ACCESS IN CHILD PROTECTION CASES

This paper is intended to remind parents' counsel of the basic issues that impact upon their clients' continued relationship with their children while *Child and Family Services Act* proceedings unfold. Each case will, of course, turn on its own facts. There are, however, some common factors at play, no matter what, where or how the issues came before the court. Many of these recommendations are not related to our legislation but rather derive from an absence of funding for basic services and the consequential need for lawyers to perform tasks that fall outside of normal legal services. We are not meant to be baby-sitters or chauffeurs but sometimes, that will be the nature of the job.

Access in Child Protection Cases: Winning or losing a case hour by hour (1)

Access decisions under the *Child and Family Services Act* (the CFSA) are always supposed to be made on the basis of the child's best interests. The factors to be considered in determining the child's best interests are set out in subsection 37(3). For the most part, these factors mirror those enumerated in subsection 24(2) of the *Children's Law Reform Act* (the CLRA) although the specific language varies in some respects. For example "continuity of care" under the CFSA, is rendered as "the length of time the child has lived in a stable home environment" under the CLRA. Generally speaking, the substantive differences between the provisions can be attributed to the fact that determinations under the CLRA typically entail competing plans proposed by litigants who already share some existing familial association with the child whereas,

under the CFSA, the court is faced with a contest between the state, a stranger to the child, and a related existing or potential caregiver to the child.

Consequently, for example, religious and cultural considerations are discretely identified as necessary “best interests” considerations under the CFSA but not under the CLRA. In a dispute between separated parents, it is to be assumed that the child shares existing or potential religious, ethnic, racial and cultural interests with each parent. One parent’s hostility or indifference to the interests of the other parent in these matters may be weighed in the context of that parent’s ability to foster a positive relationship between the child and the other parent, however, each will be assumed to contribute to the child’s global heritage.

The state shares no history, genetically, culturally, spiritually, or otherwise, with the child or her parents. The CFSA court is, therefore, directed to specifically consider the ability and willingness of the state to address these interests. While the CFSA is drafted to reflect sensitivity to these issues, in reality, pre- disposition access decisions rarely turn on these factors. The ethnicity, race, religion, cultural attachments or, even, language of temporary foster placements is seldom known much less, if ever, given serious consideration at any point before the final disposition of the application. The fact that a Catholic-Filipino child is placed in a Caucasian-Baptist foster home is unlikely to affect any decision regarding access between that child and her parents. The prevailing philosophy is that ‘you take what you can get and hope that they are not paedophiles or otherwise abusive to children’. On the other hand, it could be argued that the

availability of volunteer drivers, although in no way legislatively prescribed, has become a governing factor in determining access arrangements between children in care and their parents and siblings.

The single greatest distinction between the best interests analysis for access purposes under the CFSA versus the CLRA has its foundation in subsection 1(1) of the CFSA; the "**paramount purpose**". The section reads, "The **paramount purpose** of this Act is to promote the best interests, protection and well being of children". Subsection 1(2) goes on to enumerate a variety of other purposes, namely:

The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children are:

1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on a voluntary basis of mutual consent.

2. To recognize that the least disruptive course of action that is available is appropriate in a particular case to help a child should be considered,

3. To recognize that children's services should be provided in a manner that,
   i. respects a child's need for continuity of care and for stable relationships within a family an d cultural environment,
   ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children,
   iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interest, and

iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.

4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

5. To recognize that Indian and native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

All of these factors used to have undifferentiated statutory significance. The decision to amend the legislation to give paramountcy to the "promotion of the best interests, protection and well being of children" seems to have been widely interpreted to mean "protection", even against unproven, vague, and, sometimes speculative, risk of harm, trumps every other consideration identified in subsection 1(2). Chronic underfunding and resource shortages render most of the "secondary" factors irrelevant in the view of the societies. If a family's religious or cultural observances involve "out of office" hours resource demands , and, consequently increased costs, they will simply be disregarded in the vast majority of cases. Parents 'counsel need to advocate vigorously and creatively to develop access plans that afford the child an opportunity to spend meaningful time with her parents within their community where ever possible.

It is axiomatic to state that every case commenced under the CFSA raises at least a *prima facie* issue regarding the need for “protection” of the child. The critical issue is to define the nature of the protection concern(s) and the manner in which the concern(s) can be addressed through conditions shaping the frequency, timing, location, supervision and purpose of the access. The purpose of access shifts over the course of a child protection proceeding and that, too, will affect which of the enumerated secondary “best interests” factors are given priority.

