

**TAB 16**

**Current Issues in Custody and Access**

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The Law Society of  
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du Haut-Canada

Continuing Legal Education

# **The Six-Minute Family Lawyer 2004**

## **Current Issues in Custody and Access**

**By**

*Alfred A. Mamo*

**Speaking Notes**

### **Part I: Custody/Access Adjudication**

#### **The Problem:**

Current problems in custody and access are no different than they were during the biblical time of the King Solomon. Persons professing to love the child and acting in his/her best interests insist that they are the one to best care for the infant. The obvious fair solution is to cut the child in half so no one can have an advantage over the other. Many judges do this wanting to be seen to favour one parent over the other and then later on wonder why that solution does not work!

The wise solution is to watch which parent is prepared to back off in order to avoid placing the child in the middle of a conflict between two parents who the child loves. In our present system however the parent who is prepared to compromise is not rewarded as acting in the child's best interest but is often pressured to make more concessions and the intransigent party wins the day. The emphasis on avoiding a custody trial at any cost and the lack of accountability in our justice system after a settlement is reached perpetuates this problem.

#### **The Solution:**

King Solomon, of course, never had any intention of cutting the baby in half but used the "decision" in order to test the love of each competing mother. In our system once a decision is made, usually through a settlement voluntarily entered into after much arm twisting, no one is around to see how the parties react and who in fact acts in the child's best interests, neither

is there an assessment of the impact that the decision has on the child. We in fact discourage Motions to change a final order and use the material change test to assert that there are no grounds on which to change the decision which after all was entered into, most of the time, on consent.

I am not advocating more trials in custody cases. What I am in favour of is institutionalizing a system of custody and access adjudication that is on a continuum and that uses the formal authority of the Court and the moral authority of a clinician to provide direction and information to parents in a non-confrontational setting. The court should be involved in making sure that the parents learn to cooperate with each other, rather than ordering them to do so and hope for the best. The impact of decisions on the child should be considered through child focused assessments or mediation rather than allowing the adults to speak for the child.

#### **Four stage Process**

I would suggest that the resolution of custody and access issues is developing into a four stage process:

1. Stage One - Information and Education
2. Stage Two - Mediation, Negotiation and Assessment
3. Stage Three - Adjudication
4. Stage Four - Coordinated Implementation

Let's examine each stage briefly:

#### **Stage One - Information and Education -**

We live in the age of information. Computer technology has enabled individuals to access information about any imaginable topic. In Custody and access cases an understanding by the parent of child development issues, the effect of conflict on their children and the effect of separation and divorce on children are an essential part of the dispute resolution process. Presently Rule 8.1 of the Family Law Rules extend the previous Rule found in the Rules of Civil Procedure, making it mandatory for litigants involved in cases started in Toronto in the Superior Court of Justice to attend an information session prior to being able to take any further steps in the litigation process. This Rule will within the next two

years be extended to apply throughout the Province. In order to ensure that the information program will be available to all residence of Ontario in their respective locations and to enhance consistency a video presentation is presently being prepared which will form the basis of the information program in the future.

More extensive parent education programs are available in different locations in Ontario and are likely to be expanded as part of the Federal Government's initiative entitled "The Child Centered Family Justice Strategy".

### *Freedom 22 Website*

Even before starting court proceeding, there are a number of very valuable websites that a lawyer can direct clients to in order to assist them in understanding parenting after separation. I highly recommend to you, the following websites devised by Charlie Asher, a lawyer mediator in South Bend, Indiana:

1. [www.UpToParents.org](http://www.UpToParents.org) - this is an interactive website that parents can access, which enables them to go through a hundred commitments that parents can select to protect their children before and after divorce.
2. [www.ProudToParents.org](http://www.ProudToParents.org) - this website is intended for parents who were never married to each other, but want to continue to be an integral part of a child's life.
3. [www.WhileWeHeal.org](http://www.WhileWeHeal.org) - this website is intended for parents who are having matrimonial difficulty and are attempting to stay married, but want to make sure that the children's needs are protected as they work through their marital problems.

Each of these sites has a "professionals corner" which provides helpful information to counselors, therapists and mediators involved in custody and access issues arising out of separation or divorce.

