Syrtash Collection of Family Law Articles
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Same Sex Partners: What Rights Do They Have?*

by Joel Miller

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* Posted by John Syrtash with permission of the author.

¶ 1 In a nutshell, same-sex couples in Ontario now have some rights and are gaining others rapidly. Gay male and lesbian couples have been included in Ontario legislation in areas such as life insurance, extended medical coverage, dental insurance and bereavement leave. The Substitute Decisions Act and the Consent to Treatment Act both contemplate same sex partners. The courts have allowed same sex partners to adopt a child. And now, as the result of the case discussed below, they will have the same rights to support as other unmarried couples by mid December, 1997 and are likely to see an expansion in other family law related rights by then as well.

¶ 2 We all grew up in a world in which the vast majority of family units were headed by one male and one female. Depending on our age, the vast majority of those people were also married to each other. In today's world the size of both of those majorities is dwindling. Over the years it has become increasingly common for men and women to be living together in "common law marriages" without actually being married to each other - whether by choice or circumstance. And over more recent years it has become increasingly common for family units to consist of, or be headed by, partners both of whom are of the same sex. In today's world many gay men and women have opted to create meaningful, caring and sharing homosexual relationships which are quite similar to heterosexual relationships in most respects.

¶ 3 NOTE: The law in Ontario has recently been thoroughly reviewed in the case of M. v. H., [1996] O.J. No. 4419, Ontario Court of Appeal, December 18, 1996 confirming the decision of Epstein J., [1996] O.J. No. 365, February 9, 1996. The case is discussed below. On February 13th, 1997, the Ontario government announced that it was appealing the Court of Appeal's decision to the Supreme Court of Canada. So M. v. H is not yet the law. Considering that it gave the Ontario government one year to change the legislation before the case could have effect, this doesn't change anything for the present. For the meantime, please remember that the comment below is on the Court of Appeal decision which is now under appeal.

Same Sex Partner Has Right to Claim Support ...

¶ 4 The recent case of M. v. H. has given one partner of a same sex couple the right to claim for support upon the breakdown of their relationship despite the clear wording of the Ontario Family Law Act that the right only exists for partners where the couple

consists of "a male and a female". The case was originally heard in February, 1996 by Madam Justice Epstein of the Ontario Court (General Division) whose decision was appealed to the Ontario Court of Appeal. That court heard argument on August 6 - 8, 1996 and reserved its decision. Its decision was released on December 18th, 1996 in an 87 page judgment upholding the lower court's ruling. Justices Charron and Doherty agreed with Madam Justice Epstein, thereby upholding the earlier ruling. Mr. Justice Finlayson disagreed and wrote a dissenting opinion.

... But Not for One Year

¶ 5 The Court of Appeal has held that the definition of "spouse" for the purposes of support under s. 29 of the Ontario Family Law Act (the FLA) is to have the phrase "a man and woman" severed from it and replaced with the phrase "two persons". This was the decision of Madam Justice Epstein.

¶ 6 However, the Court of Appeal added the proviso "that the remedy be temporarily suspended for one year."

¶ 7 As Madam Justice Charron wrote, this is because:

> "the acceptance of an expanded definition of 'spouse' by this court for the purpose of s. 29 of the FLA may have ramifications which go much farther than the confines of this litigation. The court cannot address any of these concerns since it is strictly limited to a consideration of the impugned provision in question. On the other hand, the Legislature may choose to do so."

¶ 8 The court stated that its decision will take effect in one year "barring legislative activity to ensure the constitutionality of s. 29 of the FLA". This is to give the Ontario government time to consider how it wants to deal with the matter and to decide what legislative amendments will make s. 29 of the FLA constitutional. As well, this will also allow the government time to decide what changes it wants to make to the other pieces of legislation that make a distinction based upon whether or not the people involved are married or whether, if not, they are part of a heterosexual or same-sex relationship.

Only For Support Claims

¶ 9 It is important to remember that the court could only deal with the particular case before it. The issue there was one of the right to claim for support and whether it was unconstitutional to prevent same sex couples from access to the same remedies and obligations in connection with support claims as unmarried heterosexual couples have. The issue was not one of the total rights of same sex couples and did not focus, in the view of the majority of the Court of Appeal, on the issue that same sex couples were not married.

¶ 10 This case dealt with the issue in the context of the Canadian Charter of Rights and Freedoms and was a complex constitutional argument regarding whether or not the section in question infringed the provisions of the Charter; if so, whether the infringement can be justified under s. 1 of the Charter and, if not, what the appropriate remedy should be.

¶ 11 It is not at all clear that the court would have reached the same position had it been dealing with whether or not same sex couples should have the same rights and obligations regarding equalization rights (the right to equalize the value of property acquired during the marriage) as married couples have. More on this below.

The Factual Background

¶ 12 (I am taking this recitation of facts from the dissenting decision of Mr. Justice Finlayson in the Court of Appeal.)

¶ 13 M. and H. are two women who met in 1984 and began living in a house H. had owned since 1974. H. continued to pay for the upkeep of the home but they each paid their own personal expenses and shared the living expenses and household responsibilities equally. While they lived together they acquired a business property in downtown and a country property. They incorporated an advertising business and acquired other companies.

¶ 14 Mr. Justice Finlayson comments that there is "some dispute about the precise nature of the lesbian relationship between the two" but he held that it was accepted that such a relationship did exist and that M. and H. "can properly be described as a same-sex couple."

¶ 15 H. stated that they ceased to have any physical relationship in 1987 and ceased to share the same bedroom in 1989. In September of 1992, M. left the common home and in October brought a claim for a variety of relief dealing with the properties and the businesses. In April, 1993, M. amended her application to include a claim for support pursuant to the FLA and served a Notice of Constitutional Question concerning the definition of "spouse" in Part III of the FLA, which deals with support.

¶ 16 As mentioned above, the question of the constitutionality of the definition was first dealt with by Madam Justice Epstein in February, 1996 and then appealed to the Court of Appeal for a hearing in August, 1996 and a decision in December, 1996.

¶ 17 You can read a thoughtful analysis of Madam Justice Epstein's decision by Malcolm Kronby, one of the contributing editors to the Ontario Family Law Bulletin. (Malcolm is also a Consulting Editor to the Ontario Family Law Reporter.) That commentary is highly recommended.

Previous Case Law, the Constitutional Issues and the Ontario Government's Position

¶ 18 In May, 1995, in the case of Egan and Nesbitt v. Canada, the Supreme Court of Canada held by a vote of 5 to 4 that legislation which makes distinctions between the rights available to people in same sex relationships and those in heterosexual relationships is discriminatory under the section 15 equality provisions of the Canadian Charter of Rights and Freedoms. But in that same case, one of the 5 judges held that the contested provision of the Old Age Security Act was discriminatory and sided with the other 4 to hold that the court should not strike it down. He felt that the legislation was permissible under s. 1 of the Charter. That section justifies discrimination if it is "reasonably justifiable in a free and democratic society". The net effect was that 5 of the 9 judges in the Supreme Court of Canada held that legislation dealing differently with same sex partners than with different sex partners was discriminatory but that, at the same time, 5 of the 9 judges held that the legislation should not be struck out.

¶ 19 In the Egan case there were 2 gay men who had been living together since 1948 in "an intimate, caring, mutually supportive relationship" and the issue was the right to claim a "spouse's allowance"under the provisions of the federal Old Age Security Act. In the M. v. H. case there were 2 gay women who had lived together for about 10 years and the issue was the right to claim for support under the provincial Family Law Act.

¶ 20 When the former Ontario NDP government allowed a free vote in the provincial legislature over the issue of extending the rights in the Family Law Act to same sex partners, the issue was defeated. The current Ontario Progressive Conservative government is against the extension of such rights to same sex partners. When the M. v. H. case began the NDP government was in power and instructed the Attorney General's office to intervene to support the extension. When the last provincial election resulted in the government being replaced, the new provincial Conservative government instructed the Attorney General's office to reverse positions and oppose the extension.

M. v. H, the Majority Decision

Constitutional Analysis

¶ 21 The constitutional argument is fairly complex. In Canada, to strike down legislation as offending the provisions of the Canadian Charter of Rights and Freedoms, one must first establish that the law in question creates a distinction which denies the claimant equal protection, or benefit, from a right others have. Then the claimant must show that the distinction represents discrimination by falling into the enumerated list of categories which spell out discrimination, or some analogous ground. As well, the claimant must show that the discrimination violates the purpose of the Charter as set out in section 15(1) to prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens thought the stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance.

¶ 22 If the claimant gets past all of these, the party seeking to uphold the legislation has the onus of justifying the discrimination as "demonstrably justified in a free and democratic society" under section 1 of the Charter.

The Relevancy of Being Married

¶ 23 The court noted that the section it had to deal with did not concern itself with whether claimants were married or not. The definition of "spouse" already provided for unmarried couples so long as they lived together "(a) continuously for a period of not less than three years, or (b)in a relationship of some permanence, if they are the natural or adoptive parents of a child."

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Summary Judgment Available in Child Welfare and Custody Cases*

by Gene C. Colman
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1998

* Ed. note: The following commentary was written by Gene C. Colman, a Toronto-area family law lawyer with over twenty years of experience. An eminent writer and practitioner, we are grateful that Mr. Colman gave us his express approval and consent to publish his informative article on Summary Judgment in Child Welfare and Custody cases. His other articles and informative insights can be found on his website: http://www.interlog.com/[tilde]famlaw/sumjud.htm#CENTRE. There you will find his thoughtful "Family Law Centre"

C.C.A.S. of Metropolitan Toronto v. L.O.
[1996] O.J. No. 3018
Ontario Court of Justice (General Division), Chapnik J.
September 6, 1996. Court File No. 19/96

¶ 1 In both child custody and child welfare matters, counsel should, given the appropriate fact configurations, consider bringing motions for summary judgment.

¶ 2 In the above noted recent decision, the parents of six children had a history of apparently abusing their children. The father had been found guilty of aggravated assault upon one child and in 1989, was sentenced to five years imprisonment. In April 1994 one of their children died as a result of complications from extensive injuries ("violent physical attacks") visited upon her while in the care of her parents.

¶ 3 One must ask - Are these parents entitled to a trial no matter what? Are there alternative means available to adjudicate their custody and access claims which are still consistent with natural justice?

¶ 4 With the protection application booked for trial in October - November, 1995, the parents moved for an adjournment pending the completion of the criminal trial of second degree murder. The motion came before Provincial Judge James who took an activist approach by requiring counsel to present certain submissions (written and oral) to the court. Thus, having received an Agreed Statement of Facts, an adoptability report, oral submissions and written submissions, the learned judge proceeded on his own motion to find that Crown Wardship with no access should be granted. A trial was not necessary,

held the judge. Judge James converted the parents' request for an adjournment into a summary judgment motion and then summarily disposed of the entire case.

¶ 5 Judge James cited the case of Zaharova v. Kovler [1994] O.J. No. 3880 [see also [1994] O.J. No. 3877 and [1993] O.J. No. 3444] for authority to grant summary judgment in provincial division. In that case, the judge in provincial division found that he did have jurisdiction to grant such a relief but declined to do so. On appeal, Justice Eberle had no difficulty given the exceptional facts, in granting to the grandmother custody of two children whose mother had been murdered by their father. The father had conducted an unsubstantiated vilification campaign against the grandmother from his jail cell. (Gene Colman was counsel for the grandmother in this case.)

¶ 6 Judge James then wrote as follows in his reasons for judgment:

> Must a court, in fact, be condemned helplessly to endure the wasteful unravelling of a trial process whose outcome is a foregone conclusion? Do litigants have the licence to squander weeks of the court's time and other resources of the justice system on a question that has only one inevitable answer? Or is the court's control of its own process sufficiently broad to enable it mercifully to despatch a proceeding when to do so not only serves the ends of justice but the administrative exigencies of the court? And in child protection matters, is there not an overriding imperative to ensure the commencement of permanency planning for children in a timely fashion.

¶ 7 Following Judge James' decision an appeal was launched and in the interim, both parents were convicted of second degree murder. Madam Justice Chapnik heard the appeal in General Division and essentially agreed with the analysis posited by Judge James.

¶ 8 At paragraph 63, Her Honour stated:

> ... in custody matters, and a fortiori child welfare matters, a judge should, if necessary, conduct the hearing in a manner different from ordinary civil litigation and in a manner which could be characterised as more active.

¶ 9 Her Honour had no difficulty with the Provincial Judge instituting a summary judgment on his own. At paragraph 68 she stated:

> In the instant case, the motions judge brought a motion on his own initiative. Initiation of a motion is a purely procedural matter involving the conduct of litigation, and as such falls within the jurisdiction of the Provincial Court to control its own process.

¶ 10 Justice Chapnik also relied on Zaharova v. Kovler, supra, as well as on other cases where proceedings were resolved without a trial. One such case was S.C. v. K.C., [1996] O.J. No. 814, where Madam Justice Pardu is quoted (at paragraph 76):

> It is only in the rarest of circumstances that a trial upon viva voce evidence will not be necessary to determine a disputed question of custody. This is so because the determination of the best interests of the child is a complex, multi-faceted matter governed by section 24 of the Children's Law Reform Act, R.S.O. 1990, c. C-12, and it can be difficult to make findings of fact in the context of conflicting affidavit evidence. There is, however, no reason in principle why summary judgment in a custody case cannot be granted. It is in the best interests of a child to have issues resolved rapidly. Section 26 of the Children's Law Reform Act provides that a custody matter should be heard within six months after commencement of the proceedings. An ongoing custody dispute is generally stressful and difficult for children. There may be claims for custody that cannot survive scrutiny even on a motion for summary judgment, although the power to grant summary judgment in a custody action or to determine the issue on affidavit evidence should be exercised with great caution. A responding party must put their best foot forward in a motion such as this.

¶ 11 Madam Justice Chapnik therefore concluded this part of her reasons, correctly we submit, as follows (at paragraph 79):

> In my view, then, the wording of these sections, in combination with the court's ability to control its own process and the overriding stipulation that the best interests of the children must remain paramount, provides sufficient authority for a judge of the Provincial Court to grant summary judgment in an appropriate case. At the same time, this is not a jurisdiction to be exercised other than in the clearest of cases and with extreme caution. A ruling that a child be made a Crown ward without access is a very serious step. It will have a profound effect on both the parents and the children, and in the vast majority of cases ought only to be made after the hearing of viva voce evidence on what is in the best interests of the children.
>
> [para80] From time to time, however, there will arise a case in which it is wholly apparent at the outset, and on the face of affidavit evidence alone, what the outcome of any trial will be. In my view, in such a circumstance the court should not be required to waste judicial resources and impose the stress and trauma of a trial on the children, when the outcome is a foregone conclusion. As Madam Justice Pardu observed in Cress, supra, it is in the best interests of a child to have issues resolved rapidly. She noted that an ongoing custody dispute is generally stressful and difficult for children, and that there may be claims for custody that cannot survive scrutiny even on a motion for summary judgment. In my opinion those comments are equally applicable in the context of a child protection application. A child protection application, like a custody dispute, involves a consideration of the best interests of the child and a determination of where the responsibility for the care and guidance of the child is best placed. Such a proceeding may well be more stressful for the child than a custody

> dispute. Accordingly, then, in those instances where it is abundantly clear that the matter need not proceed to trial for resolution, the interests of the child are best served by the determination of the issues on a motion for summary judgment.

¶ 12 In what may be a hint to counsel in General Division cases as well, Justice Chapnik noted that the Toronto Family Case Management Rules formed part of a matrix that encouraged summary judgment. See paragraphs 101-103:

> The rules of the Ontario Court (Provincial Division) (Family) "shall be construed liberally so as to secure an inexpensive and expeditious conclusion of every proceeding consistent with a just determination of the proceeding." (Rule 4.)
> [para102] Similarly, the purpose of the Toronto Family Case Management Rules is "to establish a case management system that reduces unnecessary cost and delay in family litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding." (Rule 1.02.)
> [para103] The above legislation gives the judge the power to make orders to carry out the purpose of the rules (Rule 3.01(6)), 3.02(5). In my view, this would include a determination by way of summary judgment.

¶ 13 Justice Chapnik provided "a tentative catalogue of factors which may be relevant in making the determination as to whether circumstances exist sufficient to raise a genuine issue for trial at either stage of the proceedings:

1. the age(s) of the child(ren) and sibling(s);
2. the family background as to residence, the children's health, religion, educational history, and parental, sibling and extended family relationships;
3. the nature and extent of abuse and/or neglect, if any;
4. the nature and extent of past dealings with Children's Aid Societies and/or police authorities;
5. the practicality and viability of any proposed parenting plan;
6. the degree of compliance with legislated time zones, the estimated time for trial, and the likely effect of any delays on the parties;
7. the children's wishes, if appropriate;

8. the sworn testimony of independent third parties, and any transcripts of cross-examination thereon; and

9. the particulars of any adaptability plans for the children."

¶ 14 While she then conceded that summary judgment may only be granted in "the clearest and most exceptional situations", it should be noted that Justice Eberle said as much in Zaharova v. Kovler and we now have a number of cases that have met this test.

¶ 15 Justice Chapnik's decision has been upheld by the Ontario Court of Appeal in [1997] O.J. No. 3041 (Ont. C.A.).

¶ 16 In appropriate cases, counsel should consider employing summary judgment in order to obtain a speedy resolution.

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Uncertainty: Custody, Support, Mobility -- The Plight of Family Law*

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1. GOALS FOR EXAMINATION

(a) Hypothesis

¶ 1 Uncertainty is a known anomaly of family law. In other areas of the law uncertainty would be broadly criticized as inconsistency; appeals would succeed. Individual lack of fairness is tolerated generally in the law to achieve order and consistency. Conversely, in family law, individual justice is the determined aim.

¶ 2 The cases cited will provide practitioners with often contradictory authorities. The proposition embodied in this discussion will assist with the jurisprudential thinking that justifies frequently contradictory views, contributing to the bane of family law: inconsistency.

¶ 3 For example, in child custody the sole consideration is the welfare of the child. Secondary considerations, such as preserving the administration of justice, consistency and fairness to litigants, are all factors that the court may not consider. With respect to property dispositions, decisions as to support, and factors accepted as relevant by judges, the view that these issues are largely discretionary is a part of every flavour of family law. Individual justice is the Holy Grail. Contracts between couples have only partial enforceability and none regarding children and child support. Property rights give way to notions of fairness over houses, inheritance, and pre-marital exemptions. Even the rules of evidence over disclosure, negotiations, and hearsay of children and others, and statements between spouses are different and more relaxed. Is family law rife with inconsistencies, or should that same individual decision-making be described as necessary in order to achieve fairness and individual equity?

(b) The Application of Custody Laws

¶ 4 Each year thousands of Canadian families are guided by custody laws in arranging for the care and upbringing of their children following spousal separation. Of the 78,152 divorce decrees granted by the courts in 1990, 48,525 included custody provisions. [See Note 1 at end of document] Children were affected by divorce in 62 percent of the cases dealt with in that year.

¶ 5 The vast majority of divorce actions are uncontested, where the courts are not called upon to review parenting arrangements reached by the parties. However, the principles enunciated in cases that are litigated are of significance because they are applied as guidelines by family law practitioners in the negotiation of settlements. Thus, while statistically the number of contested custody actions is estimated to be as low as 3 percent, the broad application of custody law principles is extensive. [See Note 2 at end of document.] Research indicates that disputes regarding custody exist in 64 percent of cases, which are then resolved with the aid of professionals and, according to existing precedents, through negotiation, mediation, custodial assessments, and other alternative methods. [See Note 3 at end of document.] Accordingly, due to widespread application of these precedents and the notions they foster, the need to nurture and maintain innovative legal policies within this domain should not be taken for granted.

(c) Analysis

¶ 6 During the past 30 years society has witnessed widespread criticism of the impact of the legal process upon family conflict resolution. Experts in the behavioural and social sciences have condemned the adversarial nature of the justice system as an ineffective means of promoting the constructive resolution of family disputes. [See Note 4 at end of document.] The current criticism within the public and the legal community is that the existing legal system, being based on the winner-loser approach lying at the heart of litigation, fails to properly resolve the conflicts and hardships that arise out of family law disputes. Moreover, litigation is confrontational, exacerbating the already frayed emotions of divorcing spouses.

¶ 7 At the centre of many of these disputes lie problems relating to child custody and access that can often be the most emotional and difficult aspects of family litigation the legal system is called upon to resolve. Personal conflicts and subjective viewpoints between spouses often create this dissension. The courts, faced with these obstacles, are then called upon to serve as referee and adjudicate between the parties.

> Most judges maintain that, perhaps next to a death penalty case, custody battles are the most unpleasant, difficult and unrewarding aspects of the judicial function. Few winners ever emerge. If there is a loser, it is usually the children; and more often than not, both litigants are bitterly disappointed with the result. Since the days of Solomon, there has never been any joy in attempting to "divide the baby". [See Note 5 at end of document.]

Without question, custody arrangements have a profound effect on divorced families. New families suffering from the effects of ongoing hostilities between separated spouses, poverty, the erosion of parent-child relationships, and other hardships created by single parent families may all be symptoms of problems inherently related to custody and access. Such examples are representative of problems which currently exist within the economic and social realities faced by custodial and non-custodial parents. Accordingly, the examination of custody laws, and identifying improvements that could be made to these laws, is a task of significant societal benefit.

¶ 8 The ability of the legal system to promote arrangements under which a child may enjoy a strong relationship with both divorced parents has broad public consequences, due to the prevalence of divorce within our society. Research indicates that preserving parent-child relationships subsequent to divorce is beneficial to both child and parents. Striving to improve custody laws assists divorced spouses in reshaping their lives according to new priorities and circumstances while attempting to preserve the virtues of a child's relationship with both parents. The critical issue is how to resolve family disputes and create a viable separated familial structure while preserving the relationships between parents and their children. [See Note 6 at end of document.] In "Co-operative Parenting after Divorce: A Canadian Perspective," Professor Julien Payne and Brenda Edwards comment:

> The rearing of children, whether during the subsistence of a marriage or on its breakdown, encompasses a wide variety of cooperative relationships. Divorce is intended to sever the marital bond -- not child/parent bonds. [See Note 7 at end of document.]

(d) The Custody Battle

¶ 9 Children raised in a two-parent family structure instinctively desire the continued support, love, and attention of both parents. Indeed, children need greater emotional support from both parents during and after marriage breakdown than they do when they have the stability of a two-parent family with the status quo of home, schools, and an apparently stable household. The damage that can be done to the social development of children through the ordeal of their parents becoming divorced can be devastating and have an exponential effect. [See Note 8 at end of document.]

¶ 10 Protecting children throughout the ordeal of divorce is the paramount concern of the courts when adjudicating parental arrangements. [See Note 9 at end of document.] As stated by Mr. Justice Hinkson of the British Columbia Court of Appeal:

> Hopefully, that situation and the relationship between the [separated] husband and wife will continue and improve because, from the court's point of view, it is the welfare of the children which is the primary concern. [See Note 10 at end of document.]

¶ 11 Unfortunately, the positive spirit needed to resolve custodial problems is often not present at times of marital breakdown. Many divorcing spouses grow to resent, hate and lose respect for one another, especially those involved in contested litigation. It is against this backdrop that divorcing parents must endeavour to control their animosity and consider the desires and interests of their children.

¶ 12 In essence, custody and access problems cannot simply be dealt with as legal issues; they are family issues. They touch the lives of many average Canadians in an individual sense. These are laws of an intrusive nature, which essentially seek to govern the interpersonal relationships of citizens, and accordingly require a higher level of public acceptance if they are to be effective. They will only truly succeed if former spouses are prepared to set aside the personal irritation and frustration they feel towards each other and act rationally with a view to negotiating arrangements consistent with the best interests of their children.

2. THE IMPACT OF UNCERTAINTY

(a) Conceptual and Terminological Uncertainty

¶ 13 Custody laws seek to deal with each child in an individual way. Jurists agree that each case must be decided upon its unique facts and circumstances. [See Note 11 at end of document.] Laws are broadly framed in an attempt to grant courts the degree of flexibility necessary to accommodate the various circumstances of each family. A judge's mandate under the Divorce Act [See Note 12 at end of document.]. is to resolve disputes according to the sole criterion of what is in the best interests of the child. However, the best interests of the child criterion is considered a "legal standard" rather than a "legal rule" since it does not provide clear direction for the resolution of disputes but provides only a general direction to judges to make a qualitative and probable assessment of the situation. [See Note 13 at end of document.]

¶ 14 A consequence of ambiguously designed laws is that they manifest uncertainty, which breeds inconsistent application of the law. The indeterminacy surrounding custody law is not consistent with the judicial process.

¶ 15 Legal systems are most effective when consistently applied. For example, in contract law people govern their affairs based on legal certainty; hence, lack of fairness to an individual litigant may be sacrificed in order to preserve legal consistency. This fosters confidence in the legal system, encouraging citizens to conduct themselves in accordance with the law. Contrast that situation with the inherent uncertainty of the law relating to custody and access under the Divorce Act. As the best interests of the child are the sole issue, then presumably each case, by mandate of Parliament, is to be judged individually. This has a profound effect. The quality of advocacy may, as a result, have an undue impact on decision-making. The personal proclivities of fact-finders also have considerable impact: for example, the conduct of the spouses relevant only insofar as it relates to parenting ability, will be assessed according to the values of the judges. Judges are provided with little guidance on what standards to apply. [See Note 14 at end of

document.] In reviewing lower court decisions in MacGyver v. Richards, Abella J.A. succinctly commented:

> Both judges in this case relied on "the best interests of the child" in coming to diametrically opposite conclusions about how to achieve that result. Both acknowledged the factors they were required by statute to consider, including the child's relationship and ties to each parent, each parent's plan for the child's care, the likely stability of the proposed family units, the child's views, and expert psychological assessment. Having acknowledged the relevance of each of these factors, and having applied them to the same, undisputed facts, the two judges disagreed about the potential impact of those factors and facts on the child. [See Note 15 at end of document.]

¶ 16 No meaningful legislative mandate exists as to whether one parent or another ought to get custody, joint custody, access, or as to the rights, role, responsibilities, or involvement of the custodial parents.

¶ 17 It is this kind of uncertainty that triggers the confusion manifested by Young v. Young [See Note 16 at end of document.] and D. (P.) v. S. (C.) [See Note 17 at end of document.] respecting religious education and the conflict between Carter v. Brooks [See Note 18 at end of document.] and MacGyver v. Richards [See Note 19 at end of document.] respecting mobility rights.

(b) Uncertainty in Terminology

¶ 18 Current terminology used within custody law is indeterminate, confusing, and, combined with the win-lose of litigation, engenders ill-will. The nomenclature merits consideration. Arguably, words such as "custody" and "access" are inappropriate. They fail to recognize that parental responsibility may continue following termination of a marriage. Recent judicial opinion has remarked that terms such as "shared parenting" would more accurately reflect how divorced spouses wish to divide parental duties. [See Note 20 at end of document.] Sachs L.J. of the English Court of Appeal acknowledged the indeterminate language within the family law domain in the case of Hewer v. Bryant by stating:

> In their efforts to assist the court counsel referred to the series of words and phrases appearing in that cascade of legislation which during the past half century has touched upon the welfare and protection of children from many angles. In those statutes one finds scattered, sometimes with and sometimes without definitions, words and phrases such as "care, control, custody, actual custody, legal custody, guardianship, legal guardian and possession." In the end, so far as comprehensibility on these matters is concerned, one finds that this voluminous and well intentioned legislation has created a bureaucrat's paradise and a citizen's nightmare. Each statute was passed with its eyes focused on its own particular set of objects, and for my part I have found but little assistance from their detailed

> terminology . . . . It follows that this court must simply do its best to ascertain the particular meaning of the word "custody" . . . remembering that it has different meanings in other contexts. [See Note 21 at end of document.]

¶ 19 The uncertainty created by the sloppiness of language in the family law area is significant. For example, judges will order joint custody out of kindness to an access parent or parents will agree upon joint custody when each has quite a different view of what those words mean. The same nomenclature will signify a certain bundle of rights and obligations to one judge who uses a particular word and mean something different to a subsequent judge. [See Note 22 at end of document.]

3. STATUTORY REGULATION OF CUSTODY

(a) Jurisdiction over Divorce

¶ 20 The federal Divorce Act, 1986, [See Note 23 at end of document.] which supersedes the Divorce Act of 1968, [See Note 24 at end of document.] is the only statute in Canada under which divorce may be granted. Under section 8 of the Divorce Act, spouses may be granted a divorce upon the sole ground of a "breakdown of their marriage" established by proof of (1) adultery, (2) cruelty, or (3) separation for a minimum of one year preceding the divorce judgment. Statistics indicate that 82.3 percent of all spouses file on the basis of separation. [See Note 25 at end of document.]

(b) Definition of "Court"

¶ 21 Under section 2(1) of the Act, a decree of divorce may only be granted by "a court of competent jurisdiction." These comprise the Supreme, Superior (Quebec), Queen's Bench, General Division (Ontario), or Unified Family Courts in each of the provinces or territories. Only federally appointed justices are vested with the authority to deal with divorce [See Note 26 at end of document.]

(c) Sections 16 and 17 of Divorce Act

¶ 22 The court's authority to resolve questions respecting arrangements for the upbringing of the child in a divorce is articulated in sections 16 and 17 of the Divorce Act. Section 16 of the Act defines the court's authority to grant interim or permanent orders respecting the custody and access of children of a marriage. As set out by section 16(8), a 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, needs and other circumstances of the child"[emphasis added]. Section 17 defines corresponding criteria with respect to the court's jurisdiction to vary, rescind or suspend a "custody order or any provision thereof."

(d) Corollary Relief Jurisdiction

¶ 23 The Divorce Act, under section 16(1), deals with custody of children within the context of divorce proceedings. Custody is an ancillary and derivative claim arising out of the substantive cause of the action, that being divorce itself. [See Note 27 at end of document.] While custody alone may also be resolved under provincial welfare legislation, the federal statute holds a concurrent and paramount jurisdiction over custody when it arises as an ancillary issue to the dissolution of a marriage. [See Note 28 at end of document.] The authority to deal with child custody, child support, and spousal support arises under the Act as "corollary relief" incorporated into divorce with an aim to resolve all issues relating to the dissolution of the marriage within the same forum. [See Note 29 at end of document.] Corollary relief provisions are within the competency of the Parliament's exclusive jurisdiction over "marriage and divorce" under section 91(26) of the Constitution Act, 1867. [See Note 30 at end of document.] Mr. Justice Laskin, then of the Ontario Court of Appeal, confirmed:

> On the view I have taken of the restricted nature of the custody jurisdiction under the Canadian Divorce Act, I hold that its provisions as to custody are valid enactments under the federal power in relation to marriage and divorce. To me, they are bound up with the direct consequences of marriage and its dissolution as much as is alimony and maintenance; and, much more importantly than those it is so bound up by the reason of the physical and human relationships of parents and their children . . . . The very concept of divorce where there are dependent children of the marriage makes the question of their custody a complementary one to divorce itself. [See Note 31 at end of document.]

(e) Interim Custody

¶ 24 Child custody may be granted under the Divorce Act on an interim basis by virtue of section 16(2), which may be invoked once either spouse has filed for divorce. Although an application for divorce may not be given effect on evidence of "separation" until a minimum of one year has elapsed, either spouse is free to launch an action for divorce on the basis of a one-year separation immediately following the couple's separation or on the other grounds allowed, and by doing so establish the right to seek corollary relief under the Act -- for example, for interim custody and access, or spousal and child support.

(f) Practical Significance of Initial Parenting Arrangements

¶ 25 Regardless of whether interim custody is regulated by a provincial court order, superior court order, or separation agreement, the practical effect of a child's initial custodial arrangements is significant. The inclination of the courts in divorce proceedings is not to disturb the status quo when a child is already established in a stable and comfortable environment. [See Note 32 at end of document.] It is thus profoundly important to establish custody or access rights to one's child from the outset of separation.

(g) Appellate Jurisdictions

¶ 26 Reliance upon factual evidence within custodial dispositions has the effect of limiting the scope of appellate review. As a trial court's decision involves an assessment of the depth and character of the relationships which exist between the parents and the child, appellate courts are hesitant to upset the evidentiary determination of the trial division on the basis of the transcript. As stated in the English case of Re B. (T.A.) (An Infant), " . . . so much may turn, consciously or unconsciously, on estimates of character which cannot be made by those who have not seen or heard the parties . . . " [See Note 33 at end of document.] An appeal is not intended to be a rehearing of the merits of a case. A judge's decision is entitled to deference and should not be set aside unless the appellant can show the judge erred in reaching his or her decision. [See Note 34 at end of document.] As a result, appeal courts are unlikely to interfere with the decision of a trial judge in a custody dispute unless it can be shown that the lower court exercised its discretion improperly or took into account an inappropriate factor. The Supreme Court of Canada has stated that a case on appeal does not turn on fact or credibility; the appropriate test is whether the proper legal principles have been applied. [See Note 35 at end of document.] Since a trial judge normally bases a decision on widely enunciated principles, it is difficult to know whether he or she has acted upon some inappropriate principle or factor. [See Note 36 at end of document.]

¶ 27 The effect of this reluctance to intervene on the part of appellate courts is to perpetuate the inconsistent standards used by lower courts, leaving custody laws as indeterminate as ever.

(h) Judicial Discretion over Custody and Access

¶ 28 The Supreme Court of Canada decision of Moge v. Moge [See Note 37 at end of document.] enunciates a fundamental principle regarding the interpretation of statutory provisions within the field of divorce law that is likely to have a profound effect on the social philosophy central to the Canadian justice system. [See Note 38 at end of document.] Moge acknowledges that, subject to the overriding constitutional doctrines, the sovereignty of Parliament is paramount and that judges may explain but cannot override statute law. [See Note 39 at end of document.]

¶ 29 This statement of principle reiterates the view previously put forward in Multiform Manufacturing Co. c. R. [See Note 40 at end of document.] by Lamer C.J., who observed that "when the courts are called upon to interpret a statute, their task is to discover the intention of Parliament."

¶ 30 The Moge decision stands as a reminder to the judiciary that while they may interpret and explain statutorily enacted laws, they may not redefine what has been enacted by the legislature in an attempt to resolve legal or social imperfections. This remains a responsibility of Parliament. However, in the context of interpreting custody laws, concepts such as the best interest of the child, as set out in section 16(8) of the Divorce Act, are so broad as to confer a virtually unfettered discretion on the trial judge. Moge leaves judges walking a fine line between the inherent vagueness of custody law and the directive that courts are not to deviate from the intention of Parliament.

(i) Access Considerations by Impact on Custodial Parent

¶ 31 Even under the rubric of access, where consistency predominates, judges are flirting with a concept that says, in effect, that if the custodial parent is sufficiently unnerved by access, then access might end. The theory is that if the custodial parent is profoundly upset and impacted by access, that must impact unfavourably upon the child.

¶ 32 In Mitchell v. Price, [See Note 41 at end of document.] Baynton J. held that there is a rebuttable presumption that it is in the child's best interests to have access to the non-custodial parent. The mother experienced great anxiety about the father. Regardless of whether the anxiety was rational, it was submitted that it affected the mother's relationship with the child. Evidence showing fault with the father lacked weight. The parents had had a casual relationship and never married. The case goes some distance in focusing on the relationship between the parents and its impact upon the children, rather than on the relationship between the child and the parent. The father got restricted and supervised access on a few occasions each year.

> [T]here are instances in which parental contact is not in the best interest of the child. But this is the exception not the norm. The court will cut off parental contact only when the legal presumption of its benefit has been rebutted.
> As stated previously, it is not up to the parents to prove their worth. That is presumed until the contrary is established. Accordingly, if "onus of proof" is a concept that applies to the determination of the best . . . . [See Note 42 at end of document.]

¶ 33 In M. (B.P.), [See Note 43 at end of document.] the father, who appeared to be obsessed with access, pursued the mother, who was the custodial parent, when she moved to new jobs and attended university. There was evidence of years of harassment, insensitivity, and disruptions, as well as evidence that the father was violent, including evidence of violent behaviour in front of the child. The father made his ex-wife's life miserable. The court held that the child was in a painful situation and suffering from stress. The trial Judge found there was no benefit to the child in continuing access with the father.

¶ 34 In Abdo [See Note 44 at end of document.] the Ontario Court of Appeal dealt with a husband who was "domineering, selfish, argumentative, and at times, a cruel spouse and father." He was found to be unpredictable and uncontrollable. One issue on appeal was whether the trial Judge gave undue consideration to the custodial parent's wish that access be cut off. The Court of Appeal cited Lavery v. Lavery [See Note 45 at end of document.] from Nova Scotia and did not overturn the trial disposition.

¶ 35 Mitchell, Lavery, Abdo, and M. (B.P.) are about the wishes of the custodial parent being a relevant factor in determining the best wishes of the child.

4. TERMINOLOGY

(a) "Child of the Marriage"

¶ 36 Section 2 of the Divorce Act reads:

> (1) In this Act, . . . "child of the marriage" means a child of the two spouses or former spouses who, at the material time, (a) is under the age of sixteen years, or (b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; . . .
> (2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes (a) any child for whom they both stand in the place of parents; and (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

In practice, while possible within the confines of the Divorce Act, custody of a child over 16 years of age will not normally be granted by a court, because a child that mature will be left to determine with whom to reside. The wishes of younger children concerning custodial preferences are also considered by the courts, being accorded weight depending on the age of the child, but only as one of the factors to be taken into account in determining the best interests of the child.

¶ 37 As defined by section 2(2) of the Act, "child of the marriage" is not confined to offspring of the spouses. [See Note 46 at end of document.] Biological parents and persons deemed to be standing in the place of parents may seek custody of a child on or after divorce. The undertaking of the child-rearing responsibilities on the part of a spouse as a stepfather or stepmother establishes the right to seek custody or access, as well as the possibility of future liability for child support. [See Note 47 at end of document.]

(b) Uncertainty Surrounding "Child of the Marriage"

¶ 38 Hoilett J. of the Ontario Court (General Division) recently observed that "[i]t is probably trite to state that the concept of a "child of marriage' is a fluid one, not arbitrarily defined by age," but a conclusion implicit in the definition provided in section 2(1). [See Note 48 at end of document.] Unfortunately, no detailed test is provided under the Act for determining whether a child is a child of the marriage. This ambiguity has inflicted the court system with inconsistent results in divorce judgments.

¶ 39 The standard applied to determine the dependency of a child appears to vary from case to case and jurisdiction to jurisdiction. In Smith v. Smith [See Note 49 at end of document.] the Supreme Court of British Columbia came to the determination that the parties' 20-year-old daughter, who was in good health, not in school, and capable of entering the workforce, would continue to be a "child of the marriage" due to her financial dependence on her mother. The following year, the same Court in Baker v. Baker [See Note 50 at end of document.] found that a daughter could not, in the eyes of the law, be termed a "child of the marriage" since her disability [See Note 51 at end of

document.] would not prevent her from the potential of marrying or working in her own way.

¶ 40 Inconsistencies also exist regarding the status of children who are enrolled in post secondary education. Easton J. in the Newfoundland decision of Snook v. Snook stated that

> a person of 19 years of age attending university should take advantage of all opportunities for employment, student loans, bursaries, etc., and, if as a matter of conscience the parents can contribute so much the better. I have difficulty in placing the legal obligation on the parent [to find that the child is a "child of the marriage" as set out in section 2 of the Divorce Act, S.C. 1986, c. D-4]. [See Note 52 at end of document.]

¶ 41 Conversely, Hrabinsky J. concluded in the Saskatchewan decision of Saunders v. Saunders, which was confirmed in the Court of Appeal:

> Jane is a child of the marriage within the meaning of the [Divorce Act], notwithstanding the fact that she will soon be 21 years of age by reason of the fact that she is capable of benefit from further education which will fit her for an occupation in life. [See Note 53 at end of document.]

¶ 42 In Duncan v. Duncan, Halvorson J. went even further, acknowledging previous decisions opposed to his position and decided to the contrary in any event:

> As well, numerous decisions were cited to illustrate the cogency of the mother's position that support for the son must remain. Among these were: Jackson v. Jackson, [1973] S.C.R. 205 . . . ; Jones v. Jones, [1971] 2 R.F.L. 393 . . . ; Tapson v. Tapson, [1970] 1 O.R. 521 . . . ; Crump v. Crump, [1971] 2 R.F.L. 388 . . . ; Janzen v. Janzen (1981), 21 R.F.L. (2d) 316 . . . ; Strachan v. Strachan (1986), 2 R.F.L. (3d) 316 . . . ; and Saunders v. Saunders (1987), 10 R.F.L. (3d) 437, . . . affirmed [(1988),] 14 R.F.L. (3d) 225. . . . I am not satisfied from the material filed that the son continues to be a "child of the marriage" as contemplated by s. 2(1)(b) in the sense that he is under the charge of one of these parents but unable to withdraw from that charge or to obtain the necessaries of life. [See Note 54 at end of document.]

¶ 43 These cases are only a sample of the many contradictory decisions which exist in reference to this section of the Divorce Act. [See Note 55 at end of document.] The effect of the subjective application of the Act is to undermine its authority within the minds of the public. Moreover, due to such uncertainty, costly litigation is more likely to be required in the resolution of disputes, notwithstanding the judiciary's desire to reduce the amount of contested disputes. Further, many practitioners negotiate settlements based upon the uncertainty in the case law and the lack of clarity under the Divorce Act.

