

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

**Family Relations Act Review**

**Meeting Access Responsibilities**

**Background Paper**

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

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**SITUATING B.C. IN THE INTERNATIONAL CONTEXT****A) Introduction**

British Columbia, with its reliance on civil contempt, is becoming increasingly out of step with access enforcement developments in other Anglo-American jurisdictions. Australia, New Zealand, England and the six American states examined for this paper have moved towards a system of specific access enforcement remedies. These jurisdictions have also undertaken procedural reforms to assist in the resolution of family disputes, including access disputes. These include innovations such as the adoption of a one family-one judge model of case management in England, expedited access enforcement procedure in Arizona, Utah, and Michigan and specialized, less adversarial trials in Australia and New Zealand. Australia and England have paired legislative amendments with significant funding increases to support family programs and services.

None of these jurisdictions has a separate administrative tribunal dedicated to access enforcement.

Access-related developments in each of these four countries are discussed below.

**B) Australia**

Australia has had a specialized family court for 30 years and specific legislative access enforcement remedies for over a decade.

***Access Enforcement Remedies***

Australia introduced a three-tiered access enforcement regime in April 2001 – preventative measures in Stage 1, remedial measures in Stage 2, and finally, a set of punitive remedies in Stage 3.<sup>1</sup>

This three-tiered compliance regime did not prove as effective as originally hoped. In 2003, the Attorney-General's Department reported preliminary statistics suggesting:

*[Stage 2] orders are being made in less than 5% of applications for enforcement of orders. Anecdotally there are a number of reasons for this. Firstly, the regime is still relatively new and appropriate programs have not always been available. Further, it seems that in very many cases the original orders that have been made are not able to work effectively between the parties. In many cases where orders are made by consent it appears that couples are agreeing to orders without really appreciating what the orders might actually mean in practice. So the first court appearance is often about varying the original orders to make them more workable.<sup>2</sup>*

On July 1, 2006 some wide-ranging changes to the *Family Law Act 1975* took effect, including changes to Stage 2 and 3 of the access enforcement regime. The additional remedies are noted in bold.

The preventative measures:

- place a duty on judges to include in the order the particulars of the obligations created by the order and the consequences of its breach (s. 65DA(2));
- place a duty on judges, if the parties do not have lawyers, to explain the availability of programs to help the parents to understand their responsibilities under the orders and also the availability of location and recovery orders (s. 65DA(3));
- allow judges to require the parties' lawyers to undertake these explanations, if the parties have lawyers to represent them (s. 65DA(5) & (6)); and

- require that the information be “expressed in language that is likely to be readily understood by the person to whom the order is directed or the explanation is given” (s. 65DA(8)).
- require (with some exceptions) parents to attend family counselling before a judge can make an order (s. 65F).

The *Act* also sets out that where a contravention of an order is alleged but not established, a judge may make an order varying the existing order (s. 70NBA) or an order for costs against the person who brought the application (s. 70NCB).

The second stage of the access enforcement regime, added in 2001<sup>3</sup> and amended in 2006, is primarily remedial in nature. If an aggrieved parent establishes on a balance of probabilities that the other parent has contravened the access order, a judge may make orders:

- directing the parent who committed the contravention, or that parent and another person, to attend a post-separation parenting program (s. 70NEB(1)(a));
- granting compensatory time with the child for time not spent because of the contravention (s. 70NEB(1)(b));
- varying the order (s. 70NBA);
- adjourning the proceeding to allow either or both parents to apply for a further parenting order (s. 70NEB(1)(c));
- requiring the parent who committed the contravention to enter into a **bond**, which may include conditions that the parent attend family counselling, family dispute resolution or appointments with a family consultant (s. 70NEB(1)(d) and s. 70NEC);
- granting compensation for **expenses reasonably incurred** because of the contravention (s. 70NEB(1)(e));
- requiring the parent who committed the contravention to pay some or all of the other parent’s **costs** (s. 70NEB(1)(f)); and
- if the judge makes no other order in relation to the contravention, order that the person who brought the application pay some or all of the **costs** of the person who committed the contravention (s. 70NEB(1)(g)).

Contravention is defined in s. 70NAC as:

- intentionally failing to comply with the order;
- making no reasonable attempt to comply with the order;
- intentionally preventing compliance with the order by a person who is bound by it; or
- aiding or abetting a contravention of the order by a person who is bound by it.

Contravention of an order may be excused if the non-compliant parent had a “reasonable excuse”, including:

- the parent contravened the order because he or she “did not, at the time of the contravention, understand the obligations imposed by the order” and “the court is satisfied that the [parent] ought to be excused” (s. 70NAE(2)); and
- the parent “believed on reasonable grounds that [the contravention was] necessary to protect the health or safety of a person (including the [parent] or the child)” and “[the contravention] was not longer than was necessary to protect the health or safety of the person...” (ss. 70NAE(4), (5), (6) & (7)).

However, even where a judge finds that there is a reasonable excuse for a contravention, the judge may make an order:

- varying the existing order (s. 70NBA);
- granting **compensatory time** with the child for time not spent because of the contravention (s. 70NDB); or
- if the judge does not make an order for compensatory time, make an order for **costs** against the person who brought the application (s. 70NDC).