*Canadian Department of Justice.*

The Department of Justice Canada has an excellent section in its' website about parenting after divorce, which would be extremely helpful to lawyers and families involved in the process. The site also includes extensive information about research reports relating to a variety of topics associated with various custody and access issues ranging from high conflict custody cases to grandparent access, obligations of child involvement in the context of a separation and many other topics.

*US web sites:*

Other helpful child custody information websites in the United States include;

- [www.custodysource.com/states.htm](http://www.custodysource.com/states.htm),
- [www.custodywar.com](http://www.custodywar.com),
- [www.childcustody.org](http://www.childcustody.org),
- [www.betterdivorce.com/infodatmchildcustody.shtml](http://www.betterdivorce.com/infodatmchildcustody.shtml);
- <http://www.cooperativeparenting.com>

*Books:*

For those who prefer to obtain information the old fashion way, through books, there are numerous helpful books on the market. The most popular include:

- *Joint Custody with a Jerk*, Julie Ross
- *Helping your Kids Cope with Divorce the Sandcastle's Way*, M. Gary Neuman
- *Mom's House, Dad's House*, Isoloina Ricci
- *Divorce Poison: Protecting the Parent-Child Relationship from a vindictive Ex*, R.A. Warshak
- *Custody chaos, Personal Peace: Saring custody With an Ex Who's driving You Crazy*, Jeffery P. Whittman

- *The Co-Parenting Survival Guide*, Elizabeth Thayer

## **Stage Two - Mediation, Negotiation and Assessment**

Before proceeding to this stage, a parent should not only be mindful of child development issues, based on the ages of their children, the effect of separation and divorce on children, they should also have received information and be very conscious of the way the separation and divorce effects them, and how that in itself can impair their ability to make informed and rational decisions about what is in their children's best interests.

This stage can take the form of formal negotiations, assessments and mediation, or informal discussions between the parents and the lawyers. It can also involve the Judiciary through the use of the Case Conference, mandated by in Rule 17 of the Family Law Rules.

A few words about current trends in mediation and assessment. Although traditional mediation and assessment models continue to be used, there is a growing trend in mediation to utilize a child focused approach, which involves the children, not as decision makers, but as a resource to the mediator in order to be able to conduct the mediation based on how the child is experiencing the separation. With respect to assessments, more and more clinicians are being used as a resource to assist in the negotiation and information process, rather than as a decision maker with specific recommendations that create a "winner and a loser".

## **Stage Three - Adjudication**

The adjudication stage can encompass a traditional formal trial, or an Order made on consent or indeed a parenting agreement, entered into voluntarily by the parents. Many parents are opting out for the option of resolving custody and access disputes through private Arbitration. The advantages of

such a process is that the parents with the assistance of their lawyers can hand pick their Judge and ensure that he or she is knowledgeable in areas involving child custody and separations. The disadvantage is that there is a danger, especially in cases where there is a power imbalance between the parties due to financial, cultural, gender, control, violence or other issues that the process and therefore the outcome is not in keeping with fundamental principles of justice. Caution has to be exercised since the arbitrator might not be accountable to anyone if there is no right of Appeal from the decision and the private nature of the process shields it from the “public scrutiny” that is the hall mark of the Institution of the administration of Justice.

#### **Stage Four - Coordinated Implementation**

Many custody and access arrangements that are either agreed upon or imposed on the parties falter after the decision has been made due to lack of ability by the parents to resolve day to day issues as they arise. This deficiency has been recognized for some time and one of the solutions that have been implemented in many jurisdictions is the use of a parenting coordinator. Although this concept has yet to catch on in Canada to any degree, in many States in the United States, legislation has been passed that formalize the qualifications of a parent coordinator, his or her duties, obligations, and limitations.

#### ***Definition of parent coordinator:***

Parent coordinators are trained professionals, usually family therapists. Their role is to educate, mediate and monitor, ensure that the Court Order or Agreement is enforced and assist the parents in creating a workable parenting plan. One of the primary jobs of the parent coordinator is to ensure parental acceptance of the decision, reduce stress for the child, and teach conflict resolution skills to the parents.

