



## Things You Need To Know About Parenting Plans for Children Under 3 Years Old<sup>1</sup> (Rethinking Access for Children Under 3 years old – an Update)<sup>2</sup>

By Melanie Kraft

### *INTRODUCTION:*

As matrimonial lawyers, one of the most significant challenges in the resolution of our cases are custody and access issues, either in the context of negotiating a parenting schedule, otherwise known as a parenting plan, or in the context of custody and access litigation. If you are lucky, you will have referred your client to a mental health professional who will meet with each parent, alone and together, and will try and devise a comprehensive parenting plan to which both parents agree. Usually these parenting plans deal not only with the schedule for the children, but also with decision-making and future dispute resolution mechanisms. While we all know of the more common/typical parenting schedules, which would include primary residence with one parent and weekend access to the other; week on-week off schedule; three/four split, etc., these types of schedules assume that the children are of an age and maturity level sufficient to adjust to such a plan. What is completely different is how to negotiate or litigate parenting plans for very young children, or specifically, children under three years of age. When you find yourself in that situation, even though you are acting as a lawyer, it becomes very important to understand what is developmentally age-appropriate for these young children so that particular attention can be paid to the special needs of infant children of divorced families. Becoming familiar with this social science knowledge and the language attached to concepts such as continuity of care, attachment theory, bonding<sup>3</sup>, etc. will make you better able to instruct your clients if they find themselves having to deal with these issues.

As a general rule of thumb, lawyers tend to take the view that there should not be overnight access to the non-primary parent, usually the father for children under three, and for sure, for children under two. We tend to accept that, at least for children under two, that they are too young to handle that much time away from their primary parent, their mother. If the mother is breast feeding, then absolutely there can be no overnight access, but even in cases where a mother is not breast feeding, it is generally thought by lawyers, anyways, that frequent but shorter visits are age appropriate for these infant

---

<sup>1</sup> Melanie Kraft of the law firm, Epstein Cole LLP. The author wishes to thank Kristin Rickett for her excellent research assistance. The original version of the paper can be found in (2004) 22 Can. Fam. L. Q. 37.

<sup>2</sup> This is an updated version of the original paper. The author wishes to thank Joelle Ruskin for her excellent research assistance.

<sup>3</sup> To better understand the concepts of bonding and attachment see: chapter 19 in James Robertson and Joyce Robertson, *Separation and the Very Young* (London: Free Association Books, 1989); Mark T. Greenberg, Dante Cicchetti & E. Mark Cummings eds., *Attachment in the Preschool Years: Theory, Research and Intervention* (Chicago: University of Chicago Press, 1990) Solomon J. & George C. eds., *Attachment Disorganization* (New York: Guilford Press, 1999).

children. Think again. Recent case law and social science literature suggests that there may be no scientific basis for disallowing such overnight access for children under three. In fact, the concept that very young children can be bonded and form attachments to multi-caregivers has gained favour in the eyes of many psychologists and by the Courts. If you are acting for a father who would like overnight access to his infant child, there is a whole body of case law and research you can avail yourself to utilize in putting his case forward.

As matrimonial lawyers, we all have to put forward or advocate parenting plans in accordance with our client's wishes while keeping in mind the best interests standards. Complicating this task is the premise that any conclusions regarding a child's best interest should incorporate the child's age-specific and related developmental needs. This means that whatever the parenting plan sets out, the schedule and the decision-making plan, has to be adjusted to reflect the changing needs of each child, especially an infant. I am not a mental health professional, nor do I have an educational background in mental health. This paper does not opine as to what is developmentally age-appropriate or what parenting schedule is in the best interests of children under three from divorced families. Rather, I have compiled research from a variety of sources, including social science articles; books, case law and custody and access Guidelines from other jurisdictions to provide a summary of all resources available to lawyers which will enable you to put your client's best foot forward when negotiating and/or litigating parenting plans for children under three years of age.

### ***MENTAL HEALTH RESEARCH***

A review of the vast mental health research literature available indicates two diverse perspectives in terms of what is age and developmentally appropriate for very young children of divorced families. One body of research supports the assumption that very young children need a primary and stable attachment to their mother - one primary parent. The relationship with the mother is seen as critical, the father is peripheral. The second body of research places a greater important on children having a father or father figure and takes a family systems perspective by looking at the full network of relationships surrounding the child. The assumption of this second body of research is that the functioning of mother, father and other caregivers with their children are all significantly interrelated<sup>4</sup>.

The statutory regime in Ontario that deals with custody and access (namely, the *Children's Law Reform Act*<sup>5</sup>) dictates that in deciding on a parenting schedule the court must consider what is in the child's best interests. In answering that question, courts and lawyers like to have expert consultation by mental health professionals to advise the court or counsel. The seminal research of Joan Kelly has clearly outlined that designing parenting plans for infant children involves a determination of the following points:

- (a) nature of the child's attachments to each parent;
- (b) the child's comfort level with each parent;
- (c) the parents' ability to sooth and stimulate development as well as provide basic physical care-taking.
- (d) what is the length of time the child can endure separation from each parent, given the child's primitive sense of time and understanding, without undue stress or an undermining of each parent-child relationship<sup>6</sup>.

---

<sup>4</sup> Mary F. Whiteside, *An Integrative Review of the Literature Pertinent to Custody for Children, Five Years of Age and Younger*, (Paper submitted to Judicial Council of California Administration Office of the Courts, 1996).

