A BEHAVIOURAL SCIENCE AND LEGAL ANALYSIS OF ACCESS TO THE CHILD IN THE POST-SEPARATION/DIVORCE FAMILY

Julien D. Payne and Kenneth L. Kallish***

I. INTRODUCTION

Access rights following divorce or separation continue to be a sadly neglected area of legal analysis. They are commonly treated as an afterthought in the adversarial process. All too often, children are the innocent victims of the unresolved "emotional divorce" of their parents. When the emotional divorce of the spouses survives the judicial dissolution of the marriage, the opportunities for parental abuse of access rights are legion. Battles through the medium of the children continue without abatement, either in or out of court.[1]

This paper will examine access in the context of the behavioural sciences and the law. It will consider the psychological impact that separation or divorce has on the child, and the functional significance of

---

* Faculty of Law, University of Ottawa.
** Student-at-Law, Ottawa.

[1] Elkin, *Custody and Visitation — A Time for Change*, 14 CONC. CTS. REV. (no. 2) iii, at v (1976): "Let us be more aware that custody and visitation conflicts are not usually the issues, but are often a smokescreen that hides other more relevant issues which show that one or both parties are still connected and are working on their emotional divorce although unsuccessfully." *See also* Littner, *The Effects on a Child of Family Disruption and Separation from One or Both Parents*, 11 R.F.L. 1, at 20-21 (1973):

> Frequently after a divorce the battles between the parents tend to continue. Sometimes they increase. They may now be fought around other issues such as economic ones, but the same emotional conflicts will be present. The child therefore is even more likely to symbolize for both parents the battlefield on which they will continue to skirmish.
>
> When this occurs it becomes important to help the parents establish direct communication with each other so that they stop using the child as a vehicle of indirect communication. Such direct communication between the divorced parents will also help them avoid being manipulated by the child should he attempt to play one against the other.
>
> Sometimes it becomes clear that, either because of pre-existing problems or because of the pressures of the divorce or because of the tensions of the post-divorce situation, the child has emotional difficulties for which he may need professional mental health help. It then may be necessary to help the parents recognize this fact and assist them in implementing it.

access, together with the roles of the parents and the courts, as viewed by the behavioural scientist. It will then focus on a legal analysis of access — its meaning, whether it exists as the right of the parent or child, the criteria used when granting, refusing, or changing access rights, the rights and duties of the parents, the judicial reception of psychological or psychiatric evidence, and the courts' perception of their role when faced with questions relating to access.

II. Behavioural Science Analysis of Access

A. *The Impact of Separation or Divorce on the Child*

Psychological research has developed theories of child development, all of which are affected by maternal or paternal deprivation resulting from a breakdown of the family unit. Few behavioural scientists would deny that the withdrawal of either parent from the child's life affects the developmental processes of the child and often threatens the child's emotional well-being.

One of the better-known theories focuses on the Oedipus complex. This theory suggests that young children between the ages of three and five, loving the parent of the opposite sex more than the other, unconsciously wish the other parent dead. The child usually works through these fantasies, finally accepting and loving both parents. However, if the parent of the same sex withdraws during this period, and especially if the departure is accompanied by hostility between the parents, the child, with the tendency to fantasize, may feel he or she caused the separation, and may encounter significant disabilities on achieving adulthood. The united family helps resolve this conflict in the child. In the words of one observer:

> This Oedipal conflict is difficult to resolve under the best conditions, but if the father has actually disappeared from the family scene . . . , a child may feel that he has, in his magical omnipotence, brought about the disappearance. The consequent feelings of guilt can place tremendous inhibition on the expression of sexual or aggressive strivings later in his life. It is too often that boys raised in such atmospheres are "mother's sons" who come to have problems centering on masculinity, potency, and the capacity to love women . . . . The latter can be neutralized or modified by a father whose presence bears witness to having survived the Oedipal struggle.[2]

There is a significant body of research demonstrating the development of attachment bonds between the child and the parents.[3] Such

---

[2] Cath, *Divorce and the Child: "The Father Question Hour"*, in Explaining Divorce to Children 86, at 103-04 (E. Grollman ed. 1969) [hereafter cited as Grollman].

[3] J. Bowlby, 1 Attachment and Loss: Attachment (1969); M. Rutter, Maternal Deprivation Reassessed (1972); H. Schaffer, The Growth of

bonding results from psychological interaction,[4] and is not necessarily established with the mother or even a biological parent.[5] Attachment bonds with both parents may develop soon after the birth of the child, although research indicates no critical time at which they should be established.[6] When the attachment bonds are broken because of the separation of the parents, the impact on the child depends on various factors, including the child's stage of development and the quality of his or her past and future relationship with the departing parent.[7] Separation and divorce may result in the child suffering short-term detrimental effects, such as distress and anxiety,[8] or long-term effects, such as depression or delinquent behaviour.[9] It has been suggested that these threats to the child's well-being can be controlled or eliminated by maintaining positive bonds between the child and the absent parent,[10] because it is not the separation itself that necessarily disrupts the attachment bonds, but the distortion of those bonds arising when the child is not given the opportunity to maintain a positive relationship with the absent parent.[11]

Of a more general nature, it has been suggested that separation and divorce are particularly traumatic for very young children.

> From three to six . . . the child needs both parents more than at any other period. Intimate feelings toward the parent of the opposite sex occur at this stage of development, and these feelings need to be diluted and modified by counteracting feelings about the other parent . . . . This is one of the most traumatic periods for a child to lose a parent through . . . divorce.[12]

SOCIABILITY (1971). While Bowlby has emphasized that the child usually attaches to one person only (usually the mother), Schaffer and Rutter have challenged that finding, asserting that the child is capable of establishing and very often does establish bonds with the father as well.

[4] H. SCHAFFER, *supra* note 3, at 134-35.

[5] M. RUTTER, *supra* note 3, at 125.

[6] H. SCHAFFER, *supra* note 3, at 121.

[7] M. RUTTER, *supra* note 3, at 73-78.

[8] *Id.* at 29.

[9] *Id.* at 78, 108. This is not to suggest that separation *causes* juvenile delinquency. The factors arising out of the separation, such as family discord and altered family relationships, are more related to delinquent behaviour. Separation, then, can be viewed as a "triggering" factor. *See also* S. & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950); S. & E. GLUECK, FAMILY ENVIRONMENT AND DELINQUENCY (1962); Willie, *The Relative Contribution of Family Status and Economic Status to Juvenile Delinquency*, 14 SOC. PROB. 326 (1967); S. WOLFF, CHILDREN UNDER STRESS 96 (1969). Other long-term effects which have been statistically related to the experience of a disrupted family life during childhood include personal disorder (*see, e.g.*, Earle & Earle, *Early Maternal Deprivation and Later Psychiatric Illness*, 31 AM. J. ORTHOPSYCH. 181 (1961)); neurosis (*see, e.g.*, Gay & Tonge, *The Late Effects of Loss of Parents in Childhood*, 113 BRIT. J. PSYCHIAT. 753 (1967)); and attempted suicide in adult life (*see, e.g.*, Greer, *The Relationship Between Parental Loss and Attempted Suicide: A Control Study*, 110 BRIT. J. PSYCHIAT. 698 (1964)).

[10] M. RUTTER, *supra* note 3, at 44-45.

[11] *Id.* at 47.

[12] Blaine, *The Effect of Divorce Upon the Personality Development of Children and Youth*, in GROLLMAN 76, at 78.

As the age of the child increases, the effects of separation or divorce may be less disturbing.[13]

Research indicates that the child will very often feel hostile toward the parent who has left the home, and possibly toward the parent who has remained. The child also feels guilty, believing he or she is the cause of the separation, and feels unwanted and anxious:[14]

> Initially, almost all children and many adolescents experience divorce as painful and as disruptive of their lives, and their suffering is compounded by both realistic and unrealistic fears. These fears are related to the following factors: a heightened sense of vulnerability, sadness at the loss of the protective structure of the family and of the parent who does not retain custody, guilt over fantasized or actual misdeeds that may have contributed to parents' quarrels, . . . worry over distressed parents, anger at the parent or parents who have disrupted the child's world, shame regarding parents' behavior, a sense of being alone, and concern about being different from peers.[15]

That is not to say, however, that separation or divorce is, of itself, necessarily detrimental to children in the long-term. There is substantial research suggesting that many children adapt to the situation and become stabilized within two years following divorce.[16] Indeed, there is support for the notion that "divorce is not automatically destructive to children; the marriage which divorce brings to an end may have been more so."[17] Some research studies contend that the greatest mental confusion of the child occurs before the separation or divorce, and the actual separation of

---

[13] *Id. See also* R. WEISS, MARITAL SEPARATION 215 (1975).

[14] Benedek & Benedek, *Postdivorce Visitation: A Child's Right*, 16 J. AM. ACAD. CHILD PSYCH. 256, at 260 (1977). *See also* J. DESPERT, CHILDREN OF DIVORCE (1962); Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851 (1979); Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCH. 20 (1976); Ober, *Parents Without Partners—With Children of Divorce*, in GROLLMAN 142.

[15] Wallerstein & Kelly, *Children and Divorce: A Review*, 24 SOC. WORK 468, at 469 (1979).

[16] Hetherington, *supra* note 14, at 851-52; Kelly & Wallerstein, *supra* note 14, at 31. *See also* Jones, *The Impact of Divorce on Children*, 15 CONC. CTS. REV. (no. 2) 25 (1977).

[17] J. DESPERT, *supra* note 14, at viii. The author also states, at 117: "A child who has been able . . . to weather a divorce has a better chance for healthy maturity than a child of unhappy marriage who has not come through this stormy experience." *See* Greif, *Access: Legal Right or Privilege at the Custodial Parent's Discretion?*, 3 CAN. J. FAM. L. 43, at 50 (1980): "In fact, the breakdown of the family may have occurred long before the divorce and the end of the marital bond may be seen as a healthy solution. Children are capable of gleaning out that which is best from each parent." *See also* Bane, *Marital Disruption and the Lives of Children*, 32 J. SOC. ISSUES 103, at 110-11 (1976); Hetherington, *supra* note 14, at 855; Nye, *Child Adjustment in Broken and in Unhappy Unbroken Homes*, 19 J. MARR. FAM. 356 (1957); R. WEISS, *supra* note 13, at 219.

the parents often brings a type of security and consistency into the family.[18]

Opinions concerning the impact of separation and divorce on the child are, therefore, numerous and conflicting, ranging from one extreme to the other. Perhaps the situation is best summarized in the following observations:

> The diversity of relevant factors [such as the age of the child at the time of the separation or divorce, the duration of the marriage, the age of the parents, race, religion, socio-economic class] is so large, their possible combinations so numerous, that the query: what is the impact of divorce on children? becomes analogous to: what is the color of birds? It is, therefore, not too startling to find at least one sociologist comment that "children of divorce cannot be treated as a homogeneous group."[19]

In the words of Wallerstein and Kelly:

> Children are participants affected by at least four related stages or situations in the process of divorce. [They] are . . . 1) the predivorce family, 2) the disruptive process of divorce itself, including the events leading up to and surrounding the parents' decision to separate, and the transition period immediately following, 3) the changed social, economic, and psychological realities of being reared in a family in which divorce has occurred, and 4) the alterations in the parent-child relationship that take place after the marital breakup. . . . Each [of the above] has the potential to interfere with the child's development, just as each represents an opportunity for growth for the child.[20]

In the final analysis, the impact of separation and divorce on the children appears to be conditioned by the quality of the family relationships both before and after the breakdown of the marriage. Continued "spousal" hostility after separation or divorce has a detrimental effect on the children. Where, however, the spouses or former spouses can preserve meaningful parental relationships, notwithstanding the rupture of their marital relationship, the future augurs well for the children and may prove ultimately beneficial if the domestic hostility was substantial during the subsistence of the marriage and was injuriously affecting the children at that time.

---

[18] J. LICHTENBERGER, DIVORCE: A SOCIAL INTERPRETATION (1931), Blaine, *supra* note 12, at 77.

[19] Sprey, *Children in Divorce: An Overview*, in GROLLMAN 42, at 52. *See also* Levitin, *Children of Divorce: An Introduction*, 35 J. SOC. ISSUES (no. 4) 1, at 21 (1979). Some studies have concluded that marital disruption has little effect on the lives of children. *See* J. BERNARD, REMARRIAGE (2d ed. 1971); Burchinal, *Characteristics of Adolescents from Unbroken, Broken, and Reconstituted Families*, 26 J. MARR. FAM. 44 (1964); W. GOODE, AFTER DIVORCE (1956) (reissued as WOMEN IN DIVORCE in 1965). For a critical evaluation of research studies in the behavioural sciences, *see* L. HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES chs. 4 & 6 (1980).

[20] *Supra* note 15, at 468.

B. *The Impact of Access on the Post-Separation or Divorce Environment*

There is strong support for the view that a continued relationship between the child and the parent who has left the home may preserve the attachment bonds that the child has developed, and that this proves beneficial to the child.[21] Access, however, often perpetuates problems between the parents themselves.[22] It is not uncommon for access to result in the child being used as weapon by the parents to wage their personal battles. Often, the mother will use the child to abuse the husband's access privileges and, in response, the husband will cut off maintenance payments.[23]

Like the impact of separation or divorce on the child, the findings of researchers are conflicting concerning the potential benefits, if any, of access. One study concludes:

> Tensions were most pronounced in the minority of families where the father had continued to visit frequently after separation or divorce . . . . [W]here, as usually happened, resentment built up between the parents, all too easily the father's visits or contacts with the children became a battle for their affections. Young children . . . were puzzled and distressed that the father could not stay.[24]

Another commentator has stated:

> [T]he young child would, in most cases, be better off without the usual weekly visits with the parent who has left. He cannot really understand why the parent has left. He will most certainly react to the inevitable emotions engendered by the visits, through one or both parents. There will be recurring confusions, which cannot help stabilize the world of the child.[25]

In a major field study of post-divorce adjustment problems, W.J. Goode found that while one-half of the children were no harder to handle after

---

[21] M. RUTTER, *supra* note 3.

[22] J. DESPERT, *supra* note 14, at 59: "Probably the most frequent and familiar duels between the former partners to a marriage arise over two issues: money is one, and the exercise of the father's visitation privilege is the other."

[23] *Id.* at 200-01. *See also* Fulton, *Parental Reports of Children's Post-Divorce Adjustment*, 35 J. SOC. ISSUES (no. 4) 126, at 133 (1979). In a study of 419 families and 560 divorced parents interviewed two years after the decree absolute, Fulton found that 40% of custodial wives refused on at least one occasion to let their ex-husbands see the children, and that this was attributable to punitive reasons. *See also* W. GOODE, *supra* note 19, at 313, where he concluded from his study that the marriage usually continues after the divorce through the lives of the children: "[The children] also offer the most convenient means for learning about the activities of the other spouse."

[24] D. MARSDEN, MOTHERS ALONE: POVERTY AND THE FATHERLESS FAMILY 145 (rev. 1973).

[25] Pitcher, *Explaining Divorce to Young Children*, in GROLLMAN 63, at 69. Rather than weekly visits, this author favours an arrangement whereby the non-custodial parent could take over the care of the child for a longer period of time. It should be noted that the author is dealing with children under five years of age.

the father's visits, "[s]uch visits are nevertheless often an occasion of considerable tension for children and parents."[26]

On the other hand, it has been observed that access is an important element in the child's life, with positive meaning:

> Clinical experience . . . suggests strongly that the father can continue to play a valuable role in his children's lives even though he is no longer a member of their household. He is likely to continue to be a respected and often loved figure . . . . His becoming inaccessible to the children would be a further loss for them, extending the loss they suffered on his departure from their home . . . . [T]his would hold equally true for the mother, if she should be the noncustody parent.[27]

It is felt that regular contact between the non-custodial parent and the child will help the child overcome the feelings of guilt, anger, and depression initially experienced following the departure of the parent from the home, and will generally have a positive impact on the child's emotional development.[28] Studies have indicated that "[there is a] significant link between depression in younger children and adolescents and diminished visiting by the children's fathers. Conversely, high self-esteem in all children, especially in older boys, was tied to a good father-child relationship that had been sustained within the structure of visitation . . . ."[29] In the words of one child therapist:

---

[26] W. GOODE, *supra* note 19, at 322. The author continues:

> The relationship between the usually absent parent and the child at such visits is nagged by the fact that the parent and child will separate once again; that the advice and corrections of the absent parent will be overruled, while the assurances of love must carry their own proof during his absence. Since it is a rare young child who sees any reason for his parents to divorce, the haunting suspicion of abandonment gnaws at the enjoyment of the visits.

Goode found that 25% of the children were harder to handle after visits, while only 2% were easier to handle. As to possible reasons for this difficulty, *see* Littner, *supra* note 1, at 16.

[27] R. WEISS, *supra* note 13, at 230.

[28] Benedek & Benedek, *supra* note 14, at 260-62; Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors In the Consequences of Divorce For Children*, 35 J. SOC. ISSUES (no. 4) 79, at 84 (1979); Hetherington, *supra* note 14, at 854-56; B. STEINZOR, WHEN PARENTS DIVORCE: A NEW APPROACH TO NEW RELATIONSHIPS (1969); R. WEISS, *supra* note 13, at 191-97; Woody, *Preventive Intervention for Children of Divorce*, 59 SOC. CASEWORK 537, at 538 (1978). *See also* Littner, *supra* note 1, at 10-15 and at 16, where the author concludes that visits should be maintained even when the child no longer wishes to visit, because ending them will contribute to the development of even further emotional difficulties.

[29] *Supra* note 15, at 471. Studies have also indicated that the child usually wishes to maintain contact with the father: *see* Hetherington, *supra* note 14, at 856. *See also* Bene, *The Nature of Attachment Children have towards their Parents in Contested Custody and Access Cases*, 38 ADVOCATE 281 (1980):

> It is important for children to retain their relationships with their non-custodial parents. Each child needs to feel that he is loved by both his parents and needs a father and a mother figure for proper sex-role development. Westman, et al. (1970), have shown that children of divorced parents, who lost contact with the non-custodial parents, more frequently became

> What is in the child's best interests in terms of visits with the other parent? As I have already emphasized it is crucial to try to maintain contact between the child and the parent who has left home. Maintaining some form of contact (a) helps the child deal with his unconscious fantasies about the absent parent, fantasies which are far more terrible than anything the absent parent can be or do; (b) helps to decrease the child's feelings of rejection and abandonment; (c) decreases his feelings that this has happened because he is a bad child; and (d) minimizes his fear that he may never see the other parent again.
>
> In addition (e) a child needs to have living experiences with both a mother and a father if he is to grow up to be emotionally normal. There are many reasons for this. One has to do with the child's sense of gender identity. Thus a boy who is brought up solely by a mother may have great difficulties in feeling that he is a male and in knowing how to become a man. To do so, he requires, in addition to contacts with a mother, living experiences with a father or a father figure.
>
> Similarly for a girl to grow up to become a mature woman and to think of herself as a female, she needs to have living experiences with both a mother figure and a father figure.
>
> The child who is brought up by a single parent, and who has few actual experiences with an adult of the opposite sex to his single parent, may have great difficulty with his feelings about himself and with his specific sexual feelings.
>
> It is therefore important to try to maintain a steady schedule of visitations with the parent who has moved out of the home.[30]

It has also been suggested that access is good for the parents.[31] For the non-custodial parent, access can diminish the depression and guilt he or she feels as a result of the separation or divorce. As access helps the child, it is also argued that this will benefit the custodial parent who must always bear the brunt of the child's moods.[32] In addition, the non-custodial parent normally receives the custody of the child in the event of the death of the custodial parent. In such an event, the ongoing relationship between the child and the non-custodial parent arising from access results in a less traumatic experience for the child. "In most instances," it is suggested, "the best possible preparation for the contingency of the death of the custodial parent is to preserve the relationship between the child and his non-custodial parent."[33]

---

emotionally disturbed. However, emotions cannot be legislated and if a child hates to be with his non-custodial parent, then enforced visits might do more harm than good.

[30] Littner, *supra* note 1, at 15.

[31] Benedek & Benedek, *supra* note 14, at 262.

[32] *Id.* The author further states: "Experience has shown that noncustodial parents who rarely see their children are often irregular in the payment of child support."

[33] *Id.* R. WEISS, *supra* note 13, at 209, found that:

> Apart from the desire that the parents reconcile, the concerns children voice tend to be focused on their own situation . . . . They want to know when they can see the departing parent . . . [a]nd they may want to be reassured that they will be cared for if something happens to their custodial parent; that the other parent, even though living apart, remains responsible for them.