#### ***Authority of Parent Coordinators:***

Parent Coordinators are granted different degrees of authority by legislation or agreement. Most agreements or Order appointing a parent coordinator include at least the following:

1. The authority to recommend additional services such as parenting classes, therapy, substance abuse testing etc.
2. The authority to send updates to lawyer with respect to non compliance by parties.
3. The authority to make “temporary” modifications to the custody and access provisions.
4. The authority to make slight modifications to the terms of the custody and access provisions.
5. The parent coordinator does not have the authority to vary in any substantive fashion a Court Order.
6. If the parent takes the matter back to Court for a change in the existing Court Order or Agreement, then the parent coordinator can usually provide reports to the Court.

I am including as Schedule A to these notes a sample Court Order setting out the terms relating to a parent coordinator. These terms can also be used in an Agreement between parents to appoint a PC.

## **Part II: Miscellaneous Issues:**

- **The Federal Child Centered Family Justice Strategy**

As most of you are aware, the Federal Government has announced a Child Centered Family Justice Strategy, which consists of three components:

1. Amendments to the custody and access provisions in the Divorce Act;
2. Funding to the Provinces to the Territories for family justice services;
3. The expansion of Unified Family Courts.

Bill C-22 was introduced in December, 2002 and would have amended the custody and access provision of the Divorce Act and introduced a parental responsibilities model, amongst other things the Bill also would have introduced a new non exhaustive list of best interests criteria. The Bill did not contain any presumption with respect to the appropriate parent arrangement for the children but uses as a basic principal the fact that in an individualized plan needed to be established for each child. The Bill died in November, 2003 when parliament was dissolved. It is my understanding that



it is the intention of the present Administrative Justice to re-introduce the Bill at the appropriate time in the future.

The second component of the strategy is funding to the Provinces and Territories for Family Justice Services. The Federal Government is providing 63 million dollars to Provinces and Territories for Family Justice Services and an annual 5 million has been allotted for pilot project, public legal education initiatives and professional training with respect to custody and access issues.

With respect to the expansion of Unified Family Courts, the deadline for the proposal from the Provinces was June 30, 2004. It is my understanding that Ontario has made its proposals, for the expansion of the Court, however no decision has been made at this time by the Feds. I anticipate that during the next go around the expansion of the Unified Family Court in Ontario will be minimal and that approximately one half of the Province's population will continue to operate under the two tier Family Court system for some time to come.

- **Suggested Reading:**

1. American Bar Association section of Family Law, Law Advocate, Spring, 2004 volume 26, no 4, entitle the Custody Trial, including articles about:
  - Build your case with facts and focus
  - Marshaling the evidence
  - One hundred plus examination questions for your client
  - Dig deep into child abuse allegations
  -
2. *American Bar Association section of Family Law, Law Advocate, Winter, 2004*, volume 26 no 3, the Custody Case: From intake to Trial, including articles about:
  - a. Sizing up the client in the case
  - b. New Rules for the child's attorney
  - c. Blue print for custody evaluation
  - d. Top ten essentials for a family law practice

3. *Association of Family and Conciliation Courts, 41<sup>st</sup> annual Conference* entitled, Best Interests Revisited: challenging our assumptions, May 12-15, 2004, including numerous articles on custody and access issues by lawyers, mediators, therapists and other professionals involved in the custody and access issues resolution.

- **Case Law**

The most frequently asked question with respect to custody and access issues, is whether Court will impose a “joint custody” Order on parents who are not getting along. The answer is a resounding “maybe”.

Justice Blishen in a decision of *Nairn v. Lukowski* (2002) 29 R.F.L. 5<sup>th</sup> (117) (Ont. S.C.J.), indicated that the law now recognized two kinds of joint custody: Cooperative Joint Custody, where the parents are prepared to cooperate and work with each other and coercive joint custody where cooperation has not been the hallmark of the relationship but never the less the Court thinks it feasible to impose joint custody on the parents to force one or both parents to cooperate.

A good recent example of a “coercive” joint custody/ parallel custody Order is made by Justice G.A. Campbell in the *Sellick v. Bollert* 2004 4 R.F.L. (6<sup>th</sup>) 185, where the Court makes a very detailed Order with respect to the shared parenting regime contemplated by the Court.

