

**Ministry of Attorney General
Justice Services Branch
Civil and Family Law Policy Office**

Family Relations Act Review

Chapter 7

Meeting Access Responsibilities

Discussion Paper

**Prepared by the Civil and Family Law Policy
Office**

April 2007

This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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SETTING THE SCENE**The *Family Relations Act* Review &
The 2005 Report of the Family Justice Reform Working Group**

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*.¹ The law can offer only part of the answer to the question of what to do when parents do not follow access orders and agreements, but the focus of this paper is on law reform. Family justice programs and services are another important response to access-related difficulties and there are ongoing initiatives on that front as well. Some of these are listed below; for more information, please see [Chapter 5](#).

This paper takes into account recent work in the area of family justice, such as the 2005 report of the Family Justice Reform Working Group to the B.C. Justice Review Task Force. By way of background, that Task Force was established by the Law Society of B.C. in March 2002 to examine possible reforms to B.C.'s justice system. The Task Force appointed four working groups, one of which—the Family Justice Reform Working Group—suggested reforms to the Province's family justice system. The final report of the Family Justice Reform Working Group is entitled "A New Justice System for Families and Children" and is available online at: http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf.

The Working Group's report addresses access enforcement in a general way. It recommends that judges be given more tools, such as authority to order parents to attend a specialized parenting program, or to appoint a mediator or a parenting co-ordinator, and that there be a visible contact point (Family Justice Information Hub) where people could bring ongoing access disputes. The report also calls for greater services to assist high-conflict families.²

This paper has been prepared to seek your views on a variety of options within the context of the *Family Relations Act*. It is divided into five parts. The first four address: prevention of access disputes; legal remedies for access denial or failure to exercise access; complex cases; and preventing the wrongful removal of children from B.C. The fifth provides an opportunity for you to highlight what you feel are the most pressing issues and identify any issues that are not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

A separate paper contains more detailed background information. See [background paper](#).

Terminology

This paper refers to "custody" and "access." This reflects the current terminology used in the *Family Relations Act*. A separate discussion paper asks whether these words should be changed. Please refer to Chapter 6 for more discussion.

The Two Sides of Access Responsibilities

When parents do not comply with the access responsibilities set out in their agreements or court orders, there can be many consequences. Children and parents lose the chance to spend time together. Conflict between parents over access issues takes a toll on children. Costs mount, as plans have to be changed and changed again. Parents may continue to feel stuck in ongoing conflict with one another, and quality of relationships may suffer.

Meeting access responsibilities has two sides:

- the parent with whom the child primarily resides may prevent the child from spending scheduled access time with the other parent, or frustrate access, for example, by deliberately scheduling appointments only during access visits; or

- the non-resident parent may fail to turn up for scheduled access, always arrive late, or show up only some of the time.

Access denial and failure to exercise access may be related. For example, a parent whose efforts to exercise access are blocked consistently by the other parent may eventually give up and stop coming to pre-arranged visits. Alternatively, failure to exercise access may flip to access denial when a parent who has not exercised access for a time is refused the opportunity to revitalize the existing but previously unused access arrangement.

Scope of the Problem

There are no firm statistics in B.C. to describe the scope of the problem of non-compliance with access orders and agreements, though a 2005 survey of 501 payors enrolled with the Family Maintenance Enforcement Program provides some information. Custody or access problems were reported by 3% of respondents as the underlying cause of late support payments or those not paid in full.³ This survey did not address parents who continue to meet their child support obligations even if access arrangements break down. Nor is it representative of all B.C. families, since not all parents use the enforcement program. But numbers from other jurisdictions also suggest that enforcement problems arise in a minority of families.⁴ Of the two forms of parental non-compliance with access orders, research suggests that failure to exercise access may be the more prevalent problem.⁵

Where problems over access arrangements do arise, however, they pose a significant hardship not only on individual families, who often find themselves without effective legal recourse, but also on the family justice system since ongoing access disputes may consume significant public resources.

British Columbia's Current Response

Programs and Services

Although B.C. does not offer programs and services dedicated specifically to access enforcement, the following general resources can help parents to prevent and to resolve disputes over access:

- Family Justice Centres spread across the province, which offer information and referral services, as well as dispute resolution for non-property related family matters;
- Family Justice Services Centre (what the Family Justice Reform Working Group referred to as a "Family Justice Information Hub") in Nanaimo, <http://www.nanaimo.familyjustice.bc.ca/index.htm>;
- parent education (Parenting After Separation) – mandatory in 13 Provincial Court registries under Family Court Rule 21;
- custody and access assessments or "views of the child" reports prepared by Family Justice Counsellors;
- legal services, such as LawLINE, brief legal advice, and duty counsel;
- the B.C. Supreme Court Self-Help Centre located in Vancouver, which offers access to computers and online resources, as well as self-help packages and forms;
- opportunities for early settlement of court cases or case management by a judge, available in all Provincial Court Registries via Family Case Conferences under Family Court Rule 7;

- additional mandatory events that promote early settlement of court cases, such as meetings with a Family Justice Counsellor, available in four registries designated as Family Justice Registries under Family Court Rule 5, and
- opportunities for early settlement through mandatory Judicial Case Conferences applicable to most interlocutory⁶ motions brought in Supreme Court under Supreme Court Rule 60E.

Some of these programs and services are more widely available than others, partly because of the cost of providing a wide range of services over such a large geographical area. Another explanation for the disparity in availability of services is that access-related applications may be brought under two separate statutes—the federal *Divorce Act*⁷ or the provincial *Family Relations Act*—and in two separate courts—the Provincial Court or the Supreme Court.

A separate paper that outlines family justice programs and services is available online: see [Chapter 5](#).

Legal Remedies

Currently, the principal legal responses to a breach of an access order in B.C. are either civil contempt of court proceedings, if the order was made in Supreme Court, or applications under s. 128(3) of the *Family Relations Act*, which trigger a quasi-criminal hearing under the *Offence Act*. Section 128(3) reads:

128(3) A person who, without lawful excuse, interferes with the custody of, or access to, a child in respect of whom an order for custody or access was made or is enforceable under this Act commits an offence.

