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SECTION 1: Child Custody Definitions and Q & A

Child Custody in Canada

"What does child custody mean?"

If you have custody of your children, that means that you have the right to make the important decisions in your children's lives, such as decisions regarding education, religion and medical treatment.

"My spouse and I are still living together. Who has child custody?"

Both parents have an equal right to custody of their children until a court orders otherwise.

"What are the different types of child custody?"

SOLE CUSTODY - This is when one parent has custody of the children.

JOINT CUSTODY - Joint custody is where both parents have custody. Courts will normally only award this where the parents are able to cooperate on matters involving parenting. This is also known as joint legal custody.

SHARED CUSTODY - This is when the both parents have joint custody of the children, and both parents spend at least 40% of the time with their children. This is also known as joint physical custody.

SPLIT CUSTODY - This is when one parent has custody of some of the children, and the other parent has custody of the remaining children. This type of custody rarely occurs, as courts are reluctant to split children up.

"What about access (visitation)?"

When one parent is awarded custody of the children, the other parent is normally granted the right of access (visitation). Unless the court has concerns about a person's parenting ability, the court will generally award the non-custodial parent as much access (visitation) as possible.

"What is supervised access (visitation)?"

If the court has concerns about a person's parenting ability, then "supervised access" will be ordered. This is where the access visits occur at a facility where they can be supervised by a social worker. There are many of these throughout Canada. Also, supervised access (visitation) may be ordered in cases where a parent has abducted the children before.

"What rights does an access parent have?"

An access parent is entitled to visit and be visited by the children. He or she may also make enquiries and be given information concerning the children's health, education and welfare.

"What is primary or principal residence?"

This is the home in which the children spend most of their time. So, for instance, there may be an arrangement where there is joint custody of the children, but the children have primary residence with one of the parents.

"Are there any other alternatives?"

Yes. Many parents who are able to communicate about their children choose instead to have a decision-making process. So, for instance, all major decisions about the children's education must be discussed in advance and agreed to by both parties. If the parties are unable to agree, then the parties go to mediation or binding arbitration about the issue.

"Will my children have to testify in court?"

Normally no. However, in a hotly contested child custody dispute, the judge may want to speak with your children privately in the judge's office. The children may be represented in court by a lawyer appointed by the Office of the Children's lawyer.

"What if I want to move to another city with my children?"

This is one of the most difficult situations in family law. As with any decision involving children, the court will look at the best interests of your children. In some cases, it is better for your children to stay in the same city, so they have stability in their lives. In other cases, the children will be better off moving with you to another city. It all depends on the particular circumstances of your case. Your lawyer can help you evaluate your chances of a court allowing you to move to another city with your children.

"Can my child custody and access arrangements be changed?"

Yes. Over time, children's needs change, your circumstances change and so do your former spouse's circumstances. What was best for the children at one time may no longer be in your children's best interests.

"My former spouse has denied me access visits with my children several times, contrary to our court order. What can I do?"

A family lawyer can apply to the court to have your spouse found in contempt of court. If your spouse continues to deny you access to your children, then your spouse may be fined or in extreme circumstances, jailed. A court may even allow you to have custody of your children if the denial of access is persistent. In these types of cases, it is important to document everything as it happens.

"At what age can a child choose with which parent the child wants to live?"

Technically, the child cannot choose which parent they want to live with. Rather, the court considers the child's wishes and preferences about the parents. What the child wants is only one out of several facts a court considers. The older the child is, the more weight that is given to his or her opinion.

Most people, of course, are looking for exact numbers as to ages. There are no such rules.

However, the wishes of children fourteen and over are normally decisive in child custody disputes. This is primarly because at that age, if a child does not like things, he or she can simply hop on a bus and go to the other parent's home.

The court normally considers the wishes of children between the ages of eight and thirteen. The wishes of children younger than eight normally have a minimal impact on custody.

"Who was the primary parent during the marriage?"

If one parent was a stay at home parent during the marriage, and the other parent worked full-time, the stay at home parent is normally considered the primary parent.

The following factors are considered in identifying the primary parent:

-Getting the children dressed in the morning
-Bathing and grooming the children
-Taking care of the children while they are not in school are daycare
-Arranging for the children to meet with playmates
-Putting the children to bed at night
-Preparing meals for the children
-Arranging medical and dental appointments, and taking the children to medical and dental appointments
-Transporting the children to and from school or daycare
-Transporting the children to and from extracurricular activities
-Buying the children's clothes

-Participating in recreational or educational activities with the children
-Participating in the children's religious training
-Arranging the children's birthday parties
-Helping the children with their homework
-Attending parent-teacher conferences
-Arranging for babysitters for the children
-Caring for the children when they are ill
-Disciplining the children
-Teaching the children to read
-Generally, there is a strong presumption that parent who was the primary parent should have custody of the children. It can be very difficult to overcome this presumption in court.

"Does the mother obtain child custody?"

Not necessarily. The person who has been the children's primary caregiver usually obtains child custody.

"What does the court look at in deciding who gets child custody?"

The court decides child custody based on what is in the child's best interests. In Canada, the court will look at a number of factors in determining the child's best interests, including:

-each parent's ability to provide for the child's needs,
-the relationship each parent has with the child,
-your child's wishes, if he or she is old enough,
-if you have more than one child, the court normally prefers to keep them together,
-the court will try to minimise the disruption of the child's life (the status quo), and
-who the primary caregiver of the child was during the marriage
-time available to spend with the children (working hours, out of town trips)
-one parent's interference with the other parent's relationship with the children
-any special needs of the child.

A family law lawyer can help you evaluate how these factors apply to your circumstances, and what your chances of getting child custody are.

"What are the most important factors for child custody"

Officially, everything is important and all factors are considered.

However, three factors tend to dominate. First, if there is a satisfactory status quo, it will be difficult to change that. Second, if one parent has been the primary caregiver during the marriage (for instance, a stay at home mom), this person is likely to get custody. Finally, it is a very rare situation where the courts will give custody of one child to one parent, and another child to another parent.

It is very rare for a step-parent to obtain custody, but it also seems to be rare for a step-parent even to ask for custody.

"Can I lose child custody even if I am a great parent?"

Yes! Normally, if child custody is disputed, in Canada child custody will be awarded to only one parent. That is why it is so important to see a family lawyer as soon as possible if you have a child custody dispute.

"How do I obtain child custody?"

You can obtain child custody by agreement or by court order.

"Is it important to act quickly?"
Sometimes. For instance, if you believe that your spouse will abduct your children -- or if you believe that your spouse will not return your children to you, you should act quickly.

"What about my spouse's past conduct?"

Courts do not consider a person's past conduct, unless it is relevant to the person's ability to care for the children. Thus, things such as abuse of the children or drug use would be considered.

Child Custody - Tips for Visitation

There's a lot to think about as you arrange access visits with your children. Following are some general Canadian family law guidelines to help you think about the details and avoid common access problems.

Under Canadian family law, the most important thing is what's best for the child. Access can often become entangled with power issues between the parents. Even in the best of cases, parents may find themselves allowing children to do things they shouldn't (like refuse to visit a parent) because of their own emotional vulnerabilities. As much as possible, always try to ask yourself what an objective observer would believe was best for the children.

