A CHILD'S 'RIGHT' TO ACCESS — A PROBLEMATIC POSTULATE

by

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1. *INTRODUCTION*

Until as recently as 1970 access was seen as no more than the basic 'right' of any parent.[1] Modern perceptions regarding access differ; any 'right' to access is perceived as that of the child. Recourse to the language of a child's 'rights', poses both substantive and procedural problems. A directive that a child has a 'right' to have contact with both parents does not dispose of the question: ought or ought not this child have access to this parent? Nor does such a directive resolve potential conflict between assertion of the child's 'right' and the 'welfare' principle in the event that the latter does not accord with the former. Further, assertion of a 'right' presupposes the 'right' to be heard. A child's 'right' to be heard is circumscribed by the limitations inherent in representation of legally incompetent persons.

This article examines the statutory provisions of the Commonwealth *Family Law Act* 1975 pertaining to access; judicial reference to 'rights' in cases decided under this Act and offers some comments on the utility of the concept of a child's 'right' in access adjudication.

2. *ACCESS: THE LAW*

There are three inter-related aspects of the Commonwealth *Family Law Act* 1975, (hence the Act) which require consideration; — general principles governing the substantive law; the involvement of court counsellors in the adjudication process and the involvement of the child.

(a) *General Principles*

Access has some aspects in common with custody, and can be regarded as a short, temporary and intermittent form of custody.[2]

The Family Court of Australia and courts exercising jurisdiction under the Act, *inter alia*, can make orders with respect to access.[3] In so doing the court is guided by the general terms of s. 64 (1) (a) — that the paramount consideration in proceedings with respect to the custody or guardianship of, or access to, a child of the marriage shall be the welfare of the child. While, however, the statute sets forth the principle to be

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1 *Innes* v. *Innes* [1970] ALR 566.

2 H. A. Finlay, *Family Law in Australia* (2nd ed. 1979) at p. 202.

3 *Family Law Act* (Cth) 1975, s. 4 (1) (c) (ii).

applied in access and related matters, criteria articulating the circumstances, form and conditions under which access orders are deemed to promote the welfare of a child are not delineated. Further, the Act is silent as to the meaning of 'welfare'. In all access matters, therefore, courts exercising jurisdiction under the Act are vested with a broad discretionary power. That power, it has been suggested, is wide enough to overrule even parental consent to access, if the court is of the view that such access is not conducive to promoting the child's welfare.[4]

Some judges assume that access to both parents once they have ceased to function as a single unit, promotes the welfare of the child. For example, in *Horman and Horman*, Fogarty J. said that, 'It would in my opinion be a rare and compelling case which should require the court to refuse all access by a parent to his or her child'.[5] Similarly, consider the comment of Samuels J.A. in *Cooper and Cooper*: '... an order denying access will be made only in exceptional circumstances and upon solid grounds'.[6]

According to these views a custodial parent seeking to preclude the other from access to his child must present cogent evidence to show why that other parent should not be permitted access. Or, if the child resists access, the claimant parent must establish that forcing a child to comply with an order for access is likely to promote the child's welfare.[7] Such an approach, however, has been criticized by Treyvaud J. as begging the question.[8] To assume that access orders are the norm, states the consequences of the application of the proper rule. It is not, in fact, the rule or the principle. The principle to be applied, per His Honour is as follows: 'That access by a non-custodial parent will be ordered where and only where, access will advance and promote the welfare of the child'.[9] It follows that absent evidence to suggest that the child's welfare will be advanced by access then access should be refused.[10] These views and other recent research suggest that there has been a shift in the court's attitude — an attitude evidenced by a greater willingness to refuse or suspend access orders.[11]

The most comprehensive consideration of the relevant principles governing access matters appears in *Sampson and Sampson.* In that case Fogarty J., said:

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4 *D'Agostino and D'Agostino* (1976) FLC 90-130 at p. 75,612.
5 (19 6) FLC 90-024 at p. 75,115. See too *D'Agistino* ibid.
6 (1977) FLC 90-234 at p. 76,250.
7 *Mazur* (1976) FLC 90-132 at p. 75,630. In *Parsons and Punchon* (1978) FLC 90-490 Wood S.J. took into consideration the fact that an order for access which creates stress and disturbance for the child also generates stress and difficulties for the others in his family unit, at p. 77,537. In *Von Stieglitz* (1978) FLC 90-408 Wood S.J. could find no valid reasons why three boys aged 16, 14 and 12 respectively did not wish to see their mother. Accordingly the mother was granted an access order, at p. 77,092.
8 *Re K* (19) FLC 91-283; *Re A* (1982) FLC 91-284.
9 *Re K* ibid at p. 77,610.
10 *Re A* ibid at p. 77,612.
11 A. Marshall, *et al,* 'Suspension of Access — a Review'. Paper presented to a Seminar for Judges and Counsellors of Sydney and Parramatta Registries on access, arranged by Mr Justice Baker, Chairman of the Judges National Committee on Custody, October 1982.

'(1) In ordinary circumstances where custody of a child is granted to one parent access will be ordered in respect of the other parent.

(2) The fact that the custodial parent is opposed to access or does not desire the other party to have access to the child is in itself irrelevant. The matter has to be determined having regard to the interests of the child, not the wishes as such of the custodial parent.

(3) Where the continuation of access has a detrimental effect upon the child the court must weigh that detriment against the other advantages to the child of the continuation of access. Where it concludes that, considering the whole matter, to continue access would be to the real detriment of the child the court is required in the performance of its duty to terminate or suspend access.

(4) The option then open to the court is either to continue the existing custody and at the same time terminating or suspending access or alternatively changing the custody and determining access in the light of that changed situation.

(5) In many cases this problem arises because the custodial parent quite irrationally and wrongly creates such difficulties about access that its continuance has a demonstrable detrimental effect upon the child.

(6) In such a case the question of the future custody of the child again must be determined only upon the test of the welfare of the child.

In cases where the welfare of the child dictates that the child should remain in the custody of the former-custodian that must be the result even though the consequence may be that the non-custodial party is severed for at least the time being from continued connection with his or her child.'[12]

Since access does not entail prolonged association with the non-custodial parent the courts tend to view the conduct of the parent seeking access more leniently than in an application for custody. Further, the court rather than deny access may place conditions upon the parent. Such conditions may be imposed on the understanding that they do not continue indefinitely.

Conditions on the access parent that the court has imposed include; that the children do not come into contact with a *de facto* spouse,[13] or for that matter a legal spouse;[14] that the non-custodial parent not partake of or be affected by 'drugs' during access;[15] that no other person be near or at the front door when the children are collected or returned[16] and that there be no display of sexual affection between the mother and her homosexual lover in front of the children.[17] A recent case indicates,

12 (1977) FLC 90-253 at p. 76,357-8.
13 *Noye* (1978) FLC 90-409.
14 *Evans* (1978) FLC 90-435.
15 *Hormon* (1976) FLC 90-024.
16 *Filipovic* (1977) FLC 90-266.
17 *Spry* (1977) FLC 90-271.

however, that the court now regards, as being 'unnatural', orders which are conditional upon there being no contact with a parent's new partner.[18]

(b) *Court Counselling*

Fundamental to the operation of the Act, is the involvement of Court Counsellors at every stage of its proceedings.[19] It is not unless and until the parties fail to reach agreement on the question of access that the matter comes before the Court. Even then the court has the power, at any stage of the proceedings to make an order directing the parties to attend a conference with a court counsellor or welfare officer to discuss the welfare of the child. The aim of such a conference is to endeavour to resolve any differences between the parties by mediation rather than by litigation. Specifically, a counsellor's approach is to attempt to assist the parents to facilitate access by, *inter alia*, encouraging the notion of their continued joint responsibility for their children.[20]

