

DISPUTES ON CHILD ACCESS: JUDICIAL DECISIONS IN NEW ZEALAND

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1. *The significance of judicial decisions on access*

The issue of access to children, following the breakdown of their parents' relationship, is often amongst the most intractable and worrying problems confronting practitioners of Family Law. In particular, if hostility exists between the parents, the question of continuing access may often provide the source and opportunity for the continuation of that hostility (which, needless to say, can pose a considerable threat to the welfare of the children).

In issues of access it is always hoped that disagreements can be resolved without the necessity of a Court hearing and determination; a Court hearing is always a matter of last resort. Even if the disagreement should necessitate a judicial determination, the Court must, by virtue of section 23 of the Guardianship Act 1968, treat the welfare of the particular child as "the first and paramount consideration". This inevitably means, as the Court of Appeal noted in *Wheeler v. Wheeler*,¹ that the issues raised in access (or custody) are of "fact and discretion"; and it is consequently widely felt that there are no legal principles governing access, other than the paramountcy principle. Most lawyers practising in family law would therefore readily agree that:

"clients' questions about what to do about access are more properly answered using knowledge of child psychology and family dynamics than knowledge of legal precedents".²

Similarly, it has been judicially observed that reported cases on section 23 of the Guardianship Act 1968, possess little utilitarian value as precedents or guides, but rather have an important "cultural value" for those engaged in Family Law work.³

It can be argued, however, that the value accorded the reported case-law on access should be somewhat higher than one of cultural interest. For whilst considerable respect and deference must inevitably be paid to the assessment and expertise of child psychologists in any determination of an individual child's welfare, the lawyers and, ultimately, the judges, involved in any access case do enjoy an expertise in the law which, by virtue of their very involvement, can be assumed to have relevance in the resolution of the dispute. The law has not been completely abandoned in favour of social science, and there are some good reasons why it should not be.

First, child psychologists, like any other professionals, do not and cannot aspire to infallibility, either individually or collectively. It is a trite observation that the wisdom of social science today may, in the future, be perceived to be folly, and on many questions relating to access there is evidence of clear divergence and of dramatic changes of opinion amongst respected social

¹ (1988) 5 N.Z.F.L.R. 380, at 382.

² Jill Burrett, *Child Access and Modern Family Law* (1988) at 44.

³ *B v. B* [1978] 1 N.Z.L.R. 285, at 290 per Jeffries J.

scientists.⁴ Thus Judges, acting as “the reasonable judicial parent”⁵ and attempting to hold fast to “fundamental common sense”⁶ can provide a valuable counterpoise. Moreover, the courts, by virtue of their role in our legal system, can still legitimately perform a moral, educative function in propounding what constitutes reasonable parenting behaviour — a function inappropriate for private, professional practitioners. The potential dangers with judicial intuition inherent in these supervisory functions are minimised if decision-making is undertaken in the context of a culture of case-law, derived from the collective wisdom of other members of the judiciary.

Secondly, the reported case-law provides a public, visible framework of guidelines under which all parties involved in a particular case can operate. Whilst firm rules are clearly impossible in dealing with human relationships, a framework of case-law can assist professionals, whether legally trained or not, to advise and make recommendations in a way which is consistent with a likely judicial outcome. The parties themselves may also have an added incentive to reach agreement and to avoid a judicial hearing, if, in at least some cases, they appreciate the outcome of such a hearing is reasonably predictable. Equally, guidelines on access can, on appropriate occasions, be “very helpful” to a deciding Judge.⁷

Third, and perhaps most obviously, the body of case-law provides some minimal, visible protection against the outcome of an access dispute being dependent upon the length of a psychologist’s or judge’s foot. Whilst the circumstances of a particular child in a particular family must naturally dictate the ultimate solution in any access dispute, it is also important that both children and parents should be treated reasonably consistently throughout the country. For such reasons, the case-law on access has a value beyond the merely peripheral, and this brief article seeks to examine some of the trends which have emerged from judicial decisions, as reported until the end of 1989.

2. *A parental right of access?*

Until the 1970s it was not uncommon for access to be seen as a “right” of the non-custodial parent.⁸ However, in the important English case *M v. M*⁹ Wrangham J. declared it would be preferable to describe access as “. . . a basic right in the child rather than a basic right in the parent”; and that view was adopted by later English courts. Whilst that change in perspective

⁴ Consider, for example, the trenchant criticism of the findings and methodology of an acclaimed book co-authored by Judith Wallerstein, *Second Chances: Men, Women, and Children a Decade after Divorce* (1989), by her former co-author of the celebrated and highly influential study *Surviving the Break-up* (1980): (1989) 27 Family and Conciliation Courts Review 81. Consider, in turn, the conclusions on access of Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973).

