours by wealthy domestic abusers;" see J.T. Sutherland, *High-conflict Divorce or Stalking by Way of Family Court?*" www.mincava.umn.edu/documents/linda/linda.shtml.

[8]See H. Johnson, "The Cessation of Assaults on Wives" (2003) 34 J. Compar. Fam. Studies 75 for an analysis of the factors associated with relationships where domestic violence is likely to cease as opposed to those for which it is likely to continue or escalate.

[9]See discussion in N. Bala, " Spousal Abuse & Children: Family Law Issues" (2004), National Family Law Program, La Malbaie, Quebec.

separations are three times more likely to develop psychological distress than children of low-conflict separating parents.[10] Children of high-conflict parents are also more likely to suffer from behavioural problems as they are growing up.

There is a significant body of research which indicates that in low-conflict cases in which parents have separated, children generally have long term benefits from having regular and significant involvement with both parents.[11] There is, however, "some evidence that visitation can have a negative influence on children ...when there is a high degree of tension between the parents," and there is research to suggest that in some high-conflict cases the child's emotional well-being may be enhanced if there is no access.[12] Continued parental conflict has long-lasting negative effects on children: "continuing parental conflict is a more powerful predictor of maladjustment than is the separation itself."[13]

Prolonged post-separation parental conflict can be very stessful for children. In cases where parental post-separation disputes are extreme or continue to arise despite repeated efforts at intervention, it may not be in the best interests of the child for access to continue. It is, however, submitted that even in high-conflict cases involving alienated children, counsel for access parents and judges should be slow to conclude that access rights should be totally suspended. For one thing, research in this area is fraught with difficulty and there is no reliable research that can accurately predict what will be the effects of court enforced access in any particular child in a high-conflict case. Further, as will be more fully discussed below, there are a number of important policy and value based reasons for enforcing access, even in high-conflict cases. However, parents, counsel and judges should focus on the best interests of the child, and there may be cases where the enforcement of access may be contrary to a child's best interests.

Alienation of Children & The Dilemma of Wishes of Children

Many of the most difficult high-conflict cases raise issues of alienation of children from one parents, and the pose the dilemma of how to respond to children who say that they do not want to have contact with a parent. In the 1980's, the late American psychiatrist, Richard Gardner, developed the concept of "parental alienation syndrome" to help explain why some children reject one parent following separation, defining this syndrome as a

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[10]M.F. Elterman, "High-conflict Parents" prepared for Family Law Conference, Vancouver, B.C. (July 2001). See also Janet Johnston & Vivienne Roseby, *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (New York: Free Press, 1997).

[11]See e.g P.R. Amato & J.G. Gilbreth, "Non-resident Fathers and Children's Well-being: A Meta-analysis" (1999), 61 J. Marriage & Fam. 1269.

[12] D. Pollack & S. Mason, "Mandatory Visitation: In the Best Interest of the Child" (2004) 42 Fam. Ct. Rev. 74 at 74.

[13] B. McKenzie & B. Bacon, "Parent Education After Separation: Results from a Multi-Site Study on Best Practices," (2002, Special Supp. No. 4) Can. J. Comm. Mental Health 73, at 75; see also S.E. Palmer, "Custody and Access Issues with Children whose Parents are separated or Divorced" (2002, Special Supp. No. 4) Can. J. Comm. Mental Health 25, at 30.

> disorder [arising] in a situation in which parental programing is combined with the child's own scenarios of denigration of the allegedly hated parent...It is the exaggeration of minor weaknesses and deficiencies that is the hallmark of parental alienation syndrome. When bona fide abuse does exist, then the child's responding hostility is warranted and the concept of the parental alienation syndrome is not applicable.... It is important...to appreciate that in the parental alienation syndrome, as is true for all psychiatric disorders, there is a continuum from the mildest, through the moderate to the most severe.[14]

In his early work, Dr. Gardner focused on cases in which custodial mothers "programmed" or "brainwashed" children to reject "innocent, loving" non-custodial fathers. [15] In later work, however, he concluded that fathers and mothers are equally likely to be "alienators." [16] While his early work tended to advocate a legally aggressive response to parental alientation, including use of contempt of court powers and transfer of custody, his later work emphasized the need for taking a range of approaches, depending on the severity of the alienation.

The work of Dr. Gardner was seminal in the development of an understanding of child alienation, but his analysis was not very sophisticated, and his work is now viewed as an overly simplistic characterization of a complex problem. While the concepts of the alienated child and alienating parental behaviour are important and are used by Canadian courts,[17] it is not appropriate to refer to "parental alienation" as a *"syndrome,"* as the determination of whether alienation has occurred is not a matter of clinical diagnosis, but rather turns on the factual determination of whether a child's anger or fear of the access parent is "exaggerated," or to the contrary is justified by the conduct of that parent.[18]

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[14]R. Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (Cresskill, NJ: Creative Therapeutics, 1992) 62 & 64; for earlier works, see R. Gardner, "Recent trends in divorce and custody litigation" (1985) 29 Academy Forum 3-7; R. Gardner, *The Parental Alienation Syndrome and the Difference Between Fabricated and Genuine Child Sex Abuse* (Cresskill, NJ: Creative Therapeutics, 1987).

[15]A more dramatic gendered description of alienation is offered by American psychologist Ira Turkat who coined the term "malicious mother syndrome;" I.D. Turkat, Management of Visitation Interference" (Spring 1997) 36:2 Judges' Journal 17.

[16]Richard Gardner, "Commentary on Kelly and Johnson's 'The Alienated Child': A Reformulation of Parental Alienation Syndrome" (2004), 42 (4) Fam. Ct. Rev. 607, at 616.

[17]For a Canadian case in which Dr. Gardner testified, see *R v K.C.*, [2002] O.J. 3162 (Ont. Sup Ct.). The court permitted him to testify as an "expert," though noting the controversy about his work, and ultimately deciding the case without reliance on his testimony.

[18] See Kathleen Faller, "The Parental Alienation Syndrome: What is it and What Data Support It?" (1998), 3(2) Child Maltreatment 100-115. For an excellent set of relatively recent papers on alienation, see the 2001 Special issue of the *Family Court Review* (vol. 39(3)): Joan B. Kelly, & Janet R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome"(2001), *39 Family Court Review* 249-266; S. Margaret Lee & Nancy W. Olesen, "Assessing for Alienation in Child Custody and Access Evaluations " (2001), 39 *Family Court Review* 282-298; Lewis Zirogiannis, " Evidentiary Issues with Parental Alienation Syndrome" (2001), 39 *Family*

A number of mental health professionals have refined the concepts to focus more on the child than on parental conduct, recognizing that some level of anger, hostility or denigration of one parent by the other is quite common in high-conflict separations, but that the attitudes of many children towards access parents are *not* directly affected by the attitudes of their parents. American psychologists Joan Kelly and Janet Johnston offer a nuanced and child-centered approach to the issue of alienation, focusing on:[19]

> the alienated child rather than on parental alienation. An alienated child is ...one who expresses freely and persistently unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportionate to the child's actual experience with that parent. From this viewpoint, the pernicious behaviors of a "programming" parent are no longer the starting point. Rather the problem of the alienated child begins with a primary focus on the child, his or her observable behaviors, and parent-child relationships. This objective and neutral focus enables the professionals involved ...to consider whether the child fits the definition of an alienated child, and if so to pursue a more inclusive framework for assessing why the child is now rejecting a parent and refusing contact.

One aspect of this approach to alienation is that it recognizes that children may, in some cases, be "unreasonably" rejecting an access parent despite the absence of "alienating" conduct by the custodial parent to support the relationship. There are, for example, cases in which a husband leaves a long-term marriage for a younger partner, and his children, especially in adolescence, may feel a sense of loyalty towards their mother and anger towards their father that does not have its genesis in any overt behaviour or statements of the mother.

There is only very limited amount of empirical social science research about alienation or estrangement of children from parents after separation. All of the available research is based on relatively small samples. A number of studies suggest that among all children of separated parents, about 10% children express are "genuinely reluctant" to visit their non-custodial parent, usually their father.[20]

Janet Johnston and her colleagues have just completed one of the first empirical studies of

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Court Review 334-343; R. James Williams, "Should Judges Close the Gate on PAS and PA?" (2001), 39 *Family Court Review* 267-281 Matthew J. Sullivan & Joan B. Kelly, "Legal and Psychological Management of Cases with an Alienated Child" (2001), 39 *Family Court Review* 299-315; and Janet R. Johnston, Marjorie Gans Walters, Steven Friedlander, "Therapeutic Work with Alienated Children and Their Families" (2001), *39 Family Court Review* 316-333; see also R.A. Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37 Fam. L. Q. 273.

[19] J. Kelly & J. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome" (2001) 39 Fam. Ct. Rev. 249, at 251.

[20] J. Johnston, M.G. Gans & N. Olesen, "Is It Alienating Parenting, Role Reversal or Child Abuse: An Empirical Study of Children's rejection of a Parent in Child Custody Disputes" (forthcoming), *Journal of Emotional Abuse.*

high conflict families to focus on the issue of alienation. [21] This study, based on a review of 125 high conflict cases sent to assessment, revealed a complex spectrum of cases that require individualized assessment and analysis.

Significantly, while alienating behaviour by *both* parents was present in a majority of these cases, only about 20% of the children were alienated or estranged from one parent (slightly more likely to be the father than the mother). The alienating behaviour included telling negative stories about the other parent to the child, modeling hostile behaviour towards the other parent in the child's presence, and responding angrily if the child expressed positive feelings about the other parent. While such alienating parental conduct is the norm in high conflict cases, most children are resistant to pressures from one parent to reject the other. As the researchers comment: "It is perhaps surprising that so few children were rejecting of a parent given their parents' negative attitudes and behaviours."