A party to the proceedings can request an order for a conference or the court can make such an order on its own motion. Conferences are not compulsory. Failure by a party to attend, however, must be reported to the court by the court counsellor or welfare officer.[21] Under present legislation a child is not a party to the proceedings, he cannot, therefore, seek a conference.[22]

Where the court has ordered the parties to attend a conference, it may order in addition that the court counsellor prepare a report on such matters relevant to the proceedings as the court thinks desirable. Such a report is ordered where the issues appear to be of sufficient complexity to require further detailed information, or where the conference ordered pursuant to s. 62 (1) has failed to achieve any resolution. Preparation of the report usually involves an initial joint interview with the parents, followed by interviews with the children and significant others, observation and assessment of children in the presence of each parent both in the counselling offices and at the respective homes.[23]

Copies of the report may be furnished to the parties or their legal advisors, or if the child is separately represented, his legal advisor. A report may be received in evidence and the counsellor or welfare officer

18 *P.* v. *P.* (1982) FLC 91-221.

19 *Family Law Act*, Part III, particularly s. 62 and, also, n. 96.

20 Jill Burrett, *The Problem of Access for Children of Divorce* — paper presented at the College of Law Seminar on Family Law Practice today. Sydney, December 1982, at p. 5.

21 The *Family Law Amendment Act*. 1975 s. 23 amends s. 62A (5) of the Principal Act by empowering the court to give further directions in relation to the preparation of a report, following failure of a party to attend.

22 The *Family Law Amendment Act* 1983 s. 23 seeks to amend s. 62 of the Principal Act by allowing a request for a conference by a person who is appointed to represent the child.

23 J. Nasser, 'Post-Divorce Visitation: A Child's Right to Continue a Relationship with Both his Parents after their Separation', paper presented at R.A.N.Z.C.P. Section of Child Psychiatry (S.A.) Semi-Annual Meeting June 1978, at p. 4.

responsible for preparation of the report may be cross-examined by the parties to the proceedings.

Welfare reports, psychiatric and psychological reports can provide useful analyses of the circumstances of the parties to the proceedings and the relationships between them. Ultimately, it has been held, however, it is the Judge who must assess the situation and make a determination. That responsibility, according to the Full Court, '... should not be wholly abdicated to the realm of expert opinion'.[24] Further, the court has a responsibility to ensure that the best evidence available is before the court, *i.e.* oral evidence — affidavit evidence is not an adequate substitute.[25]

(c) *The Child's 'Right' to be Heard*

Two procedures are available to the court whereby it can seek directly the views of the child; (i) by appointment of a separate representative or (ii) by ascertainment of the child's 'wishes' if he has attained the age of fourteen years.[26]

(i) A child does not have an unqualified right to be separately represented in proceedings concerning his access.[27] The court may of its own motion order that the child be separately represented. Otherwise, the child, an organization concerned with the welfare of children or any other person with *locus standi* can apply to the court that the child be allowed his own representative when the court has proceedings before it. It is then within the discretion of the court to allow separate representation.

Appointment of a separate representative raises difficult, probably unresolvable questions — questions concerned with defining the role and

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24 *Wood* (1976) FLC 90-098 at p. 75,447.

25 Ibid at p. 75,446.

26 The *Family Law Amendment Act* 1983 amends s. 64 of the Principal Act as follows:

(a) by omitting (1) (b) and substituting the following paragraph:

(b) the court shall consider the wishes of the child in relation to the custody or guardianship of, or access to, the child, and shall give those wishes such weight as the court considers appropriate in the circumstances of the case; and

(c) by inserting after sub-section (1) the following sub-section:

(1A) For the purpose of complying with the requirement of paragraph (1) (b) the court may

(a) have regard to anything contained in a report furnished to the court in accordance with a direction under sub-s. 62A (1); and

(b) subject to the regulations inform itself as to the wishes of the child by such other means as it considers appropriate, but nothing in this section permits the court or any person to require a child to express his wishes (if any) in relation to his custody or guardianship or in relation to access to him.