The third stage is designed for second or subsequent violations (s. 70NFA(3)), or a first violation if “the person has behaved in a way that showed a serious disregard of his or her obligations under the primary order” (s. 70NFA(2)(b)). The judge must make an order that the person who contravened the order pay all the costs of another party, unless it would not be in the child's best interests to do so (s. 70NFB(1)(a) and (2)(g)) and may make other orders, such as:

- a community service order (ss. 70NFB(2)(a) and 70NFC);
- bonds for up to two years, with or without security or surety, that may include conditions such as attending counselling or maintaining good behaviour (ss. 70NFB(2)(b) & 70NFE);
- an order compensating the person for **time** not spent with the child because of the contravention (s. 70NFB(2)(c));
- an order varying the breached order (s. 70NBA);
- a fine of up to 60 penalty units (\$6,600) (s. 70NFB (2)(d));
- up to 12 months' imprisonment (ss. 70NFB(2)(e) & 70NFG);
- an order compensating for **expenses reasonably incurred** because of the contravention (s. 70NFB(2)(f)); or
- an order that the person who contravened the order pay some or all of the **costs** of another party or parties to the proceedings (ss. 70NFB(2) (g) & (h)).

### ***Program and Service Innovations***

Australia has adopted a special hearing format for cases involving child-related issues, such as custody or access. What began as a pilot project in the Family Court registries of Sydney and Parramatta in 2004 has now been enshrined in Australia's family law.<sup>4</sup> The proceedings are less adversarial, and the judge plays a much more active role. He or she maintains greater control by deciding:

- the issue(s) in dispute;
- what evidence is called; and
- the way the evidence is received.<sup>5</sup>

The judge is also empowered to make decisions (e.g. on a particular factual issue) at any point during the hearing. Thus, judgement need not be given in its totality at the end of the hearing.<sup>6</sup>

Other departures from the traditional hearing format include:

- the focus is on the future rather than the past;<sup>7</sup>
- the atmosphere is less formal: lawyers do not wear robes, for example, nor are there formal requirements as to where lawyers should sit in the courtroom relative to parties;<sup>8</sup>
- there may be direct discussions between the judge, the parties, and the parties' lawyers, and the family consultant (mediator) – as opposed to the usual pattern of direct examination by one lawyer followed by cross examination by the other lawyer;<sup>9</sup>

- the judge has authority to dispense with the traditional rules of evidence, including those governing hearsay or opinion evidence;<sup>10</sup> and
- a family consultant is available from the first day of hearing to assist.<sup>11</sup>

On July 1, 2006, the children's cases program became the standard hearing format for all cases in Australia's Family Court that involve children's matters.<sup>12</sup> Australia expects that the new system will result in shorter, faster, and, consequently, less costly hearings.<sup>13</sup> It is also expected that the new format will do no further harm to families. A study of the children's cases pilot project published in March 2006 found that the new format did no further harm to the co-parenting relationship or the children's post-separation adjustment.<sup>14</sup>

Along with its legislative reforms, the Australian government announced a large increase in spending on family law programs. It has committed to spending \$397 million over four years.<sup>15</sup> Some of this money will fund the creation of 65 Family Relationship Centres, intended to act as a gateway to the family justice system.<sup>16</sup> They are the contact point for access disputes. A brochure on Family Relationship Centres reads: "If your parenting arrangements break down, or your court orders are breached, the centres will be a first port of call to help fix the problem outside the courts."<sup>17</sup> The services offered at the Centres include:

- information and referral;
- group programs (e.g. parenting after separation courses);
- up to three hours of joint dispute resolution sessions (e.g. mediation).<sup>18</sup>

Part of the funding increases will go to supervised access and exchange services. The government has announced funding for 30 new "Children's Contact Services".<sup>19</sup>

Other family law services that will receive funding are 15 new services under the Parenting Orders Program (formerly the Contact Orders Program) and a national advice line.<sup>20</sup> The Parenting Orders Program began in 1999<sup>21</sup> and is geared to parents who have access enforcement difficulties.<sup>22</sup> Features of the program include: group parent education, individual counselling, family mediation, feedback from the participants' children gathered by the service providers as well as referrals to supervised access and exchange facilities.<sup>23</sup> According to a 2003 evaluation, the most powerful element of the program is the feedback gathered from the children regarding the effect of the parental conflict on them.<sup>24</sup>

### **C) New Zealand**

Like Australia, New Zealand has had a specialized family court for over two decades. It has also developed a legislative access enforcement regime.

#### ***Access Enforcement Remedies***

Although New Zealand has not adopted Australia's three-tiered model, many of the access enforcement remedies available under the *Care of Children Act 2004* are the same as its neighbour's. The remedies are progressively punitive.

At the preventative end of the spectrum, s. 55 of the *Act* requires an explanation to be included with each parenting order. The explanation must cover the effect of the order (the obligations it entails) and any monitoring or review processes included in the order, how to vary or discharge the order, and the consequences of non-compliance.

