



P A C E



Parents And Children for Equality

HOUSE BILL 232'S FAMILY ACCESS MOTIONS: CLARIFICATIONS AND REPLIES TO CONCERNS

Financial support is not the only form of support children need from parents. Recognizing children's need for the loving involvement of both parents, Ohio law states:

Whenever possible, the order or decree permitting the parenting time shall ensure the opportunity for both parents to have frequent and continuing contact with the child, unless frequent and continuing contact by either parent with the child would not be in the best interest of the child (ORC § 3109.05.1(A)).

Enforcement of the parenting time a court orders is, however, a time-consuming and expensive process. There is no administrative avenue for such enforcement. The parent whose time with the children has been interfered with must, as a practical matter, hire an attorney and file a contempt of court motion. Parents report spending many months and \$1,000 to \$3,000 to prosecute such a legal action. First and second offenses are seldom met with more than a scolding from the bench. Offending parents who are willing to "play the system" can usually be confident that before any significant consequences will result, the other parent will have spent five to six thousand dollars and several years just attempting to be a parent to his or her children. Many aggrieved parents give up and, as a result, children effectively lose a parent.

A survey just conducted by the Ohio Department of Jobs and Family Services indicates that 87% of child support obligors believe that enforcement of visitation rights (parenting time) is "very

*important” or “extremely important”.*¹ Remarkably, *60% of child support recipients agreed with this assessment.* Unfortunately 27% of child support recipients believed that it was either “not very important” or “not important at all” for the court’s orders concerning parenting time to be enforced.

The problem with parenting time enforcement is widely recognized by judicial officials and various programs have been developed to address it. For example, as a result of the actions of public interest groups (including PACE), the Franklin County Court of Common Pleas, Domestic and Juvenile Division under the leadership of the Honorable Kay Lias instituted a “Companionship Mediation Program” to handle parents’ concerns about interference with parenting time. Unfortunately, this program is completely voluntary and, so, fails to help in cases where one parent is resolved to interfere with the other parent’s relationship with the children.

The state of Missouri has addressed parenting time interference in a particularly effective way. In 1998, Missouri passed legislation permitting “Family Access Motions.” These are motions designed to be filed by the parents themselves (*pro se*). The courts give instructions and assistance. Filing fees are the prevailing fees for filing a motion with the court and there are effective sanctions specified, including recovery of costs and filing fees.

Missouri Revised Statute §452.400(3, 6, 7 & 8) provide for the Family Access Motion:

3. The court shall mandate compliance with its order by all parties to the action, including parents, children and third parties. In the event of noncompliance, the aggrieved person may file a verified motion for contempt. If custody, visitation or third-party custody is denied or interfered with by a parent or third party without good cause, the aggrieved person may file a family access motion with

¹ *Final Report on the Ohio Child Support Customer Survey* prepared by Strategic Research Group, L.L.C. (May, 2002).

the court stating the specific facts which constitute a violation of the judgment of dissolution or legal separation. The state courts administrator shall develop a simple form for pro se motions to the aggrieved person, which shall be provided to the person by the circuit clerk. Clerks, under the supervision of a circuit clerk, shall explain to aggrieved parties the procedures for filing the form. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerk's offices. The location of the office where the family access motion may be filed shall be conspicuously posted in the court building. The performance of duties described in this section shall not constitute the practice of law as defined in section 484.010, RSMo. Such form for pro se motions shall not require the assistance of legal counsel to prepare and file. The cost of filing the motion shall be the standard court costs otherwise due for instituting a civil action in the circuit court.

6. Upon a finding by the court pursuant to a motion for a family access order or a motion for contempt that its order for custody, visitation or third-party custody has not been complied with, without good cause, the court shall order a remedy, which may include, but not be limited to:

(1) A compensatory period of visitation, custody or third-party custody at a time convenient for the aggrieved party not less than the period of time denied;

(2) Participation by the violator in counseling to educate the violator about the importance of providing the child with a continuing and meaningful relationship with both parents;

(3) Assessment of a fine of up to five hundred dollars against the violator payable to the aggrieved party;

(4) Requiring the violator to post bond or security to ensure future compliance with the court's access orders; and

(5) Ordering the violator to pay the cost of counseling to reestablish the parent-child relationship between the aggrieved party and the child.