Debate has focussed on the question of whether access is the right of the child or of the parent. On the one hand, access is viewed as the right of the child:

> Although we believe that the noncustodial parent should indeed have the right to see his or her child unless in a particular case it is detrimental to the child, [we are] concerned with what we consider to be the primary right of visitation, that right which belongs to a child of divorce to see a noncustodial parent who wishes to visit him.[34]

On the other hand, it has been suggested that this right of the child, clothed in the "best interests of the child" test, is nothing but a sham:

> The "best interests of the child" test reflects society's guilt and the wish to do better by the child; the predominance of parents' rights . . . reflects society's actual values. . . . We as a society do not and will not accept in fact the "best interests of the child" as the standard by which to decide . . .[35]

While it is believed that specific conditions imposed on access, such as time and place, are reassuring to a young child (less than seven or eight years old), as the child grows older and develops relationships with other people, it may be inadvisable to continue the imposition of these conditions.[36] For the older child, it is felt that: "The arranged visit with a child, the 'date' circumscribed by time, is an awkward situation. Our belief that parent-child relationships should be casual and informal, based on impromptu meetings and spontaneous plans, is diametrically opposed to meeting with children at specified times."[37]

One of the more distressing trends indicated by the research is the likelihood that the visits by the non-custodial parent will gradually diminish or terminate.[38] Goode has cited a number of reasons for this — time, particularly when the parent and child live far apart from each other; money, especially in the lower income groups; the inability of parents to relate to one another over the children without tension; parents entering new circles (dating, *etc.*); the desire of the children to play with their friends rather than visit the parent; tensions between the parent and

---

See also Dean v. Dean, *infra* note 87, at 343, and Sutherland v. Sutherland, *infra* note 105, at 121, which consider this factor as a reason to grant access.

[34] Benedek & Benedek, *supra* note 14, at 257. *See also* B. STEINZOR, *supra* note 28, at 146-47; R. WEISS, *supra* note 13, at 200.

[35] Derdeyn, *Child Custody Consultation*, 45 AM. J. ORTHOPSYCH. (no. 5) 791, at 793 (1975).

[36] B. STEINZOR, *supra* note 28, at 87.

[37] *Id.* at 149. *See* Littner, *supra* note 1, at 17-18. *See also* Barber v. Barber, *infra* note 213, wherein Milvain C.J. favours the more flexible approach to access.

[38] Hetherington, *supra* note 14, at 856. In Fulton's study, *supra* note 23, at 133, it was found that there was a steady pattern of visits by the non-custodial parent in approximately 20% of the families interviewed. In 44% of the families, the visits were tapering off. In 6% of the families, the non-custodial parents visited only once or twice a year, and in 28% of the families, the non-custodial parent never visited. This study was conducted over a period of two years. *See also* Maidment, *A Study in Child Custody*, 6 FAMILY LAW 195, at 236 (1976).

child arising during access; emotional withdrawal by the child when visits are missed; and finally, the non-custodial parent may eventually become a less than satisfactory companion to the child, as the child's daily activities become less familiar to the non-custodial parent. Goode further suggests that these are not universal processes or factors; rather, they constitute an outline of the structural elements flowing from the breakdown of the family, and their relative significance turns upon the attitudes of the individual parents or the children. Goode concludes, however, that this "general set of structural elements in the postdivorce situation . . . creates a set of cost-demand processes . . . and the visits will decline in frequency unless there are unusual counter-factors at work."[39]

In a more recent longitudinal study of the impact of divorce on the visiting father-child relationship, Wallerstein and Kelly concluded:

> The visiting relationship that successfully outlived the marriage reflected not only the relationship of the predivorce family or the father's and child's motivation to maintain their relationship but the psychological capacity of fathers, mothers, and children to adapt flexibly to the new conditions of the visiting relationship. Men who could bend to the complex logistics of the visiting, who could deal with the anger of the women and the capriciousness of their children without withdrawing, who could involve the children in their planning, who could compromise between totally rearranging their schedules and not changing their schedules at all, and who could overcome their own feelings of rejection or guilt at the time of the divorce were predominant among those fathers who continued regularly and frequently to visit.
>
> Our observations regarding the fragility of the visiting relationship at the time of the marital separation take on special meaning in light of our previous finding that the relationship between children and their fathers 5 years after separation was significantly linked to outcome in both boys and girls. We have reported that children who were visited infrequently because of the father's lack of interest or rejection during the years after the divorce were likely to suffer severely diminished self-esteem. The most stressed children were those whose relationship with their father had been close and affectionate during the marriage and who experienced a disruption in this relationship after the divorce. Children found this sudden disruption incomprehensible and remained unable to assimilate the loss and the intense hurt of the rejection during the 5 years that followed. There is evidence in our work that the relationship between visiting father and child is most open to intervention immediately after the father has moved out of the household. Because the continued relationship emerged as a significant factor in good outcome, these findings suggest the father-child relationship in the immediate postseparation period as a specific target for preventive intervention. Strengthening the father-child relationship at this crucial time and helping the parents and the children to master the new and complex demands of the visiting relationship could facilitate improved postdivorce interactions.
>
> After a marital separation, both parents and children, without rehearsal or available role models, need to adapt their feelings and mutual needs in the relationship to the narrow confines of a visit. We have conceptualized this process as a funneling that requires complex, and sometimes exquisite,

---

[39] W. GOODE, *supra* note 19, at 316.

> maneuvers from the several participants. The difficulties inherent in this compressive process have been insufficiently appreciated. Unfortunately, the courts and the embattled partners and their attorneys have focused on imposing restrictions and strict conditions that further encumber a relationship that, even under the best circumstances, needs encouragement. Divorcing families could benefit considerably from guidance during this difficult transition, which could help them create new or maintain close and affectionate bonds between the visiting parent and the child.[40]

C. *Access and the Roles of the Parents*

Research demonstrates that the child's adaptation to separation or divorce and the consequential changes in the family structure depend largely on the relationship between the parents themselves.[41]

> Too often, the intractable dispute over visitation privileges stems not from a regard for the children but the unconscious desire of both parents to gain an advantage over the other. When controversies arise over visitation arrangements, the ex-husband and ex-wife each must ask the one overriding question: "What is best for the children?"[42]

What is needed is the active cooperation of both parents in providing a stable and meaningful relationship between the child and the non-custodial parent,[43] although it is conceded that the capacity of separated or divorced parents to meet these needs of their children is often questionable, because the parents themselves have suffered and do suffer serious emotional stress as a consequence of the marriage breakdown.[44] If the parents can overcome these problems, with or without the aid of

---

[40] *Effects of Divorce on the Visiting Father-Child Relationship*, 137 AM. J. PSYCHIAT. 1534, at 1538 (1980) (footnotes omitted).

[41] Hess & Camara, *supra* note 28, at 91; Hetherington, *supra* note 14, at 856.

[42] GROLLMAN at 33.

[43] Sprey, *supra* note 19, at 43. *See also* J. DESPERT, *supra* note 14, at 15-16. At 219, the author states:

> When both parents are sincerely agreed that the children's welfare is the paramount issue, they of course do not need to go to court to resolve their differences. They can find the best solution together, with the help of counselling agencies, clinics, or private consultation with a psychiatrist. Here they will learn not only what is best for the child but why it is best, and how to meet the new situations which may arise in the course of the child's development.

See also Awad & Parry, *Access following Marital Separation*, 25 CAN. J. PSYCHIAT. 357 (1980).

[44] Woody, *supra* note 28, at 538. *See also* BRITISH SECTION OF THE INT'L COMM'N OF JURISTS, PARENTAL RIGHTS AND DUTIES AND CUSTODY SUITS 11-12 (1975):

> The "right" to "access" (another unattractive word: we much prefer the term "visit") is sometimes considered a separate "parental right," sometimes constituent of that of "custody." Having subjugated the concept of "parental rights" to the welfare principle generally we think that principle should be applied to the question of visits, too. We do believe that a child's well-being is enhanced by maintaining, if possible, positive relationships with both his parents despite a breakdown in their relationship with each

qualified professionals, they benefit as well as the child. Thus, Despert states: "When both the mother and father realize the child's need for a stable, continuing relationship with his father, they are less impelled to use calendar and clock as weapons against each other."[45]

With respect to the non-custodial parent, loyalty should not be forced on the child:

> Parents too often take for granted that their children are always glad to see them, especially after a period of separation . . . . [Y]oung children and adolescents find it difficult to open themselves readily to a relationship that is time bound . . . . By not forcing loyalty — not insisting that the child come every week, for example, or that he telephone or write regularly — the parent adds to the greatest gift he can give his child: love with freedom.[46]

With respect to the custodial parent, the child's love for the missing parent should not be undermined. In the words of one commentator:

> Many wives . . . do not want to foster their husbands' relationships with their children. They feel that the husband has behaved so badly that he has forfeited his right to his children's love . . . .

---

other, and, accordingly, that the child should receive visits from and make visits to the "non-custodial" parent unless his interests dictate otherwise . . . . However, we recognise that without parental co-operation these visits can be detrimental, not beneficial, to the child. Unfortunately, after the making of an order in a custody suit, the adults concerned often develop polarised attitudes; both towards each other and towards the child. Difficulties over place and timing develop; each parent speaks disparagingly of the other to the child. The whole set-up is liable to cause him to suffer. The law is really helpless in these situations and this fact must be accepted. The problem is one of attitudes, not law enforcement. Although some argue that it is better to stop visits totally in the event of tension developing, so as to protect the child, we doubt whether this counsel of despair really contributes constructively to a long-term solution, although we do not doubt that in some cases there are some parents the excision of whom from the child's life could only be for the child's welfare. We believe that guidance and assistance are the best solution, particularly when given in on-going form.

We recommend that:

> Whenever an order is made in a custody suit, it should be the duty of the Children's Ombudsman (whose constitution we recommend at paragraph 89 *post*) to see the parties, to explain to them the necessity for adopting constructive attitudes, and to offer continued assistance and support; follow-up care should be provided in an effort to help the adults concerned resolve their problems for themselves.

We have settled the draft of a proposed Visiting Code for parents (no doubt capable of improvement). We set this out in the Appendix, and *we recommend that:*

> The Visiting Code be given to all parents at the conclusion of custody suits, to supplement the work of the "Children's Ombudsman," that visits should not be treated as a "parental right" but that they should be denied if and only if they work to the detriment of the child.

For contents of the PROPOSED VISITING CODE, *see* APPENDIX to this article.

[45] J. DESPERT, *supra* note 14, at 60-61.

[46] B. STEINZOR, *supra* note 28, at 148-49.

. . . .

> Wives who feel this way may not only discourage their husbands from seeing their children within their home but resent cooperating with them in any other visiting arrangement.[47]

Goode found that the mother's attitude to the father's visits were complex. Although being granted custody is viewed sometimes as a "victory" by the mother, this can sometimes lead to a sense of guilt in that (i) she is depriving the child of seeing the father, and (ii) depriving the father of seeing his child. Furthermore, Goode found that women who had negative feelings toward their husbands would look upon the visit as an opportunity to argue, and that women who had positive feelings toward their husbands may have "a more direct motive for wanting the husband to visit more often."[48]

Goode found that the reasons for the custodial parent's desire for less visits include:

> 1) [T]he divorced mother . . . views her relationship to the child as more important than the father's relationship to the child . . . .
> 2) The divorced mother is likely to feel that her ex-husband has "forfeited" some of his rights as father by his behavior prior to the divorce, and by the divorce.
> 3) [B]oth the ex-wife and the ex-husband gradually come to have less friendly or positive attitudes toward one another as time goes by, and thus each becomes less willing to make concessions to the other.
> 4) His visits cannot ordinarily be fitted into her life or the children's without much coordination of time and expenditure of energy, and they are in any event rarely a pleasure for her.[49]

In Fulton's study, it was found that a majority of custodial mothers do not involve ex-spouses in matters relating to the children, yet sixty-six per cent of these mothers said the fathers took "too little interest" in the lives of the children.[50]

Perhaps, not surprisingly, it has been found that where the custodial parent remarries, the desire for visits decreases on the part of the remarried spouse.[51] The significance of access to the child may also be fundamentally affected by the remarriage of either parent. Thus, Littner observes:

> If the parent with whom the child is living has not remarried, then it is particularly important to maintain the visits with the other parent in order to give the child actual experiences with both parents. If the parent at home has

---

[47] R. WEISS, *supra* note 13, at 199. For the judicial attitude on this point, *see* text accompanying notes 166-83 *infra*.

[48] W. GOODE, *supra* note 19, at 323. Goode found that 20% of the custodial mothers wanted less visiting, 14% wanted no visiting, 44% agreed with the existing pattern, and 21% wanted more visiting.

[49] *Id.*

[50] Fulton, *supra* note 23, at 134. The author found that 33% of the fathers indicated that, if they were going through the divorce again, they would seek different custodial arrangements.

[51] W. GOODE, *supra* note 19, at 324. Goode found that "47% of the remarried want the ex-husband to see the children less frequently or not at all . . . ."

> remarried, however, this may change the question of the importance of the visitations — not to the other parent, but to the child.
>
> If the child is able to develop a good, positive relationship with the step-parent, then it becomes less necessary to have regular continuing visits with the other parent if these visits pose some extreme difficulty. If the child has difficulty in developing a good relationship with the step-parent, then it is extremely important to continue the visits with the other parent in order to maintain some kind of contact between the child and parents of both sexes.
>
> If the parent with whom the child is living has not remarried, and if there are not many contacts between the child and the other parent, then it is important to try to arrange for some kind of regular replacement experiences for the relationship with the absent parent. If the absent parent is the father, then an uncle, or a favorite teacher, or a big brother, or a scout or "Y" leader — any of these might be appropriate individuals to maintain some version of a child-father relationship. If the absent parent is the mother, one might consider encouraging an ongoing relationship between the child and an aunt or teacher. Sometimes good relationships develop between the child and the father's girlfriend but this has built-in hazards because of the possibility of the father changing girlfriends.[52]

Weiss has also concluded: "If the mother remarries, the relationship of the father and the children might have to be reconsidered. The children might want continued contact with their father, but attention would have to be given to coordinating that relationship with their obligations to the new household."[53]

D. *The Role of the Court and Psychological Specialization on Questions Relating to Children of Separated or Divorced Parents*

It is felt, within the behavioural sciences, that while couples may go to court to be granted a divorce, they should not look to the court for assistance on unresolved issues of custody and access. The courts are constrained by a rigid structure that is unable to deal with people's emotional problems.[54] It has been strongly urged that the courts should

---

[52] Littner, *supra* note 1, at 18. Littner also observes, at 20:

> The parent remarrying may bring many positives for the child. If the child is a boy living with his mother, her remarriage will provide him with an ongoing relationship with another adult male in addition to whatever continuing relationship he has with his father. But remarriage may also pose many problems for the child because he now will tend to work out with his stepfather the various difficulties that are unresolved towards his father. In addition, he will have to learn again how to share his mother. And an additional complication is that both the mother and the stepfather themselves are going through a stressful period and may have difficulty in recognizing that the child is also having a hard time and needs help.

For judicial consideration of the effect of remarriage, *see* text accompanying notes 138-44 *infra*.

[53] R. WEISS, *supra* note 13, at 230.

[54] J. DESPERT, *supra* note 14, at 190-91. The courts endorse the opinion that access arrangements should, whenever possible, be resolved by the parties. *See* text accompanying notes 208-17 *infra*.

utilize the services of other professions when deciding questions involving the children of divorced couples.[55]

> [T]he exercise of discretion cannot be considered a simply legal function. However learned in the law a judge may be, his discretion is far less a product of his learning than of his personality, his background, his interests — and, we must add, his prejudices, for every human being carries his unconscious burden of bias.
>
> The more perceptive a judge, the more responsive to human needs and human weakness, the more troubling he will find his discretionary task.[56]

Nor is the problem resolved by the use of partisan expert witnesses called at the instance of either spouse. Instead, independent expert opinions and assessments should be presented to the court.[57]

> Consultation for the court would predispose to much more objectivity on the part of the consultant, leading to more consistent findings. It would also tend to prevent the more spectacular and professionally embarrassing episodes of consultants taking the role of advocates for the competing parents.[58]

Unfortunately, however, even where this approach is favoured, the social and psychological services available to the court are often characterized by "inadequate staffing or are provided by staff who are not specifically trained to work with children and adolescents."[59] Furthermore, the positive resolution of access rights may necessitate mediation and ongoing counselling, which is rarely available in a judicial setting. For an exceptional case wherein this course of action was adopted, however, see *Tylman v. Tylman* wherein Walsh J. concluded:

> The husband did not oppose the wife's claim for custody of the four children of their marriage, nor did the wife oppose the husband having reasonable access to them. To their discredit the spouses have permitted the difficulties between them to affect their relationships with the children. The husband has not had access to his children since December of 1979. Both now, however, profess to be most anxious, that in the best interests of their children, the husband re-establish his relationship with them. Yet, they disagree as to how or when or in what manner this is to be accomplished. Sadly, this Court does not have available to it, except on an *ad hoc* basis, any

---

[55] *Id.* at 191. *See also* Watson, *The Children of Armageddon Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, at 74 (1969), where the author suggests the overall improvement of communication between child care workers, *i.e.* psychiatrists, psychologists, social workers, and the court. The author urges that child care workers become more familiar with legal issues and values, and further asserts that the courts should maintain enough control over the divorce process to ensure that the welfare of the child is met.

[56] J. DESPERT, *supra* note 14, at 195.

[57] *Supra* note 35, at 799-800.

[58] *Id.* at 800.

[59] Wallerstein & Kelly, *supra* note 15, at 472. *See also* Dean v. Dean, *infra* note 87, at 341, wherein Goodridge J. stated: "The child is not represented in the conflict. On occasions reports will be provided by the Department of Social Services. These are useful but it is impossible to expect the department to make surveys in all of the custody hearings that come before the court."

> professionals skilled in this area to whom these parents and their children could be referred for the mediation and counselling so necessary for the satisfactory resolution of their dilemma. Fortunately in this case, both counsel are experienced and concerned members of the Family Law Bar and have undertaken to ensure that the entire family attends, at the expense of the husband, a skilled behavioural scientist whom they shall mutually select, for so long as may be necessary to enable the husband to resume his role as father and re-establish a meaningful relationship with his children.[60]

Although much of the literature frowns upon the role of the court in access decisions, the authority and intervention of the court may sometimes be advantageous:

> The existence of a divorce judgment providing for visitation, with implicit court support, often provides an independent force by which a conflict resulting from . . . ambivalent feelings can be prevented or resolved. In other words, the mere existence of a court order may supply the face-saving device necessary to enable the custodial parent comfortably to bring about the proper result.[61]

E. *Should the Decision as to Access be Left to the Custodial Parent?*

A radical recommendation respecting access has been presented by Goldstein, Freud and Solnit,[62] who propose that the custodial parent should decide whether or not access is to be granted. The authors state that children, unlike adults, are incapable of maintaining positive relationships with parents who do not feel positively toward one another.[63] Because divorced or divorcing parents are not in "positive contact" with one another, the child is incapable of freely loving both parents and falls prey to conflicting loyalties. Pursuing this rationale, the

---

[60] 30 O.R. (2d) 721, at 727 (H.C. 1980). *See also Re Adoptions Nos. 29191*, 5 A.R. 313, at 327-28, 2 Alta. L.R. (2d) 135, at 149-50 (Dist. C. 1977):

> I therefore propose that both parents and their respective spouses meet with a conciliation counsellor to define and overcome any anticipated problems related to the resumption of access by the father, prior to the commencement of access. I have the assurance of Mr. Lutken, a conciliation counsellor with the Family Court Conciliation Service in Edmonton that either he or another conciliation counsellor would be prepared to assist both sets of parents to prepare for the resumption of access and be available to help overcome any problems after access resumes, should any arise.
>
> I therefore direct that the father shall have reasonable access to the two younger sons who are in their mother's custody, and such access shall commence as may be agreed following the intervention of a conciliation counsellor as I have outlined and in any event not later than March 31st, 1977. If no agreement as to access can be reached, I direct that either parent may apply to me or to the court as they may be advised. (Bracco J.)

[61] Benedek & Benedek, *supra* note 14, at 263.

[62] J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). The position taken by these authors remains substantially unchanged in the revised edition published in 1979: *see* BEYOND THE BEST INTERESTS OF THE CHILD, at 116-133.

