Access

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ACCESS

INTRODUCTION

Many access decisions get made in Chambers without written decision. Much of how one approaches this area is based on experience rather than precedent however, with some of the more contentious issues in access there is some guidance from the courts.

This paper will focus on some of the more contentious issues of access where parties are seeking to limit not only the amount of access but to put conditions on the exercise of that access.

LEGISLATION

The *Divorce Act* is very general when it comes to the issues of access. Section 16 sets out that a Court may make an Order for custody and access to any of the children of the marriage. Section 16 (8) requires that the court take into account only the best interest of the child as determined by reference to the conditions, means, needs and other circumstances of the child.

The only other specific considerations to be considered are set out is in s. 16 (10), which requires that in making an Order under the Court must give effect to the principal that the child of the marriage should have as much contact with each of the spouses as is consistent with the best interest of the child and shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Under the *Family Law Act* section 33 allows the Court to make a Parenting Order for a definite or indefinite period and make impose terms, conditions and restrictions in connection with the Order.

The Supreme Court considered access issues in the decision of *Young v. Young,* [1993] 4 S.C.R. 3 (S.C.C.) wherein the Court determined the ultimate criteria for determining when it is on access to a child is the best interest of the child. The custodial parent has no "right" to limit access.

> The judge must consider all factors relevant to determining what is in the child's best interest; a factor which must be considered in all cases is Parliament's view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child. The risk of harm to the child while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access — what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is.

SUPERVISED ACCESS

One of the most difficult issues in access is when it may be appropriate to require access to be supervised.

There is not a lot of definition in the Alberta courts as a specific test or circumstances where the court will Order supervised access. Like many access issues it is very dependent on the specific circumstances.

Where the Alberta courts have not set out a specific test to determine when supervise access is there has been some attempt to do so in Nova Scotia. The decision of *M.T. v. M.G.*, 2010 NSSC 89 from Nova Scotia set out some clear guidelines in that province with respect to supervised access. The Court sets out:

> "Supervised access is not a long term solution to access problems which often arise in high conflict cases. Supervised access is appropriate in specific situations, some of which include the following:
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> a. Where there is a substance abuse issues;
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> b. The child requires protection from physical, sexual, or emotional abuse;
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> c. Where there are clinical issues involving the access parent; or
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> d. Where the child is being introduced or reintroduced into the life of the parent after a significant absence. [1]

The Court went on to state "supervised access is inappropriate if its sole purpose is to provide comfort to the primary care parent."[2]

That decision has not been cited specifically in Alberta however, has been cited in other provinces including Ontario. A review of reported decisions on supervised access in Alberta show that most decisions that order supervised access tend to fit those categories set out by the Nova Scotia court.

Clinical Issues Involving the Access Parent

In *Baldwin v. Baldwin*, 2015 ONSC 1743, supervised access was initially ordered because the father had attempted suicide. The Courts noted the Nova Scotia decision and stated "supervision is a great intrusion into the relationship between the children and the parent and its continued and position

[1] *M. T. v. M. G.*, 2010 NSSC 89 at paragraph 18

[2] Supra at paragraph 19

must be justified."[3] In that decision the Court removed the ongoing need for supervised access and set out a gradual return to access however, due to the father's mental health situation had imposed conditions wherein the father was to direct his psychiatrist to notify the mother if the psychiatrist thought the father posed a risk or if the father failed to by the recommended course of treatment.

Manderscheid J. considered the issue of supervised access after a trial in the decision of KMH v TLH, 2014 ABQB 278. In that matter, the father had had some mental health challenges after separation. He had undergone treatment and had exercised supervised access for a lengthy period of time. Manderscheid J. found for the period of the separation the father had received various treatment therapy and counselling and his mental health had improved significantly. The evidence had shown that at the time of the separation the father had some mental problems and engaged in behaviour that scared the mother and the children and he spent a week in a psychiatric unit. The court found that there was no longer a basis for restricting the father's access to the children to supervised visits. The Court ultimately set up a gradual access period increasing the father's parenting time approximately every four months until he eventually had every second weekend. The process would take approximately a year to complete.

Veit J. considered the issue in the decision of MKD v. AKI, 2008 ABQB 199. In that decision, supervised access had been ordered on the basis of concerns about the mental health of the father. The mother advised that she had been advised by the father's phycologist that there was some risk. By the time of the appearance before Veit J. the psychologist had written a letter that there was no concerns about the father's mental health issues that effect his ability to have unsupervised access. Veit J.ed noted that as is case with most supervised access it is intended to be of short duration. Once the mental health concerns were removed and there was nothing to indicate that there was an ongoing issue.

Protection from Physical, Sexual or Emotional Abuse

A 1995 decision of our Court of Appeal, *E.F. v. J.S.*, 1995 ABCA 333, considered supervised access where the father had been accused of sexual assault. The allegation was with respect to another child (not the child of the marriage) 4 years earlier. In the mean time the father had undergone therapy and rehabilitation. After six weeks of supervised access the chambers court permitted unsupervised daytime visits. The Court of Appeal found that it was not unreasonable of the Chambers Justice that she make an Order for limited period of supervised access and then moved towards unsupervised access. The Court of Appeal went on to state:

[3] Baldwin v. Baldwin, 2015 ONSC 1743 at paragraph 20