(c) The Term "Custody"

¶ 44 Under the provisions of section 2(1) of the Divorce Act, "custody" includes care, upbringing and any other incident of custody. No further definition characterizing the meaning of custody is provided under the Act. As a result, the meaning of custody remains uncertain, having been given a variety of presumed definitions through judicial interpretation. As has been observed by Gow L.J.S.C.:

> Custody is a word of chameleon qualities. It takes its meaning from surrounding circumstances. . . . Its meaning can range from immediate effective possession and control of the person . . . to control by a parent of a child in the widest possible sense, that is, not only physical but also intellectual, educational, spiritual, moral and financial. [See Note 56 at end of document.]

¶ 45 The term "custody," as canvassed by Sachs L.J. in the English decision of Hewar v. Bryant, [See Note 57 at end of document.] is essentially noted to have two common meanings when used in relation to children. In its widest sense the word is used almost as an equivalent of guardianship, while in its narrow sense it refers to the power to physically control a child's movements. As addressed by Professor Bissett-Johnson and David Day:

> The term "custody" can be used in at least two senses. First, it may refer to which parent has physical care and control of a child. Second, it may be used to indicate which parent has the bundle of legal rights associated with custody; for example, to determine the child's religious or secular upbringing, to approve of medical procedures, or to consent to the adoption, change of name, or marriage of the child. [See Note 58 at end of document.]

¶ 46 The decision of the Manitoba Court of Appeal in Lapointe v. Lapointe [See Note 59 at end of document.] also provides guidance as to which parent has "custody".

> Although the parents in this case agreed on "joint custody", their terminology was inaccurate. In determining who has custody of a child, the incidents of custody must be looked at rather than the language used: see Abbott v. Taylor (1986), 2 R.F.L. (3d) 163 [[1986] 4 W.W.R. 751] (Man. C.A.), Field v. Field, supra. The principle incidents of custody are the ultimate decision-making power and primary care and control. These the mother had. She was agreed upon as the sole custodian. [See Note 60 at end of document.]

(d) The Term "Access"

¶ 47 Even more elusive is the definition of access. Although repeatedly referred to within the Act, no definition is provided for access within the English version of the Act,

while the French version simply provides that "'Access' comporte le droit de visite." [See Note 61 at end of document.] "Access" is, however, qualified under section 16(5) as at least entitling an access parent "the right to make inquiries, and be given information, as to the health, education, and welfare of the child." Access has been deemed to include a right of the non-custodial parent to direct relevant inquiries regarding the child to third parties, such as the child's school principal or doctor. [See Note 62 at end of document.] However, this provision stops short of stipulating that an access parent must be informed or consulted prior to child-related decisions being taken by the custodial parent.

¶ 48 As access is not even defined and custody can mean different bundles of obligations and rights depending upon the judge dealing with the issue, Parliament has created a jurisprudential void. Diverse judges understandably interpret these undefined words quite differently, creating statutorily induced uncertainty.

5. CUSTODY AND ACCESS DISPOSITIONS

(a) Types of Custody

¶ 49 The Divorce Act confers a broad discretionary jurisdiction on the judiciary to make custody and access orders simultaneously or following a decree for divorce. Although a range of possible custody orders exists, sole custody remains the most frequently reached resolution agreed to by the parties or ordered by the courts. Statistics Canada data indicate that in 1990, 27,367 divorces involving custody orders were granted under the Divorce Act. Of the 47,631 children affected, 73.3 percent were awarded to mothers, 12.2 percent to fathers, 14.3 percent to joint custody and fewer than 1 percent to a person other than the mother or father. [See Note 63 at end of document.]

(i) Sole custody

¶ 50 It is generally accepted in Canadian law that, in the absence of directions to the contrary, an order granting "sole custody" to one parent signifies that the custodial parent shall exercise all powers of the legal guardian over the child to the exclusion of the non-custodial parent. [See Note 64 at end of document.] This type of order, sometimes termed a "unitary order," implies that all parental rights are vested in the custodial parent, even though the non-custodial parent may be granted a right of access to the child.

¶ 51 In Taylor v. Taylor, [See Note 65 at end of document.] Chambers J. noted his discomfort with specifically apportioning custody and access, expressing reluctance to grant orders dividing the parental bundles between the parents due to his fear that in cases where some trouble or dispute arises, it may be difficult to determine where one parent's authority ends and the other's begins. He concluded that "There should be no room for uncertainty in a field such as [custody law]." [See Note 66 at end of document.]

¶ 52 However, an access parent is not without recourse when in disagreement with decisions taken that affect the child. He or she retains the right to go to court and have

concerns reviewed by the court, which may qualify the authority of the custodial parents by varying the original custody disposition either under section 17 of the Divorce Act or under the superior court's power of parens patriae.

¶ 53 This regime for resolving disputes regarding the child following divorce, while not inexpensive, allows courts implicitly to grant to the custodial parent the authority to make decisions over the objections of the non-custody parent, in reliance upon the capacity of the latter to "appeal" decisions when necessary. To allow the non-custodial parent the right to directly impede child-related decisions from being carried out, would likely lead to an increased need to have disputes settled by the courts which would not be practical. [See Note 67 at end of document.]

(ii) Joint custody

¶ 54 At one time the rage in the United States, joint custody at its peak was statutorily endorsed by the laws of 34 states. [See Note 68 at end of document.] A corresponding demand for adoption of projoint custody laws never materialized in Canada. While section 16(4) of the Divorce Act grants a court the option to order joint or shared custody between spouses, it falls short of endorsing any presumption in favour of joint custody. [See Note 69 at end of document.]

¶ 55 The term "joint custody" is used to designate three main possibilities in the division of parental rights: (1) joint physical custody; (2) joint legal custody; or (3) a combination of joint physical and legal custody. Joint physical custody refers to the right and responsibility to provide the child with a home and to make day-to-day decisions during the time which the child spends in that parent's direct care. Joint physical custody need not be divided on a 50/50 basis and may alternate on a biweekly, weekly, monthly or so on interval. [See Note 70 at end of document.] Joint legal custody signifies that each parent is to have an equal voice in making long-range decisions regarding the child's upbringing and welfare. [See Note 71 at end of document.]

¶ 56 In practice, joint custody appears not to be the resolution of choice in Canadian courts, currently being implemented in between 12 to 14 percent of all divorce decrees. [See Note 72 at end of document.] Canadian courts remain reluctant to order joint custody over the objections of one of the parties due to the essential need for cooperation in co-parenting arrangements. [See Note 73 at end of document.] However, notwithstanding this commonly held practice, the Saskatchewan Court of Appeal has recently stated that consent need not always be required and granted an appeal imposing joint custody, a further demonstration of the unpredictable nature of custody laws in Canada. [See Note 74 at end of document.]

(iii) Custody held by third parties

¶ 57 While it remains a rare occurrence, sole or joint custody held by a third party is within the scope of section 16(4) of the Divorce Act. Grandparents are most frequently these third parties, although practical reservations exist within society regarding the

upbringing of a child by parental figures of senior years. Often, under such arrangements, joint legal custody or generous access privileges are conferred upon one or both parents, an indication that the courts look to the grandparents to provide the day-to-day stability of physical custody for the child, while seeking to maintain the benefits of contact with the parents. [See Note 75 at end of document.]

(b) Access

¶ 58 Traditionally referred to as "visitation rights," access is the privilege extended to the non-custodial parent to visit and maintain a parental relationship with the child. The purpose of access is to promote a normal parent-child relationship; however, the non-custodial parent is "not [to] change or alter the child's mode of life or . . . interfere in any way with the child's upbringing." [See Note 76 at end of document.] Orders for access are commonly made without specific provisions as to the timing and extent of the access, in an effort to allow the former spouses flexibility to make arrangements suitable to their circumstances. Only about 23 percent of access orders take a structured form, such as specific timetables or conditions regarding access. [See Note 77 at end of document.] A court will normally grant sole custody to one parent and "reasonable access" or "liberal access" to the other parent.

¶ 59 Section 16(8) ("best interest") [See Note 78 at end of document.] of the Divorce Act expressly endorses a child-oriented approach to decisions regarding access, just as with custody, which may subordinate the interests of either parent. [See Note 79 at end of document.] Access, like custody, is granted according to the sole criterion of the best interests of the child. [See Note 80 at end of document.] Section 16(10) ("maximum contact") endorses the benefit for the child of access, but there is nothing automatic about the granting of access to the non-custodial parent. Nonetheless, access is recognized as a benefit to the well-being of children in the vast majority of circumstances and will not be denied unless there are specific reasons presented as to why it should be withheld. [See Note 81 at end of document.] Access is assessed in terms of its long-term benefits for the child. In attempting to define the test used to determine whether to grant access privileges, Matheson J. stated in Michel v. Hanley:

> In Family Law in Canada, Christine Davies, it is suggested, at p. 542, that it is not because of a "right" possessed by a parent that access may be granted if there is no danger to the child in doing so, but because it is perceived that incalculable benefits will accrue to the child from contact with both parents. The benefits were generally described as having more than one parent available to influence the development of the child, and to provide affection, confirm, companionship, and emotional and material support. Viewed in this context, the "right" to access is not absolute, to be denied only when danger to the child is perceived, but to be granted only after assessing the presumed benefits which will accrue to the child upon the exercise of the "right". [See Note 82 at end of document.]

¶ 60 Access is more than merely a right to visit. Exercising access involves a transfer of the "lawful care or charge" of the child from the custodial parent to the non-custodial for the duration of the access period. [See Note 83 at end of document.] With whom the "right of access" lies has in the past been a question of some dispute. Abella J.A. has recently stated:

> The child's best interests must be assessed not from the perspective of the parent seeking to preserve access, but from that of the child entitled to the best environment possible. It is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an adult to be accountable. This by no means eliminates the adult's wishes from the equation; it means that those wishes cannot always be accommodated. It is the child's right to see a parent with whom she does not live, rather than the parent's right to insist on access to that child. That access, its duration, and quality, are regulated according to what is best for the child, rather than what is best for the parent seeking access. [See Note 84 at end of document.] [Emphasis added.]

¶ 61 That observation is consistent with the earlier contention of Wilson J. in reference to the right of child support: "[T]he benefit accrues to the individual whose legal right it is. The duty to support the child is a duty owed to the child not to the other parent." [See Note 85 at end of document.] Similarly, on the issue of the "right of custody," L'Heureux-Dubé J. stated in Young v. Young:

> The power of the custodial parent is not a "right" with independent value which is granted by the courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests. [See Note 86 at end of document.]

¶ 62 From a practical vantage point, regardless of the legal fiction surrounding its definition, access remains a privilege that confers both obligations and authority over the child, even if for only a temporary period.

¶ 63 Surprisingly, access dispositions are not victims of the inherent inconsistencies which bedevil other areas of family law. Judges have, with reasonable consistency, recognized the benefit to children of the companionship and influence of their parents and other interested third parties. Section 16(10) did not mandate the shift from judicial attitudes towards maximum contact but merely enhanced that attitude by the vast majority of judges on the courts.

(c) Restricted Access

¶ 64 Access privileges may be denied, supervised, restricted, or reduced if found to be outside the ambit of the best interests criterion. Such dispositions will be ordered in circumstances where access is seen as a perceived threat to the child, or when necessary

to ensure the safety of the child. Such arrangements may also be ordered under circumstances where an access parent is acting adversely to the authority of the custodial parent, or rarely as a penalty for not honouring support obligations. [See Note 87 at end of document.]

(d) Third Party Access

¶ 65 Third parties may apply for custody or access under section 16(1) of the Divorce Act, but require leave of the court in order to seek such privileges under section 16(3) of the Divorce Act. Grandparents, aunts and uncles, older siblings, or extended family members, perhaps even religious communities, Indian Bands, child care homes or hospitals, or others, may all be interested parties in custody and access dispositions, but, whatever the strength of the relationship with the child, any access right is still granted only in accordance with the best interests of the child. [See Note 88 at end of document.] Nonetheless, the right of non-parents to seek access is recognized as a benefit to children in some circumstances, though the number of third party access orders remains statistically negligible at less than 1 percent of all dispositions. The wishes of the child are likely to have some bearing on such third party dispositions. [See Note 89 at end of document.]

(e) Uncertainty Regarding Custody and Access

¶ 66 Judicial uncertainty exists in relation to custody and access. [See Note 90 at end of document.] As stated above, custody is not a word that has a narrow singular meaning: it may mean care and control of the child, or it may mean all of the rights of guardianship. [See Note 91 at end of document.] Identifying whether custody is merely the right to possession of the child, and thus only one element of guardianship of the person, or whether custody covers a greater range of parental rights over the child, akin to guardianship of the person, has been a primary source of debate and litigation. [See Note 92 at end of document.]

¶ 67 Historically, under common law, the term "guardianship" was a wide concept indicative of a duty and a corresponding legal ability to maintain control and care for a child: conversely, custody, which was an incident of guardianship, referred to the physical possession of a child. [See Note 93 at end of document.] Today, due to the broad definition given to custody under the Act, custody is often used to incorporate both concepts, and is regarded as virtually synonymous with the rights of guardianship. [See Note 94 at end of document.] This wider sense of the term covers a range of duties and powers including the bundle of legal rights associated with the child's care, control, education, health, and religion. [See Note 95 at end of document.]

¶ 68 It is generally recognized that the rights of an access parent presently fall short of the fundamental right to participate actively in decisions affecting the welfare or development of the child, unless that right is specifically bestowed by the court when making the custody order. [See Note 96 at end of document.] As Spencer L.J. stated in Pierce v. Pierce:

> Ex. 1, "the story of Katie", prepared by Mrs. Pierce but reflecting Mr. Pierce's attitudes towards access, and his evidence given before me, all make it abundantly clear that he has not yet grasped the fact that the mother's custody gives her the right to direct Katie's education and upbringing, physical, intellectual, spiritual and moral. His own role through a right of access is that of a very interested observer, giving love and support to Katie in the background and standing by in case the chances of life should ever leave Katie motherless. [See Note 97 at end of document.]

¶ 69 Under the authority of an unqualified sole custody order, a custodial parent assumes full legal guardianship over her child to the exclusion of the access parent. In the words of Mr. Justice Thorson in the Ontario Court of Appeal decision Kruger v. Kruger:

> 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. [See Note 98 at end of document.]

¶ 70 However, the view that the non-custodial parent should be given an increasing role in the upbringing of the children is gaining support within the legal community. Currently in Canada it is unclear to what extent a custodial parent should communicate with an access parent regarding major decisions relating to the welfare of the child. A growing minority of jurists are pressing to amplify the voice of non-custodial parents in decision-making. To achieve this end, they suggest a more even distribution of parental rights between the custodial and non-custodial parent rather than continuing to allocate rights on the conventional "all or nothing" basis. Recent decisions, notably N. v. N. of the British Columbia Court of Appeal, have stressed the importance of the role of the non-custodial parent: "An order awarding custody to one parent does not prevent the non-custodial parent from carrying out his or her responsibilities of playing a meaningful role in the child's life." [See Note 99 at end of document.] "The father in this case is eager to play a responsible and continuing role as a parent. The order that was made does not prevent the father from carrying out his responsibilities to his children as a loving parent." [See Note 100 at end of document.]

¶ 71 According to Professor Berend Hovius, [See Note 101 at end of document.] the Canadian court system is beginning to reassess the traditional roles assigned in law to the custodial parent and the access parent. He contends that, increasingly, courts are accepting the view that parental powers should be more evenly distributed between the parents in order to encourage the child to develop a meaningful relationship with both. A concurrent view is held by Judge Norris Weisman. In his article "On Access after Parental Separation" he presents sociological research which indicates that children who

foster stable, ongoing relations with both parents are more likely to deal efficiently with the adverse effects of parental separation. Judge Weisman concludes that

> it seems that the ideal situation is for children to have a balanced and "normalized" relationship with both parents, despite the separation. The visiting parent should be involved in all relevant aspects of the child's life, including school, friends, leisure, and work time. Children who are not forced to divorce a caring parent are said to do better socially, emotionally, and academically. [See Note 102 at end of document.]

¶ 72 The increasing trend toward more evenly distributed privileges and obligations between the parents is creating growing uncertainty regarding the rights of custodial and non-custodial parents. Moreover, what level of consistency will remain between individual cases if the courts move to a more fluid system of allocating parental rights? Predictably, such a move might cause custody laws to become even more uncertain.

¶ 73 Viewed appropriately, access is a right of the child, not the parent, and courts should examine the issue solely from a child-centred perspective. Cases often use commendable language about the best interests of the child being the paramount or sole consideration, but in reading cases like King v. Low [See Note 103 at end of document.] or Moores v. Feldstein, [See Note 104 at end of document.] one still gets the flavour of parental rights of access being assumed and presumed. In Family Law in Canada, [See Note 105 at end of document.] Christine Davies states that it is not because of a "right" possessed by a parent that access may be granted, but because it is perceived that incalculable benefits will accrue to the child from contact with both parents. However, uncertainty abounds in the area of access, in part because, while judges state there are no parental rights, and in so doing genuflect before the altar of best interests, judicial assumptions about the rights of parents within the access context cloud the thinking of judges.

¶ 74 This submission is evidenced by recent jurisprudential stirrings of concern. Norris Weisman of the Ontario Court of Justice, in "On Access after Parental Separation" "After parental separation," presupposes a relationship with the child often not present with children born to unmarried parents. Even so, the conclusion of the article is that children who did maintain contact with their fathers showed little evidence that the access was either beneficial or harmful to them. The data unanimously held that where parents are embroiled in conflict, and that conflict is ongoing, long-term and sometimes irreversible harm will result to the children. Mr. Justice Weisman writes:

> [T]he court is faced with unpalatable alternative. Denying access to a deserving non-custodial parent rewards a custodial parent for unreasonable behaviour, and it is clearly unfair to both parties. This decision may, however, be the only option fair to the child. If the court opts for fairness between the parties and makes an access order, the child may be put at risk. [See Note 106 at end of document.]

In short, parents' rights are coming ahead of the best interests of the child.

¶ 75 Similarly, in "Comments on the Law of Access" [See Note 107 at end of document.] Graham Berman, a staff psychiatrist with the Hospital for Sick Children in Toronto, writes that the courts sometimes focus wrongly on the perceived right of a parent to have access, to the detriment of the child:

> A number of well-known cases have led to the imposition on a child of visits with a parent who is virtually a stranger. It should be clear from our discussion that this is unlikely to be of benefit to the child. There is no established relationship within which meaningful mutual affection can exist. [See Note 108 at end of document.]

¶ 76 In Child Access and Modern Family Law Jill F. Burrett writes:

> The adversarial system's tradition of protecting the rights of parties to a proceeding at all costs allows litigation over access to become extremely protracted in some instances, so that there is a very real risk that the overriding principle that the welfare of the child (who is not of course a party to the proceedings) is paramount, can not be upheld.
> [T]he potential benefits of access are not always sufficient to warrant the introduction of contact with the parent after a lengthy absence. [See Note 109 at end of document.]

J.G. McLeod talks of presumptive rules as they relate to custody. He writes,

> Natural parents, in raising their children, normally create strong emotional and psychological bonds, . . . however, where the parental bonds are weak between the biological parent and the child, the situation may be otherwise. It is no longer considered as important as it once was that a child be exposed to his heredity whatever the consequences. The dissent of L'Heureux-Dubé J. in Young, I submit, is supportive of the same re-examination of this issue. [See Note 110 at end of document.]

¶ 77 There is no magic in blood. The concept has been recognized as regards adoptions in Racine v. Woods [See Note 111 at end of document.] and King v. Low [See Note 112 at end of document.] but biological relationships seem to be subconsciously awarded significance on applications for access. Blood is insignificant for adoptions. It is insignificant in child-protection cases. Yet the same judges applying the best interests of the child test and ignoring mythical parental rights in child protection cases will, in access cases, do hoop stands to provide access. Scherf v. Tassou is noteworthy:

> The fact remains however that there are circumstances under which the welfare of children is to be best promoted by a denial of access to one parent. Continued access to the father in this case would, in my opinion, exacerbate and continue the turmoil, tension, and anxiety which is already

> extant in the relationship of these parties. Also see Trudell v. Dootlittle, (1984) W.D.F.L. 933 (Abbey Ont. Prov. C.T.); Michael v. Hanley (1988) 12 R.F.L. (3d) 273; Stoud v. Stoud (1984) 4 O.R. (2nd) 567, 18 R.F.L. 237; and Akister v. Rasmussen (1991) 30 R.F.L. (3d) 346. [See Note 113 at end of document.]

¶ 78 Any impact upon the custodial spouse impacts upon the child. Nothing is more important to the child than the strength and capacity of the custodial parent. Based on the impact of access on the custodial spouse, it is appropriate that access be discontinued in certain situations. [See Note 114 at end of document.]

¶ 79 While these authorities address only inferentially a different attitude regarding the children born inside and outside of marital or near-marital relationships, they suggest the genesis of jurisprudential changes which currently manifests itself with indecision, depending upon the place of the judge on the learning curve or levels of enlightenment as defined, rightly or wrongly, by psychiatrists and psychologists. The whole Divorce Act mandate for maximum contact seems at times at variance with the best interests of the child. The presumptive tendencies of North American law, with parliament, judges and two generations of lawyers assuming benefit from access, is in part inconsistent with empirical data from non-legal areas of study, such as Goldstein, Freud and Solnit [See Note 115 at end of document.] and Baris and Garrity. [See Note 116 at end of document.]

(f) Foreign Jurisdictions

¶ 80 Decision-making in custody and access is largely within the discretion of trial judges. Limits on discretion have flowed from the important Wednesbury principles. [See Note 117 at end of document.] In the family law setting, the Wednesbury principles are overly broad:

> For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said to be acting "unreasonably". Similarly, there might be something so absurd that no sensible person could ever dream that it lay within the power of the authority. [See Note 118 at end of document.]

¶ 81 Other common law jurisdictions, most notably England, have asserted the role which a non-custodial parent should play in charting their children's future. In Dipper v. Dipper, [See Note 119 at end of document.] the English Court of Appeal concluded that a custodial parent has no preemptive rights over a non-custodial parent in making decisions regarding a child of their former marriage. The Court recognized that full consultation should occur between the parents for any major decision affecting the child's welfare and that in the event of a disagreement, the courts may be called upon to decide the fate of the child. In the words of Ormrod L.J.:

> It used to be considered that the parent having custody had the right to control the child's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. [See Note 120 at end of document.]

¶ 82 American jurisprudence also favours a more participatory role by both parents in the decision-making process regarding the children. In fact, many states are subject to legislation which stresses the benefits of the child living under joint custody arrangements. [See Note 121 at end of document.]

6. BEST INTERESTS OF THE CHILD

(a) Common Law Definition

¶ 83 It has been recognized that the governing consideration in determining questions regarding custody and access is what stands in the welfare or best interests of the child. As long ago as 1923, Beck J.A., of the Appellate Division of the Supreme Court of Alberta, observed:

> The paramount consideration is the welfare of the children; subsidiary to this and as a means of arriving at the best answer to that question are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children, the proposals of each parent for the maintenance and education of the children; their station and aptitudes and prospects in life; the pecuniary circumstances of the father and the mother -- not for the purpose of giving custody to the parent in the better financial position to maintain and educate the children, but for the purpose of fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration, even, I think, in a case like the present where both parties are of the same religion, for the probabilities as to the one or the other of the parents fulfilling their obligations in this respect ought to be taken into account. Then an order for the custody of some or all of the children having been given to one parent, the question of access by the other must be dealt with. [See Note 122 at end of document.]

¶ 84 Similar criteria apply throughout Canada, the United States and the United Kingdom. In McKee v. McKee, a Canadian appeal to the judicial committee of the Privy Council, it was stated:

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody; see Re Laurin, [1927] 3 D.L.R. 136, 60 O.L.R. 409, following

> Ward v. Laverty, [1925] A.C. 101. So also it is the law of Scotland, see M'Lean v. M'Lean, [1947] S.C. 79, and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield. [See Note 123 at end of document.]

(b) Canadian Divorce Legislation

¶ 85 While the "best interests of the child" has long been the principle applied in judicial decisions across Canada, it was not given explicit statutory recognition until the enactment of the 1986 Divorce Act. [See Note 124 at end of document.] Under the Divorce Act of 1968, section 11(1) prescribed that

> Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make
> . . .
>
> (c) an order providing for the custody, care and upbringing of the children of the marriage.

¶ 86 The Divorce Act of 1986 enacted a new test under which a court, in making an order for 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." [See Note 125 at end of document.] This criterion reflects Parliament's acceptance of prevailing jurisprudential views that a child is a legal entity in his or her own right whose best interests should determine his or her parenting arrangements after divorce. [See Note 126 at end of document.] As enunciated by the Manitoba Court of Appeal: "This represents a shift in emphasis. Whereas the child's best interests were previously paramount, they became as a result of this subsection the only consideration." [See Note 127 at end of document.]

¶ 87 Only three Canadian jurisdictions (Alberta, Nova Scotia, and the Northwest Territories) have not yet statutorily endorsed the best interest standard, utilizing instead the older prescription of making custody and access orders with "regard to the welfare of the infant, the conduct of the parents, and the wishes of the mother and father." [See Note 128 at end of document.] In practice, however, there is no significant difference between the standards applied by judges in all the provinces. All courts apply the same broad standard, that being decisions based upon the best interests of the child. This uniform practice reflects both the wide judicial acceptance of the best interests standard and the significant impact which the existence of the Divorce Act has had on the evolution of a nationally accepted approach in taking child custody decisions. [See Note 129 at end of document.]

¶ 88 It is noteworthy, however, that, on application of the best interests test, the Ontario Court of Appeal has recently acknowledged "that the custodial parent's best interests are inextricably tied to those of the child" within her or his care, thus indicating

an appreciation by the courts of the interconnection between the well-being of a child and of a custodial parent. [See Note 130 at end of document.]

(c) Applicability of the Best Interests Test

¶ 89 The application of the best interests test arises only in the context of a dispute between separated parents. It is not applicable to a child-related dispute when two parents live together, or when they can agree to a decision about the child's care. Abella J.A. confirmed the court's deference to decisions jointly arrived at by the parents when she recently stated:

> Absent of the kind of neglect which triggers child welfare legislation, parents are largely free to make whatever decisions they feel are best for their children. Parents who separate but can agree as to the child's care, are subject to no outside scrutiny of what they determine to be in the child's best interests. [See Note 131 at end of document.]

Thus, for example, a grandparent or other third party could not launch an application to impede a decision taken jointly by the parents on the basis that the court may determine the decision to be inconsistent with the best interests of the child.

(d) Determining the Best Interests of the Child

¶ 90 While section 16(8) of the Divorce Act provides that the best interests of the child are to be determined by reference to the condition, means, needs and other circumstances of the child, little clarification is provided under the Act as to what potential factors may be considered. Reference is thus made to the principles developed by the courts in exercising their authority to ascertain what is meant by "best interest." The leading authority on this issue is the unanimous judgment of the Supreme Court of Canada in King v. Low, [See Note 132 at end of document.] where McIntyre J. formulated the best interests test thus:

> The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. [See Note 133 at end of document.]

¶ 91 It has also been the practice in some cases, most notably T. (K.A.) v. T. (J), [See Note 134 at end of document.] to employ provisions of the Ontario Children's Law Reform Act [See Note 135 at end of document.] ("CLRA") as guidelines in the determination of the best interests of the child under the Divorce Act. Section 24(2) of the CLRA states:

> In determining the best interests of the child for the purpose of an application under this Part in respect of custody or access to a child, a court shall consider all the needs and circumstances of the child including,
> (a) the love, affection and emotional ties between the child and,
> (i) each person entitled to or claiming custody of or access to the child,
> (ii) other members of the child's family who reside with the child, and
> (iii) persons involved in the care and upbringing of the child;
>
> (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;
> (c) the length of time the child has lived in a stable home environment;
> (d) 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 any special needs of the child;
> (e) any plans proposed for the care and upbringing of the child;
> (f) the permanence and stability of the family unit with which it is proposed that the child will live; and
> (g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Alberta and one Saskatchewan case seem slightly at variance with the best interests test, discussing what the Albertans call a "Fitness Test." D. (W.) v. P. (G.), [See Note 136 at end of document.] S. (R.) v. L. (A.) [See Note 137 at end of document.] and Langdon v. York are notable. The Alberta Court of Appeal in D. (W.) v. P. (G.) [See Note 138 at end of document.] stated that the test to be applied in a custody dispute between a natural parent and non-parent is the "fitness test" rather than the best interests test. Kerans J.A. held that so long as there is a "fit" parent willing to take custody of a child, a non-parent, no matter what his or her relationship is to the child or what he or she can provide to the child, cannot contest custody with the parent.

> I understand the rules to be that a stranger to the child -- including a governmental agent -- cannot wrest custody from the lawful guardian of the child without first demonstrating that the lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons. But, in a contest between two recognized guardians, the person who can offer superior parenting will prevail. The first is the "fitness" rule;

> the second is the "best interests" rule.
> My conclusion . . . reaffirms the "fitness" rule, and does not seek to override it. Specifically, I do not say, as is sometimes said, that the "best interests" test is the only test . . .
> Like most aphoristic observations [referring to the best interest test], that is an oversimplification. This can be simply illustrated: on the application of the best interests rule, the supposed rights and feelings of parents and other adults are irrelevant. The question is simply which of the two competing claims to custody can offer the best for the child. Even a fit parent, then, might lose custody to somebody who offers superior parenting. If this rule were applied without restriction, it would mean that every fit parent of every child -- even those lawfully and happily married -- is exposed to the constant risk that some stranger might seek custody of his or her child simply by offering a better deal. . . . Such an extreme statement of the best interest rule has never been accepted in our society.
> . . .
> Of course it is not in the best interests of the child that he be left in the hands of an unfit person. The problem lies in the converse: shall a child always be taken from a fit guardian and put in the hands of one who is more fit? The answer is: not necessarily. [See Note 139 at end of document.]

¶ 92 One would have thought that there was no magic in blood and that biology is not a trump card, but not only does Alberta talk about a fitness test but one also finds the language of a "legal stranger" used often in this line of authorities. D. (W.) v. P. (G.) was decided 13 years ago, but there are also two recent Alberta decisions to the same effect. The S. (R.) v. L. (A.) and Langdon v. York decisions of the Alberta Court of Queen's Bench affirm the fitness test from D. (W.) v. P. (G.). These cases also state that only parents or guardians are entitled to apply for custody of children in most circumstances.

¶ 93 Although the Child Welfare Act was enacted in Alberta following the D. (W.) v. P. (G.) decision and purports to impose the best interests test rather than the fitness test in guardianship disputes, various other Provincial Court decisions also have followed the reasoning of Kerans J.A. Provincial Court Judge Cook-Stanhope addressed this issue in N. (F.G.) v. L. (J.R.), [See Note 140 at end of document.] stating:

> Subsequent to the decision in W.P. v. G.P., a new Child Welfare Act was introduced in Alberta. Section 49 gave equal guardianship jurisdiction to the Provincial Court concurrently with court of Queen's Bench and the Surrogate Court. The circumstances in W.D. v. G.P. had brought into focus the inequities in the law which favoured the birth mother over the birth father in a custody contest, where the parties were not married. The so-called "deeming" jurisdiction was an unusual extension of the powers of an inferior court and has been the subject of a considerable amount of jurisprudence and discussion. The new guardianship jurisdiction in the Child Welfare Act seemed to present a solution for those cases where it

> was felt guardianship status was a legal condition precedent to a simple custody application under the Provincial Court Act. [See Note 141 at end of document.]

Later, Judge Cook-Stanhope stated:

> In my opinion, s. 49 of the Child Welfare Act has changed the legal position stated by Kerans, J.A. in W.P. v. G.P. where he said:
>
> > I understand the rules to be that a stranger to a child, including a governmental agent, can not wrest custody from the lawful guardians of the child without first demonstrating that lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons.
>
> In fact, the case is now that any adult person who has had continuous care of a child for more than 6 months may apply, and even if the continuous care is less than 6 months, such a claimant may indeed "wrest custody from the lawful guardians" provided that claimant satisfies the Court that it is in the best interests of that child to do so. [See Note 142 at end of document.]

¶ 94 In Hanon v. Bolander [See Note 143 at end of document.] Landerkin Prov. J. stated:

> Clearly, since W.D. v. G.P., the laws concerning the putative father generally has improved in two respects.
>
> First, the primary Court to hear guardianship is now the provincial court in light of Madam Justice Veit's decision, B. (W.A.) v. M. (L.M.), (1988) 96 A.R. 45. Private guardianship applications under the Child Welfare Act now invoke the best interest test as opposed to the fitness test in the Court of Queen's Bench under the Domestic Relations Act. [See Note 144 at end of document.]

¶ 95 In Ochapowace First Nation v. A. (V.), [See Note 145 at end of document.] Sherstobitoff J.A., writing for the Court, seemed to be of a similar view regarding rights of parents if they are competent:

> The decision of the chambers judge can also be read as saying that where, as here, there are two parents who are competent, willing, and able to assume all of the responsibilities of legal custody of the children, some extraordinary circumstances must exist before a third party may be found to have a sufficient interest to permit it to challenge a parent for custody. It should be carefully noted here that the competence and the ability of a parent to assume custody of a child refers to exactly what the words mean, and not to the suitability of a parent to sever the best interests of a child as opposed to the suitability of someone else competing for custody. That is a

separate issue governed by s. 8 of the Act

. . .

That brings us to the question of whether any extraordinary circumstances sufficient to permit an application by a third party to displace the parental right to custody exist in this case. [See Note 146 at end of document.]

(e) Assumptions Respecting the Best Interests of the Child

¶ 96 Although the best interests of the child criterion exists as the sole consideration (with the possible exception of Alberta and less so Saskatchewan) in determining custody or access on or after divorce, certain assumptions are commonly present in the judicial resolution of custody matters. Thus, while each disposition is judged upon its individual merits, the courts nonetheless endeavour to maintain a certain level of consistent evaluation in exercising their discretion.

¶ 97 The shift to refocusing on children's rights over parental rights is a development which continues to require definition. McLachlin J. in Young v. Young commented on the historical development of this concept:

> The express rule that matters of custody and access should be resolved in accordance with the "best interests of the child" is of relatively recent origin. Under the common law regime of the 18 and 19th centuries the governing principle in a custody dispute was the rule of near-absolute paternal preference. . . .The rule was defended on pragmatic grounds, including what was thought to be the general interest of children. . . . In truth, the rule probably had more to do with the acceptance of the father's dominant right in all family matters, which in turn found its roots in the notion of the inherent superiority of men over women.
>
> The rule of paternal preference was displaced by a rule establishing in the mother a primary right to custody of a child of tender years. . . . Later still there arose a presumption in many foreign jurisdictions and to a more limited extent in Canada, of maternal preference. . . . This presumption, like the paternal preference rule, was justified on pragmatic grounds; the welfare of the child was the often cited reason for the presumption. So justified, the presumption carried the seeds of its own demise. Courts increasingly looked behind the preference to focus directly upon what was in the child's interest, which was sometimes found to conflict with a maternal preference.
>
> By the 1970s, a number of western countries had accorded statutory recognition to a "best interests" or "welfare of the child" test. Questions relating to the weight to be given these interests, and the proper means of understanding these interest, remained. In England, the child's welfare is stipulated as the "first and paramount" consideration. . . . English jurisprudence indicates that the child's welfare has, in fact, become the sole consideration. . . . In Norway, decisions in respect of custody shall "mainly" (or "primarily") consider the interests of the child. . . . In practice

> it appears that other criteria do not simply function as "tiebreakers" where the interests of the child would be equally well served by either parent, but can, in certain cases, determine the issue. [See Note 147 at end of document.]

McLachlin J. commented on section 16(8) of the Divorce Act:

> First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the Divorce Act requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
> . . .
> I would summarize the effect of the provisions of the Divorce Act on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors. [See Note 148 at end of document.]

McLachlin J. commented on the "best interests of the child" test:

> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do. [See Note 149 at end of document.]

¶ 98 In B. (R.) v. Children's Aid Society of Metropolitan Toronto [See Note 150 at end of document.] the Court dealt with whether a parent had the right to refuse a blood transfusion for his infant child due to religious beliefs and whether this right was protected by section 7 of the Canadian Charter of Rights and Freedoms. Iacobucci and Major JJ. stated:

> The rights enumerated in the Charter are individual rights to which children are clearly entitled in their relationships with the state and all persons -- regardless of their status as strangers, friends, relatives, guardians, or parents.
> . . . The nature of the parent-child relationship is thus not to be determined by the personal desires of the parent, yet rather by the "best

interests" of the child. In Young, supra, at p. 47 L'Heureux-Dubé J. . . . commented that:

> The proposition . . . is one of duty and obligation to the child's best interests. . . . One cannot stress enough that it is from the perspective of the child's interests that these powers and responsibilities must be assessed, as the "rights" of a parent are not a criterion.
>
> The exercise of parental beliefs that grossly invades the "best interests" of the child is not activity protected by the right to "liberty" in s. 7. [See Note 151 at end of document.]

¶ 99 Returning to King v. Low, McIntyre J., commenting on a custody dispute between a natural mother and adoptive parents, stated:

> The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. [See Note 152 at end of document.]

¶ 100 In M. (B.P.) v. M. (B.L.D.E.) [See Note 153 at end of document.] Abella J.A. addressed a father's claim to access:

> But the central figure in the assessment is the dependent child. And that is why, despite the fact that s. 24(2)(g) refers to "the relationship by blood or through an adoption order between the child and each person who is a party to the application," the existence of such a relationship guarantees no rights to custody or access . . .
>
> But while the father submits that, as the father, he is automatically entitled not to be prevented from seeing his child, it is clear, as Wilson J. said in R. (A.N.) v. W. (L.J.), [1983] 2 S.C.R. 173, . . . that "the law no longer treats children as the property of those who gave birth but focuses on what is in their best interests." [See Note 154 at end of document.]

¶ 101 In Racine v. Woods [See Note 155 at end of document.] Wilson J. dealing with parental consent to an adoption and the "best interests" of the child, stated:

> This does not mean, of course, that the child's tie with its natural parents is irrelevant in the making of an order under the section. It is obviously very relevant in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As

> has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations. [See Note 156 at end of document.] [Emphasis added.]

¶ 102 In Phelps v. Andersen [See Note 157 at end of document.] a father applied for sole custody of an 8-year-old girl who had been in the custody of her parental grandmother for more than half of her life. The child's biological mother opposed the father's application and also wanted sole custody of the child. Jones Prov. J. granted custody of the child to the paternal grandmother, stating:

> I am cognizant of the fact that the paramount consideration in my decision must be which custodial disposition would be in the best interests of the child, taking into consideration all the needs and circumstances of this particular child. [See Note 158 at end of document.]

¶ 103 James G. McLeod states: "Thus, the notion that similar considerations drive custody and access cases under the Divorce Act as under provincial legislation has been approved." [See Note 159 at end of document.]

¶ 104 McIntyre J. in King v. Low [See Note 160 at end of document.] reviewed the historical development of the law and its change in focus. In many cases the right to access is now referred to as a right of the child.

¶ 105 It is not the law that a parent seeking custody or access must prove the value to the child of parental contact. This is presumed by the law.

¶ 106 The basic legal principle is stated in section 16(10) of the Divorce Act and also in section 6(5) of the Children's Law Act. This principle was echoed by McIntyre J. in K. (K.) v. L. (G.), where he stated:

> I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighting the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. . . . Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside. [See Note 161 at end of document.]

¶ 107 In Emmel v. Emmel [See Note 162 at end of document.] Gerein J. affirmed a rebuttable presumptive onus of proof regarding access:

> I take it as settled law that in determining whether a parent should have

> access to a child, a court looks only to the best interests of the child. At the same time, absent unusual circumstances, it is desirable that a child have access to the non-custodial parent.

He then went on to quote with approval the comments of Klebuc J. in Sekhri v. Mahli: [See Note 163 at end of document.]

> I agree that the concept of a parent having a fundamental right of access to his or her child as stated in Tremblay is no longer the law in the context of the Divorce Act. At the same time I am satisfied there exists a rebuttable presumption favouring the granting of access unless there is solid evidence confirming a real risk of danger or harm to the child, or not possible long-term benefit to the child from continued contact with the non-custodial parent: H. v. J. (1991), 34 R.F.L. (3d) 361, affirmed (1992), 40 R.F.L. (3d) 90 (Sask. C.A.). I further conclude that the onus of proving the aforementioned exceptions, or otherwise establishing that access would not be in the best interest of the child, rests on the party opposing the granting of access. Where it is alleged that the access sought would be of no present or future benefit to the child, such allegation should be supported by the opinion of a qualified professional who has counselled the child for a sufficient length of time to arrive at an informed opinion. Generally, non-professional opinions should be given little or no probative value except where the unchallenged evidence before the court is such that it could with a substantial degree of certainty arrive at the same opinion. [See Note 164 at end of document.]

(i) Tender years doctrine

¶ 108 First introduced in the Custody of Infants Act, 1839, the "tender years doctrine" survived as a well respected criterion. This rule, that children of tender years belong with their mother, has been said to be "a rule of human sense rather than a rule of law." [See Note 165 at end of document.] However, due to changing roles of women and men within the labour force and in the upbringing of their children, the strength of this doctrine is now in dispute. American courts now tend to refer to a gender-neutral "primary caregiver doctrine," under which the primary parent is assumed to have an advantage in seeking custody of a child of tender years regardless of gender. Under that doctrine, the courts take into consideration the child-rearing roles which each parent discharged prior to custody proceedings as a factor in determining who has the best potential to serve as the custodial parent. As stated by Beck J. in Jordan v. Jordan, "the role of the primary caregiver, without regard to the sex of the parent, is a substantial factor which the trial judge must weigh in adjudicating a custody matter where the child is of tender years." [See Note 166 at end of document.]

