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Caught In The Middle: Custody And Access Rights Of Third Parties & Grandparents

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Ontario are experiencing conflict or a devastating event in their relationship, more and more third parties, including grandparents, are finding themselves in the middle of that event, seeking custody of and access to the child(ren) of that relationship. As a result, litigation has focused on the issue of custody and access rights of third parties and grandparents, which this article seeks to address.

The "Best Interests of the Child" Threshold

In determining who should have custody of the children, and what terms of access should be given to the other parent, the *best interests of the child* is the sole consideration under the *Divorce Act* (see s. 16) and *Children's Law Reform Act* (see s. 24). Any inquiry is always focused on this issue.

Third Party Access

Access is for the benefit of the child. It follows from this that persons who are involved in the life of the child should be allowed access where their presence is in the best interests of the child. Both federal and provincial legislation contain provisions which allow persons other than parents to seek such access.

Under subsection 16(4) of the *Divorce Act,* the Court may make an order granting access to any child of the marriage (as well as custody) to "any one or more persons". However, if the applicant is not a parent, the application may be made only with leave of the court (*Divorce Act*, s. 16(3)).

Similar powers are given to the Court under section 28(a) of the *Children's Law Reform Act* to grant access to a child to one or more "persons" in proceedings not involving divorce. As well, section 21 of the *Children's Law Reform Act* states that a parent of a child or any other person, including a grandparent, may apply to a Court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

Substantively, non-parents seeking access must first establish an existing close and warm relationship with the child. The Ontario Court of Appeal has held that the application cannot be used to create or establish a relationship for the first time (*W.(C.G.)* v. *J.(M.)*), but where there is an existing relationship beneficial to the child, the access requested may be found to be in the best interests of the child. In most cases, it is in the child's best interest to keep the maternal and paternal and other links open as much as possible, so that the child is aware of the wider base of affection that exists and support networks that may be utilized.

Access by third parties, however involved they may be with the child's life, should not be taken for granted. In *Morecraft* v. *Morecraft,* the New Brunswick Court of Queen's Bench indicated, "While the 'best interests' must remain paramount, the considerations revolving around the issue of access to third parties, including blood relatives, are far different from those involving natural parents. There is no automatic right of access to third parties. Great weight must be given to the custodial parents and care must be taken not to unduly interfere with the parents' inherent right to determine the course of their child's upbringing." Although this case is not binding in Ontario, it has been quoted with approval in the Ontario Courts.

The onus of proof lies on the non-parent to demonstrate why access is in the child's best interests. The Court of Appeal for Ontario has held that "in the absence of any evidence that the parents are behaving in a way which demonstrated an inability to act in accordance with the best interests of their children, their right to make decisions and judgments on their children's behalf should be respected, including decisions about whom they see, how often, and under what circumstances they see them."

Grandparents – Custody and Access

The Ontario case of *Moreau* v. *Cody,* succinctly summarizes the law arising from access claims by grandparents:

> "Firstly, clearly grandparents do not have a specific right to access. It is a right of the children and is to be exercised in their best interests. Secondly, the right of a grandparent to access is different than the right of a parent to access. The right of a parent to access is enshrined in the legislation, under the *Children's Law Reform Act* in this case. Thirdly, in the normal course of events, the law recognizes that it is of benefit for children to have contact with their grandparents and extended family members. The importance of the extended family is recognized, and it is also recognized that children should have the opportunity to know their heritage and their background through their extended family members. Fourthly, a great deal of weight should be given to the wishes of the custodial parent."

Whether the Court will interfere with a parent's decision to deny access appears to depend on the level of acrimony that exists between the parent and the grandparents. If the friction does not negatively impact on the children, typically some form of access will be ordered. If, however, tension is high, deference will be given to the parent's right to make decisions about who the child sees.

As with all custody and access disputes, the best interests of the child test will prevail. In most cases, however, a grandparent or other non-party will only be successful if the child has been living with him or her and the parent has effectively abandoned the child or is otherwise seen to be unfit in order to justify granting custody to a third-party.

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