If the parents have lawyers, the duty of providing the explanation falls to their lawyers.<sup>25</sup> If the child has a lawyer, that lawyer is under the same duty in relation to the child.<sup>26</sup> Under New Zealand's family statute, the court must appoint a lawyer for the child in disputed custody and access cases "unless it is satisfied the appointment would serve no useful purpose".<sup>27</sup> Like the Australian statute, the explanation given to the parents or to the child must be in readily understandable language.<sup>28</sup>

Once a breach of an access order has been alleged, the aggrieved parent may request that the registrar arrange counselling (conciliation) to help resolve the dispute (s. 65). The registrar need not make the referral if he or she is of the view that counselling is unlikely to help (s. 67). However, if the referral is made, a judge may also issue a summons requiring a reluctant parent to attend counselling (s. 69).

Dispute resolution options aside, a judge may also respond to a contravention of an access order by admonishing the violator (s. 68(1)(a)) or by varying or discharging the original order (e.g. decreasing the time the violator spends with the child) (s. 68(1)(b)).

The remedies which a judge may consider “only as a matter of last resort” (s. 64(2)) for serious contraventions or for second or subsequent contraventions include:

- bonds (s. 70);
- reimbursement of reasonable expenses incurred because of the violation (s. 71);
- costs (s. 142); or
- warrants authorizing the police or a social worker to apprehend and deliver the child to the access parent (s. 73).

Finally, sections 78 and 79 of the New Zealand statute are offence provisions. Section 78 is aimed at intentional breaches of access orders “without reasonable excuse”, a phrase which is not defined. Section 79 is aimed at those who knowingly resist or obstruct the execution of a warrant, including a warrant to enforce contact with a child. Both provisions carry possible penalties of up to three months’ imprisonment or a fine up to \$2,500.

Supervised access is also contemplated by the *Act*. However, it is not viewed as an access enforcement remedy for an aggrieved parent but rather as a way to protect children from violence. Supervised access is referred to in section 60 of the *Act* which sets out the procedure for family cases involving allegations of violence against a child or “the other party to the proceedings”. “Violence” is defined in section 58 as physical or sexual abuse. Sections 60(3) and (4) provide that a judge must not give the violent parent custody or unsupervised access unless satisfied, after reviewing a list of risk factors in section 61, that the child will be safe.

### ***Procedural Innovations***

One of the focuses of New Zealand’s recently reformed family law statute is family autonomy in resolving family law disputes. The brochure dealing with access enforcement, “Breaches of Parenting Orders,” states:

*The Court will make an order to deal with a breach of a parenting order only as a last resort. It’s much better for everyone involved, especially the children, if the parties can sort out the problem themselves.*<sup>29</sup>

The starting point in an access dispute in New Zealand’s family justice system is consensual dispute resolution. It is called counselling under the *Care of Children Act 2004* although it is not therapeutic in nature.<sup>30</sup> A 2003 report on dispute resolution states: “Conciliation encourages each party to understand the other’s point of view, and to co-operate in finding a resolution that accommodates both.”<sup>31</sup> These dispute resolution services are provided by the private sector, rather than by court employees.<sup>32</sup> The state offers six hours for free each year.<sup>33</sup>

It appears that counselling is quasi-mandatory in access enforcement disputes. One parent may set the process in motion by requesting a referral from the Registrar of the Family Court under section 65. Section 69 gives a judge the power to issue a summons to require the other parent to attend the session.

If an access enforcement dispute goes to court “as a last resort”, it is case managed. New Zealand has developed timelines. For example, standard track cases are to be completed within 33 weeks from filing and complex cases within 52 weeks.<sup>34</sup>

### ***Program and Service Innovations***

Although New Zealand has undertaken a comprehensive reform of its family law statute, unlike Australia, it has not announced a major budget increase for family law programs or services. One program that is under consideration by the Family Court is parent education. “Children in the Middle” is a four-hour course that was piloted between February and July 2004 in Auckland. It received a positive evaluation in 2005, and Parliament responded by announcing that the program would be rolled out nationally between 2005 and 2009. May 11, 2006, marked the official launch of the program “How to Help Your Kids When You Separate”, which was developed from the “Children in the Middle” pilot. At the launch, the Courts Minister announced a funding commitment of over \$6 million until 2009 and \$1.7 for each subsequent year for the educational program. Attendance is voluntary.<sup>35</sup>

Other recent innovations include a less adversarial hearing format for family cases involving children that is being piloted in six court locations.<sup>36</sup> The program called the Parenting Hearings Programme is based on Australia’s children’s cases program.<sup>37</sup> The pilot will run for two years.<sup>38</sup>

Like the Australian model, New Zealand’s Parenting Hearings Programme differs from traditional family litigation in that the process is:

- managed more closely by the judge;
- less formal; and
- faster (designed to be completed within 2-3 months).<sup>39</sup>

It differs from the Australian model in that a mediator is not present in the hearings. Some commentators in New Zealand have noted that it may be difficult for judges in New Zealand to wear two hats: that is, to have mediation and adjudication functions during the same hearing.<sup>40</sup>

There is also a child-inclusive mediation pilot that is underway in Auckland’s District Court.<sup>41</sup> Initial research on this new mediation model has been favourable.<sup>42</sup>

## **D) England**

### ***Access Enforcement Remedies***

Currently, England, like British Columbia, relies on civil contempt proceedings to enforce access orders. However, this is poised to change. The *Children and Adoption Act 2006*, 2006, c. 20 received Royal Assent on 21 June 2006, although it has not yet been brought into force. The *Act* will amend the *Children Act 1989* by, among other things, introducing a specific access enforcement regime.