¶ 109 The Ontario Court of Appeal has stated that under the tender years doctrine a mother who has been the primary caregiver may be deprived of custody to a young child only where "very compelling reasons" exist. [See Note 167 at end of document.] While

the doctrine has presumably become gender-neutral, the reality is that the bulk of childcare of young children continues to be performed by mothers. This reality has not changed with the statutory recognition in section 20(1) of the Children's Law Reform Act that the father and mother of a child are equally entitled to custody of the child. The tender years doctrine reflects that a young child is more likely to be cared for by the child's mother and, if that is the case, it is in the best interest of the child to remain with the mother unless there are other compelling reasons to uproot the child in the child's best interests. As such, the doctrine tends to serve as an advantage to women more frequently. [See Note 168 at end of document.] I do not find that the learned trial Judge erred in his consideration of the tender years doctrine.

(ii) Preservation of the status quo

¶ 110 Children who appear to be living happily and successfully under their current arrangements are unlikely to be disturbed by the courts in custody proceedings. A court, in an attempt not to aggravate the effects of divorce on a child, will seek to preserve the environment to which the child has become accustomed, whenever possible. While the practical effect of changing a child's place of residence and school has the potential of creating discomfort and social adjustment, the courts primarily seek to preserve relationships over geographical locations. [See Note 169 at end of document.] Preservation of temporary arrangements resulting from interim custody has been relinquished to an argument of little weight in contested trial proceedings. [See Note 170 at end of document.] Although the prospect of a child being shuffled back and forth between parents as a result of a change in custody is unappealing in practice, as it may cause a child confusion and discomfort, the court views the long-term best interests of the child as the primary concern in determining custody. [See Note 171 at end of document.]

(iii) Splitting siblings

¶ 111 The interests of children are generally seen to be best served by avoiding custodial arrangements which split the siblings between the parents. Social interaction between siblings is viewed by the courts as a significant benefit. Certainly, an argument that children be evenly split amongst the parents in order to allow both the opportunity to participate in the role of child-rearing would be unacceptable and inconsistent with the best interests of the children, even under circumstances where the parental abilities of the former spouses are evenly matched. As stated by Granger J. in Hurdle v. Hurdle:

> [A] court . . . should strive to ensure that siblings are raised together in order that they can enjoy the company of their brothers and sisters. The evidence should be extremely compelling before a judge should grant a judgement or order which would separate the children in their formative years. [See Note 172 at end of document.]

(f) Uncertainty Regarding Best Interests

¶ 112 In resolving custody disputes, the differences which exist between families generate great pressure to treat each case on its facts. Indeed, recent criticism of presumptions surrounding custody has encouraged the emergence of the best interests test as the paramount consideration when determining the status of children. [See Note 173 at end of document.] As a result of abandoning such presumptions, custody law today reflects a "complicated and chaotic multiplicity" of factors. [See Note 174 at end of document.] In his article on indeterminacy, University of California Law Professor Bob Mnookin addressed problems regarding the best interests standard in stating:

> The first theme is that the determination of what is "best" or "least detrimental" for a particular child is usually indeterminate and speculative. For most custody cases, existing psychological theories simply do not yield confident predictions of the effects of alternative custody dispositions. Moreover, even if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is "best" or "least detrimental." [See Note 175 at end of document.]

Professor Mnookin's contends as a result that, due to the indeterminacy of what is in the best interests of a particular child, the formulation of rules relating to custody is problematic. Accordingly, good reason exists to question the discretionary powers exercised by trial court justices in the resolution of custody dispute. [See Note 176 at end of document.]

¶ 113 Similar acceptance of the problems surrounding the indeterminacy of best interests has been made by Canadian courts. Abella J.A. of the Ontario Court of Appeal has stated:

> Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests [sic] which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention. [See Note 177 at end of document.]

Nonetheless, this unavoidable fluidity is important in attempting to deliver individual justice under the circumstances of each case.

7. CONDUCT

(a) Past Conduct

¶ 114 Before 1968, the primary ground for divorce in Canada was adultery, often resulting in the "guilty" spouse becoming socially ostracized with resulting custody being awarded to the "innocent" parent. Views relating to custody were equally conservative in nature. Accordingly, stringent restrictions were commonly ordered in granting a parent visitation rights to a child, in an effort to maintain the custodial parent's absolute right over care and control of the child. [See Note 178 at end of document.]

¶ 115 Section 11 of the Divorce Act of 1968 declared that a court, if it thought fit and just to do so, could regard the "conduct of the parties" as a relevant consideration in resolving custody issues. In contrast, as part of the family law reform initiative towards no-fault divorce, section 16(9) of the Divorce Act, 1986 stipulates that "the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent to a child." Consequently, a court may not prejudice the application of a parent attempting to gain custody or access to a child simply on the basis of spousal misbehaviour, such as adultery. Instead, parenting ability and conduct that affects the child are to be judicially considered under the Act. No correlation is presumed to exist between spousal conduct and parenting ability. As stated by de Grandpre J. for the Supreme Court of Canada in Talsky v. Talsky: "I agree with the trial Judge that a wife who is "well nigh impossible' as a wife may nevertheless be a wonderful mother." [See Note 179 at end of document.]

¶ 116 The statutory change concerning conduct is reflective of the attitude of most judges over the last 20 years, many of whom have acknowledged that custody and access dispositions must not be employed as a means of penalizing a parent for spousal misconduct but must instead be resolved by reference to the best interests of the child. [See Note 180 at end of document.]

(b) Parental Conduct

¶ 117 Section 16(9) does not exclude the courts from taking into account the parental roles displayed by each parent during the marriage or following separation. Past or present conduct with respect to the child may be a critical factor in the determination of custody or access dispositions or in imposing conditions, terms, and restrictions upon such orders. The nature and quality of the child's past relationship with each parent is an important consideration. [See Note 181 at end of document.] The court's regard for the role of the primary caregiver is an illustration of this consideration. Furthermore, in determining what custodial placement serves the best interests of the child, the willingness of a prospective custodial parent to facilitate the child's contact with the access spouse will normally be of substantial importance by virtue of section 16(10) (maximum contact) of the Act. [See Note 182 at end of document.]

(c) Allegations of Misconduct in Relation to the Child

¶ 118 Unsubstantiated allegations of relevant past conduct being levelled by one or both parents as a weapon in custody battles appear to be increasingly common. Unfortunately, such allegations of inappropriate conduct within the family environment

can often shift the focus of a court's inquiry away from a decision of what is in the child's best interests towards an investigations of whether the alleged misconduct actually took place. Moreover, the prejudicial effect of such allegations, even if unfounded, may affect the court's ability to make a determination based upon the best interests criterion free of bias. In fact, in an effort to discourage such allegations, it has been held that a parent who makes unsubstantiated allegations of misconduct without substantive evidence cannot complain if the trial judge decides in favour of the other parent on the basis that the latter has not exaggerated his or her case. [See Note 183 at end of document.]

8. MAXIMUM CONTACT PRINCIPLE

(a) Statutory Provision

¶ 119 Subsection 16(1) of the Divorce Act presents the court with an additional consideration when determining custody issues; that being adherence to the maximum contact principle:

> In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. [Emphasis added.]

The principle of maximum contact exists as a matter of public policy, it being the generally accepted view that continued contact with the non-custodial parent will be in the best interests of the child in the majority of cases. This view represents not only the current view of legislators, but is also the accepted view held by social scientists. In her book, entitled Child Custody and Divorce, Susan Maidment notes that

> 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 Note 184 at end of document.]

(b) Practical Effect

¶ 120 Some experts, however, take an opposing view on what constitutes a healthy level of access. They argue that the key factor in a child's well-being is a low level of conflict between his or her parents, stressing that conflict between parents has been identified as a great source of difficulty for both parents and the child. Contact with a non-custodial parent can involve complex emotional feelings which may be unsettling for a child, particularly in situations where animosity persists between parents. [See Note 185 at end of document.] Furthermore, parents may jockey for the child's affection through gifts and unbridled leniency towards discipline of the child. Spoiling a child in a bid to become the preferred parent does not serve the best interests of the child.

¶ 121 Nonetheless, most of the judiciary and the legal community appear to be in agreement with the benefits of maximum contact. In a survey conducted by the Department of Justice as part of the evaluation study on the effects of the Divorce Act, family law practitioners were asked for their opinion on the effects of the maximum contact principle.

> The question was asked, what effect, if any, this principle had on (1) negotiating custody and access arrangements and (2) the disposition of custody and access 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. [See Note 186 at end of document.]

Of those lawyers who believed that the principle had an effect, most indicated that the maximum contact principle either helped ensure generous access through fear that custody might otherwise be denied due to appearing unwilling to facilitate access; or, that clients faced with the prospect of a contested custody battle could be encouraged to act more reasonably in negotiating with the other parent. [See Note 187 at end of document.]

(c) The American Experience

¶ 122 It is noteworthy, however, that many American jurists do not share the same enthusiasm about policies similar to the maximum contact principle. Although most American writing focuses upon joint custody, it having been statutorily endorsed in many states, its effects are comparable to those under the maximum contact principle. The main criticism in the United States is that such provisions may cause undue weight to be given to maximum contact without sufficient regard to the primary criterion of which parent is most able to raise the child in a manner consistent with his or her best interests. In her research on the effects that maximum contact legislation had in California during the 1970s, Professor Lenore Weitzman 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. [See Note 188 at end of document.]

This contrasting view to that of the Canadian law practitioners' survey may serve as a warning on the effects of maximum contact: statutory presumptions in favour of joint custody in the United States and the maximum contact principle in Canada may aid practitioners in the resolution of custodial arrangements, but the long-term consequences of these precepts may be detrimental to both the child and the custodial parent.

¶ 123 The fear that reluctance to agree to generous access may be construed negatively by the courts is especially prevalent amount women trying to avoid contact with abusive husbands. Not surprisingly, women in these situations may be adverse to generous access, particularly when it places them at risk or subject to the control of the abusive non-custodial parent. A further danger is that an abusive parent may use the requirement that the custodial parent facilitate maximum contact as an argument why he or she should be granted sole custody. [See Note 189 at end of document.] One American commentator has stated:

> Parents who believe joint custody is not in their child's best interests will either "agree" to joint custody or "bargain." Few will risk going into court against a parent seeking joint custody. Children suffer either way -- by an unworkable joint custody arrangement or by the custodial parent's "bartering away" of financial resources necessary for the child's support. [See Note 190 at end of document.]

¶ 124 It should be emphasized that while negative aspects of the Canadian policy of maximum contact can be demonstrated through comparison to California's presumption in favour of joint custody, joint custody itself is not encouraged by either legislation or the judiciary in Canada. In recent years the number of joint custody dispositions granted under the Divorce Act has remained at between 12 to 15 percent of all orders. [See Note 191 at end of document.]

9. RELIGIOUS UPBRINGING

¶ 125 The Supreme Court of Canada decisions of Young v. Young [See Note 192 at end of document.] and D. (P.) v. C. (S.) [See Note 193 at end of document.] have initiated a re-examination of the meaning of "custody" and "access" and the elusive concept of the best interests of the child in custody and access proceedings. Both cases centred upon disputes between custodial and non-custodial parents regarding the right of the access parent to include the child in his or her religious beliefs and practices.

(a) Prior to the S.C.C. Decisions

¶ 126 Before Young and D. (P.) v. C. (S.), Canadian courts had generally upheld the notion that a custodial parent had the right to determine the religious upbringing of a child. The courts appeared generally unconcerned with the merits of one religion over another, but sought to ensure that stability and consistency in religious upbringing was provided to the child. The Saskatchewan Court of Appeal has ruled that the courts are not to attempt to dictate religious philosophy to either parent; their role is simply to take into account how the distinct beliefs of each parent would bear upon the well-being of the child and grant custody accordingly. [See Note 194 at end of document.] The New Brunswick Court of Appeal took a complementary position in Fougere v. Fougere [See Note 195 at end of document.] determining the religious rights of the access parent to be of secondary interest to the overall welfare of the child.

¶ 127 However, the decision by the British Columbia Court of Appeal in Young v. Young [See Note 196 at end of document.] brought this traditional view into question by declaring that the courts must apply the common law and statutory provisions, including the Divorce Act, in a manner consistent with the constitutional values espoused in the Charter of Rights and Freedoms. [See Note 197 at end of document.] The Court held that each parent, custodial or non-custodial, has the fundamental freedom of religion under section 2(a) of the Charter, to adopt and to follow whatever religious belief he or she chooses and to teach and disseminate his or her beliefs to their children both during and following the marriage. Accordingly, the Court of Appeal concluded, by a majority decision, that Mr. Young's fundamental freedom of religion under section 2(a) of the Charter was not "limited by the powers bestowed upon the custodial mother." [See Note 198 at end of document.]

(b) Decisions at the S.C.C.

¶ 128 On appeal to the Supreme Court of Canada, Young v. Young and D. (P.) v. S. (C.) produced conflicting outcomes, leaving the law in this area confused and uncertain. In Young the majority of the Judges rejected the validity of a trial judge's order restricting religious activities during access. Conversely, in D. (P.) v. C. (S.) the majority refused to overturn a similar order restricting access.

(i) Charter rights

¶ 129 All seven Judges agreed that if the Charter does apply to custody and access disputes, the criterion of the best interests of the child does not contravene it. Madam Justice McLachlin's view in Young has been summarized as follows:

> Religious expression not in the best interests of the child is not protected by the Charter because the guarantee of freedom of religion is not absolute and does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct not in the best interests of the child, even absent of the risk of harm, amounts to an "injury" or intrusion on the rights of others and is clearly not protected by this Charter guarantee. [See Note 199 at end of document.]

McLachlin J. reiterated her view in D. (P.). c. S. (C.):

> Articles 653 and 654 C.C.Q. and art. 30 C.C.L.C. affirm the "best interests of the child" standard -- the same started as in the Divorce Act, R.S.C., 1985, c. 3 (2nd Suppl.), ss. 16(8), 16(10) and 17(5). . . . The standard, and the articles that set it forth, are constitutional, and infringe no entrenched rights. [See Note 200 at end of document.]

However, the Court was not in agreement on the fundamental question of whether the Charter applies to parental custody and access disputes. Madam Justice L'Heureux-Dubé, in her majority opinion in D. (P.) v. C. (S.) and her minority opinion in Young, espoused

a return to the traditional position that a custodial parent should have sole decision-making over the religious upbringing of the children within his or her care to the exclusion of all other parties, including the access parent. This is consistent with the contemporary view taken by Canadian courts, namely that religious education is one of the elements of custody over which the custodial parent has exclusive control in the absence of any agreement or court order to the contrary. [See Note 201 at end of document.] This also represents the widely accepted view of other common law jurisdictions:

> [I]n the absence of sound countervailing reasons the decision should rest with the party who has legal custody of the child . . . There could not be other than discord engendered in the respondent's [custodial parent's] household if she were compelled to acquiesce in the child committed to her care being brought up in a faith to which she profoundly objects. [See Note 202 at end of document.]

L'Heureux-Dubé J. further concluded the Charter is inapplicable to private disputes referred to the courts. Its purpose is to protect the individual from the coercive power of the state, and provide a mechanism of review for persons who find themselves unjustly burdened or affected by the actions of government. She contended that the Charter is not intended to regulate the affairs of private citizens.

¶ 130 L'Heureux-Dubé J. also opined that section 32 does not include the judiciary as a level of government covered by the scope of the Charter, and therefore judicial orders respecting private disputes could not be covered by the Charter. [See Note 203 at end of document.] Section 32 dictates that the Charter applies to governments and legislatures. [See Note 204 at end of document.]

> [T]he Charter does not apply to private disputes between parents in a family context . . . We are dealing here with the judiciary, a separate branch of government within the meaning of s. 32 of the Charter. The Charter, accordingly, will not apply here to the order of a court in a family matter. [See Note 205 at end of document.]

(ii) Best interests criterion

¶ 131 The more difficult question with which the Court struggled was not whether restricting "religious access" infringed an access parent's religious rights under the Charter, but how the term "best interests of the child" should be defined in such disputes. In his review of these two decisions, practitioner John Syrtash credits diverging opinions on this point as the source of the opposing results:

> In particular, the Judges were polarized into three different camps. Two of the camps gave divergent and conflicting explanations of what the term "best interests" means in the circumstances under which religious rights should be curtailed. I am convinced that the third camp, comprising of Mr.

> Justice Cory and Mr. Justice Iacobucci "switched sides" between the two camps, even though the facts of the cases, in my opinion, were not so dissimilar as to have lead to a different result. It is my thesis that the ambivalence of these two Judges on this critical issue has now led to a situation where the lower courts, family law lawyers and their clients have no consistent guidelines on how to approach such disputes. [See Note 206 at end of document.]

The notable result of his split is that it leaves the parameters of custody and access even more uncertain than before these decisions.

10. MOBILITY RIGHTS

¶ 132 A second domain of custody law receiving current attention is that of the custodial parent's mobility rights. Mobility rights regulate a parent's freedom to relocate to a new community with the child of his or her former marriage. Courts may take exception to such an action, as it is likely to adversely affect a child's ability to exercise regular and frequent access with the non-custodial parent. And thus the issue becomes what is in the best interests of the child weighing the advantages and motivation for the move against the disadvantages of lost benefits of access.

¶ 133 These opposing principles, freedom of movement versus maximum contact, have caused inconsistencies in how the courts arrive at decisions regarding the mobility of a child from a divorced family. Some judges look favourably on the benefits of mobility; others see the preservation of a good relationship with both parents as paramount, in view of the access interests of the child. As a consequence, there is a critical level of uncertainty pertaining to what standards must be achieved in order to succeed in convincing a court that a proposed move is a benefit or hardship to the child.

> 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 for an unreasonable purpose.
> . . .
> An alternative view 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. [See Note 207 at end of document.]

¶ 134 Several important judgments on this topic have recently been handed down by the judiciary, including three by the Supreme Court of Canada [See Note 208 at end of document.] and two by the Ontario Court of Appeal. [See Note 209 at end of document.]

(a) Statutory Provisions

¶ 135 There is no specific statutory guidance in the Divorce Act or provincial legislation respecting a parent's right to move with his or her child to a new community. However, the following subsections are the usual focus of argument in mobility cases:

> 16.(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to the child of the change, the time at which the change will be made and the new place of residence of the child.
>
> (8) In making an order under this section, the court 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.
>
> . . .
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

(b) Contextual Setting

¶ 136 Current trends in our society also recognize the importance of freedom on mobility. Within a global society, but also across a land as diverse as Canada, the need to be mobile in order to gain advancement is common. Many are faced with the need to be mobile in order to succeed both in their careers and personal lives. The right to mobility is guaranteed by section 6 of the Charter and represents a concern for single, married, and divorced persons.

¶ 137 Contemporary psychological and legal opinion asserts that it is desirable for a child of divorced parents to maintain a strong continuing relationship with both the custodial and non-custodial parent promoted through generous contact with both parents. [See Note 210 at end of document.] Further, most research contends that frequent brief contact is better for the child than infrequent long contact; and that the regular presence of both parents leavens the influence of the other to be reasonable in the upbringing of the child. Belief in this concept is so widely acknowledged that it has received formal recognition under the maximum contact principle enunciated in section 16(10) of the Divorce Act.

¶ 138 It is noteworthy that a non-custodial parent has never been impeded by the courts from relocating to a new community regardless of the motivation. Accordingly, under what circumstances may a court restrict a custodial parent from relocating in a bona fide effort towards self-advancement.

(c) Previous Decisions

¶ 139 Litigation respecting mobility is far from a new issue. In 1884, in one of the first actions over the competing rights of custodial and non-custodial parents, the English Court of Appeal was called upon to resolve a dispute in Hunt v. Hunt between a mother with a right of access and a custodial father, a military officer, who had been given a posting in Egypt. [See Note 211 at end of document.] In finding in favour of the father's right to move, Fry L.J. stated:

> The deed appears to be only to give the wife a right of access to [the children] where they may happen to be, and to hold that it obliges the husband to keep the children in such a place that she can conveniently have access to them, would create formidable difficulties, for how could it be determined what was the limit to the places to which the husband might take them. [See Note 212 at end of document.]

The sole element which their Lordships could envisage as a bar to the right of mobility would be if the custodial parent were acting unreasonably or with the ulterior motive of defeating access, which were not the circumstances in the case. The Hunt decision was subsequently followed not only in England but also in Canada. [See Note 213 at end of document.] Ninety years later, the Ontario Court of Appeal came to a conclusion consistent with Hunt in Wright v. Wright. [See Note 214 at end of document.] There, in granting a custodial mother the right to move with her children from Ontario to Alberta, Mr. Justice Evans stated:

> The applicable law may be summarized as follows: Absenting all consideration of unreasonableness, which, in the circumstances of this case is not a factor, the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of such specific terms with respect to access as would clearly indicate that the parties must have intended that the children remain in close proximity if the specified right of access provided in the agreement was to be an effective right. [See Note 215 at end of document.]

¶ 140 Subsequent Ontario cases, most notably Field v. Field [See Note 216 at end of document.] and Landry v. Lavers, [See Note 217 at end of document.] also rendered judgments in favour of custodial mobility. In the Field decision the Judge made a significant declaration not dealt with in previous cases: the "best interests of the child," in his opinion, were served by allowing the move with the custodial parent. Decisions until that time had made no reference to the best interests principle, which, although not embodied in statutory form at that time, was the paramount common law principle for deciding custody and access disputes.

(d) A Return to Best Interests

¶ 141 The Supreme Court in the foregoing three cases talked about best interests but did little to flesh out the concept. Questions regarding what stands in the best interests of the child remain the concern of most adjudications respecting mobility rights. On this issue, the New Jersey case of D'Onofrio v. D'Onofrio stated:

> [C]hildren, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation by the non-custodial parent must be considered. [See Note 218 at end of document.]

¶ 142 The view that a child's best interests were served by allowing a new family to develop and improve was followed in Canada by Korpesho v. Korpesho:

> The new unit must be allowed to live its life as freely as possible, even to the extent of moving out of Winnipeg and out of Manitoba in order for the new husband to secure his monthly income. It is certainly in the interests of the child that his new father have a secured income, rather than to force the new father to seek new employment or to apply for unemployment insurance or social assistance. It is not in the interests of the child that he be returned to his natural father since the prior contested hearing decided just the opposite, namely, that custody should be placed in the hands of the mother.
>
> The new couple must be allowed to build a new life around the new husband and his employment. In order to do so, with as little economic or other disruption as possible, it must have the necessary mobility certainly within Canada. If the couple is to have mobility the child must follow his new parents. [See Note 219 at end of document.]

¶ 143 As enunciated in these decisions, the assessment of the best interests of the child is conducted from a wide perspective, taking into account the economic and psychological health of the new family unit as it impacts on the best interests of the child. A proposed move, under challenge from an access parent, also may be scrutinized under evidence of mala fides intentions to defeat access rights by relocation. As no statutory provisions exist relating to custodial mobility, how to evaluate such evidence and who carries the onus of proving or disproving the merits of a move remain questions on which case law is divided.

¶ 144 In Appleby v. Appleby (De Martin), [See Note 220 at end of document.] the mother with interim custody wished to move to California from Ontario for better employment opportunities. Although the mother's desire to move was found not calculated to deny access to the father, the Court denied her application. The children were well settled and well adjusted in Ontario and California offered no support network

of relatives or friends. The Court noted the uncertainty of deciding each case on individual facts and refused the move.

> No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts in which way are the best interest of the children met. While I sympathize with the mother and her sincere desire and motives for moving to California, particularly given the difficulty she has experienced with the receipt of the child support, however, it is I suggest even to her clear that the children's father, notwithstanding, has been a concerned and caring parent and one who enjoys a close bond with his children. And thus in my view, considering all factors, including the provisions of s. 16 of the Divorce Act, under which provisions this decision must be taken, I cannot conclude a move to California is in the children's best interests and direct, until further order that the children be required to have their permanent place of residence with this mother in the city of Mississauga. [See Note 221 at end of document.]

¶ 145 In Johnson v. Johnson [See Note 222 at end of document.] the mother, who had de facto custody, wished to move to Calgary with the 5-year-old son. The father had an extremely close relationship with the child and argued that if the move were allowed, the child's contact with his Native heritage would be lost. The court determined that existing case law had been decided under the previous Divorce Act (1970) and noted that under the new Divorce Act (1985) the best interests of the child were not just a "paramount" consideration but the only consideration. The Court went on to conclude that the child's best interests required frequent contact with his father and so declined to allow the mother's move even though it acknowledged that such an order restricted a person's right to move wherever he or she pleased.

¶ 146 In T. (K.A.) v. T. (J.) [See Note 223 at end of document.] the mother wished to move with the children from Ontario to British Columbia. The Court followed the reasoning in Johnson, stating that the only consideration was to be the best interests of the children. It held that the present state of the law did not require special circumstances before a court could impose limitation on either a custodial or an access parent and concluded that it was not discriminatory against custodial parents for the court to determine what was in the best interests of the children. The only requirement is that the court satisfy itself that any order will operate in the children's best interests, taking into account the "conditions, means, needs and other circumstances" of the child, including the child's right to have as much contact with both parents as possible.

¶ 147 The Ontario Court of Appeal's 1990 decision in Carter v. Brooks [See Note 224 at end of document.] renewed uncertainty regarding such questions. This case centred around a custodial mother and her new husband's proposal to move to British Columbia in order that the husband might pursue (in the words of the trial Judge) "a sound, legitimate business opportunity with the potential remuneration for him beyond that

which he currently enjoys in what is as secure as any employment can be, here, in the Brantford area." [See Note 225 at end of document.] The appeal Court upheld the trial Judge's decision to restrict the mobility of the child on the basis that such a move was inconsistent with the child's best interests. The appellate Court also asserted that the best interests criterion was the sole consideration regarding mobility, and that this principle was not to be applied based upon a mechanical set of rules. In delivering his judgment, Morden A.C.J.O. stated:

> As far as the state of the law is concerned, the proper course now [is] to make it clear that the only principle that governs is that of the best interests of the child and that it does not assist in applying this principle to rely upon a mechanical proposition such as that quoted in Landry which includes the expression "the right to remove" (emphasis added). This is not to say that a parent who has custody may not have important interests bearing on the best interests of the child which are entitled to considerable respect in the resolution of issues related to asserted access rights of the other parent. . . . I think that the preferable approach in the application of the standard is for the court to weigh and balance the factors which are relevant and the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of the parties would be unsuccessful unless he or she satisfies a specified burden of proof. This overemphasizes the adversary nature of the proceeding and depreciates the court's parens patriae responsibility. Both parents should bear an evidential burden. At the end of the process the court should arrive at a determinate conclusion on the result which better accords with the best interest of the child. If this is impossible then the result must necessarily be in accordance with the legal status quo on the issue to be decided. [See Note 226 at end of document.]

¶ 148 Factors that the Court identified for possible consideration regarding mobility included (1) the existence of a custody decision, by court order or by agreement; (2) the nature of the relationship between the child and the access parent; (3) the reason for the move; (4) the distance of the move; and (5) the views of the child.

¶ 149 The Carter decision met with substantial criticism within the legal community. In his synopsis of the effects of the judgment Professor James McLeod stated:

> The Carter case provides arguments both to those who wish removal to be easier and to those who wish it to be more difficult. When all is said and done, it is questionable whether Carter v. Brooks advances or changes the law in substance on the point. . . . Is seems clear that Morden A.C.J.O. is uncomfortable with handling custody in the adversarial setting. He envisages litigation where neither parent or both parents have the onus of establishing what is in the best interests of the child. With respect, this seems unrealistic. The fact is, there must be a starting point. [See Note 227

at end of document.]

¶ 150 The Ontario Court of Appeal subsequently revisited this position in MacGyver v. Richards. [See Note 228 at end of document.] By a majority judgment, the Court concluded that in determining the best interests of the child, courts should show deference to the parent with whom custody of the child has been entrusted:

> That is the very responsibility a custody order imposes on a parent, and it obliges -- and entitles -- the parent to exercise judgments which range from the trivial to the dramatic . . .
> . . . [T]he court should be overwhelmingly respectful of the decision-making capacity of the person in whom the court or the other parent has entrusted primary responsibility for the child. [See Note 229 at end of document.]

In essence, this case enunciates a presumption in favour of the custodial parent where disputes arise.

¶ 151 The view expressed in MacGyver was subsequently followed in Lapointe v. Lapointe [See Note 230 at end of document.] by the Manitoba Court of Appeal. There, in upholding the custodial parent's right to relocate with the child, the Court prescribed a six-point test by which the rights of the custodial parent may be judged. It includes an onus placed upon the non-custodial parent to demonstrate the move to be unworthy where the custodial parent holds an unfettered right of custody. Conversely, where mobility is restricted under the custody order, responsibility to justify the move then falls upon the custodial parent. [See Note 231 at end of document.] The Court also espoused the view that the decisions of custodial parents should be given significant weight.

> In all but unusual cases, the custodial parent is in a better position than a judge to decide what is in the child's best interests. A judge can scrutinize the decision, ensure that it is reasonable and even say, when clearly shown, that the custodial parent's decision is not in fact in the child's best interests, but initially it is the person entrusted with the responsibility of bringing up the child who probably knows best. [See Note 232 at end of document.]

¶ 152 Appellate decisions on mobility have been rendered in Ontario, Quebec, Manitoba, and Saskatchewan.

¶ 153 Jones. v. Jaworski [See Note 233 at end of document.] is the leading case in Alberta dealing with the removal of children from the jurisdiction. In that case, the parties had a joint custody agreement, the terms of which were incorporated into the decree nisi. Pursuant to the agreement, the children were to have their ordinary residence with the mother and the father's access was specified. Without notice to the father, the mother unilaterally moved the children to Ontario and the father sought their return. The Court held that the onus of proving that the move was in the best interests of the children was with the mother because she had initiated the change. The Court held that there was no

evidence that the move was in the children's best interests and thereby ordered that if the mother decided to remain in Ontario the children were to live with their father. If she decided to remain in Alberta, there was no change in circumstances sufficient to vary the existing custody order. In that case, the Court was not prepared to trade a certain situation for an uncertain one.

¶ 154 Veit J. has rendered two decisions that bear on the issue. In B. (C.B.) v. B. (M.J.) [See Note 234 at end of document.] a mother was restrained from moving to British Columbia with the children on the basis that the departure from Alberta would make it impossible to maintain a relationship between the children and their father and there was no "over-arching benefit" to the children from this interference in the parental relationship. On the same day, Veit J. rendered a decision in H. (J.M.) v. C. (M.J.) [See Note 235 at end of document.] restraining a father with primary residence in a joint custody situation from moving to Ontario, where he had been transferred by his employer, the R.C.M.P. Madam Justice Veit seemed to put weight on the fact that the parties had joint custody in that she noted the mother was not merely "an access parent." She went on to indicate that had there been a sole custody order, greater weight might have been given to the custodial parent's decision about where to live. She found that the father's reasons for leaving the jurisdiction were valid in relation to his career but because there was another viable option (custody to the mother) and because the departure would interfere with the relationship between the children and their mother, the children should not be allowed to leave the jurisdiction.

¶ 155 In Tucker v. Tucker [See Note 236 at end of document.] a mother who had entered into a "shared parenting agreement" with the child's father lost custody when she evidenced an intention to move to Vancouver from Calgary. The agreement contained a clause that provided neither parent would change residence from Calgary without the written consent of the other or an order of the court and an acknowledgment that it was in the child's best interest to have both parents residing in the same city. It was the evidence of the assessor that it was in the child's best interests to remain in Calgary and that there was no "value added" for him to move to Vancouver with his mother. The Court stated that the greater the change proposed, the stronger should be the evidence required of the moving parent to prove an absence of detriment to the child. The moving parent must prove that the child's needs dictate a change. If all else is equal, it cannot be in any child's best interests to substitute an uncertain situation for a certain one.

¶ 156 In a decision of Mr. Justice Dea in Petrie v. Petrie [See Note 237 at end of document.] the mother of an infant with sole custody was ordered to return the child to Alberta from British Columbia, where she had moved without notice to the father to take up residence with a new partner. Justice Dea determined that the move was not in the best interests of the child. While recognizing that the relocation might be in the interest of the mother, he relied on section 17(5) of the Divorce Act, stating that the issue to be determined is whether or not the changes are in the best interest of the child. He held that the relocation isolated the child from his father and made contact with extended family members more difficult, and noted the practical difficulties of the father in exercising access.

¶ 157 MacGyver is also important on uncertainty per se:

> Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention.
> . . .
> This argues, it seems to me, for particular sensitivity and a presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody. The judicial perspective should acknowledge the overwhelming relentless nature of the custodial responsibility and respect its day-to-day demands.
> . . .
> [T]he custodial parent must be understood as bearing a disproportionate amount of responsibility. The reality and constancy of that responsibility cannot be said to be the same as the responsibilities imposed on the parent who exercises access and sees the child intermittently. During those days or hours when parents without custody are not with the child, they are largely free to conduct their lives in any way they choose. The same cannot be said for parents with custody, most of whose decisions and choices are restricted by their role as the only adult legally responsible for the child.
> . . .
> Custody is an enormous undertaking which ought to be pre-eminently recognized by the courts in deciding disputed issues incidental to that custody, including mobility. The right or wish to see a child every weekend or two may be of genuine benefit to a child; but it cannot begin to approach the benefit to a child of someone who takes care of him or her every day. The scales used to weigh a child's best interests are not evenly balanced between two parents when one is an occasional and the other a constant presence. They are both, usually, beneficial. But, prima facie, one is demonstrably more beneficial than the other. As La Forest J. stated in Thomson v. Thomson [1994] 3 S.C.R. 551 at p. 589, 173 N.R. 83 at p. 126:
>
> > The right of access is, of course, important but . . . it was not intended to be given the same level of protection . . . as custody. [See Note 238 at end of document.]

¶ 158 In Green v. Green [See Note 239 at end of document.] the Court granted the wife custody notwithstanding that her choice of employment took her 500 miles away from the husband's residence.

¶ 159 In Yuzak v. Friske [See Note 240 at end of document.] the Court found that the mother had primarily cared for schoolchildren. The mother was granted custody of the children and allowed to take the children overseas for 2 years while she worked.

¶ 160 In Catellier v. Catellier [See Note 241 at end of document.] the father remained in the matrimonial home and sought custody. The Court found that the mother had been the primary caregiver for the children prior to the separation. The mother was awarded custody. The Court held that it is more important to recognize the children's attachment to people than to places or surroundings.

¶ 161 Finally, in Re Laverty [See Note 242 at end of document.] three children, the eldest with Down Syndrome, were all moved from Saskatoon to Toronto to be with their mother. The Court implicitly found that the status quo of relationships and caregivers was more important than the status quo of residence.

(e) S.C.C.: Gordon v. Goertz, P. (M.) v. B. (L.G.) and W. (V.) v. S. (D.)

¶ 162 W. (V.) v. S. (D.) [See Note 243 at end of document.] adds little to Goertz, but what the V.W. decision does not say is of some consequence. It does not find fault with the father, as the custodial parent, moving from the United States to Quebec. The case also does not address the correlation of the passage of time to the best interests of the child. The litigation in the United States concluded in the 1980s and concluded in Canada in the 1990s at the trial level, following a motion in the Superior court of Quebec filed on May 6, 1991.

¶ 163 Uncertainty, which is both endemic and understandable in the matrimonial field, is easily demonstrated by the three recent Supreme Court cases on mobility rights. The cases are not inconsistent. However, they do not accomplish the impossible task of establishing meaningful rules in this area of the law.

¶ 164 In Goertz [See Note 244 at end of document.] the mother with custody intended to move to Australia to study orthodontics. The father applied for custody of the child or alternatively an order restraining the mother from moving from Saskatoon. The Judge hearing the application to change custody relied on the finding of fact by the first Judge that the mother was the proper person to have custody and allowed the mother to move to Australia, granting the father liberal access but to be exercised only in Australia. The Saskatchewan Court of Appel upheld the order. The Supreme Court allowed the appeal in part by removing the restriction by which access might only be exercised in Australia, holding that an application to vary cannot serve as an indirect route of the initial custody order. The Court held that there was a fresh inquiry into the best interests of the child though each case turns on its own unique circumstances. The new location of the child must be weighed against the continuation of contact with the access parent and the "maximum contact" principle from sections 16(10) and 17(9) of the Divorce Act is mandatory but not absolute. La Forest and L'Heureux-Dubé JJ. held that the notion of custody encompasses the right to choose the child's place of residence.

¶ 165 The decision is a strong statement for the rights of the custodial parent. The decision does not even include an analysis of the reason for the move, although presumably a move based on caprice or a determination to minimize access might have been dealt with differently.

> All too often, such applications have descended into inquires into the custodial parent's reason or motive for moving.
> . . . Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. . . . However, absent a connection to parenting ability, the custodial parent's reasons for moving should not enter into the inquiry. [See Note 245 at end of document.]
> The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest. [See Note 246 at end of document.]

¶ 166 McLachlin J. analyzed the arguments supporting a presumption in favour of the custodial parent resulting from relocation and concluded that there is no such presumption and thus no burden of proof on either parent once the initial burden of demonstrating a change of circumstances has been satisfied. [See Note 247 at end of document.]

> Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case. . . . In the end, the importance of the child remaining with the parent in whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all of the circumstances, old as well as new? [See Note 248 at end of document.]

¶ 167 L'Heureux-Dubé and La Forest JJ. however, came close to holding that the custodial parent has a right to determine the child's place of residence:

> This construction is consistent with the presumptive "right" of a parent entitled to custody to change the residence of his or her minor children, unless such removal would result from "prejudice" to their "rights or welfare." The dispositive issue is, accordingly, not whether relocating is itself "essential or expedient" either for the welfare of the custodial parent or the child, but whether a change in custody is "essential or expedient for the welfare of the child." [See Note 249 at end of document.]

¶ 168 L'Heureux-Dubé J. made the further comment that:

> Changes of residence, which might imply a move to another province, territory or country for instance, are inevitable in light of the economic

> needs and the growing mobility of our society as well as the desirable objective that individuals rebuild their lives after divorce or separation. [See Note 250 at end of document.]

¶ 169 L'Heureux-Dubé J., speaking for herself, La Forest and Gonthier JJ. and in significant part for McLachlin, Sopinka and Cory JJ., also noted that Proulx J.A. has said that "there is attached to the right of custody a right to decide where the child will live." [See Note 251 at end of document.]

> Thus, the concept of custody under the Civil Code of Quebec, as at common law and under the Divorce Act, can not be distinguished from the concept of custody and the Convention and the Act. Since these different systems all give this concept a broad meaning that is distinct from access rights, and that includes, inter alia, the right to choose the child's place of residence. [See Note 252 at end of document.]

¶ 170 P. (M.) v. B. (G.L.) [See Note 253 at end of document.] adds nothing to the inquiry. A mother returned from Quebec to France with her young daughter. The child was 6 years old at the time of the Supreme Court's decision, and had not seen her father since 1992. The mother was in contempt of court orders in Quebec and France. Still, one wonders how it could have been in the best interests of the child that she be returned to a father whom she did not know. The father had conceded custody to her which had been recognized by the courts. Presumably she is a competent parent. Nonetheless the Supreme Court refused to grant the mother's appeal and ironically included talk in the judgment of the best interests of the child. Without additional evidence it would be difficult to overcome the assumption that this mother who was fully competent to have custody somehow became less competent because she disobeyed court orders. The case seems to have put protection of the judicial system ahead of the best interests of this particular 6-year-old.

¶ 171 However, just when it seemed that the Supreme Court had made the muddy waters of the mobility cases clear, the Ontario Court of Appeal rendered Woodhouse and Luckhurst. In companion judgments released June 4, 1996, Heather Woodhouse was refused permission to move to Scotland with her new husband. The majority gave great weight to the importance of maintaining the access relationship between the boys of the first marriage, 5 and 7, and their father. Osborne J.A., however, writing in dissent, insisted that the trial Judge should not have relied so heavily upon the testimony of the assessor, who seemed to assume that contact with the access parent is always of paramount concern when determining what is in the best interests of the child. McLachlin J., according to Osborne J.A., so stressed the need to consider each child and each circumstance individually, that any decision based on the case at hand should not be considered contrary to the guidance provided by the Supreme Court. [See Note 254 at end of document.] Osborne J.A. clearly felt that if Goertz is to be accurately followed, maximal uncertainty should prevail. At the same time in Luckhurst the Court would not overrule a decision permitting Brenda Luckhurst to move 8-year-old twins from London, Ontario, to Coldberg. Mrs. Luckhurst had also remarried and her new husband could not

find work in the London area. The Court of Appeal held there were no hard and fast rules on child mobility. Uncertainty reemerges. Lawyers seeking absolutes should have been physicists.

11. REPRESENTATION OF CHILDREN

¶ 172 Galligan J. commenced an address regarding the protection of child rights in custodial disputes by posing the question "Does our present legal machinery adequately protect the interests of children when disputes arise between the mother and the father? I regret to say the answer must be in the negative." [See Note 255 at end of document.] It is a principle of common law jurisprudence that all the parties affected by a dispute have a right to participate in the legal process. However, ordinarily the child is not a true participant. Thus, while the best interests test requires that the sole consideration be the interests of the child, the child is normally not afforded the opportunity to define those interests for himself or herself. [See Note 256 at end of document.]