<sup>5</sup> R.S.O. 1990, c.C.12.

<sup>6</sup> Joan Kelly, "The Best Interests of the Child - A Concept in Search of Meaning" (1997) 35 Fam Ct. Rev. 380.

## ***THE TENDER YEARS DOCTRINE REVISITED vs. MULTIPLE CAREGIVER MODEL:***

We know that one of the principles most often advanced by experts in consultation with the courts and/or counsel is that there should be *continuity of care* and contact with the infant's "primary attachment figure" or "primary psychological parent" which is most often the mother. Some of the more common court recommendations regarding custody are based on this concept, including (1) an infant should be in the sole custody of one parent; (2) no overnight visitation with the non-custodial parent; and (3) no change in custody should be permitted once a permanent custodial arrangement is established for the infant<sup>7</sup>.

The question that has to be answered is: What is implied in and required by the principle of continuity of care? The implications outlined include the following:

- (1) First, insisting on continuity of care implies that infants can tolerate neither multiple persons in their world nor multiple transitions between or among different caring adults. It is presumed that transitions with multiple caregivers are uniformly stressful, if not traumatic and that the traumatic effect of multiple caregivers are not evident immediately, but appear much later as maladjustment, psychological distress and crucial social deficits.
- (2) The second assumption contained in the principle of continuity of care, is that once infants have formed primary attachments to their parents, the infants then have specific physical and emotional requirements for who they are best handled, fed and loved by. Carried to the extreme, this second assumption implies that once intimately "in love" with their parents, infants have a far more restrictive range of what they can tolerate from others, assuming that such love would close down an infant's capacity for adaptation and social engagements with others, a conclusion not supported by either clinical or empirical data.
- (3) The third assumption contained within the principle of continuity of care is that the "primary attachment figure" is usually singular and usually readily identified. All other persons, by implication, in the infant's life may leave without major impact.
- (4) The fourth assumption within the continuity of care principle is a failure to acknowledge developmental difference in the narrow age range of birth to two years. Although very young children are certainly overall more vulnerable and more dependant than five to six year olds, there is a vast difference in the elaboration of an 18-month old's attachment to parents compared with a one-month old<sup>8</sup>.

It is important to note, however, that the present era of day care has taught us that a child can thrive under multiple care taking conditions so long as each is stable, emotionally available, coherent, and sensitive to the child's developmental and personal needs, and so long as each is comfortable for the various caretakers involved. Researchers have commented that experience in consulting with day care centres and in-home care providers (i.e. nannies) rebut claims made on general grounds alone that infants are better off under the sole or exclusive care of one person rather than more than one<sup>9</sup>. In fact, it has been said "that the issues of creating a framework of care giving that promotes and depends an infant's relationship with each parent, requires courts and parents alike to more considerate of joint or

---

<sup>7</sup> Linda C. Mayes and Adriana Molitor-Siegl, "The Impact of Divorce on Infants and Very Young Children" in Galatzer-Levy, R., Kraus, L., & Galatzer-Levy, J. eds., *The Scientific Basis of Child Custody Decisions* (New York: Wiley, 1999).

<sup>8</sup> *Ibid.* at 191.

<sup>9</sup> Thomas M. Horner and Melvin J. Guyer, "Infant Placement and Custody" in Charles H. Zeanah, *The Handbook of Infant Mental Health* (New York: Guilford Press, 1993) at 466-468.

shared custodial arrangements that they often are with respect to their youngest children. Courts need to be mindful of an infant's needs to have frequent and extended contacts with each parent, including opportunities to adjust to the respective (and sometimes different) ministrations of those parents, if the infant is to establish more than superficial or perfunctory ties to each parent<sup>10</sup>.

More modern mental health research establishes that very young children, including those under three years of age are "capable of developing multiple important attachments (two to three in infancy) and that frequent transitions do not work well when parents are in conflict"<sup>11</sup>. A review of this body of research concludes that very young children can enjoy overnights with the non-primary caregiver even if he/she is under three years of age, provided both parents are nurturing, interested and available caregivers and that there is no conflict between the parents<sup>12</sup>. Often, as the research establishes, "the distress of infants and toddlers relates more to erratic schedules than to overnight transitions"<sup>13</sup>. Further, a child's distress or anxiety with respect to overnights is often attributable to a mother's distress or worry being passed on to the child.

## **SPECIFIC MENTAL HEALTH RESEARCH**

### ***Solomon-George - Overnight Visitation may be Detrimental to a child's attachment to Mom:***

One term often referred to by mental health professionals when dealing with custody and young children is something called "attachment theory". The cornerstone of attachment theory is the study of separation of a child from his or her caregiver. One of the first studies that looked into whether the development of infant attachment is influenced by early experiences of separation from caregivers in the context of marital separation and divorce, was conducted by Judith Solomon and Carol George. The results of their analyses of infant attachment revealed a very high rate of attachment disorganization among one year olds who participating in regular overnight visitation schedules with father. These results supported the 'tender years doctrine' which stands for the proposition that children of tender years ought to be in the sole custody of their mothers with access to the father on a frequent basis, while restricting overnight access of very young children to fathers. A longitudinal follow-up study was conducted by Solomon and George examining the infants earlier studied in toddlerhood wherein they looked at the implications of their findings for understanding attachment disorganization more generally<sup>14</sup>.