Try to ensure that the time each parent shares with the children includes a mix of weekdays and weekends. Weekends are usually time for fun activities, even if there's some homework or other work to be done; weekdays are all about getting up on time, getting to school, getting homework done, and getting to bed on time. So make sure that you're spending some of each kind of time with your child. This will ensure that your relationship with your child is as well-balanced as possible. And it will help to prevent the child from developing the idea that one parent is nice and one is strict.

Stick to a routine as much as possible. Whatever your Canadian family law agreement is regarding access, try to stick to the plan unless there's really an emergency - or unless it's really important for your child. Having consistency in the access routine is important for a number of reasons. Once you start making changes, it gets easier to do so in the future, and a pattern might develop of canceling or changing times - a pattern that might result in children spending considerably less time with one parent that the other, and a pattern that might in the end lead to the child feeling more distant toward that parent. In addition, you and your ex-spouse are less likely to argue over access if you both simply make a commitment to

stick to the schedule. Finally, if you do have an emergency and need some flexibility in your child care schedule, both your ex-spouse and your child will be much more understanding if it’s really a rare occurrence.

Make changes formally. If you need to make a substantial change in the access schedule, have the access order or agreement changed. Otherwise, it’s likely you’ll end up in a dispute later on, and if the change was made for your benefit, it might look as though you weren’t keeping the child’s best interest firmly in mind. The only way to be sure all parties understand and agree to a change in access routine is to formally change things. You should consult a Canadian family law lawyer about formalizing these changes.

Child Custody Assessments

"What is a child custody assessment?"

This is when a child psychologist, psychiatrist or social worker meets with all parties to evaluate and recommend who should receive child custody and access. The professional meets with you, your children, your spouse, you and the children together, your spouse and the children together, and any extended family members. The professional then prepares a report with recommendations regarding child custody and access.

"How long does an assessment take?"

Between 1 and 3 months, depending on how complicated your situation is.

"How much does an assessment cost?"

Normally, between $4,000 and $10,000. The assessment is normally paid for by both spouses.

"Wow! I can't afford that kind of money. Is there a cheaper way?"

Some government agencies can provide assessments for free, such as the Ontario Children's Lawyer. However, the Ontario Children's

Lawyer may choose not to get involved in your case. Also, you do not have a choice over who will perform the assessment.

"How important is the assessment report?"

It will be very influential in the court's decision-making about child custody and access. Many cases are settled on the basis of what the assessment report recommends.

"That's a serious problem, as the report recommends that my spouse gets child custody. What should I do?"

At this point, you must seriously consider whether it truly is in your children's best interests that you get child custody. If it is, a family lawyer can help you show the court why the assessor's report is wrong.

Children's Law Reform Act

Section 30 - Child Custody and Access - Assistance to Court
(1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

[In short, the court may appoint someone to perform an assessment to help the court decide issues of custody and access. This person is normally a child psychologist or a social worker.]

(2) An order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to the child with or without a request by a party to the application.

(3) The court shall, if possible, appoint a person agreed upon by the parties, but if the parties do not agree the court shall choose and appoint the person.

[Normally, the lawyers are able to agree on someone, as each city has its own recognized experts.] (4) The court shall not appoint a

person under subsection (1) unless the person has consented to make the assessment and to report to the court within the period of time specified by the court.

(5) In an order under subsection (1), the court may require the parties, the child and any other person who has been given notice of the proposed order, or any of them, to attend for assessment by the person appointed by the order.

(6) Where a person ordered under this section to attend for assessment refuses to attend or to undergo the assessment, the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.

[As usual, the court punishes people who flout its rules or behave badly.]

(7) The person appointed under subsection (1) shall file his or her report with the clerk or local registrar of the court.

(8) The clerk or local registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

(9) The report mentioned in subsection (7) is admissible in evidence in the application.

(10) Any of the parties, and counsel, if any, representing the child, may require the person appointed under subsection (1) to attend as a witness at the hearing of the application.

(11) Upon motion, the court by order may give such directions in respect of the assessment as the court considers appropriate.

(12) The court shall require the parties to pay the fees and expenses of the person appointed under subsection (1).

(13) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

(14) The court may relieve a party from responsibility for payment of any of the fees and expenses of the person appointed under subsection (1) where the court is satisfied that payment would cause serious financial hardship to the party.

(15) The appointment of a person under subsection (1) does not prevent the parties or counsel representing the child from submitting other expert evidence as to the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

[Most of the time, however, the court will simply accept the recommendations of the assessor. If the assessment is not favourable to you, you have an uphill battle.]

Parenting Coordination

What is Parenting Coordination?

Parenting Coordination is a dispute resolution service for high conflict couples. A Parenting Coordinator (PC) is usually a mental health professional, although lawyers and mediators sometimes perform this function. Regardless of profession, the PC must have experience with and knowledge of separation/divorce, high conflict families, child development, conflict resolution skills, family systems, and domestic violence.

What do Parenting Coordinator's Do?

The Parenting Coordinator (PC) has two general functions. One is as a coach/educator/facilitator, who attempts to minimize parental conflict and enhance parallel parenting, cooperation, and mutual respect. This involves helping parents to develop more effective problem solving skills and strategies, to communicate better with each other, and to understand relevant child development principles. Whenever possible, a major goal is to help parents develop better skills so they do not need a Parenting Coordinator. The second function is to assist parents to implement, maintain and comply with their Parenting Plan. If there is a dispute and the parents cannot

come to a mutual agreement, either on their own or with the assistance of the Parenting Coordinator, the PC makes final and binding decisions in keeping with the children's best interests for matters that are not designated otherwise in the Parenting Plan. However, the PC does not make binding decisions regarding legal custody, relocation and/or parenting time schedules, other than those of a minor and temporary nature.

What types of situations are best suited for Parenting Coordination?

Parents may want to consider hiring a Parenting Coordinator when other avenues of problem and conflict resolution have been unsuccessful and when disagreements persist. It may be helpful for families where parents remain very angry at each other, and/or where the parents have difficulty sharing child-related information in an effective and child-focused manner. Parenting Coordinators may be useful in families where parents have concerns about drugs, alcohol, child abuse, and/or the stability of the other parent. Parenting Coordination may be helpful in resolving interim arrangements and issues for parents who are separated although living temporarily in the same home. Also, the PC may be useful to families with young children when the Parenting Plans include schedules that change incrementally over time. Here, the PC assists the parents to implement the evolving parenting time schedule, making minor adjustments in accordance with the children's best interests.

Many, although not all families, have already participated in a custody/access assessment. All families will have a Parenting Plan. Some of these plans, though, require more specification and clarification, which can be accomplished in Parenting Coordination.

What is involved in the referral and intake process?

The Parenting Coordinator accepts referrals after obtaining preliminary information from the parents and lawyers, if they are also involved. A review of the current Parenting Plan, Court Order and custody/access assessment report, if available, is required. If lawyers are involved, a brief conference call is advised to review the situation and mandate. The parents attend for an information

meeting with the Parenting Coordinator during which the Parenting Coordination Retainer Agreement (subsequently referred to as Agreement) is reviewed. The parents and lawyers will be provided with this Agreement prior to the conference call and/or information meeting. A retainer is accepted in advance for this preliminary work.

The parents must consent to participating in Parenting Coordination as well as consent to the specific Parenting Coordinator. It is strongly advised that the parents' consent be formalized into a Court Order. The parents are strongly encouraged to obtain independent legal advice prior to signing the Agreement.

What happens during the Parenting Coordination process?