⁵ See this description of the Court’s task given by Lord Upjohn in *J v. C* [1970] A.C. 668, at 723 per Lord Upjohn.

⁶ Note Judith Wallerstein’s important warning to the Association of Family and Conciliation Courts Conference, 1988, on the lack of psychological theory relevant to child development in families after divorce, and her plea for adherence in the meantime to “fundamental common sense”: (1989) 27 Family and Conciliation Courts Review 15, 16. See also *Second Chances*, supra n.4, p. 312.

⁷ *Re W (A Minor)(Access)* [1989] 1 F.L.R. 163, at 166 per Heilbron J; though her Honour did stress the importance of personalisation in the resolution of access disputes.

⁸ See, for example, *Re McS (An Infant)* (1950) G.L.R. 32 per Northcroft J., and *S v. S and P* [1962] 2 All E.R. 1, at 3 per Willmer L.J.

⁹ [1973] 2 All E.R. 81, at 85.

was certainly significant, and consistent with the paramountcy principle, the practical effect of the pronouncement was not great. For in his judgment Wrangham J. went on to declare that the Court would be “extremely slow” to deprive the child of access,¹⁰ and this approach inevitably resulted in the continuation of the presumption of access.

In New Zealand, it is easy enough to discover judgments which describe access as a “right” of the child.¹¹ Equally, it is rare to find a judgment describing access as a “right” of the non-custodial parent.¹² But many Judges would undoubtedly have agreed with Principal Family Court Judge Trapski when he deprecated the discussion of “rights” in this context as being a “largely academic” exercise.¹³

Yet the House of Lords in a recent judgment, which can be expected to be persuasive in New Zealand, has once more raised the issue, and has provided a juristic analysis of access that, if anything, leans more towards the concept of parental “rights”. In *Re KD (a minor)*¹⁴ Lord Oliver was certainly quick to declare that the paramountcy principle tends to deprive any so-called parental “right” of real substance, but he did hold that

“[a]s a general proposition a natural parent has a claim to access to his or her child to which the court will pay regard and it would not... be inappropriate to describe such a claim as a ‘right’ ”.¹⁵

Although, as his Lordship emphasised, the “right” could be displaced if the interests of the child so required, the positing of access “rights” as “parental” may well possess a significance beyond the semantic.

For example, if access were to be presented in terms of the child’s right (albeit one which was clearly unenforceable by the child) then, in theory, a child who was reluctant to have contact with the non-custodial parent should presumably have the capacity to forego that right — whatever the reason for that reluctance might be. The non-custodial parent, even if loving and capable, would thereby be placed in a very weak position. Conversely, if access were presented in terms of a parental right (subject always to the paramountcy principle) then reluctance or upset on the part of the child would not be as decisive — the reasons for the reluctance would be highly relevant, and the parental position would be much stronger.

Moreover, if the claim/right were to be presented as a parental one, then it could be argued that access should normally be granted, provided only that the child was not demonstrably harmed by it. The question would not be whether any demonstrable “advantage” or “benefit” inured to the child (as was suggested, for example, by Barker J. in *Collis v. Collis*).¹⁶ Rather, if the claim/right were indeed parental, the principle would be akin to that suggested by Jeffries J. in *R v. C*,¹⁷ namely:

“[a]s a starting point of principle in family law a parent is entitled to access to a child unless there are grave and weighty reasons why access should be denied”.

¹⁰ *Ibid.*

¹¹ See, for example, *D v. D* (1985) 1 F.R.N.Z. 699, at 703 per Barker J., *Morris v. Hawkin* (1986) 2 F.R.N.Z. 545, at 547 per Holland J., and *Sharman v. Sharman* (1988) 5 N.Z.F.L.R. 91, at 92 per Anderson J., where his Honour described the “right” as “paramount”.

¹² But, for an example, see *E v. E* F.L.N.- 154 (2d.) per Judge Ryan.

¹³ *S v S* F.L.N.- 83 (2d.).

¹⁴ [1988] 1 All E.R. 577.

¹⁵ *Ibid.*, at 590.

¹⁶ (1986) 3 F.R.N.Z. 41, at 43, 44.

¹⁷ (1986) 2 F.R.N.Z. 8, at 12.