27 The *Family Law Amendment Act* 1983 amends s. 65 of the Principal Act to allow the appointment of a separate representative in any proceedings under the Act in which the welfare of a child of the marriage who has not attained the age of 18 years is relevant.

function of a child's representative.[28] Difficulties arise whenever counsel is appointed to represent a person incapable of giving instructions. In that situation is the role of counsel to represent the 'person' or the 'person's interests'? In ordinary proceedings counsel act on the instructions of their client and are bound by them. Clearly they represent their client. Absent such instructions, the role of counsel as traditionally perceived is inadequate. Thus counsel representing a pre-verbal child must rely entirely on court counsellors' reports, or confine himself to calling and examining witnesses; if the child is older he is faced with other problems, *e.g.* to what extent the child should be involved in the litigation. As well, the contentious question of the relationship between the court counsellor and the separate representative is raised. The former is an officer of the court and as such has a primary duty to furnish the court with an independent, impartial and objective report. The primary duty of the separate representative is to his client. Can the two co-operate without there being a conflict both of roles and of function? The task of the separate representative is further complicated if recommendations made in the court report are not in accordance with his own views. The point to be made is that ultimately (and this will depend on the age of the child, to some extent) counsel representing a child will not only represent the child but will present views which he considers to be in the child's 'interests'. Those views may or may not accord with the child's views of his 'interests'.

Urquhart and Urquhart[29] places further limitations on the utility of separate representation. That decision holds that, under the present legislation, since a child could not have been made a party to the proceedings even if separately represented, it followed that there was no right of appeal.

(ii) Where the child has attained the age of fourteen years his wishes regarding access become relevant. This is not to say, however, that the

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28 The role and function of a separate representative has been discussed in several cases: see — *Todd (No. 1)* (1976) FLC 90-001. The judge suggested that that role was analogous to that of the official solicitor in the Chancery Division of the High Court in England. Inter alia, the official solicitor makes a full investigation and is not bound to accept either the views of the child or any expert who has been consulted. This view has not been followed — it substantially duplicates the function of a court counsellor who has been asked to prepare a welfare report. *Pailas* [1976] FLC 90-083 suggests a role which is a compromise between investigator and traditional advocate. *Demetriou* (1976) FLC 90-102 distinguishes between representing the 'child' and the child's 'interests'. *E* v. *E* (1979) FLC 90-645 held that the function of counsel could not be that of witness. *Lyons and Boseley* [1978] FLC 90-423 suggested that the function of a separate representative include: (a) cross-examine the parties and their witnesses; (b) to present direct evidence to the court about the child and matters relevant to the child's welfare; (c) to present, in appropriate cases, evidence of the child's wishes. *Waghorne and Dempster* (1979) FLC 90-700 suggested that the role of a separate representative be confined to that of traditional advocate. He cannot, therefore express his personal opinion as to the child's interest or welfare. See also S. Kobienia, 'Separate Representation in Custody Cases' (1978) 6 *Adel. L.R.* 466 and D. Whelan, 'The Wishes of Children and the Role of Separate Representative' (1979) 5 *Monash L.R.* 287.

29 (1982) FLC 91-206.

court lacks power to order access contrary to the expressed wishes of the child. Such an order is within the court's power subject to the proviso, that by reason of special circumstances it is necessary to overrule the child's wishes. Similarly, on an application for discharge or variation of an access order in respect of a child of fourteen years the court should act in accordance with the child's wishes unless there are special circumstances which render this undesirable.[30]

This means that it is the child's wishes, and not the court's concept of what the welfare of the child requires, which ought to be the determinative factor in the first instance. Yet, since 'special circumstances' are not defined in the Act it remains within the discretion of the court to determine when a child's wishes should be overruled.