As with the Australian and New Zealand legislation, the new *Act* requires access orders to include an explanation of the consequences of breaching the order. They are not called explanations but, more ominously, “warning notices” (s. 11I).

The 2006 *Act* empowers courts to impose “contact activity directions” or “contact activity conditions” (ss. 11A-11D). A contact activity is defined as “an activity that promotes contact with the child concerned” (s. 11A(3)). Such activities include: programs, classes, counselling, or guidance sessions on establishing, maintaining or improving contact or addressing a parent’s violent behaviour (s. 11A(5)(a)). Information sessions on mediation also constitute a “contact activity” (s. 11A(5)(b)).

The new *Act* provides that before a judge imposes a contact activity direction or order, he or she needs to be satisfied that the proposed activity is appropriate, the provider of the activity is

suitable, and that the activity is offered in a place where the person to be subject to the order “can reasonably be expected to travel” (ss. 11E(1)-(4)). The statute also directs the court to consider information as to the likely effects such an order would have, including “any conflict with the individual’s religious beliefs” and any interference it may cause with the person’s work or study schedule (s. 11E(6)).

A final aspect of the new statute’s pre-breach mechanism is monitoring. The court may ask “an officer of the Service or a Welsh family proceedings officer” to monitor compliance with a contact direction or condition (s. 11G). It is also empowered to request such an officer to monitor compliance with a contact order generally (s. 11H(2)(a)) or on a specific compliance matter (s. 11H(2)(b)). A general monitoring order can last for up to 12 months (s. 11H(6)).

The *Children and Adoption Act 2006* creates two access enforcement remedies in addition to a court’s civil contempt powers. The first is an unpaid work requirement (i.e. community service order) of up to 200 hours (Schedule 1, s. 3(3)). The criminal standard of proof (beyond a reasonable doubt) will apply to this kind of enforcement order (s. 11J(2)). The second is an order for compensation for financial loss caused by the breach (s. 11O).

The *Act* does not specify that the financial losses must have been “reasonable”, unlike the compensation-related access enforcement remedy in Australia and New Zealand. However, it requires judges to consider the non-compliant parent’s “financial circumstances” when determining the amount of compensation payable (s. 11O(10)).

Neither of the two proposed remedies may be imposed if there is a “reasonable excuse for failing to comply with the contact order” (ss. 11J(3) & 11O(3)). The 2006 statute does not define “reasonable excuse”.

### ***Procedural Innovations***

England has also adopted a number of procedural reforms. These are not specific to access applications, but will undoubtedly affect access and access enforcement disputes:

- creation of a unified family court (said to be a long term objective);<sup>43</sup>
- development of a set of unified family court rules;<sup>44</sup> and
- a case management system for family cases, guidance given by the President of the Family Division.<sup>45</sup>

The elements of the case management system, called the Private Law Programme, include a mandatory early “First Hearing dispute resolution appointment” to be held at the court within 4-6 weeks of filing,<sup>46</sup> which in spite of its name, may not involve dispute resolution services depending on the outcome of the risk assessment process. The risk assessment, done through both court forms and an in-person meeting, is intended to identify any safety issues.<sup>47</sup> If safety is not an issue, then on-duty CAFCASS (Children and Family Court Advisory and Support Services) employees may provide conciliation services.<sup>48</sup> The Programme states that “save in exceptional circumstances (e.g. safety) or where immediate agreement is possible”, the court is to refer the family for “support and assistance”. Examples of possible referrals include mediation, conciliation, facilitation, treatment and therapy or participation in a Family Resolution Pilot Project (if available).<sup>49</sup> At the end of the First Hearing appointment, the judge is to identify the areas of agreement and disagreement. In addition, for the unresolved matters, the judge is to identify the level of court before which future applications will be heard, set a timetable for the case and the sequence of next steps, address the filing and service of evidence, and indicate whether an expert report is necessary. The judge must also give directions for facilitation, monitoring, and enforcement “in respect of all orders, agreements and referrals”.<sup>50</sup>

Judicial continuity (one family-one judge) is one of the underlying principles of the model of the Private Law Programme.<sup>51</sup> As well, the case management system provides for expedited access

enforcement: if compliance with the original access order becomes an issue, the matter is to be re-listed within 10 days.<sup>52</sup>

### ***Program and Service Innovations***

England announced increased funding for child contact centres over three years: £100,000 in 2003-04, £1.8 million in 2004-05 and a final £1.6 investment in 2005-06. Most of the money – approximately £2.4 million – was earmarked for the creation of 14 new supervised access centres. The remaining £1 million in funding was to be divided between a sustainability fund to benefit existing supervised and supported contact centres (£430,000) and funds for training and consultancy support (£570,000).<sup>53</sup> The government committed a further £7.5 million in funding for 2006-08.<sup>54</sup>

