Syrtash Collection of Family Law Articles
SFLRP/1999-026

M. v. H.: Case Commentary*

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¶ 1 In M. v. H., [See Note 1 below] the Supreme Court of Canada has given meaning to the Charter's promise of equality for lesbians and gay men. The Court held that the wholesale exclusion of same-sex couples from section 29 of the Family Law Act offended s. 15 and could not be saved under s. 1. In an 8-1 decision, the Court struck down the Family Law Act's extended definition of spouse for support purposes effective November 20, 1999. The Legislature is invited to devise a constitutional approach in the meantime.

Note 1: M. v. H. (1996), 132 D.L.R. (4th) 538 (Ont. Ct. Gen. Div.) (Epstein J.); aff'd (1996), 142 D.L.R. (4th) 1 (C. A.) (Finlayson J.A. dissenting); aff'd (1999), 171 D.L.R. (4th) 577 (Gonthier J. dissenting) (S.C.C.) [hereinafter M v. H].

¶ 2 At the time of writing, legislatures across Canada are reviewing and amending their statutes to ensure equal recognition of same-sex spouses and opposite-sex unmarried cohabitants. [See Note 2 below] It appears that we are facing a period of significant family law reform, initially at least in favour of the equal treatment of all unmarried couples, perhaps by omnibus bill or perhaps by subject matter, an approach B.C. recently adopted in revising all of its death statutes with a single enactment. [See Note 3 below] The next six to twelve months certainly promise to be interesting for those of us who are interested in family law reform.

Note 2: All of the provincial premiers are reviewing the impact of the decision and all but one (Ralph Klein) said their governments would comply. See, The National Post (May 21, 1999) A-2. At the federal level, it has been reported that the government plans to introduce omnibus legislation redefining spouse to include same-sex couples in every federal enactment that uses an opposite-sex requirement. See, Lori Kittelberg and Mike Scandiffio, "Top Liberals discuss omnibus bill" The Hill Times (May 30, 1999). The Québec National Assembly unanimously approved such an omnibus Bill on June 10, 1999. See, Bill 32, An Act to amend various legislative provisions concerning de facto spouses, 1st session, 36th Legislature of Québec, 1999.

Note 3: On July 8, 1999, the B.C. Attorney General introduced for First Reading Bill 100 (1998/99 Legislative Session: 3rd Session, 36th Parliament), Definition of Spouse Amendment Act, 1999 which would include same-sex spouses in all death-related legislation, including the Estate Administration Act and the Family Compensation Act. British Columbia already includes gays and lesbians in most of the rights and responsibilities of family law. This is the latest package of B.C. statutes that include gays and lesbians, the earlier ones being: Adoption Act, R.S.B.C. 1995, c. 48, s. 29; Family Relations Act, R.S.B.C. 1996, c. 128, as am. by Family Relations Amendment Act, 1997 (proclaimed February 4, 1998); Family Maintenance Enforcement Act, R.S.B.C. 1996, c.127 as am. by Family Maintenance Enforcement Amendment Act, 1997, (proclaimed February 4, 1998). Parts 5 (Matrimonial Property) and 6 (Division of Pension Entitlement) of the Family Relations Act, ibid., are the only parts that do not automatically include gays and lesbians (or unmarried opposite sex couples), but couples can contract into those provisions.

¶ 3 Forward-looking provincial and federal governments should also be considering whether it is constitutional to draw distinctions between married and unmarried couples. [See Note 4 below] In our view, one of the broad implications of M. v. H. is that Canada is moving towards the equitable treatment and recognition of all spousal relationships, be they married, unmarried, opposite-sex or same-sex. Notwithstanding the reactionary Reform party resolution "protecting heterosexual marriage," [See Note 5 below] the recognition of marriage for lesbians and gays is a reality on the constitutional horizon. The Supreme Court has said that the Charter protects "the fundamental right to live life with the mate of one's choice in the fashion of one's choice." [See Note 6 below] This essential freedom -- quite literally, the freedom to love and to celebrate one's loving relationship -- lies at the core of humanity and thus human rights. [See Note 7 below] If we are to truly achieve equality and full legal personhood for gays and lesbians, the fundamental right of gays and lesbians to marry must be recognized. [See Note 8 below] And it is going to be hard to distinguish M. v. H. when that time comes.

Note 4: See, Miron v. Trudel, [1995] 2 S.C.R. 418 [hereinafter Miron].

Note 5: The federal government recently passed a resolution introduced by the Reform Party that it would take all necessary steps to preserve a discriminatory definition of marriage. Canada, Parliamentary Debates - Hansard, Number 240 (Tuesday, June 8, 1999) at 1020-2255. According to an Angus Reid poll, 53% of Canadians support the right of same sex couples to marry. See, Anne McIlroy, Parliamentary Bureau "Most in poll want gay marriages legalized: 53% support idea despite MPs' vote to uphold status quo" [Toronto] Globe & Mail (June 10, 1999) A1.

Note 6: Miron, supra, at para. 151.

Note 7: Nicholson, A. (The Honourable Chief Justice of the Family Court of Australia), "The Changing Concept of Family: The Significance of Recognition and Protection" (Conference Paper from "Sexual Orientation and the Law" presented September 1996) published in (1997) 6 Australasian Gay and Lesbian Law Journal 13 at 13 writes:... "laws outlawing discrimination should serve as more than a source of enforceable rights and protections; they should also provide a basis for shifting prejudicial community attitudes. These only change when a society truly recognizes the humanity of the group who have been enduring discrimination and, to my mind, nothing can be more central to a definition of humanity than respect for the importance each of us places upon enduring relationships."

Note 8: The fundamental freedom for gays and lesbians to marry is currently being litigated in Hawaii, Alaska and Vermont and before the U.N. Human Rights Court in a case arising out of New Zealand. See, Baehr v. Lewin, 852 P.2d 44 (1993); Baehr v. Miike, 910 P.2d 112 (1996 Hawaii); Brause and Dugan v. Bureau of Vital Statistics, Alaska Dept. of Health & Social Services, and the Alaska Court System (Case No. 3 AN-95-6562 CI; In the Superior Court for the State of Alaska, Third Judicial District at Anchorage); Baker v. State of Vermont (Vermont Supreme Court Docket No. 98-32); Quilter v. AG (New Zealand) (C.A. 200/96) (17 Dec. 1997) discussed by Nigel Christie, "New Zealand's Same-Sex Marriage Case Reaches the United Nations Human Rights Committee" Legal Recognition of Same-Sex Partnerships Conference (City University, London, England, July 1-3, 1999) Session 16.

The Meaning of Discrimination

¶ 4 In response to the achievement of equality in spousal relationships, some critics despair that the term "spouse" has been rendered meaningless. It is as though, since lesbian and gay relationships have been recognized at law, the boundaries of privilege and hierarchy have collapsed and the world no longer makes sense. This crisis of meaning produces the response that roommates and siblings, anyone and everything, must now be logically entitled to spousal recognition.

¶ 5 Those who claim that non-spousal relationships are otherwise "discriminated against" misapprehend the meaning of discrimination under section 15 of the Charter. Since Andrews v. Law Society of British Columbia, [See Note 9 below] the Supreme Court of Canada has adopted a substantive approach to the equality guarantee. Under Canadian jurisprudence, not all differential treatment is discriminatory. Instead, discrimination exists when differential treatment violates the human dignity of individuals, considering the larger social and political context of the affected person or group. The Court assesses section 15 claims from the perspective of the rights-holder, considers historical disadvantage and vulnerability, and weighs the nature of the interest affected. [See Note 10 below]

Note 9: [1989] 1 S.C.R. 143 [hereinafter "Andrews"].

Note 10: For further discussion of the interpretation of section 15, see our forthcoming paper "Foundations for 15(1)" in the Michigan Journal of Gender and the Law (Fall 1999, Vol. VI, Issue 2).

¶ 6 Using a substantive approach to equality, the Supreme Court in M. v. H. recognized the history of discrimination and invisibility faced by lesbian and gay relationships. Given this larger social and political context, the non-recognition of same-sex spouses was rightly regarded as offensive to human dignity. As Justice Cory explained, "the exclusion of same-sex partners from the benefits of the spousal support scheme implies that they are judged to be incapable of forming intimate relationships of economic interdependence, without regard to their actual circumstances." [See Note 11 below] On a substantive equality approach, the exclusion of roommates or extended

family members from the definition of "spouse" is not discriminatory. Non-recognition does not have the effect of furthering stereotype or prejudice; it does not impinge on the human dignity of an already disadvantaged minority. [See Note 12 below]

Note 11: M. v. H., supra, para 73.

Note 12: See, in particular, Law v. Canada (Minister of Employment and Immigration) (1999), 170 D.L.R. (4th) 1 (S.C.C.).

¶ 7 Furthermore, M.'s relationship with H. was qualitatively different from that of a "roommate." Her sexual orientation, a protected ground of discrimination, was the single factor that excluded her from the definition of spouse. Since the late 1970s, our judiciary has established a clear list of indicia to define cohabitation and to distinguish between spouses and non-spouse groupings like roommates. The list of indicia is a flexible bundle of attributes which "include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple." [See Note 13 below] There is no doubt that M. and H. were spouses except that they were excluded because of their sexual orientation.

Note 13: M. v. H., supra, para 59, adopting Molodowich v. Penttinen (1980), 17 R.F.L. (2d) 376 at 381-382 (Ont. Dist. Ct.).

A Cost/Benefit Analysis of Equality

¶ 8 In addition to the "everything goes" spouse/non-spouse argument, opponents of equality often argue that recognition of same-sex relationships is simply too costly to be feasible. This is false.

¶ 9 First, employers who provide same-sex spousal benefits have found that the cost of the extension of benefits is minimal. Usually, less than a one percent increase in premiums is required to fund non-discriminatory coverage. Indeed, when the federal government extended pension benefits to lesbian and gay spouses, Malcolm Hamilton, an actuary at William M. Mercer Ltd. commented, "The cost is so small you have a hard time measuring it." [See Note 14 below]

Note 14: Daniel Leblanc, Parliamentary Bureau "Civil service to get same-sex benefits Ottawa to overhaul pension plans in bid to head off court battle" The [Toronto] Globe and Mail (March 16, 1999).

¶ 10 The "cost" issue is really a question of perspective. Pause to consider the implicit sexual orientation of the person who asks the question. For generations, lesbians and gay men have been paying money so that heterosexuals can enjoy benefits. Certainly, from the point of view of same-sex spouses, it is unacceptably costly to fund a program of heterosexual privilege from which one is completely excluded. [See Note 15 below]

Note 15: The tax benefit awarded to heterosexuals, on the basis of their heterosexuality, was approximately $5 billion dollars in 1993, comprising the 67th largest government expenditure. It is estimated that same-sex couples lose between $16.2 million and $165 million by subsidizing a system which does not benefit them. See, K. Lahey, "The Political Economies of 'Sex' and Canadian Income Tax Policy" Address to the Canadian Bar Association (Ontario), (1998) [unpublished]. K. A. Lahey, Are We 'Persons' Yet, Law and Sexuality in Canada (Toronto: University of Toronto Press, 1998) (forthcoming) [hereinafter "Persons"].

¶ 11 Furthermore, the responsibilities as well as the rights of gays and lesbians are affected by same-sex spousal recognition. Advantaged lesbians and gays will have a responsibility to pay spousal support; wealthy gay and lesbian couples will cease to enjoy the advantages of two principal residence exemptions; gays and lesbians will have a primary obligation to seek support from their spouse rather than being eligible for the higher benefits paid to single persons for the purposes of social assistance, student loan benefits and legal aid coverage. [See Note 16 below] The list of burdens, as well as the list of benefits, continues. Most in the gay and lesbian community did not lament this assumption of responsibility, since the implications are clearly worth the sacrifice. [See Note 17 below] Once a gay or lesbian spouse has spousal recognition in the form of responsibility, no right can legitimately be withheld. Gays and lesbians and their relationships are, for the first time in Canada and around the world, seeing a vision of full legal personhood in the reasoning of M. v. H. [See Note 18 below]

Note 16: In Rosenberg v. Canada (Attorney General) (1998), 158 D.L.R. (4th) 664 (a case dealing with the limitation of registration of private pension plans only to plans restricting survivor benefits to spouses of the opposite sex), the Court of Appeal stated at 676: "...there appears to be no cost justification for the exclusion of same sex survivor benefits, not only because the evidence of anticipated costs was unavailable, but also because to the extent that it was, it revealed a potential net revenue gain to the government of ten million dollars."

Note 17: Of course, "H" resisted responsibility. She argued, along with the Attorney-General of Ontario, that gay and lesbian relationships were egalitarian in nature, unlike heterosexual relationships which are marked by power imbalances. It was reasonable, therefore, that compensatory spousal support be unavailable to lesbians and gay men in all cases. The appellant's case was bolstered by the writings of some members of the academic community who criticize the struggle for spousal recognition as an "assimilationist" goal.

Note 18: See, Persons, supra, and LSUC/CBAO "Are We "Persons" Yet? Sexual Orientation and Equalilty Rights in Canada" (Toronto, Ontario: June 23, 1999).

¶ 12 Last, and most importantly, we cannot put a price on equality. There are inestimable human costs in permitting discrimination to continue. Same-sex spousal recognition is morally and constitutionally necessary. The complete exclusion of gays and lesbians from spousal status expressed, with the power of law, the view that same-sex relationships were not worthy of social consideration or respect. M. v. H. is a significant achievement for all who care about equality. It says, as Andrews promised, that our Charter has life and meaning for "those groups in society to whose needs and wishes elected officials have no apparent interest in attending." [See Note 19 below] It says that we, in Canada, have embraced the truly admirable concept of substantive equality, marking us as a beacon for other nations who struggle with discrimination. And it puts us on a path to reducing the untold, painful costs of hatred on thousands of gay and lesbian citizens in Canada. Luckily for us, there are no price-tags on justice and freedom.

Note 19: Andrews, supra, at 152 quoting J. H. Ely, Democracy and Distrust (1980) at 151.

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Family Law Rules
Philosophy and Over-View of the Rules*

by Carole Curtis

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INDEX

A. Philosophy of the Rules

1. Rules Specially Designed for Family Law
2. Same Rules and Forms for All Courts
3. Easy to Use
4. Simpler Language and Simpler Process
5. Simplified Pleadings, Forms and Financial Statements
6. Case Management and Settlement Features
7. The Continuing Record
8. Accountability
   a. Disclosure
   b. Costs
9. Structural Changes
   a. Case Conferences and Motions
   b. Questioning: Discovery and Cross-Examinations
   c. The File

B. Over-View of the Rules

1. Step-by-step in the Case
   a. Starting a Case: the Application and Answer
   b. Motions
   c. Conferences
   d. Disclosure
   e. Questioning
   f. Offers to Settle
   g. Trials
   h. Costs
   i. Orders
   j. Enforcement
2. Significant Changes from Current Procedure

a. Application of the Rules
b. Practice Directions
c. Interpretation of the Rules
d. Representation of Parties
e. Service of Documents
f. Timetables and Case Management
g. Continuing Record
h. Disclosure
i. Financial Statements
j. Orders
k. Trials
l. Uncontested Divorces
m. Enforcement

Philosophy and Over-View of the Family Law Rules
[See Note 1 below]

A. Philosophy of the Rules

1. Rules Specially Designed for Family Law

¶ 1 The rules project was begun in September 1990 with the passage of amendments to the Courts of Justice Act, R.S.O. 1990, Chap. C. 43, as amended, creating a Family Rules Committee for the first time (ss. 67, 68), with authority to present rules

-- for the conduct of all family law cases
-- in all courts in the province.
-- which may adopt, change or exclude rules made by the Civil Rules Committee.

Note 1: This paper was prepared with the benefit of material previously prepared and contributed by Justice Craig Perkins, Roman Komar and Risa Sheriff (currently, the other members of the Family Rules Committee Secretariat).

¶ 2 The scope of the task and the authority of the Family Rules Committee are both wide and new. The procedure for appointing members to the Family Rules Committee is set out in the Courts of Justice Act. The current list of members is attached. Members of the Family Rules Committee include:

11 representatives from the bar, appointed by:

- the Attorney-General (1 law officer of the Crown)
- the Chief Justice Superior Court (2 lawyers),
- the Associate Chief Justice (Family Court) (2 lawyers),

- the Chief Justice of the Ontario Court (2 lawyers),
- the Law Society (4 lawyers),

12 judges representing the judiciary at all levels of court:

- the Chief Justice and Associate Chief Justice of Ontario, and one Court of Appeal judge appointed by the Chief Justice of Ontario
- the Chief Justice and Associate Chief Justices of the Superior Court, and 2 judges of the Superior Court appointed by the Chief Justice of the Superior Court
- 2 judges of the Superior Court (Family Court) appointed by the Associate Chief Justice (Family Court)
- the Chief Justice of the Ontario Court, and 2 judges of the Ontario Court appointed by the Chief Justice of the Ontario Court

2 persons employed in courts administration, appointed by the Attorney-General

- the Attorney-General, or a designate

¶ 3 The Committee examined different issues by way of policy discussions initiated by material prepared for the Committee by the Family Rules Committee Secretariat (then consisting of Carole Curtis, Justice Perkins and Roman Komar); once a decision was reached, the Secretariat drafted the rule in accordance with the Committee's instructions.

¶ 4 The rules have been specially designed by family law lawyers, judges and court administrators specifically for family law cases. These rules are a complete set of procedure. Civil rules that are unnecessary or inapplicable in family law cases, because of complexity or cost, have been eliminated. Recourse to the Rules of Civil Procedure will happen only in limited and infrequent circumstances, where the court considers appropriate.

¶ 5 In the nearly nine year period of the Committee's work, the practice of family law has evolved and has changed in dramatic ways.

-- There have been new programs introduced, including case management and parent information projects, some of which have already become institutionalized in some family court locations.

-- The ever-increasing use of technology in the legal workplace and in courts administration has grown dramatically, and there are now many software applications designed specifically for use in family law.

-- There have been many legislative changes, including the Child Support Guidelines, amendments to the Family Responsibility and

Support Arrears Enforcement Act and amendments to the Child and Family Services Act.

-- The use of mediation and assessments, although not new to family law in 1990, has changed in the intervening period.

-- Changes to the Ontario Legal Aid Plan in 1996 resulted in dramatic changes in the family courts of Ontario, as increasing numbers of parties in cases came to court without lawyers; as well, on 1 April 1999 legal aid became Legal Aid Ontario, administered by a government agency and not the Law Society, as it had been since its introduction in 1967.

