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CUSTODY AND ACCESS:

PUBLIC DISCUSSION PAPER

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INTRODUCTION

The federal/provincial /territorial Family Law Committee has undertaken a project to review the present legal regime governing child custody and access. This Discussion Paper has been prepared by the federal Department of Justice as part of this project to encourage public participation in the review process. It is hoped that the document will inform as well as stimulate discussion and ideas.

There has been general criticism that the current system is based on a winner-loser approach which only serves to contribute to conflict and increase defaults of child support payments. Many other issues have also been identified, although some of the criticisms and concerns appear to be competing and potentially conflicting, and there is surprisingly little known about the exact nature or seriousness of the problems.

The first part of the paper outlines the current legal custody and access regime. Part II identifies the major issues and problems, and Part III explores some possible options for reform. It should be noted that although custody and access disputes can arise in different legal situations, this paper is limited in scope to disputes between parents upon the event of a marital or cohabitation separation.

Through this document the Department hopes to solicit views that will help determine which issues should be addressed and provide guidance as to the nature of alternatives that should be pursued.

Since child custody and access is an area of overlapping constitutional jurisdiction, the responses will be shared with provincial and territorial officials with a view to developing joint federal-provincial recommendations for reform. However, it must be recognized that each province and territory has its own laws which govern custody and access in the context of separation. Accordingly, the issues raised in this paper are not necessarily issues common to all jurisdictions and reforms suitable to some jurisdictions may not be suitable to all. While taking into account responses to this discussion paper and recognizing the benefits of uniformity across the country, each jurisdiction will make its own assessment of the need and direction for reform.

PART I - DESCRIPTION OF THE CURRENT REGIME

In order to provide a general background to the issues raised in Part II of this paper, a brief description of how custody arrangements are currently made in Canada is presented below. The relevant provisions of the *Divorce Act* are noted. A more detailed description of these is contained in Appendix "A". In addition, Appendix "B" sets out the relevant legislation for each province and territory, and Appendix "C" summarizes several other adjudicative criteria that have been identified in case law as being important in the making of custody and access determinations.

When a marriage breaks down, arrangements have to be made for the custody, care, upbringing and maintenance of children. These can usually be settled by negotiations between the parents or their lawyers. The agreement can then be incorporated into a consent court order or a separation agreement and legally recognized.

Some disputes, however, cannot be resolved by agreement. There may be genuinely complex issues that require court intervention or the dispute may involve serious allegations which are being challenged or denied by a parent and which may require determination as to facts. In these contested cases, arrangements must be determined by the courts.

In Canada, this is done under either federal or provincial legislation. Provincial statutes provide for the granting of custody and support during the subsistence of a spousal relationship, including cohabitation without marriage. The federal *Divorce Act* governs child custody and access pending and post-divorce.

Generally, the *Divorce Act* confers a broad discretionary jurisdiction on the court to make a custody or access order. The court has jurisdiction to grant custody of, or access to, any or all children of the marriage. Custody and access can be granted to any one or more persons for a definite or indefinite period and subject to any terms, conditions or restrictions that the court thinks fit.

The statutory criteria to determine both custody and access is set out in subsection 16(8) of the *Divorce Act*. It provides that the court, in making an order respecting custody or access, "shall take into consideration **only** the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child".

While provincial statutes differ in wording and style, in effect the same statutory criteria is used, namely the best interests of the child. With one exception, all Canadian jurisdictions impose this standard as the primary or only consideration that must be applied by the court in making child custody and access decisions.[1]

In the *Divorce Act*, an additional guideline is provided by subsection 16(10) which indicates that a child should have as much contact with each parent as is consistent with his/her best interests and that the court should consider the willingness of the person from whom custody is sought to facilitate such contact.

Another important provision is subsection 16(9) which deems the past conduct of any person irrelevant unless the conduct relates directly to the ability of that person to act as a parent of a child.

NOTES

1. The exception is in the Northwest Territories where the words "best interests of the child" are not used. Rather the court is required to have regard to "the welfare of the child; the conduct of the parents; and the wishes of each parent." See the *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8, s.28(2).

PART II - THE ISSUES AND PROBLEMS

This section of the paper outlines various issues and concerns regarding custody and access. Part A identifies issues relating to the making of custody and access determinations. Although some general concerns are noted, the focus is on problems and criticisms relating to the *Divorce Act*. Part B outlines some basic concerns that have been identified about the current legal regime that have been identified.

A. CUSTODY AND ACCESS DETERMINATIONS ISSUES

1. Uncertainty about the scope and effect of custody orders

Historically, the term "custody" has its origin in the common law, where there was a distinction between guardianship and custody. Guardianship was the wider concept, and custody really only an incident of the guardianship. A guardian had the duty to maintain, protect, educate, and provide for the religious education of the child who was the ward, as well as the power to correct the child and to grant or withhold consent to the child's marriage. A guardian also had the right to custody, which meant only the physical possession of the child.

Today this distinction is blurred and the term custody can embrace two different concepts. In the narrow sense it is limited to the idea of physical custody, which refers to the actual physical care and control of the child, or more specifically, the rights and responsibilities associated with physical control of the child. It can also be used in a wide sense to cover the same range of duties and powers as guardianship including the bundle of legal rights associated with the child's care, control, education, health and religion. In this sense it is often referred to as "legal custody."

Not only is the term "custody" confusing, but it is also evident that the legal effect of a custody order is no longer clear. There is uncertainty about the legal rights of the custodial parent and which, if any, incidents of custody are limited, restricted or subject to the rights of the access parent. The matter is complicated even more by the wide variety of implicit and explicit terms used by judges to describe the various arrangements in the court orders they impose.

The traditional view respecting an order granting sole custody to one parent is that, in the absence of directions to the contrary, the sole custodial parent is responsible for providing physical care, and also for making decisions about education and religion and generally providing guidance in all matters relating to the rearing of a child without the involvement of the non-custodial parent.

For example, Thorson J.A. in *Kruger* v. *Kruger*[1] stated:

> "In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility."

Increasingly, however, arguments in favour of recognizing the continued parental status of the access parent are challenging this view. In England, the British Court of Appeal has concluded in the case of *Dipper* v. *Dipper*[2], that the custodial parent has no preemptive rights over the non-custodial parent, that full consultation is required, and that any parental disagreement as to the education or religious upbringing of the child and any other major matter affecting the child's welfare must be decided by the court.

Similarly, joint custody orders, in the widest sense refer to orders providing for custody arrangements in which both parents participate. Many courts have identified this type of order as an alternative to the sole custody model but there is no consensus about its effect or scope and it can refer to any number of various different arrangements which may or may not include the sharing of physical custody or care and control.

Currently in Canada, it is unclear to what extent, if at all, the custodial parent should consult with the access parent before major decisions about the child are made.

A review of the caselaw reveals two specific issues that illustrate this uncertainty.

The issue of mobility has arisen in cases where the court either has granted or is being asked to grant sole custody to one parent who wants to move away with the child against the objections of the access parent.

This issue is an example of the growing tension between the economic and social reality that custodial parents need or want to move following marriage breakdown for either personal or career reasons and concern that parental child ties should continue to be maintained.

There appears to be some inconsistency in how judges are applying the "best interests of the child" criteria in deciding this issue. Some judges appear to have taken the position that it is the custodial parent's right to move with the child unless the move is seen to be "unreasonable". The onus would seem to be on the parent challenging the move to show it would be detrimental to the child or is for an unreasonable purpose.

An alternate view, however, focuses on the disruption of access caused by the move. This view is said to be supported by subsection 16(10) of the *Divorce Act* which seems to encourage the maximization of parental access and subsection 16(7) that specifically allows a court to order a 30 day notice of change of residence. There is also evidence that some courts will not allow a variation to permit a move at all.[3]

Another particularly controversial issue concerns the religious upbringing of the children and/or the children's participation in religious activities. The traditional prevailing view has been that the custodial parent has exclusive control over the child's religious upbringing. However, recent caselaw suggests that if restrictions on an access parent's right to share his or her religious beliefs with a child are to be imposed, there must be evidence that either the sharing of religious beliefs and practices by the access parent with the child or the exposure of two religions is contrary to the best interest of the child[4].

Similar issues regarding the impact of race/culture on custody and access determinations can arise where parents have different cultural backgrounds.

2. Concerns about access

Under the *Divorce Act*, access, like custody, is to be granted at the judge's discretion based on whether it is in the best interests of the child.

Social science findings generally lend support for the view that continued contact with the non-custodial parent is in the best interests of the child[5] and there appears to be a powerful initial assumption by the courts that access is beneficial to children. Court file data collected in four sites across Canada and analyzed as part of an evaluation study of the *Divorce Act* conducted by the Department of Justice[6], suggests that access is very rarely denied by courts. Phase I data, which was collected in the fall of 1985, indicated that access rights were denied to the non-custodial parent in only 1.1% of cases. Similarly, phase 2 data, collected in 1988, showed that access was denied in 2.4% of cases.

A review of the caselaw confirms that it is only in the most extreme situations that a court will deny a parent the right of access and will even impose it on a reluctant custodial parent unless it is shown that there are exceptional reasons justifying its refusal.[7]

It should be noted, however, that not all experts stress the importance of a continuing relationship with the non-custodial parent. Some argue that the key factor in children's well-being is a low level of conflict between parents, and stress that access has been identified as a great potential source of difficulty both for the parents and the child. Contact with the non-custodial parent can involve complex emotions and decisions and even where relations between the parents are good, access can be unsettling for children. The custodial parent may make it difficult or impossible for the other parent to exercise access rights, perhaps out

of spite, or on the grounds that the episodes are upsetting to, or not wanted by, the children. Conversely, the non-custodial parent may fail to show up at the specified time, or not at all, which can be disappointing to the children, as well as inconvenient or expensive to the custodial parent.

Another issue that has been identified is the fact that while access is often awarded, there is a great deal of variation in how access orders are worded. Judges, in attempting to encourage what would be most suitable for the children, often leave the determination of details in the hands of the parents. Access is thus often left undefined or described in very broad terms such as "reasonable". In some cases, however, access orders are very detailed and refer specifically to such things as location, duration and frequency of contact and whether it may or may not involve staying overnight. The court may also require that access be supervised, where this appears to be in the best interests of the child.[8]

In addition, doubts have been expressed about the long-term workability of access arrangements set out in a court order. The evaluation study of the *Divorce Act* indicates that about one-fifth of men and women said that there had been some sort of change in the access arrangements from that agreed to or understood at the time of divorce[9]. It seems that as non-custodial parents remarry and sometimes have more children, their earlier commitment to the children of the first marriage becomes re-directed; new jobs and promotions may mean relocation, and, of course, as children grow older they begin to have their own interests, preferences and priorities. Thus what may have been a reasonable arrangement at one point may, some years later, be inappropriate or unworkable.