7. The reasonable expenses incurred as a result of denial or interference with custody or visitation, including attorney's fees and costs of a proceeding to enforce visitation rights, custody or third-party custody, shall be assessed, if requested and for good cause, against the parent or party who unreasonably denies or interferes with visitation, custody or third-party custody. In addition, the court may utilize any and all powers relating to contempt conferred on it by law or rule of the Missouri Supreme Court.

8. Final disposition of a motion for a family access order filed pursuant to this section shall take place not more than sixty days after the service of such motion, unless waived by the parties or determined to be in the best interest of the child. Final disposition shall not include appellate review.

In order to ensure every Ohio child's right of access to his or her parents, Ohio needs to adopt legislation modeled on Missouri's. Creation of a low-cost, efficient and effective mechanism for the enforcement of parenting time would go a long way toward protecting our children's relationship with both parents. It would also lessen the perception of unfairness in our system that is widespread among nonresidential parents. These parents feel, with justification, that there are effective, inexpensive mechanisms for ensuring compliance with court orders concerning financial child support but parenting time orders, certainly no less important to our children, often go unenforced because of the lack of effective, low-cost mechanisms for enforcement.

REPLIES TO CONCERNS ABOUT HB 232

CONCERNS ABOUT FAMILY ACCESS MOTION

The current draft of the Ohio Judicial Conference's *Judicial Impact Statement* concerning House Bill 232 conveys the following concerns about HB 232's provision for family access motions:

House Bill 232 authorizes individuals to file a "family access motion" whenever there is a violation of the court's visitation order. Current law permits individuals to file a motion for contempt whenever there is a visitation or other violation of the court's custody order. Judges recognize that the contempt remedy is difficult to obtain and may be too severe of a remedy under most circumstances. As a result, there may be a need for a legal tool to be designed that can be used to remedy minor violations of a court's visitation order. The "family access motion" is too similar to a contempt motion to qualify as an intermediary step.

Judges do not see why the "family access motion" is needed, or how it differs from a contempt motion, or why an individual would file one motion rather than the other. They believe that the availability of two motions for the same purpose may encourage many individuals to file both motions. This duplication could result in a flood of additional hearings and court workload without any benefit whatsoever for the person seeking relief. It could make it more difficult for courts to respond to motions on a timely basis, have a negative effect on the administration of justice, give the false impression that courts are not holding violators accountable for violations of court orders, and undermine public confidence in Ohio's courts and judicial system.

Judges would support an intermediate tool for dealing with visitation disputes that do not rise to the level of justifying a contempt motion or proceeding. Some counties already

have alternative programs to divert contempt or to call parties into court to discuss non compliance issues and to facilitate compliance without contempt proceedings. Judges would welcome statutory provision for such intermediate tools.

Judicial Impact Statement (Draft), Ohio Judicial Conference

These comments raise the following concerns:

1. Family access motions are not sufficiently distinguished from contempt motions.
2. Family access motions, as proposed, could “result in a flood of additional hearings and court workload” and “make it more difficult for courts to respond to motions on a timely basis” thus having “a negative effect on the administration of justice.”
3. Family access motions, as proposed, could have no “benefit whatsoever for the person seeking relief.”
4. Family access motions, as proposed, could “give the false impression that courts are not holding violators accountable for violations of court orders.”
5. Family access motions, as proposed, could “undermine public confidence in Ohio’s courts and judicial system.”

We respond to these concerns below. Additionally, in a meeting of the Juvenile and Family Law Committee after sponsor testimony on HB 232, the following question was raised:

6. Could the requirement of HB 232 that clerks of court explain family access motions and the procedures for filing them (lines 779-784) be construed as involving the clerk in the practice of law?