-- As of 15 September 1999, the on-going expansion of the Superior Court (Family Division) to new sites will mean that about half the population of the province will have access to one court for all family law matters, with specialized judges and additional services available to the public.

¶ 6 The Family Rules Committee released a set of rules in spring 1997 which were circulated for consultation. Input was received (over 80 written briefs) from a variety of sources, including individual judges, judges' associations, individual lawyers, bar organizations, individual citizens, community based groups, government agencies and institutional litigants active in the family courts. As well, there were consultation meetings held in centres throughout Ontario, attended by members of the Family Rules Committee and court administrators, mediators, Legal Aid Area Directors, lawyers and judges.

¶ 7 For the first time, the rules contain a statement of intent and principle, (sometimes called the Prime Directive) in rules 2(2), (3), (4) and (5). Judges, lawyers and parties must keep the Prime Directive in mind throughout the conduct of the case.

-- The primary objective of the rules is to enable the court to deal with cases justly.

-- Dealing with cases justly includes
- ensuring a fair process for all
- saving time and expense
- dealing with cases in ways which are consistent with the importance and complexity of the case, and
- using court resources in a manner which respects the demand for court resources for other cases

-- the court is required to apply the rules to promote the Prime

Directive

-- the parties and their lawyers are required to help the court to promote the Prime Directive

-- the court shall promote the Prime Directive by active case management of all cases, including,
- early intervention to dispose of issues that do not need a trial
- encouraging the use of alternatives to the court process
- helping parties to settle the case
- setting timetables for and controlling the conduct of the case
- using a cost benefit analysis to examine each step taken in the case
- dealing with as many aspects of the case as possible on each occasion
- using, where appropriate, alternatives to the physical attendance of parties or their lawyers (e.g., written documents only, and telephone or video conferences). (emphasis added)

¶ 8 The rules are, and are intended to be a wholesale change in the way family law cases are conducted in Ontario. The rules were designed with an emphasis on early resolution of the case, bearing in mind both the importance of the orders made early on in the case, and the fact that such a small number of family law cases actually proceed to trial. Earlier rules (civil rules) were structured on the premise that the case would naturally proceed through to a trial, and that other resolutions were an anomaly.

2. Same Rules and Forms for All Courts

¶ 9 The rules and forms apply (from 15 Sept. 1999) to the Superior Court (Family Court) (about 40% of the population of the province) [See Note 2 below] and to the Ontario Court (province-wide). The Superior Court in centres without the Family Court remains temporarily under the Rules of Civil Procedure until each location is included in the Family Court project.

Note 2: 2 Existing sites for the Family Court include Barrie, Hamilton, Kingston, London and Napanee. After 15 Sept. 1999 the court will include Bracebridge, Brockville, Cobourg, Cornwall, Durham, Lindsay, L'Orignal, Newmarket, Ottawa, Perth, Peterborough, and St. Catherines.

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3. Easy to Use

¶ 10 To make the rules easy to learn and to use, they are grouped in parts that follow the steps in a case from start to finish (including enforcement). There is a descriptive heading for every sub-rule. Each sub-rule is a simple and single sentence. Form numbers match the rule creating the form, for easy cross-reference.

4. Simpler Language and Simpler Process

¶ 11 The rules and forms use plain language. This will seem like a dramatic change to some lawyers and judges. The initial incentive was to ensure that represented parties could understand their lawyers and the judge easier. However, there has been a dramatic increase in unrepresented parties in family law cases in all courts since the devastation of the Legal Aid Ontario in 1996. The process itself is also designed to be simpler and cheaper in the great majority of cases, where the issues are relatively simple. Following are some examples of the new language used:

discovery, cross-examination	questioning
interim	temporary
judgment	order
pre-trial conference	settlement conference
proceeding	case
variation	change
with leave	with permission

5. Simplified Pleadings, Forms and Financial Statements

¶ 12 There is only one originating document for family law cases (called an application) although there are different versions of the application for divorce, child protection cases, and adoption. The application is a short document containing only the essential facts, and unrepresented parties can fill it out. It is unsworn, but unlike most current originating documents, the applicant must sign it. The application can also accommodate a complex case requiring a detailed pleading of facts and law. The answer and reply forms are similar to the application.

¶ 13 There is now only one form of financial statement for all courts. The financial statement is still an affidavit, but it has been reworked, and will likely continue to be reworked as the system adapts to the introduction of the child support guidelines. It provides a complete picture of income, expenses, assets and debts and is also easy to use.

6. Case Management and Settlement Features

¶ 14 Case management is new to many, but not all Ontario courts. Some have been operating under case management systems for nearly 10 years. The rules incorporate case management principles as an overlay to the conduct of all cases. Case management principles are consistent with and facilitate the Prime Directive. Certain cases (child protection) now have specific timelines. Certain cases will use a fixed date system for events before trial, a case conference early in the case to schedule events, explore ways to

resolve the issues in dispute and organize the disclosure of information. Settlement conferences (formerly called pre-trial conferences) may also be ordered in contested cases.

7. The Continuing Record

¶ 15 All documents served and filed from the start of the case right up to (but not including) the trial will go into a single permanent record (like a binder), which will also include all judge's endorsements and orders. This will avoid duplication of paper and should reduce paper and cost over-all. Court files should also become better organized and more reliable. The file, once opened, will always have the same title of the case and same court file number (even if there is an appeal, a future request to change an order or an enforcement) (R. 7(6)). If needed in another location, the file will be moved there. Some courts have already been using continuing records, and have found it an improvement over the current system, even for cases with unrepresented parties.

8. Accountability

¶ 16 The rules are intentionally structured to ensure higher levels of accountability, in many ways, and at different stages of the process, for parties in family law cases. Despite the requirement for "full and frank disclosure" arising both from the introduction of the Family Law Act in 1986 and from the case law interpreting those sections, family cases have not been marked by speedy and full disclosure, allowing the parties to move the case forward promptly to a resolution. In fact, the opposite is the case.

¶ 17 The Family Law Rules set standards of accountability which are connected to the desire for a cheaper, faster process, a simpler process, a more transparent process, a fairer process, and a process which does not tolerate efforts by one party to delay, fail to disclose or wildly litigate without consequences.

a. Disclosure

¶ 18 There are significant changes to disclosure requirements in the Family Law Rules. The financial statement must have attached to it either the most recent year's income tax return, or a signed direction to Revenue Canada authorizing the release of a copy of the income tax return. Without this attachment, the financial statement (and any document which requires a financial statement) will not be accepted for filing at the court counter.

¶ 19 The financial statement also requires that the party disclose the income of any other income earners in that person's household (e.g., new partner, new spouse).

¶ 20 A financial statement more that 30 days old is stale, and a new statement (or an affidavit confirming there are no changes) must be filed before a party can participate in the next step in the case (case conference, motion, settlement conference, etc.).

¶ 21 Failure to comply with disclosure requirements will no longer be tolerated. The court can strike pleadings, dismiss a case, or award costs or a fine as a penalty.

b. Costs

¶ 22 There is an entirely new regime regarding costs, including a presumption in the rules that the successful party in a step shall be awarded costs, and that the amount of costs will be immediately determined by the judge who heard that step. The goal is to prevent the bringing of frivolous steps, or steps which have no hope of success in a case.

9. Structural Changes

a. Case Conferences and Motions

¶ 23 The way family law cases are conducted will, with time, change dramatically, as the use of motions at the beginning of a case will largely be replaced with case conferences. The motion, based on affidavit evidence, will not be used in the majority of family law cases. Motions are still available to grant quick temporary relief in emergency situations. The first step in the average case will be a case conference. The parties prepare and file case conference briefs (form 17), which contain similar material to that normally filed in motions, but in an unsworn, standardized format. Only if the case conference is unsuccessful in resolving the issues will the party prepare a motion with affidavit evidence for argument before a judge. This is an enormous change in the way family law cases are processed and will require some adjustment by lawyers, judges and even parties.

b. Questioning: Discovery and Cross-examinations

¶ 24 Both discovery and cross-examinations are now called questioning. Questioning the other party is no longer available as a right in family law cases. It is available on consent, or by court order (on motion), except in child protection cases (where questioning is available as of right). This system has been in place in the former Unified Family Court in Hamilton for many years and has been successful; in appropriate cases, the parties or their lawyers consent to the questioning. However, with more stringent disclosure requirements in the rules, and more consequences for failure to disclose, questioning a party should become a last resort and should not be required in the average family law case, as all the data needed should be available and produced through other means.

c. The File

¶ 25 The way the court file is handled will change with these rules. The file will always have the same case name (the title of the case, e.g., Geraldine Hall v. Michael Jagger) throughout any further actions (including future motions to change the order, appeals, and enforcements). The contents of the file will be contained in an organized continuing record (dealt with in more detail elsewhere in this paper). The file will be sent

to other court locations if a new case is started in another region (e.g., an enforcement or a motion to change an earlier order), but will always have the same case name, no matter who the new "applicant" is.

B. Over-View of the Rules

1. Step-by-Step in a Case

a. Starting a Case: the Application and Answer

¶ 26 The applicant chooses where the case is started: R. 5.

-- Must generally be where a party lives, or, in custody and access case, where the child lives (unless there is immediate danger to the child): R. 5(1)(a)(b), 5(2).

-- Parties can agree on another place but must get the court's permission in advance: R. 5(1)(c).

-- All steps (filings, motions, hearings, and conferences) are where the case started until the enforcement stage, unless the case is transferred: R. 5(4).

¶ 27 The applicant starts the case by issuing an application: R. 8(1).

-- One application form except for divorce, child protection and adoption cases: R. 8(1).

-- Simple, easy to use form, which can also accommodate large, complex cases: Form 8.

-- Application is given a first court date when issued where there is no claim for divorce or property: RR. 8(4), 39.

-- If only a divorce is claimed, court date is not set until case is defended: R. 8(5).

¶ 28 Financial statement must be filed with application, reply or notice of motion or property case: R. 13(1), (10).

-- Can be ordered by court in custody or access case:

R. 13(3).

-- Must include latest year's tax return or direction to Revenue Canada to release it: R. 13(7).

-- Must be corrected as new information comes to light and updated as information changes: R. 13(15).

¶ 29 The continuing record is created by the applicant when an application is filed: R. 9(1):

-- All documents are filed in the record up to trial:

RR. 9(5), 23(1).

-- When the case goes to trial, trial record is prepared with only the documents needed for the trial: R. 23(1).

¶ 30 The applicant serves the application by special service: RR. 8(6), 6(3):

-- Special service includes personal service and service on a lawyer: RR. 6(3)(a)(I), 6(3)(b).

¶ 31 Late filing of documents is not permitted without court order: R. 3(7).

¶ 32 The respondent has 30 days to serve and file an answer: R. 10(1):

-- The parents in child protection cases are required to file an answer in order to defend a case: R.10(1).

-- Time for answer is 60 days if respondent served outside Canada and the United States: R. 10(2).

-- If no answer filed, the case goes by default hearing on first court date: R. 10(5).

-- If no answer to case claiming only a divorce, undefended divorce goes automatically to a judge with affidavit evidence: R. 36(5)

-- Simple, easy to use form, which can also accommodate large, complex cases: Form 10.

-- Can include a claim by the respondent against the applicant or any other person: R. 10(3).

-- If the case involves support or property, financial statement required with the answer: R. 13(1).

b. Motions

¶ 33 Motion for temporary order can be brought at anytime.

-- No motion served or heard without a case conference first, except in case of urgency, hardship or in the interests of justice: R. 14(4).

-- Minimum notice period is 4 days: R. 14(11).

-- Motion without notice only if notice unnecessary or not reasonably possible, if immediate danger to a child or party, or if service would have serious consequences: R. 14(12).

-- Financial statements more than 30 days old must be redone, unless affidavit swearing to no change is filed: R. 13(12).

-- Telephone and videoconferencing motions available as of right. Initiating party (not the court) is responsible for arrangements: R. 14(8).

¶ 34 Changing a previous order (formerly called a variation) to be started by motion instead of by application: R. 15(1).

¶ 35 Motion for summary judgment may be brought in any case except for obtaining a divorce: R. 16(2).

c. Conferences

¶ 36 Case conferences are to be scheduled and heard by a judge (or other authorized person) in every defended case: R. 17(1)(a).

-- Purposes are to narrow issues, consider alternative dispute resolution, schedule case events and ensure disclosure: R. 17(4).

-- It is optional for enforcements: R. 17(12).

¶ 37 Settlement conference (formally called pre-trial conference) to be held if judge directs it: R. 17(1)(b).

-- Expected to occur in the majority of cases

-- Conference briefs required, to be returned to parties after the conference: RR. 17(13), (21); form 17A.

¶ 38 A trial management conference may be directed by a judge to structure and schedule the trial in a case that doesn't settle: R. 17(1)(b), (6).

¶ 39 Parties and lawyers with full authority to proceed and to settle must appear at case conferences, settlement conferences and trial management conferences: R. 17(15).

-- Telephone videoconferencing may be used with a judge's permission, with the parties (not the court) responsible for the arrangements: R. 17(16).

¶ 40 A judge who conducts a settlement conference about an issue cannot hear the trial of the issue or the enforcement of the issue in any circumstance: R. 17(24).

d. Disclosure

¶ 41 Each party must disclose all relevant documents on request: R. 19(1).

-- Documents must be produced or copied on request: R. 19(2).

-- Omissions or errors must be corrected: R. 19(8).

e. Questioning

¶ 42 Parties may be questioned for a motion or before a trial only on consent or by court order, except in child protection cases: R. 20(3), (4). The order is to be made only if

-- it would be unfair to the requesting party to carry on without the information: R.20(5).
-- the information is not easily available by any other means
-- the questioning will not cause significant delay or undue expense: R. 20(5).

¶ 43 The requesting party must also have served all material required by the rules and must promise not to serve any more material for the next step in the case except in reply to the answer: R. 20(8).

f. Offers to settle

¶ 44 Offers to settle must be signed by the party making it and by the party's lawyer: R. 18(4).

¶ 45 Offers to settle are to be taken into account even when made before the case is started: R. 18(2).

g. Trials

¶ 46 The judge who conducted the settlement conference (pre-trial conference) cannot hear the trial: R. 17(24).

h. Costs

¶ 47 The successful party is presumed to be entitled to costs (no presumption in child protection cases or if party is government agency) unless party has behaved unreasonably: RR. 24(1), (2), (3).

-- Offers to settle and the party's behaviour in relation to the case is taken into account in deciding whether a party has behaved unreasonably: R. 24(5).

¶ 48 Costs to be decided and amount determined at each step of the case by the judge hearing that step: R. 24(10).

-- Presumption of costs of a step in the case against absent party or party not prepared to proceed with step: R. 24(7).

-- If success is divided, the court may apportion costs as appropriate: R. 24(6). In exceptional cases costs may include a penalty for unreasonable behaviour: R. 24(4), (5).

-- If a party has acted in bad faith, the court is required to decide costs on a full recovery basis payable immediately: R. 24(8).

i. Orders

¶ 49 Orders are generally to be taken out, and the successful party prepares the draft order for approval by other parties and signature by court staff: R. 25(2).

-- If successful party has no lawyer or if order not prepared in 10 days, the other party can prepare the order: R. 25(3).

-- If no party has a lawyer, court staff will prepare it: R. 25(11).

-- If a party fails to approve the draft within 10 days, the order may be signed without approval: R. 25(8).

-- Orders must be served on all parties by regular service: R. 25(13).

j. Enforcement

¶ 50 Enforcement generally takes place where recipient resides or, for custody and access order, where the child resides: R. 5(5), (6).

¶ 51 Recipient can require financial statement from payor in default: R. 27(1), (2).

-- Recipient can require income source to provide information about payor: R. 27(7).

-- Recipient can require payor to come to financial questioning: R. 27(11).

-- Refusal to come to financial questioning is punishable by 40 days in jail: R. 27(20).

¶ 52 Garnishment is available to seize joint bank account and other joint assets: RR. 29(4), (5), (6), (7).

¶ 53 The procedure for contempt orders set out in detail: R. 31

2. Significant Changes from Current Procedure

a. Application of the rules

¶ 54 The rules apply to all family law cases in Superior Court (Family Court) and in the Ontario Court: R. 1(2).

-- If a case is both family law and other matters, these rules apply by consent or by order: R. 1(4).

-- These rules apply to cases in progress except if ordered: R. 1(14).

b. Practice Directions

¶ 55 Practice Directions must be approved in advance by the chief justice and published in the Ontario Reports: R. 1(10).

-- Existing practice directions are all revoked: R. 1(11).

c. Interpretation of Rules

¶ 56 Considerable interpretative guidance is provided to promote the over-all objective of dealing with cases justly: RR. 2(2), (3), (4).

d. Representation of parties

¶ 57 Representation of parties must be by a lawyer (not a student), except by order: R. 4(1).

¶ 58 Removal of a lawyer from a case requires notice to the other parties, but they are not served with the affidavit on the motion for removal: R. 4(13).

-- Once an order of removal is made it must be served on all parties: R.4 (15)(b).

e. Service of documents

¶ 59 There are two categories of service: regular service, for virtually all documents, and special service, required for an application (the document that starts the case), summons to a witness, contempt motion, and notice of default hearing.

-- Regular service includes mail, courier, document exchanges, fax and special service: R.6(2).

-- Special service includes personal service, acceptance of service by a lawyer, service on party's lawyer, mailing (if a receipt card is returned), and leaving a copy with an adult together with mailing a copy: R.6(3).

-- Strict limits are imposed on fax service (including time of day and number of pages): R. 6.

f. Timetables and Case Management

¶ 60 Courts have a duty to actively manage cases: R. 2(5).

¶ 61 Child protection cases are governed by a specific timetable for events: R. 33.

-- The child protection hearing is to be completed within 120 days from the start of the case: R.33(1).

-- The court may lengthen a time in the timetable only if the best interests of a child require it: R. 33(3).

¶ 62 Other family law cases must be set down for trial within 230 days from the start of the cases: R. 39, 40.

-- Cases involving claims for custody, access or support (but not divorce or property) are assigned a first court date when the case is started: R. 39(6).

-- On or before the first court date, a clerk confirms that the case is ready to proceed before a judge and refers the parties to information about the family court process and alternatives to court: R. 39(5).

¶ 63 Cases involving claims for divorce or property are not managed from the beginning: R. 39(8)(a).

-- Case management is triggered by a party's request for a case conference or by the bringing of an urgent motion: R. 39(8)(b).

-- All other cases (enforcement and adoption cases) may be governed by a timetable if a judge orders this to advance the case.