Another issue relating to access concerns third party access. While it is generally accepted that ongoing relationships with members of the child's "bilateral" extended family are often in the best interests of the child, there is concern that children's contact with their grandparents and extended family members often declines after divorce[10]. Recently there have been calls for legislative reform that would guarantee grandparent access. Currently, under the *Divorce Act*, third parties, including grandparents must have leave of the court to make an application for custody of, or access to, any or all children of the marriage. This requirement is not meant to preclude ongoing grandparent contact but rather to discourage the use of litigation and attempt to ensure that only where serious disputes exist will recourse be made to the courts.

Access enforcement is also often identified as a serious problem. This will be discussed further in part B of this paper.

3. Criticism of the "friendly parent rule"

As noted earlier, subsections 16(10) and 17(9) of the *Divorce Act* indicate that a child should have as much contact with each parent as is consistent with his/her best interests and that the court should consider the willingness of the person from whom custody is sought to facilitate such contact.

Similar provisions in United States legislation have been widely criticised. The main criticism is that the provision could mean that if one spouse is opposed to allowing access privileges, the court may conclude that custody should be granted to the spouse who will encourage maximum contact. In particular, concern has been expressed that the reluctance by one parent to agree to joint custody arrangements could be viewed as negative conduct by the court and used as a reason to deny sole custody.[11]

In the U.S. it has been suggested that this can be especially problematic for battered wives who may feel particularly threatened by an application for joint custody brought by her abusive husband or ex-husband. It is alleged that this so called "friendly parent rule" can have the effect of acting as a "silencer" to women who fear that if they reveal abuse to back up their request for restricted access to the father, they risk losing custody altogether[12].

Further research is required to determine if these fears are justified in Canada. It should be remembered, however, that the *Divorce Act* does not contain a statutory presumption of joint custody and the judicial trend in Canada has been **not** to award joint custody over the objections of one of the parties.

It should also be noted that as part of the evaluation of the *Divorce Act*, family law lawyers were consulted about this issue[13]. The question asked was, what effect, if any, this principle had on (1) negotiating custody and access arrangements and (2) the disposition of custody and access claims at trial. The responses were split equally between those who believed that the maximum access guideline had produced no effect and those who felt it had encouraged more liberal access. Those who believed the provision had an effect mentioned that the provision helps obtain more generous access partly through fear that custody would otherwise be denied. Lawyers, thinking in terms of representing the custodial spouse, stated that it increased their powers of persuasion over their clients to "act reasonably".

4. Concerns about domestic violence and abuse

Another concern is that wife abuse may not be properly considered by the courts in the making of custody and access determinations. Many battered women feel very threatened about the possibility of not getting custody of their children should they decide to leave. Women who feel most vulnerable are victims of spousal abuse whose husbands may have never directly abused the children. A review of the caselaw confirms that although it seems

self-evident, some courts have not necessarily been considering evidence of wife abuse as relevant to determining custody and access.[14]

One problem seems to be that, currently, subsection 16(9) of the *Divorce Act* does not allow the court to consider "past conduct" unless the conduct is "relevant to the ability of that person to act as a parent of a child". This section does not specify what is, may be, or is not "relevant" to assessing the ability of a person to act as the parent of a child. As a result, this section can be construed to exclude evidence of wife abuse where courts fail to recognize its effect on children.

There is clear empirical evidence, however, that even witnessing family violence can have an impact on children and that there may be links to behavioral problems and future violent tendencies[15]. Based on this empirical evidence, it can be argued that legislative clarification is required to ensure that evidence of physical violence or verbal and emotional abuse within the family unit, even if not directed at the children, is something that must be considered by the court in making custody and access determinations.

It should be noted that some concern has been expressed about focusing undue attention on the issue of abuse within a custody context because of the possibility of untrue allegations. A similar concern has been raised about the growing use of allegations of sexual abuse as a weapon in custody battles. Such cases are particularly stressful for both parents and children. The allegation alone can have many serious consequences and when such an allegation is made, the focus of inquiry tends to shift away from the best interests of the child towards an investigation of whether the abuse actually occurred. This raises many difficult evidentiary and procedural legal issues as well as difficult ethical problems.[16]

Further research is required to identify factors that will be useful in determining probable vs. improbable allegations. Although there are research studies from the United States that suggest that one-quarter to two-thirds of the allegations of sexual abuse made in the context of parental separation may be unfounded, both the statistics and the underlying psychiatric (often Freudian) theory of these studies, have been seriously challenged.[17]

5. Concerns about gender bias

A very serious criticism that has been made about current custody determinations is based on the belief that mothers receive custody in the vast majority of cases. The allegation is that this occurs because courts are biased in favour of women. It has been suggested that women have an unfair advantage over men in custody disputes and that the tender years doctrine still operates as a maternal presumption. There are calls for formal recognition of equal rights for fathers and for mandatory joint custody legislative provisions to ensure continued paternal involvement post-separation and divorce.

Data compiled by Statistics Canada and research conducted for the Evaluation of the *Divorce Act* by the federal Department of Justice supports the view that women **do** receive sole custody more frequently than men. Statistics Canada data[18] indicates that in 1990, 27,367 divorces involving custody orders were granted under the *Divorce Act*. Of the 47,631 children affected, 73.3% were awarded to mothers, 12.2% to fathers, 14.3% to joint custody and fewer than 1% to a person other than the mother or father. The data also suggests that the spouse who petitioned or applied for the divorce increased his or her chances of being awarded custody of children, and this was particularly true for men.

However, the evaluation study of the *Divorce Act* suggests that one explanation for the high number of sole custody awards to mothers is that it is a reflection of the desire of both parents. Mothers may be getting sole custody of the children because the fathers agree to it in most cases and not necessarily because the courts are applying a maternal presumption. Interviews with divorced or divorcing persons in the four research sites revealed that "where sole custody was to the mother, this was usually the result of taken for granted notions "that children need their mothers".[19]

In reviewing the claim that the courts are biased towards mothers the Evaluation Study notes that, "If there is ... a form of "false consciousness" at work, there is no direct way of uncovering it and there was no recourse but to take as the empirical data what men told us: in very few instances had there been disputes about custody and that generally there was agreement among the men interviewed that children should be primarily in the care of their mothers".[20]

A similar explanation has been suggested regarding custody statistics in California. A major study in California indicated that despite major changes made to the California divorce law in the early 1970's that promoted joint custody, fifteen years later there had been little change in the actual distribution of child custody awards.[21] Overwhelmingly, it was mothers who continued to be children's primary caretakers after divorce. Lenore Weitzman's explanation is that, "that pattern continues to reflect the underlying social reality in which mothers assume the major share of the day-to-day care of their children after divorce, as they do during marriage". She also notes that it seems unlikely that this pattern will change in any fundamental way in the near future because of the deeply ingrained social patterns that support women's greater investment in their children.[22]

In direct contrast to the claims that custody decisions appear to be biased in favour of mothers, are suggestions that the current custody and access law is subject to patriarchal myths.

It has been suggested that courts sometimes judge the father as a parent by a different, much less demanding standard than the mother.[23] It is argued that women are still expected to play a traditional child care and home care role and where they do not play such a role, or

sacrifice "traditional" values to pursue a career or personal lifestyle choices, they are penalized. Similarly, it is alleged that men's efforts to change their traditional bread winner role to play a more active part in child or home care are unduly applauded and given special attention by the courts.[24]

It has also been argued that the way the concepts of gender neutrality and formal legal equality are being applied in custody decisions contributes to the reintroduction of patriarchal power by methods such as increased joint custody orders[25]. The trend in social policy, in applying the Canadian Charter of Rights and Freedoms, has been to formalize equality by moving toward gender neutral standards. The argument is that although gender neutralizing represents an important component of equality, it is to a large extent symbolic. In reality, women and men may not be similarly situated, and gender-neutral analysis may not always be appropriate. It is therefore argued that treating women and men as though they are equal will not, in fact, make them so but can create expectations that may operate to the detriment of women in custody cases. It is suggested, for example, that women employed outside the home may fail to live up to the courts expectations respecting mothering but still lack economic stability as compared to the father.

6. Who represents the interests and views of the child?

Despite the fact that custody and access decisions directly affect the children involved, children's participation in custody and access proceedings is very limited. The best interests of the child is the statutory consideration and there are several court procedures available that can be used to elicit the child's views in court. The use of social worker reports, expert witnesses and judicial interviews with the child are some examples. In addition, some jurisdictions provide for legal counsel to represent children in court; either a *guardian ad litem*, who is supposed to ensure that all evidence relevant to the child's best interests is made part of the record, or an *amicus curiae* appointed to assist the court who could place a child's views before the court as evidence.

A distinction must be made, however, between promoting the best interests of the child and representing the child's views. Neither a *guardian ad litum* nor *amicus curiae* act as a true advocate for the child.

Historically, children have not been represented in legal proceedings because they were not perceived to have independent rights to assert. With Canada's ratification of the United *Nations Convention on the Rights of the Child* in December 1991, however, there is increased emphasis on children's rights. In particular, Article 12 of this Convention urges that children be provided the opportunity to express their views and be heard in matters affecting them. As a result, there has been criticism of the fact that currently children have no legally enforceable right to participate in custody and access proceedings. It has also been noted that many potential conflicts of interest between divorcing parents, on one hand, and

the children on the other, can be identified. For example, a parent may decide to waive access, or child support payments, or to sell the family residence, so they can realize their property interests. Increasingly there are recommendations that children be independently legally represented by counsel who could present the child's preferences without any fear of court interference.[26] This recommendation, however, raises cost considerations as well as other issues, including concerns about a child's capacity to instruct counsel and possible negative effects of asking a child to choose between parents.

B. ENFORCEMENT ISSUES

When custody and access orders are not complied with, enforcement becomes an issue. Some commonly raised concerns are reviewed below.

1. Parental Child Abductions

The most extreme and serious enforcement issue arises when a non-custodial parent, in refusing to comply with the provisions of a custody order, abducts the child to another jurisdiction. Usually this is done to deprive the custodial parent from exercising custody in the hope of obtaining another custody order in a different jurisdiction. In these cases, the children are very much the victim of their parents dispute. They are deprived by the abducting parent of security, stability and continuity in their lives and thus their well-being is at stake.