From September 2004 to August 2005, England piloted a family program in three court registries that combined risk assessment, parent education and dispute resolution (conciliation). It was called the Family Resolution Project, and its goal was to hive off first-time access applications (later expanded to include access enforcement proceedings) from court. It was hoped that, in addition to facilitating out-of-court settlement, the pilot would improve the relationship between the disputing parents.<sup>55</sup> Both parents had to consent before the case could be referred to the pilot project.<sup>56</sup> Cases involving allegations of violence were screened out.<sup>57</sup>

The program had very low uptake and completion rates and produced very mixed results.<sup>58</sup> A 2006 evaluation concluded it had had little effect on higher conflict parents.<sup>59</sup>

## **E) United States**

This paper focuses on access enforcement in six states: Arizona, California, Colorado, Michigan, Oregon and Utah.

### ***Access Enforcement Remedies***

Like British Columbia, California, Michigan and Utah rely on the law of civil contempt as the primary access enforcement mechanism.<sup>60</sup> The difference is these states have spelled out the remedies for contempt in their state laws. The other three states – Arizona, Colorado, and Oregon – have inserted specific access enforcement remedies in their family law legislation.<sup>61</sup> The types of remedies vary, as set out in the following chart:

finding of contempt	AZ	CA	CO	MI		UT
make-up access	AZ		CO	MI	OR	
parent education	AZ		CO		OR	UT
counselling	AZ		CO		OR	UT
fines	AZ	CA	CO	MI		
community service		CA		MI		UT
additional terms & conditions on original access order			CO	MI	OR	
vary custody and/or access orders			CO	MI	OR	
imprisonment		CA	CO	MI		
mediation or other ADR	AZ		CO			
security			CO		OR	
reimbursement of expenses associated with access enforcement application			CO*		OR*	
specify the original access order					OR	
suspension of licences				MI		
terminate, suspend or modify child support					OR	
terminate, suspend or modify spousal support					OR	
costs	AZ	CA		MI**		
general order-making power	AZ		CO			

\*includes attorney's fees, court costs

\*\*if the parent has acted in bad faith

Supervised access is not a specific legislative remedy. It may be ordered by courts under a general remedial provision. In Utah, for example, the expedited complaint process for access disputes may result in referrals to contracted supervised access and exchange services.

None of the American access enforcement regimes contains specific remedies for failure to exercise access.

### ***Parenting Co-ordinators (Special Masters)***

Parenting co-ordination is one of the emerging legislative responses to ongoing disputes over access. Arizona, California, Colorado, and Oregon have legislative provisions permitting the appointment of parenting co-ordinators.<sup>62</sup>

Parenting co-ordination was the brainchild of a group of lawyers and psychologists working in Denver, Colorado in the early 1990s as a response to high conflict families.<sup>63</sup> Its use has skyrocketed across the United States in the last decade and is now spilling over into Canada.

While there are variations, parenting co-ordinators are typically mental health professionals, such as social workers, psychologists, psychiatrists or marriage counsellors. Some states also permit the appointment of family lawyers or family mediators.<sup>64</sup>

They typically work with parents who are entrenched in conflict; that is, those who cannot communicate without arguing and who have (or who are likely to have) ongoing conflict, particularly about the implementation of family law orders.<sup>65</sup> Parenting co-ordination may be used proactively, that is the appointment of the co-ordinator made simultaneously with the final order governing custody and access, but more frequently, parents are referred to parenting co-ordinators because they have established a pattern of chronic re-litigation.<sup>66</sup> Access is often a flashpoint. For example, parenting co-ordinators may be asked to resolve disputes such as holiday scheduling, transportation of the children to and from access visits, what the children eat when they are with each parent, bedtime routines, the participation of other people in scheduled access visits (e.g. a new partner), minor alterations of the access schedule so that the child can attend a special event or occasion, and child care arrangements.<sup>67</sup>

The tasks of parenting co-ordinators may be divided into four broad areas: assessment, education, resolution of minor conflicts (mediation/arbitration), and recommendations to the court.<sup>68</sup> First, they assess the difficulties the parents are having in order to try to identify the underlying causes of the conflict. The point of this assessment is to be able to make appropriate referrals and to tailor advice.<sup>69</sup> The educative role includes topics such as communication, child development, conflict resolution skills, community resources, and the negative effect of continuing parental conflict on the family's children.<sup>70</sup> Their third function is to resolve disputes. They try to help the parents reach agreement; however, unlike mediators, they can go one step further and arbitrate the issue if agreement is not possible.<sup>71</sup> Their final function is to make recommendations to the court.<sup>72</sup>

Details of the decision-making and recommendation functions vary from jurisdiction to jurisdiction. For example, in Arizona, when a parenting co-ordinator decides an issue, he or she must submit a report to the court outlining the decision and the basis for it. The court then confirms, modifies or rejects it, addressing any objections lodged by the parents.<sup>73</sup> The parenting co-ordinator may also recommend to the court significant changes to the custody and access arrangements if he or she "determines parenting or family issues or circumstances exist that are significantly detrimental to the welfare of the child(ren)".<sup>74</sup> This latter form of recommendation to the court does not arise out of the parenting co-ordinator's decision-making role, but out of the observations he or she makes of the family. These recommendations must also be set out in writing and given to the parties and to the court.<sup>75</sup>