¶ 64 Late filing of documents is not permitted without an order: R. 3(7).

g. Continuing Record

¶ 65 The continuing record is created by the applicant when the application is issued: R. 9(1).

-- All documents filed in the case go into the continuing record and a party must not serve or file a document that is already in the continuing record: R. 9(7), (8).

-- A separate trial record is prepared when the case goes to trial: RR. 9(5), 23(1).

h. Disclosure

¶ 66 All relevant documents must be disclosed in affidavits of documents, produced on request and copied at the expense of the requesting party: RR. 19(1), (2).

-- Any document mentioned in a party's pleading must, on request, be produced and copied: R. 19(3).

-- The affidavit of documents must be corrected or updated as documents come to light: R. 19(8).

i. Financial statements

¶ 67 Financial statements are required from all parties in support and property cases and can be ordered by the court in custody or access cases: R. 13(1), (3).

-- "Full and frank" disclosure is required and financial statements will be rejected at the counter for filing if income tax returns (or a direction to Revenue Canada) are not attached: R. 13(6), (7).

-- Documents required to be accompanied by a financial statement will also be rejected at the counter if they are missing R. 13(10).

-- Financial statements must be corrected and updated as information comes to light and must be redone for a motion, settlement conference or trial if more than 30 days old unless an affidavit swears that there is no change: R. 13(15), (12).

j. Orders

¶ 68 The court may penalize a party who disobeys an order by ordering the payment of a fine, penalty or costs, or anything else that the court decides is appropriate, such as striking out the party's case or any document, refusing to hear the party, postponing the trial or imposing any other sanction: R. 31(5).

k. Trials

¶ 69 A trial record must be served by the applicant 14 days before trial, and the respondent may add material to it: R. 14(1), (2).

¶ 70 Trial evidence by affidavit or electronic means may be permitted by the court on consent, on minor issues, if the witness is unavailable or if the court orders it if in the interests of justice: R. 23(20).

l. Uncontested Divorces

¶ 71 Uncontested divorces must be done by affidavit evidence: R. 36(5).

-- The applicant does not have to prepare a motion: R. 36(6).

-- Once the necessary papers are filed, the clerk is to present them to a judge: R. 36(7).

-- If the judge is not satisfied, the documents are to be returned for correction or the applicant is to have the chance to file an additional affidavit or to explain why the order should be made: R. 36(7).

m. Enforcement

¶ 72 Enforcement remedies may be transferred to or from the Director of the Family Responsibility Office without starting over: R. 26(12), (13), (14).

¶ 73 Writs of seizure and sale can be amended by statutory declaration to reflect the new terms of an order changed by the court: R. 28(3).

-- Writs do not have an expiry date: R. 28(4).

-- Courts are given the power to change or suspend each other's writs: R. 28(8).

¶ 74 Garnishment has no expiry date: R. 29(5).

-- Garnishees are required to give notice whenever a payor stops or resumes working: R. 29(23).

-- Payors are required to give a similar notice, which includes notice of any new income source: R. 29(25), (26).

-- If the payor names a new income source, the clerk will, on request, transfer the garnishment to the new income source and reissue it: R. 29(29).

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Syrtash Collection of Family Law Articles
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Ontario Family Law Rules*

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Effective only in the Superior Court of Justice
Family Law Locations and in the Ontario Court
of Justice.

* Posted by John Syrtash, with permission.

CONTENTS

1 General
2 Interpretation
3 Time
4 Representation
5 Where a case starts and is to be heard
6 Service of documents
7 Parties
8 Starting a case
9 Continuing record
10 Answering a case
11 Amending an application, answer or reply
12 Withdrawing, combining or splitting cases
13 Financial statements
14 Motions
15 Motions to change an order or agreement
16 Summary judgment
17 Conferences
18 Offers to settle
19 Document disclosure
20 Questioning a witness and disclosure
21 Report of Children's Lawyer
22 Admission of facts
23 Evidence and trial
24 Costs
25 Orders
26 Enforcement of orders
27 Requiring financial information
28 Seizure and sale
29 Garnishment
30 Default hearing
31 Contempt of court

32 Bonds, recognizances and warrants
33 Child protection
34 Adoption
35 Change of name
36 Divorce
37 Reciprocal enforcement of support orders
38 Appeals
39 Case management in Family Court of Superior Court of Justice
40 Case management in Ontario Court of Justice

RULE 1: GENERAL

SHORT TITLE

1. (1) These rules may be cited as the Family Law Rules.

CASES AND COURTS TO WHICH RULES APPLY

(2) These rules apply to all family law cases in the Family Court of the Superior Court of Justice and in the Ontario Court of Justice, whether started before, on or after the day when these rules take effect,

(a) under,

(i) the Change of Name Act,
(ii) Parts III, VI and VII of the Child and Family Services Act,
(iii) the Children's Law Reform Act, except sections 59 and 60,
(iv) the Divorce Act (Canada),
(v) the Family Law Act, except Part V,
(vi) the Family Responsibility and Support Arrears Enforcement Act, 1996,
(vii) sections 6 and 9 of the Marriage Act, and
(viii) the Reciprocal Enforcement of Support Orders Act;

(b) for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement or paternity agreement;
(c) for a constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited; and
(d) for annulment of a marriage or a declaration of validity or invalidity of a marriage.

CASE MANAGEMENT IN FAMILY COURT OF SUPERIOR COURT OF JUSTICE

(3) Despite subrule (2), rule 39 (case management in the Family Court of the Superior Court of Justice) applies only to cases in the Family Court of the Superior Court of Justice, which has jurisdiction in the following municipalities:

Regional Municipality of Durham
County of Frontenac
County of Haliburton
Regional Municipality of Hamilton-Wentworth
County of Lanark
United Counties of Leeds and Grenville
County of Lennox and Addington
County of Middlesex
Territorial District of Muskoka
The part of The Regional Municipality of Niagara that was the County of Lincoln as it existed on December 31, 1969
County of Northumberland
Regional Municipality of Ottawa-Carleton
County of Peterborough
United Counties of Prescott and Russell
County of Simcoe
United Counties of Stormont, Dundas and Glengarry
County of Victoria
Regional Municipality of York

CASE MANAGEMENT IN ONTARIO COURT OF JUSTICE

(4) Despite subrule (2), rule 40 (case management in the Ontario Court of Justice) applies only to cases in the Ontario Court of Justice.

FAMILY LAW CASE COMBINED WITH OTHER MATTER

(5) If a case in the court combines a family law case to which these rules apply with another matter to which these rules would not otherwise apply, the parties may agree or the court on motion may order that these rules apply to the combined case or part of it.

CONDITIONS AND DIRECTIONS

(6) When making an order, the court may impose conditions and give directions as appropriate.

MATTERS NOT COVERED IN RULES

(7) If these rules do not cover a matter adequately, the court may give directions, and the practice shall be decided by analogy to these rules, by reference to the Courts of Justice

Act and the Act governing the case and, if the court considers it appropriate, by reference to the Rules of Civil Procedure.

FAILURE TO FOLLOW RULES OR OBEY ORDER

(8) The court may deal with a failure to follow these rules, or a failure to obey an order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate, including,

(a) an order for costs;
(b) an order dismissing a claim made by a party who has wilfully failed to follow the rules or obey the order.

USE OF FORMS

(9) The forms authorized by these rules and set out in the Appendix of Forms shall be used where applicable and may be adjusted as needed to fit the situation.

FORMAT OF WRITTEN DOCUMENTS

(10) Every written document in a case,

(a) shall be legibly typed or printed;
(b) shall be on white paper, or on white or nearly white paper with recycled paper content; and
(c) may appear on one or both sides of the page.

PRACTICE DIRECTIONS, ETC.

(11) A practice direction, notice, memorandum or guide for the conduct of cases in any area shall be,

(a) approved in advance by the Chief Justice or Chief Judge of the court;
(b) filed with the secretary of the Family Rules Committee; and
(c) published in the Ontario Reports.

OLD PRACTICE DIRECTIONS, ETC.

(12) Practice directions, notices, memoranda and guides that were issued before these rules take effect no longer apply.

TRANSITIONAL PROVISION

(13) If a case was started before these rules take effect, the court may, on motion, order that the case or a step in the case be carried on under the rules that applied before these rules take effect.

TRANSITION -- OLD FORMS

(14) A form in use under the rules that applied before these rules take effect may continue to be used, if it contains substantially the same information as the form required by these rules, until December 31, 1999.

RULE 2: INTERPRETATION

DEFINITIONS

2. (1) In these rules,

"address" means a person's street or municipal address, mailing address, telephone number, fax number and electronic mail address; ("adresse")
"appellant" means a person who starts an appeal; ("appelant")
"applicant" means a person who starts an application; ("requérant")
"application" means, as the context requires, the document that starts a case or the procedure by which new cases are brought to the court for a final order or provisional order; ("requête")
"bond" includes a recognizance, and expressions that refer to the posting of a bond include the act of entering into a recognizance; ("cautionnement")
"case" means an application or any other method allowed in law for bringing a matter to the court for a final order or provisional order, and includes all motions, enforcements and appeals; ("cause")
"change", when used to refer to an order or agreement, means to vary, suspend or discharge, or a variation, suspension or discharge (depending on whether the word is used as a verb or as a noun); ("modifier", "modification")
"child" means a child as defined in the Act governing the case or, if not defined in that Act, a person under the age of 18 years, and in a case under the Divorce Act (Canada) includes a "child of the marriage" within the meaning of that Act; ("enfant")
"child protection case" means a case under Part III of the Child and Family Services Act; ("cause portant sur la protection d'un enfant")
"clerk" means a person who has the authority of a clerk or a registrar of the court; ("greffier")
"contempt motion" means a motion for a contempt order; ("motion pour outrage")
"contempt order" means an order finding a person in contempt of court; ("ordonnance pour outrage")
"continuing record" means the record containing all the written documents in a case that are filed with the court, as continuously updated as required

by these rules, but does not include a trial record; ("dossier continu")
"court" means the court in which a case is being heard; ("tribunal")
"default hearing" means a hearing under section 41 of the Family Responsibility and Support Arrears Enforcement Act, 1996 in which a payor is required to come to court to explain why payment has not been made as required by a support order; ("audience sur le défaut")
"Director of the Family Responsibility Office" means the Director of the Family Responsibility Office under the Family Responsibility and Support Arrears Enforcement Act, 1996, and "Director" has the same meaning, unless the context requires otherwise; ("directeur du Bureau des obligations familiales")
"document" means information, sound or images recorded by any method; ("document")
"enforcement" means the use of one or more remedies mentioned in rule 26 (enforcement of orders) to enforce an order; ("exécution")
"file" means to file with proof of service in the court office in the municipality,

(a) where the case or enforcement is started, or
(b) to which the case or enforcement is transferred; ("déposer")

"final order" means an order, other than a temporary order, that decides a claim in an application, including,

(a) an order made on motion that changes a final order,
(b) a judgment, and
(c) an order that decides a party's rights, in an issue between the parties or between a party and a non-party; ("ordonnance définitive")

"government agency" means the Crown, a Crown agency, a municipal government or agency, a children's aid society or any other public body; ("organisme gouvernemental")
"income source" has the same meaning as in the Family Responsibility and Support Arrears Enforcement Act, 1996; ("source de revenu")
"lawyer" means a lawyer licensed to practise in Ontario; ("avocat")
"legal aid rate" means the rate payable by the Ontario Legal Aid Plan on an account submitted by a lawyer for copying in the lawyer's office; ("tarif de l'aide juridique")
"mail", when used as a noun, means ordinary or regular mail, and when used as a verb means to send by ordinary or regular mail; ("poste")
"municipality" means a county, district, district municipality, regional municipality, the City of Toronto or a municipal corporation formed from the amalgamation of all the municipalities of a county, district, district municipality or regional municipality, and includes,

(a) an Indian reserve within the territorial area of a municipality, and
(b) the part of The Regional Municipality of Niagara that was the County of Lincoln as it existed on December 31, 1969; ("municipalité")

"on motion" means on motion of a party or a person having an interest in the case; ("sur motion")
"payment order" means a temporary or final order, but not a provisional order, requiring a person to pay money to another person, including,

(a) an order to pay an amount under Part I or II of the Family Law Act or the corresponding provisions of a predecessor Act,
(b) a support order,
(c) a support deduction order,
(d) an order under section 60 or subsection 154(2) of the Child and Family Services Act, or under the corresponding provision of a predecessor Act,
(e) a payment order made under rules 26 to 32 (enforcement measures) or under section 41 of the Family Responsibility and Support Arrears Enforcement Act, 1996,
(f) a fine for contempt of court,
(g) an order of forfeiture of a bond or recognizance,
(h) an order requiring a party to pay the fees and expenses of,

(i) an assessor, mediator or other expert named by the court, or
(ii)a person conducting a blood test to help determine a child's parentage, and

(i) the costs and disbursements in a case; ("ordonnance de paiement")

"payor" means a person required to pay money under an order or agreement, and includes the estate trustee
"periodic payment" means an amount payable at regular intervals and includes an amount payable in instalments; ("paiement périodique")
"property claim" means a claim,

(a) under Part I of the Family Law Act,
(b) for a constructive or resulting trust, or
(c) for a monetary award as compensation for unjust enrichment; ("demande portant sur des biens")

"provisional order" means an order that is not effective until confirmed by a court; ("ordonnance conditionnelle")
"recipient" means a person entitled to receive money or costs under a

payment order or agreement, including,

(a) a guardian or person with custody of a child who is entitled to money for the child's benefit under an order,
(b) in the case of a support order made under the Family Law Act, an agency referred to in subsection 33(3) of that Act,
(c) in the case of a support order made under the Divorce Act (Canada), an agency referred to in subsection 20.1(1) of that Act,
(d) a children's aid society entitled to money under an order made under section 60 or subsection 154(2) of the Child and Family Services Act, or the corresponding provision in a predecessor Act,
(e) an assessor, mediator or other expert entitled to fees and expenses from the party named in the order, and
(f) the estate trustee of a person who was entitled to money under an order at the time of his or her death; ("bénéficiaire")

"Registrar General" means the Registrar General under the Vital Statistics Act; ("registraire général de l'état civil")
"respondent" means a person against whom a claim is made in an application, answer or appeal; ("intimé")
"special party" means a party who is a child or who is or appears to be mentally incapable for the purposes of the Substitute Decisions Act, 1992 in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection, adoption or child support case; ("partie spéciale")
"support deduction order" means a support deduction order as defined in section 1 of the Family Responsibility and Support Arrears Enforcement Act, 1996; ("ordonnance de retenue des aliments")
"support order" means an order described in subsection 34(1) of the Family Law Act or a support order as defined in section 1 of the Family Responsibility and Support Arrears Enforcement Act, 1996; ("ordonnance alimentaire")
"temporary order" means an order that says it is effective only for a limited time, and includes an interim order; ("ordonnance temporaire")
"transcript" includes an electronic recording; ("transcription")
"trial" includes a hearing; ("procès", "instruction")
"uncontested trial" means a trial at which only the party making the claim provides evidence and submissions. ("procès non contesté")

PRIMARY OBJECTIVE

(2) The primary objective of these rules is to enable the court to deal with cases justly.

DEALING WITH CASES JUSTLY

(3) Dealing with a case justly includes,

(a) ensuring that the procedure is fair to all parties;
(b) saving expense and time;
(c) dealing with the case in ways that are appropriate to its importance and complexity; and
(d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.

DUTY TO PROMOTE PRIMARY OBJECTIVE

(4) The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.

DUTY TO MANAGE CASES

(5) The court shall promote the primary objective by active management of cases, which includes,

(a) at an early stage, identifying the issues, and separating and disposing of those that do not need full investigation and trial;
(b) encouraging and facilitating use of alternatives to the court process;
(c) helping the parties to settle all or part of the case;
(d) setting timetables or otherwise controlling the progress of the case;
(e) considering whether the likely benefits of taking a step justify the cost;
(f) dealing with as many aspects of the case as possible on the same occasion; and
(g) if appropriate, dealing with the case without parties and their lawyers needing to come to court, on the basis of written documents or by holding a telephone or video conference.

RULE 3: TIME

COUNTING DAYS

3. (1) In these rules or an order, the number of days between two events is counted as follows:

1. The first day is the day after the first event.
2. The last day is the day of the second event.

COUNTING DAYS -- SHORT PERIODS

(2) If a rule or order provides a period of less than seven days for something to be done, Saturdays, Sundays and other days when all court offices are closed do not count as part of the period.

DAY WHEN COURT OFFICES CLOSED

(3) If the last day of a period of time under these rules or an order falls on a day when court offices are closed, the period ends on the next day they are open.

COUNTING DAYS -- EXAMPLES

(4) The following are examples of how time is counted under these rules:

1. Notice of a motion must be served not later than four days before the motion date (see subrule 14(11)). Saturday and Sunday are not counted, because the notice period is less than seven days (see subrule (2)). Service on the day set out in the left column below is in time for the motion to be heard on the day set out in the right column below.

Service on	Motion may be heard on the following
Monday	Friday
Tuesday	Monday
Wednesday	Tuesday
Thursday	Wednesday
Friday	Thursday
Saturday	Thursday
Sunday	Thursday

2. A respondent who is served with an application in Canada has 30 days to serve an answer (see subrule 10(1)). A respondent who is served with an application on October 1 is in time if the answer is served on or before October 31. A respondent served on November 1 is in time if the answer is served on or before December 1.

3. If the last day for doing something under these rules or an order is New Year's Day, January 1, which is a day when court offices are closed, the time expires on January 2. If January 2 is a Saturday, Sunday or other day when court offices are closed, the time expires on January 3. If January 3 is a day when court offices are closed,

the time expires on January 4.

ORDER TO LENGTHEN OR SHORTEN TIME

(5) The court may make an order to lengthen or shorten any time set out in these rules or an order, except that it may lengthen a time set out in subrule 33(1) (timetable for child protection cases) only if the best interests of the child require it.

WRITTEN CONSENT TO LENGTHEN OR SHORTEN TIME

(6) The parties may, by consent in writing, lengthen or shorten any time set out in these rules, except that they may not lengthen a time set out in subrule 33(1) (timetable for child protection cases), rule 39 (case management in Family Court of Superior Court of Justice) or rule 40 (case management in Ontario Court of Justice).

LATE DOCUMENTS REFUSED BY COURT OFFICE

(7) The staff at a court office shall refuse to file any document that is presented for filing after the time set out in these rules, a consent under subrule (6), an order or a statute that applies to the case, unless the court orders otherwise.