Since 1983 a criminal response has been available which provides an expedient way to locate and punish the abductor. Criminal charges can be laid pursuant to sections 282 and 283 of the *Criminal Code*[27]. Once charges are laid a Canada-wide warrant may be issued for the arrest of the abducting parent. Statistics collected by the RCMP Missing Children's Registry indicate that in 1990 there were 432 victims of parental abduction reported to police agencies in Canada. Seventy-seven percent of them were located within that same year.

It must be noted that not all cases of parental child abduction will be considered criminal in nature. Whether or not a charge can be laid depends on several factors, including evidence of criminal intent, the burden of proof beyond a reasonable doubt, and the availability of the statutory defences of consent and danger of imminent harm. The ultimate decision as to whether or not to lay charges in a particular case depends on prosecutional discretion, having regard to the particular circumstances of the case. Uniform guidelines for the laying of charges under sections 282 and 283 of the *Criminal Code* were adopted by all jurisdictions in 1990. These guidelines are contained in Appendix D.

If a child is taken outside Canada to another country, the Hague Convention on the Civil Aspects of International Child Abduction may apply. Canada has ratified this international agreement and each province and territory has adopted legislation to implement the terms of

the Convention. The Convention has two main objectives: to secure the prompt return of children wrongfully removed or retained in any contracting state; and to ensure that rights of custody or access under the law of one contracting state are effectively respected in the other contracting states.

2. Problems relating to the civil enforcement of extra-provincial custody orders

Where criminal charges are not appropriate, civil enforcement will be necessary. Civil enforcement may also be used when criminal charges are laid.

Several concerns have been identified regarding the civil enforcement of a custody order made in another province. Specific provincial and territorial legislation now exists for the enforcement of extra-provincial custody orders but there are still criticisms that enforcement is time consuming, costly and too often, unsuccessful.

One issue that has been identified is that it may sometimes be difficult to determine when a court should enforce an extra-provincial custody order or rehear and possibly vary the order. Ordinarily the order of an extra-provincial tribunal with proper authority and recognized jurisdiction will be respected and enforced. Courts, however, can also recognize their right and duty to make an independent judgment as to where the best interest of the child lies; for example, where there is an allegation of risk of harm to the child.[28]

Another issue relates to the authority of police to enforce a custody order made in another province. An enforcement order granted in one province directing that peace officers assist in the enforcement of the order is not binding on peace officers outside the boundaries of that province. Thus, before peace officers in the other province can act, it is necessary to obtain an order under the legislation of the enforcing province that recognizes the order made by the extra-provincial tribunal.

It should be noted that pursuant to subsections 20(2)and(3) of the *Divorce Act*, custody and access orders made by a court in any province or territory have legal effect throughout Canada. Such orders can be registered with a court anywhere in Canada, and enforced as if they were originally made by that court, or in any other manner specified by the laws of that province or territory. This, however, pertains only to orders made under the *Divorce Act* and not to orders made under provincial legislation.

In addition, the federal *Family Orders and Agreements Enforcement Assistance Act* establishes procedures for ascertaining the addresses of parents and children from federal information banks to facilitate the enforcement of custody orders.

3. Problems relating to access enforcement

In the last few years, concerns have been expressed about the extent to which non-custodial parents with access orders are unable to see their children because of the courts' unwillingness or inability to effectively enforce access orders.

Currently in most provinces, the main form of enforcement is through contempt of court proceedings which can result in the custodial parent being fined or sentenced to jail. Judges, however, in weighing whether it would be in the best interests of the child to fine or imprison the custodial parent, are often reluctant to impose these measures. The result is that some access orders and agreements remain unenforced. It has been suggested that this frustration over access may, in some cases, add to the problem of the non-payment of support by the access parent. However, the limits of the legal system in resolving access disputes should also probably be recognized. It has been suggested that no legal remedy can entirely ensure successful or meaningful access if parents fail to recognize the advantages to the child and continue to disagree about access arrangements.[29]

It is also argued that an equally serious issue regarding access enforcement is the failure by some non-custodial parents to exercise their access rights, either by not coming at the specified times which can be disappointing to the children, as well as inconvenient or expensive to the custodial parent, or not at all.

It should also be noted that while many concerns about access enforcement have been expressed, it is difficult to assess the exact nature and seriousness of the problem. Recently, a study was conducted by the Canadian Research Institute for Law and the Family that attempted to gain information regarding the extent to which non-custodial parents in Alberta were being denied access to their children.[30] As part of the study both custodial and non-custodial parents responded to a questionnaire. The results suggest that in Alberta, access denial is not a major problem. The majority of both groups (70% of custodial and 63.6% of non-custodial parents) reported that denial of access seldom occurred. In fact, the vast majority (92%) of custodial parents indicated that they preferred that the non-custodial parent visit their children. Similarly, when parents were asked for their opinion on the amount of access or visitation time allowed, the majority of non-custodial parents felt the time was reasonable (57.9%). While 36.8% of the non-custodial parents felt that the amount of access was less than they would have liked, this actually amounts to less than the 54.5% of custodial parents who also stated that access was less than they desired.

One of the most interesting findings of this study relates to the concern noted above, regarding the inadequacy of the law to deal with access enforcement. This is often mentioned as a major problem that brings the administration of justice into disrepute. However, the study suggests that both custodial and non-custodial parents reported that they tended to be able to work out child access problems without resort to the court. Overall, 69.% of the non-custodial parents and 43.3% of the custodial parents reported that they

occasionally experienced difficulties with access. The survey included a series of multi-response questions to determine what they had done to solve these difficulties. Of those who responded, 40% of the custodial parents and 69.2% of the non-custodial parents indicated that they talked out problems with the other parent. Other informal solutions identified were talking to friends, or going to a counsellor or mediator.

C. Basic Concerns about the Current Legal Regime

1. The adversarial approach

The current statutory provisions regarding custody and access are designed within the framework of an adversary system to deal with situations where there are disputes. The law establishes the procedure and rules which authorize courts to impose custody and access orders and the court acts as an impartial decision-maker. Several issues relating to this adversary approach have been identified.

In reality, only a small proportion of custody cases are actually litigated or court imposed. Research undertaken for the Divorce Act Evaluation confirms that disputes may not occur as often as perceived and that even fewer require judicial determination. In this study, over the four research sites, only 35 cases out of a total of 1170 had gone to trial.

It is not known exactly how the formal statutory rules contained in legislation impact on the making of private custody and access arrangements. It is, however, important to acknowledge that the law likely has a significant effect. Even when informal private arrangements are worked out between the parents, it is arguable there is an indirect impact because the parents perception or understanding of the law guides the informal discussions. Thus the eventual arrangements can be seen to be based, at least in part, on what the parents perceive to be their basic rights and obligations.

If, as often happens legal advice is sought by one or both parties, the impact of the law is more direct. The lawyer advising on family law matters provides advice which is based on an assessment of the application of the facts to the relevant statutory provisions. This is influenced by such factors as precedent, personal experience and a duty to protect the interests of their client. In addition, this advice is often provided with only a limited knowledge of the complex personal dynamics that usually exist between the spouses and between parents and their children.

Serious doubts have also been expressed about the appropriateness of the adversary system to decide even disputed child custody matters.

The essence of the adversary process is the provision of an impartial decision-maker before whom competing litigants can present their claims. Each party can put forward its case and challenge the opponent's case. It has been suggested that this adversary model only serves to increase the anger and hurt associated with the process of separation and divorce and increases the chances that parents will experience ongoing difficulties. The general criticism is that a winner/loser approach contributes to conflict between the spouses and increases the sense of alienation experienced by non-custodial spouses towards their children. This in turn can contribute to increased defaults of child support payments. Too often, custody becomes just another part of the dispute with couples competing with each other for the status of "real parent".

In particular, it has been noted that under this adversarial system, the determination of custody by the court involves a deliberation as to who is the "better" parent. Not only does this provoke criticism and exacerbate the anger and hurt already implicit in the separation process, it demands that the courts explore and pass judgement on the past relationships between the parties. The parties, however, may be so preoccupied with vindicating their own position that they may disclose little of the characteristics that would enable a judge to make an informed custody decision.

It is also argued that the nature of spousal or parent-child relationships is so subjective as to be incapable of translation into relevant factual evidence. Dates and incidents are often peripheral to the real issue before the court in a custody case, and more relevant factors may not be easily assessed in a trial setting.

2. The indeterminate nature of the "best interests of the child" test

The law in Canada concerning all child custody and access decisions is that the best interests of the child must be the paramount, if not the sole, consideration. This is the accepted statutory test in all common law countries and it has also been identified in international conventions concerning children.

One result of this approach is that custody is a matter to be looked at from the perspective of the child upwards rather than from the adults down. The court is obliged to consider in each particular case what a particular child needs and which of the adults before the court seeking custody can best meet most of those needs.

The other implication, however, is that the principle is dependent on understandings of what is best for children. In this respect, it has been argued that the principle is based on beliefs about child-rearing that are influenced by religious, moral, and social values. It is clear, for example, that judicial interpretations of what is best for children have changed over the years along with changing social and cultural values and beliefs about the basic social institution of marriage. For example, when adultery was legally and socially unacceptable, the denial of

custody to an adulterous mother was said to uphold the institution of marriage and protect the child against damaging influences. Similarly, other previous certainties and prevailing understandings of proper legal and social arrangements for the care of children can no longer be relied on. A father's legal right over his children is no longer sacred. A mother's matrimonial offence no longer disqualifies her from legal control of her children. Maternal care is no longer presumed to be critical to children of "tender years".

It has also been noted that it is very difficult to predict the effects of custody arrangements on a child. Current psychological theories are generally incapable of yielding such predictions and arguably, even if reliable predictions could be made, it is unlikely that our society would agree that one outcome is better than another in disputed cases. As a result there is criticism that custody decisions based on the best interest test, may appear to the parties to be arbitrary and unpredictable. It has been suggested that because the outcome is uncertain, the party most willing to take risks and best able to bear the financial and emotional costs of continued negotiation or litigation has the advantage. It is also sometimes alleged that the denial of custody or access to an applicant may be based on a consideration which is not genuinely relevant to a child's welfare. An example often cited is the sexual orientation of the applicant.