Neither enforcement option is particularly effective, for several reasons. In quasi-criminal proceedings such as these, the burden of proof is high. The parent who is trying to enforce an order must prove the violation beyond a reasonable doubt. If the wording of the original order is vague (for example: “liberal” access), this burden is virtually impossible to meet. The parent may first have to apply for a court order specifying access terms before he or she can bring contempt proceedings to enforce the order.

More significantly, the remedies for contempt of court or for s. 128(3) applications are fines or imprisonment, or both. Sending a parent to jail, or further depleting already scarce family resources may be at odds with the best interests of the child, so judges are reluctant to make such orders, particularly if there is no clear pattern of non-compliance.

Also, the available remedy depends on which court the family has used and under which statute the order was made: contempt proceedings may only be used to enforce Supreme Court access orders made under the *Divorce Act* or the *Family Relations Act*, while s. 128(3) applications are possible only in relation to *Family Relations Act* orders.

Response of Other Jurisdictions

Outside Canada

Internationally, the trend is towards using legislation to create a range of tools for enforcing access orders, beginning with a preventative or educational approach and progressing through to punitive sanctions. Australia and New Zealand have already amended their family law statutes to embrace this approach. England is in the process of doing so, and the same trend can be seen in the U.S. For example, Arizona, Colorado and Oregon have specific access enforcement remedies in their family law statutes. Michigan and Utah include specialized remedies for contempt of access orders in their contempt legislation. If you wish to look at these laws, please refer to the following link to [Legislation](#).

These legislative remedies, discussed in more detail in the body of this paper, are often paired with some combination of procedural reforms, expanded access-related programs and services, and capital investment in family justice infrastructure. For example, the Private Law Programme issued by the President of England's Family Division uses the "one family/one judge" case management principle. The government has also announced major funding increases for supervised access and exchange services. New Zealand and England have piloted parent education workshops, and the U.S. has embraced parenting co-ordination⁸ as a solution to access disputes in higher-conflict families. Australia has introduced the most sweeping changes: spending increases of \$400 million to fund the creation of Family Relationship Centres across Australia, and expanded access-related programs and services such as supervised access and a parenting orders program for access disputes that arise after an order has been made. Australia has also recently legislated a less adversarial trial format for family cases involving children, in which judges play a more active role and have greater control over litigation. New Zealand has adapted Australia's less adversarial hearing model and is piloting it in six court locations.⁹

Another important development is the recasting of access disputes from competing rights to ongoing responsibilities. In both New Zealand and Australia, family legislation requires that when an access order is first made, an explanation must be given to parents about the ongoing obligations it places on them.¹⁰

Inside Canada

Canadian jurisdictions are also moving towards legislated remedies, which are discussed in more detail in the body of this paper. The family laws of Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Nunavut, and the Northwest Territories have adopted specific access enforcement remedies. Ontario's family statute also contains detailed access enforcement provisions passed in 1990, although these are not in force. If you wish to see these laws please refer to the following link to [Legislation](#).

Like their international counterparts, Canadian jurisdictions are beginning to combine legislative reform with changes to access-related services and programs, and family law procedure. These differ from jurisdiction to jurisdiction. The prairie provinces and New Brunswick have specialized parent education tailored for high conflict families. Ontario has invested significant resources in supervised access and exchange services, and Quebec is contemplating doing the same. Alberta has piloted the use of brief conflict intervention programs, and Saskatchewan is trying out an access facilitator program, focusing on the creation of the initial access order.

For further detail about reforms in other jurisdictions, please refer to the background paper on access responsibilities: [background paper](#).

DISCUSSION

PART A - CHANGING THE LAW TO PREVENT ACCESS DISPUTES

Many have commented that litigation is ill-suited to the resolution of family problems.¹¹ On the one hand, family law tries to protect the best interests of the child and support family relationships, while on the other, enforcement proceedings traditionally have a punitive focus. Access disputes highlight this built-in tension. A parent may be in breach of an access order, but a court may hesitate to order the traditional remedies of fines or imprisonment, because of the risk to children of continuing toxic conflict between their parents.

There are also limits to what legal access enforcement remedies can achieve. A law, however well crafted, cannot mandate good parenting, and litigation is not known for its beneficial impact on ongoing relationships.

The challenge, then, is to find ways to prevent non-compliance in the first place, or to minimize it. By getting the initial order “right,” it may be possible to reduce the likelihood of future problems. This is discussed in Chapter 6 Parenting Apart.

PART B – CHANGING THE LAW TO RESPOND TO ACCESS DISPUTES

Discussion Point (1)—Current Legislative Remedies in the Family Relations Act

Using the *Offence Act* to enforce access

One tool that is currently available to a parent who wants to enforce an access order is s. 128(3) of the *Family Relations Act*. This section (quoted earlier in this paper) makes it an offence to interfere with access that has been ordered by a court. The remedy is to prosecute the offending parent under the *Offence Act*. Penalties include a fine of up to \$2,000, up to six months’ imprisonment, or both.¹²

These applications are not a real option in most cases, for at least three reasons. First, they are quasi-criminal proceedings, and so require a prosecution. Private prosecutions are very unusual, so it means getting Crown Counsel involved. Given the already heavy criminal caseloads they carry, this can be difficult. Second, the burden of proof is high: unless the violation of s. 128(3) can be proven beyond a reasonable doubt, as in any criminal case, there will be no conviction. (Proof is easier in a civil case, where the standard is a balance of probabilities; that is, more likely than not.) Finally, even if the case is proven, judges are often reluctant to impose a fine or jail time on a parent because this could negatively affect the child.

QUESTION

1. Should s. 128(3) of the *Family Relations Act* be retained? Why or why not?

Discussion Point (2)—Contempt of Court and Provincial Court Orders

Using contempt of court proceedings to enforce access

Contempt proceedings are another way to enforce access orders, but only for those made in Supreme Court. This option is not available to the many families who have access orders that were made in Provincial Court.