We know that it is not uncommon for courts to order, or for parents to agree, to visitation arrangements for infants and toddlers to involve regular overnight stays with the non-residential parent, referred to as the father throughout this paper, of one to several nights duration. The support for this type of arrangement comes from the desire to ensure an infant's frequent and continuing contact with both parents. Despite the fact that many jurisdictions seem to favour schedules that include overnights for infants, this practice does counter some traditional child development and mental health practitioners<sup>15</sup>. The concerns about such overnight schedules include the effects of stress of repeated separations of the infant from his or her primary caregiver and the possible long-term effects on the infant's attachment security with his or her mother. The Solomon-George longitudinal follow-up report

---

<sup>10</sup> *Ibid.* at 468.

<sup>11</sup> Marsha Kline Pruett, "All Parenting Plans Are Not Equal" (2010) 33 Family Advocate 23 at 24.

<sup>12</sup> *Ibid.* at 24.

<sup>13</sup> *Ibid.* at 24.

<sup>14</sup> Solomon J. & George C., *supra* note 1.

<sup>15</sup> See Goldstein, Freud & Solnit, 1973; Hodges, 1986; Skafte, 1985 in Solomon J. & George C., *supra* note 1 at 244.

studied infants, aged 12 to 18 months, in separated/divorced and intact families. They found that the key attachment-related issue for infants was not one of loss of the father, but of developing primary relationship to both parents in the midst of repeated separations and the emotional aftermath of marital disruption. The longitudinal study found more disorganized/unclassifiable infant-mother attachments than secure and avoidant attachments among infants who had experienced overnight visitation schedules (the overnight group) as compared both to infants who saw their fathers regularly but did not have overnights (the non-overnight group) and infants from intact families (the married group). In lay man's terms, this means that the Solomon/George longitudinal study tentatively concludes that overnight visitations schedules *can* disorganize the child's attachment strategies, but that such disorganization does not necessary pervade or reflect the overall quality of the mother-child relationship<sup>16</sup>.

In the recently published Family Court Review article "Divorce in the Nursery: On Infants and Overnight Care"<sup>17</sup>, George and Solomon revisit their 1999 study and reflect on more than three decades of experience bearing on questions concerning very young children implicated in family law disputes. The researchers continue to reinforce the message of their seminal study: that, while overnights may work for some families, many babies under a year-and-a-half or two seem to show that regular overnights away from their primary caregiver are stressful.

While George recognizes that if they have to, parents can make overnights work for a baby, she queries why parents would take such a risk knowing the stress that young children experience as a result. Instead, George advocates for "times of intimacy" between parent and baby<sup>18</sup>. These types of interactions include bathing, diapering, playing, and possible feeding<sup>19</sup>. Attachment, George argues, does not depend on the second parent being the first person to see the baby in the morning or in the middle of the night. Rather, what does matter is a combination of intimacy with the baby (i.e. opportunity for the parent to be affectively attuned to the infant), sensitive response to the baby and joy and delight about the baby.

Solomon adds that there is a special vulnerability about night-time and echoes George's concerns about the stress of overnights. She advocates the need to prioritize comfort and support of the child above the experience of loss and grief a parent might experience upon separation from their baby.

If overnight access is awarded, George and Solomon agree that, from the attachment paradigm, what makes overnight care manageable and productive for a young child is the parents' capacity to communicate with one another, be flexible and keep the child's needs in focus.<sup>20</sup> These couples, who tended to have somewhat longer relationships before separation, problem solve and regulate their own stress, not allowing their child to experience intense distress for too long. While they tolerate a bit of stress in the child in order that the child learn to self-soothe, they support the child by calming them down and making sense of their experience<sup>21</sup>.

---

<sup>16</sup> Solomon J. & George C., *supra* note 1 at 260-261.

<sup>17</sup> Carol George, Judith Solomon and Jennifer McIntosh "Divorce in the Nursery: On Infants and Overnight Care" 49 Fam. Ct. Rev. 521.

<sup>18</sup> *Ibid.* at 524.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 526.

<sup>21</sup> *Ibid.*

### ***Joan Kelly/Michael Lamb - Overnight Visits are Fine, Frequency of Visits is Most Important***

In 2000, Joan Kelly and Michael Lamb presented a summary of the development of child-parent attachment and a set of Guidelines for custody and access decisions, paying special attention to very young children. In the description of these guidelines, they make the claim that:

"to be responsive to the infant's psychological needs, the parenting schedules adopted for children under age two or three must involve more transitions, rather than fewer, to ensure the continuity of both relationships and the child's security and comfort during a time of great change...To minimize the deleterious impact of extended separations from either parent, there should be more frequent transitions than would perhaps be desirable with older children". In a recent article about children's post divorce adjustment, Joan Kelly reviewed all of the studies and concluded that "the evidence suggests that when children begin the divorce experience in good psychological shape, with close or loving relationships with both parents, their adjustment will be maintained by continuing their relationships with both parents on a meaningful basis."

### ***Judith Wallerstein - Occasional Overnights are Fine if Parents get Along:***

Judith Wallerstein writes that because preschool children are dependent on parents for their total physical care, they are most afraid of being abandoned. Because they are young, they do not yet understand time and cause and effect. Their lack of experience generates an obvious logic: if one parent can disappear, certainly the other one can disappear just as easily. Since their concept of time is so limited, it may not help them to be told that "Daddy will come next Monday . . . They may have trouble separating from parents, day and night, and they especially do not want to let the custodial parent out of their sight. Many have trouble settling down or sleeping through the night. They may resume earlier behaviours such as thumb sucking, bed wetting and Linus-like attachment to a security object<sup>22</sup>.