The PC will have full access to any reports and documentation that may be relevant, as well as to any other professionals, who have been and/or continue to be involved with the family. Meetings with the parents and sometimes the children in various combinations may be regular or on an add-needed basis when a problem arises. When a dispute occurs that the parents are unable to resolve on their own, the Parenting Coordinator will attempt to assist them by providing support, education, and facilitation. If the parents cannot come to an agreement, the PC will make a binding decision relying on information from the parents, and where necessary the children and other professionals (e.g., doctors, teachers, therapists, etc.).

Once the parents have agreed to a Parenting Coordinator, they may be "stuck" with that person for the term that is defined in the Agreement and/or Order. Terms typically range from 6 to 24 months. If both parents find that the Parenting Coordinator is unhelpful, they can agree to dismiss the PC. If the Parenting Coordinator comes to the conclusion that he/she cannot be helpful to the family, he/she can resign. However, if only one parent is unhappy with the Parenting Coordinator, that parent cannot dismiss the PC prior to the previously agreed to term.

Fees are paid by the parents in accordance with the Agreement. Typically, Parenting Coordinators request a retainer when they begin their work with a family.

Moving With Children After Separation

"I have sole custody of my children. What happens if I want to move somewhere else?"

Even though you have sole custody, you must still obtain the approval of your former spouse before relocating your children.

"My ex will never voluntarily agree to my leaving with our kids. What can I do?"

You'll need to start legal action asking the court to grant you permission to move your children.

"What will the court be looking for?"

The court decides this by looking at what is in your children's best interests.

-Don't discuss your divorce problems or argue in front of your children.
-Don't use your children as messengers.
-If you make negative comments about your spouse, even in a joking manner, your children may get angry with you because children never want to hear anything negative about either of their parents.
-Maintain your positive parenting - your children want and need structure and limits (Make sure that your children are doing all they are supposed to be doing, like homework and other obligations).
-Reassure the children that you and your spouse love them and you both will always love them and take care of them.
-Reassure the children that the divorce is not their fault in any way.
-Let them know that there is nothing that they can do or say to prevent the divorce.
-Give age appropriate explanations to the children about your plans before you separate.
-Tell them your plans about the time they will spend with you, and where they will live and attend school. Invite questions and give age-appropriate answers.
-Maintain a positive attitude in front of your children - smile.

-Reduce stress by including physical exercise as a part of your regular activities together.
-Give each of your children their own journal where they can record their activities, and feelings through drawings and writing.
-Encourage your children to maintain, or develop hobbies and socialize with friends.
-Show your interest in your children's lives: Ask about school activities; go to parent teacher night; volunteer at their school; attend functions that are important to them.
-Have some fun with your children - take them to a ballgame, movie or museum.
-Keep your promises to your children.
-Your children may need to talk to an impartial, trusted adult, a counselor, a relative, a member of the clergy, or a therapist to deal with their fears and emotions surrounding the divorce.
-Most important of all:
-Enjoy your children and let them be children when they are with you.
-Take care of yourself so that you can care for your children.
-Remember, when one door closes, another one opens.

"'Best Interests' is a pretty vague standard - how do I know what the court will decide?"

You're right, it is pretty vague. This is one of the most difficult areas of family law. It can be difficult to know in advance how a court will decide. As a general guide, if one parent has sole custody, that parent is more likely to succeed in obtaining the court's permission to move the children. If the parents have joint custody, it is more difficult to move away. The larger the role in the children's lives of the other parent, the harder it is to move. The reason for the move can also make a difference. If the move is simply to join a new partner, it may be difficult to get the court's permission; whereas, if there are solid economic reasons for the move, the court is more likely to give permission.

Children's Law Reform Act

Section 24 - Merits of Application for Child Custody or Access

(1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

[This is what the court always looks at - the best interests of the children. Whenever a court looks at anything to do with children, this is the test. Even if a new issue came before the court - say whether we should send children to the moon - the question would be whether sending the children to the moon would be in the children's best interests (yes! it's fun!).]

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,

(a) the love, affection and emotional ties between the child and,
(i) each person entitled to or claiming custody of or access to the child,
(ii) other members of the child's family who reside with the child, and
(iii) persons involved in the care and upbringing of the child;

(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

[These are some (but by no means all) of the factors that a court will look at in determining what is in the children's best interests.]

(3) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to act as a parent of a child.

[So, for instance, adultery is normally irrelevant to a determination of child custody.]

Easier For Custodial Parents To Move With Their Children

A recent Court of Appeal decision has made it easier for custodial parents to move away with their children.

In Bjornson v Creighton, [2002] O.J. No. 4364, the Ontario Court of Appeal allowed the custodial mother to move from Waterloo to Calgary with her 6-year-old son. This was despite the fact that the father was, according to the court, a loving parent who frequently sees his son and is active in his son’s upbringing.

While the court has not gone as far as automatically allowing custodial parents to move their children, the court has made it very difficult for these moves to be opposed. In the past, courts have rejected such moves on the grounds that it is in the best interests of children to have maximum contact with both parents. In this case, the court gave much less weight to this factor, and stressed the importance of preserving the child’s primary care-giving environment.

In addition, the father was required to pay $23,000 of the mother’s legal costs, in addition to his own legal costs of $25,000.

Opposing a custodial parent’s move has always been difficult. This latest case has made it even more difficult and expensive than before.

Children's Law Reform Act

Section 20 - Child Custody and Access
(1) Except as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.

[Both parents have an equal right to custody of their children.]

(2) A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child.

[This is what the court always looks at - the best interests of the children. Whenever a court looks at anything to do with children, this is the test. Even if a new issue came before the court - say whether we should send children to the moon - the question would be whether sending the children to the moon would be in the children's best interests (yes! it's fun!).]

(3) Where more than one person is entitled to custody of a child, any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child.

(4) Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.

[This is one good reason why you should not leave home without first consulting a lawyer.]

(5) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

[This is something that a lot of institutions, such as schools, have a problem with. If you have access to your children, you have the right to get information about them.]

(6) The entitlement to custody of or access to a child terminates on the marriage of the child.

(7) Any entitlement to custody or access or incidents of custody under this section is subject to alteration by an order of the court or by separation agreement.

Canada Divorce Act

Section 16 - Child Custody Orders
16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of an access to, any or all children of the mariage pending determination of the application under subsection (1).

(3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

(4) The court may make an order under this section granting custody or, or access to, any or all children of the marriage to any one or more persons.

(5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

(6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs and other circumstances of the child.

(9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

(10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Dealing with Denial of Access to your Children

Motions for contempt are increasingly being used by parents when they are faced with a denial of access to their children. Unfortunately, it is very difficult to succeed on such a motion, and generally these motions should only be brought as a last resort when there is a pattern of repeated denials of access.

The main reason for the difficulty of succeeding at a motion for contempt is that contempt is considered quasi-criminal in nature. This is because of the serious penalties that a court can impose if it finds there has been contempt – including a jail sentence. Because of this, the person bringing the motion for contempt must show “beyond a reasonable doubt” that there has been contempt, which

can be difficult to do. In the typical “he says, she says” scenario, there is generally a reasonable doubt.

In addition, to succeed at a motion for contempt, it is not enough to show that the access order has been breached. You must also show that the person who did not comply with the order did so wilfully. This can be difficult in the case of access, as there are numerous valid reasons why an access order may not be followed: for instance, a mixup as to the dates, a sick child, and a refusal by an older child to go to the other parent’s home.