But even in Supreme Court, contempt proceedings are not widely used in B.C. to enforce access orders. The explanation is similar to that given above for the impracticality of s.128(3) applications. As in those applications, the burden on the person trying to prove contempt of court is high—likely requiring evidence of a clear pattern of access disruption. And because judges are required by the *Family Relations Act* to make decisions in the best interests of the child, they may be reluctant to fine or jail the child’s parent.

Some provinces and territories in Canada have changed their family law to permit contempt applications to be brought in provincial or territorial courts. One example is s. 38 of Ontario’s *Children’s Law Reform Act*, which empowers its provincial trial court, the Ontario Court of Justice, to punish “any wilful contempt” of its custody or access orders. Penalties include fines up to \$5,000, or imprisonment up to 90 days, or both.

QUESTION

2. Should the *Family Relations Act* authorize the Provincial Court to fine or imprison those in contempt of its access orders? Why or why not?

Discussion Point (3)—Specific Remedies in Family Laws to Enforce Access

In some other countries, family laws have been expanded to include specific remedies for enforcement of access orders. Australia, New Zealand, and several U.S. states have taken this approach.¹³ England is on the verge of doing so.¹⁴

Canadian family laws do this too, to varying degrees. For example, Canadian family statutes commonly allow a court to order apprehension of a child who has been unlawfully withheld from a parent who has an order for access.¹⁵ A police officer or other official can pick up the child and return that child to the other parent.

Some provinces and territories, such as Alberta, Saskatchewan, Manitoba, the Northwest Territories, Nunavut, and Newfoundland and Labrador, have incorporated detailed access enforcement remedies into their family laws.¹⁶ Ontario's family law also has a set of remedies that are specific to access enforcement, but they are not in force.¹⁷

Unlike their international counterparts, these Canadian laws provide separate remedies for access denial, and for failure to exercise access. The tables below go into more detail about the kinds of remedies available. The first table lists remedies for access denial; the second, remedies for failure to exercise access.

B.C. does not appear on either of these tables because its family law does not have a detailed system of access enforcement remedies. As noted in "Setting the Scene", the main enforcement options in B.C. are fines or imprisonment, or both, through contempt proceedings or s. 128(3) applications.

Legislative Remedies for ACCESS DENIAL: If a parent who has custody prevents the other parent from exercising court-ordered access, a judge hearing an enforcement application may order:							
	AB	SK	MB	ON	NL	NWT	NUN
reimbursement of expenses	●	●	●	●*	●	●	●
finances, or imprisonment, or both	●	●**	●***	●**	●**	●**	●**
supervised access		●	●	●*	●	●	●
make-up access time	●	●		●*	●	●	●
court-ordered apprehension of a child	●	●	●	●	●		
mediation		●		●*	●	●	●
posting of security ¹⁸	●	●					
general directions to promote compliance	●						
a custody or access order be made or varied (e.g. add an access schedule to an order)		●					

* not in force

** via contempt of court proceedings

*** via contempt of court proceedings or general offence provision

Legislative Remedies for FAILURE TO EXERCISE ACCESS: If a parent fails to exercise access, a judge hearing an enforcement application by the parent with custody may order:

	AB	SK	MB	ON	NL	NWT	NUN
reimbursement of expenses	●	●	●	●*	●	●	●
supervised access		●	●	●*	●	●	●
mediation		●		●*	●	●	●
posting of security		●					
requiring access parent to give his or her telephone number and address to other parent		●				●	●
a custody or access order be made or varied (e.g. change access times)		●					

* not in force

** via contempt of court proceedings

*** via contempt of court proceedings or general offence provision

Supervised Access

The use of supervised access to deal with access disputes varies considerably from jurisdiction to jurisdiction. Internationally, there appears to be growing enthusiasm for this service. For example, Australia and England have recently announced major spending increases for supervised access and exchange facilities. The Australian Attorney General recently announced the creation of 30 new supervised access and exchange facilities, called “children’s contact services,” bringing the total to 65 country-wide.¹⁹ England also has increased spending, from £100,000 in 2003-04, to £1.8 million in 2004-05 and £1.5 million in 2005-06 on child contact centres. Most of that money—approximately £2.4 million—went to the creation of 14 new supervised contact centres.²⁰ The government has committed a further £7.5 million in funding for the two-year period, 2006-08.²¹

The response in Canada has been mixed. Ontario offers publicly funded supervised access services in 52 out of 54 of its judicial districts.²² Alberta, New Brunswick and P.E.I., do not provide publicly funded supervised access services. B.C. tried a middle approach, contracting with service providers to provide short-term supervised access. The service was under-used and costly. Consequently, at the start of the 2006-07 fiscal year, the Province moved to a private, fee-for-service model.

Supervised access may benefit parents with serious difficulties that cannot be resolved in the short-term, or possibly ever, but the potential for a continuing need for the service coupled with infrastructure, training and labour costs makes this an expensive option.

Limitations of using the law to enforce access

Statutory access enforcement remedies are not a “silver bullet” that can fix disrupted or inconsistent access visits. Even in those Canadian provinces and territories that have more comprehensive access enforcement remedies in their family laws, these remedies are rarely used.²³

Sometimes, they can be misused. Some commentators note that access enforcement applications can be used by one spouse to harass the other.²⁴ In the first three years after Australia

introduced its three-tiered access enforcement regime, access enforcement applications increased by 250% from 786 in 1995/96 to 1,976 in 1999/00. A review of applications made in 1998/99 found that judges dismissed 45% of them and imposed no penalty in a further 17% because the breach of the access order was trivial.²⁵

QUESTIONS

3. Should the *Family Relations Act* include specific access enforcement remedies? Why or why not?
4. Should there be separate remedies for access denial and failure to exercise access?
5. Which remedies should be included? Possible remedies identified from Canadian and international jurisdictions are listed below. Please rank those you think should be included in order of priority, with 1 having the highest priority. If you favour separate remedies for access denial and failure to exercise access, please indicate your preferences in the section entitled "Additional Comments".