In her book *"What About the Kids: Raising Your Children Before, During, and After Divorce"*, Wallerstein outlines the following advice to parents going through a divorce in terms of what she calls "The Developmental Ladder":

By age two, if your child is developing well, and is comfortable with both of you, and if the two of you are communicating well, there is no reason he can't spend occasional overnights with Dad. Two nights in a row may be difficult until he's older. You don't want him to worry that Mommy has disappeared. But as long as the same routines are followed, I've seen curious toddlers thrive in such arrangements: it's a big achievement to go to another parent's house at this tender age.<sup>23</sup>

### ***Richard Warshak - Overnight Visitation is Fine***

Richard Warshak wrote an article for the Family and Conciliation Courts Review<sup>24</sup> which summarized developmental research bearing on overnight restrictions for infants and young children. Warshak

---

<sup>22</sup> Judith Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade after Divorce* (New York: Ticknor and Fields, 1996) at 282-283.

<sup>23</sup> Judith Wallerstein & Sandra Blakeslee, *What About the Kids: Raising Your Children Before, During and After Divorce* (New York: Hyperion Books, 2003) at 48-49.

<sup>24</sup> Richard A. Warshak, "Blanket Restrictions Overnight Contact Between Parents and Young Children" (2000) 28 Fam. Ct. Rev. 422.

concludes that "blanket restrictions requiring young children to spend every night with the same parent after divorce are inconsistent with current knowledge about the needs and capacities of young children and their parents". Warshak's article reviews all of the seminal authors opinions on overnight access for infants and toddlers and determines that he has found *no support in theory, research or common experience for the proposition that overnights harm children*. His view is that numerous studies have shown that children do best when they maintain rich, close relationships with both of their parents following divorce and that they are much more likely to escape psychological harm than children who are denied the chance to maintain relationships with both parents. In his view, post divorce arrangements should maximize the opportunity for children to develop and consolidate relationships with both of their parents. Warshak makes the interesting point that the theory that maintains children can tolerate sleeping during the day in their father's care, and in the presence of day care workers at day care centres, but not at night with their father, "cannot be said to express scientific judgment".

A commentary on Warshak's article appeared in Volume 40 of the Family Court Review which reviewed all of the research summarized by Warshak disagreeing with his conclusions and indicates that while they do not claim that overnight visitations are necessarily bad for infants/young children, the empirical findings available suggest that we should proceed with caution in such overnights taking place<sup>25</sup>.

### ***Marsha Pruett – Overnight Visitation is Fine for Very Young Children***

Marsha Pruett reported results from a study that examined the psychological impact of overnight access on two groups of children less than six years of age (one to three year olds; and four to six year olds)<sup>26</sup>. To date, this is the only study that compares children from in-tact homes to children with separated parents who have overnights visits. The study looked a different kinds of parenting plans, and considered the number of overnights, the number of caregivers, the consistency of schedule and young children's adjustment to parental separation and divorce. The results indicate that children between the ages of four and six who had at least one or more overnights with their non-primary parent showed better adjustment than those who did not have overnights. Parents of the younger age group, between the ages of one and three years old who had overnights and those with more caretakers, reported that their children had less social and attention problems than those with no overnights. Additionally, the report indicates that consistent schedules (the same days each week), predicted better adjustment for the younger group (one to three year olds)<sup>27</sup>. Important gender differences were also noted in the Pruett report, in that, girls rather than boys, seem to derive more benefit from parenting plans with more overnights and multiple caregivers<sup>28</sup>.

---

<sup>25</sup> Biringen, Greve-Spees, Howard, Leith, Tanner, Moore, Sakoguchi & Williams, "Commentary on Warshak's 'Blanket Restrictions: Overnight Contact Between Parent and Young Children'" (2002) 40 Fam. Ct. Rev. 204.

<sup>26</sup> See Pruett, M.K., Williams, T.Y., Insabella, G. & Little, T.D., "Family and Legal indicators of child adjustment to divorce among families with young children" (2003) 17 J. Fam. Psychol. 169 and Pruett, M. Ebling, R. & Insabella, G., "Critical aspects of parenting plans for young children: Interjecting data into the debate about overnights" (2004) 42(1) Fam. Ct. Rev. 39.

<sup>27</sup> Barbara Fidler, "Developing Parenting Time Schedules: Conundrums and Considerations" in Martha Shaffer ed., *Contemporary Issues in Family Law, Engaging with the Legacy of James G. McLeod* (Toronto: Thomson Canada Limited, 2007) at 357.

<sup>28</sup> *Supra* note 23 at 21.