The Ontario Court of Appeal has yet to render a “current” definitive judgment on the issue of joint custody Orders. Those who are not in favor of such an Order point to the Court’s decisions that rejected appeals by litigants who wanted a joint custody regime. See for example *Wreggitt v. Belanger* (2001) 23 R.F.L. (5<sup>th</sup>) 451, *Johnson v. Cleroux* (2002) 23 R.F.L. (5<sup>th</sup>) 176, additional reasons 24 R.F.L.(5<sup>th</sup>) 422, *Sodhi v. Sodhi* (2002) 25 R.F.L. (5<sup>th</sup>) 420, *Bjornson v. Creighton* (2002) 31 R.F.L. 5<sup>th</sup> 242.

Those who are looking for a signal from the Ontario Court of Appeal that they will approve coercive joint custody orders (and get away from the *Baker, Kruger* old jurisprudence) refer to Justice Laskin’s decision in *Lefebvre v. Lefebvre* (2002) ....., where a Motion to stay a joint custody Order and parenting schedule pending trial was dismissed. The Court in its’ brief reasons highlighted the apparent confusion in the law. It was

anticipated that the hearing of the Appeal would clear up this issue however; the matter was settled before the appeal was heard.

Given every lawyer's ability to have easy access to recently decided cases through the electronic media, I will only mention a few recent cases of some significance in this area of law.

- Grandparents access - see *Marginson v. Deveau* 2004 N.C.A 119
- Which is a fourteen year old not followed *Martin v. Martin* 2004 CarswellOnt. 3960 (Ont. S.C.J)
- Detailed Order and high conflict case - see *MacInnes v. Arnott* (2004) CarswellB.C. 2165
- Coercive joint custody Order - *Rutherford v. Rutherford* (2004) N.S.C.C. 148
- Don't let the client draft the Affidavit - see *K.(C.D.) v. H. (R.J.)* 2004 A.B.Q.B 364
- Considerations in making an Order for assessment - *Osmak( Bonk) v. Bonk* (2004) On. C.J. 16
- Consideration of Custody and Access Law on an interim Motion - *H.(S.) v. B.(V.)* 2004 N.B.Q.B 300
- More cases from the Court of Appeal, dismissed appeals from litigants who argued that the trial Judge erroneously Ordered sole custody - see - *Hildinger v. Carroll* (February 5, 2004), *McPharland v. McPharland*(September 10, 2004), *Babschishin v. Nicholson* (January 8, 2004)
- What is expected of a Judge when dealing with an unrepresented litigant in a custody matter - *Hockey-Sweeney v. Sweeney* Ontario Court of Appeal, November 2, 2004

## **Conclusion:**

Jurisprudence and legislation have eliminated many arguments that traditionally led family law litigants into court. Custody and access has become the last battle ground on which emotionally charged parents seek to get justice. Even though there are very few cases that in fact go to trial the sense that many parents have that the result which they were "forced" is not fair persists and causes difficulty to the children.

Fairness in custody and access case will not be achieved simply through changes in the substantive law or the label that is attached to the order. Eliminating custody designations and dealing with parental responsibilities in itself will do precious little to change how parents feel at the end of the process and to eliminate conflict. Other justifications that have done this such as Australia can attest to the fact that conflict is not reduced by changing what you call an order that divides the child's time between the a parent or how decisions are to be made.

The solution lies in the education of the parents and in implementing a holistic process that sees judges and clinicians work together to, not only come up with the best outcome at one point in time but also to continue to monitor the arrangement, provide help to parents so they can learn to resolve conflict and then be able to change the terms of the custody/access regime as the child's needs change. What is needed is a a new process and not so much new legislation. The Federal Government is on the right track but we need a commitment from the Provincial government to use the funding to ensure that the appropriate resources re in place in a specific way and not in some general fashion spend the money on nebulous programming as the government of the day did when the Child support guidelines money was provided by the federal government to implement that law.

Schedule "A"

**PARENT COORDINATOR SAMPLE ORDERS**

**Cooperative Parenting Group Program**

The parties shall participate in a Cooperative Parenting Group Program under the supervision of the Cooperative Parenting Institute. Each party shall cooperate in the timely mailing of the forms included in the Parent Packet. These forms shall be mailed to the Cooperative Parenting Institute no later than \_\_\_\_\_. The parties shall complete the program and equally share the costs associated with the program. The parties shall adhere to all the guidelines, expectations and requirements stipulated in the group program. Should the parties choose not to adhere to the program requirements and display inappropriate behaviours during the group sessions, the group leader is authorized to terminate their involvement in the group format and recommend the court appoint a parent coordinator.