In these high conflict families, it was relatively rare for either parent to actively support co-parenting and to reassure the child of the love of the other parent. Although one parent was more likely to engage in alienating behaviour than the other, to some extent reciprocal alienation often occurred, leaving children exposed to the stress of escalating conflict.

While parents in these high conflict cases alleged that the other parent had abused the child, in more than one third of the cases, only about a quarter of the allegations were substantiated. Spousal abuse was present in many of the cases, with 40% of the fathers and 15% of the mothers having perpetrated spousal abuse. Interestingly, most victims of spousal abuse did not engage in alienating conduct, despite having been victimized. That is, mothers who engage in alienating behaviour are often *not* doing so for a "good reason" (ie because their former partner engaged in spousal or child abuse), but rather of more commonly motivated by their own feelings of anger or rejection. However, men who are abusive of their spouses often also engage in alienating behaviour; that is these men both abused of their partners *and* attempted to alienate the children from their victims by denigrating her to the children.

Spousal violence alone was not significantly related to rejection of a parent. However, a child's rejection of a parent was often correlated with a history of the rejected parent having abused the child or having displayed a lack of warmth to the child. Younger children seemed less likely to be influenced by alienating behaviour of parents; older children are more likely to align with one parent. Interestingly, the more warm and involved with the child a parent who is engaging in alienating behaviour, the more effective that parent is likely to be in alienating the child's affections for the other parent.

The work of Janet Johnston and her colleagues reveals the importance of individualized assessment of cases in which a child is rejecting a parent. Gardner's model of "parental alientation syndrome" is too limited to be of much use. A feminist explanation, that mother and children reject men who are abusive, is also too simplistic to capture the reality of may cases. In many cases where children become aligned with one parent and reject the other, the aligned parent has been engaging,

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[21] J. Johnston, M.G. Gans & N. Olesen, "Is Tt Alienating Parenting, Role Reversal or Child Abuse: An Empirical Stdy of Children's rejection of a Parent in Child Custody Disputes" (forthcoming), *Journal of Emotional Abuse*. This study is summarized in Janet Johnston & Joan Kelly, " Rejoinder to Gardner's "Commentary on Kelly and Johnson's 'The Alienated Child': A Reformulation of Parental Alienation Syndrome"(2004), 42 (4) Fam. Ct. Rev. 622, at 624.

consciously or unconsciously in alienating bevahiour, but the aligned parent is also warmer and more involved in the child's life.

As noted above, many children in high conflict cases do not become estranged from either parent, despite the alienating conduct of one or both parents, but these children resent attempts to undermine the relationship with the other parent and may feel distress when one parent denigrates the other parent.[22]

It is clear that a court dealing with the allegation that a child appears "alienated" must always consider whether the child's fear or rejection of the access parent is "reasonable" or "justified," for example, because of child abuse. Even if there is no immediate threat to the child's safety, a child may have very negative feelings towards a parent who has been an abusive spouse. If the child is being influenced by the custodial parent to reject the access parent, the child may come to internalize these attitudes, and truly have feelings of fear or anger towards the access parent, even if not "reasonably justified." For some children in high-conflict cases, fully aligning with one parent and refusing to see the other may seem like the only way to stop the loyalty conflict and tension. While in some cases counselling may help a child to overcome these negative feelings towards one parent, in others the child will be resistant to intervention. In some cases, access parents may find the time with their children very unsatisfying, with the children uncooperative, rude, unhappy and disruptive; in these cases, access parents may ultimately decide that it is best for themselves and their children to stop exercising their access rights.

Richard Gardner went so far as to advocate placing children who refuse to see access parents in juvenile detention facilities for failing to visit their parents. The refusal of a child to visit can be one of the most frustrating and dispiriting outcomes of a high-conflict separation for a non-custodial parent. However, as children become older and more entrenched in their views, it can become increasingly difficult for courts to make orders that will affect their behaviour..[23]

III. THE LEGAL CONTEXT FOR ACCESS

The Law of Access:

Canadian legislation, such as the *Divorce Act* s.16(8),[24] establishes the "best interests" test for access as well as custody decisions. While not explicitly stated in legislation, courts have interpreted these statutes as creating a presumption that regular access by the non-custodial parent is in the best interests of children.

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[22]W.V. Fabricius, "Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis & Blakeslee" (2003), 52 Family Relations 385 at 390, reporting on a study of young adults who experienced divorce as children.

[23]See e.g *A.J.C. v. R.C.*, 2003 BCSC 664 (S.C.) where the court gave effect to "wishes" of an 11 year old child to change custody from the mother to father despite being satisfied that the father had engaged in alienating behaviour.

[24] R.S.C. 1985, c. 3 (2nd Supp.). For a review of the case law governing access and enforcement of access, see J.G. McLeod, *Child Custody Law and Practice* (Toronto: Carswell, 1992), chapters 9 and 10 (updated losseleaf service)

> s.16(10). In making an order [concerning a child], the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Section 16(10) preserves the discretion of a judge to make the type of access order considered to be "consistent with the best interests of the child" before the court, including the possibility of complete denial of access if the circumstances indicate that this is required. This provision uses language that focuses on the interests of the child in regard to access rather than on parental rights, but it has generally been interpreted as in effect creating a presumption that a significant amount of regular contact with the non-custodial parent is in the best interests of children. The Supreme Court of Canada in its 1993 decision in *Young v Young* accepted that s.16(10) of the *Divorce Act* creates a presumption that there will be access, though recognizing that it may be denied if the access parent can establish that contact will not be in the interests of the child. [25]

Judges deny access in a relatively small percentage of cases,[26] almost invariably ones where it is demonstrated by the custodial parent that there is a *real risk* of physical or emotional harm to the child as a result of access.[27] In some cases involving serious continuing post-separation spousal abuse, judges consider issues of domestic violence and the risk to the custodial parent that may occur when care of the child is being transferred from the custodial parent to the access parent. There is a growing recognition that psychological or physical injury to the custodial parent, the person with primary responsibility for the child, endangers the welfare of the child.[28]

While access has traditionally been defined as a best interests decision or even the right of a parent, some judges and commentators have characterized access as "the right of a child." In its 1998 decision in *New Brunswick Minister of Health and Community Services v. L.(M.)* , a child

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[25][1993] 4 S.C.R. 3, at para. 210, .McLachlin J. stated [emphasis added]:

> the ultimate criterion for determining limits on access to a child is the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests; a factor which must be considered in all cases is *Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child* .

[26] See Canada, Department of Justice, *Evaluation of the Divorce Act* (1990), p.111 reporting on two file studies of divorce cases in four Canadian cities. One carried out in 1987 found access was denied in 1.1% cases, while the other 1988 reported access denied in 2.4% of cases. See, however, Perry et al., *Access to Children Following Parental Relationship Breakdown* (Calgary: Canadian Research Institute for Law & the Family, 1992), at 50, reporting on a 1991 study of court files in Alberta indicating that access was denied in 6.4% of the cases studied.

[27] See e.g. *K.T. v. R.W.B.C.* (1990), 25 R.F.L. (3d) 433 (Ont. Prov. Ct. - Fam. Div.)(access denied to mother of 4 year old child; mother had ceased visiting when child was 10 months old); *Montgomery v. Montgomery* [1992] O.J. 2299 (C.A.)(father harassing and abusive to mother, child under "undue emotional stress" as a result of visits).

[28]See e.g *Matheson v Sabourin,* [1994] O.J. 991 (Prov. Ct.)

protection case, the Supreme Court of Canada upheld a trial judge's decision to terminate access rights of the parents of children who were permanent agency wards, emphasizing that "access is a *right* that belongs to the child, and not to the parents." Justice Gonthier wrote that "preserving the family unit only plays an important role if it is in the best interests of the child," endorsing the view that "the parents must be worthy of being 'visitors in their child's life.'"[29] This decision clearly emphasized children's welfare over parental rights. However, this rhetoric appears in child protection case, in which there was significant evidence that the children were disturbed by visits with parents who had a long history of marital violence, and the children's lawyer was advocating termination of access.

Despite this rhetorical support for the notion that access is the child's *right*, it is necessary to consider the relationship of the child's "right" to any legal remedies. If children have the "right" to access, can children enforce this right? In reality, it is the non-custodial parent who can seek to enforce the "child's right" to access, or the custodial parent who is claiming that the child has the "right *not* to have access" with the other parent if the child expresses a desire not to visit.

There is some symbolic and educational value to conceptualizing access as a right of the child. Justice system professionals may use this rhetoric to focus on the interests of the children in a dispute, and to communicate to parents the desirability of their promoting a harmonious access arrangement to meet their children's needs. A focus on the right of the child to access can, however, be problematic, and some judges prefer to conceptualize access as an obligation of the custodial parent. In an Ontario case where there was a concern that the custodial mother was "unduly influencing her children against their father," Steinberg J. cited s.16(10) of the *Divorce Act* as establishing a

> duty on a custodial parent to encourage and facilitate access between a child and his non-custodial parent.[30]

In the Saskatchewan case of *Sekhri v. Malhli,* which also involved alienation issues and a custodial mother claiming that her child did not want to visit the father, Klebuc J. recognized both the value and the limitations of conceptualizing access as the "right of the child."

> ... it is unwise to simply state access to be the right of the child for the statement is subject to many interpretations in an area of law that is already fraught with difficulties. Children may misinterpret the extent of their alleged "rights" and thereby be induced to take unreasonable positions with respect to questions of custody and access. They may erroneously conclude that they can independently and unilaterally exercise the alleged right. *To the extent that access is the right of a child, it is not one that children may unilaterally exercise but rather one that Parliament and the legislatures have charged this Court ... with the duty of supervising. In many cases what*

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[29](1998), 41 R.F.L. (4th) 339 (S.C.C.)