Normally, if access is denied, the best thing to do is to document it, and to demand “make up” time with your children, and (if applicable) any costs associated with the missed access visit (for instance, the cost of a plane ticket). Given the emotional nature of divorce proceedings, especially shortly after separation, there frequently are conflicts surrounding access. It is only in cases of flagrant or repeated violations of access that a court will do anything.

Even when the court does find a parent in contempt, it is slow to punish the parent. This is because the normal penalties for contempt -- fines or jail time -- are generally not appropriate in an access dispute. Often, a court will simply order make up time, which is something you probably can negotiate without the necessity of contempt proceedings.

Parallel Parenting

"What is parallel parenting?"

This is a form of joint child custody. The advantage of this form of joint child custody is that the parents need not be able to communicate well about the children.

"How does parallel parenting work?"
Each parent is in charge of the decisions regarding the children when the children are in their care. There is a well-defined mechanism setting out how the important decisions in the children's lives are made.

"What are the advantages of parallel parenting?"

In the past, to defeat a claim for joint child custody, all one parent had to do was claim that the parents could not cooperate in raising their children. The parent could artificially generate small conflicts, and joint custody would be denied. Parallel parenting is possible even when the parents are unable to cooperate. This gives both parents the opportunity to be involved in their children's lives.

"How common is parallel parenting?"

It is becoming must more common. The first major case in which it was used was in 1997, and called Mol v. Mol. In this case, the judge stated that joint custody can even be appropriate where parents are openly hostile and uncooperative. Since then, judges have been more and more willing to order parallel parenting.

DNA Paternity Testing

One day, John received an unexpected visit. It was from a process server, who served him with legal papers. The papers stated that a former girlfriend of John’s was suing him for child support. According to the papers, John was the father of her six-year-old son, Andrew.

John was stunned. He could not help but wonder whether the child was really his, or whether paternity fraud was involved. Although he was willing to help if the child was his, he was worried that this was simply a tactic by his former girlfriend to get some money. A paternity test would resolve whether John was the father, but will a court order that a paternity test be done?

A paternity test uses DNA, normally from blood samples, to determine whether the presumed father is the biological father. This is the same DNA testing that is used to catch criminals by the police.

Canada has recently seen a large increase in paternity testing. It has become so common that one firm has set up billboards in Toronto that advertise their paternity testing services. There are several reasons for this popularity. Modern DNA testing is a lot cheaper than previous blood-type testing, costing $600.00 to

$800.00. It can be completed more quickly, normally in a few days. Much smaller blood samples are needed, and the mother need not be tested. Finally, the accuracy of DNA testing is normally more than 99%.

In his circumstances, John can apply to the court for leave to obtain blood tests for the use of determining paternity, and to submit the results into evidence. Generally, a court will grant leave for blood tests if parentage is an issue in the case. This is because the court is trying to ascertain the truth. Given that modern paternity testing with DNA is so accurate, ordering a test often the best way for the court to resolve the issue. However, the granting of leave is not automatic, and will not be allowed if the court believes that John is simply using the paternity testing to delay matters.

If John or Andrew is unwilling to submit to the court-ordered blood tests, they cannot be found in contempt of court. This is because the court cannot actually force John or Andrew to submit to a blood test if they are unwilling to do so. Instead, the law simply allows a judge to permit the parties to obtain blood tests and submit them into evidence. However, if a person refuses to undergo blood testing, a court is entitled to drawn an adverse inference from this. In other words, if John refuses blood testing, it is likely that a court will find him to be Andrew’s father. Similarly, if Andrew’s mother refuses to allow John to undergo blood testing, then it is likely that a court will find that John is not Andrew’s father.

There have been several constitutional challenges to the laws allowing the courts to order blood tests. However, all of them have failed. The courts have found that ordering blood tests does not violate a person's privacy rights; a person's rights to life, liberty and security of the person; a person's right to security from unreasonable search and seizure; and a person's right not to be subjected to cruel and unusual punishment. This is because the court does not compel a person to submit to blood tests; rather the court only draws an adverse inference on a person's failure to do so.

If the paternity test reveals that John is not Andrew’s father, John will not be required to pay child support. So, paternity testing can be

used to protect men from paying child support for children that are not theirs.

However, there are limits to when a court will use paternity testing. These limits imposed by the courts have caused great debate over what it means to be a father.

One controversial area is that of access. A court generally will not admit the results of a paternity test when it is deciding access. For instance, suppose instead of being served with legal papers, John found out somehow that he may be Andrew's father. John wants to spend time with his son, and become involved in his upbringing. John cannot simply ask the court for leave to submit the results of a paternity test into evidence. The court would not look at this, because what is important is not whether John is Andrew's father. What matters is what is in Andrew's best interests. Introducing a total stranger into Andrew's life may or may not be good for Andrew, depending on the circumstances. Often, however, a court will deny access in such a situation. Many people do not believe that this is fair.

Another situation where a court looks at the results of paternity testing is where a parent and child relationship already exists. For instance, suppose instead that John and his ex-girlfriend had married. John then spent several years raising Andrew. After a few years, John and his wife separated. Andrew goes to live with his mother, who asks for child support from John.

After separation, in a fit of anger, John's wife informs him that Andrew is not really his son. There was paternity fraud. John has a paternity test done, and finds out that this is true. However, the results of the paternity test will not be looked at by the court. This is because for child support purposes, it does not matter whether John is Andrew's biological father. This is because a 1998 Supreme Court of Canada judgment said that a step-parent could be required to pay child support if they acted as a parent for long enough. Since John had been acting as Andrew's father for all of Andrew's life, John would be required to pay child support, regardless of the biological relationship. John cannot just walk away from his parental responsibilities.

This is a very controversial issue. The rationale for requiring a man to pay child support in these circumstances is that it is in the child's best interests. It provides the child with economic protection. However, many men are upset that they must pay 15 or more years of child support for a child who is not theirs, especially when the mother has lied to them about paternity. This happens with alarming frequency. Depending on the lab, ten to thirty per cent of all paternity tests show that the presumed father is not the biological father.

In a Quebec case, a father is challenging the fairness of this law. A Montreal police officer is suing his former wife for reimbursement of the child support payments he has been ordered to pay. He is arguing that his wife fraudulently misrepresented the paternity situation to him, causing him financial loss. This case is still before the courts.

There is no doubt that the increased availability and accuracy of paternity testing, as well as its declining price has impacted family law. It has raised fundamental questions about a father's obligations and what it means to be a father. The trend is an increased reliance on paternity testing. How this will shape family law remains unclear.

Children's Law Reform Act

Section 10 - Blood Tests

(1) Upon the application of a party in a civil proceeding in which the court is called upon to determine the parentage of a child, the court may give the party leave to obtain blood tests of such persons as are named in the order granting leave and to submit the results in evidence.

[Note that this means that granting an order requiring paternity testing is in a judge's discretion. It is not mandatory.]

(2) Leave under subsection (1) may be given subject to such terms and conditions as the court thinks proper.

(3) Where leave is given under subsection (1) and a person named therein refuses to submit to the blood test, the court may draw such inferences as it thinks appropriate.

[Note that this means that if you refuse to comply with a court order requiring paternity testing, the court will generally assume what is worst for you - normally that you are the child's father.]

(4) The Health Care Consent Act, 1996 applies to the blood test as if it were a treatment under that Act.