RULE 4: REPRESENTATION

REPRESENTATION FOR A PARTY

4. (1) A party may,

(a) appear without a lawyer or other representative;
(b) be represented by a lawyer; or
(c) be represented by a person who is not a lawyer, but only if the court gives permission in advance.

PRIVATE REPRESENTATION OF SPECIAL PARTY

(2) The court may authorize a person to represent a special party if the person is,

(a) appropriate for the task; and
(b) willing to act as representative.

PUBLIC LAW OFFICER TO REPRESENT SPECIAL PARTY

(3) If there is no appropriate person willing to act as a special party's representative, the court may authorize the Children's Lawyer or the Public Guardian and Trustee to act as representative, but only with that official's consent.

SERVICE OF AUTHORIZATION TO REPRESENT

(4) An order under subrule (2) or (3) shall be served immediately, by the person who asked for the order or by any other person named by the court,

(a) on the representative; and
(b) on every party in the case.

REPRESENTATION OF PARTY WHO DIES

(5) If a party dies after the start of a case, the court may make the estate trustee a party instead, on motion without notice.

AUTHORIZING REPRESENTATIVE FOR PARTY WHO DIES

(6) If the party has no estate trustee, the court may authorize an appropriate person to act as representative, with that person's consent, given in advance.

LAWYER FOR CHILD

(7) In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise.

CHILD'S RIGHTS SUBJECT TO STATUTE

(8) Subrule (7) is subject to section 38 (legal representation of child, protection hearing) and subsection 114(6) (legal representation of child, secure treatment hearing) of the Child and Family Services Act.

CHOICE OF LAWYER

(9) A party appearing without a lawyer may choose a lawyer by,

(a) serving on every other party and filing a notice of change in representation (Form 4) containing the lawyer's consent to act; or
(b) having a lawyer come to court on the party's behalf.

CHANGE IN REPRESENTATION

(10) A party represented by a lawyer may, by serving on every other party and filing a notice of change in representation (Form 4),

(a) change lawyers; or
(b) appear without a lawyer.

NOTICE OF CHANGE IN REPRESENTATION

(11) A notice of change in representation shall,

(a) contain the party's address for service, if the party wants to appear without a lawyer; or
(b) show the name and address of the new lawyer, if the party wants to change lawyers.

LAWYER'S REMOVAL FROM THE CASE

(12) A lawyer may make a motion for an order to be removed from the case, with notice to the client and to,

(a) the Children's Lawyer, if the client is a child;
(b) the Public Guardian and Trustee, if the client is or appears to be mentally incapable in respect of an issue in the case.

NOTICE OF MOTION TO REMOVE LAWYER

(13) Notice of a motion to remove a lawyer shall also be served on the other parties to the case, but the evidence in support of the motion shall not be served on them, shall not be put into the continuing record and shall not be kept in the court file after the motion is heard.

AFFIDAVIT IN SUPPORT OF MOTION TO REMOVE LAWYER

(14) The affidavit in support of the motion shall indicate what stage the case is at, the next event in the case and any scheduled dates.

CONTENTS AND SERVICE OF ORDER REMOVING LAWYER

(15) The order removing the lawyer from the case shall,

(a) set out the client's last known address for service; and
(b) be served on all other parties, served on the client by mail, fax or electronic mail at the client's last known address and filed immediately.

RULE 5: WHERE A CASE STARTS AND IS TO BE HEARD

WHERE CASE STARTS

5. (1) Subject to sections 21.8 and 21.11 of the Courts of Justice Act (territorial jurisdiction -- Family Court), a case shall be started,

(a) in the municipality where a party resides;
(b) if the case deals with custody of or access to a child, in the

municipality where the child ordinarily resides, except for cases described in,

(i) section 22 (jurisdiction of an Ontario court) of the Children's Law Reform Act, and
(ii)subsection 48(2) (place for child protection hearing) and subsection 150 (1) (place for adoption proceeding) of the Child and Family Services Act; or

(c) in a municipality chosen by all parties, but only with the court's permission given in advance in that municipality.

STARTING CASE -- DANGER TO CHILD OR PARTY

(2) Subject to sections 21.8 and 21.11 of the Courts of Justice Act, if there is immediate danger that a child may be removed from Ontario or immediate danger to a child's or party's health or safety, a party may start a case in any municipality and a motion may be heard in that municipality, but the case shall be transferred to a municipality referred to in subrule (1) immediately after the motion is heard, unless the court orders otherwise.

CLERK TO REFUSE DOCUMENTS IF CASE IN WRONG PLACE

(3) The clerk shall refuse to accept an application for filing unless,

(a) the case is started in the municipality where a party resides;
(b) the case deals with custody of or access to a child and is started in the municipality where the child ordinarily resides;
(c) the case is started in a municipality chosen by all parties and the order permitting the case to be started there is filed with the application; or
(d) the lawyer or party asking to file the application says in writing that the case is one that is permitted by clause (1)(b) or subrule (2) to be started in that municipality.

PLACE FOR STEPS OTHER THAN ENFORCEMENT

(4) All steps in the case, other than enforcement, shall take place in the municipality where the case is started or transferred.

PLACE FOR ENFORCEMENT -- PAYMENT ORDERS

(5) All steps in enforcement of a payment order, including a motion to suspend a support deduction order, shall take place,

(a) in the municipality where the recipient resides;
(b) if the recipient does not reside in Ontario, in the municipality where

the order is filed with the court for enforcement;

(c) if the person enforcing the order consents, in the municipality where the payor resides; or

(d) in a motion under section 26 (income source dispute) of the Family Responsibility and Support Arrears Enforcement Act, 1996, in the municipality where the income source resides.

PLACE FOR ENFORCEMENT -- OTHER ORDERS

(6) All steps in the enforcement of an order other than a payment order shall take place,

(a) if the order involves custody of or access to a child,

(i) in the municipality where the child ordinarily resides, or
(ii)if the child does not ordinarily reside in Ontario, in the municipality to which the child has the closest connection;

(b) if the order involves property, in the municipality where the person enforcing the order resides or the municipality where the property is located; or

(c) in a municipality chosen by all parties, but only with the court's permission given in advance in that municipality.

ALTERNATIVE PLACE FOR ENFORCEMENT -- ORDER ENFORCED BY CONTEMPT MOTION

(7) An order, other than a payment order, that is being enforced by a contempt motion may also be enforced in the municipality in which the order was made.

TRANSFER TO ANOTHER MUNICIPALITY

(8) If it is substantially more convenient to deal with a case or any step in the case in another municipality, the court may, on motion, order that the case or step be transferred there.

CHANGE OF PLACE FOR CHILD PROTECTION CASE

(9) Notice of a motion under subsection 48(3) of the Child and Family Services Act to transfer a case to a place within the jurisdiction of another children's aid society shall be served on the parties and the other children's aid society, with the evidence in support of the motion.

RULE 6: SERVICE OF DOCUMENTS

METHODS OF SERVICE

6. (1) Service of a document under these rules may be carried out by regular service or by special service in accordance with this rule, unless an Act, rule or order provides otherwise.

REGULAR SERVICE

(2) Regular service of a document on a person is carried out by,

(a) mailing a copy to the person's lawyer or, if none, to the person;
(b) sending a copy by courier to the person's lawyer or, if none, to the person;
(c) depositing a copy at a document exchange to which the person's lawyer belongs;
(d) faxing a copy to the person's lawyer or, if none, to the person; or
(e) carrying out special service.

SPECIAL SERVICE

(3) Special service of a document on a person is carried out by,

(a) leaving a copy,

(i) with the person to be served,
(ii) if the person is or appears to be mentally incapable in respect of an issue in the case, with the person and with the guardian of the person's property or, if none, with the Public Guardian and Trustee,
(iii) if the person is a child, with the child and with the child's lawyer, if any,
(iv) if the person is a corporation, with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be managing the place, or
(v) if the person is a children's aid society, with an officer, director or employee of the society;

(b) leaving a copy with the person's lawyer of record in the case, or with a lawyer who accepts service in writing on a copy of the document;
(c) mailing a copy to the person, together with an acknowledgment of service in the form of a prepaid return postcard (Form 6), all in an envelope that is addressed to the person and has the sender's return address (but service under this clause is not valid unless the return postcard, signed by the person, is filed in the continuing record); or
(d) leaving a copy at the person's place of residence, in an envelope

addressed to the person, with anyone who appears to be an adult person resident at the same address and, on the same day or on the next, mailing another copy to the person at that address.

SPECIAL SERVICE -- DOCUMENTS THAT COULD LEAD TO IMPRISONMENT

(4) Special service of the following documents shall be carried out only by a method set out in subclause (3)(a), unless the court orders otherwise:

1. A notice of contempt motion.
2. A summons to witness.
3. A notice of motion or notice of default hearing in which the person to be served faces a possibility of imprisonment.

REGULAR SERVICE AT ADDRESS ON LATEST DOCUMENT

(5) Regular service may be carried out at the address for service shown on the latest document filed by the person to be served.

NOTICE OF ADDRESS CHANGE

(6) A party whose address for service changes shall immediately serve notice of the change on the other parties and file it.

SERVICE OUTSIDE BUSINESS HOURS

(7) If a document is served by any method after 4 p.m. on a day when court offices are open or at any time on a day when they are not open, service is effective on the next day when they are open.

HOURS OF FAX SERVICE

(8) Service of a document by fax may be carried out only before 4 p.m. on a day when court offices are open, unless the parties consent or the court orders otherwise.

EFFECTIVE DATE, SERVICE BY MAIL

(9) Service of a document by mail is effective on the fifth day after it was mailed.

EFFECTIVE DATE, SERVICE BY COURIER

(10) Service of a document by courier is effective on the day after the courier picks it up.

EFFECTIVE DATE, SERVICE BY DOCUMENT EXCHANGE

(11) Service by deposit at a document exchange is effective only if the copy deposited and an additional copy of the document are date-stamped by the document exchange in the presence of the person depositing the copy, and then service is effective on the day after the date on the stamp.

INFORMATION TO BE INCLUDED WITH DOCUMENT SERVED BY FAX

(12) A document that is served by fax shall show, on its first page,

(a) the sender's name, address, telephone number and fax number;
(b) the name of the person or lawyer to be served;
(c) the date and time of the fax;
(d) the total number of pages faxed; and
(e) the name and telephone number of a person to contact in case of transmission difficulties.

MAXIMUM LENGTH OF DOCUMENT THAT MAY BE FAXED

(13) Service of a document or documents relating to a single step in a case may be carried out by fax only if the total number of pages (including any cover page or back sheet) is not more than 16, unless the parties consent in advance or the court orders otherwise.

DOCUMENTS THAT MAY NOT BE FAXED

(14) A trial record, appeal record, factum or book of authorities may not be served by fax at any time unless the person to be served consents in advance.

SUBSTITUTED SERVICE

(15) The court may, on motion without notice, order that a document be served by substituted service, using a method chosen by the court, if the party making the motion,

(a) provides detailed evidence showing,

(i) what steps have been taken to locate the person to be served, and
(ii)if the person has been located, what steps have been taken to serve the document on that person; and

(b) shows that the method of service could reasonably be expected to bring the document to the person's attention.

SERVICE NOT REQUIRED

(16) The court may, on motion without notice, order that service is not required if,

(a) reasonable efforts to locate the person to be served have not been or would not be successful; and
(b) there is no method of substituted service that could reasonably be expected to bring the document to the person's attention.

SERVICE BY ADVERTISEMENT

(17) If the court orders service by advertisement, Form 6A shall be used.

APPROVING IRREGULAR SERVICE

(18) When a document has been served by a method not allowed by these rules or by an order, the court may make an order approving the service if the document,

(a) came to the attention of the person to be served; or
(b) would have come to the person's attention if the person had not been evading service.

PROOF OF SERVICE

(19) Service of a document may be proved by,

(a) an acceptance or admission of service, written by the person to be served or the person's lawyer;
(b) an affidavit of service (Form 6B);

(c) the return postcard mentioned in clause (3)(c); or
(d) the date stamp on a copy of the document served by deposit at a document exchange.

RULE 7: PARTIES

WHO ARE PARTIES -- CASE

7. (1) A person who makes a claim in a case or against whom a claim is made in a case is a party to the case.

WHO ARE PARTIES -- MOTION

(2) For purposes of a motion only, a person who is affected by a motion is also a party, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

PERSONS WHO MUST BE NAMED AS PARTIES

(3) A person starting a case shall name,

(a) as an applicant, every person who makes a claim;
(b) as a respondent,

(i) every person against whom a claim is made, and
(ii)every other person who should be a party to enable the court to decide all the issues in the case.

PARTIES IN CASES INVOLVING CHILDREN

(4) In any of the following cases, every parent or other person who has care and control of the child involved, except a foster parent under the Child and Family Services Act, shall be named as a party, unless the court orders otherwise:

1. A case about custody of or access to a child.
2. A child protection case.
3. A secure treatment case (Part VI of the Child and Family Services Act).

PARTY ADDED BY COURT ORDER

(5) The court may order that any person who should be a party shall be added as a party, and may give directions for service on that person.

PERMANENT CASE NAME AND COURT FILE NUMBER

(6) The court file number given to a case and the description of the parties as applicants and respondents in the case shall remain the same on a motion to change an order, a status review application, an enforcement or an appeal, no matter who starts it, with the following exceptions:

1. In an enforcement of a payment order, the parties may be described instead as payors, recipients and garnishees.
2. In an appeal, the parties shall also be described as appellants and respondents.
3. When a case is transferred to another municipality, it may be given a new court file number.

RULE 8: STARTING A CASE

FILING AN APPLICATION

8. (1) To start a case, a person shall file an application (Form 8, 8A, 8B, 8C or 8D) and, if required, a summary of court cases (Form 8E).

CHANGE TO ORDER OR AGREEMENT -- BY MOTION

(2) A party who wants to ask the court to change an order or agreement shall do so only by a motion under rule 15 (except in a status review application under the Child and Family Services Act, to which that rule does not apply).

CLAIMS IN APPLICATION

(3) An application may contain,

(a) a claim against more than one person; and
(b) more than one claim against the same person.

COURT DATE SET WHEN APPLICATION FILED

(4) When an application is filed, the clerk shall,

(a) set a court date, except as provided by subrule 39(7) (case management, standard track); and
(b) seal the application with the court seal.

SERVICE OF APPLICATION

(5) The application shall be served immediately on every other party, and special service shall be used unless the party is listed in subrule (6).

SERVICE ON OFFICIALS, AGENCIES, ETC.

(6) The application may be served by regular service,

(a) on a foster parent, at the foster parent's residence;
(b) on a representative of a band or native community, by serving the chief or other person who appears to be in charge of its management;
(c) on any of the following persons, at their place of business:

1. A Director appointed under section 5 of the Child and Family Services Act.
2. A local director appointed under section 16 of the Child and Family Services Act.
3. An administrator in charge of a secure treatment program under Part VI of the Child and Family Services Act.
4. A Children's Aid Society.
5. The Minister of Community and Social Services.
6. An agency referred to in subsection 33(3) of the Family Law Act or subsection 20.1(1) of the Divorce Act (Canada).
7. The Director of the Family Responsibility Office.
8. The Children's Lawyer.
9. The Public Guardian and Trustee.

10. The Registrar General.

SERVING PROTECTION APPLICATION ON CHILD

(7) In a child protection case in which the child is entitled to notice, the application shall be served on the child by special service.

SERVING SECURE TREATMENT APPLICATION ON CHILD

(8) An application for secure treatment (Part VI of the Child and Family Services Act) shall be served on the child by special service.

SERVING APPLICATION ON CHILD'S LAWYER

(9) If an order has been made for legal representation of a child under section 38 or subsection 114(6) of the Child and Family Services Act or under subrule 4(7), the applicant, or another party directed by the court, shall serve all documents in the continuing record and any status review application on the child's lawyer by regular service.

SERVING PROTECTION APPLICATION BEFORE START OF CASE

(10) If a child is brought to a place of safety (section 40, 42 or 43 of the Child and Family Services Act) or a homemaker remains or is placed on premises (subsection 78(2) of that Act), an application may be served without being sealed by the clerk, if it is filed on or before the court date.

APPLICATION NOT SERVED ON OR BEFORE COURT DATE

(11) If an application is not served on a respondent on or before the court date, at the applicants request the clerk shall set a new court date for that respondent and the applicant shall make the necessary change to the application and serve it immediately on that respondent.

RULE 9: CONTINUING RECORD

HOW CONTINUING RECORD CREATED

9. (1) A person starting a case shall,

(a) prepare the continuing record of the case, to be the court's permanent record of the case;
(b) serve it on all other parties; and
(c) before filing it, add to it the affidavits of service or other documents proving service of the continuing record under clause (b).

DUTY TO KEEP UP CONTINUING RECORD

(2) Once the continuing record has been filed, the parties, under the clerk's supervision, are responsible for adding to it all documents that are filed in the case.

FORM AND COVER

(3) The continuing record shall have a red front cover and be in a form that allows documents to be added to it as this rule requires.

THREE-HOLE FORMAT

(4) All documents in the continuing record shall be punched in standard three-hole format.

CONTENTS

(5) The following requirements apply to the contents of the continuing record:

1. First, there shall be a section labelled "Contents", containing a cumulative table of contents which shall be updated every time a document is filed. The cumulative table of contents shall list every document filed, indicating the tab or page number of the record where the document is found, the kind of document, which party filed it, the date of the document and the date it was filed. For an affidavit or transcript of evidence, the name of the person who gave the affidavit or the evidence shall also be shown.
2. After the first section, there shall be a section labelled "Endorsements" containing 10 blank pages (or more if necessary), on which the judge dealing with any step in the case shall note the disposition of that step and the date. The court's file copy of each order made in the case shall be put into the endorsement section after the endorsement pages. If the continuing record has more than one volume, the endorsement section shall be only in the first one.
3. Next there shall be a section labelled "Documents", containing every document filed in the case arranged in order, with the most recent one at the back. The documents shall be numbered consecutively.
4. If 100 or more pages have been put into the documents section of a volume of the continuing record, the person filing the next document shall create a new volume. The volume shall be numbered on its front cover and shall contain separate contents and documents sections as provided in paragraphs 1 and 3.

WRITTEN REASONS FOR ORDER

(6) If the court gives written reasons for making an order,

(a) they may be endorsed on the continuing record by hand, or the endorsement may be a short note saying that written reasons are being given separately;
(b) the clerk shall add a copy of the reasons to the endorsements section of the continuing record; and
(c) the clerk shall send the reasons to the parties by mail, fax or electronic mail, together with an updated cumulative table of contents that records the reasons and the date when they were given.