[63] *Id.* at 12.

authors conclude that the child develops a psychological relationship with the parent who attends to the emotional and physical needs of the child; this parent becomes the "psychological parent",[64] with the absent biological parent being a stranger to the child. In discussing the guideline of continuity — one of three guidelines for determining whether the child should be placed with the parent who is likely to become the "psychological parent" — the authors maintain that "[c]ontinuity of relationships, surroundings, and environmental influence are essential for a child's normal development."[65] The authors continue:

> [C]ertain conditions such as visitations may themselves be a source of discontinuity. Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.
>
> Once it is determined who will be the custodial parent [which should be final and unconditional], it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is designed to protect the security of an ongoing relationship — that between the child and the custodial parent. At the same time the state neither makes nor breaks the psychological relationship between the child and the noncustodial parent, which the adults involved may have jeopardized. It leaves to them what only they can ultimately resolve.[66]

Apart from the literature already considered, which asserts the importance to the child of maintaining a relationship with the non-custodial parent,[67] thus impliedly disagreeing with the above recommendation, direct replies from the psychological literature are not lacking. Hetherington, after concluding that a continued relationship between the father (as non-custodial parent) and the child is an effective support system for both the child *and* the mother, states:

> The recommendation that has been made that the custodial parent have the right to eliminate visitation by the noncustodial parent, if he or she views it as adverse to the child's well-being, seems likely to discourage parents from working out their difference and runs counter to the available research findings.[68]

Stack asserts that the effect of implementation of the recommendation would be dysfunctional in that it would limit the relationships

---

[64] *Id.* at 16-18.
[65] *Id.* at 31-32.
[66] *Id.* at 37-38.
[67] *Supra* notes 27-29.
[68] Hetherington, *supra* note 14, at 856.

available to protect and insulate the child from the dangers of a fragmented nuclear family.[69] Stack identifies two specific problems with respect to the recommendation: (i) it would foster litigation rather than encourage the parents to offer reciprocal emotional support to each other and their children and work out custody arrangements on their own; (ii) it would encourage the child's ongoing relationship with one specific adult in one specific environment to the exclusion of others, thus inhibiting the child's growth.[70] Stack concludes that "[the recommendation] preclude[s] the possibility for divorced parents to develop the kind of working relationship that children deserve. The authors have little confidence in the capacities of adults or children to function like parents

---

[69] Stack, *Who Owns the Child? Divorce and Child Custody Decisions in Middle-Class Families*, 23 SOC. PROB. 505, at 505-07 (1976). *Id.* at 515, the author states:

> [The recommendation] effectively cuts children off from non-custodial parents and from the entire set of relatives of the parent. It limits the possibility for the child to learn yet another view of the world or approach to problems from the non-custodial parent. Parents who opt to prevent their child from contact with the non-custodial parent may also inhibit the child's opportunity for contact with other adult role models. This insulation is not likely to produce an adaptive, emotionally mature adult.

[70] *Id.* at 507-08. *See also* Wallerstein & Kelly, *supra* note 15, at 471-72, who conclude that "[t]he most tragic and clinically vulnerable children of divorce are those who become the objects of continued acrimonious legal battles between their divorcing parents." Awad & Parry, *supra* note 43, at 363-64, state:

> First, our clinical experience with children referred specifically for custody and access assessments, or children in psychotherapy for other reasons but whose parents were separated, lead us to disagree with the idea that the non-custodial parent has little chance to serve as a true object for love, trust, and identification. Our observation, like Kelly and Wallerstein's is that this relationship continues to be very important for the child . . . .
>
> Second, it is our feeling that giving the custodial parent such power could easily lead to its overuse. While Goldstein's recommendation does not mean that the non-custodial parent should have no visits, it is our contention that this will occur if such power is given to the custodial parent. Under the stress of marital separation, when there is a lot of hurt and angry feeling, the parents are more apt to behave vindictively. Thus, a custodial parent could easily use the power thrust on him or her and deny access to the non-custodial parent.
>
> The third, and perhaps the most important reason, is the effect such power would have on the custody determination. Currently, we feel that expected access helps resolve some of the more difficult custody assessments, since the parent who does not get custody would at least have the comfort of knowing that he or she will continue to see the child. If that parent sees the possibility of being denied access, then we can expect an increase in the intensity and bitterness of the custody fight. As we have done custody assessments for several years now, we have become impressed with the difficulty in deciding who the custodial parent should be and what the criteria are for determining custody. We have come to the conclusion that helping the parents reach an agreement is more useful than reaching a decision ourselves. If access can be so easily denied, we feel that the battle for custody can become a hopeless situation. The stakes are extremely high, since it will be a "winner takes all" situation.

and children outside of a co-residential, conjugal arrangement.''[71] Hess and Camara observe that any policy that ''impedes rather than facilitates the relationships between the child and either parent aggravates the effect of the divorce.''[72]

Other commentators have concluded that the recommendation is unsound because the problem of access would no longer receive close scrutiny in the light of the attendant circumstances of the particular family structure: ''[A]ny suggestion [which] avoid[s] judicial intervention by eliminating rights demands the closest scrutiny. We are concerned about the presentation of solutions that might be read as having universal application to every case.''[73]

The recommendation also assumes that the custodial parent will be motivated by fairness and by a desire to make an objective decision based solely on the needs and interests of the children. Such a belief is unrealistic.[74]

Goldstein, Freud and Solnit suggest that if their recommendation is followed, the court would not be making or breaking the relationship between the child and the non-custodial parent. In the words of one critic, however, as the custodial parent is ''crowned'' with the absolute power to preclude the non-custodial parent from visiting the child, ''the state, while not delivering the fatal blow, would certainly be providing a weapon by which a meaningful and beneficial relationship could be methodically destroyed.''[75] Furthermore, a custodial parent's absolute power to determine whether access shall be available could be exploited to secure undue advantage over the non-custodial parent, and this could be prejudicial to the best interests of the child.[76]

---

[71] Stack, *supra* note 69, at 515.

[72] Hess & Camara, *supra* note 28, at 95.

[73] Benedek & Benedek, *supra* note 14, at 256.

[74] *Id.* at 263. *See also* Greif, *supra* note 17, at 50-51:

> Furthermore, it is detrimental for all concerned when the decision about access is left to the discretion of the custodial parent. It must be recognised that, even among the best of parents, a custodial parent's decision about access by the non-custodial parent has little, if anything, to do with the best inerest of the child. Rather, it is a decision made in the best interest of the custodial parent. Such an arrangement victimises every member of the family. It is damaging for the non-custodial parent who is given the message that he is disposable in the child's life, and who by ending a marriage (a decision that may have been in the best interest of the child) simultaneously has been forced to give up the claims to that child. It is damaging to the child who finds himself or herself suddenly stripped of contact with one parent and totally dependent on the other parent's good graces to restore that relationship. And it is damaging for the custodial parent who is overburdened by the demands of such a role and, more important, who ultimately may be blamed by his or her child for the loss of the other parent.

See also note 81 and accompanying text *infra*.

[75] Benedek & Benedek, *supra* note 14, at 266.

[76] *Id.* For a concise and valuable list of suggestions for dealing with the issue of access, *see id.* at 266-71.

There are certain statements by Goldstein, Freud and Solnit that appear to inherently contradict or undermine the recommendation under discussion. For instance, the authors claim that "wanting" a child must be based on sincere feelings, and they acknowledge that when a parent desires custody of a child in order to "score a victory" over the other parent, the child is placed in jeopardy.[77] As already discussed, the unfettered decision-making power proposed for the custodial parent may itself result in the waging of a legal battle over custody, thus placing the child in jeopardy. Contentious litigation is almost invariably injurious to the child and an overwhelming "victory" by one parent can only encourage discontented litigants to take the law (and the child) into their own hands. Furthermore, even the authors admit that "our capacity to predict is limited. No one — and psychoanalysis creates no exceptions — can forecast just what experiences, what events, what changes a child, or for that matter his adult custodian, will actually encounter."[78] The authors rely on this conclusion to justify their criticism of the courts by stating that when the law imposes conditions on the custodial parent for the child's care, it is doing the impossible by looking into the future. It is suggested that the recommendation under consideration is no less an offence.

Response from the legal world to the recommendation has also been harsh and swift.[79] It has been suggested that one problem with the recommendation is that the authors gave little thought to the issue of child support.

> [Since] child support payments are difficult at best to collect, how many parents would be willing to make payments for ten or fifteen years to a child they can never see? . . . It may be that the ideal individual permanent psychological tie may not be achievable because of the child's physical need to eat.[80]

Another review of the recommendation evaluated its effects as follows:

> In short, at the whim of the custodial parent, all contact with the other parent would be foreclosed. There would be an absolute veto power over visitation. Such a position ignores the child's needs and desires, as well as those of the other parent, and in the name of continuity and autonomy encourages spiteful behavior. Given such power, one can visualize the blackmailing, extortion, and imposition which might be visited upon the non-custodial parent who wants to maintain contact with his or her child.[81]

---

[77] J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 62, at 21.

[78] *Id.* at 51.

[79] For an excellent overview of the American case law and reviews of BEYOND THE BEST INTERESTS OF THE CHILD, *see* Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L. Q. 49 (1979).

[80] Solender, *Beyond the Best Interests of the Child*, 27 S.W.L.J. 897 (1973), reviewed in Crouch, *id.* at 56. The concern expressed by Solender was expressed much earlier in *Re* Myers, [1945] O.W.N. 188, at 190, [1945] 1 D.L.R. 786, at 790 (H.C.), *rev'd* [1945] O.W.N. 308, [1945] 2 D.L.R. 544 (C.A.).

[81] Foster, *A Review of Beyond the Best Interests of the Child*, 12 WILLIAMETTE L.J. 545, at 551 (1976).

The same reviewer observed that the authors "in their promulgation of absolutes overlook humane considerations and ignore the weighing and balancing process which is the essence of law."[82] In conclusion, it was stated that the recommendation respecting access was "[t]he most objectionable statement in [the whole book] . . . . Few if any courts will accept the absolutes and extreme positions advanced by the authors."[83] This prophesy has now been confirmed in a number of judicial decisions in the United States and Canada. In *Gardebring v. Rizzo*,[84] for example, the North Dakota Supreme Court concluded that any judicial assertion of an exclusive right in the custodial parent to determine access would represent a fundamental shift in the existing state policy which was aimed at promoting a continued positive relationship between the child and both of the parents. The court further concluded that any such change of policy should be initiated by the legislature and not by the courts. Also, in *Pierce v. Yerkovich*,[85] Family Court Judge H.R. Elwyn stated:

> The respondent for her expert witness produced Alfred J. Solnit, Sterling Professor of Pediatrics and Psychiatry at Yale University School of Medicine and Director of the Yale University Child Study Center who, with Joseph Goldstein and Anna Freud, is a co-author of the recently published book, "Beyond the Best Interests of the Child".
>
> . . . .
>
> In short, the Professor's thesis, although variously stated, is that it serves the best interests of the child with the least detriment to have the custodial parent, the one with whom the child lives, rather than a court, make the determination as to when and under what circumstances, if at all, the noncustodial parent should be permitted visitation with their child.
>
> This is indeed, a novel and startling doctrine, and if accepted literally as Professor Solnit and his co-authors Goldstein and Freud seriously urge, would leave the court shorn of much of its traditional role as *parens patriae* and guardian of the child's best interest. Quite frankly, I do not believe that the law of this State would tolerate this Court, charged as it is with a responsibility for the welfare of children, so supinely and abjectly abdicating its function to any parent, however well intentioned. The danger and folly of such a course is aptly illustrated by the circumstances of this case wherein a mother, who once permitted and actively encouraged free association between father and child, has, upon the contraction of a marriage, arbitrarily reversed her field and is now unwilling to permit any contact whatever between her daughter and the man who is the father of her child. The mother's change in attitude has, of course, been reflected in the child's attitude toward her father. The child, who was once outgoing, warm and loving, has become withdrawn, apprehensive and anxious and has on occasion referred to her father as a dirty rat. Such a change in a five year old child's attitude toward her father could only have been brought about through her mother's influence. Although she would no doubt deny it, the court can only conclude that the mother, consciously or unconsciously, now sees any enforced further

---

[82] *Id.*

[83] *Id.* at 550-51. *See also* Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974).

[84] 269 N.W. 2d 104 (N.D.S.C. 1978).

[85] 363 N.Y.S. 2d 403 (Fam. Ct. 1944).

> association with her former paramour as an unwelcome reminder of her past indiscretion and as a threat to the stability and security of her marriage.
>
> Consequently, the Court totally rejects the specious notion so ingenuously urged by Professor Solnit and his co-authors that the custodial parent should have the sole right to determine in the name of the best interests of the child whether the noncustodial parent should be permitted or denied association with his own child. Experience and common sense teach that, given the imperfections of human nature from which flow the bitterness and resentment which all too often accompany a marital or illicit love affair breakup, no one parent can, under such circumstances, be safely entrusted with a power so susceptible of abuse. The authors' solution to the frictions engendered by the selfish desires of separated parents envisions an unattainable ideal wherein the custodial parent always acts from the purest, noblest and loftiest motives and never from selfish, base or crass ones. Until such time as that ideal is more nearly approached than experience shows is presently the case, this Court will retain its prerogative of making decisions, however difficult and freighted with potential for good or ill in cases involving the lives and the welfare of its wards.[86]

Similar opposition to the Goldstein, Freud and Solnit proposal has also been voiced by the Canadian courts. In *Dean v. Dean*,[87] the Newfoundland Supreme Court rejected their proposal, concluding that it is highly desirable for the child of a broken home to maintain a relationship with both the custodial and non-custodial parent. Goodridge J. stated:

> [T]he courts have consistently allowed access privileges to the non-custodial parent except where there has been a clear indication that such would be harmful to the child. Although it is suggested . . . that a custodial parent and not the court is the one who should decide what access a non-custodial parent should have, the court has frequently and of necessity prescribed the access.

---

[86] *Id.* at 410-12. For criticism of this decision, *see* Henszey, *Visitation by a Non-Custodial Parent: What is the "Best Interest" Doctrine?*, 15 J. FAM. L. 213, at 229 (1977):

> The *Pierce* court presumes to be more than a legal expert. Even though the court may have used sound reasoning in arriving at its decision, it seems ludicrous that they dismissed the "novel" concept with such firmness. Herein lie two additional problems: first, the courts are overzealous in protecting their sphere of influence and judicial prerogative in this area of the law; and second, the ancient doctrine of stare decisis is tenaciously clung to despite the phenomenal increase in the number of children of divorced parents. Unquestionably, the courts need sound justification to break with the past. Child psychologists and other experts such as those just cited are trying to provide that justification. Therefore, considering the tremendous impact on the children themselves and the society with which they interact, it would seem that expert assistance would be appropriate, and indeed welcomed by the courts. Perhaps the custodial parent should be the one to determine the time and place of the noncustodial parent visitation. Perhaps, if this "novel" concept has merit, a compromise could be formulated whereby the court would dictate the total number of visitations and the custodial parent could determine the best time and place. The important point, however, is that the courts should begin to question their own discretion, see new ideas and look to other fields of expertise toward the end of someday being able to chart a course that is truly in the best interest of the child.

[87] 7 R.F.L. (2d) 338 (Nfld. S.C. 1978).

> It is understandable but regrettable that the judgment of custodial parents is frequently biased to the extent that they will not provide reasonable access and in some cases any access to the non-custodial parent.
>
> It is to be regretted that the court is placed in the position of having to prescribe access or, for that matter, custody. It is a virtually inevitable human failing that the bitterness which surrounds the break-up of a marriage will, in fact, cloud the judgment of the parents in respect of the welfare of the child and the court must frequently make decisions not only as to access but as to custody in the arena of that bitterness where the contesting parties and their witnesses will each speak ill of each other offering only in their own favour some modest factor such as a larger home, a proximity to school and recreation facilities, greater wealth or other materialistic factors in favour of their having custody.[88]

In *Camick v. Camick*,[89] however, Stevenson J., of the New Brunswick Supreme Court, was inclined to share the opinion of Goldstein, Freud and Solnit, at least where the parents have remarried, but declined to implement their proposal in the circumstances of the particular case. Stevenson J. observed:

> There is no doubt in my mind that a young child's interests are best served if it has only one set of parents who can provide unbroken continuity of affectionate and stimulating relationships. Custody decisions which divide the care of the child between two parents or two sets of parents or which give the parent without primary custody the right to visit or to force the child to visit have been described by one group of writers as:
>
> > "Official invitations to erratic changes and discontinuity in the life of a child . . . illustrative of many determinations in law which run contrary to the often professed purpose of the decisions themselves — to serve the best interests of the child."
>
> See *Beyond the Best Interests of the Child* by Goldstein, Freud and Solnit (1973). However, such concepts have not yet been recognized by the Courts or the Legislature and, but for exceptional circumstances (none of which are present in this case), I must accord access rights to the parent without custody.[90]

III. Legal Analysis of Access

A. *Meaning of Access — Parent's Right or Child's Right*

It is regrettable, but true, that access has frequently been treated as an afterthought in the judicial process. Except in rare cases where the litigation directly focusses on parental abuse of access rights, it is customary for lawyers and the courts to rest content with an order for

---

[88] *Id.* at 340-41.

[89] 19 N.B.R. (2d) 441 (S.C. 1977).

[90] *Id.* at 443. *See also* text accompanying notes 139-44 *infra*. The views expressed by Goldstein, Freud and Solnit may prove to be acceptable to both behavioural scientists and lawyers where the custodial parent has remarried and the step-parent has established a positive relationship with the child. *See* text accompanying notes 51-53 *supra*, *but cf.* text accompanying notes 139-44 *infra*.

"reasonable access" and to spend little time in addressing the implications of this decision. In the words of Kay J. in *Evershed v. Evershed*:[91] "Access is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person. Custody is a much larger and more important thing than access . . . ."[92]

It has been asserted from time to time that access means seeing the child while in the custody of another, and that it does not include the temporary removal of the child from the custodial parent. This narrow definition was endorsed in *Re M.*[93] and other cases.[94] It is submitted, however, that the jurisdiction of a court to grant access pursuant to statutory authority cannot be so narrowly circumscribed. In *Gubody v. Gubody*,[95] the Ontario Supreme Court distinguished *Re M.* on the ground that the court was there interpreting the word "access" in the context of a separation agreement. The court refused to impose any similar limitations on the nature of "access" where the right arises pursuant to statute. In that context, the judicial power to make an access order is not limited to permitting the non-custodial parent to see the child only in the presence of the custodial parent; it extends to permit the non-custodial parent to remove the child temporarily from the custodial parent. This broader notion of access has been approved in later cases[96] and is the generally accepted view today. Indeed, in *Hefler v. Hefler*,[97] Dubinsky J., agreeing with *Gubody v. Gubody*, stated: "I am satisfied that to have access take effect only in the [custodial parent's] home . . . would be merely to invite confrontation and trouble."[98] There may be exceptional

---

[91] 46 L.T. 690 (Ch. 1882).

[92] *Id.* at 691.

[93] 33 O.L.R. 515, 22 D.L.R. 435 (H.C. 1915).

[94] *See, e.g.*, Brooking v. Brooking, [1953] 1 D.L.R. 648 (N.S.S.C. 1952).

[95] [1955] O.W.N. 548, [1955] 4 D.L.R 693 (H.C.).

[96] *See, e.g., Re* Campbell, 3 N.S.R. (1965-69) 332, at 345-46, 2 D.L.R. (3d) 159, at 159-60 (C.A. 1968), wherein Dubinsky J. stated:

> [I]t is incumbent on me presumably to determine what access means. There is a dearth of authority on this point. In *Brooking v. Brooking*, [1953] 1 D.L.R. 648, Doull, J.. held that "access" means seeing the child while in custody of another and does not include taking the child away from the person who has the custody for the purpose of visiting other relatives.
>
> *Evershed v. Evershed* (1882), 46 L.T. 690, is to like effect. However, Spence, J., in *Gubody v. Gubody*, [1955] 4 D.L.R. 693, disagreed with the Nova Scotia decision, and held that under s. 1(1) of the *Infants Act*, R.S.O. 1950, c. 180 (now R.S.O. 1960, c. 187 — similar to s. 1(1) of our *Infants' Custody Act*, R.S.N.S. 1967, Ch. 145) the Court has power to make such order as to access as well as custody as it deems fit. I feel this is right and notwithstanding Judge Doull's considered opinion, I am inclined to agree with Mr. Justice Spence.

See also Woodrow v. Woodrow, 20 W.W.R. 232 (Sask. C.A. 1956); Cooper v. Cooper, 1 N.S.R. 638, 1 R.F.L. 338, 6 D.L.R.(3d) 240 (S.C. 1969); Weiss v. Kopel, 18 R.F.L. (2d) 289 (Ont. Fam. Ct. 1980).

[97] 13 N.S.R. (2d) 1; 14 R.F.L. 274 (S.C. 1973).