Child Custody - International Parental Kidnapping

What can be done when a parent kidnaps a child to a foreign country?

For instance, when Jen and Bob divorced, Jen moved back to her hometown, New York, with their only child, Allison. Since she was short of money, Jen never bothered to get a court order formalising her child custody of Allison. Bob returned to his hometown, Ottawa. Allison would visit him there during her school holidays. This arrangement worked well for a few years. However, at the end of one summer holiday, instead of sending Allison back to New York, Bob decided to enroll her in school in Ottawa. Despite repeated phone calls from Jen, Bob refused to return Allison.

The effects of a parental kidnapping can be devastating on the children involved. Yet, in our world of increasing mobility, increasing divorces, and increasing numbers of marriages between people of different nationalities, situations like that of Jen and Bob are becoming increasingly common. That is why since 1980, when it was first adopted, many countries have signed a treaty known as The Hague Convention on the Civil Aspects of International Child Abduction, which deals with international parental kidnapping. The kidnapping may happen in two ways: a parent may simply take the child out of the country (known as "wrongful removal") or as in Allison’s case, a parent may refuse to return the child once the child is out of the country (known as "wrongful retention").

The Hague Convention helps people in Jen's situation. It allows Jen to commence family law proceedings in Ottawa to secure the prompt return of Allison to New York. It is important to note that under Article 16 of the Hague Convention, a court handling these proceedings is prohibited from making any decisions regarding Allison's child custody. Thus, if Jen starts family law proceedings under the Hague Convention, Bob cannot argue that he should have child custody of Allison. Similarly, even if Bob starts a separate proceeding for child custody of Allison, the court will not grant him this because of the proceedings under the Convention. The idea behind Article 16 of the Hague Convention is that it is in Allison's best interests that child custody decisions be made by the court where she lived prior to being kidnapped. Once Allison is back in New York, the New York courts can deal with any concerns regarding child custody.

If Jen brings family law proceedings under the Hague Convention, the first issue is whether the Hague Convention applies to her case. According to Article 4 of the Hague Convention, the Hague Convention does not apply if Allison is 16 years or older or if she was not kidnapped from or to a country that has signed the Hague Convention. To date, more than 50 countries have signed the Hague Convention, including both Canada and the United States. In addition, the Hague Convention is not retroactive: the countries must have signed the Hague Convention prior to the kidnapping. Thus, assuming that Allison is not yet 16, Jen is fortunate as she can use the Hague Convention to help get Allison returned.

Under Article 6 of the Hague Convention, each country designates a Central Authority that handles the international parental kidnapping cases for that country. In Canada, child custody is a provincial responsibility, so each province and territory has designated a Central Authority (normally the Ministry of Justice or Attorney General). Additionally, the Canadian government has designated the Department of Justice as a Central Authority to help the other Central Authorities. The federal Central Authority is particularly useful if a child is thought to have been abducted to Canada, but it is unknown to which province in Canada.

The official role of the Central Authorities is to aid people in Jen's situation. In reality, the role of the Central Authorities is often limited, due to underfunding and understaffing; however, they can be helpful in locating a kidnapped child, locating a foreign family law lawyer and providing statements of what the law is in the country from which the child has been abducted. Jen may choose to seek the assistance of either the American, Canadian or Ontario Central Authority if she needs it. Or, Article 29 of the Hague Convention allows her to bypass the Central Authorities and start proceedings on her own.

The key section of the Hague Convention is Article 3, which defines when a parent has wrongfully taken or kept a child. Basically, this occurs when there has been a breach of the custodial parent's rights under the law of the jurisdiction in which that person lived. Additionally, the custodial parent must actually have been exercising his or her custodial rights. In Allison's case, the question is whether Jen's child custody rights have been breached under the law of New York. Although Jen never obtained a formal child custody order, she still has child custody, as Article 3 of the Hague Convention makes clear that child custody can arise either by a legal decision, an agreement between the parties, or "by operation of law." Clearly then, Bob's failure to allow Jen to return is a breach of Jen's custody rights.

Where the conditions of a wrongful taking or keeping of a child are satisfied, Article 12 of the Hague Convention mandates that the court order the child returned to the custodial parent. However, there are defences that Bob could raise. If a defence is successful, the Hague Convention leaves it to the court's discretion whether to order Bob to return Allison.

Article 13 of the Hague Convention provides three important defences. The first is that the custodial parent acquiesced in the removal or retention of the child. Thus, Bob could argue that Jen had agreed to let Allison stay with him, not just for the summer, but permanently. In such a situation, the actual evidence presented to the court, such as return airline tickets and school registrations, will be important in determining the outcome.

The second defence is that the child's return would expose the child to a grave risk of harm or an intolerable situation. So, if Bob could, for instance, adduce evidence that if Allison were returned, she would be abused before he could take appropriate action in a New York court, then the Hague Convention would not require a court to order Bob to return Allison.

The third such defence is if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. Thus, if Allison says that she would like to continue living with Bob, and she is old enough to make such a decision, then a court need not order Bob to return Allison. This defence is the subject of great controversy, as different countries have different standards about at what age a child is old enough to make such a decision. In Canada, a rough rule of thumb is that a court will take into account the views of teenagers. However, German courts have taken into account the views of six and seven year olds, which is an age when many Canadians would think a child is too vulnerable to manipulation by his or her parents.

Another important section dealing with defences is Article 12 of the Hague Convention. Under this Article, if the custodial parent waits more than one year to start an action, and the other parent demonstrates that the child is settled in its new environment, then a court need not order the child's return. In Jen's case, starting an action within a year is not much of a problem. However, had Jen not known where Allison was, she could easily have spent a year trying to locate her. In that case, it would be much likely that Allison would be returned.

Another defence is found in Article 20 of the Hague Convention, which provides that a court may refuse to order a child's return if the child's return would violate the fundamental freedoms or human rights of the country in which the court is located. Obviously, this would not apply in Jen's case, as the United States is a democratic country. However, it could be used be someone objecting to the return of a child to a country where, for instance, a military coup had occurred.

Pursuant to Article 11, the Hague Convention sets a goal of completing Jen's legal case within six weeks. This is often more optimistic than realistic. However, the United Kingdom has set up a special court in which such cases are heard, and they successfully complete the cases within six weeks.

One problem with the Hague Convention is the costs involved. Legal, travel, expert witnesses and other costs may run up to $100,000.00 or more, especially if translators are required. Article 26 of the Hague Convention allows countries to implement a "loser pays" rule. However, under Article 42 of the Hague Convention, countries are allowed to opt out of this and Canada has done so. Thus, Jen may not recoup her legal costs even if she were successful in having Allison returned. However, Jen would be eligible for legal aid in Ontario on the same basis as if she were a resident of Ontario.

The Hague Convention is a mechanism by which a kidnapped child may quickly be returned to his or her custodial parent. This prevents a magnification of the already devastating effects on the child of a parental kidnapping. On paper, the Hague Convention looks quite good and accomplishes everything that it sets out to accomplish. However, given that one party has already demonstrated a lack of good faith and respect for the law, it is rare that the process works smoothly. The kidnapping party can use the defences in the Hague Convention to thwart the return of the child, or at least dramatically increase the other party's legal costs and the amount of time before the child is returned. Despite these difficulties, the Hague Convention has been a success. Statistics from the United States, the United Kingdom and Australia show that the rate of return for children kidnapped to Hague Convention countries is significantly higher than for non-Hague Convention Countries. Although it is not perfect, the Hague Convention provides a way to get a lot done. Certainly, in a situation like Jen's, it is her best chance for getting Allison returned quickly.