PARTY'S DUTY TO KEEP UP CONTINUING RECORD

(7) A party serving documents shall,

(a) serve and file any documents that are not already in the continuing record; and
(b) serve with the documents an updated cumulative table of contents that lists the documents being filed.

NO SERVICE OR FILING OF DOCUMENTS ALREADY IN CONTINUING RECORD

(8) A party shall not serve or file any document that is already in the continuing record, despite any requirement in these rules that the document be served and filed.

DOCUMENTS REFERRED TO BY NUMBER IN CONTINUING RECORD

(9) A party who is relying on a document in the continuing record shall refer to it by its tab or page number in the continuing record.

DOCUMENTS NOT TO BE REMOVED FROM CONTINUING RECORD

(10) No document shall be removed from the continuing record, except by order.

USE OF CONTINUING RECORD FOR MATTERS AFTER THE CASE ENDS

(11) If the court has made a final order, any existing continuing record for the case shall continue to be used,

(a) for an enforcement of the order, if the enforcement is started at the court office where the continuing record is kept;
(b) for a motion to change the order, if the motion is started at the court office where the continuing record is kept;
(c) for a status review of a child protection order, if the status review application is started at the court office where the continuing record is kept.

APPEAL

(12) If a final order is appealed, only the notice of appeal and the order of the appeal court (and no other appeal document) shall be added to the continuing record.

TRANSFER OF CONTINUING RECORD IF CASE TRANSFERRED

(13) If the court transfers a case to another municipality the clerk shall, on request, transfer the continuing record to the clerk at the court office in the other municipality, and the continuing record shall be used there as if the case had started in the other municipality.

TRANSFER OF CONTINUING RECORD ON REQUEST

(14) If a person takes a step referred to in subrule (11) in another municipality, the clerk shall, on request, transfer the continuing record to the other municipality and then,

(a) the continuing record may be used as if the case had started in the other municipality; or
(b) a new continuing record may be started there.

CONTINUING RECORD FOR CONFIRMATION OF SUPPORT ORDER

(15) When a provisional support order or a provisional change to a support order is sent to a court in Ontario for confirmation,

(a) if the provisional order or change was made in Ontario, the clerk shall send the continuing record to the court office where the confirmation is to take place and the respondent shall update it as this rule requires; and
(b) if the provisional order or change was not made in Ontario, the clerk shall prepare the continuing record and the respondent shall update it as this rule requires.

TRANSITIONAL PROVISION

(16) This rule applies to cases started before these rules come into effect, in the following manner:

1. Any party may at any time prepare, serve and file the continuing record as described in subrule (1). This rule then applies to all documents filed afterward.
2. If neither party has filed the continuing record in accordance with paragraph 1, the first party who files a document after these rules come into effect shall start the continuing record as described in subrule (1). This rule then applies to all documents filed afterward.

3. Despite paragraph 2, the court may free a party from the obligation to start the continuing record, and give other directions about the form and contents of the record for the case.

RULE 10: ANSWERING A CASE

SERVING AND FILING ANSWER

10. (1) A person against whom an application is made shall serve an answer (Form 10) on every other party and file it within 30 days after being served with the application.

TIME FOR ANSWER -- APPLICATION SERVED OUTSIDE CANADA OR U.S.A.

(2) If an application is served outside Canada or the United States of America, the time for serving and filing an answer is 60 days.

ANSWER MAY INCLUDE CLAIM

(3) A respondent may include in the answer,

(a) a claim against the applicant;
(b) a claim against any other person, who then also becomes a respondent in the case.

ANSWER BY ADDED RESPONDENT

(4) Subrules (1) to (3) apply to a respondent added under subrule (3), except that the time for serving and filing an answer is 14 days after service on the added respondent, or 30 days if the added respondent is served outside Canada or the United States of America.

NO ANSWER OR ANSWER STRUCK OUT

(5) If a respondent does not serve and file an answer as this rule requires, or if the answer is struck out by an order,

(a) the respondent is not entitled to any further notice of steps in the case (except as subrule 25(13) (service of order) provides);
(b) the respondent is not entitled to participate in the case in any way;
(c) the court may deal with the case in the respondent's absence; and
(d) the clerk may set a date for an uncontested trial.

REPLY

(6) A party may, within 10 days after being served with an answer, serve and file a reply (Form 10A) in response to a claim made in the answer.

RULE 11: AMENDING AN APPLICATION, ANSWER OR REPLY

AMENDING APPLICATION WITHOUT COURT'S PERMISSION

11. (1) An applicant may amend the application without the court's permission as follows:

1. If no answer has been filed, by serving and filing an amended application in the manner set out in rule 8 (starting a case).
2. If an answer has been filed, by serving and filing an amended application in the manner set out in rule 8 and also filing the consent of all parties to the amendment.

AMENDING ANSWER WITHOUT COURT'S PERMISSION

(2) A respondent may amend the answer without the court's permission as follows:

1. If the application has been amended, by serving and filing an amended answer within 14 days after being served with the amended application.
2. If the application has not been amended, by serving and filing an amended answer and also filing the consent of all parties to the amendment.

AMENDING APPLICATION OR ANSWER WITH COURT'S PERMISSION

(3) On motion, the court shall give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate.

HOW AMENDMENT IS SHOWN

(4) An amendment shall be clearly shown by underlining all changes, and the rule or order permitting the amendment and the date of the amendment shall be noted in the margin of each amended page.

RULE 12: WITHDRAWING, COMBINING OR SPLITTING CASES

WITHDRAWING APPLICATION, ANSWER OR REPLY

12. (1) A party who does not want to continue with all or part of a case may withdraw all or part of the application, answer or reply by serving a notice of withdrawal (Form 12) on every other party and filing it.

WITHDRAWAL -- SPECIAL PARTY'S APPLICATION, ANSWER OR REPLY

(2) A special party's application, answer or reply may be withdrawn (whether in whole or in part) only with the court's permission, and the notice of motion for permission shall be served on every other party and on,

(a) the Children's Lawyer, if the special party is a child;
(b) the Public Guardian and Trustee, if the special party is not a child.

COSTS PAYABLE ON WITHDRAWAL

(3) A party who withdraws all or part of an application, answer or reply shall pay the costs of every other party in relation to the withdrawn application, answer, reply or part, up to the date of the withdrawal, unless the court orders or the parties agree otherwise.

COSTS ON WITHDRAWAL BY GOVERNMENT AGENCY

(4) Despite subrule (3), if the party is a government agency, costs are in the court's discretion.

COMBINING AND SPLITTING CASES

(5) If it would be more convenient to hear two or more cases, claims or issues together or to split a case into two or more separate cases, claims or issues, the court may, on motion, order accordingly.

SPLITTING DIVORCE FROM OTHER ISSUES

(6) The court may, on motion, make an order splitting a divorce from the other issues in a case if,

(a) neither spouse will be disadvantaged by the order; and
(b) reasonable arrangements have been made for the support of any children of the marriage.

RULE 13: FINANCIAL STATEMENTS

FINANCIAL STATEMENT WITH APPLICATION, ANSWER, REPLY OR MOTION

13. (1) If an application, answer, reply or notice of motion contains a claim for support or a property claim,

(a) the party making the claim shall serve and file a financial statement (Form 13) with the document that contains the claim; and
(b) the party against whom the claim is made shall serve and file a financial statement within the time for serving and filing an answer, reply or affidavit in response to the motion, whether the party is serving an answer, reply or affidavit in response to the motion or not.

CLAIM FOR PAYMENT ORDER UNDER CFSA

(2) If an application, answer, reply or notice of motion contains a claim for a payment order under section 60 of the Child and Family Services Act, clause (1)(a) does not apply to the children's aid society but clause (1)(b) applies to the party against whom the claim is made.

FINANCIAL STATEMENTS IN CUSTODY CASES

(3) If an application, answer or notice of motion contains a claim for custody of or access to a child, the court may order each party to serve and file a financial statement within the time decided by the court.

FINANCIAL STATEMENT WITH MOTION TO CHANGE SUPPORT

(4) The following requirements apply if a motion contains a claim for a change in a support order or agreement:

1. The party making the motion shall serve and file a financial statement with the notice of motion.
2. The party against whom the claim is made shall serve and file a financial statement as soon as possible after being served with the notice of motion, but in any event no later than two days before the motion date. Any affidavit in response to the motion shall be served and filed at the same time as the financial statement.

NO FINANCIAL STATEMENT FROM ASSIGNEE

(5) The assignee of a support order is not required to serve and file a financial statement under subrule (4).

FULL DISCLOSURE IN FINANCIAL STATEMENT

(6) A party who serves and files a financial statement shall,

(a) make full and frank disclosure of the party's financial situation;
(b) attach any documents to prove the party's income that the financial statement requires;
(c) follow the instructions set out in the form; and
(d) fully complete all portions of the statement.

INCOME TAX DOCUMENTS REQUIRED

(7) The clerk shall not accept a party's financial statement for filing unless,

(a) copies of the party's income tax returns and notices of assessment are

attached as the form requires;

(b) the financial statement contains the party's signed direction to the Department of National Revenue, Taxation (Form 13A) for disclosure of those documents; or

(c) the financial statement contains a declaration that the party is not required to file an income tax return because of the Indian Act (Canada).

NO FINANCIAL STATEMENT BY CONSENT -- SPOUSAL SUPPORT IN DIVORCE

(8) Parties to a claim for spousal support under the Divorce Act (Canada) do not need to serve and file financial statements if they file a consent,

(a) agreeing not to serve and file financial statements; or

(b) agreeing to a specified amount of support, or to no support.

NO FINANCIAL STATEMENT BY CONSENT -- CHANGE IN SUPPORT

(9) Parties to a consent motion for a change in support do not need to serve and file financial statements if they file a consent agreeing not to serve and file them.

DOCUMENTS NOT TO BE FILED WITHOUT FINANCIAL STATEMENT

(10) The clerk shall not accept an application, answer, reply, notice of motion or affidavit in response for filing without a financial statement if these rules require the document to be filed with a financial statement.

ADDITIONAL FINANCIAL INFORMATION

(11) If a party believes that another party's financial statement does not contain enough information for a full understanding of the other party's financial circumstances,

(a) the party shall ask the other party to give the necessary additional information; and

(b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement.

UPDATING FINANCIAL STATEMENT

(12) At least seven days before any case conference, motion for a temporary order, settlement conference or trial, each party shall update the information in any financial statement that is more than 30 days old by serving and filing,

(a) a new financial statement; or

(b) an affidavit saying that the information in the last statement has not changed and is still true.

QUESTIONING ON FINANCIAL STATEMENT

(13) A party may be questioned under rule 20 on a financial statement provided under this rule, but only after a request for information has been made under clause (11)(a).

NET FAMILY PROPERTY STATEMENT

(14) Each party to a property claim under Part I of the Family Law Act shall serve and file a net family property statement (Form 13B) or, if the party has already served a net family property statement, an affidavit saying that the information in that statement has not changed and is still true,

(a) not less than seven days before a settlement conference; and
(b) not more than 30 days and not less than seven days before a trial.

CORRECTING AND UPDATING STATEMENT OR ANSWER

(15) As soon as a party discovers that information in the party's financial statement or net family property statement or in a response the party gave under this rule is incorrect or incomplete, or that there has been a material change in the information provided, the party shall immediately serve on every other party to the claim and file the correct information or a new statement containing the correct information, together with any documents substantiating it.

ORDER TO FILE STATEMENT

(16) If a party has not served and filed a financial statement or net family property statement or information as required by this rule or an Act, the court may, on motion without notice, order the party to serve and file the document or information and, if it makes that order, shall also order the party to pay costs.

FAILURE TO OBEY ORDER TO FILE STATEMENT OR GIVE INFORMATION

(17) If a party does not obey an order to serve and file a financial statement or net family property statement or to give information as this rule requires, the court may,

(a) dismiss the party's case;
(b) strike out any document filed by the party;
(c) make a contempt order against the party;
(d) order that any information that should have appeared on the statement may not be used by the party at the motion or trial;
(e) make any other appropriate order.

RULE 14: MOTIONS

WHEN TO MAKE MOTION

14. (1) A person who wants any of the following may make a motion:

1. A temporary order for a claim made in an application.
2. Directions on how to carry on the case.
3. A change in an order or agreement.

WHO MAY MAKE MOTION

(2) A motion may be made by a party to the case or by a person with an interest in the case.

PARTIES TO MOTION

(3) A person who is affected by a motion is also a party, for purposes of the motion only, but this does not apply to a child affected by a motion relating to custody, access, child protection, adoption or child support.

NO MOTION BEFORE CASE CONFERENCE

(4) Before a case conference has been held, no notice of motion or supporting evidence may be served and no motion may be heard, except in a situation of urgency or hardship or for some other reason in the interest of justice.

MOTION TO CHANGE FINAL ORDER

(5) Despite subrule (4), a party may serve a notice of motion and supporting evidence for an order to change a final order or agreement under rule 15 before a case conference has been held, but the motion may not be heard before a case conference has been held.

OTHER MOTIONS

(6) Subrule (4) does not apply to a motion,

(a) to change a temporary order under subrule 15(14) (fraud, mistake, lack of notice);
(b) for a contempt order under rule 31 or an order striking out a document under subrule (22);
(c) for summary judgment under rule 16;
(d) to require the Director of the Family Responsibility Office to refrain from suspending a licence; or
(e) to limit or suspend a support deduction order.

MOTION INVOLVING COMPLICATED MATTERS

(7) The judge who hears a motion involving complicated matters may,

(a) order that the motion or any part of it be heard as a trial; and
(b) give any directions that are necessary.

MOTION BY TELEPHONE OR VIDEO CONFERENCE

(8) A party who wants a motion to be heard by telephone or video conference shall,

(a) obtain an appointment from the clerk for the hearing of the motion;
(b) make the necessary arrangements;
(c) serve a notice of the appointment and arrangements on all other parties, and file it; and
(d) participate in the motion as the notice specifies.

DOCUMENTS FOR A MOTION

(9) A motion, whether made with or without notice,

(a) requires a notice of motion (Form 14) and an affidavit (Form 14A); and
(b) may be supported by additional evidence.

PROCEDURAL, UNCOMPLICATED OR UNOPPOSED MATTERS -- MOTION FORM

(10) If a motion is limited to procedural, uncomplicated or unopposed matters, the party making the motion may use a motion form (Form 14B) instead of a notice of motion and affidavit.

MOTION WITH NOTICE

(11) A party making a motion with notice shall,

(a) serve the documents mentioned in subrule (9) or (10) on all other parties, not later than four days before the motion date;
(b) file the documents as soon as possible after service, but not later than two days before the motion date; and
(c) file a confirmation (Form 14C) not later than 2 p.m. on the day before the motion date.

MOTION WITHOUT NOTICE

(12) A motion may be made without notice if,

(a) the nature or circumstances of the motion make notice unnecessary or not reasonably possible;
(b) there is an immediate danger of a child's removal from Ontario, and the delay involved in serving a notice of motion would probably have serious consequences;
(c) there is an immediate danger to the health or safety of a child or of the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences; or
(d) service of a notice of motion would probably have serious consequences.

FILING FOR MOTION WITHOUT NOTICE

(13) The documents for use on a motion without notice shall be filed on or before the motion date, unless the court orders otherwise.

ORDER MADE ON MOTION WITHOUT NOTICE

(14) An order made on motion without notice (Form 14D) shall require the matter to come back to the court and, if possible, to the same judge, within 14 days or on a date chosen by the court.

SERVICE OF ORDER MADE WITHOUT NOTICE

(15) An order made on motion without notice shall be served immediately on all parties affected, together with all documents used on the motion, unless the court orders otherwise.

WITHDRAWING A MOTION

(16) A party making a motion may withdraw it in the same way as an application or answer is withdrawn under rule 12.

EVIDENCE ON A MOTION

(17) Evidence on a motion may be given by any one or more of the following methods:

1. An affidavit or other admissible evidence in writing.
2. A transcript of the questions and answers on a questioning under rule 20.
3. With the court's permission, oral evidence.

AFFIDAVIT BASED ON PERSONAL KNOWLEDGE

(18) An affidavit for use on a motion shall, as much as possible, contain only information within the personal knowledge of the person signing the affidavit.

AFFIDAVIT BASED ON OTHER INFORMATION

(19) The affidavit may also contain information that the person learned from someone else, but only if,

(a) the source of the information is identified by name and the affidavit states that the person signing it believes the information is true; and
(b) in addition, if the motion is a contempt motion under rule 31, the information is not likely to be disputed.

RESTRICTIONS ON EVIDENCE

(20) The following restrictions apply to evidence for use on a motion, unless the court orders otherwise:

1. The party making the motion shall serve all the evidence in support of the motion with the notice of motion.
2. The party responding to the motion shall then serve all the evidence in response.
3. The party making the motion may then serve evidence replying to any new matters raised by the evidence served by the party responding to the motion.
4. No other evidence may be used.

NO MOTIONS WITHOUT COURT'S PERMISSION

(21) If a party tries to delay the case or add to its costs or in any other way to abuse the court's process by making numerous motions without merit, the court may order the party not to make any other motions in the case without the court's permission.

MOTION TO STRIKE OUT DOCUMENT

(22) The court may, on motion, strike out all or part of any document that may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process.

FAILURE TO OBEY ORDER MADE ON MOTION

(23) A party who does not obey an order that was made on motion is not entitled to any further order from the court unless the court orders that this subrule does not apply, and the court may on motion, in addition to any other remedy allowed under these rules,

(a) dismiss the party's case or strike out the party's answer or any other

document filed by the party;

(b) postpone the trial;

(c) make any other order that is appropriate, including an order for costs.

RULE 15: MOTIONS TO CHANGE AN ORDER OR AGREEMENT

SPECIAL SERVICE, MINIMUM NOTICE PERIOD -- MOTION TO CHANGE FINAL ORDER OR AGREEMENT

15. (1) Notice of a motion to change a final order or agreement and the supporting evidence shall be served by special service (subrule 6(3)), and not by regular service,

(a) not later than 30 days before the motion is to be heard, if the party to be served resides in Canada or the United States of America;

(b) not later than 60 days before the motion is to be heard, if the party to be served resides elsewhere.

REGULAR SERVICE ON OFFICIALS, AGENCIES, ETC.

(2) Despite subrule (1), the notice of motion and evidence may be served on the persons mentioned in subrule 8(6) (officials, agencies, etc.) by regular service.