## ***Rhonda Freeman - Provides Guidelines for Age Appropriate Access based on Research***

Rhonda Freeman, the director of Familiars in Transition in Toronto authored a paper entitled, "*Parenting Plans: Making Decisions in Children's Best Interests*". In this paper, Ms. Freeman attached an Appendix to her paper which outlines an age and stage framework to provide age-appropriate and developmentally appropriate residency schedules. The first category in her Appendix, entitled "Children's Developmental Responses to Parental Divorce", deals with Infants and Toddlers, which refers to children from birth to age three, and outlines that the common responses to parental divorce in this age range, include:

- disruption in sleeping
- increased irritability or distress with normal separations
- heightened fear of strangers
- more intense and frequent temper tantrums
- loss of developmental achievements
- intensified fears
- yearning for absent parent
- increased aggressiveness toward primary caregiver
- fear of abandonment
- sensitivity to parents' emotional state
- emotional lability (highly reactive to environment)
- withdrawn, listless

Ms. Freeman's writings correctly concluded that parenting after divorce requires providing child with age-appropriate information about the changing family circumstances and an opportunity to express their feelings and concerns in developmentally appropriate ways<sup>29</sup>. Ms. Freeman reviews the works of a number of mental health professionals to devise a framework for residential schedules from 10 sources, which are clearly based on knowledge of child development and clinical experience. A copy of this excellent Appendix is attached to this paper and provides a very helpful resource in knowing whether or not the schedule your client is proposing is age and/or developmentally appropriate.

## **CASE LAW REVIEW – AN UPDATE TO SEPTEMBER, 2011**

The concept of setting access in accordance with a child's age and development has been rooted in psychological writings which have been in place for many years<sup>30</sup>. Increasingly, courts have begun to move away from long-held assumptions about what is in the best interests of children under three years of age and refer to directly to this psychological research. While there remains no cohesive approach taken by the Courts in awarding access to the non-primary parent for infants and toddlers, over the past decade the judiciary has grown to accept and encourage overnight access for children under three years of age.

---

<sup>29</sup> Rhonda Freeman, "Parenting After Divorce: Using Research to Inform Decision-Making About Children" (1998) 15 Can. J. Fam. L. 69 at paras. 24, 27.

<sup>30</sup> Mitchell A. Baris & Carla B. Garrity, *Children of Divorce: A Developmental Approach to Residence and Visitation* (Ashville, N.C: Blue Ridge Printing Co. Inc.,1988) [Baris & Garrity].



I have divided my review of the case law into two sections, namely, those cases that restrict access to the non-primary parent where there are very young children and those cases that allow generous overnight access to the non-primary parent where there are very young children. Since the time that this paper was originally published in 2004, the category of cases allowing for generous overnight access has swelled. Although the specific facts of each case continue to dictate the decisions of the court, there has been an undeniable evolution in thinking concerning the very young post separation.

**(A) Cases the Restrict Access to Infant Children to the Non-Primary Parent:**

In *Holtzhauer v. Murphy*<sup>31</sup>, the court held that given the child's age (two years old) and inability to tolerate absence from his/her primary caregiver, no overnight access was to be granted. It is noteworthy, however, that in this case, the child was born as a result of an unplanned pregnancy. The child and her parents had never resided together as a family. The father had moved to from Kitchener (where the child and her mother resided) to Hamilton before the child's birth and continued to residence in Hamilton at the time of the trial.

In *Souter v. Dunn*<sup>32</sup>, the court had to consider how to accomplish "important father son contact" in a manner that was consistent with an 11-month old child's emotional and psychological health taking into consideration that the infant lived with the mother in Saskatoon and the father lived 1300 kilometres away in Kenora, Ontario. Stach, J. held that custody of the 11-month old infant was to be awarded to the mother in Saskatoon, with the father to exercise access in Saskatoon until the child reached 18 months of age, at which stage the prospect of separation from his mother would be less troublesome. At paragraph 3 of the judgment, the court stated:

"The principal difficulty confronting the court is the probability that unless this child has the opportunity to see his father on a regular and frequent basis, the child will lose the feelings of attachment he currently has toward his father. On the other hand, the court must be keenly cognizant of the very tender age of this infant, still only 11 months old, and the potential for causing emotional or psychological harm to the child if it is separated too suddenly or too soon from the care of its mother".

In *Charron-Halsall v. Halsall*<sup>33</sup>, the court dealt with an application for custody of two girls, aged five and two. The court awarded interim custody of the girls to the mother and specifically stated "the fact that the girls were young dictated that the mother have custody with minimum specified access to the father." The father had stipulated access to the girls on Tuesdays and Thursday evenings from 6-8 p.m.

In *H. (C.J.) v. H. (G.H.)*<sup>34</sup>, the mother sought leave to relocate the parties' 11 month-old child from Kelowna to Vancouver in order to take up employment. The parties separated a year after they were married and six months after the child was born in 2007. The court allowed the mother's move and set aside a prior time-limited order limiting the daughter's mobility. Notwithstanding the court's observation that the father be entitled to reasonable and generous access to his child and, at paragraph 21 that the "move will naturally have a negative impact on [the child's] contact with her father" the court ordered that due to the child's very young age and her dependence on her mother, access will not be for periods in excess of four hours per day.

---

<sup>31</sup> 1996 CarswellOnt 1831, (April 12, 1996) Doc. Kitchener 874/94 (Ont. Prov. Div.).

<sup>32</sup> [1996] O.J. No. 3554 (Ont. Gen. Div.).

<sup>33</sup> [1995] O.J. No. 2467 (Ont. Gen. Div.).

<sup>34</sup> 2008 BCSC 5, 2008 CarswellBC 1013 (B.C. S.C.).