Child Custody - Sample Parenting Plan

BETWEEN

WENDY JONES (MOTHER)

AND

HAROLD JONES (FATHER)

We, Harold Jones and Wendy Jones, the parents of [NAME OF CHILD] (date of birth [DATE OF BIRTH]) and [NAME OF CHILD] (date of birth [DATE OF BIRTH]), make this Parenting Plan to help us meet our mutual responsibilities as parents and to further the welfare of our children. We are choosing to lessen the impact of our separation on our children by working together in a cooperative manner in our roles as parents.

BASIC PRINCIPLES

1. We acknowledge that this Plan cannot reflect all future needs of our children or ourselves. We are therefore committed to the spirit reflected in this Parenting Plan and are open to being flexible and willing to discuss and resolve parenting issues as they arise.

2. We acknowledge that we have a mutually shared interest and responsibility, including shared decision making, for our children's upbringing. We believe that it is in the best interests of our children for both parents to be actively involved in their lives on a regular basis.

GUIDELINES FOR CO-PARENTING

3. We will try always to stay calm and child-focussed when we discuss issues related to our children.

4. We will speak directly with each other regarding parenting matters, and will not put our children in the middle to carry messages.

5. We will make every effort not to argue in the presence of the children.

6. We will not speak critically about each other or about each other's parenting in front of our children. We will ask our family and friends to do this as well.

7. We will keep adult matters such as legal and financial issues firmly between us and away from our children.

8. We will not burden our children with such feelings as sadness, anger, and loneliness related to our separation.

9. We will respect the other parent's right to privacy regarding his/her personal life.

10. We will encourage our children to have the best relationship possible with the other parent, and will not ask them to choose between us.

11. We will give each other the benefit of the doubt.

REGULAR PARENTING SCHEDULE

1. The children will spend one week (seven days) in the care of one parent, and the following week in the care of the other parent.

2. Transitions between the two homes will take place Friday after school. The parent receiving the children will pick them up after school. The other parent will return the children's belongings to the receiving parent on Friday morning.

3. To simplify the transitions between the homes, we want to minimize the belongings going between the homes. While the children will be free to take special belongings from one home to another, we will encourage them to have special belongings at both homes. They will have clothes and other necessities at both homes.

4. We will develop and maintain the same list of sitters for our children to provide for consistency between the two homes.

5. We will both support a healthy diet and exercise for our children.

6. We believe that it is important that the non-residential parent and children have an opportunity to spend some time together during the week when the children are residing with the other parent. We therefore agree that on Wednesday the non-residential parent will pick up the children at the bus stop or at school, have dinner with them, and return them to the other parent's home at 7:00 p.m.

7. The children are free to phone the non-residential parent any time (prior to bedtime). That parent may call the children every couple of days.

PARENTING SCHEDULE HOLIDAYS AND SPECIAL OCCASIONS

8. Changes to the schedule may be made with the agreement of both parents.

9. All holiday return times are 5:00 p.m. unless otherwise specified.

In the school year 2004 - 2005, the following will apply:

Thanksgiving Weekend:
10. The children will be in the care of their father for the Thanksgiving weekend.

Christmas:
11. The Christmas holiday period will be divided into two parts: Week 1, and Week 2. Week 1 will be the first part of the holiday, and will include Christmas Eve and Christmas Day. Week 2 is the second part of the holiday, and will include New Year's Eve and New Year's Day.

12. The children will spend the first week of Christmas with their mother. The father will pick up the children on Boxing Day at noon, and they will spend the second week in the care of their father.

March School Break:
13. The March school break is defined as the period from Friday after school until two Sundays later (that is, nine days) at 5:00 p.m. before supper. The children will be in the care of their mother for the March school break.

Easter:
14. Easter is defined as the period from after school on the Thursday before Easter until the following Monday at 5:00 p.m. The children will be in the care of their father for the Easter weekend.

May Long Weekend:
1. The children will be in the care of their mother for the three-day May long weekend.

2. In the following school year, this holiday schedule will alternate so that the children will be in the care of their mother for Thanksgiving, with their father for the first week of Christmas holidays, and so on.

Summer:
3. The summer school holiday (approximately nine weeks) will be shared equally by the parents.

4. Each parent may take a maximum of two consecutive weeks (Friday until Friday two weeks later) to spend with the children. Transition time will be at noon on Friday, unless the parents mutually agree on another time.

5. The remainder of the summer holiday period will be shared equally so that the children spend alternate weeks in the care of each parent. If there is an extra week, it will be divided so that the children spend half the week with each parent.

6. We will decide in the summer holiday by April 30 of each year.

7. If there is an uneven number of weeks in a given summer, then the parent who the children are not with prior to the last week of the summer (that last week will be shared equally by the parents) will be the parent with whom the children reside for the first week of school.

Halloween
8. Regardless of the schedule, arrangements will be made for the children to see both parents on Halloween.

Children's Birthdays:

9. The non-residential parent is free to call the child on her or his birthday. The non-residential parent and the child are free to have a brief visit on the child's actual date of birth (length of visit to be determined by the residential parent).

10. The children's birthday parties involving friends will be jointly planned by the parents and will take place in a neutral setting.

Parents' Birthdays:
11. Regardless of the regular schedule, if the children wish to see a parent on her or his actual birthday, then arrangements will be made for this visit.

Mother's Day/Father's Day
12. If the children are not regularly scheduled to be in the care of the parent being recognized, then the children may spend from 9:00 a.m. until 5:00 p.m. in the care of that parent. The regular schedule will then resume.

RIGHT OF FIRST OPPORTUNITY

13. When the residential parent will be out for an evening during a period which includes putting the children to bed, then that parent will ask a sitter to care for the children.

14. However, if the residential parent will be away for a period of time including an overnight, then the other parent will be first asked if she or he is available to care for the children. If he or she in available, then the children will be cared for by that parent. There will be no expectation by that parent needing the child care to make up for the period of time that he or she is absent.

15. Any other time a parent requires child care, it will be at his or her discretion regarding our children's upbringing.

MAJOR DECISION-MAKING

1. We agree that we will both be involved in all major decisions regarding our children's upbringing.

2. Major decisions include issues concerning our children's education, health, religion, day care, extracurricular activities, and their general welfare.

3. In the event of any disagreement between us regarding a major decision pertaining to either or both of our children, we agree to follow the dispute resolution process outlined below.

MINOR DECISION-MAKING

4. Minor day-to-day parenting decisions are made by each parent independently during their own parenting time as long as such decisions do not impact on the other parent's time with the children. When minor decisions do impact on the other parent's time with our children, then that parent will participate jointly in the decision-making.

REGULAR HEALTH/DENTAL CARE (including emotional, psychological, and physical)

5. The parent booking an appointment will inform the other parent in a timely manner. The parent who is caring for the children during the week that the appointment falls is responsible for taking the child/ren. She or he will inform the other parent of the results. Both parents are also welcome to attend.

6. Each parent is free to individually access the health care professionals treating the children.

7. The children's health cards and immunization records will travel with the children between the two homes.

EMERGENCIES

8. Each parent will be responsible for providing emergency medical and dental care during their own parenting time. Each parent is to notify the other parent as soon as reasonably possible of any illness requiring medical attention, or any emergency involving our children.