1. Family Access Motions and Contempt Motions

As the OJC *Judicial Impact Statement* indicates, “the contempt remedy is difficult to obtain and may be too severe of a remedy under most circumstances.” Lawyers often report that client costs for fully prosecuting a contempt of court motion runs into the thousands of dollars and the time to resolution is typically more than a year. As a practical matter, most ordinary parents cannot pursue this remedy *pro se*. Family access motions are simple motions designed to be used by parents without legal counsel. They carry a maximum penalty of a \$500 fine, costs and make-up time. While contempt proceedings can take many months or years to resolve, HB 232 requires a court to act on a family access motion within 60 days.

The following chart clarifies the distinction between a motion for contempt and a family access motion.

| | Contempt Motion | Family Access Motion |
|----------------------------|---|---|
| Costs of Remedy | Varies; often between \$3,000 and \$5,000. | Local filing costs; typically under \$100. |
| Representation | Usually requires legal representation. | Designed to be handled by parents. |
| Time to Resolution | Varies; often between 12 and 24 months. | 60 days |
| Penalties Available | <p>For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;</p> <p>For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;</p> <p>For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.</p> | Costs, make-up time, maximum fine of \$500. |

2. Family Access Motions and Court Workload

The Ohio Revised Code §105.911 provides for judicial impact statements. In doing so, it states:

The judicial impact statement *shall* include an estimate, in dollars, of the amount by which the bill or resolution would increase or decrease revenues or expenditures and any other information the Ohio judicial conference considers necessary to explain the fiscal effect of the bill or resolution. The statement also *shall* include an analysis of the bill or resolution's administrative and procedural effects on the courts of this state. (ORC § 105.911, emphases added)

The current draft of the OJC’s *Judicial Impact Statement* on House Bill 232 omits such an estimate. While the final draft may correct this deficiency, even the draft clearly expresses the concern about workload.

It is difficult to respond to a concern about what *could* happen. It is probably best to leave the realm of pure speculation and discuss evidence. And what evidence is available should alleviate these concerns.

The state of Missouri instituted family access motions since 1998. To arrive at some understanding of the *likely* impact of family access motions on Ohio courts, one might consider the case of St. Louis. The Twenty-Second Circuit serves this area. It is comprised of 31 court divisions (31 judges and 6 commissioners) and, in 2000, had 38,530 filings—9,553 in the domestic division. The experience of Missouri’s Twenty-Second Circuit with family access motions is tabulated below:

| Year | Number of Family Access Motions |
|-------------|--|
| 1998 | 0 |
| 1999 | 1 |
| 2000 | 14 |
| 2001 | 23 (partial year) |

Source: “Evaluation of the Effectiveness of Local Court Rules and the Mediation Program in the Twenty-Second Judicial Circuit of Missouri,” Katherine B. Miller, Institute for Court Management, Court Executive Development Program.

In the year 2000, filings for family access motions represented .03% (3 out of 10,000) of all filings and .1% (1 out of 1,000) of domestic filings.

It would certainly be an indictment of any proposed legislation that it would flood the courts with additional hearings, “make it more difficult for courts to respond to motions on a timely basis” and thereby producing “a negative effect on the administration of justice.” However, there seems to be no evidence to support these fears. The experience of Missouri, the only state so far to have such motions, suggests that the fears are groundless.

3. Benefit of Family Access Motions

There is more reason to share the concern that family access motions may not be beneficial to parents seeking a remedy for parenting time interference. The low rate of filings in Missouri’s Twenty-Second

Judicial District might indicate that the availability of family access motions is not an effective way to remedy parenting time interference. However, two considerations count against this conclusion.

First, according to Ann Bauer, Chair of the Family Law Section of the Missouri Bar Association, one reason that parents aren't pursuing the family access motions more frequently is that many Missouri courts are ignoring the statutory requirement that the motion be acted on within 60 days. Some Missouri courts are putting these hearings on their regular dockets. As a result, parents are not finding the quick relief that the legislature intended. We are confident that Ohio courts will strive to comply with the law to the best of their ability.

Secondly, Katherine Miller, M.Ed., Supervisor, Mediation and Special Court Services for St. Louis, suggests that family access motions play a role in encouraging parents to mediate their disagreements concerning parenting time. In 1997, the Twenty-Second Judicial District instituted mediation for enforcement of visitation.