¶ 173 As no one truly represents the child litigant, parents may consciously or subconsciously bargain away the rights of the children or be intimidated by the other parent into giving up those rights. Some family law practitioners avow that in addition to representing their true client, the parent, they also undertake the responsibility to represent and protect the interests of the child. In his research on the topic, Lloyd Perry, Q.C. suggests that that assertion is laudable, but impossible to achieve and inconsistent with a lawyer's primary mandate.

> I recall the declaration of Baron Brougham in the celebrated case in the house of Lords -- "An advocate[,] by the sacred duty which he owes to his client, knows in the discharge of that office . . . but one person in the world[,] that client and none other." [See Note 257 at end of document.]

¶ 174 As a result of not having been part of the process, children, particularly in the range of 10 to 13 years of age, may also resent custody arrangements and work to subvert such decisions. Although the courts may take into account the wishes of the children at that age, they are still left to their own discretion as to what stands in the best interests of the child. [See Note 258 at end of document.] As opined by Goldstein, Freud and Solnit, many decisions are "in name only" for the best interests of the specific child and are in fact fashioned to meet the needs and wishes of competing spousal claimants. [See Note 259 at end of document.] Gordon v. Goertz and the two other Supreme Court cases that accompany it have not ended the issues of uncertainty regarding mobility rights, and have added nothing on the issue of best interests, but can generally be seen as having significantly strengthened the position of custodial parents.

12. FURTHER CONCERNS

(a) The Gender Battle

¶ 175 Acceptance of judicial dispositions regarding custody and access is often a problem in family law. The reality remains that no matter how innovative, thoughtful, and forceful a custody order may appear on paper, a determined parent may, through non-compliance, frustrate the court's intent to regulate the terms of custody and access. Technical arguments and the threat of legal sanctions will not overcome the determination of an obstinate parent to control parenting arrangements. As Hugh Stark and Kirstie MacLise, legal practitioners, have observed:

> When settling custody, guardianship and access, the ability of the parties to cooperate should be considered. It is pointless to simply specify reasonable access if one or both of the parties are unreasonable. [See Note 260 at end of document.]

¶ 176 Debate over who holds an advantage in litigating custody continues to be divided on gender lines. The most common criticism enunciated by men is that mothers are looked upon more favourably by the courts. Men suggest that women have an unfair advantage in custody disputes and that principles such as the tender years doctrine operate as a maternal presumption. They argue that statutory recognition of equal rights for fathers should be enacted, including mandatory joint custody legislative provisions to ensure continued paternal involvement post-separation and divorce.

¶ 177 However, studies performed as part of the Evaluation of Divorce Act program suggest that while it is true that mothers receive custody in the majority of cases this is often the result of an agreement between the spouses and not by order of the court. Men interviewed as part of the study often agreed that children need the primary care of their mothers. That pattern continues to reflect the underlying social reality, in which mothers usually assume the major share of the day-to-day care of their children after divorce, as they commonly do during marriage. Because of the deeply ingrained social patterns that support women's greater investment in their children, it seems unlikely that this pattern will change in any fundamental way in the near future. In 1990, of the 47,631 children affected by divorce of their parents, 73.3 percent were awarded to their mothers, 12.2 percent to their fathers, and 14.3 percent to joint custody.

¶ 178 In fact, statistics show that the determinative advantage in gaining custody lies with the parent who originally petitioned for divorce, and that men meet with particular success in gaining custody under circumstances where they have initially sought custody. [See Note 261 at end of document.]

¶ 179 Women's groups, in contrast, contend that gender equity in the field of custody is unworkable and would be largely symbolic. They further postulate that the present system continues to favour men by assessing their child-rearing abilities by a much less demanding standard than that applied to women. They allege that men's efforts to play a more active part in childcare can be unduly applauded by the courts. [See Note 262 at end of document.] Advocates of this theory point to cases such as Tyndale v. Tyndale. [See Note 263 at end of document.] In that case, a judge granted custody to the father, who was self-employed, over a mother, who was in full-time employment, even while

acknowledging that the male spouse had "only really became a father to the boys after separation." Nonetheless, the Judge reached his decision on the basis that the father would have greater flexibility to care for his children regardless of his relative inexperience. Women's advocacy groups' resulting contention is that courts tend to look down upon women who cannot play the conventional role of a full time mother. However, within today's society, how could a woman satisfy a judge of economic stability without being a member of the labour force? [See Note 264 at end of document.]

¶ 180 American literature puts forward similar arguments. In her book Mothers on Trial Dr. Phyllis Chesler contends:

> I challenged the myth that fit mothers always win custody -- indeed, I found that when fathers fight they win custody 70 percent of the time, whether or not they have been absentee or violent fathers. Although 80 to 85 percent of custodial parents are mothers, this doesn't mean that parents have won their children. Rather, mothers often retain custody when fathers choose not to fight. Fathers who fight tend to win custody because mothers are held to a much higher standard of parenting. When fathers persist, a high percentage win custody because judges tend to view the higher male income and the father-dominated family as in the "best interests of the child." Many judges also assume either that the father who fights for custody is rare and should be rewarded for loving his children, or that something is wrong with the mother. [See Note 265 at end of document.]

(b) Generational Transmission

¶ 181 Prior to the 1920s each divorce had to be resolved individually through the passage of an Act of Parliament. The Divorce Act, 1968 introduced no-fault divorce. There is an ongoing societal continuum leading to divorce being more easily granted and accepted. Even traditionally conservative societies, most notably Eire, are not demonstrating acceptance of divorce.

¶ 182 The current generation of young people is the first to grow up in a society where divorce is common. While parental divorce appears to have little effect on the decision of adult offspring to have children themselves or on the quality of relations they share with their children, it does appears to have a pronounced effect on their own marital success, particularly amongst women. [See Note 266 at end of document.]

¶ 183 The effects of growing up in a divorced or a troubled marriage are hotly debated subjects amongst sociologists. A study sampling the tendencies of Colorado State University students [See Note 267 at end of document.] found that for students from both intact and divorced families, the existence of parental marital conflict in their own home was a significant predictor of their attitudes towards marriage. Results indicated that studies from intact families had a more positive self-perception of their sociability as compared to students from divorced families. Moreover, the findings indicated that among students from divorced backgrounds, parental conflict following divorce was one

of the most significant factors in predicting their future views regarding marriage and relationships. [See Note 268 at end of document.]

> [The] results showed that greater parental conflict after the divorce was a significant predictor of more negative attitudes toward marriage. This result is consistent with the findings with all students. Parental conflict influences attitudes toward marriage. [See Note 269 at end of document.]

The study concluded that offspring of divorced families may have surmised that disagreement leads to divorce and, therefore, it is not an acceptable quality of a healthy relationship. This may reflect a lower commitment to marriage or a greater willingness to leave an unhappy marriage. Conversely, individuals who came from intact families may have a greater appreciation and acceptance for the role which disagreement plays within a relationship. [See Note 270 at end of document.] Such trends can be identified within the baby boomers generation. Everyone knows of a marriage where the couple are unhappy but who remain together for the so-called "benefit of the children." Many of these couples wait until their children have passed their formative years or are no longer living in the family home before openly acknowledging their marriage is unworkable. Of course, most children sense that their parents are having martial problems and thus such a setting is unlikely a positive family environment. In fact, an American study entitled Transmission of Marital and Family Quality over the Generations found that the effects of remaining in an unhappy marriage are actually more adverse to the children's development than the negative effects of divorce: "The number and magnitude of the coefficients would suggest that divorce is much less damaging to the marital and family lives of children than staying married to a partner with whom one is unhappy. [See Note 271 at end of document.] The resulting contention is thus that the crucial element to allowing for the proper development of a child of a failed marriage is to foster the development of a stable and loving relationship with both parents. Providing such a formative environment is essential to stemming the rate of divorce amongst future generations:

> It is significant to note that conflict prior to divorce was not a significant predictor of [an offspring's] sexual behaviours or relationship factors while conflict after the divorce was . . . if the parents experience great conflict after the marriage has ended, the children may be more likely to have a more severed or conflicted relationship with the non-custodial parent. [See Note 272 at end of document.]

13. SUPPORT UNCERTAINTY

¶ 184 Discretionary awards of interim and final support orders are permitted by the Divorce Act. The legislation gives little guidance on the factors to be used to determine amounts of support. The Divorce Act mandates consideration of the condition, means and needs of both spouses. It mandates consideration of economic hardship and disadvantages arising from the marriage apportioning the financial consequences from childcare and promoting self-sufficiency.

¶ 185 Theoretically, the supported spouse, usually the female, is entitled to a standard of living comparable to that enjoyed during marriage, which is not to be lower than the standard of living of the supporting spouse. Casselman, [See Note 273 at end of document.] Kraus, [See Note 274 at end of document.] and Leatherdale [See Note 275 at end of document.] so hold, but in practice women usually experience significant financial disadvantage and a disproportionately reduced standard of living to that of their former husband. Having custody exacerbates the problem.

¶ 186 The federal and Provincial legislation all provides that support dispositions are within the discretion of trial judges. The federal and provincial recommendations may bring consistency in child support, but nothing of the kind is anticipated for spousal support. Indeed, many judges consider support to be temporary, with a view to encouraging economic self-sufficiency, rather than premised on need.

¶ 187 While some judges have advocated with determination the view that economic pressure upon a former spouse to put her back into the workforce is appropriate, others have recognized the difficulty in finding positions for older women and the economic loss and loss of earning potential occasioned by marriage. [See Note 276 at end of document.] The discretionary nature of decision-making continues to cause a dichotomy in decision and general uncertainty in this area.

14. INDETERMINACY

¶ 188 Legal fields are configured by judges and legal authorities and posited law is innately indeterminate: "Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal material and methods permit multiple outcomes to law suits." [See Note 277 at end of document.] Indeterminacy contributes to uncertainty because it allows choice rather than directing decision-making. This is a serious problem in the fact-related family law area, where so-called "common sense" and culture impact radically upon decision-making.

¶ 189 J. Stick writes that lawyers routinely take into account factors that cannot be introduced formally into submissions to the court or decisions by judges and that we have a system "in which lawyers rely unconsciously on arguments that can not be explicitly stated and still be followed." [See Note 278 at end of document.] But they are followed and they are highly significant.

¶ 190 Discretionary decision-making really means that the judge has autonomy within broad rules to exercise personal judgment and assessment. In matrimonial law, which is affected by moral attitudes and societal attitudes, both of which have been in flux since at least the First World War, the result has been that judges, in either leading or following changing attitudes, have imposed widely divergent decisions.

¶ 191 Discretion means the factors to be taken into account are not specific. There is no expressed requirement. [See Note 279 at end of document.] Because discretion is

applied in determining the standards which apply, applying the standards to the facts as found by the fact-finder, and deciding whether the facts justify or do not justify the making of a decision (in that no decision or a delayed decision can often have monumental impact), [See Note 280 at end of document.] makes it profoundly significant that in most of family law, decision making is deemed to be discretionary and without effective appellate review, decision is divergent.

15. CONFIGURING THE LEGAL FIELD

¶ 192 According to Kennedy, [See Note 281 at end of document.] a judge's political sensibilities define the personal sense of justice with which each judge addresses each fact situation. Judges in all areas of the law "manipulate" the issues that comprise the "legal fields" relative to the particular case that they must resolve, in order to construct a legal argument and a fact pattern that supports their preferred outcome for the case. Judges have an initial impression of how a case should be resolved before they consider the facts, precedents, and statutes. Judges' perceptions affect their assessments of fact; they configure based on the "unrational" and the "impacted." "Unrational" is a determination by a judge that the precedents do not apply because they were decided "on their facts with minimum argumentation and narrow or concousory or obviously logically defective holdings." [See Note 282 at end of document.] "Impacted" are "needy disposed precedents." [See Note 283 at end of document.] Judicial activity is little more than an application of rules; cases decide themselves. The task, according to Kennedy, is to make the field appear impacted to the Judge and thereby to achieve the outcome sought by counsel.

¶ 193 This phenomenon exists in all areas of the law. One might state, pejoratively, that judges manipulate fact-finding and case application to achieve the result which they perceive as fair or orderly. They do not do so subconsciously and consciously.

¶ 194 The background of the judge impacts tremendously upon his or her approach to family law dispositions. While judges have no so-called common sense approach to communications law, mining issues, contractual disputes between banks, every judge believes that his or her instincts about fairness within the family and regarding children are normal; thus the unrational impacts more significantly in this area of the law than others, creating uncertainty and inconsistencies. It is these inconsistencies which have caused women's groups in Canada generally to decry court dispositions which they perceive are too often unfair to women, based on the fact that the Bench is largely made of 50-and 60-year-old middle-class male liberals. But even with the advent of a significant number of 40-year-old female liberals, the tendency of judges to bring their own attitudes creates uncertainty. The judiciary cannot be a jury of Canadian humanity, including grade 6 dropouts, truck drivers, unemployed Inuit, Jamaican landed immigrants, but the creation of fields of configuration imposed upon a common sense approach in family law matters makes the significance of the judge overpowering and uncertainty troublesome. Kennedy argues that judges take to their work political and personal perceptions of justice which characterize their assessments of fact situations as well as the application of the law.

¶ 195 Legal theorists argue that democratic principles are not offended by unelected judges redirecting the law because the legitimacy of this activity is based upon the implicit belief that judges act only in accordance with the law, and will suspend personal views. As Kennedy puts it, "the only permissible course of action for a judge facing a conflict between the law and how he wants [a case] to come out is always to follow the law." [See Note 284 at end of document.] Kennedy's point is that reliance on such a proposition is ridiculous. Judges cannot overcome their personal views. Often they are not even fully conscious of their personal views. They are middle-class, largely liberal, and, where conservative, their even more conservative and rather self-satisfied position within society, added to the narrow cloistered lifestyle in which most judges exist, sipping, indeed often posting one another, on their own bathwater, means that in the family law field, they apply attitudes which are extremely significant and sometimes all-pervasive in decision-making.

> I am free to work in the legal medium to justify [the outcome of the case that I want]. How my argument will look in the end will depend in a fundamental way on the legal materials -- rules, cases, policies, social stereotypes, historical images -- but this dependence is a far cry from the inevitable determination of the outcome in advance of the legal materials themselves. [See Note 285 at end of document.]

¶ 196 Wrenching changes in family law have flowed from decisions over the years in the Supreme Court which relate to the changing nature of that Court. Our courts of appeal basically follow the often changing leadership of the Supreme Court. At the trial level, with case law supporting disparate dispositions on seemingly similar factual situations, trial judges and, often even more significantly, chambers judges, as the victims of the unrational, apply wholly uncertain law in the name of individuals with a reliance upon appellate jurisdictions to uphold their discretion.

16. UNCERTAINTY IN CONCLUSION

¶ 197 Under the best interests criterion, each child's future is judged individually. What is special to this child? What are her or his needs, capacities, abilities, and how does this individual relate to his or her parents? What are the circumstances in this home or family? These are the issues that have properly emerged as determinative factors in the adjudication. However, a problem with the individualization of custody decision-making is that it becomes discretionary for judges, and thus subject to arbitrary and idiosyncratic decision-making.

¶ 198 Even in something so simple as assessing support for children, we have laboured under a system with markedly diverging awards given on apparently similar facts. The noted author Alastair Bissett-Johnson [See Note 286 at end of document.] implicitly supports a formula for child care costs, pointing out that the formula exists in most American states. [See Note 287 at end of document.] The Alberta Court of Appeal in Levesque [See Note 288 at end of document.] attempted an orderly approach with a rough figure of 20 percent of the parents' gross income in a single-child family and 32

percent in a two-child family. The federal and provincial support recommendations attempt to address the dissatisfaction of Canadians who anecdotally discover that they are paying much more or receiving much less than others in similar circumstances and resent the uncertainty. The Davies [See Note 289 at end of document.] article on support is also noteworthy in this area.

¶ 199 The inherent uncertainty of the law regarding family law and children particularly has an evident impact on society. This is not a new pattern, nor is it an issue peculiar to Canadian case law. Over 30 years ago, New York law professor Henry Foster and Doris Freedy observed this dilemma regarding child custody criteria and concluded that the law of custody should not be an obstacle to sound solutions to the urgent social and human problems facing society. [See Note 290 at end of document.] They conceded that

> One of the most difficult tasks facing the courts in the development of a pragmatic jurisprudence is the shaping of decisional standards, rules, and exceptions, which will achieve a workable compromise between the values of flexibility and certainty. Nowhere has the task proved more challenging than in the area of child custody. [See Note 291 at end of document.]

¶ 200 Similarly, in his investigation of the state of custody laws in the United States, Professor Robert Mnookin focuses upon the degree to which the legal standards are discretionary. He observes that within child custody disputes, the determination of what is in the best interests of the child for a particular child is usually indeterminate:

> [T]he use of an indeterminative standard such as "best interests" raises fundamental questions of fairness, largely removes the special burden of justification that is characteristic of adjudication, and involves the use of the judicial process in a way that is quite uncharacteristic of traditional adjudication. [See Note 292 at end of document.]

¶ 201 Unfortunately, the concept of the best interests of the child has no objective content, unlike such concepts as distance or mass. Whenever the term "best" is used, the question arises, "best" according to whom? The state, the parents, and the child might all be cited as sources for such a determination. [See Note 293 at end of document.] As Professor Mnookin concludes:

> Deciding what is best for the child poses a question no less ultimate that the purposes and values of life itself . . . [W]here is the judge to look for the set of values that should inform the choice of what is best . . . ? [See Note 294 at end of document.]

¶ 202 Accepting this analysis, are the courts the proper forum for decision-making regarding children, or should the legal system show greater deference to the authority of psychologists, laymen adjudicators, or should it look to the family itself to resolve such issues?

¶ 203 Due to the personal effect a custody order has on the day-to-day lives of the parties, its success relies in part on cooperation between the former spouses in order to be effective. To assist in this process, judges should strive to make orders as flexible and workable as possible: "The parent, not the judge, will be left to live with the daily consequences of caring for the child within the limits of that one judicial pronouncement." [See Note 295 at end of document.]

¶ 204 Given the inherent uncertainty of the law, current thinking seems to suggest that the legal system should aim to foster a higher degree of self-determination by family members. New use of language and new methods may thus be required. Alternative dispute resolution methods, facilitory negotiation or mediation and pretrials -- all may provide potential for alleviating some of the problems currently generated by an adversarial legal process premised on uncertain criteria.

¶ 205 Alternative forms of dispute resolution often meet with good results. Decision-making by this process may be no more certain than the general uncertainty that bedevils matrimonial law, but this kind of custody and access disposition generally results in a high level of acceptance by the litigants, as it is their settlement which they have accepted and to which they have agreed rather than a court's decision which has been imposed upon them.

¶ 206 Evidence of the flexible and uncertain nature of family law is rife throughout the case law. L'Heureux-Dubé J. in Willick v. Willick articulated the purpose of such indeterminacy in stating that:

> Parties must be encouraged to settle their difficulties without coming before the courts on each and every occasion. Nonetheless, the threshold test cannot be applied properly unless the sufficiency of the change in circumstances is evaluated against the backdrop of the particular facts of the case at hand. It is important to point out that the Act does not qualify "change" but merely states that "the court shall satisfy itself that there has been a change" . . . . [T]he diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions. [See Note 296 at end of document.] [L'Heureux-Dubé J.'s emphasis.]

¶ 207 L'Heureux-Dubé J. reaffirmed these views in B. (G.) v. G. (L.) and concluded that "under the 1985 Divorce Act, courts retain a discretionary power the exercise of which will depend on the particular facts of each case and which will be exercised in accordance with the factors and objectives mentioned in the 1985 Act." [See Note 297 at end of document.]

¶ 208 L'Heureux-Dubé J. focused on uncertainty:

> The main purpose of the 1968 Act was, first, to standardize divorce throughout Canada and to provide additional grounds for divorce. Further,

the statute entitled courts to make corollary orders for support and custody upon granting divorce. Support orders had to take into account the conduct as well as the condition, means and other circumstances of the parties. The Law Reform Commission of Canada described the law of support in the following terms:

> Before that time [the 1968 Act], the right to maintenance on divorce could only be lost as a result of a judicial determination, based on known, settled and preexisting rules of law, that the claimant spouse had committed a matrimonial offence. The 1968 Act changed the law to allow the court to award maintenance in any event, but the result has been a maintenance rule that is both arbitrary and uncertain. The Act now requires that the award be based on the court's evaluation of conduct in addition to a consideration of the spouses' condition, means and circumstances. This means that the financial implications of a maintenance claimant's marital economic experience are always subject to the uncertainty of a behavioural evaluation according to whatever criteria a judge may find compelling. The proper standard of conduct is not defined by law, nor is the nature of the relationship between conduct and financial rights. Both these matters are, according to one appellate court decision, "within the entire and absolute discretion" of the trial judge. These inherently subjective standards lack the certainty that is essential if justice is to be done in determining the economic consequence of marriage breakdown, where the outcome will often represent the fruits of the labour of the spouses' adult lifetimes. [See Note 298 at end of document.]

One must say that, prior to the trilogy, the state of the law was no clearer. Describing the effect of the more or less incoherent approach taken by courts Chouinard J., in Messier v. Delage, [1983] 2 S.C.R. 401, said the following (at page 409):

> "I cannot state the matter any better than Judge Rosalie S. Abella of the provincial court, Family Division, for the judicial district of York in Toronto, did in an article entitled "Economic Adjustment on Marriage Breakdown: Support," (1981), 4 Family Law Review 1. She wrote the following at p. 1:
>
> > To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act (RSC 1970 c D-8) and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches. [See Note 299 at end of document.]

> Most importantly, however, and notwithstanding the above observations, while the onus of proving the sufficiency of the change in condition, means, needs or other circumstances rests upon the applicant . . . the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions. [See Note 300 at end of document.]

¶ 209 A litany of the facts in specific cases with apparently inconsistent decision-making would in some senses demonstrate uncertainty over custody. However, a critic of the previous statement could legitimately argue that because the cases are fact-specific, inconsistency is not only to be expected and unavoidable but desirable. Uncertainty is a predictable result of the application of the best interests notion to determining custody. Idiosyncratic and inconsistent decision-making is the evil accompanying the uncertainty which is necessary to do individual justice to each individual child.

Notes

Note 1: Statistics Canada, A Portrait of Families in Canada (Ottawa: Queen's Printer, November 1993) at 11, 17-18, tables 1.8 and 1.9.

Note 2: Canada, Department of Justice, Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation (Ottawa: Queen's Printer, May 1990) at 55.

Note 3: Ibid.

Note 4: J.D. Payne, "The Mediation of Family Disputes" in Payne, ed., Payne's Divorce and Family Law Digest (Toronto, De Boo) 84-1861.

Note 5: B.J. Schutz et al., Solomon's Sword: A Practical Guide to Conducting Child Custody Evaluations (San Francisco: Jossey-Bass, 1989) at 14.

Note 6: J. Wall & C. Amadio, "An Integrated Approach to Child Custody Evaluation: Utilizing the "Best Interest' of the Child and Family Systems Frameworks" (1994) 21:3/4 J. Divorce & Remarriage 39 at 55.

Note 7: J. D. Payne & B. Edwards (1989-90) 11 Advocates' Q. 1 at 23.

Note 8: N. Weisman, "On Access after Parental Separation" (1992) 36 R.F.L. (3d) 35.

Note 9: MacGyver v. Richards (1995), 11 R.F.L. (4th) 432, 22 O.R. (3d) 481 (C.A.).

Note 10: N. v. N. (1994), 3 R.F.L. (4th) 133 at 134.

Note 11: Kolsun v. Kolsun (1989), 19 R.F.L. (3d) 306 at 308 (Man. Q.B.); Smith v. Smith (1987), 12 R.F.L. (3d) 50 at 53 (B.C.S.C.).

Note 12: R.S.C. 1985 (2nd Supp.), c. 3, s. 8(1).

Note 13: N. Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can. J. Fam. L. 15.

Note 14: R.H. Mnookin, "Child Custody Adjudication:

Judicial Functions in the Face of Interdeterminacy" (1975) 39 L. & Contemp. Prob. 226 at 251-252.

Note 15: Above, note 9 at 488-489 (O.R.).

Note 16: [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117.

Note 17: Droit de la famille - 1150, 49 R.F.L. (3d) 317, (sub nom. D. (P.) v. S. (C.)) [1993] 4 S.C.R. 141.

Note 18: (1990), 30 R.F.L. (3d) 53, 2 O.R. (3d) 321 (C.A.).

Note 19: Above, note 9.

Note 20: Harsant v. Portnoi (1990), 27 R.F.L. (3d) 216 at 222, 74 O.R. (2d) 33 (H.C.).

Note 21: [1970] 1 Q.B. 357 at 371, [1969] 3 All E.R. 578.

Note 22: In this regard see below, sections 4(c) and 4(d) and, for the recent case law regarding terminology, sections 5(a)(i), 5(a)(ii) and 5(e).

Note 23: Above, note 12.

Note 24: S.C. 1967-68, c. 24.

Note 25: Evaluation of the Divorce Act -- Phase II, above, note 2 at 38.

Note 26: Judges of the Unified Family Court, and in Saskatchewan judges of the Family Law Division of the Court of Queen's Bench, exercise their jurisdiction under appointments from both the federal and provincial levels of government.

Note 27: Jones v. Jenks (1964), 48 W.W.R. 698 at 700 (B.C. S.C.).

Note 28: P.W. Hogg, Constitutional Law of Canada, 3d ed. (Toronto: Carswell, 1992) at 15.5(c).

Note 29: Children's Aid Society of Halifax (City) v. McIlveen (1980), 20 R.F.L. (2d) 302 (N.S. Fam. Ct.).

Note 30: (U.K.), 30 & 31 Vict., c. 3.

Note 31: Papp v. Papp, [1970] 1 O.R. 331 at 338, 8 D.L.R. (3d) 389.

Note 32: Mercer v. Clark (1989), 90 N.S.R. (2d) 4 (Fam. Ct.).

Note 33: [1971] Ch. 270 at 276, [1970] 3 All E.R. 705 (C.A.).

Note 34: Carter v. Brooks, above, note 18 at 329-330.

Note 35: Young v. Young, above, note 16 at 101.

Note 36: Mnookin, above, note 14 at 254.

Note 37: [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, [1993] 1 W.W.R. 481 (hereinafter cited to R.F.L.).

Note 38: J.G. McLeod, "Case Comment: Moge v. Moge" (1992), 43 R.F.L. (3d) 455 at 464.

Note 39: Moge v. Moge, above, note 37 at 364.

Note 40: (sub nom. R. v. Multiform Manufacturing Co.) [1990] 2 S.C.R. 624 at 630, 58 C.C.C. (3d) 257.

Note 41: [1995] 4 W.W.R. 505 (Sask. U.F.C.).

Note 42: Ibid. at 514 and 517.

Note 43: M. (B.P.) v. M. (B.L.D.E.) (1992), 42 R.F.L. (3d) 349 (Ont. C.A.), leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) 232 (note) (S.C.C.).

Note 44: Abdo v. Abdo (1993), 50 R.F.L. (3d) 171, 109 D.L.R. (4th) 78 (Ont. C.A.).

Note 45: (1977), 22 N.S.R. (2d) 432 at 441 (T.D.).

Note 46: Cunningham v. Cunningham (1975), 26 R.F.L. 121, 13 N.B.R. (2d) 641 (Q.B.).

Note 47: Miller v. Miller (1988), 13 R.F.L. (3d) 80 (Ont. H.C.).

Note 48: Coakwell v. Baker (1994), 4 R.F.L. (4th) 345 at 349 (Ont. Gen. Div.).

Note 49: Above, note 10.

Note 50: (1988), 16 R.F.L. (3d) 121 at 124 (B.C. S.C.).

Note 51: Surgical removal of a brain tumour had left her with very little frontal lobe.

Note 52: (1990), 84 Nfld. & P.E.I.R. 63 at 68 (Nfld. T.D.).

Note 53: (1988), 10 R.F.L. (3d) 437 at 444 (Sask. Q.B.), aff'd (1988), 14 R.F.L. (3d) 225 (Sask. C.A.). See also Keen v. Keen (1990), 30 R.F.L. (3d) 172 (Sask. Q.B.).

Note 54: (1989), 18 R.F.L. (3d) 46 at 48-49 (Sask. Q.B.).

Note 55: See also Day v. Day (1975), 18 R.F.L. 56 (Alta. S.C.); Sweet v. Sweet (1971), 4 R.F.L. 254 (Ont. S.C.); Matthews v. Matthews (1988), 11 R.F.L. (3d) 431 (Nfld. T.D.); Law v. Law (1986), 2 R.F.L. (3d) 458 (Ont. H.C.).

Note 56: Clarke v. Clarke (1987), 7 R.F.L. (3d) 176 at 178 (B.C. S.C.).

Note 57: Above, note 21 at 372.

Note 58: A. Bissett-Johnson & D.C. Day, The New Divorce Law (Toronto, Carswell: 1986) at 46.

Note 59: 17 R.F.L. (4th) 1, [1995] 10 W.W.R. 609.

Note 60: Ibid. at 622 (W.W.R.).

Note 61: Translation: access comprises the right of visitation.

Note 62: Boyd v. Wegrzynowicz (1991), 35 R.F.L. (3d) 421 (B.C. S.C.).

Note 63: Statistics Canada, "Divorces, Canada and the Provinces, 1990" by L. Lapierre in Health Reports 1991, vol. 3, no. 4 (Ottawa: Queen's Printer, 1992) at 383.

Note 64: Kruger v. Kruger (1979), 11 R.F.L. (2d) 52 (Ont. C.A.).

Note 65: (1972), 11 R.F.L. 126 (Tasmania S.C.).

Note 66: Ibid. at 127.

Note 67: Dipper v. Dipper, [1980] 2 All E.R. 722 at 733 (C.A.).

Note 68: Canada, Department of Justice, Custody and Access:

Public Discussion Paper (Ottawa: Queen's Printer, March 1993) at 29.

Note 69: Colwell v. Colwell (1992), 38 R.F.L. (3d) 245 (Alta. Q.B.).

Note 70: J.D. Payne, Payne on Divorce, 4th ed. (Toronto: Carswell, 1996) at 412.

Note 71: Templeman v. Templeman (1990), 29 R.F.L. (3d) 71 (Ont. Dist. Ct.).

Note 72: Evaluation of the Divorce Act -- Phase II, above, note 2 at 133-134.

Note 73: Colwell v. Colwell, above, note 69; Hamilton v. Hamilton (1992), 43 R.F.L. (3d) 13 (Alta. Q.B.); Mueller v. Mueller (1992), 39 R.F.L. (3d) 328 (B.C. S.C.).

Note 74: Wilson v. Grassick (1994), 2 R.F.L. (4th) 291 (Sask. C.A.), leave to appeal to S.C.C. refused (1994), 7 R.F.L. (4th) 254 (note) (S.C.C.).

Note 75: Coolen v. Coolen (1990), 96 N.S.R. (2d) 50 (N.S. T.D.); Demerchant v. Clark (1989), 102 N.B.R. (2d) 205 (Q.B.). Note 76: Gubody v. Gubody, [1955] O.W.N. 548 at 552, [1995] 4 D.L.R. 693 (H.C.).

Note 77: Evaluation of the Divorce Act, Phase II, above, note 2 at 111.

Note 78: See below, section 6.

Note 79: Hamilton v. Hamilton, above, note 73.

Note 80: Lambright v. Lambright (5 June 1990), Edmonton Appeal 9003-0129-AC (Alta. C.A.).

Note 81: Simmchen v. Potter (1991), 33 R.F.L. (3d) 430 (N.B. Q.B.), aff'd (1992), 39 R.F.L. (3d) 149 (N.B. C.A.).

Note 82: (1988), 12 R.F. L. (3d) 372 at 374 (Sask. Q.B.); see also Young v. Young, above, note 16.

Note 83: R. v. Petropoulos (1990), 29 R.F.L. (3d) 289 at 293 (B.C. C.A.).

Note 84: MacGyver v. Richards, above, note 9 at 491-492 (O.R.).

Note 85: Richardson v. Richardson, [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304 at 313.

Note 86: Above, note 16 at 37-38.

Note 87: Doucette-Clarke v. Boyle (1989), 92 N.S.R. (2d) 188 (Fam. Ct.).

Note 88: Salter v. Borden (1991), 31 R.F.L. (3d) 48 (N.S. Fam. Ct.).

Note 89: Fennell (Martin) v. Fennell (1989), 92 N.S.R. (2d) 266 (Fam. Ct.).

Note 90: Taylor v. Taylor, above, note 65.

Note 91: Read v. Read, [1982] 2 W.W.R. 25 at 29 (Alta. C.A.), leave to appeal to S.C.C. refused (1981), 34 A.R. 540n (S.C.C.).

Note 92: In fact, the definition of guardianship or custodianship itself can vary from jurisdiction to jurisdiction, as it is a matter of provincial legislative authority, regardless of whether custody is sought under provincial or federal statute. See further: Re M. (1990), 146 A.P.R. 114 (P.E.I.T.D.).

Note 93: Todd v. Davison, [1972] A.C. 392 (H.L.).

Note 94: Hewar v. Bryant, above, note 21.

Note 95: Pierce v. Pierce, [1977] 5 W.W.R. 572 (B.C. S.C.).

Note 96: Anson v. Anson (1987), 10 B.C.L.R. (2d) 357 (B.C. Co. Ct.).

Note 97: Above, note 95 at 574-575.

Note 98: Above, note 64 at 78.

Note 99: Above, note 10 at 133 (from the headnote).

Note 100: Ibid. at 134 per Lambert J.A.

Note 101: "The Changing Role of the Access Parent" (1993) 10 C.F.L.Q. 123.

Note 102: Above, note 8 at 50.

Note 103: K. (K.) v. L. (G.), 44 R.F.L. (2d) 113, (sub nom. King v. Low) [1985] 1 S.C.R. 87.

Note 104: (1973), 12 R.F.L. 273 (Ont. C.A.).

Note 105: (Toronto: Carswell, 1984).

Note 106: Above, note 8 at 39.

Note 107: (1979), 9 R.F.L. (2d) 69.

Note 108: Ibid. at 78.

Note 109: J.F. Burrett, Child Access and Modern Family Law:

A Guide for Family Law Practitioners and Counsellors (Toronto: Carswell, 1989), at 9, 14.

Note 110: J.G. McLeod, Introduction to Family Law (Toronto:

Butterworths, 1983) at 117.

Note 111: R. (A.N.) v. W. (L.J.), 36 R.F.L. (2d) 1, (sub nom. Racine v. Woods) [1983] 2 S.C.R. 173 at 185.

Note 112: Above, note 103 at 103-104.

Note 113: (1978), 12 A.R. 487 (T.D.).

Note 114: Abdo v. Abdo, above, note 44; M. (B.P.) v. M. (B.L.D.E.), above, note 43. See also Re Maher (1975), 25 R.F.L. 252, 10 Nfld. & P.E.I.R. 224 (Nfld. T.D.); Stokes v. Stokes (1974), 19 R.F.L. 326 (Ont. S.C.); Lachance v. Cloutier (1982), 18 Alta. L.R. (2d) 328 (Fam. Ct.); and Sort v. Poppelwell (1988), 13 R.F.L. (3d) 192 (Sask. Q.B.).

Note 115: Beyond the Best Interests of the Child (New York:

Free Press, 1980).

Note 116: Children of Divorce: A Developmental Approach to Residence and Visitation (De Kalb, Ill.: Psytec Inc., 1988).

Note 117: Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (C.A.).

Note 118: Ibid. at 229.

Note 119: Above, note 67.

Note 120: Ibid. at 45-46.

Note 121: Custody and Access, above, note 68 at 29.

Note 122: O'Leary v. O'Leary, [1923] 1 W.W.R. 501 at 527.

Note 123: [1951] A.C. 352, [1951] 2 D.L.R. 657 at 666.

Note 124: Canadian Advisory Council on the Status of Women, Child Custody and Access Policy: A Brief to the Federal/Provincial/Territorial Family Law Committee (Ottawa: Queen's Printer, 4 February 1994) at 7.

Note 125: Section 16(8).

Note 126: Special Lectures of the Law Society of Upper Canada 1993, Family Law: Roles, Fairness and Equality (Toronto: Carswell, 1994) at 95-96.

Note 127: Lapointe v. Lapointe, above, note 59 at 35.

Note 128: The Infants Custody Act, R.S.N.S. 1989, c. 228, s. 3; the Domestic Relations Act, R.S.A. 1980, c. D-37, s. 56(2); and the Domestic Relations Act, R.S.N.W.T. 1988, c. D-8, s. 28(2).

Note 129: N. Bala & S. Miklas, Rethinking Decisions about Children: Is the "Best Interests of the Child" Approach Really in the Best Interests of Children? (Toronto: Policy Research Centre on Children, Youth & Families, 1993) at 13-14.

Note 130: MacGyver v. Richards, above, note 9 at 491.

Note 131: Ibid. at 489.

Note 132: Above, note 103.

Note 133: Ibid. at 101.

Note 134: (1989), 23 R.F.L. (3d) 214 (Ont. U.F.C.).

Note 135: R.S.O. 1990, c. C.12.

Note 136: (1984), 54 A.R. 161 (C.A.).

Note 137: (1994), 6 R.F.L. (4th) 19 (Alta. Q.B.).

Note 138: (1994), 161 A.R. 279 (Q.B.).

Note 139: Above, note 136 at 164-165.

Note 140: [1994] A.J. No. 947 (Prov. Ct.).

Note 141: Ibid. at para. 14.

Note 142: Ibid. at para. 24.

Note 143: [1993] A.J. No. 1040 (Prov. Ct.).

Note 144: Ibid. at paras. 22, 23.

Note 145: (1994), 10 R.F.L. (4th) 152 (Sask. C.A.).

Note 146: Ibid. at 158-159.

Note 147: Above, note 16 at 115-116 (S.C.R.).

Note 148: Ibid. at 117-118.

Note 149: Ibid. at 117.

Note 150: (1994), [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 1.

Note 151: Ibid. at 432-433.

Note 152: Above, note 103 at 101.

Note 153: Above, note 43.

Note 154: Ibid. at 359.

Note 155: Above, note 111.

Note 156: Ibid. at 185.

Note 157: [1994] O.J. No. 2382 (Ont. Prov. Div.).

Note 158: Ibid. at para. 32.

Note 159: Annotation to Young v. Young (1994), 49 R.F.L. (3d) 129 at 132.

Note 160: Above, note 103 at 93-101.

Note 161: Ibid. at 101.

Note 162: (1994), Saskatoon U.F.C. 588/90 (Sask. Q.B.).

Note 163: (1993), [1994] 1 W.W.R. 17 (Sask. Q.B.).

Note 164: Sekhri v. Mahli, ibid. at 180.

Note 165: Talsky v. Talsky (1973), 11 R.F.L. 226 at 229 (Ont. C.A.), rev'd on other grounds (1975), [1976] 2 S.C.R. 292, 21 R.F.L. 27.

Note 166: Jordan v. Jordan, 448 A.2d 1113 at 1115 (Pa. Super. Ct. 1982).

Note 167: S. (B.A.) v. S. (M.S.) (1991), 35 R.F.L. (3d) 400 at 406.

Note 168: Jane Doe v. John Doe (1990), 28 R.F.L. (3d) 356 at 364-365 (Ont. Dist. Ct.), aff'd (1990), 29 R.F.L. (3d) 450 (Ont. C.A.).

Note 169: Catellier v. Catellier (1987), 51 Man. R. (2d) 22 (Q.B.).

Note 170: Stark v. Stark (1988), 16 R.F.L. (3d) 257 (B.C. S.C.), rev'd in part (1990),

26 R.F.L. (3d) 425 (B.C. C.A.), leave to appeal to S.C.C. refused (1991), 31 R.F.L. (3d) 466 (S.C.C.).

Note 171: B. (S.H.) v. F. (R.) (1988), 83 N.S.R. (2d) 422 (Fam. Ct.).

Note 172: (1991), 31 R.F.L. (3d) 349 at 352 (Ont. Gen. Div.).

Note 173: A.M. Oster, "Custody Proceeding: A Study of Vague and Indefinite Standards" (1968) 5 J. Fam. L. 21 at 37-38.

Note 174: Mnookin, above, note 14 at 227.

Note 175: Ibid. at 229.

Note 176: Ibid. at 230.

Note 177: MacGyver v. Richards, above, note 9 at 489 (O.R.).

Note 178: W.G. How & S.E. Mott-Trille, "Young v. Young: A Re-evaluation of the Rights of Custodial and Access Parents" (1992) 8 C.F.L.Q. 356 at 362.

Note 179: Above, note 165 at 29 (21 R.F.L.).

Note 180: Payne & Edwards, above, note 7 at 3-5.

Note 181: Hyde v. Hyde (1982), 19 Sask. R. 429 (Q.B.).

Note 182: See below, section 8.

Note 183: Lin v. Lin (1992), 38 R.F.L. (3d) 246 (B.C. C.A.).

Note 184: (London: Croom Helm, 1984) at 253.

Note 185: Custody and Access, above, note 68 at 9-10.

Note 186: Ibid. at 11.

Note 187: Canada, Department of Justice, Consultation with Family Law Lawyers on the Divorce Act, 1985 (Ottawa: Queen's Printer, May 1989) at 16.

Note 188: L.J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (New York: Free Press, 1985) at 246.

Note 189: J. Schulman & V. Pitt, "Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children" (1982) 12 Golden Gate U. L. Rev. 538 at 556.

Note 190: Ibid. at 555.