[98] *Id.* at 4, 14 R.F.L. at 277. *See also* Weiss v. Kopel, *supra* note 96, at 298.

circumstances, however, where the court considers it appropriate for the non-custodial parent to exercise access under supervision in the custodial parent's home. In *Thatcher v. Thatcher*,[99] for example, the husband had failed to return one of the children to the mother pursuant to an order for custody in her favour, and had refused to answer questions concerning the child's whereabouts. On an application to vary a general order for reasonable access to another child of the marriage, the husband sought a specific order for access that would entitle him to take the child out of the province for a vacation of approximately three weeks. MacPherson J. concluded:

> In this brief fiat I shall not repeat or summarize the facts as I perceive them. Indeed, many may still be in issue.
>
> Suffice it to say that I consider it unsafe to allow Mr. Thatcher to have any unsupervised access to Stephanie until there is a satisfactory explanation of Regan's absence.
>
> I direct, therefore, that Mr. Thatcher may have access to Stephanie in the home of Mrs. Thatcher in Regina between the hours of 2:00 p.m. and 4:00 p.m. each Saturday commencing 6th December 1980. Mrs. Thatcher may be present but I would prefer she choose someone else to supervise and to sit quietly in the corner; someone with the gift of diplomacy. Mr. Thatcher will give at least 48 hours' notice of his intention to avail himself of access on each occasion.[100]

An unresolved issue is whether access is a right of the parent or a right of the child. In *Homuth v. Homuth*,[101] Roach J. observed that "[t]he child cannot be regarded as a chattel, the possession of which is to be shared or divided on varying considerations. At all times the welfare of the child is the paramount consideration."[102] In *Ader v. McLaughlin*,[103] Hughes J. stated that "in matters of custody and access the paramount consideration is . . . the welfare of the children and . . . the wishes of the parents and their conduct are subordinate, although not to be overlooked."[104] The welfare of the child thus emerges as the prevailing guideline when deciding the question of access.[105] That being so, access might reasonably be regarded as the child's right, rather than the parent's right. Indeed, in *Knudslien v. Rivard*,[106] White J. concluded that, while

---

[99] 20 R.F.L. (2d) 75 (Sask. Q.B. 1980).

[100] *Id.* at 76.

[101] [1944] O.W.N. 556, [1944] 4 D.L.R. 260 (H.C.).

[102] *Id.* at 558, [1944] 4 D.L.R. at 263.

[103] [1964] 2 O.R. 457, 46 D.L.R. (2d) 12 (H.C.).

[104] *Id.* at 468, 46 D.L.R. (2d) at 23.

[105] Virtually every judicial decision endorses the welfare or best interests of the child as the paramount consideration. *See, e.g.*, Youngs v. Youngs, [1949] O.W.N. 96 (C.A. 1948); Bol v. Bol, 19 R.F.L. (2d) 93 (Ont. H.C. 1980); Podolsky v. Podolsky, 26 R.F.L. 321 (Man. Q.B. 1975); Rocke v. Rocke, 26 R.F.L. 393 (Man. Q.B. 1975); Donald v. Donald, 6 N.B.R. (2d) 668 (Q.B. 1973); Penny v. Penny, 8 R.F.L. 247 (Sask. Q.B. 1972); Sutherland v. Sutherland, 3 R.F.L. 118 (B.C.S.C. 1970); Clark v. Clark, [1952] O.W.N. 671 (H.C.); Thompson v. Thompson, 9 R.F.L. (2d) 193 (Man. Cty. Ct. 1979).

[106] 5 R.F.L. (2d) 264 (Alta. Fam. Ct. 1978).

it will always be in the best interests of the parent seeking access to be granted it, the court must be guided by what is best for the child. He asserted: "[I]t is the child who has the right to see each parent. It is not necessarily the parent who has a right to see the child. This right in the child is one to be protected by the court."[107] And in the words of Judge Smith in *Bernick v. Bernick*,[108] a decision of the Colorado Court of Appeals:

> In recent years there has been an increasing awareness that, in divorce proceedings, the children are themselves the most disadvantaged parties. This awareness has led to the requirement that decisions relative to visitation must be based upon serving the best interests of such children. Viewed from this perspective, visitation becomes primarily a right of the children and secondarily a right of the non-custodial parent.[109]

More often than not, the judicial recognition of parental rights is oblique rather than direct, being couched in terms of the child's right to maintain a relationship with both parents or in terms of the best interests of the child. In *Csicsiri v. Csicsiri*,[110] for example, access had been denied a mother because of her mental illness and the fear that the children might be physically injured. She subsequently reapplied for access and an order was granted in her favour.[111] Basing his decision in part on psychiatric evidence indicating that she was no longer mentally ill and that she was a warm and affectionate person with the capacity to be a good parent, Cullen J. stated:

> Children are part of a family. They have two parents and have a right to be influenced in their upbringing by each of the two parents. They have a right to the affection of each of the two and while divorce may dissolve the marriage it does not dissolve the parenthood and the court must be careful not

---

[107] *Id.* at 268-69. *See also* Weiss v. Kopel, *supra* note 96, at 298-99, citing Knudslien v. Rivard, *supra* note 106, and M. v. M., [1973] 2 All E.R. 81 (Fam. 1972), wherein access was characterized as a basic right of the child rather than a right of the parent. For valuable commentary on *M. v. M.*, *id.*, *see* Manchester, *Access to Child: Welfare of Child and Parental Right*, 123 NEW L.J. 738, at 740 (1973), who concludes:

> 1. The paramount consideration is the welfare of the child.
> 2. Accordingly, the right to child-parent companionship is a right of the child rather than the parent.
> 3. Usually, however, the court will not deprive a child of access to either parent unless it is wholly satisfied that such access should cease.
> 4. The wishes of an older child may be relevant to the court's decision.
> 5. Cessation of access in a particular case need not be regarded as final.
> 6. In practice, however, delay may harm a parent's claim if in the interval the child has become prejudiced against such parent, even though this be at the instigation of the other parent.

See also Bates, *The Problem of Access*, 48 AUST. L.J. 339 (1974).

[108] 505 P. 2d 14 (Colo. C.A. 1972). *See also* Wood v. Wood, 510 S.W. 2d 399, at 400 (Tex. Civ. App. 1974), cited in Henszey, *supra* note 86, at 214.

[109] Bernick v. Bernick, *id.* at 15.

[110] 13 R.F.L. 263 (Alta. S.C. 1973).

[111] Csicsiri v. Csicsiri, 17 R.F.L. 31 (Alta. S.C. 1974).

> to continue a prohibition against visitation rights except in the most exceptional cases.[112]

In *Tassou v. Tassou*,[113] where the children, aged thirteen, eleven, and eight, did not wish to see their father by reason of the mother's alienating influence, Bowen J., after asserting that these desires must to some extent be disregarded, stated:

> I cannot overlook the fact that boys of this age must be subjected to some disciplinary control and authority and in this family certainly it is doubtful if this is going to be provided to any extent by the mother. To allow access to the father to provide such discipline would provide a nice balance in the raising of these children and would be in their best interests.[114]

It seems not unreasonable to conclude that, notwithstanding judicial declarations that the welfare (or best interests) of the child is the paramount consideration, there is often an underlying premise that the rights of the non-custodial parent must be preserved.[115]

In some instances, the courts have directly supported the notion that access is a right of the parent.[116] Indeed, one commentator has concluded:

---

[112] *Id.* at 32.

[113] 23 R.F.L. 351 (Alta. S.C. 1975).

[114] *Id.* at 353. *See also* Gubody v. Gubody, *supra* note 95, at 550, [1955] 4 D.L.R. at 697.

[115] *See* Henszey, *supra* note 86, at 226-27:

> The problem, particularly in visitation cases, lies in the fact that courts confuse parental rights with children's rights. Parental rights appear to be primary. And out of the parental battlefield where children are the ultimate casualties, the courts only pay lip service to a child's welfare by parroting the "best interest" doctrine — whatever that may mean. Part of the problem may be attributed to the courts' limitless discretion.
>
> . . . .
>
> The task of more precisely defining the best interest doctrine is monumental and perhaps impossible. Nevertheless, a beginning must be made by standardizing policies with respect to visitation. Of course, this means placing court discretion within some meaningful, ascertainable and manageable guidelines. Only then can the child's best interest truly predominate over parental rights in visitation rights cases.

[116] Wright v. Wright, 1 O.R. (2d) 337, 12 R.F.L. 200, 40 D.L.R. (3d) 321 (C.A. 1973); Rocke v. Rocke, *supra* note 105; *Re* Murrin, 12 N.B.R. (2d) 532, 23 R.F.L. 356 (S.C. 1975); Thompson v. Thompson, 12 N.B.R. (2d) 645, 23 R.F.L. 376 (S.C. 1975); Sobel v. Fogler, 6 R.F.L. 198 (Ont. H.C. 1972). In Thompson v. Thompson, *id.* Stevenson J., at 646, 23 R.F.L. at 377, stated:

> To my thinking, there is some conflict in the law . . . . When we deal with custody and access, the welfare of the child is supposed to be of paramount importance. I think that the welfare of children of divorced parents would be best served in most access cases if a clean break were made, particularly in the case here, where the parents are relatively young and have both remarried. It always pleases me in a divorce trial when the parent who is not going to have custody says, "I want to make a clean break of it. I am not asking for access" . . . .
>
> However, the law recognizes the right of a divorced parent to access

> The right of a parent to visit his child should be recognized and afforded even greater independent weight than the right to possess the child. It should therefore be upheld unless there would be clear prejudice to the child if enforced. Nor, it is submitted, should this right be limited by the child's unwillingness to be visited, even if it is of the age of discretion, except insofar as visits in these circumstances would clearly detract from its welfare.[117]

Other cases involve an attempted compromise. In *Re Stroud*,[118] for example, the court asserted that the many factors which are taken into account to determine the issue of custody — such as the conduct of the parent, the wishes of the parent and of the child, the age and sex of the child, and the child's need for stability — are also used to determine the issue of access.[119] Lieff J. then stated: "[T]he Court must balance the right of a parent to access, the benefits to the child which would flow from such a relationship against what is in the best interests of the child in terms of his welfare and stability."[120]

In *Dean v. Dean*,[121] Goodridge J. approached the issue as follows:

> One is naturally inclined to speak of access as the right of a parent and this from a practical point of view would have to be true because the child is not a party to the action. On the other hand one might strongly argue that access is, in fact, a right of the child and not a right of the parent.
>
> I am inclined to be somewhat equivocal on the point because however one looks at it in a legal sense, one cannot deny that a parent should have access to his child unless there is an indication that such access would have an adverse effect on the welfare of the child and, at the same time, the child has a right of access to his parent where it is for his welfare.
>
> Whether the right of the father is a legal right or not it is, in matters of custody and access, generally treated as such.[122]

In the final analysis, it may be wiser to view access as neither the right of the parent nor that of the child; to choose either as paramount may fetter a court's ability to achieve a constructive resolution of the issues and intrudes on the welfare or best interests of the child as the

---

. . . .

See also S. v. S., [1962] 2 All E.R. 1, at 3-4, [1962] 1 W.L.R. 445, at 449 (C.A.) wherein Willmer L.J. stated:

> [T]he court should not take [the step of depriving a mother altogether of access to her children] unless satisfied that she is not a fit and proper person to be brought into contact with the children at all. Such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children, or something of that sort. But merely to say of a woman that she is a bad wife or mother, while it may be an excellent reason for not giving her care and control, is not, in my view, sufficient ground for depriving her of any kind of access.

[117] Eekelaar, *What are Parental Rights?*, 89 L.Q.R. 210, at 219 (1973).

[118] 4 O.R. (2d) 567, 18 R.F.L. 237, 48 D.L.R. (3d) 527 (H.C. 1974).

[119] *See generally* Robinson, *Custody and Access*, in 2 STUDIES IN CANADIAN FAMILY LAW 616-22 (D. Mendes da Costa ed. 1972).

[120] *Supra* note 118, at 574, 18 R.F.L. at 246, 48 D.L.R. (3d) at 534.

[121] *Supra* note 87.

[122] *Id.* at 339.

paramount consideration. Irrespective, however, of whether judges speak in terms of "rights" or the "best interests" doctrine, the predominant judicial practice seeks to preserve the relationship between the child and the non-custodial parent. In the words of one commentator:

> In theory, the judicial attitude that the best interest of the child is the paramount consideration in parental visitation is perfectly defensible. However, the courts have taken the position that the best interest of a child ordinarily requires a continuing association with the non-custodial parent. It has even been held contrary to public policy to destroy or even limit the relationship of parent and child. On the one hand, the courts refer to a non-custodial parent's visitation "rights" as a claim, subservient to the best interest of the child, and not as a legal right per se. But on the other hand, the legal "right" of visitation which purportedly has been demoted to claim status is in practice an absolute right, due to the court's interpretation of the best interest doctrine. Only under extreme and unusual circumstances will visitation be totally denied.[123]

B. *Criteria For Determining Access and When an Order Will Not Be Granted*

Applying the guideline that an access order will be granted when it is in the best interests of the child, the courts often consider the same factors as are considered in determining custody.[124] Two areas have attracted particular judicial concern — (i) the wishes of the child, and (ii) the newly-formed relationships of either parent. In *Tassou v. Tassou*,[125] the court refused to give effect to the children's views, having regard to the best interests of the children as perceived by the court. Other cases have also ignored the child's wishes not to see the non-custodial parent. In *Martiniuk v. Martiniuk*,[126] the father was granted access despite the children's wishes because their "deep-seated dislike" of the father was attributable to the mother's alienating influence. In *Sadowski v. Sadowski*,[127] the court granted access over the objections of the child by asserting that access was in "the best interests of the child." Grange J., of the Ontario Supreme Court, stated:

> I would consider it unnatural for a child residing with an embittered mother, knowing of the treatment her mother had received at the hands of her father, to want to have anything further to do with him. I am, however, absolutely satisfied that the husband loves [the 11 year old] daughter, that prior to the assault that finally broke up the marriage he and his daughter were very close

---

[123] Henszey, *supra* note 86, at 214-15.

[124] *See* text accompanying notes 118-19 *supra*. In Ader v. McLaughlin, *supra* note 103, the court also considered additional factors, such as the child knowing who the other parent was and the preservation of the right of the child as a prospective beneficiary of the non-custodial parent's estate.

[125] *Supra* note 113.

[126] 2 R.F.L. (2d) 39 (Sask. Q.B. 1978).

[127] 25 R.F.L. 240 (Ont. H.C. 1975).

> together, and I fully believe that it would be in the best interests of the child that she see her father from time to time . . . .[128]

On the other hand, the child's wishes have on occasion been the grounds on which access has been denied, or made conditional on those wishes.[129] In *McCann v. McCann*,[130] the Nova Scotia Court of Appeal upheld the trial decision and dismissed the husband's appeal to vary the access order. That order denied access to the three older children, two (fourteen and twelve) because they did not want to see their father, and one (eleven years old) because of a health problem. With respect to the younger two children (eight and six), the trial court had concluded that, while there was much to support the view that the father should see these children, it would be a mistake to force the father on them. Accordingly, the trial court held that the father's access to these younger children "should be at times when the two younger children wish to be with their father."[131] In dismissing the father's appeal, the Court of Appeal held that, with respect to the older children, it would be fruitless to grant an order that would be impossible to enforce. With respect to the younger children, the court refused to vary the order on the ground that the trial disposition had worked well and that there was no reason to vary it.

The courts have also considered the consequences of the non-custodial parent's relationships with members of the opposite sex. Some cases have denied access to the non-custodial parent living in an adulterous relationship.[132] The prevailing view, however, appears to be that an adulterous relationship is not, in itself, a sufficient ground to deny access, because the children's welfare will not necessarily be harmed thereby.[133]

In *Brown v. Brown*,[134] where the custodial mother wanted the access order made conditional on the father exercising access in the absence of his girlfriend, Bayda J. observed:

> In view of the complete lack of evidence as to impropriety between the father and [the girlfriend] and a lack of evidence of the [girlfriend] being a

---

[128] *Id.* at 242. *See also* Dean v. Dean, *supra* note 87, at 341, wherein Goodridge J. stated:

> Sometimes the judge will interview the child but this in my view seldom serves a useful purpose as the child will understandably not be aware of factors which may in the long run be for his welfare and will frequently echo the bitterness to the non-custodial parent to which he has been exposed by the custodial parent.

[129] Clark v. Clark, *supra* note 103; M. v. M., 20 R.F.L. 346, 55 D.L.R. (3d) 384 (Man. Q.B. 1975); Racette v. Racette, 27 R.F.L. 299 (Ont. H.C. 1976).

[130] 10 N.S.R. (2d) 236, 18 R.F.L. 149 (C.A. 1974).

[131] *Id.* at 237, 18 R.F.L. at 150.

[132] Youngs v. Youngs, *supra* note 105; Clark v. Clark, *supra* note 105.

[133] Sinclair v. Sinclair, 8 R.F.L. 286 (Ont. C.A. 1972); *Re* Myers, *supra* note 80; Elvin v. Elvin, [1941] 3 W.W.R. 653, [1941] 3 D.L.R. 379 (B.C.C.A.); Sutherland v. Sutherland, *supra* note 105; Ader v. McLaughlin, *supra* note 103.

[134] 10 R.F.L. 379 (Sask. Q.B. 1973).

> person of bad character or one who would have a detrimental influence upon the child, I can see no justification for imposing an absolute prohibition.[135]

The court went on to express the hope that the father would use "common sense" in the way he conducted himself while with the children and the girlfriend.[136] In *Murray v. Murray*,[137] on the other hand, the non-custodial parent was awarded access on the condition that he not exercise it while in the company of his paramour.

Access arrangements may also be affected by the remarriage of either parent. In *Donald v. Donald*,[138] for example, it was held that, where the non-custodial parent remarries and the child intensely dislikes that parent's second spouse, access may be directed to be exercisable in the absence of that spouse, because to force the child on this person would be detrimental to the child's well-being and would adversely affect the relationship between the child and the non-custodial parent.

Where the custodial parent remarries, the courts differ in their opinions respecting the desirability of a continued relationship between the non-custodial parent and the child. In *Penny v. Penny*,[139] where the remarried custodial parent sought to reduce access, asserting that this was desirable for the development of the new family unit and the child's acceptance of the new spouse as his father, Disbery J. stated:

> The happiness and welfare of [the child] is the paramount consideration in deciding his custody and the terms thereof, and it is certainly to his advantage to maintain a close relationship with both his father and his mother . . . . To accept the applicant's views would necessitate holding that, when a divorced parent having custody of a child of the former marriage enters into a second marriage, the other parent's rights of access should be restricted and the child should be encouraged to accept the new stepparent in lieu of the parent. The records of the divorce courts clearly establish that many first marriages were not, as the romantics maintain, "made in heaven", and I have never heard that second marriages have any better prospects for success after the novelty of the new connubial association has worn off. Only the future will reveal whether the applicant's second marriage succeeds or fails.[140]

Accordingly, the wife's application for variation of the access order was refused.

---

[135] *Id.* at 381.

[136] *Id.*

[137] 16 N.B.R. (2d) 269, 30 R.F.L. 185 (S.C. 1976). *See also* Duckett, *Visitation Guidelines For Divorcing Parents*, 7 CONC. CTS. REV. (no. 2) 34 (1969):

> A mother will ask, "Should the father on visitation, take the children to the girl friend's house?" It is pointed out that the visitation is a time for the father to have something with his children, and they with him. Having other people participate dilutes what the parent and children can have with each other. Also, it may appear to the children that the father does not have time for them, or that he does not care enough to give them his undivided attention on visits.

[138] *Supra* note 105, at 676-77.

[139] *Supra* note 105.

[140] *Id.* at 251.

On the other hand, a different attitude was adopted in *Amerongen v. Adams*,[141] wherein Stevenson J. concluded:

> [A]lthough it may not be strictly in agreement with what the law is supposed to be, it is my view that in the case of young children when there is a divorce and the parents remarry and establish new family units, it is always best if the parent who does not get custody of the child is prepared to make a clean break of it and leave the child to be brought up as part of one of the new units.[142]

However, it must be noted that access to the seven year old child was denied in this case on the further ground that the child had looked to the mother's new spouse as her father and, more importantly, that the non-custodial father had not seen the child for five years. Similarly, in *Podolsky v. Podolsky*,[143] where the court denied access to the non-custodial mother after the custodial father remarried, the court took account of the fact that the mother had maintained little contact with the six year old daughter in the previous four years. Deniset J., quoting from a doctor's report, stated:

> I feel that the natural mother's desire to reinstate visits is inadvisable at this time. [The child's relationship with the father's second wife] should be allowed to continue until it has been consolidated. I feel that visits with the natural mother at this point would be most confusing for [the daughter].[144]

It might be concluded from the above two cases that the decision to deny access was not based on the remarriage of the custodial parent per se, but on the absence of any positive relationship between the non-custodial parent and the child.