In *Rowley v. Rowley*<sup>35</sup>, the parties separated before the child was born. The child was five months old and still breast feeding when the Application was heard. The court held that, for now, two hour visits were appropriate given the breast feeding schedule but that two visits per week were too few for the father. Accordingly, the court ordered that the father have access three times per week for two hours intervals. Overnight visits were not proposed by the father and the court made no mention of that option.

In *Ryan v. Scott*<sup>36</sup> the court was asked to adjudicate the appropriate order respecting the parenting of a 16 month old that was born after the parties terminated their dating relationship. The court observed, at paragraph 17, that “the case law with respect to children under three demonstrates that the courts in the last decade have discarded prior thinking regarding what is appropriate in terms of the involvement of a parent with very young children following separation.” The court went on to address the scholarship of Joan B. Kelly and Michael E. Lamb; namely, that the goal of any access schedule should be to avoid long separations from both parents. The court also referred to jurisprudence holding that in appropriate circumstances, overnight access to a parent is not restricted by the age of the child.

The court, nevertheless, held that in the circumstances of this case overnight access was not suitable: the father had often returned the infant daughter to the mother exhausted, hungry and with a diaper rash indicating his failure to appreciate that perhaps shorter visits might be best, given the fact that the child was being breast-fed and required frequent diaper changes. The court did, however, order that when the child reaches two years of age alternating weekend access will consist of overnight access.

**(B) Cases that Awarded Generous Overnight Access to Infant Children to Non-Primary Parent:**

In a Manitoba Court of Appeal decision<sup>37</sup>, the court allowed a 20-month old baby to be in the father's care and control from Monday at 9:00 a.m. to Wednesday at 5:00 p.m. every week. This order was made to respond to the father's work schedule. In another decision<sup>38</sup>, the trial judge, on an interim motion, rejected the father's request for access every weekend to his 17-month child. Instead, the trial judge directed that he see the child on Tuesdays and Thursdays, from 5:00 to 7:30 p.m. and on alternate weekends from Friday at 5:00 p.m. to Sunday at 7:30 p.m.

In *Peterson v. Scalisi*<sup>39</sup>, Justice Wildman dealt with custody and access of a three year old, whose parents separated when he was one year old. She ordered joint custody of the child, with the father having primary residence of the son and alternate weekend access was ordered to the mother.

In *Terris v. Terris*<sup>40</sup>, the issue of what custody and access arrangement would be in the best interests of a three year old and a one year old and whether or not the mother ought to be entitled to move the residence of the children from Canada to Australia was considered. Much of the decision focused on the move of the children, but in the end, the court ordered that frequent and generous access was to be given to the parent who did not have primary care of the children, including overnight access.

---

<sup>35</sup> 2008 CarswellOnt 7886 (Ont. S.C.J.).

<sup>36</sup> 2011 ONSC 3277, 2011 CarswellOnt 8823 (Ont. S.C.J.).

<sup>37</sup> *Stewart-Croll v. Croll* (1996), 24 R.F.L. (4<sup>th</sup>) 219 (Man. C.A.).

<sup>38</sup> *Waugh v. Waugh* (1998) 42 R.F.L. (4<sup>th</sup>) 415 (Ont. Gen. Div.).

<sup>39</sup> [2001] O.J. No. 2774 (Ont. S.C.J.).

<sup>40</sup> [2002] O.J. No. 3018 (Ont. S.C.J.).

In *Huffman v. Kuffner*<sup>41</sup> the court determined that access from Thursday at 6 p.m. to Sunday at 6:00 p.m. was too long for the two year old son with the father. Instead, the court ordered the father to have access on alternate weekends, from Friday at 6:00 p.m. to Sunday at 6:00 p.m. and for two two-hour periods two nights per week when he was not with the child on the weekends.

In *Szczencina v. Piatek*<sup>42</sup>, the court was dealing with a custody dispute over a nine month old daughter. The mother's position was that the child was "of tender years" and that she had been the primary caregiver to the child and the father ought to have no access to the child. The court surprisingly gave custody of the nine month old to the father as he showed "a high degree of reasonableness in working out the access issues with the mother" and ordered alternate weekend access to the mother from Friday a noon to Mondays at noon.

In *Baird v. Webb*<sup>43</sup>, the court agreed with the father's request for overnight access of the parties' one year old, but limited it first to access one night at a time, twice a month, providing that if visits went well that the father's parenting time would eventually extend to a Friday - Sunday period. While the court expressed concern about the six hour travel time for each visit, the court recognized the need for the father's access to take place in a space where the father and son were comfortable and at ease.

In *O.(B.A.) v. G. (R.)*<sup>44</sup>, the mother became pregnant during a brief relationship with the father. The father commenced legal proceedings for custody just prior to the child's expected birth. The child was three years old at trial. The court engaged in a thoughtful and comprehensive analysis of the child's circumstances and expert evidence in the case. While there was a serious lack of communication between the parties and little to no cooperation, the court nevertheless ordered joint custody and a graduated shared parenting arrangement leading to equal access.

In *Heuss v. Surkos*<sup>45</sup>, the court ordered overnight visits starting with one night per week (plus mid-week) for three months, to expand to two nights overnight thereafter for the parties 28 month old daughter. At paragraph 30, the court articulated the following principles:

First, it is important to maximize the contact between access parents and young children.

Second, it is important that this contact be meaningful such that the relationship between them is allowed to flourish. Third, unless specific circumstances exist which point in a different direction, that contact should include regular overnight visits. And fourth, the overnights should be of sufficient duration and frequency to permit the relationship to flourish.