[30] *MacInnes v. MacInnes* (1992), 40 R.F.L. (3d) 345, at 357 (Ont. U.F.C.), per Steinberg J. See also *L.J.S. v B.L.S.* (1998), 214 A.R. 324 (Q.B

> *is in the best interest of the child may be contrary to what the child desires* . Further, unless the child is 12 years of age or more, the supervising court may give little, if any, weight to the subjective wishes of the child where such wishes are inconsistent with the advantages of parents and children maintaining a relationship with each other, of children maintaining contact with their cultural heritage, or with what is in the best interest of the child.[31]

While there are contexts in which it may be useful to refer to access as the "right of a child," it is submitted that this is rhetoric that should be avoided in the context of high-conflict separation, as it only tends to fuel the conflict of the parents, each of whom may be claiming to vindicate their child's rights. Rather, it is useful for each parent to know that in the absence of a court order terminating access, they have a *duty* to support the child's relationship with the other parent, and to recognize the importance of the other parent's heritage and culture to the child.

Access and the Best Interests of the Child

Although there is surprisingly little good long term research available on the effects of different patterns of access on children, the available research clearly suggests that *in general* children who have regular contact with the non-custodial parent (usually the father) have better psychological adjustments than children who see the non-custodial parent infrequently or not at all. Most children whose parents have separated express a preference for having contact with both parents, and theories of child development would suggest that children will usually benefit from continuing to have contact with both parents after going through the tumult of parental separation.[32] However, as noted earlier, one of the paradoxes of law of access is that for the high-conflict cases where the parties are most likely to seek the involvement of the justice system, there is some social science evidence that visitation can have a negative influence on children's emotional well-being.[33] In one English study of high conflict cases in which a court ordered a social work assessment, one third of the children interviewed a year after the conclusion of court proceedings reported that they would rather not see the non-residential parent if this meant an end to the arguments.[34] There are nevertheless powerful arguments for recognizing and enforcing access rights in *most* high-conflict cases.

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[31](1993), 112 Sask. R. 253 (Q.B.) at 262. Emphasis added.

[32]See e.g J. Mitchell, "Contact in Practice," [2004] Fam. Law. 662, esp. at 664. See also W.V. Fabricius, "Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis & Blakeslee" (2003), 52 Family Relations 385, reporting that many young adults who experienced parental divorce expressed a regret that they did not make more contact with non-custodial fathers.

[33]A. Buchanan et al, "Families in Conflict", [2001] Fam Law 900. See also discussion of John Eekelaar, "Contact - Over the Limit," [2002] Fam. Law 271 who questions the "assumption that contact [with the non-custodial parent] is, in itself, necessarily beneficial for children (quite apart from the issue of violence)." He argues (at 273) that courts should only use "legal coercion" in "cases "where the actions of a [custodial] parent threaten to harm a clearly beneficial relationship enjoyed by the child."

[34]A. Buchanan et al, "Families in Conflict", [2001] Fam Law 900, at 902.

Perhaps the most fundamental reason for making access a legally enforceable right for non-custodial parents is that this reflects a basic belief shared by the vast majority of Canadians that children should normally have a relationship with both parents, even if the parents are separated.[35] The law of access therefore embodies fundamental values of Canadian society about the importance of parenthood.

Further, the Canadian law imposes and enforces child support obligations on all parents. It would be grossly unfair and deeply undermining of respect for the justice system if non-custodial parents without any history of abuse were legally obliged to pay child support, but could not look to the legal system to enforce access. As it is, the disparities in the efficiency and level of state support for enforcement of child support as opposed to access causes understandable resentment on the part of many non-custodial parents. The tensions and resentment of the family law justice system would greatly increase if the courts did not treat violations of access orders seriously. Related to this, if the courts were not prepared to enforce access, there would be a much greater tendency to litigate over custody, as a parent without custody might effectively have no rights in regard to his children.

While the family justice system is not able to effectively enforce access in every case where it is denied, the awareness that a failure to honour an access order *may* result in a legal process does encourage many custodial parents to respect the rights of non-custodial parents and to facilitate access in a way that is beneficial to their children. Similarly, though the courts do not always respond effectively to alienating conduct, there are alienation cases in which legal intervention does lead to a reduction in such conduct and an improvement between the child and the alienated parent.

Circumstances of the Individual Child

When access or alienation problems arise, counsel and judges must try to understand the relationship between the adults, and the circumstances of the children who are involved. While it may be more time consuming to undertake such an inquiry, it is also more likely to produce a resolution that will truly promote the best interests of the children involved, and may make a future return to court less likely. Involvement in social and extra-curricular activities will frequently interfere with access visits.

Where a child is engaged in extra-curricular activities that are important to the child, it may not be in the child's best interests to have visits scheduled that will interfere with those activities. This will, however, require flexibility and co-operation on the part of both parents. While it has been held that each parent has the right to enroll the child in extra-curricular activities that are scheduled during the time that they have the care of the child, neither parent can require the other parent to allow the child to participate in those activities while the child is in the other parent's care.[36] The British Columbia Court of Appeal observed, in the context of a high-conflict separation, that it was wrong for a custodial father to encourage his daughter to "choose between her music and [visiting with] her mother. As talented as [the child] is, she must still develop the emotional and social

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[35]According to a 1998 COMPAS public opinion poll, 80% of Canadians think that it is "very important" for children from divorced families to maintain an on-going with the non-custodial parent, and another 17% believe that it is "somewhat important." See S. Gordon, "Father's Day," [Dec 2003] *C.B.A. National*, 18 at 19.

[36] *Shaughnessy v. Michalchuk,* [2003] A.J. No. 1567.

capacity" that can come from a relationship with her mother,[37] and might have to miss some musical events in order to visit her mother.

It is preferable for a child to be able to have both a relationship with the non-custodial parent and to enjoy extra-curricular activities which are important to the child; parents, counsel and the courts should try to accommodate both of these. However, if due to the location and schedule of the parents there has to be choice, courts will generally favour the relationship with the non-custodial parent..

IV. RESPONDING TO ALIENATION & ACCESS PROBLEMS

A. DEVELOPING THE APPROPRIATE RESPONSES

Conflict Reduction Strategies to Judicial Sanctions

Lawyers and judges should consider a range of possible responses to alienation and access problems, depending on the nature of the difficulties, the services available and the resources of the parties. The *Divorce Act* s. 16(6) and the *Children's Law Reform Act* s. 28(3) allow a court to impose conditions in regard to any order concerning children; these provisions can be invoked to help control the behaviour of any parent who is exercising custody or access rights.

Generally, the most effective responses for dealing with moderate levels of alienation and access difficulties are *conflict reduction strategies*,such as parent education, mediation, counselling, access supervision or use of a parenting coordinator. These *extra-legal responses* can help parents or children to deal with underlying emotional issues, and allow for the resolution of access problems in ways that are most likely to promote the best interests of children. These responses can help many estranged parents cooperate to promote the welfare of their children by developing appropriate access arrangements. The courts can have an important role in urging or even directing parents to take advantage of available resources.

In some cases, however, these softer responses may not work, and there may need to be a *harder coercive judicial response*, such as a police enforcement order or a finding that the custodial parent is in contempt of court for violating an access order. While conflict reduction strategies are usually best for all concerned, there is a relationship between the legal remedies and extra-legal responses. In some high-conflict parental separations, it is only the *threat* of an effective legal response that persuades a parent who has not respecting an access order to engage in an extra-legal response. Further, there remains a need for recourse to the courts to deal with cases where access should be restricted or denied due to the risks to physical or emotional security, and to deal with parents who are too emotionally disturbed or intransigent to resolve access disputes without legal involvement.

Recourse to the courts to enforce access rights is never an optimal situation for children. If, for example, the ultimate legal sanction is invoked and a custodial parent is sent to jail for contempt for violating an access order, the non-custodial parent (and judge) can only hope that this period in jail will make that parent more co-operative in the future, and that this response will not unduly

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[37] *Ebrahim v. Ebrahim*, [2000] B.C.J. 1265 (C.A.), at para. 17.

traumatize the children or damage their relationship with the non-custodial parent.

Lawyers and judges dealing with alienation and access problems must select the *most appropriate sequence or combination of approaches* depending on the nature of the problems, the resources in the community and the situation of the parties. Generally, it is preferable to first attempt to use the less intrusive extra-legal responses, though if there is not a mutual willingness to do so, it may be necessary to start with more coercive legal approaches.

There are many considerations that affect decisions about appropriate responses to access and alienation problems, including ensuring that the administration of justice does not fall into disrepute by permitting a breaching parent to "get away with" flagrantly disobeying an order of the court. While it is important to ensure that the legal process is respected, the foremost concern should always remain the best interests of the child. A leading Toronto family law practitioner, Philip Epstein, cautions

> The Court ...must not get caught up in the simplistic approach that the Court must protect its own integrity and willful disobedience must lead to a harsh penalty. This has not in the past solved the problem and it is not likely to solve it in the future. The Courts need to look at creative ways to refashion and review access orders in a timely way that brings home to both parents the need to cooperate.[38]

In many cases, the threat of coercive sanctions can move parents to accept various conflict reduction techniques that may actually reduce their level of conflict and benefit their children, but there must also be a recognition that some parents are so emotionally enmeshed and some children so alienated that these techniques are not always effective.

Preferred Legal Responses: Clear Orders & Timely Responses to Breach

Before considering the range of extra-legal and legal responses, a few general points should be made about the enforcement of access and joint custody orders and the appropriate response to breaches of these orders.

In high-conflict parental separation, it is desirable to have:

- timely identification of cases with significant access and alienation problems;
- clear and specific orders; and
- effective responses for serious or persistent breaches of orders.

For many couples there is an initial period of uncertainty and tension around the time of separation, but the parents are able to develop their own mutually cceptable child care arrangements without the need for professional assistance and over time the relationship between the separated parents actually improves. Where there is a high level of conflict, however, professional intervention is likely to be useful as soon as the parents separate. While most parents can resolve access difficulties without professional intervention, lawyers and judges should be able to identify those

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[38] Philip Epstein, "Enforcement of Access: Judicial Management of Interference with Access" (2002) Law Society of Upper Canada, 6 Minute Lawyer Lecture Series, Toronto, at p32.

parents who require assistance, including those who may "need" to go to court to resolve their dispute over access or jooint custody.