In other words, access, even if resisted by the children, would only be denied in the “most extraordinary circumstances”¹⁸ and where the children’s interests “physical or mental” would be harmed by it.¹⁹

3. *The relationship to guardianship*

The aforementioned judicial approach would obviously strengthen the position of the non-custodial parent (normally the father)²⁰ in any access dispute with the custodial parent. It would also be consistent with the argument of some Family Court judges concerning the fundamental guardianship rights enacted by the Guardianship Act 1968. In particular, Judge Inglis QC has persistently contended that when, as is normal, the non-custodial parent retains guardianship rights, then he or she can only exercise those rights in a meaningful or adequate way if there is access to the child.²¹ Accepting that to be so, then it is only if access would prove actually harmful to the child’s welfare that it should be curtailed, and, his Honour has indicated, such a situation of consequential harm might in turn raise the question of whether sole guardianship should be vested in the custodial parent.²² But, by section 10(2) of the Guardianship Act 1968, termination of parental guardianship could not be ordered unless the Court was satisfied that the non-custodial parent was for some grave reason unfit to be the guardian of the child, or was unwilling to exercise the responsibilities of guardian.²³ By inference, then, that stringent test would also serve as the test for denial of access.

Obviously, this reasoning on guardianship has some strength. Prior to separation, both parents have an association with the child which enables their guardianship responsibilities to be exercised. For practical purposes, and in the absence of grave parental failure, the parental right of association could be fairly described as pre-eminent. Although a child psychologist or Judge might feel, if consulted, that the child’s welfare would be enhanced if the child were raised by an adult other than one or both natural parents, a parent cannot be deprived of the right of association with the child — even if the child would also desire this — unless grave, exceptional circumstances exist. It is only if the matter should reach the Court, because of the event of separation, that the Court, bound by the paramountcy principle of section 23, can supervise the parental claim and can then dictate, or deny, access. Bearing in mind that a custody order is very different from an adoption order, consideration of the parental rights and responsibilities before separation can be seen as highly relevant in any judicial consideration of the rights and responsibilities after separation.

On this view, then, access and guardianship would be the norm both before and after separation, and neither would be denied in the absence of exceptional circumstances. That would not necessarily require the Court to overlook the paramountcy principle. For, as Judge Boshier emphasised in *Shannon v. Shannon*,²⁴ to deny fundamental guardianship rights without proper cause would “. . . unquestionably not be in the best interests of the children”.

¹⁸ As stated by Holland J. in *H v. C* (1986) 2 F.R.N.Z 32, at 35.

¹⁹ *Ibid.* See further *Morris v. Hawkin*, supra, n. 11, at 548 and *C v. C* F.L.N. -64(2d.).

²⁰ See Gabrielle Maxwell *Paternal Custody* (1989) 2 B.F.L.B. 35.

²¹ See, for example, his judgments in *Pooley v. Llewelyn* (1985) 3 N.Z.F.L.R. 628, *F v. E* F.L.N.-151 (2d.), and *M v. H* F.L.N.-190(2d.).

²² See, for example, the judgments of *D v. D*, F.L.N. — 168 (2d.) and *T v. T* F.L.N.-114(2d.).

²³ Consider, in particular, the significant comments of Judge Inglis QC in *Makariri v. Roxburgh* (1988) 4 N.Z.F.L.R. 673, at 680 — 683.

²⁴ (1988) 5 NZFLR 305, at 316.

Consistent with this emphasis on guardianship rights and responsibilities is the interesting argument initially put forward by Judge Inglis QC, and now favoured by Judges Boshier and von Dadelszen, to the effect that the very notions of "custody" and "access" are inconsistent with the concept of joint guardianship, and indeed could possibly be dispensed with. Where there is a dispute, it is said, the Court should consider eschewing the jurisdiction conferred by section 11 and 15 of the Guardianship Act 1968 (to make custody or access orders), and should instead consider utilising the jurisdiction conferred by section 13 of the statute to give directions as to the allocation of guardianship responsibilities.²⁵ (Such an approach, it is suggested, may also have the added advantage of proving to be more responsive to the values of the Maori community).²⁶

4. *The welfare of the child: long-term or short-term?*

The paramountcy principle is, of course, at the heart of any access or custody dispute. Regrettably, the principle is considerably easier to enunciate than define. As Jeffries J. stated in *A v. A*,²⁷ the concept of the "welfare of the child" may be "... seductive in its simplicity, but in reality conceals a most complex and far reaching judgment".