This relates directly to another implication of the "best interest test", namely that courts faced with making the difficult decision of what is in a child's best interests may rely very heavily on assessments prepared by mental health professionals like psychiatrists, psychologists and social workers. It has also been noted that assessments often play a vital role in the settlement of cases, adding a "bargaining chip" to the negotiation process.[31] The concern is that while these expert reports may serve a useful function, for the reasons noted above, they too must be critically examined and their limitations recognized.

3. The current terminology

It has been suggested that there are some real problems with the current custody terminology found in Canadian legislation.

It has been noted that the terms currently being used have been drawn from the criminal law and the law of property, and are therefore inappropriate to describe relationships between parents and their children[32]. The term "custody" for example, is a term commonly applied to incarcerated criminals and is also used in relation to the conservation of property. The use of this term with respect to children of divorce implies that they are prisoners or property to be divided between their parents, in much the same way as other assets accumulated during the marriage. Similarly, the word "access" derives from property law, where it is used to describe a right to enter and pass over adjoining land without hindrance. Applying this property concept to parent-child relationships undermines the role of the "non-custodial parent".

There is a growing recognition that the legal labels used to describe the relationships between divorced parents and their children have a powerful impact and that some child custody disputes may really be arguments over labels, rather than over the substantive arrangements for the care of children[33]. Not only do these labels promote a win/lose mentality and reinforce the idea that custody is a battle with a prize only one partner can win, there is evidence that being labelled a custody or access parent may in fact influence the expectations and roles parents assume with their children following divorce.

NOTES

1. *Kruger* v. *Kruger* (1979) 104 D.L.R. (3rd) 481 at p. 485.

2. *Dipper* v. *Dipper*, [1980] 3 W.L.R. 626.

3. See: *Jones* v. *Jworski* (1989) 93 A.R. 378 (Q.B.)

4. See *Hockey* v. *Hockey* (1989), 69 O.R. (2d) 338, (Div. Ct) and confirmed in *Young* v. *Young* (1990), 29 R.F.L. (3d) 112 (B.C.C.A). On appeal to S.C.C.

5. See, for example, Susan Maidment, *Child Custody and Divorce.*(London: Croom, Helm, 1984) at p.253 where it is noted that: "apart from Goldstein et al's particular and idiosyncratic rejection of access as a threat to the security of the child's relationship with his custodial parent, there is currently widespread professional agreement that it is in the child's interest to maintain a continuing relationship with both natural parents, and the closer and more normal that relationship can be, the better it is for the child". See also, Norris Weisman, "On Access After Parental Separation", (1992) 36 R.F.L. (3d) 35.

6. Bureau of Review, *Evaluation of the Divorce Act*, (Department of Justice Canada, May 1990) at p. 111. This study which was conducted in two stages collected data from four sites across Canada: St. John, Montreal, Ottawa and Saskatoon and included court file analysis as well as interviews conducted with divorced persons whose files has been reviewed.

7. See for example: *Ader* v. *McLaughlin* [1964] 2 O.R. 457 (H.C.); *Savidant* v. *MacLeod*, [1991] P.E.I.J. 59.

8. Data collected in 1985 for Phase 1 of the Evaluation of the *Divorce Act*, indicate that highly structured and specific timetables and conditions regarding access were set out in about 23 percent of cases, many of which were a product of agreements reached through divorce mediation. The more general pattern was either to say nothing about access, or through such phrases as "reasonable" and "liberal", to leave it to parents to work out these arrangements on their own. Supervised access was ordered in about one percent of all custody cases.

9. *Evaluation of the Divorce Act, supra*, note 6 at p. 110 and 113.

10. This is confirmed to some extent by the results of a very recent questionnaire conducted in Alberta. Extended family members of divorced children were questioned concerning access problems. While the majority of extended family members reported having visiting privileges with their grandchildren, neices and unephews, over half of the relatives described the amount of visitation and contact time with the child(ren) as less than desirable. When asked if they had experienced difficulties visiting and maintaining contact with their grandchildren, nieces and nephews following parental separation, 54.2% of the extended family members commented that they had. See: Debra Perry et al., *Access to Children Following Parental Relationship Breakdown In Alberta*, (Calgary, Alberta: Canadian Research Institute for Law and the Family, May 1992).

11. Lenore Weitzman, for example, after a ten-year study of effects of California's divorce reform of the 1970s, noted that: "An unwilling parent is more likely to be coerced into a joint custody "agreement" in states with a friendly parent" rule. Such rules require courts to consider which parent would be most likely to provide the other parent "with frequent and continuing access to the child" when the court makes a sole custody award. Because of their potential for duress and coercion in arriving at joint custody "agreements", friendly parent rules have been opposed by several bar associations." *The Divorce Revolution The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985) at p. 246.

12. See: Louise Lamb, "Involuntary Joint Custody: What Mothers will Lose if Fathers' Rights Groups Win", (1987) 5 Horizons 20; and Joanne Schulman, Valerie Pitt, "Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children", [1982] 12 Golden Gate Univeristy Law Review 538 at p. 555-6 which refers to testimony give by Diane Palladine, Director, Women Helping Women, Abused Women's Services Middlesex County, N.J. which is contained in *Hearings on A. 1471, Comm. on the Judiciary, Law, Public Safety and Defense, 1980 Sess.* (New Jersey, 1980) available from the National Center of Women and Family Law 799 Broadway, Room 402, New York, New York 10003.

13. Department of Justice Canada, *Consultation with Family Law Lawyers on the Divorce Act, 1985*, (May 1989), at p. 16.

14. See for example, *Peterson* v. *Peterson* (1988) N.S.R. (2d) 107 (Nova Scotia County Court; *Renaud* v. *Renaud* (1989), 22 F.R.L. 366 (Ont. Dist. Ct.); *Clothier* v. *Ettinger* (1989), 91 N.S.R. (2d) 423 (N.S. Family Division); and *Grills* v. *Grills* (1982) 30 R.F.L. (2d) 390 (Alta. Prov. Ct).

15. See: Peter G. Jaffe, David Wolfe, Susan Kaye Wilson, *Children of Battered Women*, (Volume 21. Developmental Clinical Psychology and Psychiatry) (Newbury Park, California: Sage Publications, 1990), Chapter 2.

16. These issues are discussed in detail in Nicholas Bala and Jane Anweiler, "Allegations of Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire", 2 Canadian Family Law Quarterly 343.

17. See: See: Elissa Benedek and Diane Schetky, "Allegations of Sexual Abuse in Child Custody and Visitation Disputes", in *Emerging Issues in Child Psychiatry and the Law* (New York: Brunner/Mazel, 1984); Arthur Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes", 25 Journal of American Academy of Child Psychiatry, 4:449; and Michael F. Elterman and Marion F. Ehrenberg, "Sexual Abuse Allegations in Child Custody Disputes", (1991) 14 International Journal of Law and Psychiatry 269.

18. Louise Lapierre, "Divorces, Canada and the Provinces, 1990", *Health Reports 1991*, Volume 3, No.4 (Ottawa: Canadian Centre for Health Information, Statistics Canada, 1992) at p. 383.

19. *Evaluation of the Divorce Act*, *supra*, note 6 at p. 106.

20. *Ibid*, at p. 108.

21. Lenore Weitzman, *The Divorce Revolution The Unexpected Social and Economic Consequences for Women and Children in America*, *supra* note 11 at p. 260-1.

22. *Ibid*, at p. 256

23. See, for example, *Tyndale* v. *Tyndale* (1985), 48 R.F.L. (2d) 426 (Sask. Q.B.), where a father was given custody over a mother who had a full-time job although the father was considered a most unreliable witness and it was acknowledged that he "only really became a father to the boys after the separation." In the reasons for judgement, the court noted that because the father was self-employed, his time was more flexible than that of the mother. The judge also acknowledged that "the petitioner [the mother] strikes me as a person quite sufficiently strong in her own right to handle the situation even though she does not have custody of the children and will continue to be a mother to the children."

24. See: Susan Boyd, "Child Custody and Working Mothers" in S. Martin and K. Mahoney (ed.), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987).

25. Susan Boyd, "Child Custody Ideologies, and Employment", (1989) 3 CJWL 111.

26. See: B. Landau, "Parents' Rights, Children's Rights and the Development of a Coherent Policy for Balancing of Interests - Family Law Reform, Where do we go from here? (1988) 26:1 Conc. Cts. Rev., 29-37. She argues that children should have a legal right to an independent advocate whenever both parents are prepared, for whatever reason, to waive important rights that primarily effect the child, or when parents fail to reach agreement and the issues of custody, access, child support, or the home are to be determined in court. This advocate could represent the child in negotiations and, if necessary, litigation. See also: The Honourable Judge A.P. Nasmith, "The Inchoate Voice", 8 Canadian Family Law Quarterly 43; and Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children", 8 C.F.L.Q. 95.

27. Section 282 of the *Criminal Code* creates an offence for any person who is a parent, guardian or other custodian of a child under 14 to entice away, conceal, or detain the child in contravention of the custody provisions of a custody order made in Canada with intent to deprive a parent, guardian or other custodian of the possession of the child.

    Section 283 is directed at abduction by parents where there is no Canadian custody order in force. Subsection (1) creates an offence for any person who is a parent, guardian or other custodian of a child under 14 to entice away, conceal, detain, etc. the child in relation to whom no custody order has been made with intent to deprive a parent, guardian or other custodian of the possession of the child. Pursuant to subsection (2), the consent of the Attorney General is required before proceedings can be commenced.

28. See for example: *Choi* v. *Choi* (1986), 69 A.R. 223 (Q.B.); *Aumais* v. *Aumais* (1986), 41 Man. R. (2d) 275 (Q.B.); *Bearisto* v. *Bearisto* (1982), 65 A.R. 281, (C.A.)

29. See for example: Norris Weisman, "On Access After Parental Separation", 36 R.F.L.(3d) 35.

30. The results of this study are contained in Debra Perry et al., *Access to Children Following Parental Relationship Breakdown In Alberta*, (Calgary, Alberta: Canadian Research Institute for Law and the Family, May 1992).

31. Nicholas Bala, "Assessing the Assessor: Legal Issues" (1990) 6 Can. F.L.Q. 179 at p. 181.

32. This was a central theme in a report prepared by Judith Ryan for the federal Department of Justice titled "Parents Forever: Making the Concept a Reality for Divorcing Parents and their Children, (March, 1989), p. 10-17 which refers to M. Elkin, "The Language of Family Law is the Language of Criminal Law" (1975), 13:1 Conc. Cts. Rev. viii.