**ORDER APPOINTING PARENT COORDINATOR**

THIS CAUSE having come before this Court, and this Court having reviewed the file and being otherwise fully advised in the premises, based on a stipulation of the parties, this Court does:

ORDER AND ADJUDGE as follows:

**1. Parent Coordinator:** The parties shall agree on a parent coordinator within thirty (30) days of the date of this Order. If counsel and/or pro se litigant cannot agree on the designation of a parent coordinator, the Court, on Motion by either party, and without a hearing, shall appoint one through the Cooperative Parenting Institute. The parent coordinator shall have the following minimal qualifications:

A. Licensed mental health provider trained in family therapy, child development, conflict resolution and;

B. Certified family mediator and/or trained in the Cooperative Parenting Parent

Coordinator model through the Cooperative Parenting Institute (404) 315-7474 Ext.1

**2. Expense Shared Equality:** Initially, the parties shall equally share financial responsibility to pay the parent coordinator (the Court reserves the right to resolve any objection to the changes made and redistribute the cost on a pro rata basis if appropriate). Each party shall promptly pay one-half of any reasonable bill submitted by the coordinator. The Court shall enforce payment of any amounts owed to the parent coordinator by either party through contempt proceedings, if necessary.

**3. General Responsibilities of Parent Coordinator:** Under Georgia law, the children are entitled to access to both parents, without interference from either parent or anyone else, once the parents separate. The parent coordinator shall assist the parties and the children to promote the children's best interest in general. The parent coordinator is entitled to communicate with the parties, children, health care providers, psychological providers, teachers and any other third parties deemed necessary by the parent coordinator. The parties shall cooperate with the coordinator by executing any necessary releases.

**4. Role of Parent Coordinator:** The parent coordinator shall:

4.1 Make any recommendations relative to enforcing any shared parenting plan and parenting schedule and to minimize conflicts between the parties by addressing the particular patterns of behavior for the parents;

4.2 Assist the parent in implementing any plan or schedule so that the children have continuous and consistent contact with both parents.

4.3 Minimize conflict, loyalty binds and unnecessary stress for the children

4.4 The parent coordinator has the following broad responsibilities;

4.4.1 Recommend approaches that will reduce conflict between parents

4.4.2 Recommend compliance with any parenting plan or parenting schedule in the Court's Order

4.4.3 Recommend outside resources as needed such as random drug screens, parenting classes, psychotherapy.

4.4.4 Monitor parenting plan or parenting schedule and mediate the parent's disputes concerning parenting issues

4.4.5 Write detailed guidelines or rules recommended for communication between parents and practicing those guidelines or rules with the parents. If parenting skills are lacking, the coordinator shall work with one or both parents to teach those skills.

4.4.6 Recommend modification of the parenting plan when agreement or

consensus cannot be reached, as a means of reducing conflict and promoting the best interests of the children. Any recommendation modification of a plan or schedule must be in writing and submitted to the parties and their attorneys

4.4.7 Prior to completion, write modification of the parenting plan when mutual agreement has been made by both parents and their attorneys

4.4.8 Prior to completion, recommend how a particular element of the parenting plan or schedule shall be implemented including, without limitation, the frequency and length of visitation, temporary changes in the schedule, holiday or vacation planning, logistics of pick up and drop off, suitability of accommodations, issues dealing with stepparents and significant others

4.4.9 Work with both parents and any significant others to update and fine tune their parenting schedule over time. (All possible changes in the family's circumstances could not be foreseen when the parenting plan originated). Parenting schedules, post divorce, may need to be adjusted to children's changing developmental needs, schools, new blended families or evolving outside interests;

4.4.10 Ensuring that both parents maintain ongoing relationships with the children; and

4.4.11 Recommending a final decision on any parenting issue over which the parents reach an impasse, by submission of a written recommendation to the parties and their counsel

4.5 Educate the parents with a program such as Cooperative Parenting in the areas of:

4.5.1 effective communication and negotiation skills

4.5.2 effective parenting skills

4.5.3 how to meet the developmental needs of their children

4.5.4 how to disengage from each other when it leads to conflict

4.5.5 how to keep their children out of the middle

4.5.6 the sources of their conflict and its effects on the children. When a loyalty bind is occurring, the parent coordinator shall point it out and help both parents stop the behaviour leading to this dilemma for the children.