Options for access enforcement	Priority Ranking	Additional Comments
• admonishment (reprimand)		
• attendance at a program or service (e.g. parent education) if appropriate		
• community service		
• costs		
• counselling (family or child) to be paid for by the non-compliant parent		
• court-ordered apprehension and delivery of a child to the access parent		
• fines		
• imposition of (additional) conditions on the order		
• information regarding a parent's telephone number, address		
• imprisonment		
• make-up access time		
• mediation		
• re-imbusement of reasonable expenses incurred as a result of the breach		
• security		
• specification of the access order		
• supervised access		
• termination, modification or suspension of spousal support		
• variation of the access order		
• OTHER:		

6. Should the *Family Relations Act* make fines and imprisonment available only as a last resort, or where the breach of the access order is extremely serious?

Discussion Point (4)—Excusable Breaches of Access Orders or Agreements

Some family laws in Canada address when a breach of an access order or agreement is excusable. For instance, Saskatchewan's *Children's Law Act, 1997* remedies only "wrongful" access denial or failure to exercise access. A breach is "wrongful" unless there was a legitimate reason for it and reasonable notice was given,²⁶ although these are not defined. Other laws list specific exceptions. For example, Newfoundland and Labrador's *Children's Law Act* (similarly worded to Ontario's unproclaimed s. 34a(4)) states:

- 41(4) *A denial of access is not wrongful where*
- (a) *the respondent believes on reasonable grounds that the child will suffer physical or emotional harm if access is exercised;*
 - (b) *the respondent believes on reasonable grounds that he or she might suffer physical harm if access is exercised;*
 - (c) *the respondent believes on reasonable grounds that the applicant is impaired by alcohol or a drug at the time of access;*
 - (d) *the applicant fails to present himself or herself to exercise the right of access within 1 hour of the time specified in the order or a time otherwise agreed on by the parties;*
 - (e) *the respondent believes on reasonable grounds that the child is suffering from an illness of such a nature that it is not appropriate to allow access to be exercised;*
 - (f) *the applicant does not satisfy written conditions that were agreed on by the parties or that are part of the order for access;*
 - (g) *on numerous occasions during the preceding 12 months the applicant had, without reasonable notice and excuse failed to exercise the right of access;*
 - (h) *the applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question; or*
 - (i) *the court thinks that the withholding of the access is, in the circumstances, justified.*

QUESTIONS

7. Should the *Family Relations Act* set out specific circumstances in which a denial of access is excusable? Why or why not?

8. If so, what circumstances should be included?

Possible reasons for access denial (check all that you would include)		Additional Comments
<ul style="list-style-type: none"> harm to the child if access is exercised 	<input type="checkbox"/>	What kind of harm? <input type="checkbox"/> physical <input type="checkbox"/> emotional What level of risk? <input type="checkbox"/> reasonable belief that the child WILL be harmed by the scheduled access visit <input type="checkbox"/> reasonable belief that the child MIGHT be harmed by the scheduled access visit
<ul style="list-style-type: none"> harm to the parent with whom the child usually resides if access is exercised 	<input type="checkbox"/>	What kind of harm? <input type="checkbox"/> physical <input type="checkbox"/> emotional What level of risk? <input type="checkbox"/> reasonable belief that the other parent WILL be harmed <input type="checkbox"/> reasonable belief that the other parent MIGHT be harmed
<ul style="list-style-type: none"> reasonable belief that the access parent is intoxicated at the time of the visit 	<input type="checkbox"/>	
<ul style="list-style-type: none"> access parent is more than one hour late 	<input type="checkbox"/>	
<ul style="list-style-type: none"> child is too ill 	<input type="checkbox"/>	
<ul style="list-style-type: none"> access parent is in breach of written conditions attached to the access order or agreed upon by the parties 	<input type="checkbox"/>	
<ul style="list-style-type: none"> numerous times during the preceding 12 months the access parent had, without reasonable notice and excuse, failed to exercise the right of access 	<input type="checkbox"/>	
<ul style="list-style-type: none"> access parent had indicated that he or she would not be seeking to exercise the right of access on the occasion in question 	<input type="checkbox"/>	
<ul style="list-style-type: none"> any reason the court finds to be reasonable in the circumstances 	<input type="checkbox"/>	
<ul style="list-style-type: none"> OTHER: 		

Discussion Point (5)—Remedies for an Excusable Denial of Access

Even where a denial of access time is found to have been excusable, Alberta's *Family Law Act* authorizes orders for:

- compensatory (make-up) time;
- reimbursement of necessary expenses incurred as a result of the denial of time;
- directions to one or both parents "to do anything that the court considers appropriate in the circumstances that is intended to induce compliance with the time with a child [access] clause".²⁷

Similarly, recent changes to Australia's *Family Law Act 1975* authorize family courts to order compensatory access time even where there is a reasonable excuse for the denial.²⁸

This kind of provision might come into play, for example, if a child is too ill to attend an access visit. The child's illness may be a reasonable excuse for the child not to go on the visit as planned, but the parent who missed the opportunity to spend time with his or her child would be able to make up the lost visit and might be entitled to reimbursement for extra expenses incurred.

QUESTIONS

9. Should the *Family Relations Act* provide remedies even when there is a reasonable excuse for the scheduled access visit not going ahead?

10. If so, which remedies should be included?

- make-up time
- reimbursement of reasonable expenses
- other _____

Discussion Point (6)—Other Rules Governing Access Enforcement by a Court

Some Canadian family laws impose restrictions on the way in which access enforcement proceedings are brought before a court, or on the timing of applications. For example:

- they set out the time limits within which access enforcement applications must be brought (limitation periods);
- some specify how soon the hearing should take place once the court enforcement process has been put into motion (timing of hearing);
- some specify how the dispute will be heard by the court (oral vs. written testimony); and
- some laws attempt to focus the information that may be brought before the court by directing that only information that is directly related to the alleged access problem is to be presented (scope of evidence).