33. *Ibid*, at p. 13-17 which refers to: Pearson, J. and Thoennes, N., "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation", (1984) 17 F.L.Q. 497-524 (with critique by Levy, R.J. at pp. 525 - 533, and author's response at pp. 535 - 538); and Patrician, Marty, "Child Custody Terms: Potential Contributors to Custody Dissatisfaction and Conflict", Mediation Quarterly, Vol. 3, March, 1984, p.41.

PART III - OPTIONS FOR REFORM

Many issues and problems with the current legal regime have been identified in Part II of this paper. Several possible approaches can be taken to address the problems. The main options available are as follows:

1. Non-legislative options such as research, judicial education, parenting education and improved counselling and mediation services.

2. Within the context of the current custody and access regime, undertake legislative amendments to address specifically identified problems.

3. Develop a new legislative approach to the ongoing care of children post-separation and divorce.

A discussion of each of these options follows.

OPTION 1: NON-LEGISLATIVE MEASURES

While clearly there are many criticisms of the current legal regime there is no consensus that legislative amendment is required at this time. Several non-legislative options can be identified that address many of the issues and problems associated with the current child custody and access regime.

Effective parenting education

It is clear that the law alone can play only a limited role in resolving some custody and access disputes. For example, while legislation can enable a court to make an access order, the law is powerless to order people to change their attitudes and feelings and thus cannot order or enforce meaningful and successful access. Arguably, a good means of resolving access disputes lies in showing people the necessity of altering their relationships for the good of their children and educating parents regarding the importance of entering into access arrangements to which they both agree.

One way of doing this is by developing effective parenting programs to inform parents about their children's needs. Often because of the emotional turmoil of divorce, parents need to have their attention focused on those needs. Parenting education programs within the community can help separated parents examine their behaviour and attitudes.

Improved access to alternative dispute resolution mechanisms

Some of the process concerns identified in this paper relating to the current advocacy approach can be addressed by improved access to mediation or other forms of alternative dispute resolution mechanisms. It must be remembered that only a small proportion of custody cases are actually litigated and that most arrangements can be worked out without the need for court intervention.

Mediation is a method whereby a third party professional meets with the parties in an attempt to assist them in reaching an agreement. In divorce and custody disputes, mediation can often be used as an alternative to litigation. Currently, pursuant to subsection 9(2) of the *Divorce Act*, a lawyer is obligated to inform his or her client about the availability of mediation.

Several years ago, the Department of Justice reviewed options relating to divorce mediation in Canada. At that time, the option of legislated mandatory mediation without the consent of both parties was rejected, but improved access to available services remains an ongoing objective.

Further research

Clearly, there are still many questions about custody and access that need to be answered. There is for example, a real need for empirical research to determine the practical reality of custody and access issues. Research that can shed light on the true arrangements experienced by children of divorced parents, beyond the terminology stated in court orders, would be extremely useful. As noted earlier, we really do not know how formal statutory rules contained in legislation designed to govern formal disputes, affects private negotiations.

However, research has its limitations. It is often suggested, for example, that more research is needed into what constitutes the best interests of children. While social science studies and research can provide some useful guides and indicators, they are not the exclusive consideration in legal policy development and cannot be relied upon too heavily. Research cannot provide definitive statutory models or even practically identify or predict the most beneficial environment for child development. It is also important to remember that the social sciences are not exact nor value-free, and studies must be assessed carefully for their theoretical and methodological reliability.

While undoubtedly further research would be useful, it is the Department's view that this should not preclude consideration of options that focus on legislative reform. Research studies can be developed and conducted which would compliment the amendments deemed necessary.

OPTION 2: LEGISLATIVE AMENDMENTS WITHIN THE CONTEXT OF THE CURRENT CUSTODY AND ACCESS REGIME

This approach involves developing options to clarify the uncertainties and respond to the identified criticisms that were reviewed in Part II of this paper. This necessitates analyzing different options to be considered and in this respect readers are invited to respond to the questions outlined below. It is hoped that your responses will assist the Department in determining which issues should be addressed and the nature of alternatives that should be pursued.

1. Clarify the scope and effect of custody orders

It has been noted that there is uncertainty about the legal rights of the custodial parent and which, if any, incidents of custody are limited, restricted or subject to the rights of the access parent.

Is statutory clarification regarding the rights and responsibilities of the custodial and access parent required? How could this be done?

Several possible approaches have already been identified:

Joint custody

It is often suggested that the use of joint custody orders could clear up some of the uncertainties about the legal rights of the custodial parent implicit in the sole custody model. The *Divorce Act* allows for this type of order but does not endorse any presumption in favour of it.

In the 1980's various jurisdictions in the United States attempted to provide for joint custody within their legislation. Generally two methods were employed:

a) legislation encouraging parties to share custody, which usually authorized courts to order joint custody if it was seen to be in the child's best interests; or

b) a stronger joint custody law which established a presumption of joint custody.

At one time, 34 states in the USA had adopted statutes that explicitly recognized joint custody and all but two allowed it to be ordered over the objections of one parent. Sixteen states gave some degree of preference to joint custody over all other arrangements. California was the first to introduce joint custody legislation, establishing a presumption of joint custody. It has, however, amended its legislation and there is now neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody.

Rather, both the court and family are provided with the widest discretion to choose a parenting plan which is in the best interests of the child or children.

There are many problems in attempting to assess the worth or benefits of joint custody including the fact that it can encompass any number of various different custody arrangements in which both parents participate. Numerous articles by lawyers, judges, mediators, psychiatrists, psychologists, social workers, feminists, and fathers rights groups have attempted to outline both the advantages and limitations.[1]

The primary rationales underlying the movement toward joint custody are equality, increased paternal involvement in child rearing, and the easing of the burden of single parenting. The argument is that children should be entitled to have both parents in their lives and that a parent on leaving a marriage should not also lose his/her parental rights. It is argued that continued paternal involvement can encourage more regular support payments and relieve the burden of single-parenting.

While these are valid social objectives, there is a growing consensus that they cannot be met through court imposed joint custody orders. Studies looking at joint legal custody, for example, suggest that in practice it has only modest effects at most in increasing fathers' involvement in childrearing.[2]

There are also many arguments against imposing joint custody over the objection of one parent. Some of the more serious concerns and warnings regarding imposed joint custody are summarized below:

The most obvious concern about legislation that provides for imposed joint custody is that one party may be coerced into accepting custody arrangements that may be unsatisfactory to them because of the fear that joint custody will be imposed on them. As noted earlier, the law has a significant impact on the negotiations leading to the making of custody and access arrangements and it is feared that the availability of imposed court-ordered joint custody may be used as a bargaining tactic.

This fear is supported by the results of a longitudinal study involving over 1,000 California families that included a comparison of parental custody desires with actual custody requests on the divorce petition[3]. The results suggest that some parents do request more custody than they actually want. The data revealed that 31 of the 158 fathers who initially said they desired maternal custody in fact asked for joint physical custody on the divorce petition, likely as a bargaining tactic in an attempt to persuade the mother to accept a less generous financial arrangement.

There is also concern that joint custody, if imposed over the objection of one parent, will be used by the court as a compromise to avoid making either parent feel like a loser. This could be a tempting solution in cases where both parent appear to be equally capable of

rearing the child. However, it is argued that the effect may be to give fathers equal rights without equal responsibilities. The argument is that in joint legal custody situations, while both parents are supposed to have equal input into decisions that affect their children, one parent, usually the mother assumes the daily care of children and she is then subject to increased control by fathers over decisions that affect her daily life.

In the mid 1980s, when the *Divorce Act, 1985* was before the parliamentary committee, the issue of whether or not to move towards a legislative presumption of joint custody was debated. It was decided at that time not to adopt the approach of a joint custody presumption and for the reasons mentioned above, this remains the current position.

Do you have any comments on the current position not to adopt a mandatory joint custody presumption?

The primary caregiver standard

Another approach that has been proposed to remove some of the uncertainties regarding custody and access determinations is to focus on past conduct and award custody to the spouse who had undertaken the primary role of caring for the child throughout the marriage.

In 1981, in the American case of *Garska* v. *McCoy*[4], the West Virginia Supreme Court of Appeals established what is today known as the primary caretaker or caregiver presumption. The court in that case declared that custody of children of tender years should be awarded to the parent, if fit, who had been the primary caretaker of the child. Stating that this award was in the child's best interest, the Court listed factors that were to be considered in making the determination:

- preparing and planning of meals;
- bathing, grooming and dressing;
- purchasing, cleaning and care of clothes;
- medical care, including nursing and trips to physicians;
- arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
- arranging alternative care, babysitting, day-care etc;
- putting child to bed a night, attending to child in the middle of the night, waking child in the morning
- disciplining, including teaching general manners
- educating, i.e. religious, cultural, social etc; and
- teaching elementary skills, i.e. reading, writing.

This standard recognizes two related values: (a) continuity: the child will continue to be cared for by the person who had done so in the past; and (b) demonstrated parenting: the person caring for the child has demonstrated the ability to parent.

This presumption was adopted in Minnesota in 1985 in the case of *Pikula* v. *Pikula*[5], and since then has been considered an important factor by courts in several states: Alabama, Alaska, Arizona, Delaware, Florida, Illinois, Iowa, Louisiana, Missouri, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, New York, North Dakota, and Utah. The presumption can take various forms. In its strongest version, as in West Virginia and Minnesota, it creates a presumption that the parent who has been the primary caregiver in the past should obtain custody in contested cases, unless proven unfit. The weakest form of the presumption would be as a tie-breaker where all other factors were "equal".

The primary caretaker presumption has been the subject of many articles and much debate.[6] The main argument in favour of the presumption is that by clarifying the value and importance of primary care of children in a gender-neutral fashion, it will probably discourage litigation by giving a clear signal about the probable outcome of going to court. It has, however, been accused of being just another version of the tender years doctrine and criticized on the basis that it is not possible to predict who is going to be a preferable custodial parent on the basis of past primary caregiving.

A legal presumption favouring a specific custody arrangment provides the court with an express directive to follow. It can be rebuttable to lessen the danger of being applied arbitrarily. Many statutes in the United States contain a presumption of joint custody. Generally, do you favour the use of statutory presumptions to determine custody and access?

Should a primary caregiver test be used to determine custody? Would you support its use in a narrower context, for example, to determine primary residence?

The Quebec Civil Code approach

The Quebec Civil Code refers to something known as parental authority. Article 647 of the Quebec Civil Code states:

> "The father and mother have the rights and duties of custody, supervision and education of their children. They must maintain their children.