PLACE FOR MOTION TO CHANGE ORDER OR AGREEMENT

(3) Rule 5 (where a case starts) applies to a motion to change an order or agreement as if the motion were a new case.

CHANGE OF SUPPORT -- SERVICE ON ASSIGNEE OF SUPPORT

(4) In a motion to change a support order or agreement that has been assigned to a person or agency, as the Divorce Act (Canada) and the Family Law Act permit, the parties shall serve their documents on the assignee as if the assignee were also a party.

ASSIGNEE MAY BECOME PARTY

(5) On serving and filing a notice claiming a financial interest in the motion, the assignee becomes a respondent to the extent of the financial interest.

SANCTIONS IF ASSIGNEE NOT SERVED

(6) If the assignee is not served as subrule (4) requires,

(a) the court may at any time, on motion by the assignee with notice to the other parties, set aside the changed order to the extent that it affects the assignee's financial interest;

(b) the party who asked for the change has the burden of proving that the changed order should not be set aside; and
(c) if the changed order is set aside, the assignee is entitled to full recovery of its costs of the motion to set aside, unless the court orders otherwise.

CONTENTS OF AFFIDAVIT

(7) An affidavit for use on a motion to change an order or agreement shall set out,

(a) the place where the parties and the children ordinarily reside;
(b) the name and birth date of each child to whom a proposed change relates;
(c) whether a party has married or begun living with another person;
(d) details of current custody and access arrangements;
(e) details of current support arrangements, including details of any unpaid support;
(f) details of the change asked for and of the changed circumstances that are grounds for a change in the order or agreement;
(g) details of any efforts made to mediate or settle the issues and of any assessment report on custody or access;
(h) in a motion to change a support order or agreement, whether the support was assigned and any details of the assignment known to the party asking for the change;
(i) in a motion to change a child support order or agreement, income and financial information required by section 21 of the applicable child support guidelines; and
(j) in a motion to change a child support order or agreement to an amount different from the amount in the table of the applicable child support guidelines, evidence to satisfy the court that it should make the order asked for.

EXHIBIT TO AFFIDAVIT

(8) In addition, a copy of any existing order or agreement that deals with custody, access or support shall be attached as an exhibit to the affidavit, unless a copy is already in the continuing record, and then the affidavit shall indicate its location in the record.

CHILD SUPPORT CHANGE ON CONSENT

(9) Subrule (10) applies instead of subrule (7) if the parties have agreed to an order,

(a) that changes only a child support order or agreement; and
(b) the only terms of which are one or more of the following:

1. Payment of child support, whether in accordance with the

applicable child support guidelines or not, or ending child support.
2. Suspension, reduction or cancellation of unpaid child support.
3. Payment of unpaid child support in accordance with a payment schedule.
4. Payment of costs.

CHILD SUPPORT CHANGE ON CONSENT -- MATERIAL TO BE FILED

(10) In a case described in subrule (9), instead of serving and filing a notice of motion and the affidavit described in subrule (7), the parties shall file,

(a) a change information form (Form 15) with all required attachments;
(b) a consent (Form 15A);
(c) five copies of a draft order;
(d) a stamped envelope addressed to each party;
(e) a support deduction order information form prescribed under the Family Responsibility and Support Arrears Enforcement Act, 1996; and
(f) a draft support deduction order.

CONSENT MOTION -- PARTIES NOT TO COME TO COURT

(11) If the parties have filed the material described in subrule (10),

(a) they shall not come to court, but the clerk shall present the material to a judge; and
(b) the judge may make the order asked for, or require one or both parties to file further material or come to court.

CONTESTED CHILD SUPPORT CHANGE -- MATERIAL TO BE SERVED

(12) If a motion to change a child support order or agreement is not proceeding with the other party's consent,

(a) the party asking for the change may serve and file a change information form (Form 15) with all required attachments, instead of an affidavit;
(b) the party responding to the motion shall serve and file an affidavit that sets out any disagreement with the evidence of the party asking for the change; and
(c) if a party claims that an order should not be made in accordance with the tables in the applicable child support guidelines, the support recipient and the support payor shall each serve and file an affidavit containing the evidence required by the following sections of the applicable child support guidelines, or the evidence that is otherwise

necessary to satisfy the court that it should make the order asked for:

Section 4 (income over $150,000) Section 5 (step-parent) Section 7 (special expenses) Section 8 (split custody) Section 9 (shared custody) Section 10 (undue hardship) Section 21 (income and financial information)

POWERS OF COURT

(13) If the court is of the opinion that a motion, whether made on consent or not, can not be properly dealt with because of the material filed, because of the matters in dispute or for any other reason, the court may give directions, including directions for a trial.

CHANGING ORDER -- FRAUD, MISTAKE, LACK OF NOTICE

(14) The court may, on motion, change an order that,

(a) was obtained by fraud;
(b) contains a mistake;
(c) needs to be changed to deal with a matter that was before the court but that it did not decide;
(d) was made on a motion without notice; or
(e) was made on a motion with notice, if through accident or inadequate notice an affected party did not appear on the motion.

STATUS REVIEW APPLICATIONS

(15) This rule does not apply to status review applications.

RULE 16: SUMMARY JUDGMENT

WHEN AVAILABLE

16. (1) After the respondent has served an answer or after the time for serving an answer has expired, a party may make a motion for summary judgment for a final order without a trial on all or part of any claim made or any defence presented in the case.

AVAILABLE IN ANY CASE EXCEPT DIVORCE

(2) A motion for summary judgment under subrule (1) may be made in any case (including a child protection case) that does not include a divorce claim.

DIVORCE CLAIM

(3) In a case that includes a divorce claim, the procedure provided in rule 36 (divorce) for an uncontested divorce may be used, or the divorce claim may be split from the rest of the case under subrule 12(6).

EVIDENCE REQUIRED

(4) The party making the motion shall serve an affidavit or other evidence that sets out specific facts showing that there is no genuine issue requiring a trial.

EVIDENCE NOT FROM PERSONAL KNOWLEDGE

(5) If a party's evidence is not from a person who has personal knowledge of the facts in dispute, the court may draw conclusions unfavourable to the party.

NO ISSUE FOR TRIAL

(6) If there is no genuine issue requiring a trial of a claim or defence, the court shall make a final order accordingly.

ONLY ISSUE AMOUNT OF ENTITLEMENT

(7) If the only genuine issue is the amount to which a party is entitled, the court shall order a trial to decide the amount.

ONLY ISSUE QUESTION OF LAW

(8) If the only genuine issue is a question of law, the court shall decide the issue and make a final order accordingly.

ORDER GIVING DIRECTIONS

(9) If the court does not make a final order, or makes an order for a trial of an issue, the court may also,

(a) specify what facts are not in dispute, state the issues and give directions about how and when the case will go to trial (in which case the order governs how the trial proceeds, unless the trial judge orders otherwise to prevent injustice);
(b) give directions; and
(c) impose conditions (for example, require a party to pay money into court as security, or limit a party's pretrial disclosure).

COSTS OF UNSUCCESSFUL MOTION

(10) If the party who made the motion has no success on the motion, the court shall decide the amount of the other party's costs of the motion on a full recovery basis and

order the party who made the motion to pay them immediately, unless the motion was justified, although unsuccessful.

COSTS -- BAD FAITH

(11) If a party has acted in bad faith, the court shall decide the costs of the motion on a full recovery basis and shall order the party to pay them immediately.

MOTION FOR SUMMARY DECISION ON LEGAL ISSUE

(12) The court may, on motion,

(a) decide a question of law before trial, if the decision may dispose of all or part of the case, substantially shorten the trial or save substantial costs;
(b) strike out an application, answer or reply because it sets out no reasonable claim or defence in law; or
(c) dismiss or suspend a case because,

(i) the court has no jurisdiction over it,
(ii) a party has no legal capacity to carry on the case,
(iii) there is another case going on between the same parties about the same matter, or
(iv) the case is a waste of time, a nuisance or an abuse of the court process.

EVIDENCE ON MOTION FOR SUMMARY DECISION OF LEGAL ISSUE

(13) On a motion under subrule (12), evidence is admissible only if the parties consent or the court gives permission.

RULE 17: CONFERENCES

CONFERENCES IN DEFENDED CASES

17. (1) In each case in which an answer is filed,

(a) a judge shall conduct at least one case conference; and
(b) a judge may conduct a settlement conference, a trial management conference or both.

UNDEFENDED CASES

(2) If no answer is filed,

(a) the clerk shall, on request, set a date for an uncontested trial or, in an

uncontested divorce case, prepare the documents for a judge; and

(b) a case conference, settlement conference or trial management conference shall be conducted only if the court orders it.

MOTIONS TO CHANGE ORDER OR AGREEMENT

(3) Subrule (1) applies, with necessary changes, to a motion to change a final order or agreement under rule 15 in which an affidavit is served in response to the motion.

PURPOSES OF CASE CONFERENCE

(4) The purposes of a case conference include,

(a) exploring the chances of settling the case;
(b) identifying the issues that are in dispute and those that are not in dispute;
(c) exploring ways to resolve the issues that are in dispute;
(d) ensuring disclosure of the relevant evidence;
(e) noting admissions that may simplify the case;
(f) setting the date for the next step in the case;
(g) if possible, having the parties agree to a specific timetable for the steps to be taken in the case before it comes to trial; and
(h) organizing a settlement conference, or holding one if appropriate.

PURPOSES OF SETTLEMENT CONFERENCE

(5) The purposes of a settlement conference include,

(a) exploring the chances of settling the case;
(b) settling or narrowing the issues in dispute;
(c) ensuring disclosure of the relevant evidence;
(d) noting admissions that may simplify the case;
(e) if possible, obtaining a view of how the court might decide the case;
(f) considering any other matter that may help in a quick and just conclusion of the case;
(g) if the case is not settled, identifying the witnesses and other evidence to be presented at trial, estimating the time needed for trial and scheduling the case for trial; and
(h) organizing a trial management conference, or holding one if appropriate.

PURPOSES OF TRIAL MANAGEMENT CONFERENCE

(6) The purposes of a trial management conference include,

(a) exploring the chances of settling the case;

(b) arranging to receive evidence by a written report, an agreed statement of facts, an affidavit or another method, if appropriate;
(c) deciding how the trial will proceed;
(d) ensuring that the parties know what witnesses will testify and what other evidence will be presented at trial;
(e) estimating the time needed for trial; and
(f) setting the trial date, if this has not already been done.

COMBINED CONFERENCE

(7) On the consent of the judge and the parties, part or all of a case conference, settlement conference and trial management conference may be combined.

ORDERS AT CONFERENCE

(8) At a case conference, settlement conference or trial management conference the judge may, if it is appropriate to do so,

(a) make an order for document disclosure (rule 19) or questioning (rule 20), set the times for events in the case or give directions for the trial;
(b) if notice has been served, make a temporary or final order;
(c) make an unopposed order or an order on consent; and
(d) on consent, refer any issue for alternative dispute resolution.

CONFERENCES WITH A NON-JUDGE

(9) A case conference or settlement conference may be conducted by a person who has been named by the appropriate senior judge, unless a party requests a conference with a judge.

SETTLEMENT CONFERENCE WITH JUDGE BEFORE CASE SET FOR TRIAL

(10) A case shall not be scheduled for trial unless,

(a) a judge has conducted a settlement conference; or
(b) a judge has ordered that the case be scheduled for trial.

CASE CONFERENCE -- MOTION TO CHANGE FINAL ORDER OR AGREEMENT

(11) A motion for an order to change a final order or agreement under rule 15 shall not be heard before a case conference has been held.

ENFORCEMENT -- CONFERENCES OPTIONAL

(12) In an enforcement, a case conference, settlement conference or trial management conference may be held at a party's request or on a judge's direction.

PARTIES TO SERVE BRIEFS

(13) Not later than seven days before the date scheduled for the conference, each party shall serve and file a case conference brief (Form 17), settlement conference brief (Form 17A) or trial management conference brief (Form 17B), as appropriate.

PARTIES TO CONFIRM ATTENDANCE

(14) Not later than 2 p.m. on the day before the date scheduled for the conference, each party shall file a confirmation (Form 14C).

PARTIES AND LAWYERS TO COME TO CONFERENCE

(15) The following shall come to each conference:

1. The parties, unless the court orders otherwise.
2. For each represented party, the lawyer with full knowledge of and authority in the case.

PARTICIPATION BY TELEPHONE OR VIDEO CONFERENCE

(16) With permission obtained in advance from the judge who is to conduct a conference, a party or lawyer may participate in the conference by telephone or video conference.

SETTING UP TELEPHONE OR VIDEO CONFERENCE

(17) A party or lawyer who has permission to participate by telephone or video conference shall,

(a) make the necessary arrangements;
(b) serve a notice of the arrangements on all other parties and file it; and
(c) participate in the conference as the notice specifies.

COSTS OF ADJOURNED CONFERENCE

(18) If a conference is adjourned because a party is not prepared, has not served the required brief, has not made the required disclosure or has otherwise not followed these rules, the judge shall,

(a) order the party to pay the costs of the conference immediately;
(b) decide the amount of the costs; and
(c) give any directions that are needed.

CONFERENCE AGREEMENT

(19) No agreement reached at a conference is effective until it is signed by the parties, witnessed and, in a case involving a special party, approved by the court.

AGREEMENT FILED IN CONTINUING RECORD

(20) The agreement shall be filed as part of the continuing record, unless the court orders otherwise.

CONFERENCE BRIEF TO BE RETURNED

(21) A conference brief does not form part of the continuing record or court file and shall be returned, at the end of the conference, to the party who filed it.

BRIEF DESTROYED IF NOT RETURNED

(22) If a conference brief is not returned to a party at the end of a conference, the court staff shall destroy the brief immediately after the conference.

CONFIDENTIALITY OF SETTLEMENT CONFERENCE

(23) No brief or evidence prepared for a settlement conference and no statement made at a settlement conference shall be disclosed to any other judge, except in,

(a) an agreement reached at a settlement conference; or
(b) an order.

SETTLEMENT CONFERENCE JUDGE CANNOT HEAR ISSUE

(24) A judge who conducts a settlement conference about an issue shall not hear the issue.

RULE 18: OFFERS TO SETTLE

DEFINITION

18. (1) In this rule,

"offer" means an offer to settle one or more claims in a case, motion, appeal or enforcement, and includes a counter-offer.

APPLICATION

(2) This rule applies to an offer made at any time, even before the case is started.

MAKING AN OFFER

(3) A party may serve an offer on any other party.

OFFER TO BE SIGNED BY PARTY AND LAWYER

(4) An offer shall be signed personally by the party making it and also by the party's lawyer, if any.

WITHDRAWING AN OFFER

(5) A party who made an offer may withdraw it by serving a notice of withdrawal, at any time before the offer is accepted.

TIME-LIMITED OFFER

(6) An offer that is not accepted within the time set out in the offer is considered to have been withdrawn.

OFFER EXPIRES WHEN COURT BEGINS TO GIVE DECISION

(7) An offer may not be accepted after the court begins to give a decision that disposes of a claim dealt with in the offer.

CONFIDENTIALITY OF OFFER

(8) The terms of an offer,

(a) shall not be mentioned in any document filed in the continuing record; and
(b) shall not be mentioned to the judge hearing the claim dealt with in the offer, until the judge has dealt with all the issues in dispute except costs.

ACCEPTING AN OFFER

(9) The only valid way of accepting an offer is by serving an acceptance on the party who made the offer, at any time before,

(a) the offer is withdrawn; or
(b) the court begins to give a decision that disposes of a claim dealt with in the offer.

OFFER REMAINS OPEN DESPITE REJECTION OR COUNTER-OFFER

(10) A party may accept an offer in accordance with subrule (9) even if the party has previously rejected the offer or made a counter-offer.

COSTS NOT DEALT WITH IN OFFER

(11) If an accepted offer does not deal with costs, either party is entitled to ask the court for costs.

COURT APPROVAL, OFFER INVOLVING SPECIAL PARTY

(12) A special party may make, withdraw and accept an offer, but another party's acceptance of a special party's offer and a special party's acceptance of another party's offer are not binding on the special party until the court approves.

FAILURE TO CARRY OUT TERMS OF ACCEPTED OFFER

(13) If a party to an accepted offer does not carry out the terms of the offer, the other party may,

(a) make a motion to turn the parts of the offer within the court's jurisdiction into an order; or
(b) continue the case as if the offer had never been accepted.

COSTS CONSEQUENCES OF FAILURE TO ACCEPT OFFER

(14) A party who makes an offer is, unless the court orders otherwise, entitled to costs to the date the offer was served and full recovery of costs from that date, if the following conditions are met:

1. If the offer relates to a motion, it is made at least one day before the motion date.
2. If the offer relates to a trial or the hearing of a step other than a motion, it is made at least seven days before the trial or hearing date.
3. The offer does not expire and is not withdrawn before the hearing starts.
4. The offer is not accepted.
5. The party who made the offer obtains an order that is as favourable as or more favourable than the offer.

COSTS CONSEQUENCES -- BURDEN OF PROOF

(15) The burden of proving that the order is as favourable as or more favourable than the offer to settle is on the party who claims the benefit of subrule (14).

COSTS -- DISCRETION OF COURT

(16) When the court exercises its discretion over costs, it may take into account any written offer to settle, the date it was made and its terms, even if subrule (14) does not apply.

RULE 19: DOCUMENT DISCLOSURE

AFFIDAVIT LISTING DOCUMENTS

19. (1) Every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,

(a) relevant to any issue in the case; and
(b) in the party's control, or available to the party on request.

ACCESS TO LISTED DOCUMENTS

(2) The other party is entitled, on request,

(a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; and
(b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a).

ACCESS TO DOCUMENTS MENTIONED IN COURT PAPERS

(3) Subrule (2) also applies, with necessary changes, to a document mentioned in a party's application, answer, reply, notice of motion, affidavit, financial statement or net family property statement.

DOCUMENTS PROTECTED BY LEGAL PRIVILEGE

(4) If a party claims that a document is protected by a legal privilege, the court may, on motion, examine it and decide the issue.

USE OF PRIVILEGED DOCUMENTS

(5) A party who claims that a document is protected by a legal privilege may use it at trial only,

(a) if the other party has been allowed to examine the document and been supplied with a copy, free of charge, at least 30 days before the settlement conference; or
(b) on the conditions the trial judge considers appropriate, including an adjournment if necessary.

DOCUMENTS OF SUBSIDIARY OR AFFILIATED CORPORATION

(6) The court may, on motion, order a party to give another party an affidavit listing the documents that are,

(a) relevant to any issue in the case; and
(b) in the control of, or available on request to a corporation that is controlled, directly or indirectly, by the party or by another corporation that the party controls directly or indirectly.