The general rule with respect to access is that it will not be lightly denied; the court requires a strong case to be made against it.[145] In *Tooley v. Tooley*,[146] the mother sought an order denying the father access, when the father, who had not seen the child for four years, threatened to take the child out of the country upon learning that his wife was living with another man to whom the child looked as his father. Wilson J., in deciding to grant the order, held that "even if, generally speaking, the father should be given a right of access, I am of the opinion that the welfare of the child is the paramount consideration, and that in this case the child would definitely be harmed by granting the father the right to see his son."[147] The Ontario Court of Appeal, however, reversed the trial

---

[141] 15 N.B.R. (2d) 181, 29 R.F.L. 131 (S.C. 1976).

[142] *Id.* at 181, 29 R.F.L. at 132. *See also* Camick v. Camick, *supra* note 89; Thomson v. Thomson, *supra* note 116.

[143] *Supra* note 105.

[144] *Id.* at 322.

[145] Benoit v. Benoit, 6 R.F.L. 180 (Ont. Fam. Ct. 1972), *aff'd* 10 R.F.L. 282 (Ont. C.A. 1973); *Re* Murrin, *supra* note 116; Csicsiri v. Csicsiri, *supra* note 111; Sutherland v. Sutherland, *supra* note 105; Ader v. McLaughlin, *supra* note 103; Benson v. Benson, 15 R.F.L. (2d) 193 (Nfld. Unified Fam. Ct. 1980).

[146] 6 R.F.L. 194 (Ont. H.C. 1971), *rev'd* 7 R.F.L. 317 (Ont. C.A. 1972).

[147] *Id.* at 195 (Ont. H.C. 1971).

decision and granted access to the father despite the wife's submission that the father had previously consulted a psychologist concerning "a personal problem" that would render access detrimental to the welfare of the child. The court hinted that, if the evidence had established that the father still required psychological help, it might have given effect to the wife's submission. Access was granted, however, on the basis that the evidence at trial disclosed a sincere concern on the father's part for the child and any disturbance to the child as a result of the access order could be resolved with the mother's cooperation.[148] In *Sadowski v. Sadowski*,[149] the non-custodial father's fondness for pornographic material, as defined in the Criminal Code,[150] was not sufficient ground for refusing access. The court observed that the father's conduct would only become relevant if and when it affected the relationship with his daughter. There was no such evidence here. In this case, the court granted access despite the husband's tendency toward violence, although access was only to be exercised under the supervision of a local pastor who agreed to accompany the husband on any visits to the child.[151]

While the traditional judicial approach has been that access will only be denied where danger to the child is apprehended,[152] and access should not be refused merely because it may unsettle the child and disturb the normal routine,[153] recent case law demonstrates a gradual extension of the circumstances in which it will be denied. For example, access has been denied on the ground that the child's emotional stability was threatened by the parents' persistent conflicts over access and the child.[154] Other reasons for denying access have included the absence of a positive relationship between the non-custodial parent and the child,[155] the non-custodial parent's false denial of the paternity of one of the three children,[156] the non-custodial parent's mental illness,[157] the unauthorized taking of the child from the custodial parent for two years,[158] the wishes of the child,[159] the non-custodial parent's living in an adulterous

---

[148] *Supra* note 146, at 319-20 (Ont. C.A. 1972).

[149] *Supra* note 127.

[150] R.S.C. 1970, c. C-34, s. 159(8).

[151] *Supra* note 127, at 245.

[152] Craig v. Craig, 13 N.B.R. (2d) 644, 26 R.F.L. 123 (S.C. 1975). *Re* Murrin, *supra* note 116; Ader v. McLaughlin, *supra* note 103. *But see* Tooley v. Tooley, 7 R.F.L. 317 (Ont. C.A. 1972); Stokes v. Stokes, 19 R.F.L. 326 (Ont. H.C. 1974).

[153] *Re* Murrin, *supra* note 116. *See also* Benson v. Benson, *supra* note 145.

[154] *Re* Stroud, *supra* note 118. The court considered the fact that the child looked to the mother's new husband as his father and became agitated whenever the biological father's name was mentioned. Access was denied until the parents could satisfactorily agree on a method of access, or until the six year old child became old enough to make his own decision — which the court estimated at 13 years of age.

[155] Amerongen v. Adams, *supra* note 141; Podolsky v. Podolsky, *supra* note 105.

[156] Broadhead v. Broadhead, 2 R.F.L. 298 (Ont. H.C. 1970).

[157] Csicsiri v. Csicsiri, *supra* note 111.

[158] Podowski v. Podowski, 2 R.F.L. 297 (B.C.S.C. 1970).

[159] McCann v. McCann, *supra* note 130; Racette v. Racette, *supra* note 129; Clark v. Clark, *supra* note 105.

relationship,[160] the danger of the non-custodial parent's visits having a disturbing psychological effect on the child and the custodial parent,[161] and the prospective injurious effect of the non-custodial parent's influence on the growth and development of the child.[162] In *Boileau v. Boileau*,[163] where the mother appealed an order granting access to her husband who had adopted her children of a previous common law relationship, the Ontario Divisional Court held that the trial judge had erred in principle by concluding that access cannot be denied unless the granting of access would constitute a clear danger to the children or have a detrimental effect on them. Delivering the opinion of the court, Galligan J. stated:

> The learned trial judge concluded that the principle of law which was binding upon him, and upon which he must act, was that principle of law which suggests a court may not deny access to a parent unless there is clear danger to the children or unless the court is satisfied that the granting of access would have a detrimental effect on the children.
>
> . . . .
>
> The rationale for the principle stated by the learned trial judge which refuses to deny access to a parent, unless there is clear danger to the children or that harm is to be apprehended, is that there is a reasonable philosophical presumption or a natural human feeling that a child will benefit from continued connection with each parent. Reference may here be made to D. Mendes da Costa's Studies in Canadian Family Law (1972), vol. 2, p. 617. If there is no reason to anticipate some benefit from a continuation of the relationship between the parent and child, then the rationale of that rule disappears and I think then the court must revert to the usual rule that determines custody and access problems, namely: What is in the best interests of the child?
>
> . . . .
>
> On the evidence I think it has not been shown that it is in the best interests of the children for Mr. Boileau to have access to them. I can see nothing in the evidence to suggest any reason to presume or infer that it is in their best interest to continue any kind of association with them. The evidence drives me to the opinion that they are better off without him.[164]

---

[160] *See* text accompanying note 132 *supra*.

[161] Lavery v. Lavery, 22 N.S.R. (2d) 432, 31 A.P.R. 432 (S.C. 1977); Rocke v. Rocke, *supra* note 105. Unlike Tooley v. Tooley, *supra* note 152, where the court granted access in part due to evidence disclosing a sincere concern on the father's part for the child, Deniset J. in Rocke v. Rocke held, at 395, that the father has to "prove himself to be more than a loving father."

[162] Thatcher v. Thatcher, 16 R.F.L. (2d) 263 (Sask. Q.B. 1980).

[163] 13 R.F.L. (2d) 275 (Ont. Div'l Ct. 1979). *See also* Dean v. Dean, *supra* note 87, at 342, where the court lists a number of factors which would lead to the denial of access.

[164] Boileau v. Boileau, *id.* at 276-78. *See also* Bol v. Bol, *supra* note 105, at 95, wherein Mullen L.J.S.C. stated:

> It is trite law that the court, in considering matters of this kind, should consider the child's welfare as paramount. In doing so, I can find no advantage or benefit to the child in allowing the petitioner access to her. This is especially so, considering that she wishes to change the child in some way, which change on the evidence of the respondent has in the past caused the child much distress.

Conceding the subjective nature of the judicial discretion in access disputes, it is difficult to draw general conclusions from the case law. Certain judicial attitudes may, nevertheless, be discerned. In those cases where the courts reject an application for the denial of access, there is a greater reliance on the traditional test of anticipated danger or harm to the child, an inclination to favour the notion of parental rights, and less significance attached to the wishes of the child. On the other hand, those cases that have denied access generally apply a liberal interpretation of the "best interests" doctrine, favour the notion of the child's right rather than the parental right, and pay greater attention to the wishes of the child. Whichever approach is adopted, however, the courts regard continued access as presumptively beneficial to the child, and the onus of proof falls on the custodial parent to demonstrate that a denial of access is justifiable.

C. *The Rights and Duties of the Custodial Parent*

Aside from specific parental rights and duties, the courts have articulated the responsibility of both parents to always act with the child's best interests in mind when faced with problems of access. In *Gubody v. Gubody*,[165] Spence J. observed:

> I am sure that even after the bitter controversy between these parties they will now have enough sense to realize that it is contrary to the child's interests for either of them to poison the child's mind in any way against the other, and that they should, in their conduct towards and in discussion with their child, keep that principle clearly in mind.[166]

As stated previously, some cases formerly asserted that the custodial parent had the right to be present when the non-custodial parent exercised access privileges, despite the "source of embarrassment her mere presence must be to [the] husband."[167] This restrictive approach has now been abandoned in favour of a more liberal attitude that reflects the rights of the non-custodial parent as well as the "best interests" of the child.[168] In *Whitehouse v. Whitehouse*,[169] the Ontario Court of Appeal varied a

---

> The fact is that the child is residing with her grandparents and her father and at least on the father's evidence, which I accept, the child is a happy and contented child. I do not feel that the court should interfere with the present situation in this matter, at least at this time, and take the chance that the child's life may be adversely affected by the visits of her mother.

[165] *Supra* note 95.

[166] *Id.* at 552, [1955] 4 O.L.R. at 699.

[167] *Re* M., *supra* note 93, at 518, 22 D.L.R. at 438. The court, however, did note that the mother would be acting in the best interests of the child if she would forego her right to remain with the child. The court stated, *id.* at 517, 22 D.L.R. at 437 that "[t]his case affords an illustration of the fact that there are many things which cannot be worked out through the Courts, and must be left to the good sense of the parties concerned."

[168] *See* text accompanying notes 93-100 *supra*.

[169] 1 R.F.L. 294 (Ont. C.A. 1970).

decree nisi of divorce where no provision had been included for access to the child by the father. Before and after the divorce, the father had enjoyed access privileges pursuant to the terms of a separation agreement. The trial judge expressed the view that it could be left to the mother to provide reasonable access. The Court of Appeal concluded that this was not a satisfactory disposition "from the point of view of either of the parties and certainly not from the point of view of the husband."[170] Accordingly, the decree nisi was varied to include specific terms of access without prejudice to any extended access that might be enjoyed by mutual consent of the parties.

Although the custodial parent should not be left with exclusive control over access, the court may allow the custodial parent to determine appropriate times when access will be available. In *Goldman v. Goldman*,[171] where the custodial mother wanted access to be given to the husband on certain days and the husband argued that the wife was acting with her own convenience in mind, the court supported the mother's position. It held that her own convenience was not her primary motive and that "[h]er proposal would . . . make it less disruptive not only for the parents, but for the child . . . ."[172]

One of the duties of the custodial parent is to respect the access privileges granted to the non-custodial parent. A custodial parent who contravenes an order of the court by unjustifiably refusing access may be found in contempt and imprisoned.[173] Such denial of access is not an indictable offence under section 116 of the Criminal Code,[174] but a civil contempt, amenable to writs of attachment, committal and sequestration in the civil process.[175] However, imprisonment for contempt is a weapon of last resort and it is subject to significant practical limitations insofar as the imprisonment of the custodial parent may be injurious to the children's emotional well-being and undermine their day-to-day care. It is noteworthy that the contempt process is customarily invoked against the custodial parent who abuses rights of access stipulated by the court. There appear to be no recorded cases in Canada where a non-custodial parent has been held in contempt by reason of his or her wilful refusal to comply with an access order. Most certainly, no child has ever been held in contempt for wilful refusal to associate with the non-custodial parent. It has been stated that the contempt process must be used sparingly,

---

[170] *Id.*

[171] 24 R.F.L. 199 (Ont. H.C. 1975).

[172] *Id.* at 199-200.

[173] *Re* Petryczka, [1973] 2 O.R. 866, 10 R.F.L. 321 (H.C.). *See also* Weiss v. Kopel, *supra* note 96, at 299.

[174] R.S.C. 1970, c. C-34, s. 116 reads:

> Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice . . . is, unless some penalty of punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and is liable to imprisonment for two years.

[175] Regina v. Clement, 17 R.F.L. (2d) 349 (Man. C.A. 1980); Regina v.

notwithstanding that a custodial parent who "uses [the] children as pawns or endeavours to break down the relationship which ought to exist between children and [the non-custodial parent] is guilty of serious moral misconduct."[176] It should only be used when the parent intended to defy the access order,[177] and the evidence of wilful contempt is clear and unequivocal.[178] It has also been held that a custodial parent is not obliged to force an unwilling child into the arms of the non-custodial parent.[179]

In order to accommodate arrangements for access where substantial distances and therefore costs are involved, the court may order either parent to meet the increased expenses arising from the exercise of access.[180]

The duty of the custodial parent to ensure that the child sees the non-custodial parent has been characterized as a positive duty. In *Tassou*

Andrews, [1978] 2 W.W.R. 153, 4 R.F.L. (2d) 225 (B.C. Prov. Ct. 1977); Regina v. Rupert, 16 R.F.L. 325 (Ont. Prov. Ct. 1974).

[176] Gribben v. Gribben, 9 R.F.L. 114, at 115 (B.C.S.C. 1972). *See also* Callender v. Callender, 11 R.F.L. 206 (B.C.S.C. 1973).

[177] Gribben v. Gribben, *id.* at 116. The court held that the mother acted as she did, not with the intention of defying the order, but because she was so "emotionally deranged" that she could not recognize her conduct as being contrary to the order. *See also* Pickard v. Coffin, 16 R.F.L. (2d) 380, at 384 (P.E.I.S.C. 1980), in which McQuaid J. refused to commit the husband for non-payment of maintenance where access had become virtually impossible as a result of the wife's removal of the children out of the province. McQuaid J. stated:

> While it is true that the move to Halifax had the effect of depriving the defendant of his opportunity to visit with his children in accordance with the award of the court, he should not have arbitrarily taken it upon himself to discontinue the payments he was required to make. His proper course was to apply to the court for relief and if the court was satisfied that its order for access had been frustrated without just cause it could suspend maintenance payments until the plaintiff made satisfactory arrangements for the exercise by the defendant of his access rights. (*Kett* v. *Kett* (1976), 13 O.R. (2d) 27, 28 R.F.L. 1, 70 D.L.R. (3d) 379 (H.C.).)
>
> While I certainly do not [condone] the course of action that the defendant chose to follow and while I recognize that an order of the court must not be lightly regarded nor ignored at the mere whim of the one against whom it is made, I am satisfied that the defendant discontinued his payments only because of his honest belief that, under the circumstances, he was justified in no longer continuing to pay towards the maintenance and support of his wife and children. I heard and observed him as he gave his evidence and I am satisfied that he holds the court in high regard and the thought of "contempt" did not even enter his mind when he stopped his payments. Under the circumstances, I am not prepared to hold him in contempt.

[178] Genoa v. Genoa, 12 R.F.L. (2d) 85 (Ont. Prov. Ct. 1979). For a helpful comment on the problem of denial of access, the rights and potential remedies of the parents, and the "child factor" in this process, *see* the annotation by McLeod accompanying this case at 85-87.

[179] Racette v. Racette, *supra* note 129; Singer v. Singer, 17 R.F.L. 18 (Ont. H.C. 1974).

[180] Korol v. Korol, 18 R.F.L. 294 (Sask. Q.B. 1974); Klassen v. Klassen, 14 R.F.L. 155 (Ont. H.C. 1974); *Re* Fitzpatrick, 13 O.W.N. 176 (H.C. 1917); B. v. L., [1970] C.S. 17 (Que. 1969).

v. Tassou,[181] the non-custodial husband with access rights brought an application for custody, contending that the children did not want to see him because of the prejudicial influence of the mother. In dismissing this application, Bowen J. stated: "I do feel . . . that the mother has a duty to do everything within her power to see that the boys see their father and to carry out the wishes of this court as contained in my original judgment. It is her positive duty to assume this responsibility."[182] When the custodial parent attempts to estrange the child from the non-custodial parent, it is not uncommon for the courts to advise that parent that continuation of such conduct jeopardizes his or her rights to custody.[183] However, the efficacy of this potential sanction, like that of committal, is open to question. A parent who seeks compliance with an access order that has been contravened may not wish to obtain custody or be capable of assuming the attendant responsibilities.

D. *The Rights and Duties of the Non-Custodial Parent*

Access must be meaningful and respect the convenience of the non-custodial parent.[184] At the same time, access should "create as little disturbance as possible to the daily routine of the children's lives, both educational and recreational . . . ."[185]

The responsibility for raising the child lies with the custodial parent; the non-custodial parent with access rights usually has little impact on the child's upbringing, unless invited to do so by the custodial parent. Thus, in *Gubody v. Gubody*,[186] Spence J. stated:

> I make it plain that the father's contact with his daughter must be that of a person who visits her, who spends some time with her, but who cannot change or alter her mode of life or have any general direction of the child's conduct. That is a matter for custody . . . .[187]

This notion that the non-custodial parent is to have only that ordinary control over the child which is necessary while they are together, but may not interfere with the child's upbringing, was also approved in *Pierce v. Pierce*,[188] wherein it was stated that a custody order granted to the mother gives her the right to direct the child's education and physical, intellectual, spiritual and moral upbringing. The role of the father with access privileges is that of a very interested observer, giving love and

---

[181] 28 R.F.L. 171 (Alta. S.C. 1976).
[182] *Id.* at 172-73. *See also* Weiss v. Kopel, *supra* note 96, at 299.
[183] Penny v. Penny, *supra* note 105; Weiss v. Kopel, *supra* note 96.
[184] Craig v. Craig, *supra* note 152.
[185] Ader v. McLaughlin, *supra* note 103, at 477, 46 D.L.R. (2d) at 32.
[186] *Supra* note 95.
[187] *Id.* at 550, [1955] 4 D.L.R. at 697.
[188] [1977] 5 W.W.R. 572 (B.C.S.C.). *See also* Gunn v. Gunn, 10 Nfld. & P.E.I.R. 159, 24 R.F.L. 182 (P.E.I.S.C. 1975); Donald v. Donald, *supra* note 105.

support in the background and standing by in case the child is left motherless.

Some courts have, nevertheless, asserted that liberal or generous access may be appropriate to enable the non-custodial parent to maintain a close association with the child and thus influence the child's development.[189] In reality, however, the non-custodial parent is little more than an interested bystander, unless the custodial parent welcomes a positive contribution from the non-custodial parent and promotes a meaningful relationship between that parent and the child.

The rights of the custodial parent extend to the religious education of the child, and the court may order the non-custodial parent with access to refrain from interference in this context. Thus, in *Gunn v. Gunn*,[190] McQuaid J. stated:

> I think it can be taken as a basic principle that when one party to a divorce proceeding is granted the sole custody of the child of a marriage, that party is inherently vested not only with the sole right, but also the sole responsibility for the care and upbringing, and education, including religious instruction of that child. So long as those matters are being adequately attended to, even though that religious instruction may seem contrary to the beliefs held by the other party, that other party does not have the right to interfere.
>
> . . . .
>
> [Accordingly], the respondent shall, at all times during which he is in the company of the boy, refrain from making any remarks, of a religious nature or otherwise, which would or might tend to reflect adversely upon the person or character of the petitioner.[191]

---

[189] *See, e.g.*, Barca v. Barca, 9 R.F.L. 78, at 86 (Alta. S.C. 1972), where Cullen J. stated:

> The petitioner, however, should have most liberal rights of visitation and this for two reasons. Firstly, he is the father of the child and therefore has the right to develop their association together so that he may to some extent influence her development and be rewarded by her affection and regard. Secondly, because he is a person of proven ability and ambition which has raised him above the handicaps of a poor beginning, and a most pleasing personality, [the child] has much to benefit by an increased association with him.

See also Re Sharp, 40 W.W.R. 521, at 525, 36 D.L.R. (2d) 328, at 331 (B.C.C.A. 1962), wherein Davey J.A., dissenting, stated:

> In reaching this conclusion I am not unmindful that the purpose of the so-called right of access is more than provision of an opportunity to gratify parental affection for the children; it is also a right of visitation to enable a parent to discharge adequately his remaining duties as guardian of the person and estate of his child.

See also Rocke v. Rocke, *supra* note 105, at 394, citing *Re* Sharp with approval.

[190] *Supra* note 188.

[191] *Id.* at 162-64, 24 R.F.L. at 185-86. *Cf.* Benoit v. Benoit, 10 R.F.L. 282 (Ont. C.A. 1972), where it was held improper for the court to prohibit the father from discussing religion or related subjects with his children during access periods. *See also* note 196 and accompanying text *infra*.