As is well-known, the application of this amorphous test is essentially dependent upon the situation of the particular child in the particular family. But, in the context of access, an important trend has become apparent: it appears that the Courts will generally prefer to take a long-term view of a child's welfare.²⁸ The cases thus suggest that the Court should seek to concern itself with the whole life of the child, rather than with the immediate few months after the making of an order.²⁹ To cite Judge Inglis QC in *F v. E*:³⁰ "... painful short-term measures may sometimes be necessary in order to achieve a child's true welfare in the long term".

The reasoning is therefore clear: the terms welfare and happiness are not invariably interchangeable. Whilst a child may endure short-term unhappiness or superficial "trauma" from court-ordered access, it is nevertheless often perceived that the child's long-term welfare may sometimes dictate that an order should be made.³¹ There are various factors relevant here. First and foremost, it is considered that children will at some time wish to seek out and form some relationship with their non-custodial parent; and it is felt that the longer the non-custodial parent is kept away from the child, the harder it will be to develop that relationship.³² It is also considered that the emotional development of children will, generally speaking, be enhanced by continuing contact with both parents. The children are thereby enabled to know their biological roots, and to know for themselves what their non-

²⁵ See, for example, *Makariri v. Roxburgh*, supra n.23; also *Franklin v. Franklin* (1988) 4 F.R.N.Z. 466, at 470 — 472 per Judge Boshier and *B v. P* (1988) 5 N.Z.F.L.R. 462, at 472-474 per Judge von Dadelszen.

²⁶ *Makariri v. Roxburgh*, *ibid.*, at 684.

²⁷ [1978] 1 N.Z.L.R. 278, at 281.

²⁸ Consider, for example, *D v. D* (1985) 1 F.R.N.Z. 699, at 703, *M v. M* (1983) 2 N.Z.F.L.R. 145, at 154, *G v. Adams and G* (1985) 2 F.R.N.Z. 14, at 15 *F v. E*, supra n. 21, at N. 219, and *Shannon v. Shannon* supra n. 24, at 318.

²⁹ See the comment of Holland J. to this effect in *H v. C*, supra n. 18, at 35.

³⁰ Supra n.21, at N 219.

³¹ Consider, further, the comments in *D v. D* (1985) 1 F.R.N.Z. 699, at 703 per Barker J., and in *E v. E* F.L.N-154 (2d.) per Judge Ryan.

³² *Morris v. Hawkin*, supra n.11, at 548.

custodial parent is really like.³³ This desire to know one's roots has been judicially described by Anderson J. in *Sharman v. Sharman*³⁴ as “[a]lmost an atavistic compulsion”, and it is, of course, familiar enough in the adoption context.

Moreover, the vagaries and chances of life for any given child can never be predicted. To take one of the worst hypotheses, it is conceivable the present custodial parent could die during the period of childhood; if the child has lost contact with the other parent, this would effectively render the child an orphan.³⁵

An occasional judicial suggestion (of a more paternalistic kind) is also sometimes made to the effect that the long-term interests of a child may require the inculcation of a sense of duty, responsibility and self-discipline. On this view (which might not be shared by all modern child psychologists) a child's reluctance to see his or her parent may be overridden by the child's duty and responsibility to that parent; and, implicitly, a child's development and character is assumed to be enhanced by fulfilment of that responsibility.³⁶ The argument, as stated, neatly illustrates the difficulty in the application of the welfare test (adopting either a long- or short-term perspective). For, quite apart from the problem of applying generalisations to an individual access case, there is the difficulty in formulating the apt generalisation. Can anyone state with absolute certainty that a child's welfare is more likely to be promoted if the child has a sense of personal warmth and happiness, than if he or she has a sense of moral discipline and responsibility? Can anyone with absolute certainty state the converse?

Whilst the above description of the case-law has tended to suggest that the courts will normally consider access to be in the child's long-term welfare, it is, needless to say, not difficult to find cases where the courts have found that the child's welfare would be harmed by contact and in consequence have denied access. For example, access was denied where the children were caught in the middle of a parental “battlefield” and where they were likely to be subject to continuing “emotional abuse” if access was to occur.³⁷ It has also been denied where access parents have subjected their children to emotional blackmail,³⁸ and to outbursts of irrational conduct.³⁹ It is further likely to be denied if a child is nearing the age of 16 (when the child could make his or her independent decisions concerning contact), and enforced access might

³³ See, for example, *F v. F* F.L.N.-151(2d.) and *R v. C*, supra n.17, at 12; also *M v. H* F.L.N.-190(2d.).

³⁴ Supra n.11, at 94.

³⁵ See the dicta in *K v. K* (no 2) (1988) 5 N.Z.F.L.R. 283, at 286; also note *Morris v. Hawkin*, supra n.11, at 547.