ACCESS TO LISTED DOCUMENTS

(7) Subrule (2) also applies, with necessary changes, to any document listed in an affidavit ordered under subrule (6).

DOCUMENTS OMITTED FROM AFFIDAVIT OR FOUND LATER

(8) A party who, after serving an affidavit required under subrule (1) or (6), finds a document that should have been listed in it, or finds that the list is not correct or not complete, shall immediately serve on the other party a new affidavit listing the correct information.

ACCESS TO ADDITIONAL DOCUMENTS

(9) The other party is entitled, on request,

(a) to examine any document listed in an affidavit served under subrule (8), unless it is protected by a legal privilege; and
(b) to receive, free of charge, a copy of any document that the party is entitled to examine under clause (a).

FAILURE TO FOLLOW RULE OR OBEY ORDER

(10) If a party does not follow this rule or obey an order made under this rule, the court may, on motion, do one or more of the following:

1. Order the party to give another party an affidavit, let the other party examine a document or supply the other party with a copy free of charge.
2. Order that a document favourable to the party's case may not be used except with the court's permission.
3. Order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order.
4. Dismiss the party's case or strike out the party's answer.
5. Order the party to pay the other party's costs for the steps taken under this rule, and decide the amount of the costs.
6. Make a contempt order against the party.
7. Make any other order that is appropriate.

DOCUMENT IN NON-PARTY'S CONTROL

(11) If a document is in a non-party's control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,

(a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and
(b) order that a copy be prepared and used for all purposes of the case instead of the original.

RULE 20: QUESTIONING A WITNESS AND DISCLOSURE

QUESTIONING -- PROCEDURE

20. (1) Questioning under this rule shall take place orally under oath or affirmation.

CROSS-EXAMINATION

(2) The right to question a person includes the right to cross-examine.

CHILD PROTECTION CASE -- AVAILABLE AS OF RIGHT

(3) In a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) by questioning the other party, in which case the party shall serve the other party with a summons to witness (Form 23) by a method of special service set out in clause 6(3)(a); or
(b) by affidavit or by another method, in which case the party shall serve the other party with a request for information (Form 20).

OTHER CASES -- CONSENT OR ORDER

(4) In a case other than a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) with the other party's consent; or
(b) by an order under subrule (5).

ORDER FOR QUESTIONING OR DISCLOSURE

(5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.
2. The information is not easily available by any other method.
3. The questioning or disclosure will not cause unacceptable delay or undue expense.

QUESTIONING SPECIAL PARTY

(6) If a person to be questioned is a special party, the court may, on motion, order that someone else be questioned in addition to or in place of the person.

QUESTIONING ABOUT AFFIDAVIT OR NET FAMILY PROPERTY STATEMENT

(7) The court may make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit or net family property statement.

QUESTIONING OR DISCLOSURE -- PRECONDITIONS

(8) A party who wants to question a person or obtain information by affidavit or by another method may do so only if the party,

(a) has served and filed any answer, financial statement or net family property statement that these rules require; and
(b) promises in writing not to serve or file any further material for the next step in the case, except in reply to the answers or information obtained.

NOTICE AND SUMMONS TO NON-PARTY

(9) The court may make an order under this rule affecting a non-party only if the non-party has been served with the notice of motion, a summons to witness (Form 23) and the witness fee required by subrule 23(4), all by special service (subrule 6(3)).

PENALTY FOR FAILURE TO OBEY SUMMONS

(10) Subrule 23(7) (failure to obey summons to witness) applies, with necessary changes, if a person summoned under subrule (9) fails to obey the summons.

PLACE OF QUESTIONING

(11) The questioning shall take place in the municipality in which the person to be questioned lives, unless that person and the party who wants to do the questioning agree to hold it in another municipality.

OTHER ARRANGEMENTS FOR QUESTIONING

(12) If the person to be questioned and the party who wants to do the questioning do not agree on one or more of the following matters, the court shall, on motion, make an order to decide the matter:

1. The date and time for the questioning.
2. The person responsible for recording the questioning.
3. The method for recording the questioning.
4. Payment of the expenses of the person to be questioned, if a non-party.

NOTICE TO PARTIES

(13) The parties shall, not later than three days before the questioning, be served with notice of the name of the person to be questioned and the address, date and time of the questioning.

QUESTIONING PERSON OUTSIDE ONTARIO

(14) If a person to be questioned lives outside Ontario and will not come to Ontario for questioning, the court may decide,

(a) the date, time and place for the questioning;
(b) how much notice the person should be given;
(c) the person before whom the questioning will be held;
(d) the amount of the witness fee to be paid to the person to be questioned;
(e) the method for recording the questioning;
(f) where necessary, that the clerk shall issue,

(i) an authorization to a commissioner (Form 20A) who is to supervise the questioning outside Ontario, and
(ii)a letter of request (Form 20B) to the appropriate court or authorities outside Ontario, asking for their assistance in getting the person to be questioned to come before the commissioner; and

(g) any other related matter.

COMMISSIONER'S DUTIES

(15) A commissioner authorized under subrule (14) shall,

(a) supervise the questioning according to the terms of the court's authorization, these rules and Ontario's law of evidence, unless the law of the place where the questioning is to be held requires some other manner of questioning;
(b) make and keep a copy of the record of the questioning and, if

possible, of the exhibits, if any;

(c) deliver the original record, any exhibits and the authorization to the clerk who issued it; and

(d) notify the party who asked for the questioning that the record has been delivered to the clerk.

ORDER TO BRING DOCUMENTS OR THINGS

(16) An order for questioning and a summons to witness may also require the person to bring any document or thing that is,

(a) relevant to any issue in the case; and

(b) in the person's control or available to the person on request.

OTHER RULES APPLY

(17) Subrules 19(2), (4) and (5) (right to examine document and obtain copy, documents protected by legal privilege, use of privileged documents) apply, with necessary changes, to the documents mentioned in the order.

SCOPE OF QUESTIONS

(18) A person to be questioned may be asked about,

(a) the names of persons who might reasonably be expected to know about the claims in the case and, with the court's permission, their addresses;

(b) the names of the witnesses whom a party intends to call at trial and, with the court's permission, their addresses;

(c) the names, addresses, findings, conclusions and opinions of expert witnesses whom a party intends to call or on whose reports the party intends to rely at trial;

(d) if it is relevant to the case, the existence and details of any insurance policy under which the insurance company may be required to pay all or part of an order for the payment of money in the case or to pay back to a party money that the party has paid under an order; and

(e) any other matter in dispute in the case.

REFUSAL TO ANSWER QUESTION

(19) If a person being questioned refuses to answer a question,

(a) the court may, on motion,

(i) decide whether the question is proper,

(ii) give directions for the person's return to the questioning,

and

(iii) make a contempt order against the person; and

(b) if the person is a party or is questioned on behalf or in place of a party, the party shall not use the information that was refused as evidence in the case, unless the court gives permission under subrule (20).

COURT'S PERMISSION

(20) The court shall give permission unless the use of the information would cause harm to another party or an unacceptable delay in the trial, and may impose any appropriate conditions on the permission, including an adjournment if necessary.

DUTY TO CORRECT OR UPDATE ANSWERS

(21) A person who has been questioned or who has provided information in writing by affidavit or by another method and who finds that an answer or information given was incorrect or incomplete, or is no longer correct or complete, shall immediately provide the correct and complete information in writing to all parties.

LAWYER ANSWERING

(22) If there is no objection, questions may be answered by the lawyer for a person being questioned, and the answer shall be taken as the person's own answer unless the person corrects or changes it before the questioning ends.

METHOD FOR RECORDING QUESTIONING

(23) All the questions and answers at a questioning shall be recorded electronically or manually.

OBLIGATION TO KEEP INFORMATION CONFIDENTIAL

(24) When a party obtains evidence under this rule, rule 13 (financial statements) or rule 19 (document disclosure), the party and the party's lawyer may use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained, subject to the exceptions in subrule (25).

USE OF INFORMATION PERMITTED

(25) Evidence and any information obtained from it may be used for other purposes,

(a) if the person who gave the evidence consents;

(b) if the evidence is filed with the court, given at a hearing or referred to at a hearing;

(c) to impeach the testimony of a witness in another case; or
(d) in a later case between the same parties or their successors, if the case in which the evidence was obtained was withdrawn or dismissed.

COURT MAY LIFT OBLIGATION OF CONFIDENTIALITY

(26) The court may, on motion, give a party permission to disclose evidence or information obtained from it if the interests of justice outweigh any harm that would result to the party who provided the evidence.

RULE 21: REPORT OF CHILDREN'S LAWYER

REPORT OF CHILDREN'S LAWYER

21. When the Children's Lawyer investigates and reports on custody of or access to a child under section 112 of the Courts of Justice Act,

(a) the Children's Lawyer shall first serve notice on the parties and file it;
(b) the parties shall, from the time they are served with the notice, serve the Children's Lawyer with every document in the case that involves the child's custody, access, support, health or education, as if the Children's Lawyer were a party in the case;
(c) the Children's Lawyer has the same rights as a party to document disclosure (rule 19) and questioning witnesses (rule 20) about any matter involving the child's custody, access, support, health or education;
(d) within 90 days after serving the notice under clause (a), the Children's Lawyer shall serve a report on the parties and file it;
(e) within 30 days after being served with the report, a party may serve and file a statement disputing anything in it; and
(f) the trial shall not be held and the court shall not make a final order in the case until the 30 days referred to in clause (e) expire or the parties file a statement giving up their right to that time.

RULE 22: ADMISSION OF FACTS

MEANING OF ADMISSION THAT DOCUMENT GENUINE

22. (1) An admission that a document is genuine is an admission,

(a) if the document is said to be an original, that it was written, signed or sealed as it appears to have been;
(b) if it is said to be a copy, that it is a complete and accurate copy; and
(c) if it is said to be a copy of a document that is ordinarily sent from

one person to another (for example, a letter, fax or electronic message), that it was sent as it appears to have been sent and was received by the person to whom it is addressed.

REQUEST TO ADMIT

(2) At any time, by serving a request to admit (Form 22) on another party, a party may ask the other party to admit, for purposes of the case only, that a fact is true or that a document is genuine.

COPY OF DOCUMENT TO BE ATTACHED

(3) A copy of any document mentioned in the request to admit shall be attached to it, unless the other party already has a copy or it is impractical to attach a copy.

RESPONSE REQUIRED WITHIN 20 DAYS

(4) The party on whom the request to admit is served is considered to have admitted, for purposes of the case only, that the fact is true or that the document is genuine, unless the party serves a response (Form 22A) within 20 days,

(a) denying that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine; or
(b) refusing to admit that a particular fact mentioned in the request is true or that a particular document mentioned in the request is genuine, and giving the reasons for each refusal.

WITHDRAWING ADMISSION

(5) An admission that a fact is true or that a document is genuine (whether contained in a document served in the case or resulting from subrule (4)), may be withdrawn only with the other party's consent or with the court's permission.

RULE 23: EVIDENCE AND TRIAL

TRIAL RECORD

23. (1) At least 14 days before the start of the trial, the applicant shall serve and file a trial record containing a table of contents and the following documents:

1. The application, answer and reply, if any.
2. Any agreed statement of facts.
3. If relevant to an issue at trial, financial statements and net family property statements by all parties, completed not more than 30 days before the record is served.
4. Any assessment report ordered by the court or obtained by consent

of the parties.

5. Any temporary order relating to a matter still in dispute.
6. Any order relating to the trial.
7. Any transcript on which the party intends to rely at trial.
8. Any expert report on which the party intends to rely at trial.

RESPONDENT MAY ADD TO TRIAL RECORD

(2) Not later than seven days before the start of the trial, a respondent may serve, file and add to the trial record any document referred to in subrule (1) that is not already in the trial record.

SUMMONS TO WITNESS

(3) A party who wants a witness to give evidence in court or to be questioned and to bring documents or other things shall serve on the witness a summons to witness (Form 23), together with the witness fee set out in subrule (4).

WITNESS FEE

(4) A person summoned as a witness shall be paid, for each day that the person is needed in court or to be questioned,

(a) $50 for coming to court or to be questioned;
(b) travel money in the amount of,

(i) $5, if the person lives in the city or town where the person gives evidence,
(ii) 30 cents per kilometre each way, if the person lives elsewhere but within 300 kilometres of the court or place of questioning,
(iii) the cheapest available air fare plus $10 a day for airport parking and 30 cents per kilometre each way from the person's home to the airport and from the airport to the court or place of questioning, if the person lives 300 or more kilometres from the court or place of questioning; and

(c) $100 per night for meals and overnight stay, if the person does not live in the city or town where the trial is held and needs to stay overnight.

CONTINUING EFFECT OF SUMMONS

(5) A summons to witness remains in effect until it is no longer necessary to have the witness present.

SUMMONS FOR ORIGINAL DOCUMENT

(6) If a document can be proved by a certified copy, a party who wants a witness to bring the original shall not serve a summons on the witness for that purpose without the court's permission.

FAILURE TO OBEY SUMMONS

(7) The court may issue a warrant for arrest (Form 32B) to bring a witness before the court if,

(a) the witness has been served as subrule (3) requires, but has not obeyed the summons; and
(b) it is necessary to have the witness present in court or at a questioning.

INTERPROVINCIAL SUMMONS TO WITNESS

(8) A summons to a witness outside Ontario under the Interprovincial Summonses Act shall be in Form 23A.

SETTING ASIDE SUMMONS TO WITNESS

(9) The court may, on motion, order that a summons to witness be set aside.

ATTENDANCE OF A PRISONER

(10) If it is necessary to have a prisoner come to court or to be questioned, the court may order (Form 23B) the prisoner's custodian to deliver the prisoner on payment of the fee set out in the regulations under the Administration of Justice Act.

CALLING OPPOSING PARTY AS WITNESS

(11) A party who serves a summons under subrule (3) on an opposing party to come to court may call the opposing party as a witness and may cross-examine the opposing party.

OPPOSING PARTY DISOBEYING SUMMONS

(12) When an opposing party has been served with a summons under subrule (3), the court may make a final order in favour of the party calling the witness, adjourn the case or make any other appropriate order, including a contempt order, if the opposing party,

(a) does not come to or remain in court as required by the summons; or
(b) refuses to be sworn or to affirm, to answer any proper question or to bring any document or thing named in the summons.

READING OPPOSING PARTY'S ANSWERS INTO EVIDENCE

(13) An answer or information given under rule 20 (questioning) by an opposing party may be read into evidence at trial if it is otherwise proper evidence, even if the opposing party has already testified at trial.

READING OTHER PERSON'S ANSWERS INTO EVIDENCE

(14) Subrule (13) also applies, with necessary changes, to an answer or information given by a person questioned on behalf of or in place of an opposing party, unless the trial judge orders otherwise.

USING ANSWERS -- SPECIAL CIRCUMSTANCES

(15) Subrule (13) is subject to the following:

1. If the answer or information is being read into evidence to show that a witness's testimony at trial is not to be believed, answers or information given by the witness earlier must be put to the witness as sections 20 and 21 of the Evidence Act require.
2. At the request of an opposing party, the trial judge may direct the party reading the answer or information into evidence to read in, as well, any other answer or information that qualifies or explains what the party has read into evidence.
3. A special party's answer or information may be read into evidence only with the trial judge's permission.

REBUTTING ANSWERS

(16) A party who has read answers or information into evidence at trial may introduce other evidence to rebut the answers or information.

USING ANSWERS OF WITNESS NOT AVAILABLE FOR TRIAL

(17) The trial judge may give a party permission to read into evidence all or part of the answers or information given under rule 20 (questioning) by a person who is unable or unwilling to testify at the trial but, before doing so, the judge shall consider,

(a) the importance of the evidence;
(b) the general principle that trial evidence should be given orally in court;
(c) the extent to which the person was cross-examined; and
(d) any other relevant factor.

TAKING EVIDENCE BEFORE TRIAL

(18) The court may order that a witness whose evidence is necessary at trial may give evidence before trial at a place and before a person named in the order, and then may accept the transcript as evidence.

TAKING EVIDENCE BEFORE TRIAL OUTSIDE ONTARIO

(19) If a witness whose evidence is necessary at trial lives outside Ontario, subrules 20(14) and (15) (questioning person outside Ontario, commissioner's duties) apply, with necessary changes.

EVIDENCE BY AFFIDAVIT OR ELECTRONIC RECORDING

(20) The court may allow a witness to give evidence at trial by affidavit or electronic recording if,

(a) the parties consent;
(b) the witness is ill or unavailable to come to court for some other good reason;
(c) the evidence concerns minor or uncontroversial issues; or
(d) it is in the interests of justice to do so.

CONDITIONS FOR USE OF AFFIDAVIT OR ELECTRONIC RECORDING

(21) Evidence at trial by affidavit or electronic recording may be used only if,

(a) the use is in accordance with an order under subrule (20);
(b) the evidence is served at least 14 days before the trial starts; and
(c) the evidence would have been admissible if given by the witness in court.

AFFIDAVIT EVIDENCE AT UNCONTESTED TRIAL

(22) At an uncontested trial, evidence by affidavit in Form 23C may be used without an order under subrule (20), unless the court directs that oral evidence must be given.

EXPERT WITNESS REPORT SERVED BEFORE TRIAL

(23) A party who wants to call an expert witness at trial shall, at least 14 days before the trial starts, serve on all other parties and file a report that,

(a) is signed by the expert;
(b) sets out the expert's name, address and qualifications; and
(c) summarizes the expert's proposed evidence.

FAILURE TO SERVE EXPERT WITNESS REPORT

(24) A party who has not followed subrule (23) may not call the expert witness unless the trial judge allows otherwise.

RULE 24: COSTS

SUCCESSFUL PARTY PRESUMED ENTITLED TO COSTS

24. (1) There is a presumption that a successful party is entitled to the costs of a motion, enforcement, case or appeal.

NO PRESUMPTION IN CHILD PROTECTION CASE OR IF PARTY IS GOVERNMENT AGENCY

(2) The presumption does not apply in a child protection case or to a party who is a government agency.

COURT'S DISCRETION -- COSTS FOR OR AGAINST GOVERNMENT AGENCY

(3) The court has discretion to award costs to or against a government agency, whether it is successful or unsuccessful.

SUCCESSFUL PARTY WHO HAS BEHAVED UNREASONABLY

(4) Despite subrule (1), a successful party who has behaved unreasonably during a case may be deprived of all or part of the party's own costs or ordered to pay all or part of the unsuccessful party's costs.