Sample legislative restrictions on access enforcement applications				
Province	limitation periods for applying to court	timing of hearing	type of evidence	scope of evidence
AB <i>Family Law Act</i> , S.A. 2003, c. F-4.5	12 months after the alleged denial of time: s. 40(1)			
ON <i>Children's Law Reform Act</i> , R.S.O. 1990, c. C-12 *unproclaimed	30 days after the alleged breach: s. 34a(8)*	within 10 days of service of the application on the respondent: s. 34a(7)*	oral evidence only, unless leave granted to file affidavit: s. 34a(9)*	only evidence directly related to the alleged breach of the order OR to the reasons for breach: s. 34a(10)*
NL <i>Children's Law Act</i> , R.S.N.L. 1990, c. C-13	30 days after the alleged breach: s. 41(8)	within 10 days of service of the application on the respondent: s. 41(7)	oral evidence only, unless leave granted to file affidavit: s. 41(9)	only evidence directly related to the alleged breach of the order OR to the reasons for breach: s. 41(10)

QUESTIONS

11. Should the *Family Relations Act* specify a limitation period for making an access enforcement application? If so, how long should it be?
12. Should the *Family Relations Act* specify the kind of evidence (e.g. oral evidence only, unless leave is granted) that may be presented in an access enforcement proceeding?
13. Is it necessary to specify that only evidence that is directly related to the alleged breach or the reasons for the breach will be considered?
14. Should the *Family Relations Act* set out the timing of the hearing of an access enforcement application? If so, what should it be?

PART C – COMPLEX CASES

Discussion Point (7)—Older Children

Unlike support orders, which depend solely on the compliance of one of the parents, access orders depend on the compliance of both, and also the children. Access arrangements may break down if children refuse to go on scheduled visits as sometimes happens, particularly with older children.

New Zealand's family statute says that custody orders must not be made for children who have reached the age of 16, unless there are special circumstances.²⁹ Access orders are not specifically addressed.

The Ministry of Attorney General has prepared a separate consultation paper on children's participation in family law disputes: [Chapter 8 Children's Participation](#).

QUESTIONS

15. Should the *Family Relations Act* specifically address the issue of the creation, variation or enforcement of access orders involving older children?
16. If so, what should it provide?

Discussion Point (8)—Responding to Higher Conflict Families**High Conflict & Family Violence**

Much has been written about “high conflict families,” but it is a very broad phrase. Some use it to mean families marked by violence, but others use it to refer to people who may have never been violent but continue to have extremely strained relations and communication with their ex-spouses for many years after separation.

Family violence raises distinct policy issues and a separate discussion paper has been prepared on that topic. For questions about access and family violence, please refer to [Chapter 9 Family Violence](#).

Parenting Co-ordination (Special Masters)

One emerging response to higher conflict families is parenting co-ordination. Parenting co-ordination was developed by a group of lawyers and psychologists in Denver, Colorado in the early 1990s.³⁰ Its use has skyrocketed across the U.S. in the last decade and is now attracting interest in Canada. The Family Justice Reform Working Group recommended that it be available to help high conflict parents in B.C. sort out access matters.³¹

Parenting co-ordinators are typically mental health professionals, such as social workers, psychologists, psychiatrists or marriage counsellors. However, some jurisdictions also permit the appointment of family lawyers or family mediators.³²

The tasks of parenting co-ordinators may be divided into four broad areas:

1. assessment;
2. education;
3. resolution of minor conflicts; and
4. recommendations to the court.³³

First, they assess the difficulties the parents are having, to try to identify the underlying causes of the conflict. This assessment helps the co-ordinator to make appropriate referrals and to tailor advice to the particular family.³⁴ The educative role includes communication, child development, conflict resolution skills, community resources, and the negative effect of continuing parental conflict on the family's children.³⁵ Their third function is to resolve disputes. They try to help the parents reach agreement; however, unlike many court-based mediators, they can go one step further and arbitrate (decide) the issue if agreement is not possible.³⁶ Their final function is to make recommendations to the court.³⁷

Some American states have built in incentives to keep parents from taking the decisions of parenting co-ordinators to court. For example, in Colorado, if a parent requests a court hearing and the court “substantially upholds” the decision of the domestic relations decision-maker, that parent has to pay the fees and costs of the other parent, as well as the domestic relations decision-maker's fees and costs for the court hearing, unless the court decides it would be manifestly unjust to do so.³⁸

A further incentive against continuing conflict is the fact that under the American model of parenting co-ordination, the parents bear the full cost of the parenting coordinator's involvement. Typically, the fees are split between the parties.

Although parenting co-ordination has been implemented in different ways—court order, court rule, non-specific legislation, specific legislation—the trend in the U.S. is toward legislating provisions specific to parenting co-ordination. California has non-specific legislation (*Code of Civil Procedure*) that permits the appointment of special masters or referees, but Arizona, Colorado and Oregon have adopted either a specific court rule or specific provisions within their family law statutes.³⁹

Supporters of specific legislation for parenting co-ordinators argue it is needed to:

- authorize the appointment of a co-ordinator after a court order has been made;
- permit the court to order fees to be paid by the parents; and
- set out the responsibilities of parenting co-ordinators while respecting the legal rights of the parties.⁴⁰
- An inter-disciplinary committee of private-sector family lawyers and mental health professionals has been looking at issues related to the use of parenting co-ordinators in B.C. Interest in parenting co-ordination seems to be growing.

Parenting co-ordination is also discussed in the paper on family justice programs and services: [Chapter 5](#).

QUESTIONS

17. Do you think parenting co-ordinators would help families in B.C.?
18. Have you had any experience with parenting co-ordinators?
19. Do you have other suggestions for resolving or preventing access disputes in higher-conflict families?

Discussion Point (9)—Higher Conflict Families & Repeat Litigation

Some people use “high conflict” to describe those who return to court again and again, sometimes with minor disputes; that is, whose conflict with their former spouse does not lessen with the passage of time. For families who experience high levels of conflict long after separation or divorce, access may be a flashpoint for ongoing disputes.