Similarly, Article 648 states:

> "The father and mother exercise parental authority together. If either parent dies, is deprived of parental authority or is unable to express his will, the other parent exercises parental authority.

This has been interpreted to mean that whether custody is entrusted to one of the spouses or to a third person, the father and mother retain the right of watching over the maintenance and education of the children. In the Supreme Court of Canada case of *T.V.-F. and D.F.* v. *G.C.* [1987] 2 S.C.R. 244, Mr. Justice Beetz described the roles of custodial and non-custodial parents in Quebec civil law as follows:

> "The person who has custody has control over the child's outings, recreation and associations. That person must also, as a consequence of his or her privileged position, make the day-to-day decisions affecting the life of the child. Nevertheless, the non-custodial parent who is deprived of the physical presence of his or her child most of the time enjoys a right to watch over the decisions made by the person who has custody... The non-custodial parent also has, pursuant to his or her status of person having parental authority, the right to decide as to the major choices affecting the direction of the child's life".[7]

While this interpretation appears to clarify some uncertainty, it has been criticized for effectively giving the non custodial parent rights without corresponding responsibilities.

Do you agree with the Quebec civil law approach? To what extent should access parents be consulted in major decisions affecting the child.

Specific legislative provisions

It has been noted that the issues of mobility and religious education are especially problematic. Several provincial statutes already contain some specific provisions regarding religious upbringing. For example, subsection 60(1) of Alberta's *Domestic Relations Act* and subsection 32(1) of the Northwest Territories' *Domestic Relations Act* provide that the court can make an order to have the child brought up in the religion of the parent even where the parent is not given custody of the child. Also, paragraph 3(2)(b) of Prince Edward Island's *Custody Jurisdiction and Enforcement Act* expressly provides that a person entitled to custody of a child has "the right to direct the education and moral and religious training of the child, in the best interests of the child".

Should legislation specifically address issues such as mobility, and religious and cultural upbringing? What provisions would you recommend?

2. Address access concerns

Currently, The *Divorce Act* encourages maximizing parental access but does not provide any further guidance as to how such access is to be encouraged. That is left to the judge's discretion based on what would be the best interests of the child.

Generally, should the best interests of the child test be maintained as the standard in making custody and access decisions? If so, would adopting a statutory checklist of factors in the Divorce Act *to direct judicial discretion be useful?*

What other measures to direct or limit judicial discretion could be proposed?

With respect to access specifically, is there is a need for more specific legislative criteria; for example a prescriptive rule prohibiting or restricting access in cases where there is a history of violence or child abuse?

It has been noted that legal means of enforcing access disputes appear to be unsuccessful. Courts cannot simply order successful or meaningful access if parents fail to recognize the advantages to the child and continue to disagree about access arrangements.

What further steps can be taken to promote, in appropriate cases, children's continued contact with both their parents, post-divorce?

Are further steps required to specifically encourage grandparent access in appropriate cases?

3. Remove the "friendly parent rule"

The principle of maximum contact with the non-custodial parent contained in s. 16(10) and 17(9) of the Divorce Act *has been reviewed earlier in this paper. Should these provisions be repealed? Why or why not?*

4. Deal directly with domestic violence and abuse

It has been suggested that legislative clarification is required to ensure that evidence of spousal abuse is something the court must consider in making custody and access determinations.

Do you support this position? What type of legislative provision could accomplish this?

How should allegations of child sexual abuse be handled within the custody decision-making process?

5. Accept and address gender bias concerns

Although on their face, Canadian laws that govern custody and access of children appear to apply equally to both fathers and mothers, there are allegations that the law may nonetheless be subject to gender bias, particularly in the application of the statutory provisions by judges. Concerns have been expressed about courts applying a maternal presumption that favours custody being awarded to women. On the other hand, it has also been argued that courts sometimes judge fathers as a parent by a different and much less demanding standard than the mother.

Do you feel that gender bias is a problem? How can gender bias in the determination of custody and access be reduced or eliminated?

6. Representing children

Although the best interest of the child is the statutory consideration in deciding custody, the child is not usually legally represented and in many cases the child's views are not known to the court. In addition, while children are affected in a major way by custody and access decisions they are not a party to custody/access proceedings and have no legally enforceable right to participate.

Should the law ensure that children participate more fully in custody and access proccedings that affect them? If yes, how do you think this should be done?

7. Address enforcement issues

Several jurisdictions have recently enacted or are considering new access enforcement legislation. In both Newfoundland[8] and Saskatchewan[9], statutes contain provisions allowing for remedies such as compensatory access and payment of costs associated with access refusal, as well as provision to make or vary custody or access orders to respond to access problems.

Other provinces are developing new programs to deal with access problems. In Manitoba, the Access Assistance Program attempts to assist the family in working out difficulties surrounding access. The goal of the program is to have access reinstated in accordance with the provisions of the court order provided that would be best for the children. It includes a voluntary conciliation component aimed at resolving the root problems of the access difficulty as well as a legal component through which court action can be taken to ensure compliance.

Ontario has recently established a new supervised access pilot project that focuses on providing supervised access services. Funding has been given to 14 community organizations and agencies across the province to assist separated families in carrying out access arrangements ordered by the court, or agreed to by the parents. The objective of supervised access is to provide a safe, monitored, neutral, and child focussed setting for access visits to take place. These centres can also be used for drop-off and pick-up of a child.

To what extent do you think enforcement of custody and access is a problem? What is the nature of the problem?

What further steps do you think could be taken to improve custody and access enforcement?

OPTION 3: A NEW LEGISLATIVE APPROACH

This option must be considered to respond to the issues presented at pp. 18-21 of this paper which identify some very basic and fundamental problems with the current legal regime.

Some other examples

It should be noted that several American states have already enacted legislation that uses new terminology and attempts new approaches.

In Florida, for example, legislation which adopted a shared parenting approach called the *Shared Parental Responsibility Act* was enacted in 1982. The main goal was to ensure, as far as possible, continued participation in decision making about the children by both parents, and to maximise contact between children and their parents following marriage breakdown. The legislation declares that it is the public policy of the state of Florida that each minor child has frequent and continuing contact with both parents after separation or divorce, and to encourage parents to share the rights and responsibilities of child rearing.

In Maine, the *Domestic Relations Statute* replaces the traditional custody and visitation terminology with the language of parental rights and responsibilities, and is based on the policy explicitly stated in the legislation that "encouraging mediated resolutions of disputes between parents is in the best interest of minor children". Three options are presented. The first option allocates various aspects of a child's welfare between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. The legislation provides that such responsibilities may be divided exclusively or proportionately.

Another option is shared parental rights and responsibilities, which means that most or all aspects of the child's welfare remain the joint responsibility of both parents - with both parents retaining equal parental rights and responsibilities and making joint decisions.

A third option is where one parent is granted exclusive parental rights and responsibilities over all aspects of the child's welfare, with the possible exception of the right and responsibility of support. The legislation expresses no preference or presumption for any one of the options, but where the parents have agreed to option 2 - shared parental rights and responsibilities - the court must make that award unless there is substantial evidence that it should not be ordered. Where there is no agreement, the Court is directed to make an order in terms of one of the three options set out above according to the best interests of the child.

In the state of Washington, the 1987 *Parenting Act* has abandoned the language of custody and replaced it with the concept of "parenting". It has adopted a functional approach in that the statute identifies four general areas of "parenting" (based on the needs of children) that must be addressed in a "parenting plan". These four identified areas are: (i) the child's residential arrangements; (ii) provision for financial support of the children); (iii) the allocation of decision-making authority; and (iv) a dispute resolution process. With respect to the allocation of decision making, the parenting plan must indicate who has responsibility for the day to day care as well as specifically allocate decision making to one or both parents in the major areas of education, health care, and the religious upbringing of the children.

It is important to note that like Florida, this Washington legislation undoubtedly encourages shared parenting and assumes that a child's needs are best met by a continuing close relationship with each parent, unless there are compelling reasons to the contrary. The Act, however also specifically limits the situations in which mutual decision-making may be designated and thus attempts to provide a safeguard to limit the involvement of a parent, where necessary, to protect the well-being of children.

Given the fact that only a small proportion of custody cases in Canada are actually litigated or court imposed, one of the most interesting aspects of this Washington legislation is the extent to which it attempts to regulate private negotiations as well as formal disputes. The legislation takes a very interventionist approach; outlining exactly what must be contained in a parenting plan, including a detailed schedule of the time each child will spend with each parent, as well as the terminology (not custody and access) that should be used. As well, it identifies harmful behaviours and subjects each of the plan components to different limiting factors.

The parenting plan approach

A parenting plan is a devise that instructs parties about what parental responsibilities should be considered and directs parents to think through carefully the arrangements they want to make for their children. Parents can create this plan themselves through negotiation with the help of their lawyers or through mediation.

As noted above, the Washington State legislation adopts a parenting plan approach which requires parents to formulate a parenting plan with specific components for incorporation into all final decrees for legal separation or dissolution of marriage. Courts are directed to approve agreed upon plans if the plan does not breach any of the mandatory limitations that are to be applied in cases where neglect, abuse or domestic violence is found.

Parenting plans have also been reviewed by the Family Law Council of Australia which issued a Discussion Paper in 1991 that notes: "The Council emphasises the usefulness and importance to all separating parents of preparing their own parenting plan as a statement of intent as to their long term commitment to their children. The Council considers that one option requiring consideration is the Family Act be amended to include the requirement for parents in conflict to formulate a parenting plan."[10]

Do you support the use of a parenting plan approach in Canada?

Do you support the view that the current concepts of custody and access should be replaced with new terminology? What new terms or concepts could be used?

Developing basic objectives and principles

The statutes just referred to offer some interesting alternatives. However, it is submitted that the first step in developing a new legislative approach in Canada should be to determine basic objectives and principles.

For purposes of discussion, several preliminary objectives are set out below:

(a) It is important that legislation be carefully developed in terms of the values it implies, the assumptions it makes about parenting after divorce and the language it uses to express its basic orientation.

(b) A new approach should focus on the needs and rights of children and concentrate on parental responsibilities and obligations rather than parental rights.

(c) Where parties have shown that they are capable of working together, the continued participation of both parents in the lives of their children following divorce should be encouraged.

(d) The continuing use of children as pawns in one parent's struggle to control must be minimized.

(e) Children and spouses who had been victims of abuse or violence must be protected against further harm.

(f) Individualized arrangements between parents and their children should be permitted and encouraged.

(g) The reality that most arrangements are worked out without the need for court intervention should be recognized.