In a high-conflict case, any child-related order for access or form of shared parenting should be as clear and specific as possible. The more specific the agreement or order, the less likely either of the parties will be able to manipulate or misinterpret the provisions – a frequent issue with high-conflict parents. Further, having an order that is clear and specific will facilitate enforcement by a judge, the police or some other agency like a supervised access facility.

American psychologist Ira Turkat advocates use of clear and specific "multi-directional court orders" in high-conflict cases.[39] These orders are detailed, and directed not only to the parents but also to other parties who deal with them or their children. Turkat argues that specifying such matters as dates, times, places and the conditions of visitation increases the likelihood of compliance. The order should deal with issues such as communication between the parties, and between each parent and the children when with the other parent. The order should make clear what information is to be provided to each parent by schools, health care providers and individuals like coaches. It should specify under what circumstances access might be denied, for example stipulating that if there the child's illness would prevent a visit, it must be documented by a letter from a physician. There should be a clear specification of what, if any, compensatory access is to occur if access is missed due to illness or some other cause.

If there are concerns about safety or health issues related to how access is enjoyed, it is useful, especially in a high-conflict case, to impose clear conditions on the exercise of access. The terms of access might, for example, stipulate that the access parent shall not consume illegal drugs or alcohol during visits or for twelve hours prior, and if the custodial parent has reasonable grounds to believe that this term has been breached, access may be denied. While there may still later be a dispute about whether the facts justified a denial of access, such an order at least sets out clear expectations for both parents.

As much as possible, communication and contact between high-conflict parents should be structured and limited. It may be appropriate for the order to specify that all communication between the parents only communicate by way of email; this provides a record of communications, and because email is more impersonal, may also reduce the chance of heated exchanges taking place between the parties.[40] In some high-conflict cases, it is often helpful for orders to provide that when a child is with one parent, there will be no contact with the child from the other parent unless there is an emergency; this will limit the possibility of manipulation of the children, as well as reducing the possibility of conflict between the parents.

Access orders can also reduce the possibility for conflict by having transitions occur in neutral locations, like a restaurant parking lot, or better still to have one parent take the children to school or day care in the morning and have the other parent pick them up there at the end of the day.

Timely and effective response to a serious or persistent breach of an access order is important in a high-conflict case because this will help to deter further breaches. It may also help to reduce the

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[39] I.D. Turkat, "Management of Visitation Interference" (1997) 36:2 Judges' Journal 17.

[40] Two concerns may be raised against the use of email: 1) access to computers and 2) ability to manipulate the record. Both of these concerns are addressed below in the discussion on "Email communication & the Internet."

likelihood that a child will become estranged from the access parent, as may occur if there is a longer period without contact.

Preventing Alienation and Access Difficulties - Placement With the "Friendlier" Parent

As noted above, s. 16(10) of the *Divorce Act* requires that in making decisions about children, courts "shall take into consideration the willingness of the person for whom custody is sought to facilitate ... contact" with the other parent. Although never the only factor, if a parent introduces evidence that the other parent is engaging in serious alienating behaviour and that access is being denied, the courts should consider the willingness of each parent to facilitate contact with the other parent. Some reported high-conflict cases do focus on the importance of awarding custody to the parent with a less hostile and more co-operative attitude.[41]

If one parent is engaging in alienating behaviour, for example by denigrating the other parent to the children and telling them that the other parent is to blame for the loss of their home, there may be a strong argument at the interim stage for not placing the children in the custody of that parent. If a parent who is engaging in alienating behaviour has primary care of a child for a significant period, the child's attitudes towards the other parent may be irreversibly affected. Placement with a parent who is more willing to support a relationship with the other parent and is less hostile towards the other parent is likely the best way to ensure that the children will have a positive relationship with both parents and that future access difficulties will be avoided.

If there are alienation concerns or access difficulties, counsel seeking custody should be prepared at both the interim and trial stages to adduce evidence about these difficulties, and of the willingness of his or her client to support the child's relationship with the other parent. Evidence of alienating conduct, such as tape recordings of conversations between a parent and child in which the parent urges the child to reject the other parent or ignore her instructions, will be important.[42] It will also be helpful to have an assessor or other professional to help establish that this type of behaviour has been occurring, and to testify about what the children say that their parents are saying and doing. [43]

The ultimate test for awarding custody is the best interests of the child, and the willingness of each parent to support a positive relationship with the other parent is only one factor. A pattern of "intransigence" about facilitating access during the interim care period or engaging in alienating

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[41] *Rose v. Rose* (1989), 22 R.F.L. (3d) 72 (Alta. Q.B.); *Tremblay v. Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta. Q.B.); *Stark v. Stark* (1988), 16 R.F.L. (3d) 257 (B.C.S.C.)..

[42] See *e.g. P.(E.J.) v K..(E.A.)*, 2003 BCSC 363, per Hood J. See also *Reddick v. Reddick,* [1997] O.J. 2497; and *S.(J.A.) v. W.(E.E.)*, [2002] B.C.J. 2069 (Prov. Ct.). In some cases, judges refuse to admit recordings made by one parent of conversations between the other parent and the child, on the grounds that they are an invasion of privacy and often done illegally; see *e.g. Elliott v. Elliott*, [1998] O.J. 4827(Ont. Gen. Div.) and discussion in D.A.R Thompson, "Are There *Any* Rules of Evidence in Family Law?" (2003), 21 Can. Fam. L. Q. 245, at 312-315. It would seem that the more revealing of alienating or abusive conversations, the more likely that a judge will admit such recordings.

[43] *Forte v. Forte,* [2004] O.J. 1738 (Sup. Ct.), per Corbett J.

conduct, however, may be a significant factor.[44]

B EXTRA-LEGAL APPROACHES

Parenting Education

Programs to educate parents on the needs of their children following separation are now offered in many places in Canada. The structure and nature of these programs vary, but they are relatively short (2 to 8 hours) and provide parents with basic information about the divorce process, with an emphasis on the effects on children of parental separation. A common theme of these courses is a consideration of the harm that parental conflict does to children and the value to children of having positive relationships with both parents. There is usually some discussion of various conflict reduction strategies, and references to various print, video and Internet resources. While attendance at such a short course is not a panacea for access problems, there is research that suggests that even for high-conflict separations, attendance may help reduce conflict levels. [45]

In Toronto, attendance at such a course is mandatory for parents who are involved in litigation.[46] In places where attendance is not mandatory but such a course is available, a referral by counsel may have value in addressing access and other child related concerns. In appropriate cases a judge may make attendance at a program a condition of exercising custody or access rights, or part of a sentence for contempt of court.[47]

Mediation

Mediation can be helpful to some parents in working out satisfactory access arrangements, even in cases with relatively high levels of conflict.[48] Issues related to access may be more amenable to mediation than some other issues. The parents have a continuing relationship which may benefit from the negotiation and dispute resolution skills typically developed in mediation. [49] Further, in

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[44] See e.g *Struck v Struck* (2003), 47 R.F.L. (5tth) 405 (B.C.C.A.); and *R.A. v H.D.A.*, [2004] O.J. 1341 (Sup. Ct), per Marshman J. ("Given [the mother's] intransigence in this matter[access to the father], I have no alternative but to place the children in the custody" of the father.)

[45]See Brad McKenzie & Brenda Bacon, "Parent Education After Separation: Results From a Multi-site Study on Best Practices," [2002, Summer Supp no. 4] Can. J. Comm. Mental Health 73-88.

[46]*Family Law Rules*, R. 8.1, Ont. Reg. 89/04

[47]*Payton v. Shymkiw* (1996), 26 R.F.L. (4th) 22 (Man. Q.B.); *A.J.C. v. A.G.*, [2001] M.J. 301 (Q.B.) at para. 36, aff'd [2002] M.J.149 (C.A.).

[48] Richardson, *Court-based Mediation in Four Canadian Cities: An Overview of Research Results* (Ottawa: Department of Justice, 1988) at 36. See also Perry et al. *Access to Children Following Parental Relationship Breakdown in Alberta* (Canadian Research Institute for Law and the Family, 1992), reporting that of parents surveyed with access problems, 50% resolved them by talking to a mediator or counsellor, but only 11.5% went to court.

[49]See J. Paetsch, L. Bertrand & J.P. Hornick, *Family Mediation Canada Consultation on Custody, Access and Child Support* (Ottawa: Department of Justice, 2002), online http://canada.justice.gc.ca/en/ps/pad/reports/index.html

contrast to economic issues, where one party's gain usually come directly at the expense of the other, access need not be a "zero sum" game. Custodial parents may, through mediation, come to realize that they may actually be better off "giving up" some time with their children, both because they will have more time to pursue their own needs and interests, and because their children will benefit from contact with the other parent.

Mediation may be the most effective response to *some* high-conflict cases in which there are access difficulties, but the decision about whether to participate must be voluntary. While counsel or a judge may recommend that the parents try mediation, as a matter of law and common sense, this cannot be ordered by a court if one or both are unwilling to try.

Mediation about access issues should not be precluded even if there has been a relationship that has involved some incidents of spousal violence, though there are cases involving spousal abuse where mediation will clearly be inappropriate. Mediators and counsel need to be especially sensitive to issues of domination and imbalance of power between parents in high-conflict cases, particularly if there has been a history of abuse; further, counsel for a victim of domestic violence has a responsibility to review any mediated agreement to ensure that it does not expose the victim or the children to danger.