A sample appointment order from Marin County, California, outlines that certain categories of minor decisions made by parenting co-ordinators are binding unless challenged in court (e.g.

diet, clothing, bedtime). Others (e.g. hiring a lawyer for the child, supervised access, religious training) are merely recommendations to the court.<sup>76</sup>

Colorado has taken a different approach and has separated the decision-making and recommendation roles. Its legislation provides for parenting co-ordinators and also for domestic relations decision-makers. Parenting co-ordinators help the parents implement their parenting plan, develop communication guidelines, inform the parents of available parenting resources, identify the causes of conflict, and assist the parents to develop strategies to minimize conflict.<sup>77</sup> Domestic relations decision-makers take on the mediation/arbitration role. Their decisions are not reviewed by a court unless one of the parents files a request for a *de novo* hearing within 30 days of the decision-maker's determination.<sup>78</sup>

Some jurisdictions have incentives to keep parents from contesting the decisions of parenting co-ordinators (or domestic relations decision-makers). For example, Colorado's 2005 legislation provides that if a parent requests a court hearing and the court "substantially upholds" the domestic relations decision-maker's decision, then

*the party that requested the de novo hearing shall pay the fees and costs of the other party and shall pay the fees and costs incurred by the decision-maker in connection with the request for de novo hearing, unless the court finds that it would be manifestly unjust.*<sup>79</sup>

Another incentive against continuing conflict is the fact that under the American model of parenting co-ordination, the parents bear the full cost of the parenting co-ordinator's involvement.<sup>80</sup> Typically, the fees are split between the parents.

Although parenting co-ordination has been implemented in different ways – court order, court rule, general legislation, specific legislation - the trend in the U.S. is toward legislating provisions specific to parenting co-ordination. This trend is reflected in the states reviewed in this paper: California has general legislation (*Code of Civil Procedure*) that permits the appointment of special masters or referees, but Arizona, Colorado and Oregon have adopted either a specific court rule or specific provisions within their family law statutes.<sup>81</sup>

Proponents of specific legislation argue it is needed to:

- authorize post-order appointments;
- permit the court to order fees to be paid by the parents; and
- delineate the responsibilities of parenting co-ordinators while respecting the legal rights of the parties.<sup>82</sup>

### ***Administrative Agencies and Access Enforcement***

Michigan has an agency called Friend of the Court Bureau (FoCB), which is part of the family division of the state's circuit courts.<sup>83</sup> Since 1983, the FoCB has had responsibility for providing the court with custody and access assessments and for initiating enforcement proceedings of child support and custody and access orders.<sup>84</sup>

With respect to access disputes, the FoCB is under a duty to "initiate enforcement" if it receives a written complaint that contains a specific allegation of a breach of an access order.<sup>85</sup> The FoCB may decline to accept a complaint if the alleged violation is out of time (the breach is alleged to have occurred more than 56 days before the filing of the complaint) or if the complainant has previously made two or more unwarranted complaints, costs were assessed and were not paid.<sup>86</sup> It may also decline to act if the "parenting time order does not include an enforceable provision that is relevant to the...violation alleged in the complaint"<sup>87</sup> (e.g. if the original access order is too general to be enforceable).

If the FoCB accepts the complaint, it may do one of three things. It may offer dispute resolution services in the form of "joint meetings" or voluntary family mediation.<sup>88</sup> It may also exercise a

limited decision-making role. For example, its employees may apply a “makeup parenting time policy” created by each circuit court.<sup>89</sup> Finally, FoCB employees may start court proceedings to enforce access.

If the FoCB pursues the court track, it may either launch civil contempt proceedings (a show cause hearing) or apply for a variation of the original access order (e.g. to specify access so that enforcement proceedings will be possible in the future).<sup>90</sup> The hearings are presided over by a judge or, more commonly a referee.<sup>91</sup> A referee’s decision is a recommendation to the court. A party may file a request for a new hearing within 21 days after the recommendation “is made available” to that person. The referee’s recommended order may be entered as an interim court order pending the *de novo* hearing.<sup>92</sup>

Remedies for civil contempt in Michigan include:

- the imposition of additional terms and conditions to the original order;
- variation of the access order;
- make-up time;
- a fine up to \$100;
- imprisonment: (45 days for the first offence, 90 days for each subsequent finding of contempt);
- suspension of state-controlled licenses (driver’s licences, occupational licences, sporting licences or recreational licences); or
- mandated participation in a community corrections program.<sup>93</sup>

Further fines and an order for costs are available if a party to a parenting time dispute has acted in bad faith.<sup>94</sup>