In your view are the above objectives and principles appropriate?

NOTES

1. An excellent chart comparing the contradictory stances is contained in: Julian Payne and Brenda Edwards, "Co-operative Parenting After Divorce: A Canadian Perspective", *supra*, note 19 at p. 15-22. In addition, a thorough review of the empirical research reviewing 14 research studies on joint custody is found in Judith Ryan's article "Joint Custody in Canada: Time for a Second Look", 49 R.F.L. (2nd) 118 at p. 120.

2. See: Frank Furstenberg,Jr. and Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part.* (Cambridge, Massachusetts: Harvard University Press, 1991 at p.74 which refers to a study done at Stanford by Albiston, Maccoby and Mnookin that found that once income and education were taken into account, fathers who had joint legal custody did not visit their children more often; they did not cooperate and communicate more with their former wives; and they didn't participate more in decisions about the children's lives.

3. Robert H. Mnookin, Eleanor E. Maccoby, Catherine R. Albiston and Charlene E. Depner, "Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?" in *Divorce Reform at the Crossroads*, S. Sugarman, H. Hill Kay ed. (New Haven: Yale University Press, 1990) at p. 50. See also Lenore J. Weitzman, "Gender Differences in Custody Bargaining in the United States" in *Economic Consequences of Divorce, The International Perspective*, L. Weitzman, M. Maclean ed. (Oxford: Clarendon Press, 1992) at p. 395-405.

4. *Garska* v. *McCoy* 178 S.E. 2d 357.

5. *Pikula* v. *Pikula*, (1985) 374 NW 2d 705 (Minn S. Ct).

6. See: Sue Boyd, "Potentialities and Perils of the Primary Caregiver Presumption", (1990) 7 C.F.L.Q. 1; Richard Neeley, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984), 3 Yale Law and Policy Review 168, pp. 180-82; Marcia O'Kelly, "Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian", (1987), 63 North Dakota Law Review 481; Sher A. Ahl, "A Step Backward: The Minnesota Supreme Court Adopts a Primary Caretaker Presumption in Child Custody Cases: Pikula v. Pikula", (1986) 70 Minnesota Law Review 1344; Jeff Atkinson, "Criteria for Deciding Child Custody in Trial and Appellate Courts" (1984), 18:1 R.L.Q. 1 at p. 16-19.

7. *T.V.-F. and D.F.* v. *G.C.* [1987] 2 S.C.R. 244 at p. 282.

8. *The Children's Law Act* R.S.N. 1990, c. C-13, sections 40-47.

9. *The Children's Law Act*, S.S. 1990, c. C-8.1, Part V.

10. Australian Family Law Council, *Patterns of Parenting after Separation Discussion Paper*, (Robert Garran Offices, National Circuit, BARTON ACT 2600, April 1991) at p. 44.

CONCLUSION

The purpose of this Discussion Paper was to review the need for change to the current law respecting child custody and access and to seek input respecting the seriousness of the problems and the nature of alternatives that should be pursued.

Readers are invited to respond to any or all of the specific questions outlined in the paper or to more generally present their views regarding alternatives to the current law.

Comments and submissions may be sent to:

Custody and Access Project
Family and Youth Law Policy Section
Department of Justice
239 Wellington Street
Ottawa, Ontario
K1A OH8

Submissions should be received no later than December 31, 1993.

APPENDICES

Appendix A

RELEVANT PROVISIONS OF THE *DIVORCE ACT*

Jurisdiction

Under the *Divorce Act*, the making of a custody order is a corollary relief proceeding which pursuant to section 4 can be heard and determined "if the court has granted a divorce to either or both former spouses".

Subsections 16(1), 16(4) and 16(6) of the *Divorce Act* confer a broad discretionary jurisdiction on the court to make a custody or access order granting custody of, or access to, any or all children of the marriage. This can be made for any one or more persons for a definite or indefinite period and subject to such other terms, conditions or restrictions as the court thinks fit and just.

In addition, subsection 16(2) expressly empowers a court to make "an interim" order and subsection 17(1)(b) confers jurisdiction on the court to make an order varying, rescinding or suspending prospectively or retroactively any custody order or specific custody provision.

A summary of the courts' powers under the *Divorce Act* is set out below:

> A court is empowered ... to make an interim or permanent order of custody, access, or custody and access...
>
> a) to a spouse or former spouse
> b) to spouses or former spouses jointly or
> c) to a combination of persons drawn from spouses or former spouses and/or other persons who can apply with permission of the court.
>
> The duration of the order may be
>
> a) for a definite period of time,
> b) for a period of time terminating upon the happening of a specified event, or
> c) for an indefinite period.

If thought "fit and just" to do so, the court may include in the order provisions

a) setting terms,
b) making conditions, or
c) imposing restrictions.[1]

DETERMINING CUSTODY AND ACCESS

Custody

Subsection 2(1) of the *Divorce Act* provides that the term "custody" includes care, upbringing and any other incident of custody. The use of the word "includes" suggests that the term embraces a wider range of things than just what is articulated in this definition.

The statutory criteria to determine both custody and access is set out in subsection 16(8) which provides that the court, in making an order respecting custody or access, "shall take into consideration **only** the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child".

An additional guideline is provided by subsection 16(10) which states that "a child of a marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, [the court] shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact".

Another important provision is subsection 16(9) which deems the past conduct of any person irrelevant unless the conduct relates directly to the ability of that person to act as a parent of a child.

These statutory provisions are very general and the caselaw indicates that there are very few restrictions on the types of custody orders that can be made. As a result a wide variety of different custody orders are available under the *Divorce Act*.

The traditional and most usual order for custody and access is the sole custody order which provides for custody in one parent with access in the other. Other commonly identified types of orders include:

a) "split orders" where care and control is entrusted to one parent with whom the child lives but the other parent is given broad rights to make major decisions regarding the child"[2]; and

b)"joint orders" which in the widest sense refer to orders providing for custody arrangements in which both parents participate and which may or may not include arrangements for sharing physical custody or care and control.

Also if the court feels that neither parent is fit to have custody of the child, it may make an order giving custody to a third person or agency.

Access

The term access is not statutorily defined, but there are several statutory references to access in the *Divorce Act*.

The most specific reference is in subsection 16(5) which provides that unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health education and welfare of the child.

Access, like custody, should be granted based on whether it is in the best interests of the child. As noted above, subsection 16(10) the *Divorce Act* appears to encourage the maximizing of parental access by stating that a child of a marriage should have as much contact with each spouse as is consistent with the best interests of the child and that the court shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

In addition, subsection 16(7) specifically empowers the court to order any person who is granted custody of a child of the marriage to give notice of any intended change of residence to any person who has been granted access privileges. If not specified this notice must be given at least 30 days before the intended change of residence and the person with access privileges, once given this notice, will then have the opportunity to challenge the intended change of residence in court or seek a variation of the custody and access arrangements.

Like custody orders, there is a great deal of variation in how access orders are worded.

Judges, in attempting to encourage what would be most suitable for the children, often leave the determination of details in the hands of the parents. Access is thus often left undefined or described in very broad terms such as "reasonable". Some access orders, however, are very detailed and refer specifically to such things as location, duration and frequency of contact and whether it may or may not involve staying overnight. The court may also require that access be supervised, where this appears to be in the best interests of the child.[3]

NOTES

1. Alastair Bissett-Johnson and David C. Day, *The New Divorce Law*, (Toronto: Carswell, 1986) at p.59-60.

2. This was the order made in *Huber* v. *Huber* (1975), 18 R.F.L. 378 (Sask. Q.B.).

3. Data collected in 1985 for Phase 1 of the Evaluation of the *Divorce Act*, indicate that highly structured and specific timetables and conditions regarding access were set out in about 23 percent of cases, many of which were a product of agreements reached through divorce mediation. The more general pattern was either to say nothing about access, or through such phrases as "reasonable" and "liberal", to leave it to parents to work out these arrangements on their own. Supervised access was ordered in about one percent of all custody cases

Appendix B

PROVINCIAL AND TERRITORIAL LEGISLATION RELATING TO CUSTODY AND ACCESS

Provincial legislation governs the granting of child custody and support during the subsistence of a spousal relationship including cohabitation without marriage.

Some provincial and territorial statutes have included a checklist or set of relevant factors to be taken into account in determining the best interest of the child. The following is a summary (listed without reference to the legislation) of the different factors statutorily mentioned in provincial/territorial legislation to be considered in deciding custody:

- the conduct of the parents
- the wishes of the father and the mother
- the health and emotional well-being of the child including any special needs for care and treatment
- where appropriate, the views of the child
- the love, affection and similar ties that exist between the child and other persons
- education and training for the child
- the capacity of each person to whom guardianship, custody, or access rights and duties may be granted to exercise these rights and duties adequately
- the effect upon the child of any disruption of the child's sense of continuity
- the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child
- the child's cultural and religious heritage
- the length of time the child has lived in a stable home environment
- the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child
- the ability of each parent seeking custody or access to act as a parent
- plans proposed for the care and upbringing of the child
- the permanence and stability of the family unit with which it is proposed that the child will live
- the relationship by blood or through an adoption order between the child and each person who is a party to the application
- the personality, character and emotional needs of the child
- the physical, psychological, social and economic needs of the child
- the capacity of the person who is seeking custody to act as legal custodian of the child
- the home environment proposed to be provided for the child
- the plans that the person who is seeking custody has for the future of the child

- the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

In addition, section 9 of Saskatchewan's *Children's Law Act* enumerates the following factors to be considered specifically in an access application:

- the quality of the relationship that the child has with the person who is seeking access
- the personality, character and emotional needs of the child
- the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care
- the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child.

A list of the relevant legislation for each province and territory is set out below:

Canada: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3; *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985 (2nd Supp.), c. 4, Part I.

Alberta: *Child Welfare Act*, S.A. 1984 c. c-8,1, ss. 8, 9 and 12, *Domestic Relations Act*, R.S.A. 1980, c. D-37, Part 7; *Extra-Provincial Enforcement of Custody Orders Act*, R.S.A. 1980, c. E-17; *International Child Abduction Act*, S.A. 1986, c. I-6.5; *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32.

British Columbia: *Family Relations Act*, R.S.B.C. 1979, c. 121; *Law and Equity Act*, R.S.B.C. 1979, c. 224, ss. 29, 47, 55.