Orders for costs are one way to discourage parents from overusing access enforcement applications. In 2006, Australia amended its family law to provide that if an application to enforce access is brought, but a judge decides to make no order (i.e. imposes no penalty) for the breach, the judge can nevertheless make an order for costs against the person who brought the application.⁴¹ Presumably, this change in the law is meant to deter parents from using access enforcement applications as a way of controlling or harassing their former spouses.

Another option is increased reliance on existing provisions that address vexatious litigation. A vexatious proceeding is one where the person starting it does so merely “to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result”.⁴² The Australian Law Reform Commission recommended in its 1995 report on complex contact (access) cases that:

The Family Court should be more robust in declaring a party in a complex contact case to be a vexatious litigant and in adhering to a declaration when a vexatious litigant seeks

*leave to commence proceedings, unless the best interests of the child require otherwise. The [Family Law Act 1975] should be amended to allow the Court to make an order of its own motion ...*⁴³

British Columbia's *Supreme Court Act* contains a vexatious litigant provision. However, it requires that one of the litigants apply for such an order: it does not allow for an order to be made on the court's own motion:

*18. If, on application by any person, the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.*⁴⁴

Such an application would take place in Supreme Court. In considering a vexatious litigant application under s. 18, the Supreme Court may take into consideration vexatious proceedings started in either Provincial Court or Supreme Court.

Michigan law allows officials to decline to respond to an access enforcement complaint if:

*The party submitting the complaint has previously submitted 2 or more complaints alleging custody or parenting time order violations that were found to be unwarranted, costs were assessed against the party because a complaint was found to be unwarranted, and the party has not paid those costs.*⁴⁵

Another approach is to enact a provision regarding bad faith applications. For example, s.41(13) of Newfoundland and Labrador's *Children's Law Act*⁴⁶ responds to bad faith⁴⁷ applications by imposing a mandatory leave requirement on further applications. Ontario's unproclaimed s. 34a(13) would do the same.⁴⁸ Michigan's *Support and Parenting Time Enforcement Act* includes fines for bad faith applications: up to \$250 for the first, up to \$500 for the second and up to \$1,000 for third and subsequent bad faith applications.⁴⁹ A finding of bad faith also triggers a mandatory costs order.⁵⁰

QUESTIONS

20. Is s. 18 of the *Supreme Court Act* (see above) adequate to deal with vexatious litigants in family cases?
21. Should the *Family Relations Act* include a provision permitting the court, on its own motion or on application by a party, to ban a litigant who brings unmeritorious or trivial complaints from further litigation without the express permission of the court?
22. If yes, should the leave requirement be automatically triggered after a certain number of applications are found to be either unsubstantiated or too trivial to warrant a sanction? How many?
23. Should the *Family Relations Act* address access enforcement applications brought in bad faith? How?
24. Do you have any comments about the role of orders for costs in access enforcement proceedings?

PART D – INTER-JURISDICTIONAL ENFORCEMENT

Families are increasingly mobile, moving between provinces and between Canada and other countries. When parents who live in different jurisdictions have disputes over access, a number of problems can arise.

Orders made outside of B.C. can be enforced here under Part 3 of the *Family Relations Act*. Most other provinces and territories have similar provisions in their family laws that allow their courts to enforce custody and access orders made in B.C.

The *Criminal Code* also deals with parental child abduction,⁵¹ and the 1980 *Hague Convention on the Civil Aspects on International Child Abduction* has a procedure for securing the return of a child abducted from one country that has implemented the convention to another.⁵² This convention has been implemented in B.C. and the rest of Canada, but it only applies between a province and another country, not between provinces.

The 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* sets out a conflict of laws regime that provides international rules for recognizing and enforcing custody and access orders made in other countries.⁵³ Canada has not yet signed this convention.

Discussion Point (10)—Preventing Wrongful Removal of Children from B.C.

Enforcing a B.C. order outside the province can be time-consuming and expensive. A better approach would be to find ways to minimize the number of inter-jurisdictional disputes that arise in the first place.

Unlike the equivalent law in most other provinces and territories, the *Family Relations Act* does not have a provision specifically aimed at minimizing the potential for inter-jurisdictional access disputes.⁵⁴

By contrast, in Saskatchewan, a custody order must include a requirement that a custodial parent who intends to change place of residence must give at least 30 days notice of the move (or as otherwise ordered) to anyone who has access to the child, or who shares custody. Alberta provides for a 60 day notice period (or as otherwise ordered) but does not require judges to add this term to custody orders.⁵⁵

In most other provinces and territories, the law provides a number of options in cases where a person intends to move a child from the province or territory, contrary to a court order or agreement: a judge may order that person to transfer property to a trustee; make child support payments to a trustee; post a bond; or deliver his or her passport, the child's passport, or other travel documents to a specified person or to the court.⁵⁶

QUESTIONS

25. Should the *Family Relations Act* include a specific provision aimed at preventing wrongful removal of children from B.C.?

ENDNOTES

¹ *Family Relations Act*, R.S.B.C. 1996, c.128.

² Family Justice Reform Working Group's Report, presented to the B.C. Justice Review Task Force, "A New Justice System for Families and Children," (May 2005) at 74 & 75.

³ There were 501 respondents out of a total 2,022 who were contacted. Matrix Planning Associates, "Payer Survey – Family Maintenance Enforcement Program," (March 2005) at 12.