Parenting Coordinator

An important development in the field of post-separation parenting in the United States has been the use of parenting coordinators. There are places in Canada where counsel are starting to make use of these individuals to help high-conflict parents deal with problems related to access or shared parenting. A parenting coordinator is responsible for helping parents to implement a parenting plan.. The coordinator is a combination of educator, mediator and limited purpose arbitrator, who helps to resolve issues related to implementation of a parenting plan.[50] The parenting coordinator is expected to be relatively accessible to the parents, including having meetings in person as well as by email or conferences calls.

The parenting coordinator may, for example settle a disagreement between the parents about a child's birthday party or a wedding. If the parenting coordinator cannot help the parents to resolve their disagreements, the coordinator may be empowered to impose a solution. While decisions of the coordinator can be appealed to the court, they are considered binding unless and until this is done; in practice, given the costs and delay involved, most minor decisions are not appealed. Parenting coordinators can also have a role in the enforcing of access orders, and may be authorized to report to the court about non-compliance issues.

Most parenting coordinators are mediators or mental health professionals, though some are family lawyers. In Canada, this process can only be adopted with the consent of the parties, since judges cannot delegate their powers to define or clarify the terms of an access order to a third party.[51] The parents are required to pay for the parenting coordinator's services on the basis of an agreed

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[50]For a discussion of the role and function of a parenting cor-ordinator (or special master as it is known in some American states, see C.Coates, et al, "Parenting Coordination: Implementation Issues" (2003), 41 Fam. Ct. Rev. 533-564; and Andrew Schepard, *Children, Courts and Custody: Interdisciplinary Models for Divorcing Families* (New York: Cambridge University Press, 2004) at 108-112.

[51]*M.(A.C.) v. M.(D.)* (2003), 67 O.R.(3d) 181 (C.A.).

formula. While the costs may preclude many parents from using this, use of a parenting coordinator is often less expensive and more effective than resort to the courts.

Counselling for a Parent

In high-conflict separations, especially where there are alienation issues, the struggles over the children usually are the result of deep-seated, unresolved feelings about the spousal relationship, and individual or even couple-based counselling may be needed to resolve emotional issues before these child-related problems can be properly addressed. Counselling for parents who are engaging in alienating behaviour can help parents to understand what they are doing and the effect that their behaviour is having on their children.

Parents may be more prepared to actively engage with counselling if it is voluntary, perhaps on a referral from a lawyer, than when it is imposed by a judge. However, if there are alienation or access concerns, a judge may require either or both parents to undertake counselling as a condition of exercising custody or access. Further, if there is a finding of contempt for access denial, counselling may be imposed a condition of a sentence.[52] There are also cases in which courts have ordered that a parent attend an anger management course as a condition of exercising access.[53]

Counselling for a Child

Children whose parents are involved in a high-conflict separation often have feelings of anxiety, guilt, anger and stress. While judges are understandably reluctant to dictate to parents how they should deal with their children's problems, when there is evidence that a parent has engaged in alienating behaviour which has resulted in a child expressing animosity towards the other parent and that is affecting the exercise of access or shared parenting, a court may order that a custodial parent arrange and pay for counselling for the child.[54]

There are mental health professionals in some communities with experience in providing counselling and support for both parents and children concerning access, who can be present to help facilitate visits and improve relationships between a child and parent visits if the child has a high levels of animosity or fear.[55]

Developing Parenting Competence

In some cases the custodial parent will be reluctant to allow access because the non-custodial parent has had little or no experience in the care of children, or perhaps in the dealing with special needs of their child. In some of these cases, the non-custodial parent may have never lived with the child. In such cases, the non-custodial parent might be required, as a condition of exercising access,

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[52] *Kramer v Kramer*, [2003] O.J. 1418 (Sup. Ct.), per Henderson J. at para. 38. See also *Mikan v Mikan,* [2004] O.J. 740 (Sup. Ct.), per Langdon J..

[53] See e.g. *Fisher v. Fisher,* [2003] O.J. 976 (Sup. Ct.)

[54] See e.g. *A.J.C. v. R.C.*, 2003 BCSC 664 (S.C.), per Bennett J; *Hladun v. Hladun*, 2002 Carswell Sask 501(QB) and *Mikan v. Mikan,* [2004] O.J. 740 (Sup. Ct.), per Langdon J..

[55]See Rhonda Freeman et al, "Reconnecting Children with Absent Parents" (2004), 42 Fam. Ct. Rev. 439.

to take a parenting course or perhaps undertake some volunteer work with children. The non-custodial parent might, for example, be expected to do some supervised volunteer work at the child's day care, school or extracurricular program.

C. STRUCTURING RELATIONS TO REDUCE CONFLICT

Parallel Parenting

In cases in which there have been significant problems with alienation or access, some judges judges will consider imposing a form of joint custody known as "parallel parenting," despite the fact that there is a high-conflict relationship between the parents.[56] Under these arrangements, parents are *not* expected to consult and agree about major issues about the care of the children, but rather each parent is to have the sole legal authority to make certain decisions, such as those regarding education or participation in extra-curricular activities. As discussed below, parallel parenting orders for high-conflcit parents may include terms to limit contact between the parents and structure their communications.

This type of arrangement typically does not involve equal or nearly equal time with each parent, but rather judges are using terms like "joint custody" and "parallel parenting" to signal that both parents are to have an important role in the lives of their children. The judicial use of an imposed parallel parenting language is intended to remind both parents that they have an obligation to avoid undermining the relationship with the other parent. Further, there is an implicit judicial message that if the primary residence parent interferes with the relationship of the child and the other parent, the court may give the other parent sole custody as that parent already had custody rights under the parallel parenting arrangement.

Email Communication& Use of the Internet

Many parents in high-conflict relationships have difficulty communicating with their ex-partners without hostility. The volatility of their relationship is heightened by the on-going necessity of having to communicate and co-operate about access visits.

One possible way to improve communication may be to stipulate that all communication between the parties occur through email.[57] This has a number of benefits. First, it may decrease the chances of a spontaneous, emotional outburst by one or both of the parties. Email can be a more neutral means of communicating and, provides the parties with an opportunity to self-edit and contemplate the words being put to the other party. In person and over the phone conversations have a tendency to increase thoughtless and reactionary responses. Further, email may provide a record of the communication for later court proceedings. Software programs exist that ensure email communications, sent and received, cannot be tampered with by either of the parties, thus avoiding any suggestions of manipulation.

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[56] See *e.g. T. (T.E.) v. L. (J.D.),* [2003] SKQB 517, per Klebuc J.; *Mulder v. Mulder,* [2003] O.J. 2236 (Sup Ct.), per Herold J. *Sukhu v. Hamid*, 2003 CarswellOnt 102 (S.C.) per Wein J.; *D.H.A v K.E.M.*,[2004] Y.J. 21(S.C.), per Veale J.; and *Lefebvre v. Lefebvre*, [2002] O.J.. 4885 (C.A.) (Laskin J.A. refused to issue stay pending appeal of parallel parenting order in high-conflict case).

[57] *D.H.A v K.E.M.*,[2004] Y.J. 21(S.C.), per Veale J.

A related possibility is for counsel or the court to require that the parents use *Our Family Wizard*,[58] to facilitate communication and co-operation. This is a web-based commercial product which facilitates scheduling and planning for children of separated parents, and which keeps a record of communication between the parents that cannot be altered; arrangements can be made up to allow for direct Internet based access to schedules and correspondence between the parents by professionals working with the parents, such as lawyers, a mediator, a parenting co-ordinator or even a judge. The cost of *Our Family Wizard* is currently $99 (US) per year, with a one-month free trial period following which parents can elect to use and pay for the program for as short as six months; not cheap but affordable for upper income families.

Technological innovations can help some high-conflict parents to communicate and plan with less hostility, as they do not have direct contact. It must, however, be recognized that with some individuals, use of electronic communication may heighten levels of hostility and make communication more difficult.

Avoiding Face-to-Face Transitions

One way to reduce the possibility of post-separation arguments between parents is for transitions to be structured in such a way as to avoid having them meet with one another. This may, for example, be achieved by having the access parent pickup the children in the afternoon from school or day care at the start of each visit, and leave the child there in the morning at the end of the visit. This type of arrangement will also increase the likelihood that access will occur, as if the child comes to school or day care in the morning, the visit will occur.

Supervised Access & Supervised Transitions

Another option for reducing the likelihood of conflict between parents and increasing the likelihood that access will occur is to have either the visits themselves or the transition between the parents supervised. A supervisor can be a professional, a volunteer or a relative (e.g. member of father's family chosen by mother).[59] It is important that the supervisor is not an inappropriate person, in particular not someone who may be controlled by an abusive spouse. Given its intrusive, expensive and artificial nature, supervised access should not be seen as a permanent arrangement when a parent is too much of a risk to be alone with a child, but rather should be seen as a "temporary measure...to help resolve a parental impasse over access."[60] Preferably during the period of supervised access, the supervised parent will be taking steps, such as participation in a parenting course or taking counselling, that will reduce the risk to the child and permit unsupervised access

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[58] Information about the Our Family Wizard program and services are accessible on line at www.ourfamilywizard.com

[59] See *e.g. F.K.H.W. B. v. F.S.M.W.B.,* [1995] N.S.J. 471 (Fam. Ct.).

[60] Judge Norris Weisman, "On Access After Parental Separation" (1992), 36 R.F.L. (3d) 35, at 74, quoted with approval by Abella J.A. in *B.P.M. v. B.L.D.M.*(1992), 42 R.F.L. (3d) 349, at 360 (Ont. C.A.)

at some future time.[61] In many localities in Ontario government assisted supervised access projects have been established, which can help to maintain parent-child relationships while protecting children and victims of spousal abuse. There are fees for use of these agencies, though subsidies are available for low income parents. These programs can either supervise entire visits or the transition from custodial to access parent.