The parties in *J. (D.B.) v. J. (L.A.)*<sup>46</sup> married in 2003 and separated two years later in 2005. In consideration of the child's age – 21 months – and the principle of maximum contact, the court made the following observations, at paragraph. 33:

The young age of the child, 21 months, means that her views are not a factor. However, her age is important in the context of her relationship with her father and her need for bonding. While no expert evidence was tendered at this interim hearing, I note the following passage from a case filed by the father's counsel, *O. (B.A.) v. G. (R.)*, 2003 SKQB 112 (Sask. Q.B.), a decision of McIntyre J. of the Saskatchewan Court of Queen's Bench. At paragraph 25 the Court referred to

<sup>41</sup> [2003] S.J. No. 292 (Sask. Q.B.).

<sup>42</sup> [2003] O.J. No. 1249 (Ont. S.C.J.).

<sup>43</sup> 2002 SKQB 518, 2002 CarswellSask 798 (Sask. Q.B.).

<sup>44</sup> 2003 SKQB 112, 2003 CarswellSask 205 (Sask. Q.B.).

<sup>45</sup> (2004), 2004 CarswellOnt 3517 (Ont. C.J.); additional reasons at (2004), 2004 CarswellOnt 3317 (Ont. C.J.).

<sup>46</sup> 2005 YKSC 65m 2005 CarswellYukon 103 (Y.T.S.C.).

the article "Using Child Development Research to Make Appropriate Custody and Access Decisions For Young Children", authored by Joan B. Kelly and Michael E. Lamb, in the *Family and Conciliation Court's Review*, Vol. 38, No. 3, July 2000, 297 — 311. In *O. (B.A.)*, the expert author of the parenting assessment report referred to that article and testified about the stages of attachment involving infants and young children. He said that infants begin forming attachments to their caregivers at six or seven months, continuing through to 24 months and that if a child is removed from a parent with whom he or she is attached, there are negative implications. At para. 27, the Court went on to quote from the article:

The goal of any access schedule should be to avoid long separations from both parents to minimize separation anxiety and to have sufficiently frequent and broad contact with each parent to keep the infant secure, trusting, and comfortable in each relationship.

I accept this as simply underscoring the rationale for the maximum contact principle.

In the result, the court refused the mother's application to move to Vancouver and granted the father access on Tuesdays, Wednesdays and Thursdays between 9:00 a.m. and 1:00 p.m., and overnight from 4:00 p.m. Friday to 1:00 p.m. Saturday.

In *Lygouriatitis v. Gohm*<sup>47</sup>, the baby was just three months old when the case came before the court on an interim motion. The parties had met in 2004, had a child in 2006 and separated a few weeks later. The relationship had, at all times, been turbulent. It was the wife's position that at three months old, the child was not ready to spend overnights away from home. The court disagreed and referred to both the scholarship of Joan B. Kelly and Michael E. Lamb as well as the court's decision in *Cooper v. Cooper, supra*. In the result, the court ordered access on an interim basis in the following alternating weekly schedule: Week One – Monday 6:00 to 9:00 p.m., Wednesday 6:00 to 9:00 p.m., Friday 6:00 to 9:00 p.m.; Week Two – Monday 6:00 to 9:00 p.m., Wednesday 6:00 to 9:00 p.m., Saturday 6:00 p.m. to Sunday 8:00 p.m.

The parties in *Morano v. Colleta*<sup>48</sup>, married in 2006, had one child and separated in 2007. Despite numerous requests from the father's lawyer, the mother refused regular access to the father. The father brought an application for interim joint custody and shared parenting of the parties' one year old son. The court noted the father's great determination in staying involved in his son's upbringing, despite the "serious and unwarranted opposition" by the wife. The court awarded alternating week-on/week-off access to the father.

In *S.(C.M.) v. S. (M.R.J.)*<sup>49</sup>, the mother sought permanent custody of the child, an infant of 9 months old, as well as an order allowing her to relocate from the Yukon Territory to Ontario with the child. The court emphasized the principle of maximizing the contact between the child and both parents and referred with approval to Joan Kelly and Michael Lamb's scholarship concerning the necessity of regular interaction with both parents to foster and maintain attachments. The court concluded that it would be in the child's best interests to spend equal time with each parent and made an order requiring the child to reside with the father for one week during which the mother would have access to the child on each of Wednesday and Saturday evenings from 6:00 p.m. to 8:30 p.m. The child would then return

---

<sup>47</sup> 2006 SKQB 448, 2008 CarswellSask 601 (Sask. Q.B.).

<sup>48</sup> 2008 ONCJ 228, 2008 CarswellOnt 5127 (Ont. C. J.).

<sup>49</sup> 2009 YKSC 32, 2009 CarswellYukon 39 (Y.T. S.C.); additional reasons at (2009), 2009 CarswellYukon 92 (Y.T.S.C.).

to reside with the mother for the following week during which time the father would have evening access to the child on Wednesdays and Saturdays.