⁴ Alberta reports < 1% of Provincial Court applications in Calgary from Oct. 2001 to March 2006 relate to access enforcement (180/19,408): Alberta Justice, "Key Research Questions in Respect of Access Enforcement" (23 January 2006). Manitoba's access enforcement program which operated in Winnipeg from 1989-1993 had only 99 client families: Pauline O'Connor, "Child Access in Canada: Legal Approaches and Program Supports" (2002) at 45, presented to the Department of Justice Canada. Australia reported that 10% of all divorce applications involving custody and access matters involved court applications over access enforcement in 1996 and 1997 (105,234 total divorce applications, of which 21,897 involved custody and access issues, of which approximately 2,000 involved applications over access enforcement): Family Law Council of Australia, "Interim Report: Penalties and Enforcement" (March 1998) at paras. 2.06 & 3.06. Michigan's Friend of the Court Office, a body charged with access enforcement, shows 2,639 parenting time petitions out of a total of 23,682 filed (11%) for 2003: State Court Administrative Office, "Friend of the Court – Petition Activity," Friend of the Court Statistics 2003 at 30, online: <http://courts.michigan.gov/scao/resources/publications/statistics/foccaseloadreport2003.pdf> (last accessed: February 23, 2007).

⁵ See, for example, two research reports commissioned by the Department of Justice Canada: Dr. Martha Bailey, "Overview and Assessment of Approaches to Access Enforcement," (2001) at 11 and Pauline O'Connor, "Child Access in Canada: Legal Approaches and Program Supports," (2002) at 9. Both reports are available online at: <http://canada.justice.gc.ca/en/ps/pad/reports/index.html> (last accessed: February 23, 2007).

⁶ "Interlocutory" means: "Provisional; interim; not final. ... An interlocutory order...is one which does not finally determine a cause of action but only decides some intervening matter pertaining to cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Black's Law Dictionary*, 6th ed., s.v., "Interlocutory".

⁷ *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3.

⁸ The Family Justice Reform Working Group report describes a parenting co-ordinator as a highly trained mental health professional, mediator or family law lawyer who is appointed by a judge to help parents resolve parenting disputes, provide education and advice, and with the prior approval of the parents and the judge, make decisions within the scope of the order of appointment: Family Justice Reform Working Group, *supra* note 2 at 73.

⁹ Judge Peter Boshier, "Parenting Hearing Programme – Less Adversarial Children's Hearings," speech to Auckland Family Courts Association, Novotel, Ellerslie, Auckland (14 September 2006), online: <http://www.courts.govt.nz/family/publications/speeches-papers/default.asp?inline=auckland-family-courts-association-september-2006.asp> (last accessed: February 23, 2007) & New Zealand Family Courts, "Parenting Hearings Programme – What this new Family Court process means for you and your children," (brochure), online: <http://www.justice.govt.nz/family/pdf-pamphlets/courts085.pdf> (last accessed: February 23, 2007).

¹⁰ *Family Law Act 1975*, Cwth, s. 65DA [Australia] & *Care of Children Act 2004*, s. 55 [New Zealand].

¹¹ Family Justice Reform Working Group, *supra* note 2 at 10.

¹² *Offence Act*, R.S.B.C. 1996, c. 338, s.4.

¹³ Australia, *supra* note 10, Part VII (Children), Division 13A; New Zealand, *supra* note 10, ss. 68-71, 73, 78-79 & 142; *Arizona Revised Statutes*, 25-414; California's *Code of Civil Procedure*, s. 1218; *Colorado Statutes*, 14-10-129.5; Michigan's *Support and Parenting Time Enforcement Act*, Act No. 295 of 1982, 552.644; 1998 *Oregon Revised Statutes*, 11-107.434; and *Utah Code*, 78-32-12.1.

¹⁴ See *Children and Adoption Act 2006*, 2006, c. 20, Part 1 (given Royal Assent on 21 June 2006 but not yet brought into force).

¹⁵ Eight jurisdictions – Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, P.E.I., and the Yukon – have apprehension orders in their family statutes as an access enforcement remedy: *Family Law Act*, S.A. 2003, c. F-4.5, ss. 40(2)(f) & 44 [Alberta]; *Children's Law Act, 1997*, S.S. 1997 c. C-8.2, s. 24 [Saskatchewan]; *Child Custody Enforcement Act*, C.C.S.M. c. C360, s. 9 [Manitoba]; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 36 [Ontario]; *Family Services Act*, R.S.N.B. 1980, c. F-2.2, s. 132.1 [New Brunswick]; *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 43 [Newfoundland and Labrador]; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 21 [P.E.I.]; & *Children's Act*, R.S.Y. 2002, c. 31, s. 46 [Yukon].

¹⁶ Alberta, *ibid.*, ss. 40 & 41; Saskatchewan, *ibid.*, ss. 24, 26-29; Manitoba, *ibid.*, ss. 9, 14 & 14.1; Newfoundland and Labrador, *ibid.*, ss. 41 & 43; *Children's Law Act*, S.N.W.T. 1997, c. C.14, s. 30 [N.W.T.] & *Children's Law Act (Nunavut)*, S.N.W.T. 1997, c. C.14, s. 30 [Nunavut].

¹⁷ Ontario, *supra* note 15, s. 34a.

¹⁸ Security means paying money into court. If the parent violates the access order again, he or she loses the money.

¹⁹ Government of Australia's Family Relationships Online, "Fact Sheet No. 3 – Additional Services for Families," at 2 online:

[http://www.familyrelationships.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)~FactSheet_3.pdf/\\$file/FactSheet_3.pdf](http://www.familyrelationships.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)~FactSheet_3.pdf/$file/FactSheet_3.pdf) (last accessed: February 23, 2007).

²⁰ According to the House of Commons, Hansard Written Answers for 10 November 2004 (pt 22), £2.5 million was spent to develop 14 new supervised contact centres. In the 2 March 2006 Debates, the figure cited was £2.4 million (pt 12). See UK, H.C., *Written Answers*, Vol. 426, col. 757W (10 November 2004) & UK, H.C., *Debates*, Vol. 443, col. 419 (6 March 2006).

²¹ UK, H.C., *Debates*, Vol. 443, col. 419 (6 March 2006).

²² Sylvie Lachance, "Rapport du comite interministeriel sur les services de supervision des droit d'access," *Advocate* (Fev. 2004) at 14.