Supervised access may be appropriate if there is a reasonable apprehension of a threat to the safety of a child during a visit, if the child is afraid of or refusing to visit, or if there is a reasonable apprehension that the non-custodial parent will abduct the child.[62] Some form of supervised access may be especially appropriate on an interim basis if there are serious allegations and a significant *risk* of harm to a child, but there is a real dispute about whether abuse occurred. Supervisors who are acting in a professional capacity keep records and may be able to testify about the quality of parent-child interaction during a visit. In some cases there will be sufficient evidence of hostility or stress on the part of the child during supervised access to obtain an order terminating all access.[63]

In high-conflict situations, the process of exchange of the child has the potential for violence, or at least verbal altercations and displays of parental anger. Even without the risk of violence, parental shouting matches at the time of exchange can be very distressing to children. In high-conflict situations where there is a concern about the potential for displays of hostility between the separated parents, but the risk of direct harm to the children seems low, it may be appropriate to have supervision of the transition process of exchanging the child. Supervised exchange can be arranged through such programs, with parents arriving and leaving at different times to avoid direct contact, or a relative or neighbor who is trusted by both parents could also be a supervisor.

In some cases, access transitions may be arranged at a public place, like the parking lot of a fast food restaurant, but without direct supervision. In high-conflict cases with children who are of school age, it may be appropriate to require the parents to park near each other, but each remain in their cars with windows closed during the transition.

Dealing With Domestic Violence Concerns - Restraining Orders

While a detailed discussion of the relationship between spousal violence and access difficulties is beyond the scope of this paper,[64] it is important to recognize that many (but certainly

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[61] See *e.g. F.K.H.W. B. v. F.S.M.W.B.,* [1995] N.S.J. 471 (Fam. Ct.) and *D.F.M. v. J.S.S.* (1995), 17 R.F.L. (4th) 283 (Alta, CA). The failure to comply with terms of supervised access, such as obtaining counselling for anger management, may result in the termination of even supervised access: *C.D. v. J.B.,* [1996] A.Q. 181 (Sup. Ct.)

[62] See *Zahr v. Zahr* (1994), 24 Alta L.R.(3d) 274 (Q.B.), per Hunt J. where the court ordered supervised access for a father's visits with his 13 year old son because of his past threats to take the boy to Lebanon, and because the boy had witnessed acts of violence by the father against the mother, and had not seen the father for two years. See, however, *H. (H.) v. C.(H.)* (2002), 27 R.F.L. (4th) 63 (Alta. Q.B.) per Lee J. See also Marie Gordon, "Supervised Access: Why, When and How Long?" (2004), 22 Can. Fam. L. Q.185.

[63] See *e.g. Pavao v. Pavao*, [2000] O.J. 1010 (Ct. Just.).

[64]For further discussion, see *e.g.* N. Bala, "Spouse Abuse and Children; Family Law Issues," National Family Law Program of the Federation of Law Societies of Canada, La Malbaie, Quebec, July 12-15, 2004.

not all) "high-conflict" separations also raise issues of spousal violence. If there is a history of spousal violence, the access transitions may be occasions for continuing the violence or intimidation, and a supervised exchange may be required. Further, children may be at risk of manipulation during visits. Safety concerns for victims of spousal violence and their children must be addressed. In cases with a serious risk of violence or abuse, denial or termination of access may be in the best interests of the child.

In cases where there are continuing concerns about post-separation violence or harassment, it may be appropriate to have a restraining order to prohibit any contact of the victim by the other spouse except at access transitions, or in specified ways to discuss the children. [65] A restraining order (or its *Criminal Code* equivalent the recognizance) makes a clear judicial statement that certain types of conduct are unacceptable, and violation may result in sanction (including possible consideration in a motion to terminate access). These orders do not offer direct protection from violence, though the police are obliged to respond to violations of these orders, and the fact that such a court order was made may restrain a generally law abiding formerly abusive spouse who is willing and able to control his violent tendencies.

D THE PROCESS FOR RESOLVING ALIENATION CASES

Judicial Continuity & Judicial Exhortations

If possible, one judge should remain responsible for a high-conflict case, especially one where there are access difficulties or alienation issues. This will allow the judge to get to know the parties and better understand the relationship, which will help to reduce the possibility of parents manipulating the judicial process. In some places, judicial continuity may be achieved by a judicial case management system. Even if there is no case management, a judge may rule that he or she will remain seized of a case to deal with any future problems.[66]

For example, if after a trial in a high-conflict case where the judge has a concern about whether the terms of the access order will be honoured, the judge may require a review hearing within a reasonable time period (like 6 months), so that the court may be apprized of whether the order is being complied with, and require that the judge who made the order will remain seized with the case.[67] Potentially recalcitrant parents who know that they will have to appear before the same judge who made the order may be more likely to comply with the terms of the access order.

If there are access difficulties, adjournments should be kept short. It may be appropriate, for example to give a conditional adjournment, with the parties told that the next court date is in two months, but if any of the weekend access visits scheduled for before then do not occur for any reason, the parties will be required to appear in court on the Monday following the missed visit.

Judges have an important role in access disputes, not only in terms of making orders that can be enforced through sanctions such as contempt of court, but also in terms of encouraging both of

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[65]See *e.g. Shaughnessy v Michalchuk*, [2003] A.J. 1567 (Q.B.), per Veit J.

[66]*Ameral v. Myke* (1992), 42 R.F.L. (3d) 322 (Ont. U.F.C.).

[67]*A.J.C. v. R.C.*, 2003 BCSC 664 (S.C.), per Bennettt J.

the parents to behave in a reasonable fashion that takes account of the best interests of the children. While not effective in every case, judicial exhortations have an effect in many cases. Parents do not just heed the words of judges because they know that a judge may be making a decision about their case, but also because they generally respect the neutrality and position of the judges.

Assessments

In cases where there are access problems, it is often very useful to have an assessment prepared by a psychologist or social worker so that counsel, judges and parents can properly understand the relationship between the parents, and the effect that the parents' strained relationship is having on the children.[68]

The circumstances in which an assessment should be ordered in an access dispute were recently considered in *Kramer v. Kramer,*[69] where Henderson J. allowed the application of a non-custodial father, and ordered an assessment of the family. The court held that there needs to be something more than just problems regarding access, but that it is not necessary to identify a "clinical issue" to have an assessment ordered. The major concern in *Kramer* was establishing the reasons why the children were refusing to see the father, and what could be done, given the wishes of the children. As observed by the judge, an "assessment would greatly assist ... in determining the underlying cause of [their] alienation" from their father, and concluded that the benefits of the assessment outweighed any demand it may put on the children.

In high-conflict access dispute cases, assessments may provide the most objective evidence about a child's wishes concerning access, and can delve into the question of alienation. [70] Assessments can be very important to help ascertaining whether a child's rejection of an access parent is the result of unjustified fears or sentiments expressed by the custodial parent, or whether there is a genuine revulsion for or justified fear of the non-custodial parent. It is now becoming increasingly common to have "focused" assessments which deal specifically with problems related to access, and may be completed more quickly and less expensively than traditional assessments.[71]

Child Representation

In Ontario, where the Office of the Children's Lawyer may provide for legal representation for children, it may be appropriate to consider appointment of counsel for children in cases where access or alienation are at issue. However, because of the dilemmas posed by alienation, and the limited resources available for child representation, counsel for the child is appointed relatively

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[68]In Ontario, if the Office of the Children's lawyer is involved in a case, that Office may decide that a social work investigation should be conducted; there is no charge to the parties fro such an assessment.

[69] [2003] O.J. 1418 (Sup. Ct.), per Henderson J. For further discussion of assessments, including the statutory basis for ordering these reports, see Bala & Saunders, "Understanding the Family Context: Why the Law of Expert Evidence is Different in Family Law Cases" (2003) 20 Can. Fam. L. Q. 277.

[70]Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003) 37:2 Fam. L.Q. 273.

[71]Rachel Birnbaum & Dena Moyal, "Visitation Based Disputes Arising on Separation and Divorce: Focused Child Legal Representation" (2002) 20 Canadian Family Law Quarterly 37-53.

rarely in cases that focus only on access difficulties.

Counsel for the child can be an independent voice for the child, reminding parents in high-conflict separations of the interests and needs of their children, and that their children will suffer further if the parents continue to display hostility towards one another. The child's counsel may help parents and their counsel to negotiate a settlement that meets the needs of the children. If there are court hearings about access issues, counsel for children can ensure that issues such as about the children's wishes, peer relationships and extra-curricular activities are properly canvassed and before the court.[72]

One of the challenges for counsel for children in high-conflict cases is that counsel may conclude that the child's stated wishes are a product of the influence of a manipulative, alienating parent, and that the court should not place any weight on those views. In Ontario, if counsel for the child is satisfied that the child's wishes are reflective of adult manipulation and are contrary to the child's interests. [73]

E JUDICIALLY IMPOSED RESPONSES

Compensatory access

The least intrusive response to visits that have been missed due to an unjustified denial of access by a custodial parent is for the court to order that there is to be "compensatory access" to "make-up" for the missed visits. However, it is often not practical to use this option in a way that is consistent with the best interests of the children involved.

Given the expense and delay in seeking relief in the courts, compensatory access is only likely to be a viable legal remedy in cases where a custodial parent has refused to allow a child to go on an extended visit, such as two weeks in the summer or during a school break.[74] If the missed visit involved expenses that have been wasted, such as a non-refundable plane ticket, these expenses may be recoverable as well.[75]

Apprehension Orders & Police Enforcement

If a custodial parent refuses to comply with an access order, the most direct method of securing enforcement of access right is to have a police officer enforce the order. If an access parent contacts the police because the custodial parent is refusing to comply with the access order, the police are generally reluctant to become involved in what is often an emotionally volatile situation, typically involving a distressed child. Section 36 *Children's Law Reform Act* authorizes a judge to include in an access order a provision directing a law enforcement officer to apprehend a child and

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[72] See *e.g. Kramer v. Kramer*,[2003] O.J. 1418 (Sup. Ct.).