Access between the parent and the child at the pre-disposition stage will have a critical impact upon the ultimate disposition of the case. Child protection litigation is notoriously fraught with systemic delay. If a parent is unable to maintain a meaningful connection with the child pending determination of the application, the parent-child relationship may be irremediably damaged which will, in turn, impact upon the ultimate disposition of the matter. After the court determines that a child is in need of protection and should remain in the care of the society, permanently or for a specified period of time, an entirely different set of considerations regarding parental access applies.

Parents must provide concrete plans for access at each stage of the proceedings having regard to the applicable statutory provisions and the specific allegations of risk made by the society.

Sections 51, 58, 59 and 65 are the primary provisions governing access in child protection proceedings.

Temporary access orders : The hours (and minutes) count

Subsection 51(5) prescribes that, when making a temporary custody order in favour of the society or any person other than the person who had charge of the child prior to intervention by the society, the court may include provisions regarding **"any person's right of access to the child on such terms and conditions as the court considers appropriate"**. Subsection 51(6) provides that these orders may be varied or terminated at any time. These are the orders that will win or lose the case for parents and their children. Particularly where the subject child is an infant (See the materials distributed regarding developmental stages), it is critical that the parents have the opportunity to have meaningful contact with the child in order to develop and maintain a relationship with her. Practically, this means that every hour, every minute, counts. As observed by Justice Katarynych in *The Children's Aid Society of Toronto v. M. (A.)*

> It is fundamentally unfair at the earliest stages of a court case to provide a level of access that in its effect sets the child on the path to a loss of his family. [The child]'s opportunity for relationship with his family is not extinguished by the fact that he was taken into foster care. Possession of the child pending adjudication of a protection application is not license to ignore the fact that the society's authority of the child is temporary, that there has been no judicial finding that this child is in need of protection at all – much less to the degree alleged by the society – and that the outcome of the protection application is unknown to any of the parties. The society's apprehension of the child from his mother's care had already disrupted a process of parent-child

attachment that had barely begun. The uncertainty of outcome makes it particularly important that the society arrange parent-and-child access in a manner that does not create an ever-widening chasm between the child and his family.(2)

Virtually every children's aid society, when it has apprehended a child or otherwise brought the child into its care, will ask that access between the subject child and the parent(s) be at its discretion. Parents must vigorously oppose this request and seek at least an order that, at least, specifies the minimum frequency and duration of access and stipulates whether supervision is required and, if so, by whom.

The concept of "access at the discretion of the society" orders is extraordinary. Imagine a hockey game where one team gets to decide when, where and how often the other team gets to have contact with the puck. Or, as more eloquently articulated by Goodman, J.:

> Yet, I do find it difficult to accept that the legislature ever intended to leave decisions regarding access to children in the hands of one of the litigants, itself, particularly where children have no right of access to their parents unless an order for access is made under Part III. (See subsection 103(2) of the CFSA). While I can certainly understand some of the reasons why it would be efficient, time – and or cost-wise to delegate access issues to the CAS, children and their parents have a right, in my view, to have decisions in respect of access made in an objective and neutral manner. One would expect that it would be rare, if ever, that legislation would authorize a court to delegate its judicial functions to any third party who/which is a party to the litigation, when neutrality and objectivity are so vital to the decision-making process. In my view, simply put and at least on a final basis, the CFSA does not permit, either

expressly or by implication, the court to delegate its authority to make orders in respect of access under section 58 to any person or entity, including the CAS.(3)

There is conflicting case law regarding the legitimacy of these “access at the discretion” orders. Goodman, J.’s case cited above provides a useful summary of the case history. In practice, such orders continue to be routinely requested by societies and assented to by parents.

As parents’ counsel, you must develop a plan for access that specifically, and proactively, addresses the safety concerns identified by the society. Without conceding the society’s allegations, the prudent course is to proceed on an “even if so” plan. If the society’s concern is that the parent physically abuses the child, concede the need for supervision without acknowledging culpability. It doesn’t, however, have to be society supervision and, whenever possible, should not be exclusively society supervision. Children’s aid societies, and some courts, have a tendency to view family members as natural conspirators in the abuse or neglect of children despite the absence of any prior record of criminal or unlawful conduct. Get records checks, reference letters and background information on potentially helpful family and community members at the earliest opportunity in order to present them as potential supervisors. Where the parent client is involved with any community resources (e.g. the Massey Centre, the June Callwood Centre, Rosalie Hall, etc...), determine whether those resources can/will facilitate access visits. If a society has apprehended a child on the basis that a mother is young and has no parenting experience, for instance, a proposal that the mother and

child attend regular infant care coaching sessions at a community clinic can be used as an access opportunity. The society is less likely to claim that the Massey Centre is going to permit the parent to drop the baby on its head than that her mother would cover up such an event in order to protect her daughter, the mother.