²³ For example, a QuickLaw search revealed only one reported case decided under Alberta's legislative access enforcement regime, 14 under Saskatchewan's, and one from Newfoundland and Labrador: *S.J.S. v. M.W.S.*, 2005 ABQB 817; *Jarocki v. Callaghan*, [1996] S.J. No. 206 (Q.B.) (Q.L.); *Paul v. Pisis*, [1998] S.J. No. 243 (Q.B.) (Q.L.); *R.L.G. v. S.A.F.*, [1999] S.J. No. 507 (Q.B.) (Q.L.); *D.A.L.(F.) v. D.A.L.*, 2003 SKQB 132; *Flood v. Flood*, 2005 SKQB 475; *R.F. v. O.B.*, 2006 SKQB 496; *Longeau v. Longeau*, 2001 SKQB 533 (Q.B.) (Q.L.); *Simpson v. Simpson*, 2002 SKCA 97; *Kerfoot v. Pritchard*, 2005 SKQB 63, appeal dismissed 2006 SKCA 22; *Sikler v. Snow*, 2000 SKQB 189; *Tubello v. Tubello*, 2000 SKQB 276; *Weiman v. Liske*, 2003 SKQB 4; *Berg v. Bruton*, 2006 SKQB; *Mercer v. Mercer*, 2006 SKQB 381 & *Drake v. Cox*, [1993] N.J. No. 40 (Prov. Ct.) (Q.L.).

There were no reported cases from Manitoba, the Northwest Territories or Nunavut.

²⁴ Helen Rhoades *et al.*, "The Family Law Reform Act 1995: The First Three Years," (Dec. 2000) at 9, available online: <http://www.familycourt.gov.au/presence/resources/file/eb0011059e844c8/famlaw.pdf> (last accessed: February 23, 2007).

²⁵ *Ibid.*

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- ²⁶ Saskatchewan, *supra* note 15, s. 26(3).
- ²⁷ Alberta, *supra* note 15, s. 40(6).
- ²⁸ Australia, *supra* note 10, ss. 70NDA & 70NDB.
- ²⁹ New Zealand, *supra* note 10, s. 50(1).
- ³⁰ Family Law Institute, "What is Parenting Coordination?" (July 13, 2004) at 2, online at www.ottawalawyer.net/images/ParentingCoordinationarticle.pdf, (last accessed: February 25, 2007).
- ³¹ Family Justice Reform Working Group, *supra* note 2 at 75.
- ³² Barbara Ann Bartlett, "Parenting Coordination: A New Tool for Assisting High-Conflict Families," Oklahoma Bar Journal Articles (Feb 14, 2004) at 3, online: http://www.okbar.org/obj/articles_04/021404.htm (last accessed: February 25, 2007) & Marin County Task Force on Special Masters, "Marin County Special Master Program – Recommended Special Master Credentials and Qualifications," (1995).
- ³³ See discussion in Christine A. Coates *et al*, "Parenting Coordination for High-Conflict Families," (April 2004), 42 *Fam. Ct. Rev.* 246 at 254 & Family Law Institute, *supra* note 30 at 5-7.
- ³⁴ Family Law Institute, *ibid.* at 5-6.
- ³⁵ "The Functions of the Parenting Coordinator" taken from *Working with High-Conflict Families: A Practitioner's Guide* by Mitchell Baris et al. (2001), Northvale, New Jersey: Jason Aronson Inc.
- ³⁶ Family Law Institute, *supra* note 30 at 6.
- ³⁷ *Ibid.* at 6-7.
- ³⁸ *Colorado Statutes*, 14-10-128.3, s. 4(b).
- ³⁹ *California Code of Civil Procedure*, 638-645.2 & 1285-1287; *Arizona Rules of Family Law Procedure*, Rule 74; *Colorado Statutes*, 14-10-128.1 to 128.5; and *Oregon Revised Statutes*, 11-107.425(3).
- ⁴⁰ Judge Arline Rotman, (Ret.), "Parenting Coordination: Facts & Pending Legislation," Winter 2004, Vol. 3 No. 1, *Fam. Med. Q.* 17 at 18.
- ⁴¹ Australia, *supra* note 10, s. 70NEB(1)(g).
- ⁴² *Black's Law Dictionary*, 6th ed., s.v., "Vexatious proceeding".
- ⁴³ Australian Law Reform Commission, "For the Sake of the Kids: Complex Contact Cases & the Family Court," Report No. 73 (1995), Recommendation 5.7.
- ⁴⁴ *Supreme Court Act*, R.S.B.C. 1996, c. 443, s.18.
- ⁴⁵ *Support and Parenting Time Enforcement Act*, Act 295 of 1982, 552.641, Sec. 41(2)(a).
- ⁴⁶ Newfoundland and Labrador, *supra* note 15.
- ⁴⁷ "Bad faith" means: "The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty... it implies the conscious doing of a wrong because of dishonest purpose..." *Black's Law Dictionary*, 6th ed., s.v., "Bad faith".
- ⁴⁸ Ontario, *supra* note 15, s. 34a(13).
- ⁴⁹ *Support and Parenting Time Enforcement Act*, Act No. 295 of 1982, 522.644, Sec. 44(6).

⁵⁰ *Ibid.*, Sec. 44(8).

⁵¹ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 282 & 283.

⁵² *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, T.I.A.S. 11670, 1343 U.N.T.S. 89.

⁵³ *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for Protection of Children*, 19 October 1996, 35 I.L.M. 1391.

⁵⁴ Section 35 (4) of the *Family Relations Act*, *supra* note 1 is a general provision providing that: "An order for custody or access may include terms and conditions the court considers necessary and reasonable in the best interests of the child."

⁵⁵ Saskatchewan, *supra* note 15, ss. 6(5) & (6); Alberta, *supra* note 15, s. 33 (2).

⁵⁶ Manitoba, *supra* note 15, s. 10; Ontario, *supra* note 15, s. 37; *New Brunswick*, *supra* note 15, s.132.2; P.E.I., *supra* note 15, s. 22; Newfoundland and Labrador, *supra* note 15, s. 45; Yukon, *supra* note 15 s. 47; N.W.T., *supra* note 16, s. 32 (3); & Nunavut, *supra* note 16, s. 32(3).