3. *JUDICIAL REFERENCE TO 'RIGHTS'*

In addition to the statutory provisions of the Act governing access, the decided cases not infrequently refer to one of the three general principles set down in s. 43. That principle is as follows:

> The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction have regard to — . . .
>
> (c) the need to protect the rights of children and to promote their welfare.

The significance of this provision has been subject to a variety of judicial interpretations. A legislative intention to confer a 'right' on a child has been elicited therein by some members of the judiciary; others see s. 43 (c) as of no relevance to extending the jurisdiction of the court.

For example in *Hayman and Hayman*[31] Murray and Lusink J.J., in reference to s. 43 (c) stated:

> This is a positive direction — this is a principle to be applied by the courts and it is mandatory that we act according to these principles.
>
> A child has rights, a child has status. He is not another asset acquired by the parties during the marriage and available for distribution on breakup.

Wood J. (as he then was) has commented on s. 43 (c) in the following terms:

> This statute is possibly unique in Australia, in adverting specifically to the rights of children. One sees with regret so many statutes designed to promote the welfare of children which proceed on a very paternalistic basis with little thought having been given, apparently to the fact that children do have rights as persons and that those rights are to be protected . . .[32]

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30 See generally A. Marshall, *et al. Children's Wishes in Custody and Access Dispute* (1978) 31, *Australian Social Work* 4, at pp. 15-18. A. Lutzyk, 'Investigation of Children's Custodial Wishes' (1979) 14 *Aust. J. of Social Issues*, 218-229.

31 (19 6) FLC 90-140 at p. 75,681.

32 *Mazur* (1976) FLC 90-132 at p. 75,629.

That opinion has been qualified by his Honour, in a more recent decision. In *D.H.* v. *M.K.*[33] he said that, 'It must, of course, be borne in mind that a parent has no proprietory right in his child and that if there is a right to access, then that right is the child's right and not that of the parent.' Strauss J., albeit not in reference to access, has stated that 'The provisions of s. 43 do not extend the jurisdiction of this court and they are no warrant for this court to seek to confer rights or to impose duties beyond those conferred or imposed in respect of actual children by the Family Law Act . . .'[34]

It is submitted that the view expressed by Strauss J. is correct. The Act, as presently constituted, does not confer a 'right' to access on a child. The following analysis will support that submission. A necessary preliminary step to negating the existence of a 'right' to access in the child, is to define a 'right'.

Any discussion of a 'right' to access must distinguish between the legal interest of the parent on the one hand and the interest of the child on the other. To that end Hohfeld's analysis of the fundamental difference between a 'right' (or claim) and a 'privilege' (or liberty) is appropriate.[35] According to this analysis 'rights' are nothing but duties placed on others to act in a certain manner. 'Privileges' are the correlatives of 'no-rights'. Legal 'rights' therefore are not merely claims but jural relations. For example if Parent A has a 'right' against Parent B that he/she permit access to their child, then the correlative of A's 'right' is that B is under a duty to A to permit access to the child. By virtue of the enforcement provisions of the Act obstruction or interference by B to A's 'right' to access grounds an action by A against B. 'Rights' then imply the existence of a correlative duty. Such duties, however, cannot be deduced from mere privileges. 'Privileges' inhere in a person where that person may do an act in the sense that he is not under a duty to forbear from it, but others are free to prevent him. For example if Parent A has no duty to refrain from seeing his child then A has a privilege to act; the child has 'no-right' against his parent. The essential difference between 'rights' and 'privileges' is that the former impose duties on others to act in a certain manner whereas privileges do not. Accordingly, a child has a 'right' to access to his parent if his parent is under a duty to have access to him; or the child has a 'right' to refuse access if his parent is under a duty to refrain from seeing him.

Reference to 'rights' in access matters is possible in three distinct situations; a 'right' to access pursuant to the statutory joint custody provision; a 'right' to institute proceedings for access, and a 'right' to enforce an order granting access following court proceedings.