Note 191: Evaluation of the Divorce Act, Phase II, above, note 2 at 133. See also "Divorces, Canada and the Provinces, 1990," above, note 62 at 383.

Note 192: Above, note 16 (on appeal from British Columbia).

Note 193: Above, note 17 (on appeal from Quebec).

Note 194: Brown v. Brown (1983), 39 R.F.L. (2d) 396.

Note 195: (1987), 6 R.F.L. (3d) 314, 77 N.B.R. (2d) 381, leave to appeal to S.C.C. refused (1987), 8 R.F.L. (3d) xxxx (note), 82 N.B.R. (3d) 90 (note) (S.C.C.).

Note 196: (1990), 29 R.F.L. (3d) 113, 50 B.C.L.R. (2d) 1 (C.A.) (hereinafter cited to R.F.L.). The Young decision followed an earlier decision of the Ontario Divisional Court in Hockey v. Hockey (1989), 21 R.F.L. (3d) 105, 69 O.R. (2d) 338.

Note 197: How & Mott-Trille, above, note 178 at 362.

Note 198: Young v. Young (B.C. C.A.), above, note 196 at 219.

Note 199: Headnote to Young, above, note 16 at 13, summarizing McLachlin J. at 121-122. Justice McLachlin was a little less positive on the question of the absence of the risk of harm than the summary would suggest.

Note 200: Above, note 17 at 195.

Note 201: J.T. Syrtash, "Practical Tips on Religious and Other Access Disputes: How

to Decipher and Apply the Conflicting Definitions of "Best Interests' in Young v. Young and D.(P.) v. C.(S.)," in the Ontario Bar Admissions 1993 Textbook (Toronto: Ontario Bar Assn., 1993) at F-7.

Note 202: Sturm v. Sturm (1973), 8 R.F.L. 140 at 144 (N.S.W. S.C.).

Note 203: Syrtash, above, note 201 at F-3 and F-4.

Note 204: Young v. Young, above, note 16 at 90.

Note 205: P.(D.) v. S.(C)., above, note 16 at 181.

Note 206: Syrtash, above, note 201 at F-5.

Note 207: Custody and Access, above, note 68 at 8-9.

Note 208: Gordon v. Goertz, [1986] 2 S.C.R. 27, 19 R.F.L. (4th) 177; Droit de la famille -- 1763, 19 R.F.L. (4th) 341, (sub nom, W. (V.) v. S. (D.)) [1996] 2 S.C.R. 108; P. (M.) v. L. (G.), [1995] 4 S.C.R. 592, 18 R.F.L. (4th) 185.

Note 209: Woodhouse v. Woodhouse (1996), 20 R.F.L. (4th) 337 (Ont. C.A.); Luckhurst v. Luckhurst (1996), 20 R.F.L. (4th) 373 (Ont. C.A.).

Note 210: J.D. Payne & K.L. Kallish, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family" (1981) 13 Ottawa L. Rev. 215.

Note 211: (1884), 28 Ch. D. 606.

Note 212: Ibid. at 613.

Note 213: Douglas v. Douglas, [1948] 1 W.W.R. 473 (Sask. K.B.); Lamond v. Lamond, [1948] 1 W.W.R. 1087 (Sask. K.B.); Beck v. Beck, [1949] 2 W.W.R. 1175, [1950] 1 D.L.R. 492 (B.C. C.A.).

Note 214: (1973), 12 R.F.L. 200, 40 D.L.R. (3d) 321.

Note 215: Ibid. at 324 (D.L.R.).

Note 216: (1978), 6 R.F.L. (2d) 278 (Ont. H.C.).

Note 217: (1985), 45 R.F.L. (2d) 235, 17 D.L.R. (4th) 190 (Ont. C.A.).

Note 218: 144 N.J. Super. 200 at 204, aff'd 144 N.J. Super. 352 (N.J. Super Ct. -- App. Div. 1976).

Note 219: (1982), 31 R.F.L (2d) 449 at 452 (Man. C.A.).

Note 220: (1989), 21 R.F.L. (3d) 307 (Ont. H.C.).

Note 221: Ibid. at 315.

Note 222: (22 June 1989), Hamilton-Wentworth V/1322/88 (Ont. U.F.C.).

Note 223: Above, note 134.

Note 224: Above, note 18.

Note 225: Ibid. at 323 (O.R.).

Note 226: Ibid. at 326-328.

Note 227: Annotation to Carter v. Brooks (1991), 30 R.F.L. (3d) 54 at 54-55.

Note 228: Above, note 9.

Note 229: Ibid. at 491 (O.R.).

Note 230: Above, note 59.

Note 231: Ibid. at 10-11.

Note 232: Ibid. at 12.

Note 233: (1989), 18 R.F.L. (3d) 385 (Alta. Q.B.).

Note 234: (1993), 142 A.R. 53 (Q.B.).

Note 235: (1993), 142 A.R. 210 (Q.B.).

Note 236: (1994), 148 A.R. 306 (Q.B.).

Note 237: (1994), 159 A.R. 311 (Q.B.).
Note 238: Above, note 9 at 489-491 (O.R.).
Note 239: (1983), 27 Sask. R. 205 (Q.B.).
Note 240: (1983), 26 Sask. R. 243 (U.F.C.).
Note 241: Above, note 169.
Note 242: (1978), 94 D.L.R. (3d) 402 (Sask. Q.B.).
Note 243: Above, note 208.
Note 244: Gordon v. Goertz, above, note 208 at 48 (S.C.R.) per McLachlin J.
Note 245: Ibid. at 48.
Note 246: Ibid. at 54.
Note 247: Ibid. at 59.
Note 248: Ibid. at 60-61.
Note 249: Ibid. at 85, quoted from In Re Marriage of Burgess, 51 Col. Rptr. 2d 444 at 452-453 (1996).
Note 250: Ibid. at 87.
Note 251: Ibid. at 74.
Note 252: Ibid.
Note 253: P. (M.) v. L. (G.), 18 R.F. L. (4th) 185, (sub nom. P. (M.) v. L.B. (G.)) [1995] 4 S.C.R. 592.
Note 254: See Woodhouse, above, note 209 at 370.
Note 255: Reid v. Reid (1975), 25 R.F.L. 209 at 215 (Ont. Div. Ct.).
Note 256: "The Roles and Rights of Children in Divorce Actions" (1966) 6 Can. J. Fam. L. 1.
Note 257: Prov. guide, at 66.
Note 258: W. Gaylin & R. Macklin, Who Speaks for the Child? The Problems of Proxy Consent (New York: Plenum Press, 1982) at 126.
Note 259: Above, note 115 at 54.
Note 260: H.G. Stark & K.J. MacLise, Domestic Contracts (Toronto: Carswell) (looseleaf) at 39.
Note 261: Evaluation of the Divorce Act, Phase II, above, note 2 at 100-01, table 4.18.
Note 262: S. Boyd, "Child Custody and Working Mothers" in S.L. Martin & K.E. Mahoney, eds., Equality and Judicial Neutrality (Toronto: Carswell, 1987) 168.
Note 263: (1985), 48 R.F.L. (2d) 426 (Sask. Q.B.).
Note 264: Custody and Access, above, note 68 at 14.
Note 265: Excerpts taken from the introduction of Mothers on Trial (New York: Harcourt Brace & Co., 1991) as reported in Ms. Magazine (May/June 1991) at 47.
Note 266: A. Booth et al., "Transmission of Marital and Family Quality over the Generations" (1982) 13(2) J. Divorce 42.
Note 267: L. Gabardi et al., "Intimate Relationships:

College Students from Divorced and Intact Families" 18:3/4 J. Divorce & Remarriage.
Note 268: Ibid. at 25 and 37.
Note 269: Ibid. at 50.
Note 270: Ibid.
Note 271: Booth et al., above, note 266 at 55.

Note 272: Gabardi et al., above, note 267 at 51.

Note 273: Casselman v. Pasluns (1974), 3 O.R. (2d) 132 (C.A.).

Note 274: Krause v. Krause, 19 R.F.L. 230, [1975] 4 W.W.R. 738 (Alta S.C.), varied 23 R.F.L. 219, [1976] 2 W.W.R. 622 (Alta. C.A.).

Note 275: Leatherdale v. Leatherdale, [1982] 2 S.C.R. 743, 30 R.F.L. (2d) 225.

Note 276: [C]ourts may have unrealistic expectations about the opportunities to older women to make careers for themselves . . . the courts may feel compelled to speculate on the ability of the dependent spouse to become trained or education . . . to sell herself in a marketplace indifferent to both the experienced and the older job applicant. Canadian Institute for Research, Matrimonial Support Failures: Reasons, Profiles, and Perceptions of Individuals Involved, vol. 1 (Edmonton: Institute of Law Research and Reform) at 14. Note 277: K. Kress, "Legal Indeterminacy" (1988) 77 Calif. L. Rev. 283.

Note 278: "Can Nihilism Be Pragmatic?" (1986) 100 Harvard L. Rev. 332.

Note 279: D.J. Galligan, Discretionary Powers: A Legal Study of Official Discretion (Oxford: Clarendon Press, 1986) at 31.

Note 280: Ibid. at 9.

Note 281: D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 J. Legal Education 518.

Note 282: Ibid. at 566.

Note 283: Ibid. at 569.

Note 284: Ibid. at 559.

Note 285: Ibid. at 526.

Note 286: "Reform of the Law of Child Support" (1996) 74 Can. Bar Rev. 585.

Note 287: J. Munsterman, Child Support Guidelines: A Compendium (Arlington Va: National Center for State Courts, 1991) in Australia and England.

Note 288: Levesque v. Levesque (1994), 4 R.F.L. (4th) 375, 20 Alta. L.R. (3d) 429.

Note 289: C. Davies, "The Emergence of Judicial Child Support Guidelines" (1995) 13 C.F.L.Q. 89 and S.M. Cretney & J. Masson, Principles of Family Law, 5th ed. (London: Sweet & Maxwell, 1990) at 387-388.

Note 290: H. Foster & D. Freedy, "Child Custody" (1964) 39 N.Y.U. L. Rev. 423 at 630.

Note 291: Ibid. at 423.

Note 292: Mnookin, above, note 14 at 292.

Note 293: D. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984-85) 83 Mich. L. Rev. 477 at 488.

Note 294: Above, note 14 at 260.

Note 295: MacGyver v. Richards, above, note 9 at 490.

Note 296: [1994] 3 S.C.R. 670 at 733, 6 R.F.L. (4th) 161. See also Sopinka J. at 688.

Note 297: [1995] 3 S.C.R. 370 at 399, 15 R.F.L. (4th) 201.

Note 298: Ibid. at 383.

Note 299: Ibid. at 387.

Note 300: Ibid. at 396, quoted from L'Heureux-Dubé J.'s own judgment in Willick, above, note 296 at 734.

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Practical Tips on Religious and Other Access Disputes: How to Decipher and Apply the Conflicting Definitions of "Best Interests" in Young v. Young and P. (D.) v. S. (C.)

*by John T. Syrtash**

1997

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¶ 1 The book "Religion and Culture in Canadian Family Law" (Butterworths Canada Ltd. 1992) was published before the recent release of the Supreme Court of Canada decisions in Young v. Young (an appeal from the British Columbia Court of Appeal), and P. (D.) v. S. (C.), an appeal from the Quebec Court of Appeal. In the book's review of the case law, I opined that "the similarity of the trends...in this area... illustrate the gradual erosion of the custodial parents' authority and control over the child." If these two cases have not interrupted this trend then, at the very least, they have either called it into question or accelerated it.

¶ 2 Prior to the release of the Supreme Court of Canada decisions, the Ontario, British Columbia, and Quebec Courts of Appeal cited the freedom of religion clauses in the Canadian Charter of Rights and Freedoms in Canada's Constitution as part of the reason for allowing an access parent to introduce his faith, without condition or qualification, to his children, even if his teachings conflicted with the wishes of the custodial parent. Surprisingly, the only part of this "religious access" discussion that was resolved by the majority of the Supreme Court of Canada Justices in Young and P. (D.) v. S. (C.) is that using the Canadian Charter of Rights and Freedoms to promote such rights of the access parent to override the "best interests" test may not be helpful. The Charter does not override provisions in Canada's Divorce Act which mandate "best interest" tests when assessing custody dispute cases. As McLachlin J. states in Young (p. 16) "... guarantees of religious freedom and expressive freedom in the Charter do not protect conduct which violates the best interest of the child". In P. (D.) v. S. (C.), Justices La Forest, L'Heureux-Dubé and Gonthier, find that the trial judge's order, which invoked the "best interests" test to circumscribe a father's religious activity with his child, does not infringe upon the freedoms of religion, expression and association, and the right to equality protected by the Charter of Rights and Freedoms. One of the many reasons given is that private disputes between parents in a family context are not covered by the Charter. According to one of the Justices, the Charter does not cover judicial orders concerning such disputes since, apart from exceptional circumstances, the judiciary is not covered by section 32 of the Charter. In any event, the Court ruled that even if the Charter applied, the child's best interests override any religious freedoms. Justices Cory and Iacobucci appear to agree, although not expressly. In the same case, Madam Justice McLachlin also agrees that the

relevant sections of the Divorce Act and The Quebec Civil Code that promote the best interest test for determining decisions pertaining to children did not infringe on "entrenched rights". Similarly, in the case of Young, most of the Judges agree that the relevant sections in the Divorce Act, which mandate the judicial decisions, be made in the "best interests of the child", do not violate sections 2(a) (b) or (d) or section 15(1) of the Charter.

¶ 3 However, on a discordant note, Mr. Justice Sopinka in Young maintains that the "best interests of the child test....must be reconciled with the Canadian Charter or Rights and Freedoms". It may be that the way in which the question was put to the Court invited a negative response. I would have been surprised if the Court had ruled against "the best interest test" (whatever that means), as reflected in both the Divorce Act and The Quebec Civil Code, in favour of an access parent's totally unfettered right to express his religious freedom. Rather, the more difficult question with which the Court in both cases struggled was not whether restricting "religious access" infringed an access parent's religious rights under the Charter, but how the term "best interests of the child" should be defined in such disputes. In particular, the Judges were polarized into three different camps. Two of the camps gave divergent and conflicting explanations of what the term "best interests" means in the circumstances under which religious rights should be curtailed. I am convinced that the third camp, comprising of Mr. Justice Cory and Mr. Justice Iacobucci "switched sides" between the two cases, even though the facts of the cases, in my opinion, were not so dissimilar as to have lead to a different result. It is my thesis that the ambivalence of these two Judges on this critical issue has now lead to a situation where the lower courts, family law lawyers and their clients have no consistent guidelines on how to approach such disputes.

BACKGROUND

¶ 4 Both cases involved Jehovah's Witness fathers, who were teaching their religion to the children, a matter that the custodial mother found highly objectionable. The trial Judges in both the British Columbia Court in Young and the Quebec Courts in Quebec in P. (D.) v. S. (C.), made similar decisions. In the Young case, the older daughters liked their father, but disliked his religious instruction. There is some evidence that religious instructions were damaging to the father/daughter relationship. The majority found that the children were functioning in a normal fashion with no adverse effects on their psychological or physical health. In the dissenting opinion, there was an emphasis on the stress felt by the children due to religious pressure exerted by the father. In the P. (D.) v. S. (C.) case, the husband was described as being a fanatical influence on his three-and-a-half year old child. The Court found that the conflict between the parents may be disturbing to a child of such an age, although there was no objective evidence of any suffering or psychological harm. At the trial level in both the Young and P. (D.) v. S. (C.) cases, access by the father was limited in similar ways. In Young, on the trial level, the father was ordered:

a) not to discuss religion with the children,
b) not to take them to religious services,

c) not to take them on canvassing meetings,
d) not to make adverse remarks and
e) not to prevent the children from having blood transfusions in the event of an emergency.

In the P. (D.) v. S. (C.) case, access by the father was limited by:

a) an order that he not continue to indoctrinate the child, and
b) forbidding the father from taking the child to demonstrations, ceremonies, conferences and door-to-door canvassing.

However, the Court ordered that the father could teach the child his religion in all other ways. (How one can remove these elements from the Jehovah's Witness faith and be left with "other ways" remains a mystery).

¶ 5 In her decisions in both her dissent in the Young case and the majority decision in the P. (D.) v. S. (C.) case, Madam Justice L'Heureux-Dubé championed, what I document in my book, as the traditional approach. In "Religion and Culture in Canadian Family Law", I predicted the possibility that the pendulum of judicial opinion could swing back towards the position that the custodial parents should have the sole decision-making power over the faith in which the children should be raised. I had no idea that the pendulum would swing back so quickly, at least in the minds of one-half of the Supreme Court of Canada.

¶ 6 Historically, several cases ordered that religious education in one religion only was necessary to satisfy the child's best interests. Common-Law jurisdictions both inside and outside of Canada have traditionally maintained this view. One of the most broadly quoted exponents of this decision is the Supreme Court of New South Wales in Australia in Strum v. Strum [See Note 1 below]. The case reviewed facts in which a Jewish father and Roman Catholic mother disagreed on which religion should be taught to the children. The mother had custody, and therefore had the right to educate the children in the Roman Catholic faith, while the father was prohibited from teaching the Jewish faith to the children:

> "... in the absence of sound countervailing reasons the decision should rest with the party who has the legal custody of the child.... [there] could not be other than discord engendered in the respondent's [custodial parent's] household if she were compelled to acquiesce in the children committed to her care being brought up in a faith to which she profoundly objects."

Note 1: (1973), 8 R.F.L. 140 (N.S.W.S.C.).

¶ 7 This view was also reflected in the dissenting opinion of the British Columbia Court of Appeal level in Young. Madam Justice Southin attempts to validate the traditional concept that only "the legal guardian" of a child could direct the child's religious education to the exclusion of all parties, including the access parent.

¶ 8 Similarly in Alberta, the Courts traditionally look at religious access in the same way. In Bateman [See Note 2 below], the father had agreed before marriage that the children would be raised as Roman Catholics, even though he had no particular religious affiliation at the time. Thirteen years later, the father became a zealous Jehovah's Witness, which put tremendous strain upon the marriage, since he adamantly insisted upon raising the children in his faith. With the exception of the thirteen year old, who wished to live with his father and be raised in the Jehovah's Witness faith, the mother obtained custody of the other three children on the ground that their welfare was paramount over the father's "common-law" right to raise his children in his own faith. Similarly, in the Alberta case of Mosely [See Note 3 below] the parties had three children aged 5, 3 and 1, who remained with the mother following separation. The mother became very involved with the "True Tabernacle", part of an organization known as the United Pentecostal Church in Calgary. The Court did not like the activities of this church, and since the mother had no tolerance for the father's lifestyle, Mrs. Mosely was prohibited from providing any form of religious indoctrination whatsoever during periods of access with the children. Custody was then awarded to the father and a "gag" order was placed on the mother not to discuss religion during access visits. Once again it appears that unlike the majority decisions in the Courts of Appeal of Ontario, British Columbia and Quebec, the Court of Appeal in Alberta was less concerned with religion or faith itself, and more interested in the child's stability. It was also impressed by the greater degree to which the father would permit access to the mother, and far less impressed with arguments pertaining to religious rights. Nonetheless, I wonder if the Court would have made a similar decision had the mother been a member of a more "acceptable religion". Similarly, a traditional "gag order" was also imposed by the Alberta Court of Appeal in Irmert [See Note 4 below], which made as a condition of access an order prohibiting the father from taking his child to any religious activities or services without the mother's consent. It further prevented him from using religious instruction in such a way as to turn the child's mind against the mother or from allowing anyone else to do so.

Note 2: (1964) D.L.R. (2d) 266 (Alberta Supreme Court) affirmed 51 WWR 633 (Alberta Court of Appeal).

Note 3: (1989) 20 A.R. (3d) 301 (Alberta Provincial Court)

Note 4: (1984) 64 A.R. 3432 (C.A.); Reversed in part 55 A.R. 14 (2.C.)

¶ 9 Like Alberta, the Court of Appeal in Saskatchewan has also sided with the custodial parent. In Brown [See Note 5 below], religious differences over the husband's participation in a church called "Plymouth Brethren" brought the Brown marriage to an end. The Court found that the father's religion would have the children "withdraw from their mother, renounce their maternal grandparents, yield their friendships, cease their social and recreational activities, eschew higher education, even though they appear intellectually gifted, and in the case of girls, adopt the submissive role of the women of the brethren." [See Note 6 below]

Note 5: (1983) 39 R.F.L. (2d) 396 (Saskatchewan C.A.)

Note 6: Ibid., at 400-441

¶ 10 Accordingly, the trial judge prohibited the father from taking the children to religious services in the course of exercising his right of access. On appeal, the father contended that under section 2(a) of the Charter, "everyone has the following freedoms.... freedom of conscience and religion". The father attempted to rely on jurisprudence in Ontario, which suggested that the Court has no right to dictate to parents a particular religious philosophy to choose for themselves and their children, let alone the right to deny custody to a parent because of his or her religious beliefs. [See Note 7 below] Nonetheless, unlike the British Columbia Court of Appeal in Young, the Saskatchewan Appellate Court in Brown ruled that the trial judge did not attempt to dictate a religious philosophy to either parent, or deny custody because of the father's religious belief, but rather simply took into account "his beliefs" as they bear upon the well-being of the children. Accordingly, the Saskatchewan Court of Appeal ignored the "religious rights argument" and reaffirmed the gag order.

Note 7: McQuillan v. McQuillan (1975) 20 R.F.L. 324 (Ontario Supreme Court)

¶ 11 I reiterate the concerns I expressed in my book (see page 20) about the many religions in Canada which run their own schools. It is also natural for these religions to stress that their congregation's children spend more time with co-religionists, where there will be a continuity of spiritual values, than with children of other faiths. Whether this is bigotry or preserving one's religious way of life depends upon the particular faith's view of others. However in Brown, a "best interest" test for deciding custody appears to be the degree of insularity that the particular religion imposes upon the children and the extent to which that insularity interferes with contact in the outside world.

¶ 12 In Manitoba, the courts are apparently quite fond of the need for continuity of religious environment upon marriage breakdown. In Skubovius [See Note 8 below], a Roman Catholic mother lost custody of her two children, partly because she suddenly took them from a traditional Roman Catholic environment (Morden, Manitoba) and

moved in with a boyfriend into a comparatively lax lifestyle in Winnipeg, a strange and presumably "sinful" secular environment. Similarly, in the case of Elias [See Note 9 below], a child who had grown up as a devout Roman Catholic was left with his Roman Catholic grandparents, even though the biological mother sought custody. Although the mother was also Roman Catholic, she had married a Protestant and the Court was not convinced that her new husband would work with his wife to raise the child in the faith to which he had become accustomed.

Note 8: Skubovius v. Skubovius (1977), 1 R.F.L. (2d) 284 (Man. Q.B.)

Note 9: Ellis v. Ellis (1980), 8 Man. R. (2d) 114 (Q.B.)

¶ 13 However, in Manitoba the Court's reluctance to interfere in a child's accustomed religious upbringing does not always follow. Therefore in Friesen, [See Note 10 below] the Court varied the access provisions of a custody order so that the father, who no longer believed in Christmas, was nonetheless permitted to see the children on Christmas, notwithstanding the mother's objection that the father had become a Jehovah's Witness. Here the Court interpreted the term "best interest" as the need for the father to introduce a variant form of religion notwithstanding the mother's view that it would interfere with their religious upbringing.

Note 10: Friesen v. Friesen (1988), 56 (Man. R.) (2d) 303 (Q.B.)

¶ 14 In summary, Manitoba appears to be "sitting on the fence" as to who has the final say in such matters. It is not a province which falls easily into one camp or another.

¶ 15 However, the New Brunswick Courts clearly take the traditional and pro-custodial approach. In the case of Jaillet [See Note 11 below], the Court balanced (at the custodial parent's insistence) that her child attend church every Sunday morning, with the father's right to access. The Court ruled that regular attendance at Sunday morning churches and Sunday School is a reasonable part of the child's religious upbringing, and further imposed limitations on the father from taking the child to religious services of his own church during visitations. In making its decision, the New Brunswick Court of Queen's Bench adopted the reasons of Fougere an Appellate Court decision [See Note 12 below], where, contrary to decisions of the Courts of Appeal in British Columbia, Ontario and Quebec, but in conformity with the decision of Brown in the Saskatchewan Court of Appeal, the "religious rights" of the access parent were ruled to be of secondary interest only. The custodial mother gave evidence that the father was indoctrinating her children with the Jehovah's Witness religion. Expert evidence from a Quebec psychologist, Wallace Rozefort, suggested that the exposure of the child to two or more religions is by

no means detrimental to his development. A child following the religion of parents of different creeds is not subject to confusion, and such exposure does not hinder the child in making the choice of a religion for himself. Indeed, the psychologist testified that the child's acquaintance with a variety of religions is likely to enhance his tolerance towards creeds and opinions differing from or conflicting with his own and contributing to the fulfilment of his personality. Under cross-examination, Rozefort admitted that although he had not come across a single case where exposure to different religions had been harmful to children, much depended on the attitude of parents. The Court seized upon his comment and indicated that the parents attitudes in cases of religious conflict were quite relevant because "the children are being confused and hurt precisely because of the attitude of the parents". [See Note 13 below] Accordingly, the Court adopted an earlier decision of the same court in Milton [See Note 14 below] It decided that:

> "the custodial parent is... .inherently vested with the sole right and the sole responsibility for the care of bringing an education, including religious instructions of those children.... Mr. Milton does not have the right to interfere and must refrain, when in the company of the children, from making any remarks of a religious nature. Accordingly, the Court ordered that the father be forbidden from involving the children in his religious activities, and to refrain from his attempts of indoctrinating his beliefs.

Note 11: (1988), 91 N.B.R. (2d) 351 (Q.B.)

Note 12: Fougere v. Fougere (1986), 70 N.B.R. (2d) 57 (Q.B.); revd in part 77 N.B.R. (2d) 381 (C.A.); leave to appeal to S.C.C. refused 82 N.B.R. (2d) 90n (S.C.C.).

Note 13: Ibid., at 70

Note 14: Milton v. Milton (1985), 64 N.B.R. (2d) 165 (Q.B.).

¶ 16 Prior to the Supreme Court of Canada decision in Young, the Prince Edward Island Courts have taken a similar approach. In Gunn [See Note 15 below], the Court ruled that under the Divorce Act [See Note 16 below], "where one party to a divorce proceeding is granted the sole custody of the child of the marriage, that party is inherently vested not only with the sole right, but the sole responsibility for the care, upbringing and education, including religious instruction, of that child." The access father was then ordered to refrain from making any remarks of a religious nature or otherwise, which would or might tend to reflect adversely upon the person or character of the petitioner. In another P.E.I. decision, Sullivan v. Fox, a similar philosophy was espoused with a plea that parents exercise tolerance and with a view to accommodating the other parent's religious beliefs. It decided "if either party is unable or unwilling to comply with this condition injunction, and with that shall constitute a ground for immediate review of custodial and/or visitation arrangement". This plea is of great practical importance to advising one's client, even if it may offend deeply held religious beliefs.

Note 15: Gunn v. Gunn (1975), 24 R.F.L. 182 (P.E.I.S.C.).

Note 16: R.S.C. 1970, c. D-8 (now R.S.C. 1985, c.3 (2nd Supp.)).

¶ 17 In Nova Scotia, the Courts had traditionally adopted the attitude that custodial parents should generally have exclusive control over issues pertaining to religious upbringing. However, in recent Nova Scotia court decisions, the Courts appear to be looking very closely at the facts of each case and worrying less about being either traditional or "pro-access". Thus, in the case of Re A(P) [See Note 17 below], the custodial mother was given sole discretion with respect to the upbringing of a child in the Catholic faith, even though she had earlier converted to Judaism. Similarly, on the facts of the case in Robb [See Note 18 below], three children were split up between two parents based on religious lines. The oldest child was to stay with the father and the younger two children in the custody of the mother. Both were found to be caring parents, but concluded that the older child was in any case not intending to be associated with the Jehovah's Witness. However, the Court left the residual authority with the father respecting medical procedures in the event of emergencies when blood transfusions would be required with respect to the younger children who were left in the mother's care and control.

Note 17: Re A.(P.) (1969), 1 N.S.R. (2d) 232 (T.D.).
Note 18: 2 R.F.L. (2d) 172 (T.D.)

¶ 18 However, in the Smith [See Note 19 below] case, a Nova Scotia court decided that the access father, a Jehovah's Witness, should be free to expose his children to that religious faith without restriction. In this case the mother did not have a particular religious affiliation and the Court felt that some type of exposure to religious training was preferable. The Court decided that in the absence of any religious training, the access parent's religious values should be imparted on the child, even if those faith's values are from a religion to which the custodial parent does not espouse. As I note in my book, atheists may well be repelled by this decision, but there does appear to be a general sensibility in Canada which favours some form of instructions in morality and ethical behaviour. As the renowned Canadian literary critic, the late Northrup Frye, once explained to us in one of my classes with him at Toronto's Victoria College: "the trouble with atheists is that they keep 'bumping into' G-d wherever they turn in a literary or artistic world." Perhaps the same may be said of family law, at least in Nova Scotia.

Note 19: Smith v. Smith (1989), 92 N.S.R. (2d) 204 (T.D.).

¶ 19 Similarly, Newfoundland cases uphold the custodial parent's control of religion as being in the child's best interest, but not without some deference to the access parent. [See Note 20 below] For instance in Fullerton, [See Note 21 below] the court ignored the custodial parent's religious objection that she did not want her five year old boy to stay overnight with his father because he was living in a common law relationship. The, court relied on an earlier decision of the Newfoundland Trial Division in Allan: [See Note 22 below] "If such [common law] unions were a bar to custody or overnight access a great many children would not be able to live with or visit their parents". However, the Newfoundland Courts are less tolerant about minority religions that practise the "occult". In the case of Ryan [See Note 23 below] the seven-year-old child of the marriage lived with his mother since the separation. The child was apprehensive about leaving his mother for access visits with his father, especially overnight. The mother raised the child as a Roman Catholic. The access parent developed an interest in the Rosicrucian Order and became interested in it philosophies and teachings, which included witchcraft, the occult and belief in the paranormal. The court ordered that he be precluded from teaching his interest to the child and ordered "that he should not make available to him literature or photographs that stimulate an interest in paranormal matters or, conversely, that might frighten him. [See Note 24 below] In short, Newfoundland Courts have stood firmly behind the traditional view that:

(a) the custodial parent has exclusive right to guide the children to a religious upbringing to the exclusion of the access parent;
(b) the access parent should not share his beliefs with the children; and
(c) sleeping with an unmarried person does not deprive a parent from enjoying access, notwithstanding the custodial parent's cherished religious beliefs.

Note 20: Re Fitzpatrick (1986), 57 Nfld. & P.E.I.R. 38 (Nfld T.D.), and Hart v. Twyne (1988), 17 R.F.L. (3d) 107 (Nfld. T.D.).

Note 21: 37 R.F.L. (2d) 168

Note 22: Allan (unreported, Nfld. T.D.).

Note 23: Ryan v. Ryan (1986), 3 R.F.L. (3d) 141 (Nfld. U.F.C.).

Note 24: Ryan v. Ryan (1986), 3 R.F.L (3d) 141 (Nfld. U.F.C.). at pg 144

¶ 20 In contrast to these traditional approaches in Saskatchewan, Alberta, Prince Edward Island, Nova Scotia and Newfoundland, the appellate courts in British Columbia, Ontario and Quebec have redeveloped the concept of best interests in this area by:

(a) citing the Charter of Rights to freedom of religion and expression by the access parent; and

(b) citing amendments to the Divorce Act which these courts have interpreted to expand and enhance greatly the access parent's role in their children's lives (i.e. to "maximize" it).

In particular, the British Columbia Court of Appeal in Young refers extensively to section 16(10) and 17(9) of the Divorce Act. Writing for the majority, Wood J. maintains that these decisions have statutorily enhanced the position of the access parents, especially since they were new provisions that were not part of the former Divorce Act. [See Note 25 below] These sections are reproduced as follows;

16.(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

(10) In making an order under this section, the court shall give the effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact [emphasis added].

17.(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

(9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

Note 25: R.S.C. 1970, c. D-8

¶ 21 According to the majority decision in the British Columbia Court of Appeal ruling in Young, the inclusion of these new sections mark a significant departure from the traditional rights given to custodial parents. They appear to erode the custodial parents' exclusive authority over religious matters. In deciding that an access father could introduce his religion's practices and involve his children in Jehovah's Witness activities without his wife's consent, the court applied 16(10) to suggest that it was Parliament's intention to encourage the access parent to so involve the children in his religious life:

"When the purpose of 16(10) is viewed in that light, it can be seen that the word "contact" must be given a broad meaning. ..... viewed in that way,

> real contact would necessarily include the opportunity for an access parent to whom a religious belief is important to share that belief, at least in a consensual way with his or her children."

Mr. Justice Wood then concluded that the Divorce Act amendments must be taken to modify the scope of the ancient concept of guardianship.

¶ 22 According to Wood, J, contact must then be maximized to the fullest extent with unfettered discretion on the part of the access parent as to the degree to which he can introduce religion to the children. The onus shifts to the custodial parent to prove that the access parent's practices are "harmful". The onus is no longer on the access parent to show that introducing his religion is not harmful. He also suggests that the cases of real harm will be rare and difficult to prove. He voices the view that in the exercise of the court's duty to protect the well-being of the child,

> "care must be taken to ensure that real harm is ... distinguished from the general emotional distress which every child experiences when confronted with both the reality of divorce and the turmoil which characterizes the post divorce relationship of many ex spouses. The former can properly be addressed by Judicial intervention. The latter is inevitable, and in most cases lies beyond the influence of any order of the court". [See Note 26 below]

Note 26: Young v. Young (1990), 50 B.C.L.R.(2d) 1 (C.A.). at page 98

¶ 23 As we shall see later, Sopinka, J. of the Supreme Court of Canada shares Wood's view. Similarly in a much briefer appellate decision the Ontario Divisional Court, in Hockey [See Note 27 below] rules that exposures to two religions would not be harmful to five year old twins in the absence of "compelling evidence that the sharing of religious beliefs and practices by the access parent with the child or that the exposure to two religions is contrary to the best interests of the child". The appellate court in Hockey overruled the trial judge's decision that placed a "gag" order upon Mr. Hockey and attempted to prevent him from instructing or lecturing his children as to the principles of any religion, including his own.

Note 27: (1989), 69 O.R. (2d) 338, 21 R.F.L. (3d) 105 (DIST. CT.)

¶ 24 Similarly, in a further challenge to the traditional approach, Mr. Justice Malouf wrote the Quebec Court of Appeal decision that overturned a trial judge's order prohibiting the father from discussing religion with his son or sharing other religious

activities during access periods (see Droit de la Famille-955 [See Note 28 below]). In this decision, the court invoked the principles set out by the Supreme Court of Canada in R. v. Big M. Drug Mart Ltd. [See Note 29 below] in exactly the same manner as it was applied in Young by the British Columbia Court of Appeal. Although the Quebec Court of Appeal invokes the Canadian Charter and the Civil Code rather than rely on the Divorce Act to expand the rights of access parents, the result is the same. The case appears to decide that "best interests" must be construed to be compatible with the access parent's right of religious access, but not in all cases. As a result, in this particular case the access parent was given the unfettered right to have his child participate in his religion and the Court overruled the trial judge in that regard. However, the Appellate Court felt that the access parent overstepped the boundaries of good sense by treating the mother's beliefs in such a "cavalier fashion" and did feel that some constraints were justified. For example, it ruled that not taking the child on door to door canvasing was a justifiable intrusion on the father's freedom of religion to protect the child's best interests on these facts. However, the court did find that it was against Canada's Constitution for the trial judge to prohibit the father from teaching the son any religion other than the Roman Catholic religion and prohibiting him from participating in any activity of a religious nature contrary to Catholicism.

Note 28: [1986] R.J.Q. 945 (C.A.)
Note 29: [1985] 1 S.C.R. 295.

¶ 25 Earlier decisions of the Quebec Courts have been less generous, going back to the time of Duplessis, when the Jehovah's Witness religion were persecuted. I, therefore, feel that Mr. Justice Malouf's decision was part of a conscious effort by the Quebec courts to give access parents a higher profile. For instance, in Droit de la Famille-353 [See Note 30 below] the court ruled that an access father, a member of the Jehovah's Witness, could not take his child door to door to proselytize. There was evidence that the visits disturbed the child. [See Note 31 below] However the court did overrule the trial judge's decision to put a "gag" order on the father, which restricted him from instructing the child in his beliefs and taking him to religious assemblies. The appellate court ruled that there was no evidence that the teachings were harmful to the child.

Note 30: (1987), 8 R.F.L. (3d) 360 (Que. C.A.)

Note 31: In this connection, it is important to recall that a distinction must be made between what a child may dislike and that which is harmful to a child.

¶ 26 In a similar decision, the Quebec Superior Court, in H.(N.) v. P.(C.) [See Note 32 below] confirmed that a Jehovah's Witness access father was entitled to take his four year old daughter to Jehovah's Witness services during his weekend access. No harm to the

child was evidenced by the child's participation in these services even though the mother had complained the child was having psychological problems dealing with the religious differences in the family. (See also Harvey v. Lapointe [See Note 33 below]). However Quebec courts have often put constraints on religious practice where the well being of the child is felt to be in danger. Thus, door to door canvassing was forbidden to an access parent in Droit de la Famille - 274 [See Note 34 below]. It is difficult to reconcile this decision with the H.(N.) v. P.(C.) [See Note 35 below] where a parent was entitled to do the opposite. In another contradiction a very recent decision of the Quebec Court of Appeal (Droit du la Famille - 1150) left in place the trial judge's ruling, that while permitting the access parent to teach the Jehovah's Witness religion to his child he was prohibited from "continually indoctrinating him with the precepts and practice of the Jehovah's Witness" [See Note 36 below] The Court of Appeal confirmed the trial judge's order that prevented the access parent from taking the child to demonstrations, ceremonies and the congresses of the Jehovah's Witness or to take the child to preach from door to door, at least until the court determined that the child was at an age where he could choose the religion of his choice.

Note 32: (1988), 15 R.F.L. (3d) 418 (Que. S.C.).
Note 33: (1988), 13 R.F.L. (3d) 134 (Que. S.C.).
Note 34: [1986] R.J.Q. 945 (C.A.).
Note 35: Supra
Note 36: [1991] R.J.Q. 306 (Que. C.A.).

¶ 27 In short, like Manitoba, Quebec is a confusing place to practice law in this area, although it appears that Mr. Justice Malouf's decision in Droit du la Famille-955 sets out certain principles that could have made it easier for access parents to argue for a greater degree of participation in the child's religious and cultural life than the traditional approach might allow. At least this was true until the Supreme Court of Canada decision in P. (D.) v. S. (C.) (see below).

¶ 28 In Ontario, even before the Hockey decision, access parents had always done surprisingly well, even before the Charter of Rights and Freedoms was incorporated into Canada's Constitution. In Elbar, [See Note 37 below] the access parent, a Roman Catholic mother, was permitted by the Court to abrogate the children's Orthodox Jewish religious practices learned from birth, by obliging them to travel in a motorized vehicle on the Jewish Sabbath so as to facilitate access. Similarly, in Avitan vs. Avitan [See Note 38 below] the Court ruled, in part, that an orthodox Jewish father should have unsupervised access to his child because (a) "it was in... [the child's] best interest and in his welfare to understand what it means to be a Jew" and (b) "worldly goods should never completely replace spiritual ones in a person's life, whether that person is an adult or a child". Accordingly, staged-in unsupervised access during the Jewish Sabbath on a trial basis was ordered (despite a previous accessor's report recommending no access because of the father's attempt to flee with the child to Israel).

Note 37: - (1980) 29 O.R. (2d) 207 (H.C.J.)
Note 38: 38 R.F.L. (3d) 382

¶ 29 Finally, in Benoit [See Note 39 below] the Ontario Court of Appeal ruled, as far back as 1972, that restrictions on religious discussion imposed by the trial judge should be removed.

Note 39: (1972) 10 R.F.L. 282 at 284 (Ont. C.A.)

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¶ 30 The traditional approach is mirrored by the dissent in Young and the majority opinion in P. (D.) v. S. (C.), both written by Madam Justice L'Heureux-Dubé.

¶ 31 Accordingly, Madam Justice L'Heureux-Dubé criticizes the British Columbia Court of Appeals interpretation of Section 16(10) of the Divorce Act. She indicates that the Court went too far by insisting that the best interests of the child would be served by seeing the father in every case unless "real psychological or physical harm" be shown. She feels that the proper criterion is the more general idea of "best interests of the child", a much broader test which gives the Court more room to manoeuvre in favour of the custodial parent where the Judge feels it to be warranted. In her view, the Divorce Act does not mandate such a high test. L'Heureux-Dubé indicates that the best interests of the child "encompasses more than the absence of harm". She cannot agree that this "objective compels the conclusion that there must be evidence of "real and significant harm to the child" before contact to the access parent can be limited in any manner". The principles to be applied to the Court should not be fettered by some type of presumption in which "real harm" must be proved. In my opinion, what she is really suggesting is that "best interests" should be a vague term; that every case must be decided on its facts, except that in the event of serious conflict over religion, the custodial mother has final decision-making powers. Most tellingly, L'Heureux-Dubé expressly re-asserts the traditional principles of custodial parents' rights as earlier defined. In her view, once the Court has determined the appropriate custodial parent, it must presume that the parent will act in the best interests of the child. She specifically cites the New Brunswick Court of Appeal stated in Fougere vs. Fougere [See Note 40 below]:

> "Once Courts award custody they must, in our view, support the custodial parent and that parent's reasonable efforts to bring up the children, including the tight of the custodial parent to decide questions relating to the religious upbringing of the children."