“The goal of ...[the rule instituting Enforcement of Visitation Mediation] is to defer contempt and family access filings by dealing with issues before they rise to the level of court intervention. The intention is that by addressing issues as they arise families can avoid further litigation. The result for the family is less litigation and for the court is more expedient dockets...The appearance, by the parties [in such mediation], is totally voluntary but their absence, it is explained, could give the complaining party reason to file a contempt of family access motion.” (“Evaluation of the Effectiveness of Local Court Rules and the Mediation Program in the Twenty-Second Judicial Circuit of Missouri,” Katherine B. Miller, Institute for Court Management, Court Executive Development Program.)

So, while it appears that family access motions have not been frequently filed in Missouri, they may well have an important effect in encouraging parents to mediate their differences. This encouragement may be most important in cases where parents lack the financial resources to pursue a contempt action. In such cases, the threat of such action in order to encourage mediation may be recognized by the offending party as an empty one. Parents of modest means, just as much as wealthier parents, deserve mechanisms to encourage compliance with court ordered parenting time.

4. Family Access Motions and Public Impressions of Courts' Seriousness in Enforcing Orders

If family access motions do not flood the court and interfere with the administration of justice, there is little reason to fear that they would create in the public an impression that the courts are not serious about enforcing their orders. On the contrary, the absence of a low-cost, easily accessible remedy for parenting time interference—especially in the context of serious, almost automatic, administrative remedies for nonpayment of child support—certainly encourages the perception that courts do not care about enforcing parenting time orders.

5. Family Access Motions and Public Confidence in Ohio's Courts and Judicial System

Judge Thomas Frawley, who is in charge of the administration of Missouri's family law courts, has replied to our request for information on the effects of Family Access Motions in Missouri. (See Appendix A for our request and Appendix B for his reply.) In brief, Judge Frawley's letter indicates that Missouri's experience with Family Access Motions was not beset with any of the myriad ills that are conjectured about in the in the Ohio Judicial Conference's *Judicial Impact Statement on House Bill 232*. Judge Frawley did not explicitly answer the question "Has the introduction of family access motions in Missouri undermined public confidence in Missouri's Courts and Judicial System." In conversation, the head of the Missouri Bar Association's Family Law Section, Ms. Bauer, indicated that it had not.

The Clerks of Court's Role in Family Access Motions

The materials that Missouri's clerks of court disseminate in connection with family access motions are not plausibly construed as involving the clerks' offices in the practice of law. Some sample materials are appended to this document.

The Missouri Revised Statutes make this explicit.

The court shall mandate compliance with its order by all parties to the action, including parents, children and third parties. In the event of noncompliance, the aggrieved person may file a verified motion for contempt. If custody, visitation or third-party custody is denied or interfered with by a parent or third party without good cause, the aggrieved person may file a family access motion with the court stating the specific facts which constitute a violation of the judgment of dissolution or legal separation. The state courts administrator shall develop a simple form for pro se motions to the aggrieved person, which shall be provided to the person by the circuit clerk. Clerks, under the supervision of a circuit clerk, shall explain to aggrieved parties the procedures for filing the form. Notice of the fact that clerks will provide such assistance shall be conspicuously posted in the clerk's offices. The location of the office where the family access motion may be filed shall be conspicuously posted in the court building. *The performance of duties described in this section shall not constitute the practice of law as defined in section 484.010, RSMo.* Such form for pro se motions shall not require the assistance of legal counsel to prepare and file. The cost of filing the motion shall be the standard court costs otherwise due for instituting a civil action in the circuit court.

Missouri Revised Statutes §452.400(3) (emphasis added)

While it is unlikely that anything a clerk of courts would be required or encouraged to do in assisting parents with the filing of family access motions would be construed as involving the practice of law, it might be prudent to follow Missouri's lead and make this explicit in the legislation.

Respectfully Submitted,

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Parents and Children for Equality

APPENDICES

Appendix A:

Correspondence from Donald C. Hubin to the Honorable Thomas Frawley,
Director of the Missouri Family Courts, 10/10/2003..... p. 12

Appendix B:

Reply from the Honorable Thomas Frawley, to Donald C. Hubin, 12/23/2003..... p. 14