(i) The Act proclaims each of the parties to the marriage to have joint custody of the child subject to any order of the court to the con-

33 (1981) FLC 91-015 at p. 75,186.
34 *Opperman* (1978) FLC 90-432 at p. 77,199. See also H. A. Finlay, *Family Law in Australia* (2nd ed. 1979) at p. 266.
35 R. W. M. Dias, *Jurisprudence* (3rd ed., 1970) at p. 248 *ff.*

trary (s. 61 (1)). Each parent, therefore, has a duty *vis-a-vis* the other to permit, *inter alia*, access to the child. In contradistinction to the duty imposed on parents to maintain their child, the Act does not impose a duty on a parent to avail himself of his right to access. The child, therefore, has no 'right' to access to his parent pursuant to s. 61 (1).

(ii) A parent, or other person who is a party to the proceedings has a right to institute proceedings for access as specified in s. 4 (1) (c) (ii). A separate representative appointed for a child cannot institute proceedings; he can participate only in proceedings properly before the court. Under the current legislation constitutional limitaitons preclude a child from qualifying as a party to the marriage; he has, therefore, no right to institute proceedings concerning his access.

(iii) Pursuant upon custody or access adjudication, the court may either reiterate joint-custody or award sole custody to one parent with, commonly, an order for access to the child, in favour of the other. Both parents have a right to custody and therefore access, in the former situation; in the latter, one parent has a right to access but not to custody. Interference or obstruction to the right to access may be subject to court imposed sanctions. Failure by a parent to assert his right to access does not entitle the child to a legal remedy. It follows that the duties owed are inter-parental and not to the child; the child, therefore, has no right to access.

The above position is altered by the *Family Law Amendment Act* 1983 s. 3 (cc). That section amends the principal Act by making the following a 'matrimonial cause':

> ... proceedings by or on behalf of a child of a marriage against one or both of the parties to the marriage with respect to the custody, guardianship or maintenance of or access, to the child.

Clearly, s. 3 (cc) intends conferral on a child of the 'right' to institute proceedings regarding access. That proposed Amendment raises important issues. First, does the child's 'right' to institute proceedings imply the further 'right' that representations made by him or on his behalf will be determinative, in the first instance, or will the court's perception of what promotes his 'welfare' prevail?

Access matters can be governed either by the 'welfare' principle or by reference to 'rights'. Assertion of a 'right' demands at least the 'right' to be heard. That means, in the first instance, representations made by the child or on his behalf ought to be determinative. Yet, the fundamental principle governing access matters under the Act, is that the welfare of the child is the paramount consideration (s. 64 (1) (a). What promotes a child's welfare in any matter is determined by exercise of judicial discretion. What, then, prevails, the child's representations or the opinion of the court? S. 43 (c) provides no guidance. It refers both to protecting 'rights' and to promoting 'welfare'. These imperatives are logically inconsistent. Further, the reference to 'rights' in s. 43 (c) is inconsistent with the welfare principle enunciated in s. 64 (1) (a).

If the opinion of the court prevails, the conferral of 'rights' upon the child, other than in a symbolic sense, is rendered meaningless. Such was the position in *Paisio and Paisio*.[36] In that case both parents sought custody of a seven year old girl who had been cared for by the mother since birth. The girl expressed a wish to remain in the care of her mother. She was not separately represented. In the course of his judgment, the judge referred to s. 43 (c), 'supposed' that the 'greatest right that the child has is that a human being has in our society a right to be free, and no doubt the right to be free so clearly involves a freedom of choice... perhaps the most powerful right of all is the right to be wrong'.[37]

Having identified to his satisfaction what a child's 'rights' ought to be and therefore what he ought to protect, his Honour decided on the facts that a child reared in the mother's religious faith (Jehovah's Witness) could entail the loss of rights and protection of rights to which he had adverted and the right to freedom of choice.[38] In the result the views of the court prevailed over that of the child — custody was awarded to the father.

