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Family

'Grandparents' rights' enhanced by amendments to the Divorce Act?

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(July 15, 2021, 12:07 PM EDT) -- There has long been activism seeking to enhance the right of grandparents to have access to their grandchildren in the event one or more of the parents denies them such rights. Thus, for example, (as noted in Kristen Douglas, *Divorce Law in Canada*), in 1995, a private member's bill introduced by Reform MP Daphne Jennings, which would have amended the *Divorce Act* to enhance grandparents' rights, was studied and defeated by the House of Commons Standing Committee on Justice and Legal Affairs.

The provisions in the *Divorce Act* for a "custody" and "access" order were amended effective March 1, 2021 to use the terms "parenting" and "contact:" "A court … may, on application by a person other than a spouse, make an order providing for contact between that person and a child of the marriage" [s. 16.5(1)]. The Department of Justice Canada (DOJ Canada) has specifically advised that "a non-spouse, such as a grandparent or someone else important to the child, can apply for a contact order" (see Contact Orders — The Divorce Act Changes Explained, Contact order).

It is important to highlight, however, that a person (including a grandparent) may make such application to the court for contact, only with leave of the court in the first instance (s. 16.5(3)). DOJ Canada explains the rationale for such leave on the basis that "the court must consider all relevant factors, including the strength of the child's relationship with the applicant," and thus would assess an application for contact on a case-by-case basis (see Contact Orders — The Divorce Act Changes Explained, Leave of the court). Some have argued that the new amendments to the Divorce Act have achieved the goal of enhancing grandparents' rights.

Grandparents' rights have historically been based on a fundamentally different premise than parents' rights. The right of "any other person," and hence grandparents, to apply, with leave, for access to a grandchild was first introduced to the *Divorce Act* in 1985 (*Divorce Act*, RSC 1985 c. 3 (2nd Supp) ss. 16(1), 16(3)).

However, the *Divorce Act*, in its former version, specifically entrenched the principle that a child has a right to a relationship with both parents (referred to as the "maximum contact rule"), but the maximum contact rule has not been anchored in the *Divorce Act* regarding grandparents' rights.

The right of the child to enjoy both parental relationships, the maximum contact rule, is now set out in the definition of the best interests of the child in the recent amendments to the *Divorce Act* (s. 16(6)). Thus, if a spouse is found to have engaged in parental alienation to thwart the children's relationship with the other spouse, the courts may order a change of parenting to address the situation (as illustrated in *JLZ v. CMZ* 2021 ABCA 200).

Legislation across Canada has required that the grandparent(s) have a pre-existing and strong relationship with the grandchildren before their access rights would be protected. This is illustrated by the recent Alberta case of *DLL v. CCL* 2021 ABQB 283. The Alberta *Family Law Act* required that

the court consider the "significance of the relationship" in assessing whether leave to apply for a contact order should be given to a grandmother.

As the case involved a 14-month-old child, there was no significant relationship with the grandmother developed by the child, and permission to seek a contact order was denied. Justice Michael J. Lema seemingly attributes the harshness of the decision to the Alberta legislature: "[I]t reflects the Legislature's decision to require a demonstrable correlation between contact with [the grandmother] and the lived experience of the child . . ." (para. 21).

The different guiding principle pertaining to grandchildren is continued in the recent amendments to the *Divorce Act*, despite the amendment to the wording in s. 16.5(1). In the March 1, 2021 amendments, a grandparent, as a "person other than a spouse," is given the right to apply, with leave, for a "contact order" giving grandparents contact with their grandchildren, whether during a parenting time or not.

In assessing whether such a contact order would be in the "best interests of the child," the court, by further provision in the *Divorce Act*, is directed to consider the nature *and strength* of the relationship with the grandparents prefatory to a contact order (*Divorce Act* s. 16(3)(b), emphasis added). There is no underlying "maximum contact rule," and the court will assess whether the already developed relationship between grandparent and grandchild is in the best interests of the child and should be promoted.

In her scholarly article, "To Grandmother's House We Go? An Examination of Grandparent Access" ((2004), 21 C.F.L.Q. 437), Martha Shaffer discusses the different guiding principles in grandparent access disputes and why there is a weaker claim of grandparents to access rights. Shaffer's article remains the predominant piece of research in this area.

Grandparents' rights have also been discussed academically by the Law Reform Commission of Nova Scotia in its *Final Report on Grandparent-Grandchild Access* dated 2007. The Law Reform Commission noted that, although grandparents had no "automatic right of access," they could make such application with leave of the court. The commission concluded, however, that the legislation "struck the right balance" in considering the best interests of the child, and decided not to promote an automatic right.

The commission did, however, recommend wording changes to make it clear that a grandparent or other member of the child's family could make such an application, with leave of the court.

According to Shaffer, under the "parental autonomy approach," the courts take the view that they should respect the inherent right of the parents to determine the course of their child's upbringing, provided they are fit and competent.

As the custodial parent has a significant role, the courts should be reluctant to interfere with their decision and should do so only if satisfied that it is in the child's best interests. Weight is also given to the concern that it is not in the best interests of the child to be placed in a position of real conflict and hostility between their parent and the grandparent.

Further, as noted by Shaffer, competing with the principle of parental autonomy is that contact with grandparents is generally in the children's best interest. Under this "pro-contact approach," the courts will scrutinize the parents' reasons for denying grandparent access and will override them where the reasons are found not to be compelling or reasonable. The stronger the relationship between the child and grandparents, the more difficult the implicit presumption of grandparent access rights is for the parents to rebut.

Martha Shaffer is of the view in her article that the "pro-contact" approach is the position taken in the majority of the Canadian cases regarding grandparents' rights of access.

Perhaps it was the intention of the drafters of the recent amendments to the *Divorce Act* to enhance grandparents' rights by their demarcation of the rights of grandparents to a contact order, with leave. The "best interests of the child" test continues to govern, however, and the amendments place continued emphasis on the need for a strong relationship between the grandparent and grandchild.

In view of the fundamental differences in parental rights, as entrenched in the *Divorce Act* and the case law, and the weaker rights of a grandparent, the amendments may not, in and of themselves, be sufficient to enhance grandparents' rights in the manner long sought by activists.

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