³⁶ See, for example, the judgment in the Family Court of Australia of Rourke J. in *Keaton and Keaton* (1986) F.L.C. 91-745, at (75, 435) — quoting the judgments of Treyvaud J. in *Bishop and Bishop* (1981) F.L.C. 91-016, and Selby J. in *Gallaghan v. Gallaghan* (1966) 9 F.L.R. 331. In the New Zealand Family Court see *T v. T* F.L.N.-114 (2d.). Note the comment of Eekelaar, *What are Parental Rights* (1973) 89 L.Q.R. 210, 219 suggesting that access visits can be reasonably regarded as “. . . one of the duties of childhood”.

³⁷ *Simpson v. Simpson* (1986) 2 F.R.N.Z. 637, at 640, 641; *Reid v. Calder* unreported, C.A. 29/88, 26 June 1989.

³⁸ *Patterson v. Patterson* (1987) 2 F.R.N.Z. 347; in *Wheeler v. Wheeler* (1988) 5 N.Z.F.L.R. 380 at 383 Cooke P. declared that the virtual certainty of emotional pressure on the child during access visits necessitated a breach from access. (See also Judge Inglis QC's warning to the access parent in *Brooks v. Brooks* (1987) 2 F.R.N.Z. 338, at 345).

³⁹ *Johnson v. Johnson* (1986) 4 N.Z.F.L.R. 184.

damage the future relationship with access parent.⁴⁰

Many other examples could, of course, be given. However, because the long-term welfare of the child is generally thought to be promoted by continued contact with the non-custodial parent, it does seem more usual (if difficulties arise) for the court to impose conditions on access, and perhaps to decline overnight access, rather than to deny access altogether.⁴¹

5. *Meaning of access, and conditions*

Given that both parents normally remain guardians after separation, with continuing responsibilities for the upbringing of the child, it might be argued that, from a legal point of view, the concepts of custody and access differ more in degree than of kind. The difference between custody and access might be said to be temporal rather than qualitative. As Gault J. noted in *B v. E*⁴² if access involves the child moving to stay with his or her non-custodial parent, particularly on an overnight basis, then:

“[f]or that period the right to possession and care conferred by custody is subject to the right and possession and care necessarily flowing from the right of access”.

However, his Honour did proceed to identify two significant differences between substantial access and joint custody.⁴³ First, his Honour pointed out that if each parent enjoys custody, then section 19(1A) of the Guardianship Act 1968, as inserted by s. 2 of the Guardianship Amendment Act 1979, enjoins the issue of an enforcement warrant under s. 19(1) against a parent. Secondly, the Judge pointed out that custody carries greater responsibility as:

“. . . access is a right that need not be exercised and if it is not, the responsibilities of the custodial parent continue during that period”.

Thus whilst staying access may allow for the exercise of much the same legal privileges over the child, it does not impose the same parental responsibilities. Moreover, in practice, if not in law, access is often perceived to confer an inferior parenting status on the access parent. As Judge Inglis put it in *Makariri v. Roxburgh*,⁴⁴ access is often perceived to be “. . . no more than the right to borrow the child from time to time . . .”.

It is also obvious that “access” can vary in quality, frequency, and duration. Indeed, as the authors of Butterworths Family Law Service suggest, access might not even necessitate physical contact with the child.⁴⁵ Of course, access, if ordered, will normally involve such physical contact — though, for example, in *Pooley v. Lewyln*⁴⁶ access to one of the two daughters was subject to the condition that the father would not attempt to see her, and similarly

⁴⁰ *Collis v. Collis*, supra, n.16. The Court is enjoined by section 23 (2) of the Guardianship Act 1968 to take account of the wishes of the child “. . . to such extent as the Court thinks fit, having regard to the age and maturity of the child”. Here the implications of the decision of the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 are potentially significant.

⁴¹ Consider *M v. M* (1984) 1 F.R.N.Z. 388, at 397, and *Walters v. Walters* (1986) 3 F.R.N.Z. 45.

⁴² (1988) 5 N.Z.F.L.R. 65, at 69.

⁴³ *Ibid.*, at 70.

⁴⁴ *Supra*, n. 23, at 684. Also see Judge von Dadelszen in *B v. P*, supra, n.25 at 473.

⁴⁵ B.F.L.S., 6033, March 1989.

⁴⁶ *Supra* n. 21.

in *Adams v. K and K*⁴⁷ physical “access” was denied to one daughter, but correspondence was allowed.