If, on the other hand, representations made for or on behalf of the child prevail, then these representations may come into conflict with the 'welfare' principle. The following hypothetical fact situation illustrates the point. A child has a strong affectional tie to a parent who is serving a prison sentence. His representative submits that access should occur and take place at the prison. The court is of the opinion that such visits would not promote the child's welfare.

Clearly, there are inherent contradictions in the assertion of 'rights' and the 'welfare' principle. Strictly speaking either one has or has not a 'right'. There is no scope for the exercise of discretion.[37a]

The second issue posed by the conferral upon the child of 'rights' in access matters concerns utility and effectiveness. There are two aspects to this issue (a) the utility of a 'right' which imposes a duty on another to participate in an access arrangement, and (b) the utility of assertion of a 'right' the consequence of which is, that no duty is imposed or, that an existing duty is negated.

(a) Conferral of a 'right' which imposes a positive duty to participate in access is of limited utility. Access presupposes reciprocity. It demands continuing interest, concern and intimacy on the part of both child and parent.

Absent parental interest in a continuing relationship with the child — the child lacks power to compel that interest.

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36 4 *Fam. L.R.* 689.

37 Ibid at p. 694.

37a In *Grimshaw* (1981) FLC 91-090 (a dispute over custody) it was stated by the full court that there is nothing in s. 43 which can override the provisions of s. 64 (1), at p. 76,619.

38 Ibid at p. 695. For a view totally opposed to this interpretation of a child's rights in *Paisio* see F. Bates, 'Principle and the *Family Law Act*', 1975; 'The Uses and Abuses of s. 43' (1975) 55 *ALJ* 181.

Generally, the utility of 'rights' as a means of compelling performance of a duty depends on two elements; the nature of the relationship between the parties and the nature of the duty.[39] As far as the nature of the relationship is concerned it is appropriate to speak of asserting a 'right' against an outside agency such as a government instrumentality, it is less so if continuance of the relationship is the *raison d'etre* for asserting the 'right'. Likewise the nature of the duty; to speak of 'rights' is appropriate when the duty sought to be imposed is instrumental, for example, the payment of maintenance. If, however, the duty sought to be imposed is expressive, requiring affection, emotional commitment and concern, then to speak of 'rights' is inappropriate. Such a duty cannot be effectively compelled, infringement thereof cannot be enforced by threat of punishment.

(b) The utility of seeking a variation or discharge of an existing access order — *i.e.* the negation of a duty. This does not pose the problems of imposition of a duty. Given the predilection of the judiciary in favour of access orders, the 'right' to institute proceedings regarding access may assist the child to divest himself of a duty the fulfilment of which has become onerous.

Another purpose served by conferral on a child of a 'right' to institute proceedings with respect to access or custody, is that the child can seek an order in favour of a person other than his parent.[40] Such persons cannot presently institute proceedings under the Act.

Finally there is an important function of conferral of a 'right' which must not be overlooked. And that is the symbolic function. As has been aptly said that, 'Not all law is enacted in the expectation that vigorous enforcement will ensue. Some legislation is designed primarily to affirm values and is therefore largely expressive or symbolic display'.[41]

The symbolic function of law operates at two different but inter-related levels — on an individual level and at a community level. A specific function is served for the child by possession of a 'right' in so far as a duty is imposed on the court and others to permit the child certain acts. Thus a child acquires an independent status to protect and further his interests. At the same time on a community level, there is an affirmation of a value — the value that a child is an autonomous individual.

39 F. Schoeman, 'Rights of Children, Rights of Parents, and the Moral Basis of the Family' (1980) 91 *Ethics* 6 at p. 8.

40 See for example *A and A* (1981) FLC 91-070.

41 Paul Rock, *Deviant Behaviour* (1973) at pp. 134-135.