9. The parents agree to leave with each other instructions on how they can be reached in case of emergency.

10. In urgent situations regarding our children at school, we will do the following:

a. If the non-residential parent (of the week) is contacted by the school regarding the need for one or both of our children to be picked up at school for any reason (for example, illness or a snowstorm), then that parent will try to contact the residential parent.

b. If the residential parent is contacted, then it is his or her responsibility to pick up the child at school and to care for the child.

c. However, if the residential parent cannot be contacted, then the non-residential parent will pick up the child at school, care for the child, and leave a message for the residential parent regarding the situation. Once the residential parent becomes aware of the situation, it is his or her responsibility to care for the child.

d. If the child is ill and is at the home of the non-residential parent's, then the residential parent, with input from the non-residential parent, with input from the non-residential parent, will make the decision regarding whether to have the child return to her or his home that day.

SCHOOL EVENTS/EXTRACURRICULAR ACTIVITIES/MEETINGS

1. We consider it to be important to our children that we both are frequently present at their school events, extracurricular activities, and any meetings pertaining to either or both of our children, regardless of their regular schedule.

2. When one of our children is participating in an activity (for example, a soccer game), the residential parent that week will take the child to the activity, and, by mutual agreement, the other parent may have the option to spend one on one time with the non-participating child. The parents will make such arrangements together prior to talking with the children.

3. If the residential parent is unable to take the child to an extracurricular activity, then that parent will first ask the other parent if he or she is available to do so. If that parent is unable to do so, then the parent initiating the request is responsible for making appropriate arrangements.

PARENTS' COMMUNICATION ABOUT OUR CHILDREN

4. We will communicate by log book and electronic mail. We will correspond in a respectful manner that addresses child-related issues only. The parent who is invited to respond will do so in a timely manner (even if the parent is simply responding saying she or he is unable to respond within the suggested timeline, and will get back to the other parent by a specific date.)

5. Information sent home with the children from school will be shared between the parents in a timely manner.

TRAVEL WITH THE CHILDREN

6. The parent planning to travel with the children will let the other parent know of the plans as soon as possible and request any documentation required, including a letter of permission. Requests to travel with the children will not be unreasonably withheld.

PASSPORTS

7. The parents will initiate the process to obtain the children's own passports once the parents have obtained the necessary documentation regarding their separation.

CHILDREN'S DOCUMENTS

8. The children's passports, birth certificates, and social insurance cards will be kept in a safety deposit box . Both parents will have keys to the safety deposit box. We will inform the other parent when we will be accessing the documents.

9. The documents will be promptly returned to the safety deposit box following each use, and the other parent will be notified that they have been returned.

RELOCATION

10. We both agree that it is very important to our children that they have easy and uninterrupted access to both parents through until their completion of high school.

11. However, in the event of unforseen circumstances which involve a relocation of either parent, we agree that we will discuss together, or attend mediation if either believes that would be helpful, to make any necessary changes to the Parenting Plan which are in the best interests if the children. The parent who is relocating will discuss the relocation at least 90 days in advance with the other parent.

DISPUTE RESOLUTION PROCESS

12. We agree that if a dispute occurs about any of the terms of this Parenting Plan, or any other issue regarding the children, we will first make a reasonable attempt to resolve the dispute between ourselves, including seeking any professional consultation which may be appropriate.

13. In the event that we are unable to reach a consensus, after having made a reasonable attempt to resolve the issue(s), we will attend mediation within fifteen (15) days from the time that the parent initiating the mediation has informed the other parent in writing of this intent. (We realize that the timeline of 15 days may be minimally extended to accommodate the mediator's schedule.) The parents will share equally the cost of mediation.

14. However, should a decision be required on an urgent basis, then either parent may proceed with an application to a Court of competent jurisdiction to determine the matter in issue.

INDEPENDENT LEGAL ADVICE

15. We each acknowledge that we have been advised to seek independent legal advice prior to signing this Parenting Plan; that we have read the Parenting Plan and understand our respective rights and responsibilities outlined herein; and that we are signing this Parenting Plan voluntarily.

Child Custody - 12 Ways to Make Visitation Easier on Children
Going from one parent's house to another and back again can take its toll on children. Here are some suggestions to make this easier for the children:

1. Age is probably the biggest factor to consider when dealing with visitation. For younger children, it may be more difficult to spend time away from their primary residence. Visitation for infants and toddlers generally involves shorter, frequent visits. Older children can do better with longer access.

2. Consistency in visitation is extremely important. Children need a stable routine so they feel safe and know what to expect. If change becomes necessary due to illness or other reasons, the parents should consult with each other to arrange an alternative. This conversation need not include the children.

3. Parents should always be on time for visitation. If there is a problem with the time, arrangements should be made as soon as possible so the children do not feel anxious about the parent not arriving as scheduled.

4. Parents need to make sure children are packed and ready for access on time. Clean clothes for the length of the visit, shoes, hats, gloves, etc., should all be ready so there are no last-minute hassles. Letting the kids pick out a special suitcase (or duffel bag, book bag, etc.) for their visits will make this a special time for them.

5. Parents should make sure children are not hungry or over-tired when it's time for drop off or pick up. Happy, well-fed and rested children can deal with the transition much better.

6. Allowing the children to bring their stuffed animals, blankets, special toys, etc., will make them feel more comfortable during visitation.

7. Don’t hold any conversations about child support, personal problems, or other subjects that may create tension in front of the kids. The communication at the time of drop off and pick up should always be cordial and non-threatening. This should be a happy time for the children. Any problems between the parents should be discussed at a time when the children are not present. Children can sense hostility between parents and will react to it.

8. Don’t tell your children how much you will miss them. This causes unnecessary stress on the children if they see you unhappy over their visits.

9. Don’t interrogate your children when they return to your home. Let them know they can talk to you about the visit, but let them tell you the things they want to, without prying. You want them to talk to you. Let them know by your actions that they can expect a neutral response. This will let them know they have not said anything wrong.

10. Visitation is not about you, but what is best for your children. Keep in mind that children love their other parent, even if you don't. Do not talk negatively about the other parent or what goes on at their home.

11. Allow children to call the other parent when they request it. That does not mean you need to allow the child to call the other parent just because they are upset with you. Tell the child they can call their other parent when they settle down. Children should know they have access to both parents at any time.

12. Children should understand that visitation is something that you have set up for them and for their benefit. The parents make the decisions regarding it. The children can express their ideas and opinions regarding access, but the parents make the final decision.

Child Custody and Access Assessments

Statutory Authority
Section 30 of the Children's Law Reform Act authorises the court to order a child custody and access assessment. It provides as follows:

Section 30 - Child Custody and Access - Assistance to Court
(1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

(2) An order may be made under subsection (1) on or before the hearing of the application in respect of custody of or access to the child with or without a request by a party to the application.

(3) The court shall, if possible, appoint a person agreed upon by the parties, but if the parties do not agree the court shall choose and appoint the person.

(4) The court shall not appoint a person under subsection (1) unless the person has consented to make the assessment and to report to the court within the period of time specified by the court.

(5) In an order under subsection (1), the court may require the parties, the child and any other person who has been given notice of the proposed order, or any of them, to attend for assessment by the person appointed by the order.