Where there are problems with physical access, it is not uncommon for the Court to order an initially “low level” of such access, which would be subject to review, and which is expected to evolve into fuller access.⁴⁸ In such situations, access is also commonly ordered to be subject to compliance with certain prescribed conditions (as authorised by section 15 (2A) of the Guardianship Act). There seem to be no limits to the types of conditions which may be imposed. They can range, for example, from a requirement that the access parent, intending to travel overseas with the children, post a substantial monetary bond⁴⁹ to a somewhat more creative direction that an apparently immature access parent work for old and sick people in the area.⁵⁰

More commonly imposed is a condition to the effect that access is to take place under supervision. Supervisors of such access have included a social worker,⁵¹ a counsellor or psychologist,⁵² and, in a case where the access father had previously kidnapped his child, a plain clothes police officer.⁵³ Conditions for access may also include the undertaking of counselling by the access parent,⁵⁴ both parents,⁵⁵ or, possibly, by parents and child.⁵⁶

It is also possible that access may also be confined to a specifically designated place,⁵⁷ or to a place to be designated by a counsellor, psychologist, or Counsel for Child.⁵⁸ An access parent’s partner might also be excluded from the place of access.⁵⁹

Thus, restricted or supervised access is often seen as the solution to difficult situations; but, particularly in relation to supervision, it is not easy to controvert the finding of the Court of Appeal in *M v. M*⁶⁰ that such supervision does introduce “. . . an artificial element into access occasions which militated against their purpose and justification”. Equally, though, it must be remembered that the restricted, supervised access is designed to be temporary. It is always the hope that restricted access will evolve into less restrictive access, taking place

⁴⁷ (1985) 1 F.R.N.Z. 653. In a recent case the Court of Appeal has ruled that whilst there would be “no access”, occasional and unemotional correspondence would be acceptable: *Wheeler v. Wheeler*, supra n.1, cf. *Reid v. Calder*, supra n.37, where the Court of Appeal denied access and discouraged correspondence.

⁴⁸ Consider *R v. C*, supra n.37, where access was initially ordered for only one hour per month, and *Sharman v. Sharman*, supra n.11, where access was ordered for four hours every month; see also *Shannon v. Shannon*, supra n.24.

⁴⁹ *Gough v. Gough* (1987) 3 F.R.N.Z. 200. See also the undertakings and bond required from, but not provided by, an access parent living overseas: *Pawley v. Reid* (1988) 5 N.Z.F.L.R. 238.

⁵⁰ *Christie v. Christie* (1988) 5 N.Z.F.L.R. 353; the direction was made under s. 13 of the Guardianship Act 1968.

⁵¹ *R v. W* F.L.N. [6].

⁵² *Sharman v. Sharman*, supra n. 11, and *Shannon v. Shannon*, supra n.24.

⁵³ *G v. Adams and G* (1985) 2 F.R.N.Z. 14. The family psychotherapist, counsel for the access father, and counsel for the child were also to be present, together with the mother (if she wished).

⁵⁴ *T v. T* (1987) 3 F.R.N.Z. 30, at 32.

⁵⁵ *M v. M* (1983) 2 N.Z.F.L.R. 145, at 154.

⁵⁶ *Shannon v. Shannon*, supra n. 24. Note Judge Boshier observed that there did not seem to seem to be any specific legislative provision for child counselling (at 319).

⁵⁷ For example, in *T v. T* F.L.N. -114(2d.) access was to be confined to the mental clinic at which the access parent was often confined.

⁵⁸ *R v. C*, supra n. 17, at 13.

⁵⁹ *E v. E* F.L.N.-154 (2d.); see also *M v. M* supra n.41.

⁶⁰ F.L.N. [131] N. 64.

in a more natural way and in an easier emotional context. The ideal, of course, would be for the issue to be decided by way of agreement between the parties.⁶¹

6. *Sexual abuse allegations*

If an allegation of sexual abuse is raised against the putative access parent, then the sensitive and fair handling of the access issue becomes particularly difficult. First, the question of proof must be addressed. Obviously, great care must be taken and the allegations cannot be accepted without question.⁶² Equally, though, the paramountcy principle of section 23 means that the resolution of the allegation must be subservient to the welfare of the child. As Smellie J. noted in *Day v. Day*⁶³ the rules normally applying in an adversary situation in Courts of other jurisdiction cannot be allowed to displace the paramountcy of the child's welfare. A Judge may therefore accept the allegations, even if the civil burden of proof is not met, where there is a "real possibility" that the accusations are true.⁶⁴ In the New Zealand High Court, Prichard J. has stated that he wanted to be satisfied "there was no risk" of future abuse;⁶⁵ the High Court of Australia has recently stated that it would decline access (or custody) if there was "an unacceptable risk".⁶⁶ Even if the court is not satisfied, according to ordinary evidential standards, that "sexual abuse occurred" it may nevertheless be satisfied that there has been negative "physical interaction"; and such a finding will be of almost equal significance in the Court's ultimate determination on access.⁶⁷