Note 40: (1987) 6 R.F.L. (3rd) 314 at page 316

¶ 32 By contrast, both Madam Justice McLachlin and Mr. Justice Sopinka in Young and the Quebec case insist on the need to show "real harm", with Sopinka being even more vociferous on this point than McLachlin. In Young, Mr. Justices Cory and Iacobucci support Madam Justice McLachlin as part of the "pro-access" camp in that case. In fact, they appear to write with some indignation against the thought that the Courts can, in any way, put a gag Order against the access parent and prevent him from having open discussions with his own children:

> "We find it difficult to accept that any genuine and otherwise proper discussion between a parent and his or her child should be curtailed by Court Orders... Surely the best interests of the child test embraces a genuine discussion of religious belief, as opposed to indoctrination, enlistment or harassment having the aim or effect of undermining the religious decision made by the custodial parent."

¶ 33 However, these same two judges appear to have changed their minds between the two cases and switched camps between the Young and Quebec decision. They both agree with the "pro-access" camp of Mr. Justice Sopinka and Madam Justice McLachlin and the pro-custody Quebec decision in which they sided with Madam Justice L'Heureux-Dubé. In trying to understand why they "switched sides" the two rely on concepts of "best interests of the child" without defining that term. In the Quebec case, they do reconfirm their view that opinions of parents regarding religious questions will not automatically be harmful. However, I respectfully suggest that in order to withdraw from the debate between L'Heureux-Dubé and McLachlin/Sopinka, Mr. Justices Cory and Iacobucci relied on the trial judge in the Quebec case and his ability better to assess witnesses at the trial level. Accordingly, the two reluctantly agree with the conditions imposed by the trial judge because "he had the benefit of seeing all of the witnesses". However, that is no less true and the same could be said of the Young decision. Yet for some reason, Justices Cory and Iacobucci did not feel they had to rely upon the trial judge's assessment of credibility in the Young case and voted to remove the restrictions on Mr. Young with respect to religious access. The following chart may now become understandable. However, given the conflicts between members of the Court, its ambivalence on this issue of "religious access" is palpable.

	YOUNG v. YOUNG	P. (D.) v. S. (C.)
Married:	1974	1981
Separated:	1987	1984
Trial:	1989	Application 1987
Children:	Three	One

Ages at trial: 10, 8, 2		3 1/2
Custody:	Mother (by Court Order)	Mother (by Court Order)
Order:	Access of Father Limited: a) Not discuss religion with children; b) Not take to religious services; c) Not take on canvassing meetings. d) No adverse remarks by either party e) Father can prevent blood transfusion.	Access of Father Limited: a) Cannot indoctrinate child continually; b) Cannot take child to: - demonstrations - conferences - conferences c) Can teach child religion
Evidence at trial:		
	- Older daughters liked father but disliked religious instruction. - Some evidence that religious instructions was damaging "father/daughter relationship" - Children functioning in normal fashion, i.e. no adverse effects to psychological/physical health; - (dissent) - emphasize stress felt by children due to religion of father.	- Husband is influence on young child. - conflict from two views may be disturbing re young age - Majority and dissent mention young age - No evidence of suffering either psychological or physical harm.
Decision Summary:		
Majority:		
	McLachlin Sopinka Cory & Iacobucci	L'Heureux-Dubé La Forest Gonthier Cory & Iacobucci
Minority:		

L'Heureux-Dubé La Forest Gonthier	McLachlin Sopinka

Decision:

Reject order placing religious access restrictions on father	Allow order placing religious access restrictions on father

Constitutionality:

Neither order is unconstitutional re: freedom of religion/expression. Constitution may not even apply to such an order (L.H.-D.) However, in strong dissent, in Young, Sopinka maintains that "best interest of the child fact" must be reconciled with the Charter;

Best Interest Tests (by majority)

Place more importance on harm being present and inherent benefits of free and full contact with access parent. (Dissent per L'Heureux-Dubé as adopted in CP vs. CS, cases) (custodial parent has overriding authority)	Harm is not determining - increased value placed on best interest as only factor, meaning the will of the custodial parent (in most cases)
	McLachlin

Decision

Majority - reject order restricting access parent's rights re religion.	Dissent - same

Issue framed as:

1. "Access parent offer children religious views over objection of custodial parent"? and "what does best interest test require"?	1. Same
2. "Place of Best Interests of Child test vs. Constitution Charter of Rights"? or "does	2. "Is A. 653 & 654 C.C.Q. & A.30 (best interest test) vs. the Charter"?

best interest test as applied
in 1) infringe on guarantees
of religion, expression
association and equality".

History Perspective of Best
Interest of Child Test:

- New role in control and access law;
- Used in U.S. and many other jurisdictions; universally accepted test.

Not discussed.

Legislative provisions:

- S. 16(8) Divorce Act. Best interest test is ONLY test for custody/access;
- Best interest test is broad to permit judicial discretion in large number of circumstances
- S. 16(10) = "child as much contact with each parent as is consistence with best interest of child"
- Therefore she finds contact with both parents much more beneficial. Desirable to make contact;
- Custodial parent cannot restrict type of contact unless vs. best interest.

- Quebec civil code same standard as Divorce Act

Risk of Harm Re. Limitations on access:

- Not necessary to find harm to limited access, but often a factor (harm).
- Ultimate determinate is best interest;
- However, to outweigh benefit of full and free access - harm may be necessary. Therefore, harm may and often will be the key factor in those circumstances.

- Risk of harm important factor where determining whether parent can share different religious beliefs.

- Conflict in parents over access not necessarily means harm.

Custodial Parent's Right to Limited Access:

- None. All based on best interest. (meaning "lack of harm).

- Same

Application of Best Interest Test:

- Best Interest Test = (1) no consideration to custodial parent's desires; (2) must consider benefits to child of knowing "true" father. (full and free access) (3) where (2) is issue court must look at "harm" to outweigh the benefit of (2) (where limiting access of lawful activities).

- Same

Conflict Between parents:

- Not by itself enough to harm. Must be better evidence of harm.

- Cannot infer from conflict between parents that harm exists to child.

Deterioration of Relationship with Access Parent:

- Possibility of not enough because not knowing true father is also harmful.

- No comment.

Expert Evidence:

- Not required to show harm or best interest but can be useful.

- No comment.

Facts of This Case to Best Interest Test:

- Not enough evidence to

- No evidence to show

outweigh benefit of full and free access.
- Need some "harm" in these circumstances.

child adversely affected by father.
- Nothing to offset assumed benefit of full and free access.

Charter Applies:

- Assumes does.

- See Young discussion for all charter issues.

Charter Issue:

- "Does Charter protect religious expression that is vs best interest of child"?

Charter Position - Religion:

- Freedom of Religion does not protect activity which 'harms' other.

- Harm = "injure"

Charter position - Expression:

- Broader right prima-facie case for protection can be made;
- But purposive approach to interpret charter. Therefore, since activity here is primarily religion, then Court must interpret expressive freedom consistent with religious freedom.
- Therefore, in this case religious freedom standards are used instead of expression standards.

L'HEUREUX-DUBE

Decision:

- Dissent -- would allow order restricting parent's access re

(Incorporates all of her reasoning in Young plus

religion.	the following:) Majority -- allowed order restricting religious access by father.
Issue Framed As:	
(1) Is curtailment of access ok in the circumstances of the case? Therefore what is standard to be applied? (Best interest test content?)	(1) what is applicable test to right of access?
(2) Does the applicable test best interest) violate Charter? based on (a) discretion (b) vagueness	(2) Best interest infringe on right to freedom of religion/ expression?
Historical perspective of Best Interest of Child Test:	
Legislative provisions:	
- Discuss s. 16 (8) & (10) of Divorce Act. - Only test is best interest of child.	- Discusses relevant Quebec Civil Code statutes and finds test is best interest of child.
Risk of Harm re Limitations on Access:	
- Best interest = many considerations and factors. - Harm is not the test even when limiting access. Just another factor. - If use harm, then one places too much burden on the child in the event of miscalculation. - Slippery slope problems because harm not a good test -- too weak;	- Not determining factor even if it is one to consider. - Even in absence of harm can restrict.

- Best interest = not just free from harm but best possible conditions.

Custodial Parent's Right to Impose Limited Access:

- Everything subject to best interest but custodial parent has full authority.
- Expert's opinions secondary to mother's instincts; instincts verified by mother's daily care.

- Same

Application of Best Interest Test:

(1) Only consideration is best interest.
(2) Does evidence show that best interest of child would be jeopardized by unrestricted access?
- Therefore, here relationship with father being damaged -- not in best interest of children.

- Wide range of factors.

Conflict Between Parents:

- Not necessarily bad but if circumstances/evidence show causing bad environment then not in best interest
- Here conflict over religion is disturbing to child.
- Quote studies show conflict between parents very harmful and not in best interest.

- Same

Deterioration of Relationship:

- S. 16(1) and best interest is contact with access parent. If part of access damaging then must be curtailed.

- Same

- No significant value to "knowing" full and free access parent if in end no relationship.

Expert Evidence:

See McLachlin

- Same

Facts of This Case to Best Interest Test:

(1) Evidence shows that unrestricted access is not helping relationship flourish.
(2) General rights to access not threatened.
(3) Evidence = religion causing pressure, stress and problems to smooth access therefore limited area causing problems (two experts)
Therefore, stop area causing problems (even if not harm per se).

(1) Evidence shows very fanatical and tried to impose on everyone.
(2) Evidence shows influence. Child.
(3) Trial judge said this = harm therefore meet her less stringent test.
(4) Saw possible future trauma because not in best interest.

Charter Applies:

- Same as in P. (D.) v. S. (C.) but also considers
(1) discretion
(2) vagueness
(see below)

- No. Charter does not to apply to judicial orders or to resolving private family disputes.

Charter position - Religion:

(1) Can discretion be rationally tied to legislate objective?
- Because of nature of family law must have discretion to apply leg. objective.
Yes.

(2) Can a legal debate be framed? Yes - world-wide application = judicial norm.

- Even if charter did apply then this order does not curtail religious freedom since it restricts Indoctrination and not discussion.

easily debatable and lots of case law considering.

Charter Provision - Expression:
See above

Custody:

- Long discussion on custody and rights.
- Common law = custody is parental authority.
- If sole custody then have all parental authority -- not subject to access parent.
- Now recognized that child's best interest contact with both parents but access parent has no authority.
- Decision power alone in custodial parent is to ensure best interest.
(same discussion as in P. (D.) v. S. (C.), but writing minority decision)

- Similar discussion (But writing majority decision)

Access:

- Agrees with McLachlin that S. 16(1) = maximum contact is good but limited by best interest test.
Unlike McLachlin, no need to show harm.
- Access a temporary possession with husband being limited re best interest.
No parental authority.
- Access is right of child not of parent.
- Goal of access to maintain relationship with non-custodial parent, therefore, it is best interest of child to remove sources of conflict that damage meaningful relationship.

- Similar discussion.

- Point of access is to have relationship flourish.

SOPINKA

Decision:

- Followed majority (McLachlin)
- Reject order restricting parent's access rights re: religion

- Followed dissent (McLachlin)
- Reject order restricting access rights re: religion

Issues Framed As:

- Same as McLachlin

- Same as McLachlin

Historical Perspective of Best Interest of Child Test:

- Not discussed -- see McLachlin

Legislative Provisions:

- Not discussed -- see McLachlin

Risk of Harm Re: Limitations on Access:

- Agree with McLachlin
- But see constitutional discussion

Custodial Parent's Limited Access

- No comment

Application of Best Interest Test:

- Same as McLachlin
- But must be reconciled with Charter.

Conflict Between Parents:

- No comment.

Deterioration of Relationship:

- No comment.

Expert Evidence:

- No comments.

Facts of This Case to
Best Interest Test:

- Evidence does not show harm re:
benefit of free and full access.

Charter Applies:

- Yes. No issue.

Charter Issue:

- Best interest test must be
reconciled with Charter (and
not other way around).

Charter position -- Religion:

- Best Interest is usual
test but if religious
expression by the access parent
being restricted then harm or
risk of must be shown.
- Rejects McLachlin's statement
that anything vs best interest
of child = "injure" as defined
in Big M Drug Mart case;

LA FOREST & GONTHIER

- Same as L'Heureux-Dubé in
both decisions.

CORY & IACOBUCCI

- Swing vote.

- Agree with both McLachlin and L'Heureux-Dubé and that best interest standard does not violate the charter.

- Agree with L'Heureux-Dubé that access determined on best interest of child.

- Expert evidence sometimes useful.

- Agree with McLachlin that proper application of best interest test does not support restrictive order.

Discussion between parent and child should not be curtailed as opposed to indoctrination

Best interest embraces open discussion if they are not unreasonable.

- Removes restrictions on religious access and overrules trial judge.

- Agree fundamental principle is best interest of child.
- Religious difference nor discussion of different religion not necessarily harmful. Often, in fact, beneficial.
- Some evidence visits with father disturbing child.
- Therefore, best interest to place some limitation on access.
- Trial judge best to apply evidence and applied correct test. Order is, therefore, (reluctantly) o.k.

- Would not have imposed two conditions on visitation that are in order. Therefore, despite reservations, follow L'Heureux-Dubé.

¶ 34 From the foregoing chart it appears that the best interests of the child is the determinative test in custody and access decisions, but that each Supreme Court Judge has his or her own view as to when the term can be best applied in religious access cases.

¶ 35 McLachlin's camp feels that where access is being limited based on religious expression, "harm" (meaning substantial physical or psychological harm) should usually be introduced into evidence by the custodial parent before any expression of religious sentiment directed towards the children by the access parent is curtailed by the Court. Sopinka goes further and rules (unlike Mclachlin) that "substantial harm is not only an important factor but also must be shown" (p. 4). This is the school of thought as enunciated by the British Columbia Court of Appeal, and Justices McLachlin and Sopinka of the Supreme Court of Canada, as well as the development of the case law in Ontario and, to some extent, in Quebec.

¶ 36 However, Madam Justice L'Heureux-Dubé states that "harm" is never a determinative factor in these types of Orders even if restrictions on religion are being requested. Rather she feels that a conflict over religion is intrinsically harmful to the child and cites my book (at page 90) as authority for the idea that "it is precisely the cases in which children become embroiled in religious conflict that cast doubt on the wisdom of the decisions which have allowed the religious rights of the access parent to prevail". A true "best interests" test considers their trauma in such situations.

¶ 37 The facts of the cases are similar except for the age of the children. Age is not mentioned as being the determinative difference between the court's conflicting decisions. Indeed, the evidence in Young indicates a better example of access not being in the child's best interests because of the problems that his religious instruction was causing with the father and the two older daughters. However, in the Quebec decision there was really little evidence of such problems, except that the child was being influenced by a "fanatical" father and at times appeared to be confused. In conclusion, the Supreme Court does not resolve the problem of how to define the best interests test, whether in religion or non-religion cases. Some members support the view that "harm" is never determinative. Others support the view that it is "important". And Mr. Justice Sopinka considers it to be "necessary" before religious access is curtailed.

¶ 38 As a result of these decisions, the Supreme Court has now promoted more questions rather than answers to the basic problems raised in the conflicting decisions made in religious access and custody disputes across Canada. It has given us opposing views of how and what the definition should be in two cases released on the same day.

¶ 39 Initially, I had thought that the cases would make it difficult to know what stare decises could possibly mean with such a scenario. However, in a recent decision of the Prince Edward Island Supreme Court in Sherry vs. Sherry [See Note 41 below] McQuaid, J. applies principles from Justices Mclachlin's and Sopinka's view of the "new found" rights of the access father. In this particular case it gave the access father more access that the mother had desired. Although there was no religious dispute in Sherry, the adoption of McLachlin's principles is best summarized as follows...

Note 41: [1993] P.E.I.J. No. 138

> There are a number of different opinions delivered by the Court [in Young]. I believe that the Court sends forth with clarity that the determining matters of custody and access the best interests of the children is the sole test.

The judge then remarkably cites McLachlin's majority opinion in Young and her view of the meaning of best interests in religious access disputes, completely ignoring Madam Justice L'Heureux-Dubé's ruling as incorporated in the Quebec case. He notes that while all factors must be considered, one such fact is the need to maximize contact to the access

parent. Moreover, it is genuinely relevant to consider "whether the risk of harm, if any outweighs this need".

¶ 40 This judge also selectively quotes from Sopinka by quoting from him as follows:

> "The policy favouring activities that promote a meaningful relationship [to the access parent] is not displaced when there is substantial risk of harm to the child".

Practical Tips:

¶ 41 In light of all the confusion, it would be tempting for individual lawyers to forget the Supreme Court of Canada decisions and refer to jurisprudence in their individual provinces before trying to adopt the convergent views contained within these two Supreme Court of Canada decisions. However, the Sherry case was decided in Prince Edward Island, the same court that had earlier stood behind the traditional principles recited in Gunn (supra).

¶ 42 At the same time, reconciling the irreconcilable is futile. Every litigant will pick from these two decisions what he or she wants to argue.

¶ 43 I personally don't believe that such cases will be won or lost on the basis of picking one as opposed to the other camp. They will be won on the way in which a litigant responds to domestic crises and the way his lawyer presents the case. I suspect that if the litigant presents a sympathetic case of the facts, then the Supreme Court of Canada has provided the judge with the legal reasons of his choice to emphasize, adumbrate or underline his decision. In short, the manner of presentation and a client's conduct will be more crucial than legal proofs, presentations or standards. In that regard I adopt the suggestions I've made in the first chapter of my book, but now qualified in light of Young and P. (D.) v. S. (C.). Bluntly stated, the key is still tolerance, even if one's religion does not appear to permit such tolerance. It is for this reason that sections 16(10) and 17(1) of the Divorce Act specifically mandate that a judge "take into consideration the willingness of the person for whom custody is sought to facilitate contact" with the other parent when making custody/access orders. Tellingly, this is the sole statutory guideline on how to assess custody applications and best interests.

¶ 44 A review of Canadian jurisprudence, the Divorce Act, the Canadian Charter of Rights and Freedoms, and these two Supreme Court decisions suggest the following principles and strategies when the courts approach disputes in which one parent either seeks custody or enhanced access rights for religious or cultural reasons. I have italicized the changes to conclusions reached in my book as a result of Young and P. (D.) v. S. (C.).

¶ 45 The first set of principles are "formal" observations:

(i) Culture or religion is only one, among many factors, when the best home is determined. However, when both homes are equally healthy

and the parenting skills of both parents are excellent, culture and religion may well become the focus of a determination.

(ii) Custodial parents may have the "final say" over their children's religious upbringing in the event of irreconcilable conflicts in practice or formal education, but not necessarily over the degree to which the access parent observes his religion with the children.

(iii) Under Canada's Charter and s. 16(1) of its Divorce Act the access parent has a constitutional right to introduce his religious beliefs and practices to his child, even if they conflict with the custodial parent's, subject only to compelling evidence of real physical or psychological harm in those rare cases where some intrusive constraints on the access parent's religious rights may be warranted.

(iv) Expert testimony is not crucial in determining if such harm actually exists and is not merely the "normal" result of anxiety caused by the parents' separation.

(v) The parent who most willingly wishes to accommodate and maximize contact between the child and the other parent, notwithstanding his or her religious beliefs, is most likely to succeed in a custody and access dispute over religion or culture. This may mean that such a party may have to tolerate the other parent's religion to a degree that is unacceptable within his or her faith, but such toleration is necessary to comply with recognized "Canadian" virtues of compromise and deference. Whether this principle conflicts with a parent's Charter rights remains an open question.

(vi) The courts will not prefer one religion or another, but will rather see how a particular set of beliefs or practices impact on the child's general well-being.

(vii) If the child is a member of a visible minority, then custody may be granted to the parent who more closely resembles the child, so that the child will have fewer problems with his "identity" as he matures. [See Note 42 below]

(viii) An older child's religious views will be a significant factor in any determination, although the access parent's rights may well override even this consideration.

Note 42: See Singh vs. Singh (1981) 34 A.R. 271, 26 R.F.L. (2d) 75 (Alta. C.A.)

¶ 46 Complementary "informal" comments regarding these principles suggest the following:

(i) The custodial parent's supposed "pre-eminent" control over his or her children's religious upbringing may be eroding in Canada, as the courts struggle to balance the access parent's newly established rights in the Divorce Act, with the need to maintain some governing

form of stability for the child. The ubiquitous and protean "best interests tests" is (a) seriously undermining the traditional presumption concerning the custodial parent's rights, or (b) reinforcing those rights, depending on the facts. This observation should concern those custodial parents whose ex-spouses may seek to use these "new-found rights" as a means to harass and interfere with the custodial parents' day to day lives. However, if conflicts over the issue demonstrate that a child can be confused by the access parent, then a broader "best interest" test may override the need to maximize contact with the access parent.

(ii) The courts are prejudiced against those religions that encompass an entire way of life, and which insulate themselves from the community as a whole, even though the courts purportedly claim not to prefer one religion over another. Accordingly, mainstream religions are much better than minority groups, sects or fundamentalist persuasions such as Jehovah's Witnesses or certain Pentecostal churches, although orthodox Jews have been much more sensitively treated than this theory suggests. "Real harm" is more likely to be found if the parent is a Jehovah's Witness living in Quebec, than if the parent is a Catholic or Protestant, particularly if the congregant canvasses door to door with his children against the custodial parent's wishes.

(iii) The clever litigant might persuade both an assessor and a court that he or she is the better parent because of a greater willingness to accommodate and maximize contact with the other parent. However, this does not mean that these wishes will actually lead to such accommodation or contact once the decision is rendered or the assessment is completed. Unfortunately, appearances may be the best that a court or assessor, in their limited capacities, have the ability to observe. In one Ontario case, in which the writer was the mother's counsel, the parents were Roman Catholics, but the mother joined a fundamentalist church shortly before the parties separated. The father brought an emergency motion for the return of the children to his care and control on the ground that his wife was a religious fanatic and was taking the children up to her church, which was foreign to the children's Roman Catholic upbringing. The husband led much evidence about his wife's supposed fanaticism in a rather hysterical fashion. It was explained to the court that the mother was perfectly willing to leave the children in a Roman Catholic school to accommodate the husband's concerns and maximize contact with him. Upon hearing this, the court was so impressed that it granted custody to the mother without any hesitation. In that particular case, a condition of the custody order was that the children actually attend the husband's choice of school. However, in those cases where no such conditions are imposed, there is nothing to prevent the so-called "sensitive and

accommodating" parent from turning his or her back on promises made during the course of an assessment or trial.

(iv) Although expert testimony may be helpful when the courts determine whether any harm exists when the parents introduce differing religious practices to the child, the quality of such expert testimony is often slanted towards the parent who appears to be more interested in accommodating the other parent's beliefs. The poor choice of an expert could lead to disastrous results. In one such case, the writer successfully cross-examined an assessor who had recommended that the children's paternal grandparents provided a more stable environment than the mother. In the assessor's opinion, the mother's religious beliefs suggested that she was less rational than the grandparents and therefore less disciplined in the organization of her children's schedules. Cross-examination unearthed the fact that the assessor happened to be an adherent of a male-dominated religious group. More importantly, the assessor neglected to conduct any sessions in which he could observe the grandparents interacting with the children. His incompetence led opposing counsel to agree that the assessment should be ignored, even though it was prepared by a qualified child psychiatrist of a recognized Toronto hospital.

(v) In fact, the courts will prefer one religion over another, even though they may appear to limit their analysis to see how those beliefs impact on a child's general well-being. In Canada, it is better either to be indifferent to religion or to be the member of a group instantly recognizable to a judge, who will more than likely have a mainstream Christian upbringing. However, parents of a minority faith and their counsel, who are litigating in this field, will seek to characterize the beliefs of the minority faith as perfectly natural for the children involved. They will argue that the family's history and accustomed lifestyle conforms more to the minority faith than to the judge's own "majority" value system. In Viltorio Toselli's essay, "Religion in Custody Disputes" [See Note 43 below], Toselli concludes that as a matter of strategy, the custodial parent should portray the other parent as a very intolerant person. This serves two purposes: first, the defendant will lose the sympathy of the court, and second, since intolerance between parents is the major cause of stress for the child, the likelihood of harm to the child increases. Toselli's comments are not entirely accepted. As mentioned, the key is not so much to portray the other parent as intolerant, but rather, to demonstrate just how tolerant and accommodating the parent seeking custody or enhanced access has been in the past and wishes to be in the future. For this reason, a litigant should always express some positive statements about the other parent in his or her evidence.

Note 43: "Religion in Custody Disputes" (1990) 25 R.F.L. (3d) 261 at 266

¶ 47 Ultimately, each case will probably now be decided on the facts.

¶ 48 They may even choose to ignore these two cases altogether and simply rely on the vague notion of best interests whatever it means to them. Accordingly, the approach the courts will take could well mirror the decision of Mr. Justice Morden of the Ontario Court of Appeal in Carter vs Brooks [See Note 44 below] as they relate to mobility cases. It is worthwhile citing his view to illustrate the futility of relying on "law" in custody and access cases:

> I think that the preferable approach in the application of the standard is for the court to weigh and balance the factors which are relevant in the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of We parties will be unsuccessful unless he or she satisfies a specified burden of proof. This overemphasizes the adversary nature of the proceeding and depreciates the court's parens patriae responsibility. Both parents should bear an evidential burden. At the end of the process the court should arrive at a determinate conclusion on the result which better accord with the best interests of the child [emphasis added]. [See Note 45 below]

Note 44: 1990 2 O.R. (3d) 321 (C.A.)
Note 45: Ibid at 328

¶ 49 Not every lawyer will enjoy living in the "law of the jungle". The custodial parent's lawyer will attempt to demonstrate a risk of harm. The access parent's lawyer will conversely demonstrate his client's "tolerance" towards the custodial parent's alternative religious lifestyle. The courts will continue to debate the issue with only ambivalent guidance from the Supreme Court of Canada.

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Designated Insurance and Pension Beneficiaries and Unfulfilled Expectations*

by Keith B. Farquhar

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* The following paper is reproduced from the Canadian Journal of Family Law, (1997) 14 Can. J. Fam. L. 63, with the written permission of the author, Professor Keith B. Farquhar of the Faculty of Law at the University of British Columbia, and Mr. Paris Simons, Senior Editor of the CJFL. The paper is an excellent case comment. I believe that Professor Farquhar alerts counsel to pay more scrupulous attention to those "boilerplate" clauses in domestic contracts which deal with rights by spouses or children to the "payor" spouse's life insurance proceeds. In light of the following article, it may be time to reconsider the wording of such provisions (John Syrtash).

INTRODUCTION

¶ 1 The recent cases of Fraser v. Fraser, [See Note 1 below] Munro v. Munro Estate, [See Note 2 below] and Gregory v. Gregory [See Note 3 below] focus attention on an issue that recurs in Canadian law and illustrates the abundant resources of the common law and equity to solve a problem that has many different manifestations. The issue arises when it is expected that insurance or pension benefits will, on death, go in a particular direction, but subsequent complications arise that leave that expectation in some doubt.

Note 1: (1995), 16 R.F.L. (4th) 112 (B.C.S.C.).
Note 2: (1995), 13 R.F.L. (4th) 139 (B.C.C.A.).
Note 3: (1994), 92 B.C.L.R. (2d) 133 (B.C.S.C.).

FACTS AND ARGUMENT

¶ 2 The classic fact pattern involves an agreement (usually entered into as a result of marriage breakdown) between a husband and wife. The agreement will provide inter alia that one spouse will maintain insurance policies or pension benefits in good standing and ensure that the other spouse receive the benefits on the death of the insured. What then typically happens is that the policies or pensions are allowed to lapse, or the insured changes or revokes the beneficiary designation.

¶ 3 This occurred in the New York case of Simonds v. Simonds. [See Note 4 below] A husband and wife, upon marriage breakdown, negotiated a separation

agreement, one of the terms of which obliged the husband to maintain $7,000 worth of life insurance for the benefit of the wife as a named beneficiary. After the divorce the husband married again, and upon his death it was discovered that all of his life insurance policies named either the second wife or the new couple's daughter as beneficiaries. The husband's estate was insolvent, and consequently an action in contract between the first wife and the estate was futile. As a result the first wife, by means of an action against the second wife and the daughter, sought to impose a constructive trust over insurance funds in their hands. The insurance companies had discharged their obligations at law by paying the insurance proceeds to the beneficiaries on their books.

Note 4: (1978), 45 N.Y. Supp. (2d) 360 (N.Y.C.A.).

¶ 4 The New York Court of Appeals was prepared to impose a constructive trust on a variety of bases, thus ensuring that the first wife was able to secure what was, in effect, her contractual entitlement. The first basis upon which the Court was prepared to act must be seen to be novel and highly debatable by the standards of Anglo-Canadian law. It was simply that "the separation agreement vested in the first wife an equitable interest in the insurance policies." [See Note 5 below] It is true that the law of constructive trust has undergone considerable development and expansion in Canada in recent years, [See Note 6 below] but we do not yet have any clear authority for the proposition that a breach of contract is a reason for the imposition of a constructive trust. The second avenue of approach used by the court has more support in Canadian jurisprudence. It rested on the proposition that the husband and the first wife were, at the time of the separation agreement, in a confidential and fiduciary relationship. Hence it was a breach of fiduciary obligation, leading to constructive trust, for the husband to direct the insurance proceeds into the hands of a volunteer. [See Note 7 below] Finally the court viewed the situation between the first and second wives as amounting to unjust enrichment. Again, after Pettkus v. Becker [See Note 8 below] and Peter v. Beblow [See Note 9 below] unjust enrichment as an open-ended concept in Canadian law is now well-established. According to the canons of those cases the second wife could be seen to be enriched and the first wife correspondingly deprived. By the same token the existence of the separation agreement could be seen to constitute an absence of juristic reason for the second wife's enrichment. [See Note 10 below] Simonds then, although an American case, provides a comprehensive analytical basis upon which to evaluate subsequent Canadian decisions.

Note 5: Ibid., at p. 362.

Note 6: See LAC Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14. For one of several commentaries on the implications of this landmark case see D.M. Waters, "The Constructive Trust in Evolution: Substantive and Remedial" (1990), 10 Est. and Tr. J. 334.

Note 7: Cases in which a husband and wife were held to be in a fiduciary relationship at the time of and after marriage breakdown include Gregoric v. Gregoric (1990), 28 R.F.L. (3d) 419 (Ont. C.J.G.D.) and De

Mornay v. De Mornay (1991), 34 R.F.L. (3d) 101 (Ont. C.J.G.D.). See also cases noted infra. At p. 78 et seq. That a breach of fiduciary obligation may be remedied by constructive trust was confirmed in LAC Minerals, ibid.

Note 8: [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 254.

Note 9: [1993] 1 S.C.R. 980, (1993), 101 D.L.R. (4th) 621.

Note 10: The question of absence of juristic reason in these situations will be analyzed more closely in a discussion of Steeves v. Steeves, infra. footnote 40.

¶ 5 In Phillips v. Spooner [See Note 11 below] the separation agreement provided that the husband would keep the wife as the beneficiary of certain life insurance policies. The wife re-married in 1973 and the husband then revoked and replaced the wife's designation. The husband, having himself re-married, died in 1975 without making any provision for the first wife. The insurance proceeds were in the hands of the second wife as the designated beneficiary on death. The first wife brought an action for breach of contract against the estate, seeking the proceeds of the insurance policies as the appropriate sum in damages. The estate defended on the basis, among others, that the Saskatchewan Insurance Act [See Note 12 below] specifically provided, first, that insurance monies of the kind in question here were not part of the estate of the insured and, secondly, were not in any event subject to claims by the estate's creditors. In response to this Johnson C.J.Q.B. made the unorthodox suggestion that it could not have been the intent of the legislature, in enacting the Insurance Act, to deprive the first wife of the benefits of a successful judgment in contract against the estate and that she should therefore be accorded the status of a special creditor. But it was clear that the Chief Justice was sufficiently uncertain about the legitimacy of this analysis that he went on to observe that there were sufficient general assets in the estate to satisfy the judgment. It is suggested that the Insurance Act was clear on its face, and that it would have been more appropriate for the court to circumvent the Act's terms by the imposition of some form of trust that would have been impressed on the insurance policy prior to or contemporaneously with the death of the insured. It is, as we shall see, the concept of trust that has historically proved more popular to ensure that benefits reach the destination viewed to be the most appropriate. This is nowhere more clear than in Shannon v. Shannon. [See Note 13 below]

Note 11: (1979), 4 E.T.R. 178 (Sask. Q.B.).

Note 12: R.S.S. 1965, c. 143, s. 157.

Note 13: (1985), 19 E.T.R. 1 (Ont. H.C.). See also Wilkinson v. Wilkinson (1976), 26 R.F.L. 88 (Ont. C.A.).

¶ 6 In this case the classic fact pattern appears once again. By a separation agreement a husband agreed not to revoke the designation of the wife as beneficiary of his life

insurance policy, but before his death the husband did revoke, and named his siblings as beneficiaries instead. The proceeds were paid into court by the insurance company, and the wife brought an action against the siblings both in contract and trust. Again, there was not enough money in the estate, outside of the insurance funds, to satisfy a judgment in contract. McKinlay J., however, concluded that at the time of the separation agreement either the husband had intended to create an express trust of the insurance policy and its proceeds, or that the law imposed one. This decision was reached simply by a brief reference to the three basic requirements for the creation of a trust - certainty of subject-matter, certainty of beneficiary and, either, certainty of intention by the settlor or the imposition of a trust by law. It is not clear ultimately whether McKinlay J. saw this as a situation of express trust created by the husband, or whether it was seen as a constructive trust, but the finding of trust resulted in the funds being allocated to the wife as beneficiary rather than to the siblings as volunteers.

¶ 7 The decision of the British Columbia Court of Appeal in Munro v. Munro Estate [See Note 14 below] demonstrates an ingenious combination of principles of contract and trust to bring about a desired result. At the time of a separation agreement the husband here undertook to nominate the wife as the surviving beneficiary of his two pensions from the Federal government. The agreement also provided that the husband was to be a trustee for the wife of half of all the benefits accruing to him under the pensions. The couple later divorced and the husband soon after died. At that time the pension authorities advised the former wife that the surviving beneficiary nominations were not permitted under the rules governing the pensions. It appears that neither party to the agreement was aware that the pension rules were so limited. The wife brought an action against the estate primarily in contract, for compensation for the loss of the benefits promised her. The estate defended, unsuccessfully, on the basis that the husband's lack of knowledge of the pension rules amounted to contractual mistake. The trial judge awarded damages against the estate for breach of the agreement to nominate the wife as beneficiary, and found also that the contract contained an implied term (also breached) that the nomination could legally be made. In addition the trial judge referred to the express trust contained in the agreement and found that there was a breach of it insofar as the husband had failed in his trustee's obligation to find out about the legitimacy of the nominations. All of the findings of the trial judge were upheld in the Court of Appeal, and the net effect of the decision was to award the former wife, out of the remainder of the husband's estate (presumably large enough to support the award), the amount she would have received had the pension rules permitted the nominations. [See Note 15 below]

Note 14: Supra, footnote 2.

Note 15: Cf. Britton v. Britton Estate (1995), 16 R.F.L. (4th) 266 (Ont. C.J.G. D. (Div. Ct.)), discussed infra.

¶ 8 The most recent of the agreement cases, Fraser v. Fraser, [See Note 16 below] raises more wide-ranging doctrinal questions, although the facts were classic. In a separation agreement the husband agreed with the wife that he would maintain and name her as beneficiary under two life insurance policies and a Federal government pension. The husband remarried and made his widow the beneficiary of the policies and pension. Upon his death the former wife brought an action against the estate and the widow, claiming specific performance of the contract and a declaration of constructive trust over the proceeds. As to the action in contract Melvin J. agreed that damages against the estate should be awarded, but at the same time he went further, in a ruling reminiscent of (but not referring to) Simonds v. Simonds. [See Note 17 below] For whatever reason, Melvin J. was convinced of the desirability of declaring that the widow was a constructive trustee of the proceeds for the wife, and referred both to Shannon v. Shannon [See Note 18 below] and Gregory v. Gregory. [See Note 19 below] The fact that this last case was cited as well as the earlier is of special interest, since Gregory involved a finding that in certain circumstances a husband and wife stand in a fiduciary relationship to each other. The implications of a fiduciary finding are more momentous [See Note 20 below] than the finding of an express trust on the Shannon model, as the indicia of the former are considerably less precise than those of the latter, and we are left to wonder why Melvin J. thought it necessary to make concurrent findings.

Note 16: Supra, footnote 1.

Note 17: Supra, footnote 4.

Note 18: Supra, footnote 13.

Note 19: Supra, footnote 3, discussed infra. At p. 77.

Note 20: These implications will be explored more fully later, in the discussion of Gregory itself.

¶ 9 So far in this exposition we have encountered only cases where the courts have thought it appropriate to upset arrangements that would conventionally follow from the designation of a beneficiary on death. Other cases make it clear that this result is not inevitable. In Baker v. Hall [See Note 21 below] there was a separation agreement, one of the terms of which was that the wife acknowledged that she relinquished all claims that she might make on the property of the husband. Among the husband's assets was an insurance policy that named the wife as the beneficiary. The marriage was dissolved and the husband died, leaving the beneficiary designation unrevoked. The estate brought an action against the wife and the insurance company, claiming that the husband had no intention of benefiting his wife after the separation, and that the insurance designation must be subordinated to the agreement. In other words, the fact pattern was the reverse of the normal, but the plaintiff's analysis was consistent with that we have observed in the cases already noted. Ultimately the Alberta Court of Appeal found for the defendants by employing a variety of interpretative techniques to the separation agreement. The conclusion was that the husband had not intended, in the agreement, to deprive the wife of her entitlement, but that he would have been free to do so by revoking the designation. As he had not done this, the insurance company was correct in making

payment to the wife. We may observe in passing that there is no evidence in the reported decision that the plaintiff estate had raised any argument centred on either trust or unjust enrichment.

Note 21: (1985), 44 R.F.L. (2d) 275 (Alta. C.A.).

¶ 10 In Meisner v. Bourgaux [See Note 22 below] the plaintiff and the deceased began living together shortly before his premature death. During the relationship the deceased bought a house in which the couple lived together, and at the plaintiff's suggestion the deceased took out mortgage life insurance. The plaintiff was not named as the beneficiary, although part of her claim against the estate was that the deceased had contracted with the plaintiff to this effect. The insurance payment retired the mortgage on the house and it passed, under the deceased's will, to his parents. The claim in contract failed for lack of evidence that the plaintiff and the deceased had intended by their words and conduct to affect legal relations. The plaintiff also pressed a claim in unjust enrichment, but it, too, failed. Even though the estate was enriched by the insurance proceeds, there was no evidence that the plaintiff was correspondingly deprived. She had made no financial contribution to the policy, and the brevity and nature of the relationship precluded any credible assertion of an indirect contribution. Interestingly, it was held that the terms of the will provided a juristic reason for the estate's enrichment, but on the Simonds [See Note 23 below] analysis it would seem that, had a binding contract been found, the contract would have overridden the will on the matter of juristic reason.

Note 22: (1994), 4 E.T.R. (2d) 295 (N.S.S.C.).
Note 23: Supra, footnote 4.

¶ 11 Two other cases not yet mentioned have involved agreements to maintain insurance designations, and these are identified for the sake of completeness. In Re Taylor [See Note 24 below] there was a separation agreement of the usual kind described in this note, but the husband allowed the insurance policies to lapse. He later went bankrupt and died undischarged. The question then arose whether the former wife could assert her contractual claim and prove in the bankruptcy as a creditor. Because of the state of the law of bankruptcy, a claim related to alimony, maintenance or support could not be proved in a bankruptcy, and the issue here reduced itself to whether the wife's status as a creditor should be eliminated on this account. After a comprehensive review of the authorities, Campbell L.J.S.C. held that it was a question of fact in each case whether a financial provision in a separation agreement amounted to "maintenance" or not. In Taylor the insurance debt did not, because the agreement had other provisions concerning monthly payments to the wife for her support. In Barton v. Barton Estate [See Note 25 below] the issue was whether insurance monies subject to a trust were part of a deceased's estate and thus available to compensate dependants for whom inadequate

provision had been made by the deceased. [See Note 26 below] A father here had signed a separation agreement under which he had, inter alia, agreed to name his two children from his first marriage as beneficiaries of certain insurance policies. He never fulfilled this obligation. Before his death he married for a second time and adopted his second wife's daughter. Thus, at his death he left, as dependants, his second wife and three children. There was an application for re-arrangement of the provisions of the husband's will, and one of the questions related to the separation agreement and the destination of the insurance monies. On a review of the authorities it was held by McWilliam J. that the separation agreement gave rise to a trust of the Shannon [See Note 27 below] type in favour of the two natural children, but that the trust formed part of the husband's estate as defined in the Act and that it was thus accessible for re-distribution. [See Note 28 below]

Note 24: (1985), 48 R.F.L. (2d) 214 (B.C.S.C.).
Note 25: (1991), 42 E.T.R. 213 (Ont. C.J.G.D.).

Note 26: The obligation is set out in Part 5 of the Succession Law Reform Act, R.S.O. 1990, c. S.26.

Note 27: Supra, footnote 13.

Note 28: See also CIBC v. Besharah (1989), 58 D.L.R. (4th) 705, 68 O.R. (2d) 443 (Ont. H.C.).