(6) Where a person ordered under this section to attend for assessment refuses to attend or to undergo the assessment, the court may draw such inferences in respect of the ability and willingness of any person to satisfy the needs of the child as the court considers appropriate.

7) The person appointed under subsection (1) shall file his or her report with the clerk or local registrar of the court.

(8) The clerk or local registrar of the court shall give a copy of the report to each of the parties and to counsel, if any, representing the child.

(9) The report mentioned in subsection (7) is admissible in evidence in the application.

(10) Any of the parties, and counsel, if any, representing the child, may require the person appointed under subsection (1) to attend as a witness at the hearing of the application.

(11) Upon motion, the court by order may give such directions in respect of the assessment as the court considers appropriate.

(12) The court shall require the parties to pay the fees and expenses of the person appointed under subsection (1).

(13) The court shall specify in the order the proportions or amounts of the fees and expenses that the court requires each party to pay.

(14) The court may relieve a party from responsibility for payment of any of the fees and expenses of the person appointed under subsection (1) where the court is satisfied that payment would cause serious financial hardship to the party.

(15) The appointment of a person under subsection (1) does not prevent the parties or counsel representing the child from submitting other expert evidence as to the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

Should an order for a child custody assessment be made?

Subsection 30(2) provides that an order “may” be made rather than an order “shall” be made. As such, it is in the court’s discretion as to whether to make an order. How does the court exercise its discretion?

In the past, if requested in a contested child custody or access case, an assessment would normally be granted. However, since the mid-

1990's, courts have been more reluctant to order assessments. This is due to the cost and delay of carrying out an assessment.

The case normally considered the turning point is Linton v Clarke, 21 O.R. (3d) 568 (C.A.). The court dismissed the mother's appeal of an order denying her request for a child custody assessment. The court stated that:

Assessments should not be ordered in all cases as a vehicle to promote settlement of custody disputes. If the legislatures had intended that assessments were to be a vehicle to settle custody disputes, the legislation would have mandated assessments in all cases.

Assessments should be limited to cases in which there are clinical issues to be determined in order that such assessment can provide expert evidence on the appropriate manner to address the emotional and psychological stresses within the family unit in the final determination of custody.

What are "clinical issues"?

Linton v Clarke (supra) is one of the first times a case mentioned that there must be "clinical issues" to be determined for a child custody assessment to be ordered. What exactly a clinical issue is has not been well defined in the cases. In addition, the cases have not been consistent in requiring there to be clinical issues for an assessment to be ordered.

Ottawa Judge, Madam Justice Blishen, in Glance v Glance, [2000] O.J. No. 3244 (S.C.J.) listed some types of clinical issues, as follows:

-alleged manipulation of the child by one parent
-alleged physical abuse of the child
-alleged emotional abuse of the child
-alleged sexual abuse of the child
-child exhibiting behavioural problems or difficulties

Ottawa Judge, Madam Justice Blishen stated that a parent's angry outbursts and irrational behaviour were not enough to be considered a clinical issue.

Cases where child custody assessment ordered

Goldberg v Goldberg, [1996] O.J. 3205 (Gen. Div.)
In this case, the father alleged that the mother was manipulating the children not to want access with their father. There was no discussion of clinical issues. A child custody assessment was ordered, despite the fact that the Office of the Children's Lawyer had been involved and had filed an affidavit. The court found the mandate of the Office of the Children's Lawyer to be to narrow (namely, "to provide assistance in confirming the views of the children") and an assessment would be more helpful in determining whether the mother was alienating the children from their father or not.

D.M.M. v D.P.L., [1999] A.J. No. 30 (Alta. Q.B.)
In this case, an assessment was ordered given the allegations of abuse, violence, mental instability, police involvement in this matter (with facilitating neutral drop-off/pick up) and the parent's conflicting affidavit material and just the general high-conflict situation. The case is most useful for its statement of what the purpose of a child custody assessment should be:

An assessment should not be ordered automatically. Mr DPL has the onus of justifying the request. He is required to establish that the home study is likely to provide evidence that pertains to the welfare of the child and would not be discoverable otherwise.

Liao v Liao, [2003] O.J. No. 5063 (S.C.J.)
In this case, there was extreme bitterness on both sides. The mother claimed that the father was a workaholic physician who was never interested in his children and had violent temper tantrums (although she admitted that this was never against her or the children). The father claimed that the mother exhibited signs of being mentally unstable. He also argued that in the wife's previous relationship, she manufactured fears of violence and abuse to gain a tactical edge in the litigation (he showed this with an affidavit from

her former husband). The court stated that although there was no clear clinical issue, the parties were so diametrically opposed in their views of the other that a neutral third party would be helpful to the trier of facts.

Parniak v Carter, [2002] O.J. No.2787 (S.C.J.)
This case is useful as it specifically states that a clinical issue is not the only reason to order a child custody assessment:

There is no statutory requirement of a clinical issue, explicit or implicit, in s.30 CLRA... Although a clinical issue may be an excellent reason for a court to obtain the assistance of a professionally prepared assessment, it is not the only reason that an assessment might be ordered.

[....] Although assessments should not be ordered in every case, neither should they be limited to those cases where “clinical issues” are involved.
The court gives an alternative reason why a child custody assessment may be ordered:

In addition to the pronouncements of an expert, assessment reports also provide, admittedly often in hearsay form, mountains of information about the family that simply is not found in the pleadings before the court. There is no question that this is factual material and that it forms evidence that is before the court. This is a major contribution to the evidence needed by the court to make a proper decision.

Kramer v Kramer, [2003] O.J. No. 1418 (S.C.J.)
In this case, the father brought a motion for a child custody assessment because he was continually being denied access. The mother stated that this was because of the children’s scheduled activities. Access suddenly ceased. The mother claimed that the children did not want to see their father. The father claimed that the mother was manipulating the children.

An assessment ordered because there were issues of the mother allegedly manipulating the children. As well, a child custody

assessment was needed to determine the root cause of the children's alienation from their father.

Cases where child custody assessment refused
There are many such cases, as it is more common to refuse a child custody assessment than to order one.

One case normally cited in refusing a child custody assessment is Glance v Glance, [2000] O.J. No. 3244 (S.C.J.) by Ottawa Judge Madam Justice Blishen. The father wanted an assessment on the ground that the child was having behavioural problems. Madam Justice Blishen found that there was no evidence to suggest the need for an assessment as the evidence of the daughter's daycare provider indicated that the behavioural problems the child was having had ceased. Madam Justice Blishen had this to say about assessments:

Assessments by their very nature are intrusive. They are also expensive and time consuming. There must be evidence sufficient to satisfy the court that the reasons for requiring the assessment more than offset any harm that might be incurred by ordering the assessment. The paramount concern must be the best interests of the child.....

Ultimately, the court has the discretion as to whether or not to order a custody/access assessment. If such an assessment would be materially helpful on clinical issues relating to the best interests of the child and such an assessment itself, is in the best interests of the child, then it may be ordered.

Another decision by Madam Justice Blishen refusing a child custody assessment is Vanier v Vanier, [2002] O.J. No. 5244 (S.C.J.). In this case, the father requested an assessment on the ground that the mother had alienated him from their younger son, age 11. He provided plenty of evidence of difficulties surrounding his access. Madam Justice Blishen found that there was insufficient evidence to justify an assessment. The father was exercising regular access, and once the son left his mother and was with his father, the son enjoyed his time with his father.