Moreover, even if the Court should find itself unable to accept the allegation that sexual abuse, or negative physical interaction, has previously occurred, the very allegation may have considerable significance in an access dispute. Thus in *Sharman v. Sharman*,⁶⁸ Anderson J. found that whilst there was "no credible evidence" relating to the allegation of sexual abuse, the "underlying emotional factors" leading the mother to make the allegation were relevant in his consideration of the issues of access and the advancement of the child's welfare.

However, the case of *Shannon v. Shannon*,⁶⁹ reveals that a finding of negative physical interaction will not necessarily result in a denial of all access — for the long-term welfare of the child might depend upon some future contact and relationship with the father. Thus in *Shannon's* case Judge Boshier prescribed a slow, incremental access plan, commencing initially with counselling for the parties (but with no physical contact between father and children), and progressing gradually to managed and controlled physical access. Just occasionally, it seems, a Judge may be prepared to grant unsupervised access, even where satisfied that there has been past sexual abuse,⁷⁰ but such

⁶¹ *Morris v. Hawkin*, supra n.11, at 549, and *M v. M* (1985) 1 F.R.N.Z. 693, at 698.

⁶² See e.g. *J v. J* (1987) 3 F.R.N.Z. 33.

⁶³ Unreported, High Court, Auckland Registry M. 1495/85, 27 March 1986, but quoted in *Shannon v. Shannon* supra n. 24, at 316.

⁶⁴ *Day v. Day*, *ibid.*, and *M v. M*, (1984) 1 F.R.N.Z. 388, at 395.

⁶⁵ *H v. O* (1984) 1 F.R.N.Z. 525, at 526.

⁶⁶ *B v. B* (1988) F.L.C. 91-978; and *M v. M* (1988) F.L.C. 91-979.

⁶⁷ *Shannon v. Shannon*, supra n. 24.

⁶⁸ Supra, n.11, at 93.

⁶⁹ Supra n.24.

⁷⁰ Consider *T v. T* (1987) 3 F.R.N.Z. 30 where the father had been convicted on a number of occasions of criminal offences of sexual interference with young boys, and a psychologist's evidence was to the effect that he was likely to reoffend either with his own children, or with other children. Staying access to his two boys was granted for alternate weekends.

a possibility must be regarded as highly exceptional. Certainly in both Australia⁷¹ and the United Kingdom⁷² appellate court judgments indicate that a finding of sexual abuse is likely to result in a complete denial of physical access to the child who has been abused, though the position may be different when access is contemplated at some time in the future.⁷³

7. Enforcement

Assuming that the court does order access in a disputed case, the issue of enforcement of the order can sometimes arise. Indeed, a primary reason for seeking an agreement, mediated or otherwise, between the parties on access, is the hope that an agreed access arrangement is more likely to work. However, any access arrangement (both agreed and court-ordered) can fail: either because the access parent loses interest (in which case there is no legal recourse for either the child or custodial parent), or because the custodial parent's intransigence prevents the arrangement working, or because the child simply refuses to comply.

If an intransigent custodial parent should refuse to comply with court-ordered access, there are potentially serious consequences. Section 20 A of the Guardianship Act provides for a maximum fine of \$1000.00 if a person, without reasonable excuse and with intent, hinders or prevents another person exercising access which is authorised under a court order.⁷⁴ Furthermore, section 20A (2) expressly preserves the power of the Court to punish for contempt, and section 19(2) of the same Act provides for the issue of an enforcement warrant.

However, punishment under s.20A (or by way of contempt proceedings) could sometimes be potentially damaging to the welfare of the child. For example, it is clearly not in the child's welfare (or in the interests of good access parent/child relationships) that a custodial parent be imprisoned for contempt. Similarly, a financial penalty could have considerable implications for the child's material welfare (and this type of concern must certainly have been influential in the High Court ruling that a denial of access should not affect the level of maintenance payable).⁷⁵ Quite simply, punitive measures are not very effective in regulating human relationships.