The parent who has been granted access may have limited powers when an emergency necessitates an immediate decision and the custodial parent is unavailable for consultation. In the words of Begg J.:

> I think it is obvious that where a person has extended access to a child, of necessity the access includes the duty to care for the child and of course the control of it. An order for access entitles a person having access to take all necessary steps in relation to the management of the child, such as the provision of medical treatment for the child if the child is in need of immediate medical attention or the sending of the child to a dentist in the case of an emergency need of dental care, but an order for access does not entitle the person having access to make important decisions which have a long-term effect on the life of the child. Those decisions must be made by the person who has the legal custody and if any important matters arise during access (or prolonged access) the person having the legal custody should be consulted.[192]

Other limited rights of the non-custodial parent include the right to apply to vary the terms of access and, in appropriate circumstances, to seek a change of custody.[193] The consent of the non-custodial parent may be required in proceedings for the adoption of the child,[194] and the non-custodial parent may be entitled to inherit from the child if the child dies intestate.[195] Pursuant to express statutory authority, the non-custodial parent may have decision-making powers over the child's religious education.[196] It is open to question whether the non-custodial parent is entitled to information from the custodial parent regarding the child's education, upbringing and welfare and to the cooperation of teachers, physicians and other professionals who come into contact with the child.[197]

The non-custodial parent in exercising access must not disparage the custodial parent.[198] Such conduct can lead to variation or termination of the access order.[199]

---

[192] Long v. Long, 89 W.N. (pt. 1) 54, at 58-59 (N.S.W.S.C. 1968). *Quaere* whether this opinion implies limited guardianship rights in emergency situations. *Quaere* also whether any parental consent is required by law in emergency situations.

[193] *See, e.g.*, Divorce Act, R.S.C. 1970, c. D-8, s. 11(2).

[194] *See, e.g.*, the Adoption Act, R.S.B.C. 1960, c. 4, s. 8(1)(*b*), where the consent of the parents is required. *Cf.* The Child Welfare Act, R.S.A. 1970, c. 45, s. 54, wherein the consent of the guardian is required.

[195] *See, e.g.*, Administration Act, R.S.B.C. 1960, c. 3, s. 104.

[196] *See, e.g.*, The Infants Act, R.S.O. 1970, c. 222, s. 24. *But see* DeLaurier v. Jackson, [1934] S.C.R. 149, at 153; Benoit v. Benoit, *supra* note 191; *Re* Smith, [1952] O.W.N. 286, [1952] 2 D.L.R. 778 (H.C.). *See also* The Domestic Relations Act, R.S.A. 1970, c. 113, s. 50.

[197] *See* Payne & Boyle, *Divided Opinions on Joint Custody*, 2 FAM. L. REV. 163, at 165 (1979).

[198] Gillespie v. Gillespie, 7 N.B.R. (2d) 579 (C.A. 1974); Gunn v. Gunn, *supra* note 188. In Gillespie v. Gillespie, the court imposed an additional duty on the non-custodial parent to facilitate correspondence and telephone communications between the child and the custodial parent while the child was staying with the non-custodial parent over the summer vacation.

[199] Gillespie v. Gillespie, *id. See also Re* Milsom, *infra* note 253.

The non-custodial parent must adhere to any specific conditions imposed by the access order. Apart from the usual terms respecting time and place, the courts may impose additional restrictions on access in response to the particular circumstances of the case. One restriction may be a prohibition against taking the child out of the jurisdiction;[200] others may include directions that access be exercised in the presence of a third party due to the non-custodial parent's emotional state,[201] tendency toward violence,[202] or non-compliance with a prior custody order;[203] that the non-custodial parent refrain from consuming or being under the influence of drugs or alcohol when with the child;[204] that access be exercised in the absence of the non-custodial parent's girlfriend[205] or new spouse;[206] and that the access take place only if the child wishes it.[207]

E. *The Desire of the Court to Let the Parents Resolve Access Issues*

Apart from those occasions when specific terms of access are required because of continued hostility between the former spouses, and subject to the exceptional circumstances referred to above, the courts often prefer the parents to work out their own specific arrangements as to access.[208] In *Brown v. Brown*,[209] Bayda J. observed:

---

[200] Hilborn v. Hilborn, 35 N.S.R. (2d) 521 (S.C. 1979); Kash v. Kash, 1 R.F.L. 292 (Sask. Q.B. 1970).

[201] M. v. M., *supra* note 129; Csicsiri v. Csicsiri, *supra* note 111; Kash v. Kash, *id.* Supervised access may also be ordered to give the absent parent the opportunity to develop a meaningful relationship with the child that has been previously lacking. In this event, supervision is imposed in the interests of the child. *See* Weiss v. Kopel, *supra* note 96, at 298.

[202] Sadowski v. Sadowski, *supra* note 127.

[203] *Supra* note 99.

[204] Mallett v. Mallett, 24 R.F.L. 389 (B.C.S.C. 1976); Gunn v. Gunn, *supra* note 188; Thomson v. Thomson, *supra* note 116.

[205] Murray v. Murray, *supra* note 137.

[206] Donald v. Donald, *supra* note 105.

[207] McCann v. McCann, *supra* note 130; M. v. M., *supra* note 129.

[208] Thompson v. Thompson, *supra* note 116; Penny v. Penny, *supra* note 105; Serdar v. Serdar, 2 R.F.L. 296 (B.C.S.C. 1970); Gubody v. Gubody, *supra* note 95. *See also* Awad & Parry, *supra* note 43, at 361:

> For parents in conflict . . . flexibility is not possible. A clear, rather rigid access plan is required since alteration of the plan may precipitate increased antagonism. The following are some general principles that are useful in disputed access situations:
>
> (i) The child belongs to one home and that is the home of the custodial parent. Generally speaking, this is the place where the child spends most time, keeps most belongings, and from which most activities originate. Custody arrangements should clearly support the child in feeling that he *lives* with the custodial parent, and *visits* the non-custodial parent.
>
> (ii) The custodial parent carries the primary responsibility for bringing up the child. The daily routines, education, religion, health care, and leisure time activities are to be decided by the custodial parent. Support

> Rather than devising and defining rigid terms by which access will be made available to the father, I would have preferred to leave it to the common sense of both parents and their knowledge of the boy, his habits, his sensitivities, and the like, to work out between themselves the terms that would be in the best interest of the boy and at the same time [would be] operative and satisfactory from the point of view of the parents. Apparently I am not to be allowed this luxury.[210]

In *Thompson v. Thompson*,[211] where the father wanted access rights specifically defined, Jewers J., in denying the request, stated:

> [I]n light of the fact that so far the parties have been able to mutually agree upon and accommodate one another in respect of visiting privileges, it would be unwise to rigidly fix the conditions and times of access. To do so would mean imposing upon the parties, and particularly the three children involved, all of whom doubtless have their own activities to pursue, dates and times which they might not always find convenient or desirable to observe.[212]

In *Barber v. Barber*,[213] Milvain C.J. stated:

> I prefer saying "reasonable" access to defined access for this reason: Where you have sensible parents who really and sincerely have the best interests of the child or children in mind, the access that will be enjoyed will be on a reasonable basis because they are thinking of the best interests of the child and not of their own selfish interests. If parents are prepared to be selfish and make demands that are designed more to satisfy their own wishes than the well-being of the child, then it becomes necessary to define access.[214]

---

of these plans during access visits is expected of the non-custodial parent.

(iii) The age of the child should be a primary factor in planning length of visits, location, and frequency. As noted earlier, the needs of the preschool child are different from the older child or young adolescent if access is to be productive for the child and satisfying to the parent.

(iv) Changes in visiting arrangements should be expected and planned for, arising out of changes in the child's activities, illness of either the child or one of the parents. Visiting time should disrupt the child's normal routines as little as possible. In other words, the visiting parents should fit in with the child's schedule and not vice versa. Arrangements for unexpected changes in the visiting plans should be preset, requiring minimal negotiation by the parents.

(v) Visiting parents should avoid making visits into "special" occasions. It is more beneficial for the parent and the child to join in normal activities. To maintain visits as "special" occasions places a strain on the non-custodial parent, and limits the opportunity for the development of an easy parent/child relationship. Further, there is a risk in alienating the custodial parent who may perceive himself or herself as performing the necessary child-rearing routines while the visiting parent reaps the benefits.

[209] *Supra* note 134.
[210] *Id.* at 379.
[211] *Supra* note 105.
[212] *Id.* at 196-97.
[213] [1978] 4 W.W.R. 411 (Alta. S.C. 1977).
[214] *Id.* at 419-20.

Where the parents continue to play "war games", using the child as ammunition in the emotional conflict arising from their unresolved personal hostilities, the court defines access rights with precision.[215] If that fails to work, the non-custodial parent may be denied access altogether. Thus in *Re Stroud*[216] Lieff J. stated:

> [I]f the parties are unable to agree on a method of allowing access to the child which is suitable to preserve his emotional welfare, it becomes necessary for the court to "use the knife" and cut off altogether the rights of access of the non-custodial parent, at least until the child has reached an age when he is able to cope with the situation.[217]

F. *Access and Maintenance*[218]

Access and maintenance provisions in a court order or decree of divorce are not dependent on one another.[219] Accordingly, the custodial parent cannot deny access on the ground that the non-custodial parent is in arrears of maintenance,[220] nor can the non-custodial parent use maintenance as leverage in relation to access.[221]

Where the non-custodial parent has been denied access, whether lawfully by the court or unlawfully by the custodial parent, a refusal to discharge maintenance obligations may be understandable in human terms, but is not legally condoned; the non-custodial parent is not thereby

---

[215] *See* McCabe v. Ramsay, 19 R.F.L. (2d) 70, at 82-83 (P.E.I.S.C. 1980), wherein McQuaid J. stated:

> It is, of course, preferable that the parents, by mutual agreement, work out the terms of access between themselves rather than have them imposed by the court. Unfortunately, in this case, the parents are so filled with animosity one to the other that they are able to agree on virtually nothing. It therefore becomes necessary for the court to set out the places and times at and during which visiting privileges may be exercised. In doing so, I accompany my direction with a strong admonition that, in the interests of the children, both parents co-operate in seeing that these visits are pleasant ones and not occasions for one parent to criticize and condemn the actions and conduct of the other in the presence of the children. Admittedly, the visits may very well have a disturbing effect on the normal routine of the children and they may, at least for a time, return home emotionally upset. Both parents must be prepared to accept this and the court will expect them to adjust to it and not complain about it either to the children or to each other.

[216] *Supra* note 118.

[217] *Id.* at 575, 18 R.F.L. at 246, 48 D.L.R. (3d) at 535.

[218] *See* McDonald & Komar, *Access Rights to Children and Maintenance Obligations: A Quid Pro Quo?*, 2 CAN. J. FAM. L. 299 (1979).

[219] Donald v. Donald, *supra* note 105. *See also Re* Bockner, 6 R.F.L. 34, at 35 (Ont. H.C. 1971), where the court held that "[t]he principle is undoubted that financial questions between spouses may not be permitted to stand in the way of the Court when an order otherwise proper respecting custody or access is sought."

[220] Homuth v. Homuth, *supra* note 101.

[221] Gribben v. Gribben, *supra* note 176.

relieved of legally imposed support obligations.[222] However, the custodial parent who denies the other parent access places his or her custodial rights in jeopardy.[223]

Although the parents must not use access or maintenance as weapons, the courts have on occasion imposed an interdependence on access and maintenance rights. Thus, where the custodial parent has unjustifiably denied access to the non-custodial parent in breach of an order of the court, the maintenance obligations of the non-custodial spouse or parent may be rescinded, varied or suspended by the court. In *Tassou v. Tassou*,[224] for example, Bowen J. stated:

> It is the responsibility of this court to try and ensure that its orders are not thwarted by the parties to an action and the only effective method that I can use to have the access continued is to use the payment or non-payment of maintenance as an inducement to the wife to assume the responsibility [of seeing that her children visit their father] as outlined above. I am therefore ordering that all maintenance payments . . . be suspended for such length of time that the husband fails to obtain access to the children.[225]

Similarly, in *Kett v. Kett*,[226] where the custodial parent had removed the children from the province and thereby denied access to the non-custodial parent, the court varied the decree nisi of divorce with respect to child support and directed that future payments be suspended until such time as practical arrangements were made for the exercise of access. In *Pickard v. Coffin*,[227] the court cancelled arrears of maintenance that had accrued under a court order, but ordered the father to make a twenty-five per cent contribution toward the future costs of rearing his children, having regard to the respective financial circumstances of the parents, the impossibility of the father exercising access by reason of the removal of the children to another province and the mother's conversion of the surname of the children to her own maiden name.

Just as the courts have used maintenance as a weapon against the custodial parent, they have also, on occasion, made access conditional on the payment of future maintenance and, in some instances, arrears of maintenance. In *Re Logan*,[228] for example, the court directed that access should be available to the father "subject to his payment of [a designated weekly sum] for the support of each child."[229] In *Hill v. Humphrey*,[230]

---

[222] Vickell v. Vickell, 3 R.F.L. 257, 17 D.L.R. (3d) 497 (Man. C.A. 1970); Woodburn v. Woodburn, 11 N.S.R. (2d) 528, 21 R.F.L. 179 (S.C. 1975); Hwong v. Hwong, 24 R.F.L. 70 (Ont. Prov. Ct. 1976).

[223] Woodburn v. Woodburn, *id.*

[224] *Supra* note 181.

[225] *Id.* at 173.

[226] 13 O.R. (2d) 27, 28 R.F.L. 1, 70 D.L.R. (3d) 379 (H.C. 1976), considering Shoot v. Shoot, *infra* note 234 and Wright v. Wright, *infra* note 235.

[227] *Supra* note 177.

[228] 18 N.B.R. (2d) 58 (S.C. 1977). *See also* Fisher v. Fisher, 14 D.L.R. (3d) 482 (P.E.I.S.C. 1970).

[229] 18 N.B.R. (2d) 58, at 60 (S.C. 1977).

[230] 7 R.F.L. 171 (Ont. C.A. 1972).

the Ontario Court of Appeal concluded that it is improper for a trial judge to deny access until the arrears of maintenance under a separation agreement have been paid. Nevertheless, the trial judge may order that the terms of access set out in the agreement shall be operative so long as the non-custodial parent pays future periodic support as provided by the agreement. In *Genziuk v. Jablonowski*,[231] the Quebec Court of Appeal concluded that section 12 of the Divorce Act[232] empowers the court to grant a conditional order whereby the non-custodial parent's right of access shall be subject to his payment of the arrears of alimony that have accrued under a previous judgment for separation from bed and board. Although the court observed that such a condition might be ordinarily regarded as objectionable in principle, the particular circumstances of this case were regarded as justification for the conclusion that the father should not see his child again until he had given some indication of taking a responsible interest in the child. The court may also refuse to entertain a non-custodial parent's application to vary an order denying access until arrears of maintenance are paid or until the court is satisfied of an inability to pay.[233]

It appears that when the courts are dealing with problems of access and maintenance pursuant to a separation agreement, they may treat the issue somewhat differently. In *Shoot v. Shoot*,[234] the husband terminated his maintenance payments because the wife took the children to Florida. The court found that the separation agreement included a provision that the promises and covenants therein were to be "mutual", and the court gave effect to the agreement. However, where the separation agreement does not stipulate the mutuality or interdependence of its terms, the courts are disinclined to allow access and maintenance to be set off against each other.[235]

---

[231] [1973] Que. C.A. 988.

[232] S. 12(*b*) of the Divorce Act provides:

> Where a court makes an order pursuant to section 10 or 11, it may . . . .
>
> (b) impose such terms, conditions or restrictions as the court thinks fit and just.

[233] Parkinson v. Parkinson, [1973] O.R. 293, 11 R.F.L. 128 (C.A.). *See also* Cartagenova v. Lipson, 29 R.F.L. 369 (Ont. H.C. 1976).

[234] [1957] O.W.N. 22, 6 D.L.R. (2d) 366 (C.A. 1956).

[235] *See* Carwick v. Carwick, 6 R.F.L. 286 (Ont. C.A. 1972). *See also* Wright v. Wright, *supra* note 116, at 341-42, 12 R.F.L. at 204-05, 40 D.L.R. at 325-26, where Evans J.A. (Dubin J.A., concurring) stated:

> In *Hill v. Humphrey* (1972), 7 R.F.L. 171 (Ont. C.A.), Gale C.J.O., speaking for the Court, held that the mother having custody of the child could not refuse access simply because the father was in arrears under the separation agreement. He referred to *Homuth v. Homuth*, [1944] O.W.N. 556, [1944] 4 D.L.R. 260, in support thereof. I should consider the converse to be equally applicable, that is, that a parent cannot avoid payment of child maintenance because of inability to exercise his right to access. I do not regard *Carwick v. Carwick* (1972), 6 R.F.L. 286, a decision of this Court, as inconsistent with this view.

G. *The Granting of the Access Order: Its Variation or Termination*

The courts may grant an order for access under the authority of a provincial statute,[236] or by way of corollary relief in proceedings instituted pursuant to the Divorce Act.[237] Where the parents agree respecting access, the court may incorporate such an agreement in a judgment.[238] If the court incorporates the terms of a separation agreement into a decree nisi of divorce, the court is not merely approving the provisions but declaring them part of its judgment.[239] When an agreement is submitted to the court, however, it is not binding on the court. In the exercise of its discretion, the court may determine that the terms of the agreement are not in the best interests of the child and it may ignore them.[240]

When the court construes a provision in a separation agreement dealing with access, it has been held that "[t]he agreement should be construed as containing the implied term that the [custodial parent] would not do anything unreasonably that would prevent the [non-custodial parent from] having the frequent access to his child for which the agreement provided."[241] In *Wright v. Wright*,[242] the husband was granted access at "reasonable times" by the terms of a separation agreement. He requested the court to interpret the separation agreement so as to imply a term that the wife could not remove the children from the city where the family lived. The court held that:

> [A]bsenting all considerations of unreasonableness . . . the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of such specific terms with respect to access as would clearly indicate that the parties must have intended that the children

---

Compare the dissenting judgement of McGillivray J.A., who stated that the three cases cited by Evans J.A. were not authoritative on the issue of the father's right to suspend maintenance payments by reason of the denial of access rights. While concluding that the terms of the separation agreement in question expressly precluded the husband from asserting a right to suspend maintenance payments, McGillivray J.A. cited Shoot v. Shoot, *supra* note 234, as support for the proposition that situations can arise where a denial of access will justify the suspension of maintenance payments. *See also* Wreaks v. Wreaks, 3 R.F.L. (2d) 291 (Ont. Cty. Ct. 1978).

[236] *See, e.g.*, The Family Law Reform Act, 1978, S.O. 1978, c. 2, s. 35.

[237] Ss. 10, 11.

[238] Pursuant to s. 53 of The Family Law Reform Act, *supra* note 236, the parties may agree on access in a separation agreement. No similar agreement is permitted in a "marriage contract" or "cohabitation agreement": *see* ss. 51(1)(*c*), 52(1)(*c*). Furthermore, any provision of a separation agreement relating to access may be disregarded by the court where this is in the best interests of the child: s. 55(1). For general provisions respecting consent judgments and the incorporation of the terms of a domestic contract in an order of the court, *see* The Family Law Reform Act, ss. 2(7), 2(8).

[239] Frappier v. Frappier, 2 R.F.L. 289 (Ont. H.C. 1975).

[240] Clark v. Clark, *supra* note 105. *See also* note 238 *supra*.

[241] Shoot v. Shoot, *supra* note 234, at 24, 6 D.L.R. (2d) at 369.

[242] *Supra* note 116.

> remain in close proximity if the specified right of access provided in the agreement was to be an effective right.[243]

The court held that the wife was not in breach of the terms of the agreement because it conferred an "unfettered right to take the children with her in the event that she should move from Ottawa."[244] The court based its decision on the following facts and contractual terms: the wife was to reside at such a place as she saw fit; the access provided was of a general nature, *i.e.* at "reasonable times", and the agreement stated that its validity and interpretation were governed by the law of Ontario, thus affording recognition that the wife was free to move out of the province. In defining the "standard of reasonableness" to be applied in such cases, the court observed that it "must be a flexible one influenced to some extent by the circumstances of the parties and viewed against the background of their legal agreement."[245]

Under the Divorce Act,[246] the court has the discretionary power to vary or rescind any order it has made respecting access. Accordingly, any order purporting to preclude an application to vary access for a designated period of time is invalid as contrary to the express provisions of the Divorce Act.[247]

Factors that may justify the variation of an order so as to provide increased access include the growing relationship between the non-custodial parent and the child[248] and substantial improvement in the non-custodial parent's control of his drinking habits.[249] Factors that may justify reduced access include the child's intense dislike of the non-custodial parent's new spouse[250] and the "smothering" effect of access which leaves a child little time to himself.[251]

It has been held that the parents may themselves from time to time vary a defined access order pursuant to their own agreement.[252]

The court may terminate access rights previously ordered where the non-custodial parent abuses access by denigrating the custodial parent, thereby causing emotional distress to the child.[253]

---

[243] *Supra* note 116, at 340, 12 R.F.L. at 202-03, 40 D.L.R. (3d) at 324.