[73] *A.J.C. v. R.C.*, 2003 BCSC 664 (S.C.), per Bennett J.

[74] See e.g. *Shaughnessy v. Michalchuk*, [2003] A.J. 1567 (Q.B.), per Veit J.

[75] See e.g. *Poitras v. Bucsis*, [2003] B.C.J. 460 (S.C.).

deliver the child to a parent entitled to access.[76]

Where there is a significant history of non-compliance with access orders, judges may be prepared to make police enforcement orders, if requested by the access parent.[77] There is a recognition both by judges and by most non-custodial parents, that having the police enforce an access order is very intrusive and potentially frightening for a child. As Quinn J. observed in *McMillan v. McMillan*, it is not a condition precedent to seeking a contempt citation against the other parent that the party seeking redress establish that they have sought police enforcement of an access order.[78]

This type of order should only be made if the access parent is not likely to abuse the power in such an order by calling the police to deal with minor incidents; the judge should be satisfied that the access parent is not "immature or vindictive."[79] As suggested by one judge in making such an order: "Ideally, the making of the order should be effective enough to persuade the wrongdoer to co-operate. However, that is not always the case and the aggrieved party must [be able] to call on the police."[80] After the police enforcement order is made, it should be delivered to the police force, and both parents should have a copy of the order.[81] The access order should be as clear and specific as possible about when and where the child is to be picked up by the access parent. Police officers are, understandably, generally not enthusiastic about enforcing this type of order, especially if the children are reluctant to go on the access visit; the orders should be written in non-legal language that a police officer can readily understand, with a clear indication of the dates when access is to occur.

Contempt of Court

If a custodial parent has wilfully breached the terms of an access order, the access parent may bring an application to have the custodial parent found in contempt of court, and punished by a fine, imprisonment, or by having various conditions imposed. A finding of contempt is a quasi-criminal process, with potentially serious consequences. While in some cases there is a need to resort to a court for a finding a parent is in contempt, there is also a concern that in some high-conflict cases, the contempt process may be misused to harass a parent. As noted by Chadwick J. in dismissing an

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[76]See e.g. *J.G.W. v A.C.S.*,[2004] B.C.J. 889 (S.C.); and *Re Leponiemi v Leponiemi* (1982), 35 O.R. (2d) 440(C.A.)

[77] See e.g. *Shaughnessy v. Michaelchuk,* [2003] A.J. 1567 (Q.B.), per Veit J.;*Mikan v. Mikan,*[2004] O.J. 740 (Sup.Ct,), per Langdon J.; *C.L.S. v. P.E.S.*, [2004] A.J. 293 (Q.B.), per Lee J.; and *M.A. v. J.D.*, [2003] O.J. 2946 (Ont. Ct.J.), per Spence J.

[78] *McMillan v. McMillan* (1999) , 44 O.R. (4th) 139 (Gen. Div.) .

[79]*Wentzell v Schumacher*, [2004] O.J. 1892 (Sup. Ct.), per Wein J; *Cromwell v. Cromwell,* [1994] O.J. 245 (Gen. Div.)

[80]*Allen v Grenier* (1997), 145 D.L.R.(4th) 286 (Gen. Div.)

[81]Although not clearly specified in legislation, some cases suggest that an access parent seeking a police enforcement order should give the police force to which it is directed notice of the application. See *Re Leponiemi v. Leponiemi* (1982), 35 O.R. (2d) 440(C.A.); and *Allen v Grenier* (1997), 145 D.L.R.(4th) 286 (Gen. Div.)

application for a finding of contempt in a high-conflict separation:[82]

> Contempt of court is the big stick of civil litigation. It should be used sparingly and only in the most clear cut of cases. To use contempt motions to enforce minor but annoying breaches...takes away and waters down the contempt procedure. Contempt should be reserved for those serious breaches which justify serious consequences.

Despite these cautionary words, there are high-conflict separations in which a contempt proceeding is an important method for gaining future compliance from a recalcitrant custodial parent. The primary purpose of the punishment that is imposed in contempt proceedings is to secure future compliance.

Superior Courts have an inherent jurisdiction to make findings of contempt for violations of their orders. Further, in Ontario the *Children's Law Reform Act* s. 38 gives the provincially appointed judges of the Ontario Court of Justice the jurisdiction to impose penalties of up to 90 days imprisonment and fine of up to $5,000 for contempt from a breach of an access order made by that court. Rule 31 of the Ontario *Family Law Rules* sets out a procedure for applications for findings for contempt.[83]

A contempt proceeding to enforce an access order is civil,[84] and the onus is on the party seeking to enforce the order to bring the case before the court.[85] Although the reason for pursuing an action for civil contempt is to seek compliance and not punishment, where there is an attempt to punish past behaviour, like in the case of a parent who breaches an access order, there are criminal elements to the proceedings.[86]

Contempt proceedings for violation of an access order require a clear order, so that the court can be satisfied that there was in fact a breach. [87] Further, the court may have to deal with the question of whether the denial of access was "justified," for example because the access parent came to pick up the child in an intoxicated state. One of the most difficult issues that can arise in a

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[82] See *e.g. Fisher v. Fisher,* [2003] O.J. 976 (Sup. Ct.)

[83] Ont. Reg. 114/99. [hereinafter *Family Law Rules*]

[84] In cases where there is no penalty "expressly provided by law" for the violation of a court order, a violation of the order is an offence under the *Criminal Code* s. 127. Where legislation does not provide for a remedy for breach of an access order, it might be possible to invoke this provision. Prosecutors and police, however, are very reluctant to become involved in enforcing an access order, though police and the criminal courts do deal with child abduction. See discussion in M. Bailey, *Overview and Assessment of Approaches to Access Enforcement* (Ottawa: Canada, Department of Justice, 2001) , p. 35.

[85] *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 at 522 cited in *S.R. v. M.R.*, [2002] O.J. No. 1519 at para 216.

[86] *M.R. v S.R.,* [2002] O.J. No. 1519 at para 218.

[87] See *e.g. MacKenzie v. MacKenzie* (1984), 65 N.S.R. (2d) 52 (S.C.A.D.) Where the court declined to find a custodial parent in contempt of court for failing to drive the children some 300 miles to nearest commercial airport so that they could go on a scheduled access visit with their father, as the access order did not specifically require this.

contempt application is if the child is the one who is refusing to go on the visit, and the custodial parent is not directly interfering with the access right of the other parent. In *White v. White* the access father arrived for a visit but his eleven year old daughter refused to go with him. He understandably was unwilling to drag her away. There was a dispute about what exactly the mother told her child when the father arrived, but the judge, noting that contempt has to be proven "beyond a reasonable doubt," accepted that the mother encouraged the daughter to go on the visit.[88]

The response of the court will depend on the nature of the breach and the circumstances, as well as on the attitude of the judge. Despite the importance of upholding respect for the administration of justice, judges in contempt applications should consider the interests of the children. Justice Veit in *Salloum v. Salloum* writes:[89]

> ... by long tradition, the court exercises restraint in family law cases.... restraint is appropriate, given the twin objectives of protecting both the best interests of the children and the administration of justice. As frustrating as it must be for a parent whose court ordered access is sterilized, the court's focus is on the interests of the children, not on the behaviour of parents. Children are better off if their parents are not in jail or paying fines. Where the court can find that a parent is disobeying a court order out of honest concern for the welfare of the children, a court will be loathe to stigmatize and sanction the parent's behaviour...

A continuing focus on the best interests of the child even in the context of sentencing for contempt requires a flexible judicial approach.

The Dilemma of Sentencing &- Suspended Sentencing

Access parents bringing an application for contempt are usually not seeking a punitive sanction, but rather want to have the court use its moral suasion, to ensure future compliance. Rather than imposing a fine or a jail sentence, judges commonly impose sentences with various behavioural conditions, such as requiring attendance at a parenting education course or counselling, in the hope that this will address some of the underlying emotional issues and lead to a better result. If these conditions are not complied with, then there may be a more punitive sanction for the breach. Further, the judge will often make an explicit threat that if there is a further finding of contempt for breach of the access order, there will be a more punitive sanction. Such threats should be followed up if there is further breach, though this requires the sentencing judge to remain seized with the case.[90]

A judge who makes a finding of contempt may decide to delay the imposition of a sanction for a period of time to see whether there will be compliance, with the expectation that the sentence will be influenced by behaviour in the interim. The hope being that if a pattern of compliance can

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[88] [1999] N.S.J. 312 (S.C.), at para 13.

[89] [1994] A.J.304 (Q.B.), at para 19.

[90] *A.J.C. v. A.G.*, [2001] M.J. 301 (Q.B.) at para. 36, aff'd [2002] M.J.149 (C.A.).

be established, it will continue after sentencing. [91]

Financial Penalties: Reimbursement for Expenses & Costs but No Damages

When the violation of the terms of an access order by a custodial parent causes an access parent to suffer a financial loss for expenses that were incurred but wasted, for example for an airplane ticket, if requested the courts will usually order the custodial parent to reimburse the access parent for the wasted expenditure.[92] If a parent is found to be in contempt of court, it is also common for the judge to order that parent to pay the costs that the access parent incurred to enforce the order, at least on a partial indemnity basis.[93] Further, it has been held that the costs award may be deducted from any child support that is required to be paid, at least in circumstances in which a child will not suffer economic deprivation as a result.[94]

The Supreme Court of Canada in *Frame v. Smith* clearly claim by an access parent to recover damages in tort from a custodial parent for refusing to comply with an access order and destroying the relationship between the child and the access parent.[95] While the Supreme Court acknowledged the emotional loss to the access parent (and child) from such conduct, it held that the legislative scheme governing access did not contemplate this type of monetary award for the breach of the duty to allow access or for alienation of a parent.

Suspension of Child Support?