The FoCB model contains many of the elements advocated for by some (e.g. a specific agency to which to direct access enforcement complaints, decision-makers other than judges, and public carriage of access enforcement complaints). However, there are problems with the FoCB system. The Michigan Chief Justice wrote to the Attorney General, the Governor, and the Legislators in January 2003 advising that the ever-increasing volume of family-court cases had triggered a wave of complaints against the FoCB.<sup>95</sup> Under-funding and under-staffing have been identified as problems in some counties.<sup>96</sup> Moreover, although the FoCB is a neutral agency, parents may perceive it as gender biased: custodial parents, mainly mothers, complain that the FoCB pursues access denial complaints more vigorously than it does child support violations while the perception of access parents, mainly fathers, is the reverse.<sup>97</sup> As well, Michigan’s FoCB appears to enforce only access denial complaints. The Friend of the Court Handbook has a “Parenting Time Questions and Answers” section that states:

***The other parent refuses to see our children. What can the friend of the court do?***

*The friend of the court cannot force a parent to see his or her children. To promote a positive relationship with the children and the other parent, you may wish to consider counselling, mediation or filing a motion to change the parenting time order.<sup>98</sup>*

### ***Expedited Access Enforcement & Mandatory Mediation***

Another trend in the U.S. regarding access enforcement disputes is the use of mandatory mediation as a first response to the problem. This is commonly paired with an expedited complaint system.

For example, since 1988, Maricopa County, Arizona has offered “Expedited Services” as a mechanism to deal with access enforcement complaints.<sup>99</sup> When a complaint is filed, a conference is scheduled within 20 days.<sup>100</sup> At the conference, an employee of the Superior Court

Clerk's Office attempts to mediate the dispute.<sup>101</sup> Unresolved matters are referred to court for an evidentiary hearing.<sup>102</sup>

Monitoring used to be a feature of the program. Most commonly, this involved follow-up phone calls for six months after the program. It was discontinued because of its cost.<sup>103</sup>

Utah introduced a similar model in 1997 called the Co-Parenting Mediation Program.<sup>104</sup> Once a motion to enforce a parent-time order is filed, the clerk schedules a mediation session within 15 days. Participation in mediation is mandatory unless a protective order is in place (and both parties do not agree to mediate). Penalties for failing to attend include fines, suspension of licences, or variation of custody or access orders. The case returns to court only if mediation is unsuccessful.<sup>105</sup> The program uses a roster of approved private-sector mediators who have agreed to charge a reduced fee of \$75/hour. In addition, a sliding scale is used if parents cannot afford the \$75/hour rate.<sup>106</sup> The program involves contracts for related services, such as supervised access and exchange and parent education classes.<sup>107</sup> Employees monitor mediated agreements for up to six months to "encourage compliance".<sup>108</sup> Monitoring may take the form of phone calls, e-mails, letters or in-person meetings.<sup>109</sup>

The Utah State Courts' 2004 Annual Report holds the co-mediation pilot out as a success. The report states that 54% of the pilot's cases reached full agreement and 23% reached partial agreement.<sup>110</sup>

On July 1, 2005, Oregon also adopted an expedited parenting time enforcement procedure. The 2005 legislative amendment permits mandatory mediation as part of the expedited procedure.<sup>111</sup> The discretion as to whether to implement mandatory mediation lies in the hands of the presiding judge of each judicial district.<sup>112</sup> Oregon's family law legislation requires that an access enforcement hearing occur within 45 days of filing the motion to enforce.<sup>113</sup>

California's *Family Code* mandates mediation of contested custody and access disputes.<sup>114</sup> However, it is not combined with an expedited procedure.

### ***Parenting-time Guidelines***

Another trend emerging from the United States is the use of parenting-time guidelines. In some states, these materials are purely educational. In others, they are prescriptive. Arizona, Colorado, Michigan, Oregon and Utah publish (or legislate) parenting time guidelines.<sup>115</sup>

The guidelines or sample parenting plans of Arizona, Colorado, Michigan, and Oregon are educational in nature. They provide general information about access in relation to the children's developmental stages.<sup>116</sup>

Utah's legislated guidelines are prescriptive. They set minimum parenting times based on the age of the children, unless the parents agree otherwise.<sup>117</sup>

Appendix 1 includes an excerpt from Oregon's *Basic Parenting Plan Guide* (June 2003) that sets out age-specific sample access schedules, as well as Utah's prescriptive guidelines.

## SITUATING B.C. IN THE CANADIAN CONTEXT

### A) Legislative Remedies Specific to Access Enforcement

#### *General Access Enforcement Remedies – Information Orders*

Most family law legislation in Canada allows courts to make orders that a person or public body provide information in that person's or body's control about a potential respondent to aid in enforcing an access order.<sup>118</sup> The most common information order is one regarding the proposed respondent's address.<sup>119</sup> Four statutes, including British Columbia's *Family Relations Act*, permit demands for information about the proposed respondent's location and place of employment.<sup>120</sup>

	Address	Location	Place of Employment
BC	X	X	X
AB			
SK	X	X	X
MB	X		
ON	X		
PQ			
NB	X		
NS	X		
NL	X		
PEI	X		
YK	X		
NWT	X	X	X
NUN	X	X	X
CDA			

#### *Legislative Remedies for Access Denial*

Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, P.E.I., and the Yukon have provisions for apprehending a child to deal with access denial situations (e.g. where a child is unlawfully "withheld").<sup>121</sup> All apprehension provisions permit the police to locate, apprehend and deliver the child to the access parent.<sup>122</sup> Some authorize the access parent or his or her agent to apprehend the child to give effect to the access order.<sup>123</sup>