Manitoba: *The Child and Family Services Act*, R.S.M. 1987, c. C80, ss. 2, 78, 80; *The Child Custody Enforcement Act*, R.S.M. 1987, c. C360; *Court of Queen's Bench Act*, S.M. 1988-89, c. 4, ss. 33, 63; *Domicile and Habitual Residence Act*, R.S.M. 1987, c. D96; *The Family Maintenance Act*, R.S.M. 1987, c. F20, ss. 2, 9, 11, 39, 49, 50, 51.

New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 1, 6, 8, 9, Part VII; *International Child Abduction Act*, S.N.B. 1982, c. I-12.1; *Judicature Act*, R.S.N.B. 1973, c. J-2, ss. 11.4, 11.51, 38.

Newfoundland: *Children's Law Act*, R.S.N. 1990, c. C-13; *Family Law Act*, R.S.N. 1990, c. F-2, ss. 64, 66.

Nova Scotia: *Child Abduction Act*, R.S.N.S. 1989, c. 67; *Family Services Act*, S.N.S. 1990, c.5, ss. 107, 108; *Family Orders Information Release Act*, R.S.N.S. 1989, c. 161, s. 5; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss. 18, 19; *Married Women's Property Act*, R.S.N.S. 1989, c. 272, s. 25; *Reciprocal Enforcement of Custody Orders Act*, R.S.N.S. 1989, c. 387.

Ontario: *Law Reform Act*, R.S.O. 1980, c. 68; *Courts of Justice Act*, 1984, S.O. 1984, c. 11, s. 109; *Family Law Act*, 1986, c. 4, ss. 54, 56; *Support and Custody Orders Enforcement Act*, 1985, S.O. 1985, c. 6, ss. 2, 6, 7.

Prince Edward Island: *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33; *Family Law Reform Act*, R.S.P.E.I. 1988, c. F-3, ss. 47, 49(1); *Supreme Court Act*, R.S.P.E.I., c. S-10, s. 29.

Saskatchewan: *The Children's Law Act*, S.S. 1990, c. C-8.1; *The International Child Abduction Act*, S.S. 1986, c. I-10.1; *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45(11).

Northwest Territories: *Domestic Relations Act*, R.S.W.N.T. 1988, c. D-8; *Extra-Territorial Custody Orders Enforcement Ordinance*, R.S.W.N.T. 1988, c. E-12; *International Child Abduction Act*, R.S.N.W.T. 1988, c. I-15.

Yukon: *Children's Act*, R.S.Y. 1986, c. 22, ss. 1, 2, Part 2, ss. 167, 168; *Maintenance and Custody Orders Enforcement Act*, R.S.Y. 1986, c. 108, ss. 2, 6.

Appendix C

OTHER ADJUDICATIVE CRITERIA

The determination of custody and access by a court is obviously done within the framework of the statutory provisions but it is important to acknowledge the influence of case law and precedent within this framework. The statutory test governing child custody and access decisions is really quite simple to summarize. The best interests of the child must be the paramount, if not the sole consideration. However, although the test can be simply summarized, it is difficult to apply because the concept "best interests" has many interrelated components and by its very nature is indeterminate.

Traditionally, several factors have been identified in case law as being important to determine what is in the child's best interest. Most of these factors were formulated some time ago in the context of the traditional judicial disposition that granted the sole custody of the children to one spouse with access to the other. They were often relied on in cases where both parents appeared to be equally capable of rearing the child. In the past, these factors appeared to have the status of a rule or presumption of law requiring rebuttal evidence. The modern trend has been to use them as rules of common sense; an assumption of fact rather than a presumption of law, subject to the particular circumstances of the case.

The most common caselaw assumptions are summarized below:

a) *Status quo*: Where the respective claims of the parents are evenly balanced the court should preserve the status quo.

The case law indicates that very substantial emphasis has been laid upon preservation of the status quo, especially in the context of interim applications.[1] Generally, it seems the courts are reluctant to intervene with an arrangement that has survived a period of time without difficulty and upon which the child has established a sense of security, stability and consistency. Status quo refers to the de facto custody of the child by one of the parents and not to any particular place or location where the child may have lived.

b) *The tender years doctrine*: Children of tender years should usually be placed in the custody of their mother.

Although this was once a very common assumption based on the notion that young children require maternal care, in 1975 the Supreme Court of Canada in *Talsky* v. *Talksy*[2] held that the doctrine is not a rule of law but rather a principle of common sense. Mr. Justice Spence noted that the special ability of a mother to care for a young child is "simply one of the more

important factors which must be considered in granting custody... and does not create a legal presumption in favour of the mother".

Even as a so-called principle of common sense, the doctrine has been much criticised and increasingly there is judicial authority that indicates that neither the "tender years" doctrine nor the argument that the needs of female children are best met by their mother are of any validity today.[3]

c) *Keeping siblings together*: In the ordinary course of events, the court should avoid the separation of siblings.

This general rule appeared to be based on the desirability of keeping the children of a family together to that they may share the affection and support of each other and grow up with a sense of family solidarity.

d) *Child preference*: significance should be attached to the wishes of an older child.

Generally, the courts have taken a pragmatic view. For example, in *Alexander* v. *Alexander*[4] the court noted that "although a child's wishes are not necessarily determinative of custody, there comes a point when at near-adult years, a child, capable of responsible thought, must be deemed to be able to settle his or her own future".

However, in *Young* v. *Young*[5] the wishes of the children aged 13 and 11 to be placed in the custody of their father was over-ridden by the fact that the father's abuse of their mother raised serious concerns as to his parenting ability. Accordingly, the children's best interests required that they be placed with their mother.

Similarly, in *Mamchur* v. *Mamchur*[6] the court felt it was inappropriate for the judge to interview a 12 year old child concerning his custody preferences, given the child's age, lack of maturity and the possible trauma which may result.

Judges have also voiced concern about placing such a heavy burden on a child.[7]

NOTES

1. See: *Kyle* v. *Kyle* (1985) 44 R.F. L. (2d) 200 (Sask. Q.B.) p. 202, where the court noted that it is a working rule that on an application for interim custody more cogent evidence is required to support a disturbance of de facto custody than is required in a trial on the merits.

2. *Talsky* v. *Talsky* (1975) 21 R.F.L. 27, from the reasons for judgement of Spence J., at p. 40.

3. See: *Williams* v. *Williams* (1989), 24 R.F.L. (3d) 86 (B.C.S.C.); *Ferjan* v. *Ferjan* (1980), 19 R.F.L. (2d) 113 (Man. C.A.); *Bendle* v. *Bendle* (1985), 48 R.F.L. (2d) 120 (Ont. Prov. Ct). Also: *Harden* v. *Harden* (1987), 6 R.F.L. (3d) 147 (Sask. C.A.). which suggests that "the doctrine of tender years" can be constitutionally challenged under s. 15 of the Charter.

4. *Alexander* v. *Alexander* (1988), 15 R.F.L. (3d) 363 (B.C.C.A.).

5. *Young* v. *Young* (1989), 19 R.F.L. (3d) 227 (Ont. H.C.).

6. *Mamchur* v. *Mamchur* (1987), 11 R.F.L. (3d) 66 (B.C.S.C.).

7. See: *McCarney* v. *McCarney* (1985) 49 R.F.L. (2d) 69 where the court held that "the burden of deciding whether to live with is father or mother should not be placed upon a ten year old child". For a study that supports this view see: D. Leupnitz, *Child Custody: A study of Families After Divorce*, (Lexington, Massachusetts: D.C. Heath, 1982) at p. 52.

Appendix D

MODEL CHARGING GUIDELINES FOR PARENTAL CHILD ABDUCTION

INTERPROVINCIAL PARENTAL CHILD ABDUCTION

A. Under Section 282 of the *Criminal Code* charges may be laid where:

1. A child under the age of 14 is involved.

2. There is a court order granted in Canada which is not being complied with.

   (Note: It is not necessary to register a court order of custody granted from one province before criminal charges can be laid in another. However, inquiries should be made by the investigative agency charged with the responsibility of investigating the type of crime to ascertain whether the custody order is the last custody order with respect to custody that has been granted and that the order is still in effect.)

3. A parent, guardian or other person having the lawful right to care for a child takes a child or withholds a child in contravention of the custody terms of the Canadian custody order.

4. That person is acting with the intent to deprive the parent, guardian or person having care or charge of the child under the court order of the possession of the child.

5. A parent, guardian or other person having the lawful care or charge of the child did not consent to the taking or detention of the child by the other parent.

6. The taking or detention of the child was not clearly occasioned by the need to protect the child from danger or imminent harm.

B. Under Section 283 of the *Criminal Code* charges may be warranted where:

1. A child under 14 is involved.

2. No order of a Canadian court exists in respect of the custody of the child. However, charges may be laid where an order of custody has been granted by a court in a foreign country.

3. A parent, guardian or person having the lawful right to custody of the child, takes the child from or out of the control of another parent, guardian or person having a similar right to custody of the child with the intent to deprive that parent, guardian or person having possession of that child.

4. Consent of the Attorney General or counsel instructed by him/her for that purpose is received.

5. A parent, guardian or other person having the lawful care or charge of the child did not consent to the taking or detention of the child, by the other parent.

6. The taking or detention of the child was not clearly occasioned by the need to protect the child from danger of imminent harm.

EXAMPLES OF WHEN CHARGES MAY BE AUTHORIZED BY THE ATTORNEY GENERAL:

(1) A child is taken from circumstances where there is some degree of permanency, (i.e. contrary to an arrangement which has existed between the parties for some time or contrary to the provisions of a written agreement, or

(2) Proceedings have been initiated in the courts for custody and the parent taking the child is frustrating proceedings, or

(3) **There are reasonable grounds to believe** one parent has a foreign custody order and the parent taking or withholding the child is in breach of such order or

(4) A party has repeatedly breached section 283, or

(5) A child has been taken by a person who may cause harm to the child and it appears that provincial legislation is inadequate to ensure the protection of the child, or

(6) A person takes the child surreptitiously and disappears with the child or the person is about to take the child out of the country.

Although technically a charge could be laid in a situation where a parent, in the process of separation, moves out of the home with the child and remains in the same city, it would be unlikely that a charge would be laid in these circumstances if it appears that the parties are attempting to resolve custody either through the courts or by agreement. **Appropriate prosecutorial discretion should be exercised in these circumstances.**

The defences under Sections 282 and 283 are as follows:

1. It is a defence if the accused establishes that the taking of the child was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of the child.

2. It is a defence if the child was taken to protect the child "from danger of imminent harm". For example, protecting a child from child abuse would be a defence.

N.B. It is not a defence to any charge that the young person consented to the conduct of the accused.