It is infinitely preferable that access be arranged to occur through a third party not adverse to the parent's interests. Positive observations by persons with some expertise (academic or experiential) in child development and or parenting capacity can be used very effectively to expand temporary access arrangements as well as to enhance the parent's case at trial. While most child protection clients are of modest means, precluding the opportunity to retain independent professionals, the evidence of day care centre workers, parenting course instructors and sometimes even other parents can be helpful.

It must be assumed that every time a parent attends a supervised access visit at the society offices, he or she is being scrutinized for failings rather than being assessed or encouraged in areas of strength. Expect detailed notes about every late arrival by a parent, whether it is by three or four minutes or an hour, but little will be said about the many occasions when she arrived 45 minutes early; unless it is to suggest that she is disorganized and/or compulsive. A parent who is exuberant upon the arrival of the child at a visit will be characterized as "emotional". If she is subdued, she will be described as "indifferent". Regular and frequent disclosure of access observation notes must be

requested in order to anticipate and address the criticisms that will be levelled by the society against the parent.

Once a child has been apprehended, or otherwise placed in care, an institutional bias is established. The society will want to justify its decision in removing the child from the parent's charge and, in doing so, will seek, not necessarily consciously, to vilify the parent. Volumes have been written about child protection proceedings not being adversarial in nature. That is pure Utopian fiction. If the society was inclined to work with the parent in a non-adversarial manner, your services would be unnecessary or marginal.

Temporary access orders are not written in stone. If you are unable to persuade the society to liberalize access in the face of a series of successful visits there is no prohibition against bringing the matter back to court. If the society proposes to curtail access due to drivers' or workers' unavailability or because of foster parent s' vacation plans or other issues of convenience, seek the assistance of the court. Should the society decide to reduce or eliminate access because it has decided internally, prior to judicial determination, that the child should be made a Crown ward and that access is, therefore, no longer beneficial move immediately for relief to address the issue of access between the parent and child. Unlike the CLRA, the CFSA does not require a material change in circumstances to vary a temporary access order:

Unlike section 29 of the *Children's Law Reform Act*, R.S.O, 1990, c. C-12, as amended, the variation power under subsection 51(6) of the Act does not include such limiting words as "material change in circumstances that affects or is likely to affect the best interests of the child. Subsection 51(6) contains no statutory threshold that must be met before a variation motion may be entertained. The reason for not fettering the court's jurisdiction to change an order relates, no doubt, to the very nature of the temporary order sought to be varied. Such orders are made prior to any finding that a child is in need of protection, but after state intervention that frequently results in the removal of children from their homes. Subsection 51(6) is drafted in such a way that any change in circumstances is capable of supporting a change in the temporary order, provided it supports the primary and secondary purposes of the Act as set out in section 1 and is the least disruptive order appropriate in the circumstances. I am ever cognizant of both the need to protect children and the need to preserve family unity, if possible. The court must balance a child's need for stability against the risk that an unnecessary delay in returning a child to his or her family may result in the child's forming new primary attachments with current caregivers that will be a factor that must be considered at the dispositional hearing should a finding be made."(4)

Final Access Orders: The end game

The statutory presumptions about access alter significantly in the context of the final disposition of an application under the CFSA. Prior to a finding that a child is in need of protection, the onus will be upon the society to demonstrate why access by parents should be restricted in the interests of the child. Once a finding has been made the onus shifts depending upon the nature of the dispositional order made by the court whether under section 57 or section 65. The operative section for access orders is section 58 which provides that the court may, in the child's best interests, when making an order under Part III, make, vary or terminate an order respecting a person's access

to the child or the child's access to a person, and may impose such terms and conditions on the order as the court considers appropriate.

Section 59 prescribes the court's discretion over access when making an order removing the child from the care of the parents.

Where an order is made under paragraph 1 or 2 of subsection 57(1) removing a child from the person who had charge of the child immediately before intervention under this Part, **the court shall make an order for access** by the person unless the court is satisfied that continued contact with him or her would not be in the child's best interests....