[244] *Id.* at 341, 12 R.F.L. at 204, 40 D.L.R. (3d) at 325.

[245] *Id.* at 340, 12 R.F.L. at 202, 40 D.L.R. (3d) at 324. *See also* Wreaks v. Wreaks, *supra* note 235, at 294.

[246] *Supra* note 237. This power also exists under The Family Law Reform Act, s. 35.

[247] Heikel v. Heikel, 73 W.W.R. 84, 1 R.F.L. 326, 12 D.L.R. (3d) 311 (Alta. C.A. 1970).

[248] Dean v. Dean, *supra* note 87; Serdar v. Serdar, *supra* note 208.

[249] Tocco v. Tocco, 4 R.F.L. (2d) 174 (Ont. C.A. 1977).

[250] Donald v. Donald, *supra* note 105.

[251] Kajtar v. Kajtar, 27 R.F.L. 85 (Ont. Prov. Ct. 1976). *See also* Grass v. Grass, 17 N.B.R. (2d) 4 (S.C. 1977).

[252] Thomson v. Thomson, *supra* note 116, at 645, 23 R.F.L. at 377.

[253] *Re* Milsom, 11 R.F.L. 250 (B.C.S.C. 1973).

H. *Judicial Use of the Behavioural Sciences*

The court "must always treat the expert evidence in the same manner as other evidence and assess and decide the outcome on the whole of the evidence."[254] Courts very often adopt expert testimony when it is available,[255] but have on occasion rejected it. In *Martiniuk v. Martiniuk*,[256] the court agreed to continued access by the father despite psychological evidence that this would be stressful for the children and would only further alienate the father from the children. The court asserted that this professional opinion was "at least partly speculative in its conclusions regarding the impact on the children of further visits with their father."[257] Hughes J. continued:

> No book of knowledge contains clear-cut answers as to whether I have reached a correct or incorrect decision. Like so many decisions that have to be made in matrimonial matters, knowledge of the law, limited as it may be, is of a secondary nature and has played little part in the decision arrived at. I cling to no precedent nor authoritative text as supporting the result I have arrived at. In deciding this problem, it has been a matter, after weighing and considering all of the evidence, of drawing on such experience, reason and common sense that I have at my command, admittedly limited in each instance. I am mindful that in light of the evidence of Dr. Shepel and his supporting brief that perhaps there is some risk involved in deciding as I have. On balance, I have concluded that that cannot deter me from ordering as I feel I must do, and, of course, responsibility for the decision must rest with me.[258]

Since the use of expert evidence is impractical in every case, given the time and expense involved, and because such evidence, when available, is often less than conclusive, the courts are often forced to reach pragmatic decisions based on common sense and the perceptions of the individual judge. In *Dean v. Dean*,[259] Goodridge J. observed:

> A judge is not a child psychologist and develops little expertise in these matters because he seldom becomes aware of the result of his decision except in the cases where there is a subsequent application for variation. It would be impractical to have a child psychologist in every case so the judge can do little more than render a judgment based on common sense having a view to the somewhat coloured testimony that is usually presented to him.[260]

Although the judges from time to time acknowledge the difficulty of reaching appropriate decisions respecting access,[261] it is all too easy for

---

[254] Tassou v. Tassou, *supra* note 113, at 352.

[255] *Re* Stroud, *supra* note 118; Csicsiri v. Csicsiri, *supra* note 111; Sobel v. Fogler, *supra* note 116; Podowski v. Podowski, *supra* note 158.

[256] *Supra* note 126.

[257] *Id.* at 47.

[258] *Id. See also* Rocke v. Rocke, *supra* note 105.

[259] *Supra* note 87.

[260] *Id.* at 341.

[261] Hefler v. Hefler, *supra* note 97, at 5, 14 R.F.L. at 277, where Dubinsky J. stated: "In cases dealing with . . . access to children, a judge not infrequently must need to have some Solomonic wisdom which, I hasten to add, I do not possess."

the courts to side-step their responsibility by granting an order for "reasonable access," thus leaving the disputing parents to resolve the terms of access by agreement, with a right of further recourse to the court in the event that no agreement can be reached. Although this course of action is commendable when there is a reasonable prospect that the parties can negotiate terms of access, it is to be deplored when the circumstances manifested by contested custody proceedings are indicative of probable future strife between the parents that will necessitate re-opening the issue of access. The common judicial assumption that access is necessarily beneficial to the child and should only be denied in exceptional circumstances may also be too readily invoked as a means of evading the judicial responsibility for determining whether access is in the best interests of the child.[262] In the final analysis, it is the responsibility of the court to ensure that all relevant evidence is adduced that will enable the court to determine the quality of the relationship between the child and the non-custodial parent and the future prospects of a continuing constructive relationship. In *Gordon v. Gordon*,[263] where custody was in issue, Morden J.A., of the Ontario Court of Appeal, stated:

> In the argument before us there was criticism of the way the hearing progressed which also rendered the result unsatisfactory. The criticism was primarily directed at the decisions of counsel not to call as witnesses either the babysitter employed by the father or the man with whom the wife was living. It was submitted that their evidence would have been vital to a proper understanding of what would have been in the best interest of the child and

---

[262] *See* Maidment, *supra* note 38, wherein a random sample of 95 custody and access dispositions by a county court in England were examined. In commenting on access, Maidment, *id.* at 239, stated:

> Most significant of all however is the fact that the access order appeared to bear no relation to the actual factual situation. In 32 cases (34 *per cent*) access was not taking place at all (these were usually [husbands], who accounted for 81 *per cent* of the cases) even as early as the statement as to arrangements for the children. Obviously there is an overlap between cases where access is not taking place and it is not asked for; on the other hand access, though not taking place, was asked for in 18 cases and granted in 17 of these (and not asked for in 15 cases). The order might be very desirable in supporting a parent's claim for access against the other who has been denying it or making it difficult, or as a safeguard for future possibilities. But it is thought that it does somewhat suggest an automatic granting of access as the right of every parent, unless exceptional circumstances justify a denial. For example in one case a father was allowed reasonable access even though his wife had alleged his threatening behaviour towards the child. The right of the parent, or the right of the child as *M v. M* described it, might be worthy of enforcement, but it is certainly not clear that the court considers this aspect, but rather automatically grants access without considering the effect on the child. Even in the contested custody cases, where bitterness and resentment are particularly likely, in only one case was access denied, and in another its terms were set out.

[263] As yet unreported, 24 Nov. 1980 (Ont. C.A.) (citations hereafter refer to page numbers of the reasons for judgment).

> that the Commissioner should have done something about this. Because, for the reasons that have already been given, we consider it necessary that there be a new trial, it is not necessary to express a concluded opinion on this submission. However, this much can be said. A custody case, where the best interests of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. It is not necessary for us to go into details. In some instances it may well be sufficient for him to put the suggestion to counsel that a particular witness be called or information produced and, if the response is a negative one, to draw the appropriate inference from the absence of the evidence, depending on his assessment of the explanation given for such absence in all of the circumstances. In this particular case, it seems reasonably clear that the hearing would have been more satisfactory if the two persons mentioned had been called to give evidence.[264]

Active steps must also be taken to reduce the partisan character of expert evidence in custody and access proceedings. Such evidence merely compounds the difficulties encountered by the courts. The solution lies in the provision of facilities for independent expert evaluations.[265] Such facilities already exist in certain Canadian urban centres, including Toronto and Ottawa. Thus, the Family Court Clinic in Ottawa provides an interdisciplinary diagnostic approach to the resolution of custody and access problems and this facilitates both the judicial and non-judicial resolution of disputes. In other jurisdictions, mediation or conciliation services are used to facilitate the settlement of custody and access disputes. In California, for example, jurisdiction over child custody and access is vested in the Conciliation Court, and mandatory mediation of all such disputes has been introduced as of 1 January 1981.[266]

IV. General Conclusions

It is frequently asserted that divorce terminates the marital relationship but not the parent/child relationship. This generalization distorts the distinction between the legal divorce and the emotional divorce. All too often, the legal divorce and the emotional divorce are not coincident in point of time for one or both spouses. Lawyers frequently encounter situations where one spouse has resolved to terminate the marital relationship but the other spouse is unwilling or unable to accept that reality. In this situation, contested spousal litigation over property, support, custody or access often reflects the unresolved emotional divorce.

---

[264] *Id.* at 4-5.
[265] *See* text accompanying notes 271-73 *supra*.
[266] Cal. Civil Code s. 4607.

The liberalization of divorce laws in contemporary society offers little or no opportunity for legal dispute between the spouses respecting the proposed change of marital status. Furthermore, the adversary process precludes any realistic appraisal of the viability, if any, of the marital union. There is ample opportunity, however, for either spouse to contest the attendant issues of property rights, spousal or child support, or custody and access. The spouse who has not weathered the storm of the emotional divorce may, therefore, "displace" the non-justiciable issue relating to the preservation or dissolution of the marriage by fighting on any one or more of these collateral matters. Thus, in commenting on marriage breakdown during cohabitation, Paul Bohannan has observed:

> Difficulties arise . . . when marital conflict is side-tracked to false issues . . . , or when the emotional pressures are shunted to other areas. When a couple are afraid to fight over the real issue, they fight over something else — and perhaps never discover what the real issue was . . . . If it is impossible to know or admit what a fight is all about, then the embattled couple may cast about for areas of displacement, and they come up with money and sex, because both can be used as weapons. Often these are not the basis of the difficulties, which lie in unconscious or inadmissible areas.[267]

It is not surprising, therefore, that judicial divorce often does not terminate the hostilities arising from the emotional trauma of marriage breakdown. When the legal battles over property and support rights have been adjudicated by the courts, the most effective means of continuing the "spousal" conflict is through the children.

The multi-faceted aspects of divorce as a process[268] necessitates more than an adversarial legal response. In the words of Bohannan:

> A "successful" divorce begins with the realization by two people that they do not have any constructive future together. That decision itself is a recognition of the emotional divorce. It proceeds through the legal channels of undoing the wedding, through the economic division of property and arrangement for alimony and support. The successful divorce involves determining ways in which children can be informed, educated in their new roles, loved and provided for. It involves finding a new community. Finally, it involves finding your own autonomy as a person and as a personality.[269]

The special difficulties of securing a positive resolution of the divorce process when children have been born of the marriage are underlined in the following observations of Professor Andrew Watson, M.D.:

> When a marriage to which children have been born fails, the process of terminating it through divorce may range from difficult to impossible. The needs of the children and the child-needs of the parents will often ensure that the marital warfare which divorce was intended to resolve continues in kind if

---

[267] *The Six Stations of Divorce*, in DIVORCE AND AFTER 33, at 38 (P. Bohannan ed. 1971).

[268] *Id.* at 34-62.

[269] *Id.* at 62.

> not intensity. For many, the sought-after separation is frustrated because one or both spouses cannot discontinue the self-defeating patterns of behavior which brought them to divorce in the first place, and because they *must* continue to struggle with the ongoing problems of child rearing. When this happens, the social remedy of divorce has failed, and the ex-spouses and their children move into a group which is highly vulnerable to a multitude of maladaptive possibilities. This suggests that couples with children who seek divorce should be the objects of considerable professional attention from both the psychotherapeutic and the legal professions. Divorce is a crisis point in a family's life, and the combined skills of psychologically sophisticated lawyers and therapists sensitive to law will be needed if society is at least to minimize the unhappiness and the risk for those family members.[270]

It is clear that no single discipline has a monopoly on the knowledge required to promote a constructive resolution of access disputes. In the words of Meyer Elkin:

> In an area as complex and critical as custody, there is a pressing need for becoming more aware of what is in the best interest of the child, for developing criteria and guidelines underpinning the decision making process in custody and visitation and translating all this into practices that are more responsive to the needs of divorcing and divorced parents and their children. Neither the law alone nor the behavioral sciences alone can reach this goal. The search must be an interprofessional effort. If the law and the behavioral sciences are not responsive to each others findings and suggestions, both parents and children will suffer. The ultimate goal of divorce practices generally, and custody/visitation specifically, should be to insure the

---

[270] Watson, *Contested Divorces and Children: A Challenge for the Forensic Psychiatrist*, in LEGAL MEDICINE ANNUAL 489 (1973). Watson, *id.* at 491-92, also states:

> In some respects, the phenomena which unfold in the wake of a failing marriage are very similar to those which occur in response to any stress — they reflect a fight or a flight reaction. While few lawyers know Cannon's Law, they in fact work with its manifestations in many divorce actions. For example, if our hypothetical couple above had failed to resolve their problems, after they have fought and fled in various ways within the marriage, they may seek the social and legal resolution of flight through divorce. In advance of the divorce proceeding and while still aided by ignorance it may *seem* to them that divorce will terminate the marital conflict and the war will be concluded. More often than not this result appears to be true, but when there are children in the marriage it is not so easy. In the latter cases, providing the divorced parents love their children (which is the usual state of affairs), they will be forced into continuing contact by virtue of the need to provide ongoing care and to deal with a stream of decisions, such as education, summer vacation, medical problems, and the visitation rights of the noncustodial parent. Since much if not most of this contact will be in the context of some kind of decision-making, the old conflicts with their concomitant resolution-incompetence will be dragged into the open once more. Since the divorce process *per se* does not endow the parties with any new negotiation skills or interpersonal insights, the ancient warfare will most likely continue. However, there are a number of factors about the *way* a divorce is carried out that can either increase or decrease the likelihood of postdivorce feuding. Since we psychiatrists are deeply concerned with the healthy growth of children, we should see that these families become an important target for primary prevention in community mental health centers.

> maximization of human resources by minimizing the potential damage that is present for both parents and children in all divorce cases.
>
> There is no such thing as a simple custody/visitation determination. For in that determination we set the pattern of the future for not only the child but the parents. In the case of the child, he or she stands by helplessly as critical decisions are made about his or her life. We owe the children of all ages a custody/visitation determination based on a reasonable rationale and an awareness of what is in the child's best interest. A child is not a piece of property. A child is not a prize to be awarded to a winner. A child has rights. A child should not be used by the parent(s) as a convenient club with which to clobber the other parent. A child's future should not be snuffed out by the gales of rage generated by parents trying to emotionally end a broken but once cherished relationship.
>
> There is no one today who has the answers. Collectively we have a responsibility to search for answers so that when we say, "in the best interest of the child," we will truly know its meaning. Today, for the most part, this statement glibly rolls off the tongue into a pile of social gibberish that contains phrases that do not mean too much but sound good.
>
> It is important that the law and the behavioral sciences work together to find answers. Those involved in court-connected counseling services as well as researchers outside the court system are beginning to shed some light on the direction to take. They are raising important questions without which the search for answers cannot begin.[271]

Non-legal experts who are called upon to assist the family in the resolution of custody/access disputes may be acting in either of two capacities. They may establish contact with the family in a therapeutic setting, where their role is to remove emotional roadblocks to an amicable and reasonable resolution of the issues. Or they may be called upon by the lawyers or the courts to assume a diagnostic role for the purpose of providing expert opinion evidence concerning the most appropriate judicial disposition of the issues, having regard to the "best interests" of the child.

The ability of separated or divorced parents to cope with continuing parent/child relationships does not naturally flow from legal intervention or judicial dissolution of the marriage. In many instances, the preservation of positive relationships between the absent parent and the children requires that therapeutic counselling or mediation services be available to both parents, the children and, in appropriate cases, members of the extended family. As Elkin has observed:

> The two-home approach will only work in families where both parents can maintain an amicable relationship. It is possible for such relationships to exist between a divorced couple but they may need counseling help to attain this desireable [*sic*] relationship. This is another reason why all family courts and domestic relations courts should, whenever possible, provide court-connected marriage and family counseling services. Additionally, divorce courts should implement educational programs in the courthouse for divorcing parents so that these parents become more aware of the experience they are going through as well as prepare them for effective parenting during and after the divorce.

---

[271] Elkin, *supra* note 1, at iii.

> . . . .
> Effective parenting cannot be proclaimed by court edict alone nor can desireable [*sic*] human behavior be legislated. But, effective parenting can be encouraged and realized with expert educational-counseling help.
> . . . .
> The concept of a winner and loser has no place in custody matters. Our entire society should begin to think in terms of both families having ongoing responsibility and commitment to the child's physical and emotional welfare. The law can provide much needed leadership in moving society in that direction.
> In family law we should start with a simple premise that lawyers and judges are not marriage and family counselors and conversely that marriage and family counselors are not judges. From this it easily follows that both the law and counseling professions should cooperate and communicate with each other to a greater degree if families, and therefore society, are to be served. The skills of both professions are needed to help families involved in the crisis of divorce, which includes not only the legal divorce but the emotional divorce as well.
> . . . .
> The assumption is probably false that most divorcing parents can adequately deal with visitation problems. Many more probably need help with this than we realize.
> The goal of a court in custody/visitation disputes should be to create a climate for negotiation rather than merely determining the "best" parent.[272]

Although conciliation courts with counselling services have been established in California and some other jurisdictions, the conventional adversary process is still predominant in the judicial resolution of custody disputes. Given the inadequate response of this process to the constructive resolution of custody/access disputes, it becomes imperative to establish auxiliary counselling services, whether by way of staffing within the courts or by way of access to outside agencies or individuals with the requisite expertise. It should not be assumed that the availability of such services or facilities necessitates an undue expenditure of public funds. The experience in the Conciliation Court of Santa Clara, California, suggests that the non-judicial determination of custody/access disputes with the aid of court counsellors is time-saving and therefore cost-efficient, when compared to the traditional adversary process. W.W. Weiss and H.B. Collada have observed:

> Traditionally, custody and visitation litigation has been viewed with an aura of intensity requiring detailed investigation and voluminously written reports. Vast amounts of time and effort have been expended in collecting

---

[272] *Id.* at iv-v. Compare Awad & Parry, *supra* note 43, at 357:

> Agreement between the separating parents, taking into account the needs and wishes of the child, is ideally reached without recourse to the courts. Many couples at the point of separation can work out sensitive and viable arrangements for their children. Others can use the help of counsel. A further group may utilize the services of clinicians through a conciliation/mediation process to arrive at a mutually acceptable plan. There remains a small group who cannot use any means of voluntary dispute resolution. The dispute is intractable and must be settled through court order following clinical assessment.

> evidentiary material often irrelevant toward enhancing the family process. Although some cases do require this investigative approach, it has been our experience that many visitation and custody cases lend themselves to brief and incisive counseling intervention with positive results.
>
> . . . .
>
> Within a court system it is seldom that counselors have the opportunity to so consistently provide such a practical, immediate and salutary service to both the judiciary and public. Although as with all new procedures, there is a persistent need for reevaluation and adjustment, the benefits are clearly evident. One such benefit relates to the apparent decline in the recidivism or perennial re-appearance of certain cases. Another benefit is the economic practicality of this procedure. It is significantly less costly to involve a single counselor than a judge, clerk, reporter and bailiff in a trial setting.[273]

Conciliation or mediation procedures may also prove beneficial when problems respecting custody/access continue after judicial dissolution of the marriage. Although custody orders have some degree of finality in the absence of substantial change in the circumstances of either parent, access arrangements require modification from time to time as the child develops or new relationships are formed by the parents. For this reason, judges have recognized that parents may vary court-ordered terms of access without further need for judicial intervention.[274] In speaking of the benefits of post-dissolution counselling, F. Bienenfeld has observed:

> Post-dissolution visitation counselling in court settings is still very new. I consider it one of our most valuable services to the community. If help is not given in time to help these parents develop a cooperative post-dissolution parental relationship, great harm can result not only to their children, but their children's children. I believe that this post-dissolution visitation counseling service has the potential of being able to break this vicious cycle and help parents move forward, away from the hostility of the marriage. This helps the parents to become more helpful, effective and responsive to the needs of their children.
>
> This service to couples already divorced grew out of the court's ongoing concern for the best interests of the children. The success of this service cannot be measured only in terms of the number of amicable agreements reached. Either way, parents still take important things away from the counseling experience. At times, the parties that were unable to reach an agreement contact the Conciliation Court at a later date, willing to continue to work on unresolved problems.
>
> This service provides the opportunity for parents to leave the dark past and to take themselves and their children into the light once again.[275]

Too much emphasis may be placed, however, on court-connected counselling or conciliation services. Indeed, most behavioural scientists acknowledge that therapeutic counselling in family conflict situations must not be confined to circumstances in which litigation is imminent.

---

[273] *Role of the Conciliation Court in Visitation Disputes*, 12 CONC. CTS. REV. (no. 2) 21, at 21, 25-26 (1974).