In *Blank v. Micallef*<sup>50</sup>, the parties began cohabiting in 2006, had one child and separated in 2008. The child was 23 months old at the time of the Application. In 2008, the parties had come before another judge on issues of residency and access. On the issue of access, the judge had ordered that the father have overnight access, equal or close to equal time with the parties' child and ordered that the parties execute a parenting regime. In the time between that 2008 Court Order and the 2009 Application, communication between the parties had deteriorated, there had been no progress in achieving the equal access Order and the child had been diagnosed with Cystic Fibrosis. The court ordered that rather than continue with the father's limited access, the parties should move towards the father having equal or close to equal access. Importantly, the court noted that a party not be allowed to argue the "status quo" by simply delaying or refusing to implement a court order.

The parties in *Cavannah v. Johne*<sup>51</sup> met in late August 2005 and begun a casual relationship. In October 2005, the mother found out she was pregnant. By November of 2005 communication had broken down between the parties and they had stopped dating. The parties did not know each other well. At the time of the father's Application for joint custody, the child was three years of age and seeing the father for one overnight on alternate weekends and for midweek visits. Despite the enormous commitment of the father to his child, his contact with his child had been restricted by the child's breast feeding schedule. Citing the principle of maximum contact, the court set a schedule with the mother having the child four days per week and the father having the child three days per week, to be reversed when the child reached school age.

*Cavannah v. Johne, supra*, is the subject of a recent and informative case comment by Fiona Kelly entitled "Custody and Access decision-Making and the Breastfeeding Child: *Cavannah v. Johne* (2008), [2008] O.J. No. 5028, 2008 CarswellOnt 7455 (Ont. S.C.J.)". In addition to addressing this decision, the case comment surveys recent case law on access schedules and breast feeding practices.

## **CUSTODY AND ACCESS GUIDELINES FROM OTHER JURISDICTIONS:**

### **(1) Arizona Access Guidelines**

In Arizona there are access Guidelines (attached to this paper as Appendix B) which assume that one parent has sole custody and the second parent is an access parent. The Arizona Guidelines stipulate that for infants up to age six months; basic access should be brief but frequent during the week, recommended at three times a week at two hours each for the early months. As the child progresses to 6 months, an additional four hours should be added during the day on the weekend. If a parent's schedule cannot facilitate the frequent weekday access, then four hours on the weekend if recommended. Optional access should include one time per a week which progresses to three to four hours per week at four hours each with a weekend overnight by six months. For six months to three years, the Guidelines suggest that for children six to 12 months - the full day on Saturday and starting at 12 months to three years, alternate weekends from Saturday morning to Sunday evening with one mid-week visit - not overnight.

---

<sup>50</sup> 2009 CarswellOnt 5735 (Ont. S.C.J.); additional reasons at (2009), 2009 CarswellOnt 6790 (Ont. S.C.J.).

<sup>51</sup> 2008 CarswellOnt 7455 (Ont. S.C.J.).

## **(2) Washington Access Guidelines**

In Washington State the access guidelines (attached at Appendix C) suggest the following for children aged 0-18 months:

(a) 0-6 months: for the baby, it is essential to have consistency of physical care and sensitive, cooperative interaction between the infant and caregiver. The pattern of access should not interrupt the ability of the parents to provide smooth child care routines. Access periods should occur frequently enough to facilitate good bonding between the infant and parents. Daily contact of a few hours in the primary residence of the infant would be the optimal plan with both parents sharing in feeding, bathing, changing and otherwise caring for the infant as well as playing with the child. time with the child away from the residential parent should be limited to one or two hours

(b) 6-18 months: the forming of secure attachment relationships is the major issue at this age. The most important features of care giving are stability and responsiveness. Young children can quickly lose feelings of attachment to people they do not frequently see. If frequency is less than once or twice a week, access should not be more than 1-3 hours. Children this age need routine contact with familiar people. Overnights away from the primary caregiver should be discouraged unless the instability for the child is outweighed by other factors.

(c) toddlers - 18 months to 3 years: the tasks of children during this period are developing a sense of separateness from the parents and learning to master limits. While frequency and consistency are still important, child of this age can handle a schedule of access which provides less frequent contact. at 18 month old child who is with the other parent only on the weekends can handle parts of a day. for older toddlers, when the non-residential parent has been a regular and significant caretaker, an overnight per week is possible once the child has become accustomed to the other parent's surrounding, weekend long access is still not recommended.

While there are no custody and access Guidelines in Ontario, or Canada for that matter, it is sometimes helpful to refer to access guidelines from other jurisdictions as an indication to the Court as to what is considered age and developmentally appropriate for infants of divorced families.

### **AN UPDATED CONCLUSION:**

A review of the case law in the past decade demonstrates that overnight access to a non-primary parent for infants or toddlers is routinely being ordered for infants over six months of age. In so doing, the courts refer to and address the mental health literature to support the overriding goal of avoiding long separations between the child/children and both parents. To further this goal, and in contrast to past jurisprudential trends, the courts are no longer willing to simply restrict overnight access to a parent based on the age of the child alone. There is an abundance of case law and research supporting the theory that parenting schedules ought to be designed and ordered to ensure meaningful parenting time for both the primary and non-primary parent in an attempt to maintain appropriate and meaningful relationships between young children and both parents. When representing the non-primary parent seeking overnights to a child under 36 months of age, it is crucial to ensure that there will be continuity of care within and between the two homes, ongoing communication about the continuity of care and routines either by a written journal, email or telephone and a built in review period to address the concern of the other parent in case the overnights are not working for the particular child/children.

*This article was originally published in the 2011 Six Minute Family Law Lawyer*