The Parent Coordinator may determine if the educational component is completed in a group format with other divorcing parents or in a co-parent format. If the parents participate in a group the Parent Coordinator may determine if they participate in the same group together or separately. The joint co-parent sessions may occur simultaneously or after the completion of an eight week group.

4.6 The parent coordinator shall maintain communication among all parties by serving, if necessary, as a conduit for information. The parent coordinator is not the ally of either parent and the parent coordinator is not a neutral mediator. The parent coordinator's role is active and specifically focused on helping parents work together for the benefit of the children. The parent coordinator's fundamental role is to minimize the conflict to which the children are exposed by the parties.

4.7 The parent coordinator is not a custody evaluator, nor can they change the amount of custodial time either parent has been granted by the courts. Making decisions to place children in the residence and custody of one parent would seriously compromise the parent coordinator's neutrality. The parent coordinator does not have the power to recommend changes relevant to the primary residence of the children. The parent coordinator may make temporary changes to reduce conflict for the children or to better understand the needs of the children. Temporary changes are those changes that would not expand more than a few weeks and might include slight changes in the transfer location, time of phone calls and other parenting issues. The parent coordinator shall also not be called as a witness in any Court proceedings regarding change of primary residence except by Order of Court for good cause shown in exceptional cases such as when the parent coordinator has directly witnessed relevant facts.

4.8 The parent coordinator shall recommend, if necessary, supervised visitation to protect the children, but not as a sanction. The coordinator may also recommend a move from supervised to unsupervised visitation in writing to counsel.

4.9 Assistance provided by the parent coordinator is not intended to be a crisis service except when a crisis directly impacts on the child. Unless an emergency directly impacts on the child neither parent shall contact the parent coordinator outside normal working hours.

4.10 Significant financial matters shall not be addressed by the parent coordinator

## 5. Meeting with the Parent Coordinator



5.1 The Parent Coordinator may meet with the parties, the children, and significant

others jointly or separately. The parent coordinator shall determine if the appointments shall be joint or separate. The parent coordinator shall determine if the joint appointments are video or audio taped for educational purposes. The tapes may be reviewed by either parent during or after their appointments.

5.2 Both parent shall contact the Parent Coordinator to schedule appointments.

Appointments may also be scheduled when the Parent Coordinator requests.

5.3 Each parent should direct any disagreements or concerns regarding the children to the parent coordinator. The Parent Coordinator shall work with both parents to resolve the conflict and if necessary, shall recommend an appropriate resolution to the parties and their counsel.

6. Written and Oral Reports and Appearance in Court:

6.1 At the completion of the work, the Parent Coordinator may submit written reports

to the parties and their counsel describing any conflicts and the Parent Coordinator's recommended resolutions. The Parent Coordinator may also report to the parties and their counsel on parental compliance with and parental attitudes about any element of the parenting plan as amended by agreement or the parties or decided by the Parent Coordinator. Copies of all reports to the Court shall be sent to the parties and their attorneys, not to the Court directly.

6.2 If either parent wants the Parent Coordinator to testify on any matter, he or she

must file a Motion and Notice of Hearing and show good cause in the Motion and at the hearing why the Court should require the Parent Coordinator to testify. The Parent Coordinator must be given a copy of the Motion and Notice of Hearing. If the Parent Coordinator is required to testify, a new Parent Coordinator may be assigned by the Parent Coordinator to be available to the family after the hearing date.

7. Terms of Appointment:

7.1 The Parent Coordinator is appointed until the completion of the program, until either party requests an additional hearing or until it comes up on a regular court calendar for final resolution. The Parent Coordinator may be discharged by the Court, or by written agreement of the parties. The Coordinator may apply directly to the Court of a discharge, and shall provide the parties and counsel with notice of the application for discharge. The Court may discharge the Coordinator without a hearing unless either party promptly requests a hearing on the application.

7.2 Future work with the Parent Coordinator; At the completion of the work with the

Parent Coordinator, a closing memo shall be sent to the parties and their counsel. At that time, the Parent Coordinator shall be available to the family on an as needed basis. However, the Parent Coordinator shall no longer have any authority to make recommendations or changes.



BY THE COURT, \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_ 2000