Indeed, sometimes the bitterness or hatred of the custodial parent towards the non-custodial parent has been so absorbed by the children that the Court is obliged to cancel an access order, rather than attempt to enforce it.⁷⁶ Yet if Court-ordered access is to have real meaning, and if it is to amount to more than posturing, then there must be the prospect of enforcement. Thus, Judge Inglis QC sternly warned non-complying parents in *Redmond v. Redmond*⁷⁷ that ". . . they defy Court orders at their peril".

⁷¹ See the decisions of the High Court of Australia in *M v. M* and *B v. B*, supra n. 66

⁷² See the decisions of the English Court of Appeal in *Re R (A Minor)* [1988] 1 F.L.R. 206, and *S v. S (Child Abuse: Access)* [1988] 1 F.L.R. 213.

⁷³ *H v. H (Child Abuse: Access)* [1989] 1 F.L.R. 213. For general comment on the recent English cases see [1989] Fam. Law 349-350.

⁷⁴ There appear, though, to be "few if any" prosecutions under this provision: Atkin, *Child Maintenance and Access* (1986) B.F.L.B. 93, 95.

⁷⁵ *Shrimski v. Shrimski* (1985) 3 N.Z.F.L.R. 707 per Sinclair J. Consider the analysis of Atkin, *ibid.*

⁷⁶ *DY v. DY* (1985) 3 N.Z.F.L.R. 446.

⁷⁷ (1988) 4 N.Z.F.L.R. 697, at 698. The respondent was requested to tender a letter of apology to the Court, together with a formal undertaking that she would obey Court orders; warrants for enforcement were also issued but were to lie in Court. See also the comments of his Honour in *CL v. CL* (1985) 3 N.Z.F.L.R. 455, at 465, and in *M v. H* F.L.N.- 190 (2d.) N.290.

Amongst the possible consequences hinted at by the Judge in the Redmond case, was the vesting of custody in the hitherto access parent.⁷⁸ This possibility of reversal of custody was further discussed by Anderson J. in *Sharman v. Sharman*,⁷⁹ when his Honour stated that the Court has on occasion considered the option “. . . reluctantly but deliberately if it is the only way the child's welfare can be advanced”. It can be noted, though, that whilst reversal of custody might be an available option if the issue of custody has previously been finely balanced, it would presumably cease to be available if the Court had previously awarded custody to a preferred parent after some deliberation, and for some good reason.

Another possibility for the enforcement of an order, in the face of intransigence by the custodial parent, is by making a wardship order, removing the child from the custody of both parents⁸⁰ — again, though, this could be quite inappropriate and damaging in some family relationships. Perhaps, then, the most realistic and helpful approach may be for the Court simply to require a written undertaking from the custodial parent that he or she will not prejudice, or interfere with, the exercise of access rights.⁸¹

In addition to the above options, and the punitive measures of section 20A, passing consideration can be given to the issue of enforcement warrants under section 19(2). If it is the child who should refuse to comply with an order, the enforcement machinery of section 19 may seem singularly heavy-handed and inapt; most would share Judge Gilbert's view expressed in *Simpson v. Simpson*⁸² that the use of force by the police or social worker to remove a reluctant child to an access parent's home is “unthinkable”. Holland J. has certainly expressed a similar distaste, but in *H v. C*⁸³ his Honour did hold that unless “serious physical or mental harm” was likely to come to the eleven-year-old girl in question he would ensure that the access order was enforced. In that case, His Honour conceded there would be short term distress for the girl in the eventuality of section 19 enforcement, but his Honour believed that access was in the girl's long-term welfare.

8. Conclusion

To some, that approach of Holland J. may be seen as the very exemplar of the futility of judicial involvement in access disputes. Yet, to adapt Mnookin's analogy,⁸⁴ all family decision-making and all professional work with families (whether it be counselling, negotiating, mediating) must take place “in the shadow of the law”. It may thus be useful for everyone involved in access disputes, both professionals and parties, to be reminded from time to time that the law is not in a state of total eclipse. It may be useful to be reminded, when consideration is being given to the welfare of the child, that the law, and law reports, are not entirely inconsequential.

⁷⁸ *Ibid.*, at 700; see also *H v. C*, supra n. 18, at 34 per Holland J.

⁷⁹ Supra n. 11, at 94.

⁸⁰ *Ibid.*

⁸¹ See B.F.L.S. 6076, August 1989; for an example, see *Pooley v. Llewelyn* supra n. 21.

⁸² Supra n. 37, at 642.

⁸³ Supra n. 18, at 35.

⁸⁴ See the article of Mnookin and Kornhauser *Bargaining in the Shadow of the Law: The Case of Divorce* (1979) 88 Yale L.J. 950.