The appellate courts in Canada have generally held that the ability to exercise access rights and the obligation to pay child support are legally distinct issues, and that there should be no suspension of the child support obligation of the access parent because the custodial parent is refusing to exercise access rights.[96]

The conceptual separation between the two issues is perhaps clearest if the custodial parent is on social assistance, and child support being paid to the welfare authorities, and hence the custodial parent will not suffer from the suspension of child support. If the custodial parent directly receives child support, there is an understandable concern that, any suspension of child support will negatively affect the child's standard of living and welfare. There may also be a concern that linking these two issues will promote more family litigation, with non-custodial parents arguing that they should not have to pay child support as they do not see their children, and blaming the custodial parents (and their children) rather than their own disinterest.

Despite repeated judicial pronouncements that the two issues are distinct, many separated

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[91] *S.R. v M.R.*, [2002] O.J. 4239 (Sup. Ct.), per Wein J. A similar approach was taken in *B.E.D. v J.L.H.*, [2003] N.S.J. 142 (S.C. Fam. Div.), per Hall J.

[92] See *e.g. Poitras v. Bucsis*, [2003] B.C.J. 460 (S.C.).

[93] See *e.g. S.R v. M.R.* [2003] O.J. 205 (Sup. Ct.), per Wein J.

[94] *Maciberka v. Maciberka*, [1998] O.J. 5592

[95] [1987] 2 S.C.R. 99 at 20.

[96] *Wright v Wright* (1973), 40 D.L.R. (3d) 321 (Ont.C.A.).

parents believe that there is a link between them. And there are a number of reported trial decisions in which judges have threatened to, [97] or actually have, suspended child support in the face of intransigent refusal by a custodial parent to allow or support access. [98] The correctness of these decisions can be doubted as a matter of *stare decisis*. There is, however, some support for this approach in the commentary of lawyers and scholars.[99] Suspension of child support, while questionable in light of the appellate jurisprudence, does provide some limited comfort to frustrated judges, lawyers and non-custodial parents, who realize that in some cases there may be no effective way to enforce access and this approach at least provides non-custodial parents with some justice.

Varying Custody

It is not uncommon for judges dealing with alienation access enforcement cases to warn recalcitrant custodial parents that the court may have to vary custody if access does not occur. [100] Although many non-custodial parents who want their access rights respected are not willing or able to take custody of the child, in some cases the threat of variation may be credible. However, if the access parent applies to a court to vary custody because the custodial parent is not supporting access and undermining the child's relationship with the access parent, the ultimate question will always be the best interests of the child. While non-compliance with an access order may be a significant factor, a variation of custody is not to be used to punish a parent or even to ensure that access occurs. Rather a variation requires an assessment of all of the circumstances. Since any variation in custody will be very disruptive to the child, and the child may be closely attached to the custodial parent, variation of custody in situations of non-compliance with access is rare.[101] Many cases in which there are serious access problems involve alienated children who are at least somewhat hostile to the access parent and unwilling to go on visits; in these cases variation of custody is unlikely to be in the child's best interests.

When making an order for custody at trial, judges commonly consider the unwillingness to facilitate access and support a relationship with the other parent as a significant factor, in particular

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[97]See *e.g. Rosenberg v Rosenberg*, [2003] O.J. 2962 (Sup. Ct.) where Chapnik J. threatened to reduce or terminate child support in the future if the mother did not support the father's right of access. See also *Welstead v. Bainbridge*(1994), 2R.F.L. (4th) 419 (Ont. Prov. Ct. - Fam. Div.)

[98] See *e.g. Casement v. Casement* (1987), 9 R.F.L. (3d) 169 (Alta. Q.B.); *Brownell v. Brownell*(1987), 9 R.F.L. (3d) 31 (N.B.Q.B.); and *Paslawski v. Paslawski,* 2003 SKQB 462.

[99] J.G. McLeod, "Annotation to *Lee v Lee*" (1990), 29 R.F.L.(3d) 417; see also Philip Epstein, "Enforcement of Access: Judicial Management of Interference with Access" (2002) Law Society of Upper Canada, 6 Minute Lawyer Lecture Series, Toronto, at p. 32.

[100] See *e.g. Paton v. Shymkiw*(1996), 114 ma. R. (2d0 303, at apar 41 (Q.B. - fam. Div.), per Steel J.

[101] See e.g Cox *v. Stephens* (2003), 47 R.F.L. (5th) 1 (Ont.C.A.), no variation of custody despite mother's frustrating access as variation not in best interests of the child.

in order to address problems that become apparent during the interim care period.[102] However, after a judge makes a custody order at trial, the threat to vary custody to ensure that access occurs is only rarely carried out.[103]

F. TERMINATION OF ACCESS TO PROMOTE BEST INTERESTS

There are cases in which, despite the absence of fault on the part of the non-custodial parent, continued access may not be in a child's best interests. Some children become deeply, unreasonably alienated from one parent, and may be very resistant to any efforts to change their attitudes by counselling or judicial sanctions imposed on the custodial parent.[104] In some cases this situation may be a child's response to the alienating behaviour of the custodial parent, while in others it may be the child's reaction to a high level of conflict between the parents, with both parents having engaged in alienating conduct.

Counsel or a mental health professional may help the non-custodial parent to come to terms with this type of situation. In some of these cases, the access parent may voluntarily give up the effort to seek to enforce access rights, while in other cases it may be up to the judge to suspend access. Non-custodial parents understandably feel a deep sense of frustration and sadness in these cases. They are the type of cases in which some judges may decide to suspend child support, though as discussed above, this is legally problematic.[105]

In these situations, it is often appropriate for the non-custodial parent to have a "final" visit with the child, perhaps in the presence of a mental health professional, even if the child seems reluctant to attend.[106] At that meeting, the parent may tell the child why access is being discontinued, and express continued love and the hope that a relationship may be resumed at some point in the future. These sentiments may also be put in a letter to the child. The non-custodial parent should be permitted to continue to correspond with the child and send gifts at special occasions, which the custodial parent should be required to share with the child.

At least in some cases, children do resume relationships with estranged non-custodial parents after long periods without contact, though sometimes only in adulthood.

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[102]See discussion above of "The Best Way to Ensure Access - Placement With the Friendlier Parent"

[103] For one of the few reported cases where variation of custody occurred, see *Tremblay v. Tremblay*(1987), 10 R.F.l. (3d) 166 (Alta. Q.B.)

[104] Richard Gardner advocated a change of custody in these cases, but if the child is deeply alienated, this may be contrary to the child's best interests and unbearable for the "target" parent: see R. Gardner, *The Parental Alienation Syndrome and the Difference Between Fabricated and Genuine Child Sex Abuse* (Cresskill, NJ: Creative Therapeutics, 1987).

[105] See e.g. *J.E.P. v. H.J.W.* (1987), 11 R.F.L. (3d) 136 (Sask Q.B.) where a six year old girl had an aversion towards her father because of the mother's hostility to him. The mother was opposed to access, despite mediation efforts. The court refused to order access, at least until "the child is considerably older."

[106] See Richard Warshak, "Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence" (2003), 37:2 Fam. L.Q. 273, at 282; and M.J. Sullivan & J.B. Kelly, "Alienated Children in Divorce: Legal and Psychological Management of Cases With An Alienated Child" (2001), 39 Fam. Ct. Rev. 299, at 311.

V. ALIENATION, ACCESS & THE BEST INTERESTS OF CHILDREN

Cases that involve alienation and enforcing access rights are among the most challenging that family law judges and lawyers deal with. While each case is unique and some cases will defy resolution, this paper offers some advice to counsel and judges, which can be summarized as follows:

- Most parents can and should resolve access difficulties without professional intervention, but lawyers and judges should at an early stage identify the high-conflict cases with significant access or alienation issues. It is not uncommon for both parents in high-conflict cases to engage in alienating conduct, and some children are pressured into unreasonably rejecting one parent as a result of such conduct. A significant portion of children continue to maintain good relationships with both parents despite the alienating conduct of the parents, though these children suffer emotionally from the parental conduct.
- Counsel and judges need to take the time to understand the relationship between the parents and between parents and children, and shape appropriate remedies; for example, if there are real abuse concerns, these must not be ignored but rather need to addressed. Assessments and representation for a child may be important for helping lawyers and judges to understand the underlying issues of a case.
- Parenting and access orders in high-conflict cases should be clear, specific and detailed orders. Measures to structure and limit contact between high-conflict parents should be considered, such as limiting communication to email, supervising exchanges or having transitions at school.
- Conflict reduction strategies like parenting education, mediation or counselling for children or parents can help in many cases.
- If conflict management approaches are not effective, there should be timely legal responses to significant access difficulties.
- If there are significant access difficulties, there should be serious consideration given to awarding primary care to the "friendlier" parent at the interim or trial stage, as legal enforcement is very difficult to effect and later variation may not be a realistic alternative.
- Because of the possibility of alienation, the express wishes of a child about access should not determine the legal outcome of an access dispute, but as children's views become more fixed and as they become older, it becomes increasingly difficult to enforce access rights. Counselling can help some children overcome their feelings of hostility to a parent , but some alienated children may be very resistant to counselling.
- Judges have an important role in enforcing access, though they need to understand the dynamics and nature of the individual cases that they are dealing with, and should stay seized of cases with access problems. Judicial persuasion and exhortations are effective with many cases, but the legal sanctions may be necessary to push some parents into cooperation.
- In occasional cases, children may be so alienated from their non-custodial parents that termination of access may be in the best interests of the child even if the non-custodial parent is not "at fault."

It must be recognized that responding to alienation issues and enforcement of access rights requires time, money and community resources. It is understandable that some non-custodial parents lack the energy or resources to enforce access, and may effectively give up their relationships with their children. The overriding concern in dealing with post-separation parenting issues must always be the best interests of the child. If access orders do not in fact accord with the best interests of children, enforcement problems are more likely to arise. Judges and lawyers should from the beginning of a case do as much as possible to make access work, though this can be challenging in high-conflict situations.