	Apprehension by Applicant or Agent	Apprehension by Law Enforcement (police, sheriff)
BC		
AB		X
SK		X
MB	X	X
ON	X	X
PQ		
NB	X	X
NS		
NL	X	X
PEI	X	X
YK	X	X
NWT		
NUN		
CDA		

Roughly half of Canadian jurisdictions have legislated specific access enforcement remedies for access denial: the prairie provinces, Newfoundland and Labrador, the Northwest Territories and Nunavut.<sup>124</sup> Ontario added access denial remedies to its family law statute in 1990; however, they have never been brought into effect.<sup>125</sup>

Jurisdictions, like British Columbia, that do not have specific access denial remedies, rely on general enforcement mechanisms such as contempt. For example, superior courts have the power to punish contempt of court by way of fines or jail or both. Inferior courts can only punish contempt made in the courtroom. Some jurisdictions, like the Manitoba, Northwest Territories, Ontario, Newfoundland and Labrador, and New Brunswick, have rectified this anomaly by granting inferior courts additional contempt powers.<sup>126</sup> The Provincial Court of British Columbia does not have these additional contempt powers.

In addition to enforcement by way of contempt, some jurisdictions rely on quasi-criminal or criminal sanctions. For example, British Columbia's *Family Relations Act* contains an offence provision in s. 128(3) that could trigger a quasi-criminal hearing and result in fines up to \$2,000 or to six months' imprisonment or both.<sup>127</sup> Finally, in those jurisdictions that do not have "a punishment or other mode of proceeding" expressly set out in their family law statutes (i.e. those that rely solely on superior courts' powers of civil contempt), s. 127 of the *Criminal Code* applies. That section specifies a maximum penalty of two years' imprisonment.

For those seven jurisdictions with more comprehensive access enforcement remedies - British Columbia not being among them- the chart below sets out specific and general access denial remedies that are available.

Access Denial Remedy	Jurisdiction						
	AB	SK	MB	ON*	NL	NWT	NUN
reimbursement of expenses							
finest/jail	AB  Up to \$5K; where default of payment up to 90 days jail	SK**  1 <sup>st</sup> off. – up to \$5K & 90 days jail  2+ off. - up to \$10K & 2 yrs jail	MB***  Up to \$500 & six months jail	ON**  Sup. Crt's contempt powers + for Ont. Crt. of Just. - up to \$5K & 90 days jail	NL**  Sup. Crt's contempt powers + for Prov. Crt. - up to \$1K & 90 days jail	NWT**  Sup. Crt's contempt powers + for Terr. Crt. – up to \$5K & 90 days jail	NUN**  Sup. Crt's contempt powers
supervised access		SK	MB	ON*	NL	NWT	NUN
make up time	AB	SK		ON*	NL	NWT	NUN
court ordered apprehension	AB	SK	MB	ON	NL		
mediation		SK		ON*	NL	NWT	NUN
security	AB	SK					
general directions to promote compliance	AB						
vary or make access order		SK					

\* unproclaimed \*\*via contempt \*\*\*via contempt or offence provision

Some Canadian family law statutes set out reasons that can justify a denial of access. Such clauses serve to limit the number of potential access enforcement proceedings. They also provide guidance as to what constitutes a legitimate reason for access not going ahead as scheduled.

	<b>NOT wrongful denial</b>
<b>AB</b> <i>Family Law Act</i> , S.A. 2003, c. F-4.5, s. 40(5)	A denial of time may be “excusable”.
<b>SK</b> <i>Children’s Law Act, 1997</i> , S.S. 1997, c. C-8.2, s. 26(3)	A denial of access...is wrongful unless  (a) it is justified by a legitimate reason & (b) respondent gave...reasonable notice of the failure and of the reason
<b>ON*</b> <i>Children’s Law Reform Act</i> , R.S.O. 1990, c. 12, s. 34a(4)  *unproclaimed	A denial of access is justified by:  1. a reasonable belief the child might suffer physical or emotional harm if access took place 2. a reasonable belief that the respondent might suffer physical harm if access took place 3. reasonable belief that access parent was impaired at the time of access 4. access parent > 1 hr late 5. illness of the child 6. access parent did not satisfy written conditions concerning access 7. on numerous occasions during the preceding year, the access parent had failure to exercise access without reasonable notice & excuse 8. the access parent said s/he would not be exercising access on the occasion in question.
<b>NL</b> <i>Children’s Law Act</i> , R.S.N.L. 1990, c. C-13, s. 41(3)	Legitimate excuses: (a) reasonable belief the child <u>will</u> suffer physical or emotional harm if access occurs. (b) reasonable belief the respondent <u>might</u> suffer physical harm if access is exercised (c) reasonable belief that access parent is impaired at the time of access (d) applicant > 1 hour late (e) illness of the child (f) access parent does not satisfy written conditions agreed upon (or that are part of access order) (g) on numerous occasions during the preceding 12 mo’s, the access parent failed to exercise access without reasonable notice & excuse (h) the access parent said s/he would not seek to exercise access on the occasion in question (i) the court thinks the withholding of access is justified in the circumstances.



















































