If a custody order is made under section 57.1 removing a child from the person who had charge of the child immediately before intervention under this Part, **the court shall make an order for access by the person unless the court is satisfied that continued contact will not be in the child's best interests.**

If an order is made for supervision under clause 65.2(1)(a) or for custody under clause 65.2(1)(b), **the court shall make an order for access by every person who had access before the application for the order was made under section 65.1, unless the court is satisfied that continued contact will not be in the child's best interests.**

Where the court makes an order that a child be made a ward of the Crown, **any order for access made under this Part with respect to the child is terminated.**

A court shall not make or vary an access order made under section 58 with respect to a Crown ward unless the court is satisfied that,

(a) the relationship between the person and the child is beneficial and meaningful to the child; and

(b) the ordered access will not impair the child's future opportunities for adoption.

So, where a child is made a Society ward or placed in the custody of someone other than the parent, whether under a supervision order or a 57.1 custody order, there is a presumption in favour of access by the parent(s). The task for parents' counsel is, as with temporary access orders, to attempt to obtain as much access as possible and to ensure that any restrictions are necessarily related to the specific finding(s) that has been made. If, for example, a finding has been based upon a parent's inability or unwillingness to obtain treatment for an identified health condition then the only restrictions upon access should be those that are reasonably necessary to protect the course of treatment.

If, however, the child is made a Crown ward any existing access order is terminated and no further order may be made unless the conjunctive test set out in subsection 59(2.1) is met. The dual criteria of an existing beneficial and meaningful relationship between the child and the parent **and** that the access order not pose an impediment to adoption presents a daunting challenge to any parent seeking access to a Crown ward.

Any access order precludes the placement of a child for adoption. Societies take the position that they will not even investigate the possibility of prospective adoptive

placements if there is an access order made (see CAST v. P. (D.) at footnote (3), paragraph 26; and see footnote (2)). Societies routinely call their adoption workers to say that every child is adoptable. The practical implication of this provision in the legislation is that unless a serious challenge to the society's representations regarding adoptability is brought, parents will be hard pressed to meet the test for obtaining an access order in the event that the child is made a Crown ward. I have heard submissions by the society that even where a child over the age of seven is expressing a clear desire for a continuing relationship with his parents the court should not be concerned about the child's ultimate consent to an adoption because once he is cut off from contact with his family of origin and "prepped" to move on to an adoptive home, he is likely to relent and give his consent. And, no, the child's counsel did not object to this submission.

Conclusion

Within the context of domestic custody and access proceedings, judges and lawyers are quick to use the phrase that "access is the right of the child". We operate from the presumption that every child is entitled to enjoy a meaningful relationship with each of his or her parents. Parents who unduly restrict or deny the child's opportunity to develop or maintain such a relationship with the other parent face the ire and, sometimes, sanctions of the court (see Filaber et al).

The precise nature, frequency and duration of access arrangements will vary in accordance with a number of factors linked to the “best interests” of the child and will evolve over time. The child’s age and stage of development are taken into account in devising appropriate access schemes. Proximity of parental homes, compatible parenting styles and the child’s extra-familial commitments are important considerations. However, there has, over at least the last decade, been a clear shift toward “maximum” contact as a goal to ensure that children do not experience either parent as a marginal figure in their upbringing. The parent-child relationship is recognized as having intrinsic value in all but the most exceptional cases.

Notwithstanding that access orders in the child protection context are also prescribed to be made in accordance with the “best interests” of the child, the reality is that, in too many cases, factors extraneous to the needs of the child or the circumstances of the family dictate the nature and quality of contact that is permitted to occur between children in care and their parents. It is crucial to acknowledge that the critical distinction between child protection cases and the majority of domestic cases is that some specific type of harm or risk of harm, that has led the Society to bring the child into care and the court to, at least temporarily, endorse that decision, is purported to exist in the parent-child relationship. Clearly, access arrangements must be tailored to minimize the child’s exposure to the alleged cause(s) for protection concerns. Unfortunately, there is far too seldom a considered, purposive analysis of risks versus benefits when these access orders are made. Instead, budgetary constraints, scarcity of foster placements and resource deficiencies are often what determine the fate of parent-child relationships

once protection proceedings have been commenced. Children will frequently see their parents only briefly once per week due to transportation issues. This is a profound systemic failure for which children, their parents and our society suffer greatly.

Footnotes

1. Credit goes to Justice Stan Sherr for coining and repeating this phrase.
2. *The Children's Aid Society of Toronto v. M. (A.)* 2002 CarswellOntario 1051, Katarynych, J.
3. *The Children's Aid Society of Toronto v. P. (D.)* 2005 CarswellOntario 922*,* Goodman, J.
4. *The Children's Aid Society of Toronto v. M.(D.)* 2002 CarswellOntario 154, Jones, J.

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