¶ 12 At this point it is appropriate to examine the destination of insurance and pension proceeds where there has been either a court order concerning matrimonial property distribution, or where court proceedings are pending or likely.

¶ 13 In some cases the destination of the proceeds is dependent on whether or not the asset in question is subject to the relevant matrimonial property statute.

¶ 14 In Jennings. v. Irving Pulp and Paper Ltd. [See Note 29 below] a husband had died intestate, and one of the assets in the estate consisted of an insurance policy of which the husband's father was the named beneficiary. Under the Marital Property Act [See Note 30 below] the widow was entitled to half of the marital property in the husband's estate. Issue was joined between the husband's widow and the father's widow (the ultimate heir to the intestate estate). The Insurance Act [See Note 31 below] specifically provided that insurance money was not to be regarded as part of an estate, and Hoyt J.A. held that there was nothing in the Marital Property Act to suggest an implied revocation of that provision when it came to the intestacy of a husband survived by his wife. In other words, the proceeds of the policy were not marital property. There was a similar, albeit more complicated, finding in Olsen v. Olsen Estate. [See Note 32 below] The husband in this case bought a life insurance policy in 1988 and named the wife as its beneficiary. In May of 1989 the husband and wife separated, and in July of 1989 the wife petitioned for divorce and a division of matrimonial property. In August of 1989 the husband named a third party as the new beneficiary and the husband died intestate before any order could be made under the Saskatchewan Matrimonial Property Act. [See Note

33 below] Both the wife and the new beneficiary applied for payment of the insurance proceeds from the insurer. The wife's position was that the proceeds were either matrimonial property or that they were in the husband's estate and thus payable to her as his spouse on his intestacy. The court ruled that the proceeds should be paid to the new named beneficiary on the basis that the wife had no interest in them. The policy of insurance was, it was true, matrimonial property, but the wife could not, under the Act, acquire an interest in it until an order of the court was made. Neither, on the facts, could the husband's act in changing the beneficiary, be seen to be a dissipation of matrimonial property under the Act. Finally, the proceeds were not part of the intestacy, as the Insurance Act [See Note 34 below] provided that insurance proceeds were not part of the husband's estate. [See Note 35 below] Both Jennings and Olsen indicate, ironically, that the existence of a detailed statutory scheme for the distribution of matrimonial property on marriage breakdown may work more to the disadvantage of a claimant spouse than the common law in circumstances involving entitlement to insurance and pension proceeds. But some statutes are more broad in their scope, and the Family Relations Act [See Note 36 below] of British Columbia is one such. In Hattle v. Hattle [See Note 37 below] a wife was attempting to obtain an order instructing her husband to rescind insurance and pension designations naming persons other than the wife as his beneficiary. The matrimonial property distribution regime of the Family Relations Act had been engaged by a declaration of irreconcilability under section 44, but the husband had attempted to argue that his insurance policies were not family assets and were thus beyond the control of the court. Houghton J. referred to the decision in Jiwa v. Jiwa [See Note 38 below] for authority for his ruling that insurance policies are generally family assets because they are ordinarily purchased for the future security of the family. The order for recission and the restoration of the wife as the named beneficiary was issued. [See Note 39 below]

Note 29: (1988) 14 R.F.L. (3d) 423 (N.B.C.A.).

Note 30: S.N.B. 1980, c. M-1.1, s. 4.

Note 31: R.S.N.B. 1973, c. I-12, s. 157.

Note 32: (1990), 30 R.F.L. (3d) 447 (Sask. Q.B.).

Note 33: S.S. 1979, c. M-6.1.

Note 34: R.S.S. 1978, c. S-26, s. 158.

Note 35: Cf. Phillips v. Spooner, supra, footnote 11; Barton v. Barton, supra, footnote 25; Jennings v. Irving Pulp & Paper, supra, footnote 29.

Note 36: R.S.B.C. 1979, c. 121.

Note 37: Unreported, B.C.S.C., Kamloops Registry No. 09515, July 03, 1993.

Note 38: (1992), 72 B.C.L.R. (2d) 96, 42 R.F.L. (3d) 388 (B.C.C.A.).

Note 39: See also Baxter v. Baxter, Unreported, B.C.S.C., Kamloops Registry No. 10539, Nov. 21, 1994.

¶ 15 We turn now to the techniques employed by the courts where a husband has changed beneficiary designations in defiance of specific court orders. The first of these cases is Steeves v. Steeves. [See Note 40 below] A husband and wife divorced and in that proceeding the husband was ordered to secure the payment of support by naming the wife as the beneficiary of his life insurance policy. The husband later disobeyed the order and named as beneficiary the woman who subsequently became his second wife and the administrator of his intestate estate. The first wife brought an action against both the estate for payment of debt, and against the second wife for a declaration that the latter held the insurance proceeds on constructive trust. The action in debt was successful but its effect was reduced by the fact that the estate was not large enough to support the judgment. It was common ground that the insurance proceeds did not form part of the estate. Thus the attention of the court turned to whether the funds could be attached in the hands of the second wife, who was a volunteer. The latter attempted to refute the allegation of unjust enrichment by arguing that her lawful designation as the beneficiary provided a juristic reason for the enrichment. The court ruled that the husband had been enriched and the wife deprived, and that the court order amounted to an absence of juristic reason for the enrichment. [See Note 41 below] On the authority of Pettkus v. Becker [See Note 42 below] the court, having found unjust enrichment, was able to declare that the second wife held the insurance proceeds on constructive trust. What is interesting here is that the court seems to assume that the trust arose at the time of the court order, and does not discuss this assumption in the light of the recent Supreme Court of Canada decisions in LAC Minerals v. Corona Resources, [See Note 43 below] Rawluk v. Rawluk [See Note 44 below] and Peter v. Beblow. [See Note 45 below] When, after Pettkus v. Becker, the law of constructive trust began its process of change and expansion, one of the issues assuming great importance was whether it retained any of its substantive attributes or became totally remedial. If the constructive trust were seen to be remedial, then it could not in any given case arise until a court made its declaration to this effect. It could only attach retroactively if the court specifically so ruled after consideration of the relevant implications for third parties. In Rawluk the question of substantive versus remedial was obscured, but after Peter v. Beblow it now seems that the Supreme Court of Canada has a concluded view in favour of the constructive trust's being remedial in nature. Thus the assumption of retroactivity in Steeves is open to question. [See Note 46 below]

Note 40: (1995), 10 E.T.R. (2d) 72 (N.B.Q.B.).

Note 41: See Simonds v. Simonds, supra, footnote 4, but cf. Meisner v. Bourgaux, supra, footnote 22.

Note 42: Supra, footnote 8.

Note 43: Supra, footnote 6.

Note 44: [1990] 1 S.C.R. 70, (1990), 65 D.L.R. (4th) 161.

Note 45: Supra, footnote 9.

Note 46: For an account of the implications of Rawluk v. Rawluk in conjunction with Peter v. Beblow see K.B. Farquhar, "Unjust Enrichment and Special Relationships" (1993), 72 Can. Bar Rev. 538.

¶ 16 In Britton Estate v. Britton [See Note 47 below] the court order on divorce provided that the husband should name the wife as the beneficiary of any insurance policy he might have, and should also name her as the beneficiary of any benefits to which she would be entitled under his company pension plan. The husband married again and named his second wife as his beneficiary. Upon his death the second wife brought an application to determine the question of entitlement to the insurance and pension funds. Both the estate and the second wife were made parties to the application. As to the pension funds it was discovered that the plan did not permit benefits to be paid to a former wife and that the divorce judge should have been aware of this. The wording of the pension plan was plain on this point and the court order was therefore ineffective insofar as it referred to pension benefits. [See Note 48 below] As to the insurance proceeds, it was held that the husband's breach of a court order led directly to the imposition of a constructive trust over the proceeds in the hands of the second wife. It is interesting to note here that the court does not state that the court order itself imposed trust obligations on the husband. Neither does the court speak of the unjust enrichment of the second wife. The constructive trust is said to flow directly from the breach of the court order. It may have been this leap in logic that caused Steele J. to dissent in Britton. His view was that the breach of a court order did not taint the contract of insurance between the insured, the insurer and the beneficiary with illegality. That being the case, the funds were properly in the hands of the second wife. If, however, the majority [See Note 49 below] had made specific reference either to the court order's having itself amounted to a constructive trust, or to the concept of unjust enrichment, then Steele J. might well have had a different opinion, bearing in mind that the second wife beneficiary was a volunteer who could be seen to be receiving trust funds.

Note 47: Supra, footnote 15

Note 48: Cf. Munro v. Munro Estate, supra, footnote 14. In Munro the separation agreement imposed a trust obligation on the husband, and he was in breach of trust when he undertook to do what the pension authorities subsequently advised could not be done. In Britton there is no suggestion made that the court order as to the pension benefit imposed trust obligations on the husband.

Note 49: McMurtry C.J.O.C. and Saunders J.

¶ 17 We now turn to the case that has, in this area, the most wide-ranging implications, namely Gregory v. Gregory. [See Note 50 below] Here the wife petitioner separated from her husband in December of 1988. One of the assets owned by the husband was a pension plan that provided a death benefit of $28,000. Prior to the commencement of any formal proceedings associated with the marriage breakdown the husband, in January of 1989, changed the beneficiary designation under the plan. He removed the wife's name and substituted the name of his new companion. Before any court order was made that would engage Part 3 of the Family Relations Act, [See Note 51 below] the husband died. The death benefit was paid to the companion, and the wife

sought to recover it. As the husband, on the face of it and in the absence of any agreement or court order concerning the pension, had the right to change the designation when he did, the wife's only remedy lay in the law of trust. Thus the wife alleged that the husband was, in January of 1989, a trustee of the pension entitlement for the wife. Houghton J. examined the law concerning fiduciary relationships as it had been set out in LAC Minerals, [See Note 52 below] and concluded that, at the relevant time, the husband was a fiduciary vis-à-vis the wife. Once the law of fiduciaries had been invoked, it was a simple matter to impress the pension benefit with a constructive trust in the hands of the companion, who was a volunteer. In LAC Minerals several members of the Supreme Court of Canada had referred to the general tests for a fiduciary relationship that had been set out by Wilson J. in Frame v. Smith. [See Note 53 below] First, a fiduciary has scope for the exercise of some discretion or power. Houghton J. observed that the husband had the power to change the beneficiary designation. Secondly, the fiduciary can unilaterally exercise the discretion or power so as to affect the beneficiary's interests. The husband here was able to, and did, change the designation without reference to any external agency. Thirdly, the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. Houghton J. seemed to find this the most compelling factor in his analysis of the relative positions of the husband and wife. He said: [See Note 54 below]

> In particular, because Mr. Gregory had control of his pension plan after separation, Mrs. Gregory was at the mercy of Mr. Gregory when he alienated the pension before Pt. 3 of the Family Relations Act took effect.

Note 50: Supra, footnote 3.
Note 51: Supra, footnote 36.
Note 52: Supra, footnote 6.
Note 53: [1987] 2 S.C.R. 99.
Note 54: Supra, footnote 3, at p. 140.

¶ 18 The concept of the fiduciary obligation is notoriously difficult to define compendiously, [See Note 55 below] but in the latest Supreme Court of Canada decision on the topic - Hodgkinson v. Simms [See Note 56 below] - it was affirmed that it is the general duty of the fiduciary to put aside all self-interest in dealing with the principal, and at the same time to promote actively the interests of the principal. Thus, a fiduciary is obliged to surrender any profit made at the expense of the principal and to compensate for losses caused to the principal by the fiduciary's breach. [See Note 57 below] Given that the duties and liabilities of the fiduciary are so onerous, it will be immediately apparent that it is no small matter to introduce the fiduciary concept into the matrimonial domain. The complexity and intensity of economic interplay between a husband and wife over (usually) an extended period of time would seem to make the fiduciary concept a peculiarly inappropriate means of re-arranging economic interests between the two.

Note 55: See, for example, P.D. Finn, "The Fiduciary Principle" in Equity, Fiduciaries and Trusts (Youdan ed., Carswell, 1989).

Note 56: [1994] 3 S.C.R. 377.

Note 57: Canson Enterprises Ltd. v. Boughton & Co. [1991] 3 S.C.R. 534.

¶ 19 With the exception of Fraser v. Fraser, [See Note 58 below] the very few other cases where the issue of husband and wife as fiduciaries has been raised have proceeded very cautiously. [See Note 59 below] In Gregoric v. Gregoric [See Note 60 below] a husband was said to be in breach of his fiduciary duty to his wife because it had already been found that he was a trustee, through resulting trust, of property held by him. In De Mornay v. De Mornay [See Note 61 below] a fiduciary role was imposed on a husband because he also had a controlling interest in a company in which the wife had a minority shareholding. In Murray v. Murray [See Note 62 below] fiduciary liability was denied, and there was specific reference to the dangers of introducing it into the matrimonial setting.

Note 58: Supra, footnote 1.

Note 59: These were not cases involving changes in beneficiary designations.

Note 60: (1990), 28 R.F.L. (3d) 419 (Ont. C.J.G.D.).

Note 61: (1991), 34 R.F.L. (3d) 101 (Ont. C.J.G.D.).

Note 62: (1994), 157 A.R. 224, 119 D.L.R. (4th) 46, 10 R.F.L. (4th) 60 (Alta. C.A.). See also Van Bork v. Van Bork [1993] O.J. No. 2668 (Ont. C.J.G.D.).

¶ 20 It is true that neither Gregory nor Fraser comes close to suggesting that spouses are fiduciaries throughout the course of the marriage. At the very outside they seem to support only the proposition that the liability could arise only after marriage breakdown (however that may be defined) and where one party has exclusive control over a specific asset. But this notwithstanding, it would seem less confusing if the correct result between husband and wife could be reached without reference to the imprecise and ill-defined fiduciary concept. It was not necessary to introduce it in Fraser, [See Note 63 below] and the goal in Gregory could have been achieved by the more conventional avenue of unjust enrichment. The companion could be seen to be enriched and the wife correspondingly deprived. The wife's contribution to the husband's ability to acquire the pension could be seen to provide a juristic reason why she should reap the benefit, and an absence of juristic reason why the companion should retain it.

Note 63: See discussion supra.

CONCLUSION

¶ 21 The cases noted above emerge because of the intersection of two important concepts of law. On the one hand, it is crucial to the integrity of a system involving the payment of benefits on death that a high priority be given to the naming of beneficiaries by the insured or the pensioner. Most insurance legislation in Canada reflects this in a variety of ways. [See Note 64 below] The right of the insured to nominate, the right of the insurer to make payment to the nominee, and the right of the nominee to the proceeds are all enshrined. On the other hand, the sanctity of agreements or court orders concerning death benefits must also be maintained, and thus the courts have been called on time after time to alter the dispositions that would conventionally flow from the naming of a beneficiary. Where a husband and wife have made a contract concerning the destination of death benefits, the courts are naturally anxious to uphold the contractual obligation where possible. We have observed, however, that as often as not, the estate of the deceased is inadequate for the payment of damages or a decree of specific performance. It thus becomes necessary to look to particular funds already, and quite legitimately, in the hands of a third party named beneficiary. For obvious reasons concerned with privity of contract, the courts are then obliged to consider and employ doctrines of trust that extend their embrace to third party volunteers. The express trust used in Shannon v. Shannon represents the most uncomplicated of a series of trust alternatives. Interestingly, however, the courts have preferred to resort to the more flexible doctrine of unjust enrichment which, if invoked, permits the imposition of a constructive trust over the funds in question. One spouse is seen to be deprived of a benefit, and the other correspondingly enriched by the ability to allocate the benefit elsewhere. A separation agreement, a court order, or the mere fact of contribution by the deprived spouse provides the absence of juristic reason for the enrichment that the doctrine requires. More rarely the constructive trust emerges out of a ruling that the spouses were at the relevant time in a fiduciary relationship, and that the naming of the new beneficiary was a breach of fiduciary obligation. But it has been suggested that other, more conservative, doctrines are almost always available to re-arrangement of interests, and that the introduction of the fiduciary concept into the matrimonial domain is best avoided.

Note 64: See, for example, the legislation referred to in Phillips v. Spooner, supra, footnote 11, Jennings v. Irving, supra, footnote 29 and Olsen v. Olsen Estate, supra, footnote 32.

¶ 22 Ultimately, however, we observe that a combination of doctrines of common law and equity have provided the courts with ample ammunition to resolve the conflict of principles associated with inter vivos and quasi-testamentary dispositions.

Syrtash Collection of Family Law Articles
SFLRP/1997-005

Emergency Motions in Family Court at Ontario Court (General Division) in Toronto

by John T. Syrtash

October 5, 1997

¶ 1 If Ontario counsel have occasional need to bring a motion ex parte or on short notice in Toronto by reason of some truly urgent matter, they must be very careful to follow the process currently governing such appearances at 393 University Ave. Otherwise, the Court will not likely hear them and worse, counsel can incur considerable displeasure of this Court. Certain Judges have grown increasingly impatient with counsel who fail to follow the procedural niceties and protocol that this Court has developed. Unless the matter is truly urgent, a factum must be prepared and filed at least two days prior to the hearing of a motion. Confirmation sheets are called Form 3's and must be faxed into the Family Law office by 2 p.m. two days prior to a Case Conference or Motion. However, if counsel has failed to file a factum then the motion will not be listed, even if the Form 3 has been filed correctly and by the prescribed deadline. It is also not likely to be heard by the Court if counsel subsequently "show up" and attempt to have the matter placed on the list by the Judge himself. Counsel must now also be gowned for all motions and hearings, except for Pre-trial Conferences and Case Conferences, or other settlement meetings in chambers. Moreover, if counsel arrive to argue a motion prior to a Case Conference, he or she must convince the Court that the client will be irretrievably prejudiced unless the Court considers interim relief prior to a Case Conference. The Case Conference is usually a mandatory step prior to any motion. Otherwise, the motion will be adjourned to a date after the Case Conference. For a full treatment of these rules, counsel are urged carefully to review the practice direction that this newsletter reported in issue SFLN/#1, which was released by Madam Justice S.M. Lang, Regional Senior Justice-Toronto Region on May 6, 1997.

¶ 2 Counsel may convince themselves that their client's matter is truly urgent, but they can not simply walk into a Courtroom on the 9th floor, speak to a Judge's clerk and ask that their client's matter be placed on the list to be spoken to. (This used to be a procedure once successfully followed by some counsel before the Court moved from 145 Queen St. West to its new facility.) Moreover, if one now attempts this manoeuver the Court will not likely hear counsel and certain Judges may become initially ill-disposed to anyone who attempts this technique. The proper procedure for urgent ex parte or "short notice" motions is to attend the 10th floor Family Law office with the client's originating process (Notice of Application, Statement of Claim or Divorce Petition), along with a Notice of Motion and Affidavit(s) in support on Counsel should inquire as to which court officer is handling the administration of emergency applications that morning. (Currently, ask for Susan McDougall.) Ensure that you bring with you the correct filing fees. The Court has recently insisted that these be paid prior to placing any

matter on a motions list. Do not assume that you will be permitted to give an undertaking to commence an action after obtaining your client's order. Obviously counsel should arrive as early as possible in the morning before the lists have been set, if possible. Then, after all of these materials and fees are filed with this official, she consults with a Judge and an administrative decision is made. You and opposing counsel, if any, are then advised "over the counter" and without a hearing, as to whether the matter is sufficiently urgent to be heard that day, or whether you must come back another day.

¶ 3 Recently, I participated in a process at the Court's "counter" where a competent fellow lawyer attempted to have a matter placed on the list. His client pleaded a serious allegation concerning a suicidal mother who had custody of three young children. The lawyer represented another caregiver who was seeking an emergency interim interim custody order to take the children away from the mother. The affidavit material made several allegations, but it also revealed that a child welfare agency was involved. Accordingly, the Court's administrator advised counsel that in the Court's opinion, the child welfare agency could deal with "child protection" issues of immediate concern. Otherwise, the motion could be heard on the following day, but not the day counsel arrived to place the matter on the list. Since such an agency was involved, the Court did not perceive there to be the type of urgency necessary for the motion to be heard the same day. If there was an immediate danger to the children, then the Court was confident that the child welfare agency would attend to the matter. Subsequently, the child welfare agency did take certain precautionary measures that day and evening. The next day, the Court heard the motion and transferred care and control of the children to the caregiver who brought the emergency application on a very short-term interim interim basis.

¶ 4 It appears to be clear from this example that counsel should be careful to follow the Court's procedures carefully. He or she should not assume that the client will be given much relief from the Court's protocol in such situations. Moreover, since this Court's practice directions and protocols change from time to time, counsel are best advised to contact its office to ensure that the foregoing procedures are still current.

Syrtash Collection of Family Law Articles
SFLRP/1997-004

"Special or Extraordinary Expenses"*

by Jim M. Stoffman, Q.C.
[See Note 1 below]

March 21, 1997

* Posted by John Syrtash with permission of the author.

a) Introduction

¶ 1 The restriction on the length of this paper and the time allocated for its preparation prohibits any form of in-depth analysis of this new frontier.

Note 1: The author is grateful to Cynthia Hiebert-Simkin, an associate lawyer with Taylor McCaffrey, for her assistance in preparing this paper.

¶ 2 Some of the stated objectives of the child support guidelines are to "reduce conflict and tension between spouses by making the calculation of child support orders more objective" and "to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders" and "to ensure consistent treatment of spouses and children who are in similar circumstances". [See Note 2 below] A review of s. 7 of the Guidelines indicates that s. 7 may well be the ultimate testing ground of those objectives.

Note 2: S5.1(b),(c) and (d) of the Federal Child Support Guidelines.

¶ 3 A number of the expense categories which now form part of s. 7 are, typically, items which, under past decisions and under statistical studies, have formed part of the day-to-day considerations in apportioning child support obligations. [See Note 3 below] Among these are daycare expenses, schooling expenses and extra-curricular activities. As a result, s. 7, in apportioning these expenses over and above the child support itself, opens up a new area for both payor and recipient spouses.

Note 3: Child care, some aspects of extracurricular activities, and costs related to school are included as special expenses in s. 7, Willick v. Willick, (1994) 6 R.F.L. (4th) 161 (S.C.C.), words and phrases considered "direct costs include the children's share of rent, food, and washing, as well as reasonable sums for clothes, recreational needs, schooling, pocket money, babysitting, and transportation, to name a few. They also include the costs incurred by both parents of making reasonable arrangements for visits by the non-custodial spouse." Family Expenditure in Canada, 1992, Statistics Canada Catalogue No. 89-523E. Child care expenses were considered in category "Household operation". Tuition was considered in category "Education". "Recreation equipment and associated services" and "sporting and athletic equipment" were considered in category "Recreation". The Province of Manitoba Department of Agriculture's estimate of the cost of raising a child also considered "child care" in considering the average costs.

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s. 7(1) "In a child support order the court may, on either spouse's request, provide for an amount to cover the following expenses, or any portion to those expenses, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense, having regard to the means of the spouses and those of the child and to the family's spending pattern prior to the separation"

¶ 4 One of the concepts in the wording of "on either spouse's request" is that the non-custodial parent who is paying for children's expenses over and above the child support now is in a position to bring a court application asking that the custodial spouse contribute to expenses of a specific nature which fall under the six sub-categories in s. 7.

¶ 5 In interpreting the six sub-categories, (a to f), two criteria must be met and three factors can be distilled:

A) the necessity of the expense in relation to the child's best interest, and
B) the reasonableness of the expense
having regard to
i) means of the spouses;
ii) means of the child; and
iii) the family's spending pattern prior to separation.

¶ 6 The test is conjunctive: the expense must be a necessity as well as reasonable within the further defined parameters.

A) "the necessity of expenses in relation to child's best interests"

¶ 7 A "necessity" is defined as "an indispensable thing, a necessary"; a "necessary" is defined as "requiring to be done... essential". [See Note 4 below] Case law traditionally has examined the meaning of the "necessaries of life" in four areas: the liability of a husband to provide necessaries for his wife, bankruptcy, the obligations imposed under the Criminal Code and infant's contracts. Generally, "necessaries" in relation to an individual's needs are determined upon the subjective circumstances of the case and, particularly in the case of infants, can include not only items necessary for existence but

also things "suitable to or proper for his station in life bearing in mind his requirements at the time." [See Note 5 below] Expenses for recreation and education have long been held to be a necessary. [See Note 6 below]

Note 4: The Concise Oxford Dictionary

Note 5: Re Regional Municipality of Peel and A, (1982) 64 C.C.C. (2d) 289 Ont. C.A.) at p.296.

Note 6: Ibid at p.297-299, re: Taha, (1976) 28 R.F.L. 353 at p. 359.

¶ 8 Thus, arguably, anything that broadens a child's life experience/exposure, that develops any skill, aptitude, self-confidence, that readies him or her for independence, that would allow a child to develop any vocation or avocation could be seen as meeting the child's best interests. The first prong of this test arguably seems to be confined only to one's imagination. It is unrelated to the family and it is unrelated to spending. It only relates to the child.

¶ 9 This is particularly true where the family's income before separation was such that the expense was economically feasible though not absolutely necessary. It can be argued that requiring the child to do without the expense after separation is contrary to the child's best interests as it further disturbs the child's stability in his or her already unstable, post-separation world.

B. "the reasonableness of the expense"

¶ 10 Both the "necessity of the expense" and the "reasonableness" of the expense are qualified by a consideration of the means of the spouses and child as well as the spending pattern prior to marriage. The basic philosophy in considering child related cases is that everything possible will be done to ensure the best interests of the child. After determining the expense is a necessity, the courts will have to consider how to set the threshold in determining if the expense is "reasonable". In some circumstances, reasonableness of the expense will involve consideration of whether the special or extraordinary item can be undertaken in a less expensive or different fashion. The applicant may have to provide evidence that the child's best interest cannot be met, for example, by group lessons vs. private instructors, provide evidence comparing the costs and/or provide evidence of the benefit of the expense to the child, etc.

i) "means of the spouses"

¶ 11 The use of the words "means" in s. 7(1) contrasts with the use of the word "income" in s. 7(2) which sets out how the expense will be shared. The guidelines have now defined "income" as set out in ss. 15 - 20, however, the Divorce Act 1997 includes "means" only in the section dealing with variation of custody orders. "Means" is not

defined in the guidelines. Will the courts continue to rely upon the previous definitions, where "means" has been interpreted as income and/or capital? [See Note 7 below]

Note 7: Wittke v. Wittke an Bauer, (1974) 16 R.F.L. 349 (Sask. Q.B.) at p. 360 "The word "means" includes all a person's pecuniary resources, capital assets, income from employment or earning capacity and any other source from which the person receives gains or benefits, together with, in certain circumstances, moneys which the person does not have in possession but which are available to such person."

¶ 12 The guidelines differentiate from, for example, the previous ss. 15(5) factors (corollary relief) and s. 17(4) provisions (variation) which directed the court to take into account "the condition, means, needs and other circumstances of each spouse and of any child". The Act's previous s. 15(83)(b) outlined the objectives requiring a division of the expenses according to the spouse's "relative abilities." While s. 14(b) of the Guidelines (variation where the child support was not determined in accordance with the tables) continues to direct the court to consider the "condition, means, needs or other circumstances of the spouse", s. 7(b) is to consider the "means" of the parties in isolation from other factors.

ii) "means of the child "

¶ 13 The court will be asked to consider to what extent a child obliged to contribute to the household income of the custodial spouse. There has been some case law where the child's independent means have been taken into account in considering the quantum of child support. [See Note 8 below] Under s. 3 of the Guidelines, the means of the child are not a consideration at all if the child is a minor and are an alternative consideration to the Guidelines if the child is over the age of majority.

Note 8: Howorko v. Howorko, (1980) 20 R.F.L. (2d) 43 (Sask. U.F.C.): child support set at fixed amount against which there was to be a credit for the children's income from shares in corporation set up for tax purposes by the father. McManus v. McManus, (1984) 37 R.F.L. (2d) 407 (Ont. H.C.) where wife was directed to first request that a family trust established by the father pay any amount required for child. Littlechild v. Littlechild, [1996 S.C.J. No. 205] QL child support varied for children in receipt of income from the Band and who would be entitled to an education incentive allowance from the Band. Gordon v. Gordon [1995 B.C.J. No. 2991] QL. Support refused for 23 year old "child" attending university where no evidence of child's expenses or income from college fund, earnings and student loans.

¶ 14 The court will have to determine the extent to which a child will be required to contribute to his/her own expenses. While the obligation has been imposed upon the child, the extent to which the child will be required to contribute has not been uniform.

[See Note 9 below] Further, traditionally the focus has been on actual expenses, rather than anticipated ones. [See Note 10 below] There is, however, no requirement in s. 7 that the expense sought to be shared must be an expense currently incurred by one or the other spouse, leaving it open for a party to bring an application for any proposed or anticipated liability.

Note 9: Contract Guillemette v. Home (1993), 48 R.F.L. (3d) 299 (Man. C.A.) where the child attending university had past earnings of $4,500.00 to $5,500.00 annually yet her contribution to her expenses was determined to be $125.00 per month with Fraser v. Jones (1995), 17 R.F.L. (4th) 218 (Sask. Q.B.) where an application for an increase in support was dismissed on basis that the child's university education needs were being met by the money she earned from summer employment, scholarships and an education fund.

Note 10: Fraser supra at p. 225-226, Geiren, J. specifically declined to increase child support to account for the future cost of university.

¶ 15 Also absent from s. 7 is a consideration of the child's "needs and circumstances". As a result, it is unclear to what extent the court will be permitted to set parameters for the sharing of an expense. For example, it can be anticipated that the court will be asked to give direction that a child must attend school full-time and complete his or her education expeditiously, thus reducing the length of time over which the parties must share the expenses. The court may be asked to define "full-time" and, in doing so, one consideration may be the fact that many Registered Education Savings Plans, for the purposes of paying out the entitlement, recognize that a 60% course load is full-time. The court may also be asked to direct that the student must apply for and provide evidence of all available scholarships, bursaries or student loans.

¶ 16 This section almost throws the child into the conflict between his short- and long-term needs, his dependence and independence. In terms of the expense, it is not a question of which two people should bear the expense, i.e., the parents, but rather which three people, i.e., the parents and the child.

iii) "family spending pattern prior to separation"

¶ 17 One must query the regulation's mandate to only look at the family's spending pattern prior to separation instead of examining the spending pattern that may have occurred in the post-separation period. The phrasing does not appear to consider the comments of Sopinka J. in Willick v. Willick [See Note 11 below] when he stated that a "significant increase in the means of the payor parent may require that the needs of the child include benefits that were not available." The phrasing is particularly interesting in legislation which, by its very existence, creates a material change of circumstance permitting any payor or recipient to make an application.

Note 11: Supra note 2 at p. 182

¶ 18 An examination of the spending pattern prior to separation may well create an unintended restrictive and narrow ability for the courts to review the overall equities of the families. The utility of examining a family's pre-separation spending pattern may be limited when almost all modern legislation directs the parties to look through the windshield rather than through the rear-view mirror. One has to wonder where the benefit will be in having the parties provide reams of affidavit material, detailing the spending habit of the family fifteen years ago when little "Jessica" was three when it comes time to consider Jessica's attendance at university.

¶ 19 In examining the spending pattern prior to marriage, the court may be looking at a frugal pattern, directed towards savings, while the post-separation period has limited the ability to save, thus freeing up money for the expenses of the children. Perhaps an implied term of the phrase "spending habits prior to separation" will be "where applicable or where appropriate". Even so, there is a question whether the court will be entitled to direct monies to the child's current expense which did not previously form part of the pre-separation history. In essence, the court may well be reinventing the family's spending pattern.

Specific expenses:

s. 7(1)(a) "child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment"

¶ 20 Child care expenses are traditionally considered an expense of the custodial parent and one of the considerations in the quantum of child support. Under s. 7(1)(a), it is an expense over and above child support. It is noteworthy that the situation is geared for sharing of the child care expense that is the result of the custodial parent's situation, that is "employment, illness, disability or education or training for employment". The regulation does not appear to contemplate a situation where the child is severely disabled or handicapped and, as a result, additional child care expenses are incurred. On a strict reading of the section, the custodial parent would appear to be precluded from making an application, for example, to share the cost of a respite worker unless it is specifically tied to the custodial parent's employment situation. The courts may be forced to interpret either s. 7(1)(a) or s. 7(1)(d) liberally in order to meet the child care expenses of special needs children.

¶ 21 The court will also be in the position of determining what sort of "child care" is appropriate in each case. The applications, no doubt, will run the gamut from sharing the cost of subsidized daycare to live-in nannies. [See Note 12 below]

Note 12: Bailey v. Nash, (1991) 36 R.F.L. (3d) 292 (Ont. H.C.) at p. 294: a decision under the Family Law Act, 1986, a nanny was found to be a necessary expense for the child.

s. 7(1)(b) "that portion of the medical and dental insurance premiums attributable to the child"

¶ 22 The Guidelines, in 2.6, provide that, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the court may order that the coverage be acquired or continued as part of the child support. This is a separate application from the court's ability, in s. 7(1)(b) to order that the parties share the cost of the premiums. It thus appears that at least two options unfold: a) the applicant has two different opportunities to have the expense or a portion thereof imposed upon the respondent; and b) having had an order imposed under s.6, the respondent can seek to have the expense shared with the applicant. It is not clear if, after imposing an order under s.6, there must be a proportionate sharing under s. 7(1)(b) or if there must be a specific application.

¶ 23 The nature and extent of the medical and dental coverage necessary for the children will be a matter of judicial interpretation. There is, however, the potential argument and opportunity for one party to impose a "cadillac" plan on the other party in order to obtain optimum coverage.

s. 7(1)(c) "health related expenses that exceed insurance reimbursement by at least $100 annually per illness or event, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupation therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses"

¶ 24 An important question is whether the $100.00 expense is "per child" or "per household". For example, if it is "per household" and there are four children with combined annual expenses of $390.00, then the expense is not shareable. However, if it is "per child" and one of the children has an expense of $390.00, then it is shareable. In one case, the custodial parent may be able to get a contribution and in the other, they can't.

¶ 25 There is no direction if prior consultation, agreement or court approval will be required or who will determine the appropriate treatment or expense. It is common, for example, for parents to disagree on which orthodontist should do the work, when the treatment should be done and if it should be undertaken at all.

¶ 26 The section also creates a disparity between applicants who can afford or are able to contribute to a health insurance plan and those who are not able to do so. The wording as it stands dictates a sharing of health related expenses covered by insurance where the party can apply for reimbursement. It does not appear to cover health related expenses if the parties do not have a health insurance plan. Thus, the person who can't contribute to a health plan is apparently unable to seek a sharing of the expense while the person who can do so can seek a contribution to the expense.

¶ 27 Further, s. 7(1)(c) does not cover health related expenses which are not included in the plan and the defined treatments appear to be limited to traditional treatments by western medical standards. Some current health plans permit some non-traditional treatments, such as massage therapy, reflexology, aromatherapy, etc. This section as worded seems to offer much different benefits based upon the type of health plan as opposed to medical need.

s. 7(1)(d) "extraordinary expense for primary or secondary school education or for any educational programs that meet the child's particular needs"

¶ 28 The word "extraordinary" is defined as "unusual or remarkable; out of the usual course". [See Note 13 below], "being beyond what is usually required or established, having a special, often temporary task or responsibility, exception to a high degree, beyond what is usual, regular or established". [See Note 14 below] To qualify, the expense must be something over and above the ordinary expenses for the child's education. Further, the expense must be something that isn't applicable to any child but rather, this particular child. One of the qualifiers the court must consider is defining what meets this child's particular needs. Perhaps a tutor is appropriate if the child has a reading problem or is a slow learner. At the other end of the scale is the gifted child who would benefit from a particular program designed to meet their particular needs.

Note 13: The Concise Oxford Dictionary
Note 14: The Random House Webster's Dictionary

¶ 29 The group of children that does not seem to be addressed by the section is the children who are average, who aren't gifted and who aren't shackled by learning or other disabilities. This student may very well not have "extraordinary" needs.

¶ 30 An interesting conundrum arises when considering the "extraordinary" nature of the expense in both s. 7(1)(d) and s. 7(1)(f): at what point does an "unusual" or "remarkable" expense become an ordinary expense because it is a regular and on-going expense? The question that may then face the court is whether it can order a sharing of the expense once it has ceased to be "extraordinary".

s. 7(1)(e) "expenses for post secondary education"

¶ 31 The interpretation of a child's ability to withdraw from home has always imposed on separated or divorced parents a greater obligation to provide for post-secondary education. Where no child of a happily married couple can force his or her parents to support them well into adulthood, the courts have routinely ordered children of divorced parents to assist with support while the child attends at least some post-secondary education. This section now provides a mechanism for sharing of the post-secondary expenses, over and above any order of child support.

¶ 32 It appears that s. 3(2), (which deals with the child support order for an adult child) and s. 7(1)(e) operate to give the custodial parent two chances for support for a child attending university while applying slightly different tests. The court is mandated to examine the "means of the child" in s. 7(1) but to consider the "condition, means, needs and other circumstances of the child" in s. 3(2)(b). It appears that, having considered the contribution of the adult child in determining child support, the custodial spouse is then in a position to seek further contribution from the payor under s. 7(1)(b). If the child's contribution has been "maxed out" under s. 3(12)(b) considerations, then the child's "means" under the s. 7(1)(b) may be little or nothing, leaving a greater burden to be shared by the parents. While considering the "financial ability" of the parents in s. 3(2)(b) (which arguably could be consideration of means and needs of the parent), s. 7(1) only considers the "means" of the parents.

¶ 33 Another uncertainty is defining an "expense" for post-secondary education. Tuition may be the only "obvious" expense. Less obvious items which may be the subject of s. 7(1)(e) include books, student fees, on-site parking, car pool expense, gas, transportation by bus or taxi, all related automobile expenses such as insurance, maintenance, driver's license fees, as well as other costs for lockers, meals, residence (room and board) for the child's home base during the school term, either in or out of the city, and air travel costs to and from the child's home when not in school.

¶ 34 The meaning of "post-secondary education" is without definition. It will be open to decide if it will include a certificate or diploma program, a junior college in the United States, a vocational school or college or the traditional post-secondary institutions such as universities. With no restrictions on what sort of post-secondary education is appropriate or the length of study, it may be open for argument that parents contribute to some child's education to the doctorate level.

s. 7(1)(f) "extraordinary expenses for extra-curricular activities"

¶ 35 At first blush, many custodial parents may see this section as the opportunity to have their former spouse share the expenses of the child's extra-curricular activities. There is no question that it can cost hundreds or thousands of dollars annually to have children enrolled in activities. However, s. 7(1)(f) doesn't say parents will share the expenses for extracurricular activities. It says they will share the "extraordinary" expenses. Again, based on the simple definition of the word "extraordinary", it implies something above and beyond what is ordinarily required.

¶ 36 The section has two tests which must be met and which will require definition by the courts: the meaning of "extraordinary expense" and the meaning of "extra-curricular activity". Both tests must be met. While "extracurricular" may have an ordinary meaning, it may not be easy to define from the bench. Does extra-curricular include summer camp, hockey, guitar lessons, stamp collecting, card collecting and flying lessons? If so, the court is directed not to look at the expense but at the "extraordinary expense" associated with the activity. If a child is talented enough to need to have a

private figure skating coach on a regular basis, arguably it is not an "extraordinary" expense. If a child's involvement in hockey requires regular attendance at out of town games and tournaments, then these expenses may not be "extraordinary".

¶ 37 Extracurricular activities are an expanding horizon for children and it is anticipated that this section will generate much attention. Even five years ago, a computer for a child might have been seen as an extraordinary expense. Today? As it is said, even the status quo is changing.

s. 7(2) "The guiding principle in determining the amount of an expense is that the expense is shared by the spouses in proportion to their respective incomes"

¶ 38 The definition of income set out in ss. 15 to 20 is no longer such a moveable best. It takes into account many years of developing case law and will include perquisites, non-arms length transactions, corporate restructuring, the retained earnings of corporations, the creation of trusts, capital cost allowances and the deduction of expenses. However, the Guidelines have deliberately used "income" in s. 7(2) while using the words "means" in s. 7(1). Is the term "income" intentionally more restrictive? Once the court has determined that the expense should be shared between the spouses, the parties appear to be sharing without regard to capital. As a result, it may be that the spouse who has large capital and small income will benefit over the spouse who has a large income and no capital.

¶ 39 Once again, apparently the needs of the spouses are not a consideration. While the child support tables have considered a certain subsistence level for each spouse, s. 7(2) does not appear to do so.

s. 7(2) "the expense is to be shared after deducting from the expense, the contribution, if any, from the child."

¶ 40 Similar to the discussion dealing with the post-secondary expenses, it appears that s. 3(2) may operate such that, if the means of the child have been considered in setting support for the child, there will be little or no contribution from the child to the s. 7 expenses.

¶ 41 It will be necessary for the courts to clarify the meaning of the word "expense", particularly in considering s. 7(2) and s. 7(3). Among the possibilities is that the expense will be the out-of-pocket expenses by the parent and/or child subject to adjustment after the "subsidies, benefits or income tax deductions or credits" are taken into account or that it will be the "net" expense with either the parents or the child shouldering the cash burden until the "subsidies, benefits or income tax deductions or credits" are reimbursed. It will be up to the court to determine how the expense will be shared in light of s. 7(3).

s. 7(3) "In determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deduction or credit relating

to the expense and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense."