[274] *See* text accompanying notes 54-61 *supra*.

[275] *Pay-offs of Post-Dissolution Visitation Counseling*, 12 CONC. CTS. REV. (no. 2) 27, at 32 (1974).

Quite apart from the notion of "too little, too late", the institution of legal proceedings in a traditional adversary setting will often, of itself, augment the hostilities between the spouses and parents with consequential injurious effects on the children. Furthermore, experience demonstrates that governments pay scant attention to opinions or research studies demonstrating the cost-saving characteristics of court-connected conciliation and mediation processes in the resolution of family disputes. Accordingly, the need for community-based conciliation or mediation facilities is self-evident.

The inadequacy of community-based services at the present time underlines the need for a more effective exchange of information between the interested professions and the development of more sophisticated educational and training programmes. Professor Andrew Watson, M.D., who has pioneered educational exchanges in the disciplines of psychiatry and law, has observed:

> It is commonly stated by lawyers and judges that psychiatrists are of little help in the legal resolution of marital difficulties. I would have to agree that all too often this is true, but the main reason is failure to communicate rather than failure to perceive the issues. It is regrettable when so much potentially useful information is not brought into the context of such an important social decision. While marriage counselors know many techniques for effective communication, they often lack the kind of psychological sophistication which could make their communications most meaningful. Psychoanalysts could be useful in training the marriage counselors who do so much of the divorce consultation work and will do more in the future. Learning may also take place in the opposite direction. We can learn from marriage counselors that active interpretive intervention can be very useful in situations of marriage stress . . . .
>
> Regardless of the success or failure of the marriage per se, effective psychodynamically-based intervention can at least help the parties to "break clean." As noted above, one of the most debilitating aspects of divorce is the continuation of the battle. If the couple has children, they will often be used as pawns in this battle, and any means that can effectively terminate the blind and symbolic fighting between the former spouses will be all to the good. For this reason, clarification even of a dissolving marriage will be useful.[276]

Speaking specifically to the need for interdisciplinary education for psychiatrists and lawyers, Watson has further stated:

> Every child therapist should *know* the implications of the law relating to custodial disposition so that he does not fall into the yawning chasms that lie before him if he does not take such legal considerations into account in his treatment plan. It is unconscionable to throw one or two years of a child's life in the balance just because the court cannot reach a decision owing to lack of appropriate evidence, especially when the evidence exists but has not been handled adequately because of therapist or lawyer ignorance. This kind of appreciation and consideration should be part of every decision to hospitalize a child or to place a child in a foster home. No move as important as that should be made without carefully weighing the decision in relation to its

---

[276] *Psychoanalysis and Divorce*, in THE MARRIAGE RELATIONSHIP 325-26 (S. Rosenbaum & I. Alger eds. 1968).

> effect on the evidence needed by the court for long-term disposition. Teaching and training in this kind of procedure should be added to the curriculum for all child therapists. Every institution that seeks to carry out its training goals appropriately should move swiftly to incorporate some of this important legal information into its program.
>
> On the other side of the same issue, lawyers need to be trained systematically to understand accurately what psychodiagnosis and psychotherapy are all about and what kinds of information psychotherapists can give and not give in relation to family problems. I am pleased to observe that during the seventeen years I have been a member of a law faculty, much change has taken place in this regard. For example, a whole new generation of text books has grown up around family law, for which psychiatrists have either been co-authors, or the writings of psychotherapists have been extensively incorporated into the text. Formerly, students of "domestic relations", as the courses were called, spent a great deal of time learning such things as how to calculate an appropriate alimony settlement while giving due consideration to the tax implications of various alternatives. This kind of course orientation is fast becoming a thing of the past. Now psychiatrists, psychologists, and social workers are often included in the classroom teaching, not only to help students learn the relevant theoretical material, but also to initiate the process of learning about the emotional problems a lawyer must face when he deals with the distraught clients who are swept into the maelstrom of impending or threatened divorce.[277]

It is not sufficient, however, to establish a limited class of specialists whose intervention is triggered only by the institution of legal proceedings. Medical practitioners in general practice must be alerted to the physical and emotional consequences of stress resulting from marriage breakdown or family crisis and their professional training must equip them to treat the family unit as a whole so as to alleviate these problems. Counselling family members in distress is also a function of organized religions and adequate professional training is here again vital. What is required is a network of professionals in the community to assist families in crisis. This necessitates more effective communication and coordination between the diverse professions and between the existing community resources.

---

[277] *Supra* note 270, at 499.

[278] *See also* PROPOSED RULES OF CIVIL PROCEDURE, REPORT OF CIVIL PROCEDURE REVISION COMM. (Williston Chairman 1980), rule 73.04(3), (4):

> (3) *Assessment*
>
> (a) In any proceeding where the custody of or access to a child is in issue, the court may, at any time and upon such terms as may seem just, appoint a qualified person to assess the needs of the child and the ability of any persons to meet those needs to whom the custody of or access to the child might be awarded, and order the child and any such persons to attend before the person so appointed.
>
> (b) Any person appointed by the court to make such an assessment shall file a full report of his assessment with the court and serve a copy thereof on each of the parties to the proceeding within the time prescribed by the order appointing him.
>
> (c) Any such person may be a witness in the proceeding and, if called as a witness, shall be subject to cross-examination by any party to the proceeding.

Diagnostic services staffed by a team of professionals must also be established in major urban centres in order for the courts to determine more effectively the "best interests" of the child in custody/access disputes. The Family Court Clinic in Ottawa and the Clarke Institute of Psychiatry in Toronto constitute possible models for province-wide or even nation-wide diagnostic services. These facilities provide an opportunity for independent expert evidence to be adduced in litigation to the exclusion of partisan expert opinion.[278]

Destructive processes must be eliminated from the judicial resolution of custody/access disputes. Legal and social policies must focus on maintaining positive parent/child relationships. If conciliation or mediation are to constitute effective alternatives to the litigation process, any communications made during such conferences must be inadmissible as evidence in legal proceedings.[279]

Children should be entitled to be consulted at all times and have independent legal representation in court if the judge considers this necessary to protect their interests.[280]

---

(4) *Remuneration*

The court may fix the remuneration of any person appointed under this sub-rule, and shall determine the liability of the parties for the remuneration of any such person.

[279] Compare Divorce Act, *supra* note 193, s. 21:

21.(1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose.

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings.

See also PROPOSED RULES OF CIVIL PROCEDURE, *supra* note 278, rule 73.04(2):

(2) *Mediation*

(a) In any proceeding where the custody of or access to a child is in issue, the court may, at any time and upon such terms as may seem just, appoint a qualified person to act as a mediator for the purpose of assisting the parties to resolve, by agreement, any issue concerning the custody of, or access to, a child.

(b) Any communication made in the course of the mediation process shall be privileged and no report of the mediator shall be admitted in evidence nor shall he be called as a witness at the trial or hearing of the proceeding.

See also rule 73.04(4), *supra* note 278.

[280] Compare The Child Welfare Act, 1978, S.O. 1978, c. 85, s. 20:

20.—(1) A child may have legal representation at any stage in proceedings under this Part.

(2) Where on an application under this Part a child does not have legal representation, the court shall as soon as practicable in the proceedings, determine whether legal representation is desirable to protect the interests of the child and if at that or any later stage in the proceedings the court determines that legal representation is desirable the court shall direct that legal representation be provided for the child.

In accordance with the recommendations of The Law Reform Commission of Canada,[281] it is submitted that whenever custody or access is in dispute in non-divorce proceedings or whenever a judicial divorce is sought, whether contested or uncontested, the law should require an "assessment conference" involving the parents, children and, where appropriate, members of the extended family. This conference should be informal in character and might take place before a court-appointed conciliator or in a community-based service. The purposes of the conference would be as follows:

(i) to ascertain whether appropriate arrangements have been made for continued parenting of the children and, if not, to determine whether such arrangements can be worked out by agreement;

(ii) to acquaint all family members with the available resources in the community or the court that can assist in negotiating reasonable arrangements for continued parenting;

(iii) to ascertain the need for mandatory mediation in the absence of an agreement being reached concerning continued parenting;

(iv) to ascertain the wishes of the children as well as those of the parents and members of the extended family;

(v) to ascertain whether the children require independent legal representation;

(vi) to ascertain whether a mandatory independent psychiatric or psychological assessment is required; and

(vii) to ascertain whether a formal investigative report by a public authority, such as the Official Guardian, is required.[282]

Changes in substantive law are also necessary to displace the conventional judicial reliance on outmoded presumptions and preconceptions. Specific statutory guidelines must be provided to assist the court in determining what access, if any, is in the "best interests" of the child and whether joint custody is a viable alternative to the traditional order granting "sole custody" to one parent and "reasonable access" to the other.[283] Although detailed statutory guidelines have been formulated in several jurisdictions to define the "best interests" of the child so far as

---

See also PROPOSED RULES OF CIVIL PROCEDURE, *supra* note 278, rule 73.04(1):

> (1) *Separate Representation for Children*
> In any proceeding where the custody of or access to a child is in issue, the court may, where it appears necessary in the interests of the child so to do, order that any such child be separately represented in a proceeding by a solicitor appointed by the court.

See also rule 73.04(4), *supra* note 278.

[281] REPORT ON FAMILY LAW (Hartt Chairman 1976).

[282] *See Children and the Dissolution of Marriage*, in REPORT ON FAMILY LAW, *id.*, at 45-68. *See also* Gosse & Payne, *Children of Divorcing Spouses: Proposals for Reform*, in THE LAW REFORM COMMISSION OF CANADA, STUDIES ON DIVORCE 99-203 (1975).

[283] For recent legislation in California establishing a presumption in favour of joint custody, *see* Assembly Bill 1480, CAL. CIV. CODE s. 4600 (*in force* 1 Jan. 1980).

custody is concerned,[284] no corresponding guidance has been offered the court in adjudicating access. In the absence of specific guidelines, it is not surprising that access is often relegated to the status of an afterthought.

Neither procedural nor substantive changes in the law can operate in isolation. Substantive changes cannot operate in a procedural vacuum, nor can procedural changes be simply superimposed on the traditional adversary process.

The court should be a forum of last resort and greater efforts must be made to facilitate self-determination rather than adversarial judicial intervention. As Professor Andrew Watson has observed, the present adversarial atmosphere of the courtroom inevitably mobilizes "the fight potential of both parties."[285] Furthermore, court-imposed rights and responsibilities concerning custody and access are much less likely to be observed than arrangements that have been determined by the agreement of all affected family members. The ultimate responsibility for good parenting lies with the individuals involved rather than in any structural process, be it legal or otherwise. Experts in all disciplines increasingly recognize that the affected persons must assume a greater input into future decision-making. In the words of Meyer Elkin:

> Family law courts should allow divorcing couples more self-determination. It is their lives that are involved. It is their future. They should therefore be encouraged and allowed to play a greater part in the decision-making process, particularly in matters like custody and visitation. Rather than fostering increased dependency on the court, these couples should be encouraged to accept more responsibility for decisions affecting their lives and their children. If the anger is too great; if the communication between the parties is broken down, the impulse of the court should be to refer the couples to a court-connected marriage and family counselor before proceeding with the adversary process. Let us not underestimate the ability of divorcing persons to help themselves in their crisis. Let us not rob them of the opportunity to grow with the crisis. More self-determination, when appropriate, increases the chances for this to happen.[286]

---

[284] *See, e.g.*, Child Custody Act, MICH. COMP. LAWS ANN. s. 722.2. *See also* The Infants Act, R.S.S. 1978, c. I-9, s. 3. Compare Awad & Parry, *supra* note 43, at 357-58, citing Lewis, *The Latency Child on a Custody Conflict*, 13 J. AM. ACAD. CHILD PSYCHIATRY 635 (1974):

> Lewis suggests three categories of need as guidelines in assessing custody and access disputes involving a latency age child:
> - the need for stimulation of intellectual, emotional and social interests inside and outside the family;
> - the need for an environment that promotes increasing stability of ego and superego functions and avoids identifications; and
> - the need for appropriate disengagement from psychological dependence on the parents.

[285] *Supra* note 270, at 492.

[286] Elkin, *supra* note 1, at iv. *See also* Awad & Parry, *supra* note 43, at 360-61:

> The importance of encouraging parents to undertake the planning of access themselves cannot be over-estimated. It is useful to think of access as a continuing process reflecting adaptation to the changing developmental

It might be argued that any right of self-determination is impractical because of the conflict of interest between the rights of the child and those of the parents. It is misleading, however, to regard access as a right of the child rather than a right of the parents or vice versa. Often, the best interests of the child will coincide with the best interests of both parents. Provided that the "war games" flowing from an unresolved emotional divorce are halted, there are few obstacles to meaningful relationships between the child and each parent. As Meyer Elkin has observed:

> We cannot serve the best interest of the child without serving the best interests of the parental relationship. The two cannot be separated. The kind of relationship the parents maintain during the divorce and after the divorce will have a significant impact on the children involved — for better or for worse.
>
> . . . .
>
> A custody proceeding that focuses solely on what is in the best interest of the child is too restrictive an approach. More realistically we should also strive for what is in the best interest of the family.[287]

---

needs of the child and the changing circumstances of the parents' [lives]. If parents can agree about access, their plan should be accepted even if it is unusual or unorthodox. The court should only satisfy itself that there are no obvious disadvantages to the child.

. . . .

The important point to stress is the need for flexibility and that helping the parents reach a plan on their own is more important than the plan itself. The only limitation to the plans that can be developed is the limitation to our creativity. In our experience, access arrangements may be as varied and creative as the needs of the child and the parents require. The essential ingredients are the family members' comfort with the plan and their flexibility in devising adaptations as needed.

[287] Elkin, *supra* note 1, at iii-v.

APPENDIX

PROPOSED VISITING CODE*

Needs of children

All young children NEED to have the opportunity to love and be loved by both parents, in security. They NEED to be able to enjoy parental love without tension, and without being made to feel guilty through the jealousy or demands of either or both parents. A balanced and stable love relationship with both parents is the best introduction to the formation of relationships with their contemporaries of both sexes.

Children of estranged, separated and divorced parents particularly NEED to be able to enjoy both parents without seductive or hostile pressures by either, without questioning, devaluation, smear or recrimination by either parent, and without disturbing the normal rhythms of life or being made conspicuous among other children.

Children NEED to see their estranged parents behaving towards each other if not with warmth and understanding, then at least with courtesy and consideration. Their most important NEED in this connection is that both parents accept that visits are primarily the right of the child and not that of the parent.

Needs of estranged, separated and divorced parents

Both parents NEED to feel secure in their children's love, and to be able to receive love and express their own without competition. To be with their children only in public places is not enough. All parents NEED opportunities to relate to their children in the more intimate scenes of life and when their children are in trouble.

Both parents NEED to be able to look to the future and perhaps to form new relationships of their own that can include, in appropriate ways, the children of their broken marriage.

Some common misconceptions

When children are unhappy or disturbed by parental visits, the parents with care and the visiting parents commonly come to conflicting conclusions about the causes. For example:

---

* Reprinted by consent from PARENTAL RIGHTS AND DUTIES AND CUSTODY SUITS (British Section of the Int'l Comm'n of Jurists 1975). *See also* PARENTS ARE FOREVER (Ass'n of Family Conciliation Cts., Fla., U.S.). And *see* Awad & Parry, *supra* note 43, at 361.

Parents with care	*Visiting parents*
1. That children's anxiety about parental visits, unwillingness to go, and attempts to refuse are due to:	
fear, dislike of, or anger with the visiting parents.	indoctrination by, or the children's need to curry favour with, the parents with care.
2. That children's eagerness to go with the visiting parents is due to:	
the visiting parents' bribery, promises and "spoiling."	the children's eagerness to see them and to get away from the parents with care.
3. That children's hostility and rudeness to the visiting parents when with the latter is due to:	
fear or dislike of, or anger with, the visiting parent.	indoctrination by the parent with care.
4. That children's unwillingness to part from the visiting parents is due to:	
bribery and spoiling by the visiting parent.	love for and desire to stay with them the visiting parent.
5. That children's rudeness, hostility, sleep disturbances, etc. on return are due to:	
indoctrination and bribery by the visiting parent.	dislike of, or anger with the parent with care, or fear of recrimination because of enjoyment of the visit.
6. That the remedy for these difficulties is:	
to reduce or deny access.	to obtain care of the children themselves.

Any or all of these conclusions are likely to be false, though, of course, they may be true sometimes. When children spend nearly all their time in the care of one parent on whom they depend for food and pleasure and all the solid satisfactions of childhood, and for daily help in petty troubles, this parent will probably be paramount in their regard.

Visiting parents may have no more than three or four hours each week in which to influence their children; often they are allowed to be with them only in public places. Many visiting parents feel constrained to

compete with the parent with care by giving lavish presents and making promises out of their power to keep.

In such circumstances the influence of visiting parents is weak in comparison with that of parents with care; and it follows that disturbances in the children are more likely to result from the attitudes to the visits of the parent with care than from the conduct of the visiting parent. Reduction of access may be followed by less visible disturbance, but it is not reasonable to suppose that reduction will help to resolve problems arising out of children's need to love both parents; the contrary is more likely.

How can childrens' needs be supplied?

1. The children's need to feel that both parents approve of the visit can be supplied, partially at least, by customarily arranging the handover and return from parent to parent with a few minutes conversation, a cup of tea or whatever may be helpful. Parents with care would be wise to try to share in the children's pleasure from the visit.

2. Visiting parents should ideally have a home to which to take the children. Parks, restaurants, cinemas and visits to the seaside are not the staple fare of parent-child relationships. Wherever possible, short staying access should be allowed to provide the intimacy lacking in day visits; but obviously in the case of very young children in the care of their mother, this is impracticable unless an appropriate mother-figure is available in the other home.

Pre-school children

In principle, visits should be frequent (but not more often than weekly), usually for half a day and should include a major meal. Some children can enjoy whole-day visits and where conditions are suitable overnight stays, say, one or two nights at one or two monthly intervals, can be beneficial. The children's response is the best guide.

Complete regularity of day and time each week can interfere with children's normal social lives and tie down both parents unnecessarily. It is better to vary the day, provided the children understand why. Generous parental attitudes about variations and absences, and also occasional unexpected "treats" (which should be fixed in advance by the parents) can do a lot of good all round.

Older children

In principle, visits can be less frequent, perhaps less than once a week unless the children ask for more. Visits should last all day, with appropriate meals. Staying access is important. An unvarying weekly time for the visit can seriously interfere with school children's normal

lives, deprive them of social opportunities and also make them conspicuous.

Many school children, and their parents, prefer not to have regular day visits but to arrange, say, a long weekend a month, with week-long staying access during Christmas and Easter school holidays and a fortnight or more in the summer. It is usually a good idea to arrange some more casual day visits or relatively unplanned excursions (cleared in advance with the parent with care).

Where children are at boarding school the plan of visiting during term time and holiday stays need thinking out as a whole, in consultation with the children, who must always be told in advance the reasons for any change of plan, or telephoned personally in the event of an unforeseen problem.

REMEMBER that to those (many) children who want nothing other than to live happily with both parents, parental visits can be recurrent reminders of their unhappiness.

Parents who love their children will be at great pains to give their children as much happiness and as little pain as possible in connection with the visits.

Some important DON'TS for parents

(a) DON'T make standing arrangements inconvenient to any party so that there is a "built-in" strain.

(b) DON'T be rigidly regular — always the same day and time each week can easily become a bind.

(c) DON'T forget the children's private lives — *e.g.* a favourite weekly "telly" programme, other children's birthday parties, etc.

(d) DON'T have a pre-school child taken out of its usual home too frequently — visiting more frequently than weekly, if desired by the child, may well be better arranged at the child's home.

(e) DON'T carp or criticise before, during or after access visits — the child may be hurt.

(f) DON'T force the visiting parent to rely on tea-shops, the park and the cinema — this soon becomes trying for both parties and may lead the parent to bribe and promise pies in the sky.

(g) DON'T regularly arrange for the hand-over and return of the child to be undertaken by a third party, for example, a grandparent or other relative, or a universal aunt or solicitor's clerk. A civil and courteous exchange, even if very brief, between estranged, separated or divorced parents can be very valuable to the child, who needs to be able to love both parents without feeling guilty.

(h) DON'T send anybody as a bodyguard or spy on staying visits; this defeats the main object of the stay and injects dangerous tension into the visit. This is not to say that a person should not be present, if this be the wish of both parents — and the child.

(j) DON'T try to bribe the child with presents or promises; although they may accept them, children will usually see through the reason for them and no one will benefit.

ABOVE ALL, remember that access visits are for the good of the child and are not a parental right; that perceptible acrimony between parents may ruin the visit for the child, and that sensitive children may well feel humiliated at being apparently the cause of fights between the two people they love most.