¶ 42 In contract with s. 7(1), the language in s. 7(3) is mandatory rather than permissive and discretionary. To what extent must a child or parent apply for all subsidies, benefits or take advantage of every possible income tax deductions or credits? It appears that a failure to apply may result in the court proportionally reducing the expense, thus reducing the amount the respondent spouse must contribute.

¶ 43 Also yet to be defined is the meaning of the words "subsidies, benefits, income tax deductions or credits relating to the expense" and the eligibility to claim same. The G.S.T. refund is a subsidy which may have to be considered. A student loan is a subsidy but it also has an accompanying debt. Judges and lawyers may well have to develop a whole new knowledge base -- that of the subsidies, benefits, deductions and credits available to the parents and child and the effect of those items on income or expense.

¶ 44 Also at issue is how far the court will be prepared to enforce s. 7(3). Consider that, currently, under The Income Tax Act, students may receive certain tax relief. There is a credit in respect of tuition fees, there is an education credit based on an amount of $100,000 for each month enrolled as a full-time student and there is exemption of $500.00 for scholarship, fellowship or bursary income. If the student doesn't have sufficient income to take full advantage of the education or tuition credit, the unused portion may be transferred to a parent or grandparent, subject to a limit of $5,000.00. Unused credits are lost. The 1997 Budget delivered on February 18, 1997 proposes to double the credit and also proposes a carry forward, such that the student will be allowed to carry the credits forward indefinitely until they have enough income to make use of them and will limit the carry forward to the student's own use. It would be open to the respondent spouse to ask for an order that the child assign the credit to one or the other parent, the argument being that the child should not be entitled to accumulate a benefit while the applicant seeks a contribution for the expense. The parent who says they want their child to keep their credits for future use may face a reduced contribution from their spouse as a result.

CONCLUSION

¶ 45 The divorcing world has become a very disorderly place. Section 7 has consolidated in some ways many years of judicial thought and pronouncement and, in other ways, has created an uncertain ground which, for some years to come, will keep moving afoot.

Syrtash Collection of Family Law Articles
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Loss Prevention and the Child Support Guidelines*

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Introduction

¶ 1 In Ontario, claims arising out of the practice of family law have remained relatively stable over the course of the past five years. The financial impact of these claims has not decreased as in other areas of practice. The American Bar Association Standing Committee on Lawyers' Professional Liability published a study in February 1997 which indicates a significant increase in the relative number of claims relating to family law (up 1.25 percent) between 1990-1995 as compared to 1983-1985. These statistics are based on data provided by LPIC, the Professional Liability Insurance Fund of the Quebec Bar, the Law Society of British Columbia as well as lawyer-owned insurance companies in the United States.

¶ 2 The introduction of the Child Support Guidelines and related amendments to the Income Tax Act, perhaps the most significant change to occur in the practice of family law since the enactment of the Family Law Act, is a logical time to focus on loss prevention.

¶ 3 Traditionally, we have analyzed loss prevention issues against a background of statistics and claims information developed over many years. The challenge in discussing loss prevention in the context of the Child Support Guidelines is utilizing the lessons of the past to shield ourselves from the dangers that may lie ahead.

Main Causes of Claims

¶ 4 Extensive statistical records, combined with the experience of LPIC's claims personnel in the course of examining thousands of files provide some insight into the practices which have caused claims. They fall into four major groups:

1. Failures in communication.
2. Failures in analyzing legal issues.
3. Failures in handling and documenting the file diligently.

4. Failure to give proper attention to detail.

Failure to Communicate Properly with the Client

¶ 5 All too frequently, when a lawyer meets with a client, he or she fails to take the time to discuss with the client what the client hopes to achieve, and what the lawyer can reasonably achieve on the client's behalf. Often, clients have unreasonable expectations about what their cases are worth. Lawyers are afraid to disabuse these clients, for fear of losing them at the outset. When the clients' unreasonable expectations are not achieved, the clients turn on the lawyer. This is especially true if fees were never discussed initially, and the client feels "over charged" for results which did not meet the client's expectations. A lack of courtesy on the lawyer's part can aggravate a client's sense of grievance. We have seen many claims where the client complains that the lawyer does not write to the client for months on end, except to deliver an account. Telephone calls are not returned or, the lawyer will not take the time to meet with the client personally. While non of these omissions constitute negligence, they lead to a poisoned atmosphere in which negligence claims will often arise.

¶ 6 Many claims have arisen because lawyers have failed to property document the terms of their retainer, or changes in their retainer, or the termination of their retainer. For instance, if the lawyer is retained to negotiate an agreement but not to commence an action, a written retainer would clarify the extent of the lawyer's responsibilities. If, after protracted and futile negotiations, the client decides to start an action and move for interim relief, a fresh confirming letter is advisable. If a separation agreement requires follow-up with respect to matters such as irrevocable designation of a beneficiary under a life insurance policy, will that be the client's responsibility or the lawyer's responsibility? If the lawyer considers the retainer to be at an end once the separation agreement is executed, that must be communicated to the client, preferably in writing.

¶ 7 Some lawyers feel that there is no need to document such discussions and agreements because they and their clients have good memories, or because they are confident the client would never turn against them. Experience shows us that clients have self-serving and selective memories and that loyalty has its, limits, particularly when money is at stake.

¶ 8 Another danger is "one time" advice to individuals, without keeping notes and without confirming in a letter what was or was not agreed upon. The lawyer believes that he or she has not been retained, while the client believes that the lawyer is "looking after things". A limitation period goes by. The claimant then alleges either that the lawyer undertook to act for him or, in the alternative, failed to warn that the limitation period was about to expire.

¶ 9 Claims which arise from poor communication, whether it relates to the scope of the retainer, the client's expectations and the lawyer's ability to meet those expectations, or failure to reduce verbal communication to writing, can be readily prevented.

Failure to Analyze Legal Issues

¶ 10 Failure to analyze all the legal issues in a case, and deal with them properly is another frequent cause of claims. Failure to identify and analyze conflict issues has been the most costly failure to the Ontario insurance program. In the area of family law, we have had dozens of claims arising from lawyers acting for husbands and wives in negotiating domestic contracts. It is trite advice, but well worth repeating: never act for both parties. Regardless of how friendly and co-operative they may seem, they are adverse in interest.

Handling the Files

¶ 11 We have seen a number of claims that have arisen as a result of a lawyer's failure to make a claim for support under the Family Law Act within two years from the date of separation or failure to bring an application under Part I of the Family Law Act within six months after a spouse's death. The underlying cause of the missed limitation was either failure to diarize it properly or failure to cross check the subsequent follow up. Although many of these claims can be repaired, the cost to the insured member and to LPIC is significant.

¶ 12 Another serious cause of claims in Ontario is failure to leave an adequate paper trail in the file. For example, we have seen many claims involving allegations that the lawyer failed to recommend obtaining a valuation of a spouse's pension, with the result that the client was short changed on an equalization payment. Although the lawyer may recall that the client was given the option of having the pension properly valued, there is nothing in writing to support his or her recollection. Regardless of the outcome, these claims are both difficult and expensive to defend.

Handling Details

¶ 13 Failure to handle details thoroughly is responsible for many claims. A typical problem in the area of family law is failure to proof-read and detect errors in the drafting of domestic contracts. The executed agreement may contain an inherent ambiguity which enables one spouse to resile from the bargain. Frequently, these errors can be repaired, although again at significant cost to the lawyer and to LPIC.

¶ 14 With these general points in mind let us turn to a consideration of the specific issues which may arise in the context of the Federal Child Support Guidelines.

Complexity

¶ 15 The Child Support Guidelines are not nearly as simple as the name would suggest. A review of Bill C41 will quickly convince the most skeptical practitioner that careful reading and careful analysis will be required to properly understand the Guidelines and apply them to individual client situations.

¶ 16 As one reviews the various provisions, numerous questions come to mind. For example, which expenses will be deemed to be special or extraordinary? How narrowly will a court interpret the term "undue hardship"? What will constitute "substantially equal" sharing of custody? How exactly does one calculate a spouse's annual income? Lawyers should not assume that clients will understand what the guidelines are really about. Lawyers will have to ensure that they and their clients are on a parallel course, rather than operating under a vastly different understanding of the issues and the range of probable outcomes.

¶ 17 It is easy to see how failure to communicate properly with the client, will be a significant issue in the context of the Guidelines. It is not unreasonable to foresee that a poorly informed client may have unreasonable and unrealistic expectations about what the lawyer can achieve.

Avoiding the Presumptive Rule

¶ 18 The Guidelines create, in s. 3(1), a presumptive rule in favour of the applicable guidelines.

¶ 19 However, section 15.1(5) provides that, notwithstanding the foregoing, the court may award amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied that special provisions in an order, judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child or that special provisions have otherwise been made for the benefit of a child AND that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

¶ 20 It is important to note that this is a two-pronged test and the mere existence of a written agreement or a previous order will not present imposition of the applicable guideline amounts. In order to present a viable argument under this section, it will be important to set out, very clearly in the agreement the nature of the provisions which directly or indirectly benefit the children and the parties should both acknowledge their agreement to confer such a benefit.

¶ 21 Even if the first part of the test is met, the second part requires demonstrating that the application of the guidelines would result in inequitable circumstances, having regard to those special provisions. Since the test is very stringent, clients should not be given false hope. The wisdom of protracted litigation must be weighed carefully against the likely outcome.

Contracting Out of the Guidelines on Consent

¶ 22 Subsections 15.1(7) and 17(6.4) provide that the court may make a child support order or a variation order on the consent of the spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates. In

determining whether such arrangements are reasonable, the court is to have regard to the Guidelines, but shall not consider the arrangements to be unreasonable solely because the quantum of support differs from the amount that would otherwise have been determined in accordance with the Guidelines. Since these sections make it clear that the guideline amounts will serve as the benchmark, one should not anticipate that consent arrangements will necessarily prevail. Cogent reasons will need to be given or the parties may find that the consent agreement is not approved by the court.

¶ 23 Failure to analyze these issues, communicate with the client, and properly document the file may lead to significant consequences for both the client and lawyer.

Uncontested Divorces

¶ 24 If you are handling an uncontested divorce, consider carefully the significance of the court's duty pursuant to subsection II(1)(b) "to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made" [emphasis added].

¶ 25 In the case of uncontested divorces, it will be very important to present sufficient information to persuade the court that the standard has been met. Clients who plan to remarry immediately upon the granting of a divorce should be cautioned that it may be prudent to build flexibility into such plans.

To Vary or Not to Vary

¶ 26 Many clients, assuming they will benefit from the provisions in the Guidelines, ill be anxious to bring variation applications. Before advising the client on whether or not to vary an existing agreement or order, the lawyer will have to assess the quantum of a support order under the Guidelines.

¶ 27 In order to do this it will be necessary to consider:

(1) determination of the payor's annual income pursuant to s. 16 including:

  (i) the applicability of s. 17(1) relating to patterns of income and s. 17(2) relating to non-recurring losses;
  (ii) if the payor is a shareholder, director r officer of a corporation, the applicability of s. 18;
  (iii) the applicability of s. 19 (imputing income).

(2) whether or not the payor's income as determined pursuant to (1) above is over $150,000.00;
(3) the ages of the children, i.e., over the age of majority (s. 3(2));
(4) special or extraordinary expenses which may result in a higher order,

(5) undue hardship;
(6) the impact of custody arrangements, including the treatment of split custody as opposed to shared custody; and
(7) changes in tax treatment.

¶ 28 As this fist illustrates, advising the client properly will not be a simple task. On the other hand, unless the client is properly advised, it is not possible to reasonably assess the advantages/disadvantages of a variation application. The general principles outlined above in analyzing the main causes of claims are applicable in this context.

Income Tax Considerations

¶ 29 Under the amendments to the Income Tax Act, child support payments will not be deductible or taxable for new agreements or orders made after May 1, 1997. Any written agreements or orders made prior to that date will remain under the pre-existing income tax rules UNLESS there is a variation after May 1, 1997, in which case the new income tax provisions will apply notwithstanding any agreement to the contrary or the agreement or court order specifically provides that the new tax rules will apply to payments made after a specified date which cannot be earlier than April 30, 1997. It is important to note that the coming into force of the amendments to the Income Tax Act is deemed, pursuant to the Guidelines, to constitute a material change in circumstances. The parties can jointly elect to have the new tax rules apply to child support payments made after May 1, 1997 under existing agreements by signing and filing the appropriate form with Revenue Canada. After 1996 an individual who pays child support will not be entitled to the equivalent to married exemption.

¶ 30 Although the amendments to the Income Tax Act will not affect the tax treatment of spousal support, there is one important caveat. Payments will automatically be considered to be child support if the agreement does not specify that a payment is solely for the support of a spouse. Accordingly, a support clause contained in an existing agreement or order which provides for the payment of a certain amount for the support of the wife and children without setting out specifically how much of the amount is solely for the support of the wife will be neither deductible nor taxable. The recipient of the support payments will have no cause for complaint. The payor, on the other hand, will likely be very unhappy and will no doubt look to his lawyer. Melded support clauses are problematic for other reasons and accordingly it may be advisable to unravel them in any event. Third party payments which are not clearly identified as being solely for the benefit of the spouse will also be treated as child support.

Oral Agreements Entered Into Prior to May 1, 1997

¶ 31 Spouses who separated prior to May 1, 1997 and have been making child support payments pursuant to oral agreements entered into prior to May 1, 1997, have until December 31, 1998 to enter into written agreements if they wish to have the pre-existing income tax provisions apply. This is a new and very important limitation period. Once

the deadline passes it cannot be revived and accordingly you must act quickly if your clients qualify.

Custody/Access Arrangements

¶ 32 Custodial and access arrangements may have a significant impact on the amount of child support. The Guidelines provide that, here each spouse has custody of one or more children, the amount of the order shall be the difference between the amount each spouse would pay for the child or children in the custody of the other spouse. However, where both spouses share physical custody of a child in a substantially equal way, the amount of the order shall be determined by taking into account the amounts that would be payable by each spouse, the increased costs of the shared custody arrangements and the conditions, means, needs and other circumstances of each spouse and child for whom support is sought.

¶ 33 Accordingly, the amount of support payable in sole custody, split custody and shared custody arrangements may differ significantly.

¶ 34 This will no doubt be a very important issue for lawyers and clients to consider. Unfortunately, some clients will consider making different demands for custody and access based on financial considerations rather than the best interests of the children. Whatever their motive, it will be the lawyer's obligation to very carefully point out the different financial consequences to sole, shared or split custody.

Conclusion

¶ 35 The Guidelines and related amendments to the Income Tax Act will present an ongoing challenge to lawyers. It is essential that we apply the lessons we have learned through time and experience. Effective communication, care in analyzing the provisions of the Guidelines and their impact on clients, handling and documenting the file diligently and paying attention to detail will go a long way towards minimizing the risk of claims.

Syrtash Collection of Family Law Articles
SFLRP/1997-002

Is Public Value Really Greater Than Private Value?*

By Stephen Cole
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* Posted by John Syrtash with permission of the author.

¶ 1 Very often in a family law matter private value is erroneously computed on a "public" basis or comparable public company values are used. Why is a private company generally worth less than a public one?

¶ 2 At an imaginary dinner party of private entrepreneurs, when the conversation turns to financing, it would be easy to overhear observations such as these:

> "DOC-IT has developed document management software. The underwriters told me that DOC-IT can undertake an initial public offering ("IPO") at a value of $80,000,000. I'll own 60% after the IPO and my share will be worth $48,000,000. But if I bring Microsoft or IBM as a strategic partner, they will buy in based on value of only $40,000,000 post investment. Why won't they pay more?"
> "Acklands, a national auto-parts distributor and our company have been in the business for years and now I'm ready to sell-out to them. Why is my business only worth 4 times earning before interest and taxes ("EBIT") and they trade at 8 times or better? It doesn't seem fair."
> "We are in the medical instrumentation software business. Our partners, venture capitalists have been investors for 8 years and they have not seen a penny of return. They invested at $2 per share. If they want us to buy them out before the story ends, I'll pay them $2.50. However, if they wait a year after we have recorded our third straight year of profits and growth, they will receive $4.00 per share on the IPO."
> "Our family trucking business was worth $4,000,000 (4 times EBIT) last year when we sold the President 15%. Now we are selling to a public competitor who is paying us $7,000,000 or 7 times EBIT. Boy, did he score."

¶ 3 The above are exemplary of the common dilemma. Why is public value so much higher than private value? Because generally you're comparing apples and oranges and often at different stages of the growing cycle. Because the price to exit for cash is not the same as the price to enter and keep playing.

¶ 4 What are some of the differences between public and private companies? The major difference is liquidity--the ability to sell at any time at an informed price. Other differences include: size (small v. large); purpose of ownership (method of earning a livelihood v. investment); transaction participants (informed buyers and sellers, often non-arm's length and well diversified, often with a lower opportunity cost v. more careful buyers, less substantial, more risk adverse, profit motive may be stronger than growth orientation, minorities less well organised); future orientation (private buyers are often overly focused on historical patterns and performance v. analysts and buyers of public stock who have a more future oriented approach); management (owner/manager v. professional management); capital sources (private placements v. public capital markets); opportunities (aggressive growth in public context and necessary resources to expedite v. careful, slower growth with many constraints); complexity of operations; quality of information.

¶ 5 What is the relationship between company size and returns on equity? There is an inverse relationship between company size and average rates of return. Public companies with a market cap lower than $25 million sold at P/E ratios of less than 75% of those with caps greater than $100 million. Investors demand higher equity risk premiums from smaller firms. On a 30-year average, the risk premium for small public stocks is 9.58% versus 3.15% for large stocks.

¶ 6 Is a public exit an oxymoron?. Often. Value in the public markets in the long run will generally be awarded to those firms wanting to grow and partner with the public. Hence, such companies can raise funds at a much lower cost of capital and higher values than the owner who is taking his/her marbles and leaving the game. There are of course exceptions for those owners of mid-market and larger companies who have built well enough that their personal exit does not impact on future income prospects and value.

¶ 7 Do private companies sell for less than public companies? Yes.

¶ 8 What rules of thumb and other observations are commonly accepted? Private transactions are often at discount in the range of 35% to 60% when compared with the prices of those same securities after going public. The most significant difference between a private and public security is the private security's lack of marketability. Marketability discounts will generally range between 10% and 40% over and above other appropriate discounts from en-bloc value. Restricted stocks, including many minority interests, require further discounting to produce an acceptable rate of return. Private and public securities consistently sell for 15%-35% less than their unrestricted counterparts.

¶ 9 What about two otherwise identical, large companies...one private one public, wouldn't they be of equal value? Yes, when looking from the bottom up. That is to say, when applying fundamental valuation principles and after neutralising the other differentiating factors. The methodologies and concerns relevant to the enbloc value of a private company are the same as those applicable to a publicly held company.

¶ 10 Generally, private company values are not determined using transaction comparables (a "top-down") approach. There are a number of difficult issues relevant to valuing private companies which do not arise as frequently in the public context including: the inability to compare one private company with another; a lack of comparability between private and public corporations; the illiquidity of the private market place as compared to the public markets...particularly pertaining to minority interests; financial structure; assessing future outlook; normalizing adjustments; availability of industry information; valuing the "one-man show"; redundant assets; perceived risk; and income tax rates.

¶ 11 In light of an IPO in the foreseeable future ,why are options given out to senior management or why do vendors sometimes sell part of their companies to venture or strategic partners at, say, 50% less than the IPO price? Reasons generally include improving the IPO profile, solidifying good management, enlarging the equity, enhancing the Board and demonstrating sophisticated investor support. A recent examination of private transactions by insiders within five months of their firms making an IPO illustrates that they sold their shares to third-party buyers at a 45% mean and a 44% median discount from the IPO price.

¶ 12 Does the discount vary directly with the risk profile of the business itself? Yes. Hence, technology private values are often more deeply discounted than say real estate assets in the private v. public markets.

¶ 13 Will a competitor, a strategic or synergistic buyer pay more and narrow the gap? Of course. It is only a question of how competitive a bidding process the vendor can develop and how much of their incremental profits the buyer is willing to share...and whether they are public or private themselves.

¶ 14 If the spread between public and private value is so well known, why isn't there more arbitrage? There is, but it requires moving against the herd for a while. Under Brent Belzberg, Chairman and CEO, Harrowston Inc., a public investment holding company bought Marselux in a private transaction but it required taking it public to legitimize a gain in the order of $50,000,000. Under Gerry Schwartz, Chairman and CEO, Onyx Corporation bought Celestica from IBM at book value and some analysts think Onyx may have doubled their money were Celestica to go public. Under Joseph Rotman, Clairvest, itself a public company is also known to be a fundamental, "bottom-up", value buyer of private companies. All these firms appreciate the differences at issue.

¶ 15 Why are REIT units trading up to or over their pro-rata share of underlying real estate value? Why, prior to 1996 were they trading at the conventional discounts to net asset value? Perhaps the answer is that investors would not otherwise be able to buy such quality and diversified real estate. Or, perhaps "it is easier to swim down-stream", that " everything that's old will be new again" or because people now think they are bonds.

¶ 16 Does the discount from enbloc value for minority shares in a private company typically exceed the discount of a similar minority in a public company? Yes. The

former are in the range of 25% to 40% while the latter is much smaller. A recent study indicates that investors demand a 40% higher aggregate discount for a privately held partnership interest v. a publicly traded limited partnership interest.

¶ 17 Regardless of the anecdotal thoughts of the dinner party guests, what does the more academic community think? The bibliography following is a good reflection of current thinking. However, if you are looking to create value, prepare to paddle up-stream.

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Syrtash Collection of Family Law Articles
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Removing Barriers to Religious Remarriage in Canada: Rights and Remedies

Jewish Divorce, Remarriage and the Problem of Consent and the "Get"

by John T. Syrtash

August 26, 1997

Sections 2(4)-(7) and 56(5)-(7) of the Family Law Act, 1986

¶ 1 Although the Family Law Act provisions relating to religious remarriage could apply to any religion, ss. 2(4) to (7) and 56(5) to (7) of the Family Law Act were designed and developed to help solve a serious problem facing the Jewish community in Ontario. Under Jewish traditional laws, when a man and a woman seek a divorce a Jewish man gives a Jewish woman a piece of paper consenting to a bill of divorce or a 'get'. The get must be given of his own free will and a Jewish woman must accept this get of her own free will. Not all Jews feel this is necessary, but a significant number do, no matter to which sect of Judaism they may adhere. The get is simply a contractual release between the parties. Unless a husband gives this get and unless the wife agrees to receive it, the couple, under Jewish tradition, is not divorced and neither party is free to remarry.

¶ 2 Without this freedom an observant Jewish spouse must force herself to overlook and set aside her deeply-held faith going back many millennia. When and if she then decides to remarry under secular or civil law before a secular judge without obtaining the get, she then must abandon her convictions and to some extent abandon traditional Judaism. Moreover, if such a spouse does remarry without his or her spouse's consent to a Jewish divorce, then the children of a second and now strictly secular marriage may have their status within the observant Jewish community impaired, even though such a spouse will, in her second marriage, marry another Jew. Such children face religious restrictions on whom they can marry.

¶ 3 For these reasons, on separation or divorce, the obtaining of a get, or bill of divorce, from one's spouse is critical not only to one's own future if one is observant, but also to that of one's children, one's grandchildren and the generations to come.

¶ 4 In recent times, and with more increasing familiarity, a number of Jewish spouses are attempting to extort rights to which they would normally not be entitled under the Family Law Act or the Children's Law Reform Act by offering to consent to a religious divorce only if their spouses give up property, support, custodial or access rights, or agree to a modification of these rights. Even where spouses do not resort to coercion, the

matter of religious divorce frequently arises in negotiations leading up to the resolution of matrimonial disputes, which lead to separation agreements. Accordingly, the get has often become a negotiating chip to be exchanged for the modification of other rights.

Section 56(5)-(7) of the Family Law Act - Problems and Some Solutions

¶ 5 There should be no reason that this religious issue should be present in these negotiations. It is now the view of the Ontario legislature that abuse of religious custom has no place in interfering with matrimonial negotiations that lead to separation and divorce. Such legislation was necessary in light of a brief review of the common law principles of duress, undue influence and contracts void on grounds of public policy, which suggests that these common law principles may not be sufficient to render void a spousal agreement entered into under the threat of withholding a get (see Chitty on Contracts, Vol. 1 (25th ed.), 1983. Accordingly, s. 56(5) to (7) of the Family Law Act provides as follows:

> 56 (5) The court may, on application, set aside all or part of a separation agreement or settlement, if the court is satisfied that the removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was a consideration in the making of the agreement or settlement.
>
> (6) Subsection (5) also applies to consent orders, releases, notices of discontinuance and abandonment and other written or oral arrangements.
>
> (7) Subsections (4), (5) and (6) apply despite any agreement to the contrary.

¶ 6 This provision goes beyond the normal type of written agreement that can be set aside by the court, and includes, for the first and only time in the Act, a provision whereby agreements that are oral in nature can be set aside. Thus, even if the separation agreement or minutes of settlement made no reference whatsoever to the get, the entire agreement could be set aside if money was paid "under the table" or if consideration was exchanged for the get in any other surreptitious manner. Moreover, this section does not impose a test upon materiality: that is, the consideration paid or exchanged for the removal of barriers to one spouse's religious remarriage does not have to be a material consideration, but merely a consideration or any consideration.

¶ 7 Of particular concern among some critics is that, because of s. 56(5), spouses who would normally provide or receive gets freely and willingly might be warned by their lawyers not to do so for fear that a carefully negotiated agreement could be set aside, even though a get played no role whatsoever in these negotiations. I would suggest that if any party wishes to consent to a get but is particularly nervous that the other party may later set aside an agreement merely because a get was exchanged, (even if the get played no part in the negotiations), then the parties should simply exchange affidavits under s. 2(4) to (7) in the manner reviewed below and in the context of an action. If no action was

ongoing or pending during negotiations then an action may have to be commenced merely for the purpose of exchanging affidavits. Since the removal of barriers would then be made within the context of an action and pursuant to the provisions of ss. 2(4) to (7), the giving and the receiving of the get would therefore be sanctioned by statutory procedure as opposed to having taken place within the framework of a "negotiated" settlement.

¶ 8 Another course of action is to develop a standard acknowledgement clause in minutes of settlement or the separation agreement to the effect that "removal by one spouse of barriers that would prevent the other spouse's remarriage within that spouse's faith was not a consideration in the making of this agreement or settlement". Notwithstanding the provisions of s. 56(7) (see above), such a statement would be a meaningful acknowledgement or indication between the parties. It might provide another hurdle that the court must overcome, since the onus would then likely be on the spouse seeking to set aside such an agreement to prove that he or she did not sincerely believe that such a statement was true.

¶ 9 If a civil court sets aside such an agreement under s. 56(5) and forces a spouse to return consideration obtained in exchange for a get, then under Jewish law the get may be impugned. A solicitor who is contemplating the setting aside of an agreement under this section would therefore be wise to consult with a Rabbi whose speciality and skill lies in the field of Jewish divorce before commencing an action under s. 56. Under the relevant circumstances, such an action could possibly jeopardize the divorcee's status under Jewish marital law, even if she has already remarried under Jewish law.

¶ 10 One suggested method of employing this section is to pay the negotiated sum to her spouse, obtain the get, then immediately commence an action and obtain an interim ex parte order for the preservation of property, which in this case is money (under rules 44 or 45 of the Rules of Civil Procedure). Section 56(5) may be quite useful in respect of improvident settlements made prior to the coming into force of the Family Law Act (March 1, 1986). The Act is clearly retroactive in effect to at least June 4, 1985 but we would argue to even before that date, subject only to common law limitations of laches or the normal six-year limitation period under the Limitations Act.

Section 2(4) to (7) of the Family Law Act - the Affidavit Route

¶ 11 In situations where one or the other spouse makes application for virtually any relief under the Family Law Act, even if merely for court costs if one is defending, the Ontario Legislature has enacted a procedure under s. 2(4) to (7) under the Family Law Act which obliges a recalcitrant spouse to remove all barriers that are within his or her control and that will prevent the other spouse's remarriage within that spouse's faith:

> 2(4) A party to an application under s. 7 (net family property), 10 (questions of title between spouses), 33 (support), 34 (powers of court) or 37 (variation) may serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating

that

(a) the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouses faith; and

(b) the other party has not done so, despite a request.

(5) Within ten days after service of the statement, or within such longer period as the court allows, the party served with a statement under subsection (4) shall serve on the other party and file with the court a statement, verified by oath or statutory declaration, indicating that the author of the statement has removed all barriers that are within his or her control and that would prevent the other spouse's remarriage within that spouse's faith.

(6) When a party fails to comply with subsection (5),

(a) if the party is an applicant, the proceeding may be dismissed;

(b) if the party is a respondent, the defence may be struck out.

(7) Subsections (5) and (6) do not apply to a party who does not claim costs or other relief in the proceeding.

¶ 12 Within ten days after the s. 2(4) affidavit is served, or such longer period as the court allows, the party which initiated the affidavit procedure may apply to the court to have his spouse's proceeding dismissed or defence struck out by reason of his failure to comply with these subsections. The only way that the party who received such an affidavit can fulfil his statutory obligation and prevent himself from being faced with such an application is to complete whatever procedures are necessary to remove barriers within his control to permit his spouse's religious remarriage within her faith. He must therefore immediately swear out and serve upon his spouse an affidavit stating that he has completed such a procedure and further indicating that he has removed the barriers that have been requested to be removed by his spouse.

¶ 13 The lawyer acting on behalf of a Jew who is concerned about obtaining a get should simply phone his client's Rabbi and ask what has to be done. In almost all cases the procedure is invariably inexpensive, quick and simple. A get can be given and received in a matter of hours.

¶ 14 Although the court has a discretionary power, and not an obligatory one to dismiss an application or strike out a defence, it will probably closely scrutinize and be suspicious of any reason that a recalcitrant spouse might give for his or her failure to consent to the get procedure. This is particularly true insofar as s. 56(5) at the very least statutorily indicates the statute's displeasure with spouses who use their ability to withhold their consent to a religious divorce as a negotiating tool in matrimonial disputes. The secular purpose of facilitating remarriage would also be in the mind of the court and we would suggest that the court should rarely, if ever, deny relief to a spouse who needs a get. Clearly such relief should not be denied because of any assertion that the recalcitrant party was withholding his consent for "religious reasons". It has been

documented repeatedly in the Rabbinic literature and by every informed Judaic source that in most cases there cannot be the slightest religious basis for the withholding of a get, and that, indeed, it is contrary to religious principles to do so. There cannot even be a financial reason for withholding a get as its cost is negligible. Even before the section came into force there was authority for the Supreme Court of Ontario withholding a portion of proceeds of the sale of matrimonial home pending the husband's delivery of a get: See unreported decision of Solomon v. Solomon (Rutherford J., July 22, 1982, File No. D90844/81) and this decision was made over the objections of counsel for the husband (not appealed).

Recent Developments

¶ 15 Since the enactment of these Family Law Act provisions, the very threat of these sections have substantially mitigated the problem of matrimonial blackmail in Ontario. Predictably the affidavit route ss. 2 (4) to (7) has been used more frequently than s. 56 and a brief survey of various counsel in the province suggest that once an application for such relief is made, the recalcitrant spouse eventually succumbs. The courts also do not appear nervous about applying the sections. In Glass v. Glass, unreported (Ont. H.C., Master Cork, February 23, 1987), digested at (1987), 6 L.W. 644-012 (6 Lawyer's Weekly No. 44, March 27, 1987) and 3 A.C.W.S. (2d) 287, it was the husband who was seeking an order that the wife remove barriers to his religious remarriage. The wife argued that as long as they were civilly married, she could not remove all barriers to the husband's religious remarriage. The court affirmed that the legislation envisioned the existing civil marriage and was intended to deal only with religious barriers whose removal was within the power of the parties. Mrs. Glass was ordered to give her irrevocable consent to a get. The court also ordered that the obtaining of a get be comparable with the civil divorce in the circumstances where a divorce action was proceeding.

¶ 16 In New York State, legislation similar to Ontario's was recently upheld in a decision by its appellate court. The transfer of money and property under a settlement was stayed pending the husband's compliance with the statute: Friedenberg v. Friedenberg, 523 N.Y.S.2d 578, January 19, 1988 (N.Y.S.C., Appellate Division).

¶ 17 Finally, on a practical note, due to the all-encompassing wording of s. 56 it is not advisable to make any mention of the religious divorce in minutes of settlement or a separation agreement. The alternative practice has grown to have these agreements signed, held in escrow and not delivered until the get procedure has been completed.

¶ 18 Recently, in the late fall of 1988, the United States Supreme Court confirmed the decision of the New York Appellate Court in the case of Shragai (unreported) by refusing the husband's application to stay the lower court order that he be imprisoned for failing to give his wife a get. Mrs. Shragai had successfully registered an Israeli rabbinical court order that Mr. Shragai give his wife a get in New York's court system. However, Mr. Shragai refused to honour what then became a New York court order on the constitutional ground that such an order violates Mr. Shragai's freedom of religion under

the United States Bill of Rights and its Constitution. By affirming the lower court decision, the United States Supreme Court has confirmed the appellate and lower courts' view that Mr. Shragai's failure to grant his wife a get offended public policy, and that his arguments raised no substantial constitutional issue. This decision substantially answers and dispenses with any of the constitutional objections to the Ontario Family Law Act and its sister legislation in New York State.

Divorce Act

¶ 19 Effective August 12, 1990, Canada's Divorce Act was formally amended by the proclamation of Bill C-61. Essentially, under Section 21.1 of the amended Act, after the deponent serves an affidavit reciting the other spouse's refusal to remove barriers to the deponent's religious remarriage within the other spouse's control, the court has the discretionary power to dismiss any application filed under the Act, and to strike out any other pleadings and affidavits filed by such a "recalcitrant" spouse. If a husband refuses to give his wife a get, or if a wife refuses to accept same, then either can thus be refused the right either to present or defend any motion or claim for a civil divorce or corollary relief, including motions or claims for spousal support, child support, custody, access or the variation of any existing divorce judgments for such relief.

¶ 20 As a consequence of the ability to frustrate a defence to a variation claim, a Jewish spouse who needs a get to remarry, but who has already been civilly divorced by a court judgment rendered several years ago, can now bring a claim to increase child or spousal support and prevent her spouse from defending such a claim until he gives her a get. Needless to say, the relief under s. 21.1 cannot be brought independently of a proceeding for corollary relief or for variation of such relief and, for that reason, there should be some legitimate basis for the claim - such as true need or new parental conduct during access visits (or the lack of them) that adversely affects the child's best interests.

¶ 21 Some of the differences between the Family Law Act and Divorce Act procedures are summarized as follows:

1. Unlike the Family Law Act procedure, the Divorce Act procedure may prompt a court to prevent or delay the resolution of a recalcitrant spouse's custodial or access claims to his/her child or children. Subject to the best interests test, a spouse who refuses to remove the religious barriers within his or her control could be restricted or even prevented from seeing his or her children: s. 21.1(3) (c) and (d).
2. The recalcitrant spouse under the Divorce Act normally has fifteen (15) days, not ten (10), to file his own affidavit confirming his having removed the religious barriers: s. 21.1(3) (a).
3. Unlike the Family Law Act, the Divorce Act permits a court to excuse a recalcitrant spouse from removing religious barriers if the spouse can satisfy the court that he has genuine grounds of a religious or conscientious nature for refusing to remove such barriers

within his or her control: s. 21.1(4)(a) (b).

This apparent loophole is difficult to invoke because,

(i) the onus is on such a spouse refusing to give a get to make this expensive argument succeed, not the spouse requesting the removal;

(ii) under Jewish law there is no religious ground for refusing to remove barriers to one's spous's religious remarriage once marriage breakdow has occurred; there is not even a one-year separation prerequisite before divorcin;

(iii) unlike the Family Law Act affidavit, the Divorce Act affidavit filed by the spouse requesting the removal must, inter alia, specify "the date and place of the marriage, and the official character of the person who solemnized the marriage [i.e., if the marriage officer was a rabbi or judge]".

Presumably, a spouse who allowed himself or herself to be married by a rabbi cannot consistently maintain that he or she may have been a religious Jew for the purpose of marriage', but not divorce. Other extrinsic evidence pertaining to past participation in Jewish life, such as a bar mitzvah or even infrequent synagogue attendance also would be useful. Moreover, wise counsel who anticipate such a defence should "negotiate' for the get in writing and expressly state on such correspondence that the letters are not without prejudice. Including such exchange of letters in the affidavit may vitiate the recalcitrant spouse's claim that his grounds for refusing to remove barriers on religious or conscientious grounds are truly "genuine". The section was designed to make the entire amendment more constitutionally defensible and less prone to attack on the grounds that it offends a recalcitrant spouse's freedom of religion under Canada's Charter of Rights.

4. Unlike the Family Law Act provisions, s. 21.1(b) of the Divorce Act excludes from its operation those spouses subject to religious divorces where "the power to remove the barrier to religious remarriage lies with a religious body or official". Only Judaism (and

> occasionally Islam) vests control to remove barriers with the spouses themselves. Rabbis merely supervise or "umpire" the proceedings - they cannot effect the divorce itself. However, the Catholic Church and, in most cases, the Islamic religious courts can and do effect the termination of a marriage - often against the will of one of the spouses, albeit in Catholicism the process is annulment. The purpose of s. 21.1(b) was to ensure that the jurisdiction and practices of non-Jews would not be affected in any way, shape or form by the passage of remedial legislation designated to primarily assist blackmailed Jewish spouses whom the rabbis are powerless to assist. By contrast, a Catholic spouse may delay the annulment by refusing to co-operate, but he or she cannot prevent the annulment forever. For the remedial impact of these sections on Islam, see my article in 1 C.F.L.Q. 29 or Chapter 3 of my book Religion and Culture in Canadian Family Law (Butterworths 1992). In certain cases, the sections can help an Islamic woman significantly.

¶ 22 Finally, the constitutionality of allowing a court to indirectly oblige a spouse to remove religious barriers to remarriage in the face of a spouse's "religious freedoms" was confirmed by the unreported decision of Shragai in the United States Supreme Court, confirming a New York appellate court's decision to send a Jewish male to jail for refusing to give his wife a get. This decision was made in the face of strenuous "religious freedom infringement" arguments by the husband. However, the appellate court ruled that it was against public policy for him to be able to prevent his wife from remarrying within her own faith. This case, although not binding, should be very persuasive in a Canadian court.

¶ 23 Recently a Quebec Superior Court in E.S. v. O.S. confirmed the use of section 21.1 of the Divorce Act to "level the playing field" in situations where husbands use their ability to withhold their consent to a get to extract concessions. Therefore, Mr. Judge Tannebaum dismissed the husband's contention that he was refusing to give a get on "conscientious grounds". The Court concluded that the husband's willingness to grant the get only after the civil divorce suggested that his real intention was to use his power over the wife in settlement negotiations. His offer to give the get after the civil divorce is meaningless since he would, in no way, be bound to do so. In the Judge's view, section 21.1 clearly indicates that the barriers are to be removed prior to the completion of the civil proceedings, since it empowers the Court to dismiss any proceedings taken by the refusing spouse. Moreover, since the husband consents to the get once the civil divorce is pronounced, it was clear to the Court that no moral, conscientious or religious grounds really existed for his refusal. Accordingly, the husband's proceedings were dismissed: E.S. v. O.S. [1995] Q.J. No. 1263, Quebec Superior Court, October 6, 1995.

Conclusion

¶ 24 Section 21.1 of the Divorce Act and Sections 2 and 56 of Ontario's Family Law Act provide remedies for Jewish and some Islamic spouses whose partners refuse to give

their consent to a religious divorce. Although these sections have been law for several years, a recent survey of lawyers across Canada has shown that very few matrimonial counsel are familiar with these provisions or the reasons behind them. Basically, these laws are designed to thwart the coercive conduct of a spouse who withholds his or her consent to a religious divorce, called a "get" in Judaism. A similar problem exists among some Islamic clients. Caution should be used in employing these sections in a given case without close consultation with a religious figure, such as an experienced Rabbi. According to some opinions, counsel who employ these remedies without such consultation could contravene Jewish or Islamic law, rendering any prospective religious divorce invalid if sanctions are imposed by secular courts. In certain fact situations, the employment of such remedies imposed by a secular court might be considered "coercive" and improper by a Jewish religious court, since a spouse's consent to a Jewish divorce or "get" must be given by one's "free will". However, others have expressed the view that the spouse who refuses to consent to a religious divorce and is now faced with a Court's order will do everything possible to convince religious officials that he is in compliance with religious law if he wishes to escape sanctions that the secular courts would impose under these sections. In other words, the problem of "religious law" making it difficult to comply with the Court's order will become his problem, not the problem of the woman or man who is suffering from an inability to remarry within Judaism or Islam. Such commentators suggest that it would certainly not be the problem of the secular courts which are governed by the Divorce Act or Ontario's Family Law Act, not Jewish or Islamic law. These contradictory views on how best to approach these legislative remedies have yet to be reconciled, although the debate has recently come alive in a number of recent cases and articles that have appeared. Both have merit. One does not wish to do anything for a client that may frustrate her ultimate goal of obtaining a Jewish or Islamic divorce under religious law. Consultation with religious leaders therefore appears to be imperative. However, it equally may be true that these concerns should not necessarily stop counsel from employing these very unique statutory remedies. The spouse who withholds his consent often realizes that it is in his best interests to give consent when faced with the threat of these provisions. In fact, a study prepared by the federal government has confirmed that this very threat has proved to be effective. The problem has not vanished, but has been greatly ameliorated as a direct result of the legislation.