DECISION ON REASONABLENESS

(5) In deciding whether a party has behaved reasonably or unreasonably, the court shall examine,

(a) the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle;

(b) the reasonableness of any offer the party made; and

(c) any offer the party withdrew or failed to accept.

DIVIDED SUCCESS

(6) If success in a step in a case is divided, the court may apportion costs as appropriate.

ABSENT OR UNPREPARED PARTY

(7) If a party does not appear at a step in the case, or appears but is not properly prepared to deal with the issues at that step, the court shall award costs against the party unless the court orders otherwise in the interests of justice.

BAD FAITH

(8) If a party has acted in bad faith, the court shall decide costs on a full recovery basis and shall order the party to pay them immediately.

COSTS CAUSED BY FAULT OF LAWYER OR AGENT

(9) If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,

(a) order that the lawyer or agent shall not charge the client fees or disbursements for work specified in the order, and order the lawyer or agent to repay money that the client has already paid toward costs;
(b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;
(c) order the lawyer or agent personally to pay the costs of any party; and
(d) order that a copy of an order under this subrule be given to the client.

COSTS TO BE DECIDED AT EACH STEP

(10) Promptly after each step in the case, the judge or other person who dealt with that step shall decide in a summary manner who, if anyone, is entitled to costs, and set the amount of costs.

FACTORS IN COSTS

(11) A person setting the amount of costs shall consider,

(a) the importance, complexity or difficulty of the issues;
(b) the reasonableness or unreasonableness of each party's behaviour in the case;
(c) the lawyer's rates;
(d) the time properly spent on the case, including conversations between the lawyer and the party or witnesses, drafting documents and correspondence, attempts to settle, preparation, hearing, argument, and preparation and signature of the order;
(e) expenses properly paid or payable; and
(f) any other relevant matter.

PAYMENT OF EXPENSES

(12) The court may make an order that a party pay an amount of money to another party to cover part or all of the expenses of carrying on the case, including a lawyer's fees.

ORDER FOR SECURITY FOR COSTS

(13) A judge may, on motion, make an order for security for costs that is just, based on one or more of the following factors:

1. A party ordinarily resides outside Ontario.
2. A party has an order against the other party for costs that remains unpaid, in the same case or another case.
3. A party is a corporation and there is good reason to believe it does not have enough assets in Ontario to pay costs.
4. There is good reason to believe that the case is a waste of time or a nuisance and that the party does not have enough assets in Ontario to pay costs.
5. A statute entitles the party to security for costs.

AMOUNT AND FORM OF SECURITY

(14) The judge shall determine the amount of the security, its form and the method of giving it.

EFFECT OF ORDER FOR SECURITY

(15) Until the security has been given, a party against whom there is an order for security for costs may not take any step in the case, except to appeal from the order, unless a judge orders otherwise.

FAILURE TO GIVE SECURITY

(16) If the party does not give the security as ordered, a judge may, on motion, dismiss the party's case or strike out the party's answer or any other document filed by the party, and then subrule (15) no longer applies.

SECURITY MAY BE CHANGED

(17) The amount of the security, its form and the method of giving it may be changed by order at any time.

RULE 25: ORDERS

CONSENT ORDER

25. (1) If the parties agree, the court may make an order under these rules or an Act without having the parties or their lawyers come to court.

SUCCESSFUL PARTY PREPARES DRAFT ORDER

(2) The party in whose favour an order is made shall prepare a draft of the order (Form 25, 25A, 25B or 25C, 25D), unless the court orders otherwise.

OTHER PARTY MAY PREPARE DRAFT ORDER

(3) If the party in whose favour an order is made does not have a lawyer or does not prepare a draft order within 10 days after the order is made, any other party may prepare the draft order, unless the court orders otherwise.

APPROVAL OF DRAFT ORDER

(4) A party who prepares an order shall serve a draft, for approval of its form and content, on every other party who was in court or was represented when the order was made (including a child who has a lawyer).

SETTLING CONTENTS OF DISPUTED ORDER

(5) Unless the court orders otherwise, a party who disagrees with the form or content of a draft order shall serve, on every party who was served under subrule (4) and on the party who served the draft order,

(a) a notice disputing approval (Form 25E);
(b) a copy of the order, redrafted as proposed; and
(c) notice of a time and date at which the clerk will settle the order by telephone conference.

TIME AND DATE

(6) The time and date shall be set by the clerk and shall be within five days after service of the notice disputing approval.

DISPUTED ORDER -- SETTLEMENT BY JUDGE

(7) If unable to settle the order at the telephone conference, the clerk shall, as soon as possible, refer the order to the judge who made it, to be settled at a further telephone conference, unless the judge orders the parties to come to court for settlement of the order.

NO APPROVAL REQUIRED IF NO RESPONSE FROM OTHER PARTY

(8) If no approval or notice disputing approval (Form 25E) is served within 10 days after the draft order is served for approval, it may be signed without approval.

NO APPROVAL REQUIRED FOR CERTAIN ORDERS

(9) If an order dismisses a motion, case or appeal, without costs, or is prepared by the clerk under subrule (11), it may be signed without approval.

NO APPROVAL REQUIRED IN EMERGENCIES

(10) If the delay involved in getting an order approved would have serious consequences, the judge who made it may sign it without approval.

WHEN CLERK PREPARES ORDER

(11) The clerk shall prepared the order for signature,

(a) within 10 days after it is made, if no party has a lawyer;
(b) as soon as it is made,

(i) if it is a support deduction order under the Family Responsibility and Support Arrears Enforcement Act, 1996, or
(ii) if the judge directs the clerk to do so.

WHO SIGNS ORDER

(12) An order may be signed by the judge who made it or by the clerk.

SERVICE OF ORDER

(13) Unless the court orders otherwise, the person who prepared an order shall serve it, by regular service (subrule 6(2)) or by mail, fax or electronic mail to the person's last known address,

(a) on every other party, including a respondent to whom subrule 10(5) (no notice to respondent) applies;
(b) if a child involved in the case has a lawyer, on the lawyer; and
(c) on any other person named by the court.

SUPPORT DEDUCTION ORDER NOT SERVED

(14) A support deduction order under the Family Responsibility and Support Arrears Enforcement Act, 1996 does not have to be served.

SERVICE OF CROWN WARDSHIP ORDER

(15) An order for Crown wardship under Part III of the Child and Family Services Act shall be served on the following persons, in addition to the ones mentioned in subrule (13):

1. The child, if that Act requires notice to the child.

2. Any foster parent or other person who is entitled to notice under subsection 39(3) of that Act.
3. A Director appointed under that Act.

SERVICE OF SECURE TREATMENT ORDER

(16) An order for secure treatment under Part VI of the Child and Family Services Act shall be served on the administrator of the secure treatment program, in addition to the persons mentioned in subrule (13).

SERVICE OF ADOPTION ORDER

(17) An adoption order shall be served on the following persons, in addition to the ones mentioned in subrule (13):

1. The adopted child, if the child gave consent under subsection 137(6) of the Child and Family Services Act.
2. The persons mentioned in subsection 162(3) of that Act.

EFFECTIVE DATE

(18) An order is effective from the date on which it is made, unless it states otherwise.

RULE 26: ENFORCEMENT OF ORDERS

WHERE TO ENFORCE AN ORDER

26. (1) The place for enforcement of an order is governed by subrules 5(5) and (6) (place for starting enforcement).

HOW TO ENFORCE AN ORDER

(2) An order that has not been obeyed may, in addition to any other method of enforcement provided by law, be enforced as provided by subrules (3) and (4).

PAYMENT ORDERS

(3) A payment order may be enforced by,

(a) a request for a financial statement (subrule 27(1));
(b) a request for disclosure from an income source (subrule 27(7));
(c) a financial examination (subrule 27(11));
(d) seizure and sale (rule 28);
(e) garnishment (rule 29);
(f) a default hearing (rule 30), if the order is a support order;
(g) the appointment of a receiver under section 101 of the Courts of

Justice Act; and

(h) registration under section 42 of the Family Responsibility and Support Arrears Enforcement Act, 1996.

OTHER ORDERS

(4) An order other than a payment order may be enforced by,

(a) a writ of temporary seizure of property (subrule 28(10));
(b) a contempt order (rule 31); and
(c) the appointment of a receiver under section 101 of the Courts of Justice Act.

STATEMENT OF MONEY OWED

(5) A statement of money owed shall be in Form 26, with a copy of the order that is in default attached.

SPECIAL FORMS FOR STATEMENT OF MONEY OWED

(6) Despite subrule (3),

(a) if the Family Responsibility and Support Arrears Enforcement Act, 1996 applies, a statement of arrears in the form used by the Director may be used instead of Form 26;
(b) if the Reciprocal Enforcement of Support Orders Act applies, a document receivable under subsection 16(4) of that Act may be used instead of Form 26.

RECIPIENT'S OR DIRECTOR'S ENTITLEMENT TO COSTS

(7) Unless the court orders otherwise, the recipient or the Director is entitled to the costs,

(a) of carrying out a financial examination; and
(b) of issuing, serving, filing and enforcing a writ of seizure and sale, a writ of temporary seizure and a notice of garnishment and of changing them by statutory declaration.

ENFORCEMENT OF ADMINISTRATIVE COSTS

(8) For the purpose of subrule (7), the recipient or the Director may collect under a writ of seizure and sale, a notice of garnishment or a statutory declaration changing either of them,

(a) the amounts set out in the regulations under the Administration of Justice Act and awarded under rule 24 (costs) for filing and

renewing with the sheriff a writ of seizure and sale or a writ of temporary seizure;

(b) payments made to a sheriff, clerk, official examiner, court reporter or other public officer in accordance with the regulations under the Administration of Justice Act and awarded under rule 24 (costs), on filing with the sheriff or clerk a copy of a receipt for each payment or an affidavit setting out the payments made; and

(c) the actual expense for carrying out a financial examination, or any other costs to which the recipient or the Director is entitled under subrule (7), on filing with the sheriff or clerk an affidavit (Form 26A) setting out the items of expense in detail.

AFFIDAVIT FOR FILING DOMESTIC CONTRACT OR PATERNITY AGREEMENT

(9) An affidavit for filing a domestic contract or paternity agreement under subsection 35(1) of the Family Law Act shall be in Form 26B.

DIRECTOR'S STATUS

(10) If the Director enforces an order under the Family Responsibility and Support Arrears Enforcement Act, 1996, anything in these rules relating to enforcement by the person in whose favour the order was made applies to the Director.

FILING AND REFILING WITH THE DIRECTOR

(11) A person who files or refiles a support order in the Director's office shall immediately mail notice of the filing to the clerk at any court office where the recipient is enforcing the order.

TRANSFERRING ENFORCEMENT FROM RECIPIENT TO DIRECTOR

(12) A recipient who files a support order in the Director's office shall, on the Director's request, assign to the Director any enforcement that the recipient has started, and then the Director may continue with the enforcement as if the Director had started it.

TRANSFERRING ENFORCEMENT FROM DIRECTOR TO RECIPIENT

(13) If the parties withdraw a support order from the Director's office, the Director shall, on the recipient's request, given to the Director at the same time as the notice of withdrawal, assign to the recipient any enforcement that the Director has started, and then the recipient may continue with the enforcement as if the recipient had started it.

NOTICE OF TRANSFER OF ENFORCEMENT

(14) A person who continues an enforcement under subrule (12) or (13) shall immediately mail a notice of transfer of enforcement (Form 26C) to,

(a) all parties to the enforcement;
(b) the clerk at every court office where the enforcement is being carried on; and
(c) every sheriff who is involved with the enforcement at the time of transfer.

RULE 27: REQUIRING FINANCIAL INFORMATION

REQUEST FOR FINANCIAL STATEMENT

27. (1) If a payment order is in default, a recipient may serve a request for a financial statement (Form 27) on the payor.

EFFECT OF REQUEST FOR FINANCIAL STATEMENT

(2) Within 15 days after being served with the request, the payor shall send a completed financial statement (Form 13) to the recipient by mail, fax or electronic mail.

FREQUENCY OF REQUESTS FOR FINANCIAL STATEMENTS

(3) A recipient may request a financial statement only once in a six-month period, unless the court gives the recipient permission to do so more often.

APPLICATION OF RULE 13

(4) If a party is required under this rule to give a financial statement, the following subrules apply with necessary changes:

13(6) (full disclosure)
13(7) (income tax documents)
13(11) (additional information)
13(12) (updating financial statement)
13(15) (correcting and updating)
13(16) (order to file statement)
13(17) (failure to file).

ORDER FOR FINANCIAL STATEMENT

(5) The court may, on motion, order a payor to serve and file a financial statement.

FAILURE TO OBEY ORDER

(6) If the payor does not serve and file a financial statement within 10 days after being served with the order, the court may, on motion with special service (subrule 6(3)), order that the payor be imprisoned continuously or intermittently for not more than 40 days.

REQUEST FOR STATEMENT OF INCOME FROM INCOME SOURCE

(7) If a payment order is in default, the recipient may serve a request for a statement of income (Form 27A) on an income source of the payor, requiring the income source to prepare and mail to the recipient a statement of income (Form 27B).

FREQUENCY OF REQUESTS FOR STATEMENT OF INCOME

(8) A recipient may request a statement of income from an income source only once in a six-month period, unless the court gives the recipient permission to do so more often.

ORDER FOR STATEMENT OF INCOME

(9) The court may, on the recipient's motion, order an income source to serve and file a statement of income.

INCOME SOURCE'S FAILURE TO OBEY ORDER

(10) If the income source does not serve and file a statement of income within 10 days after being served with the order, the court may, on the recipient's motion, order the income source to post a bond (Form 32).

APPOINTMENT FOR FINANCIAL EXAMINATION

(11) If a payment order is in default, the recipient may serve on the payor, by special service (subrule 6(3)), an appointment for a financial examination (Form 27C), requiring the payor to,

(a) come to a financial examination;
(b) bring to the examination any document or thing named in the appointment that is in the payor's control or available to the payor on request, relevant to the enforcement of the order, and not protected by a legal privilege; and
(c) serve a financial statement (Form 13) on the recipient, not later than seven days before the date of the examination.

FINANCIAL EXAMINATION OF PERSON OTHER THAN PAYOR

(12) If a payment order is in default and a person other than the payor may know about the matters listed in subrule (17), the recipient may require that person to come to a financial examination by serving a summons to witness (Form 23) and the witness fee (subrule 23(4)) on the person by special service (subrule 6(3)).

PLACE WHERE FINANCIAL EXAMINATION HELD

(13) A financial examination shall be held,

(a) in a place where the parties and the person to be examined agree;
(b) where the person to be examined lives in Ontario, in the municipality where the person lives; or
(c) in a place chosen by the court.

OTHER RULES APPLY

(14) Subrules 19(4), (5) and (8) (documents protected by legal privilege, use of privileged documents, documents omitted from affidavit) and 23(7) (failure to obey summons) apply to a financial examination, with necessary changes.

NOTICE OF TIME AND PLACE OF EXAMINATION

(15) A payor who is served with an appointment or a person who is served with a summons for a financial examination shall have at least 10 days' notice of the time and place of the examination.

BEFORE WHOM EXAMINATION IS HELD, METHOD OF RECORDING

(16) A financial examination shall be held under oath or affirmation, before a person chosen by agreement of the payor and recipient or in accordance with subrule 20(12) (other arrangements for questioning), and shall be recorded by a method chosen in the same way.

SCOPE OF EXAMINATION

(17) On a financial examination, the payor or other person may be questioned about,

(a) the reason for the payor's default;
(b) the payor's income and property;
(c) the debts owed to and by the payor;
(d) the disposal of any property by the payor either before or after the making of the order that is in default;
(e) the payor's past, present and future ability to pay under the order;
(f) whether the payor intends to obey the order, and any reason for not doing so; and
(g) any other matter relevant to the enforcement of the order.

RESISTANCE TO EXAMINATION

(18) Subrule (19) applies if a payor who is served with an appointment or a person who is served with a summons for a financial examination,

(a) does not come to the examination as required by the appointment or summons;

(b) does not serve on the recipient a financial statement as required by the appointment;
(c) comes to the examination, but does not bring a document or thing named in the appointment or summons; or
(d) comes to the examination, but refuses to take an oath or affirm or to answer a question.

ORDER FOR ANOTHER EXAMINATION

(19) The court may, on motion, make an order and give directions for another financial examination of the payor or other person and may in addition require the payor or person to post a bond (Form 32).

IMPRISONMENT

(20) If a payor or other person, without sufficient excuse, fails to obey an order or direction made under subrule (19), the court may, on motion with special service (subrule 6(3)), order that the payor or person be imprisoned continuously or intermittently for not more than 40 days.

IMPRISONMENT POWER IS ADDITIONAL

(21) The court may exercise its power under subrule (20) in addition to or instead of its power of forfeiture under rule 32 (bonds, recognizances and warrants).

FREQUENCY OF EXAMINATIONS

(22) A recipient may conduct only one financial examination of a payor and one financial examination of any other person in a six-month period, or more often with the court's permission.

RULE 28: SEIZURE AND SALE

ISSUE OF WRIT OF SEIZURE AND SALE

28. (1) The clerk shall issue a writ of seizure and sale (Form 28) if a recipient files,

(a) a request for a writ of seizure and sale (Form 28A); and
(b) a statement of money owed (subrule 26(3)).

STATUTORY DECLARATION TO CHANGE AMOUNT OWED

(2) The statutory declaration to sheriff mentioned in section 44 of the Family Responsibility and Support Arrears Enforcement Act, 1996 shall be in Form 28B.

STATUTORY DECLARATION IF ORDER CHANGED

(3) If a court changes a payment order that is being enforced by a writ of seizure and sale, a statutory declaration to sheriff (Form 28B) may be filed with the sheriff and once filed, it has the same effect as a declaration mentioned in subrule (2).

DURATION OF WRIT

(4) A writ of seizure and sale continues in effect until,

(a) the recipient withdraws it under subrule (7), whether because no money owed when the writ was issued or mentioned in a statutory declaration under subrule (2) or (3) remains owing or for some other reason; or
(b) the court orders otherwise under subrule (8).

WRIT ISSUED UNDER FORMER RULES

(5) A writ directing the sheriff to seize and sell a payor's property that was issued by the court under the rules that applied before these rules take effect shall be treated in every way as if it were a writ of seizure and sale issued under these rules.

NOTIFYING SHERIFF OF PAYMENT RECEIVED

(6) If a writ of seizure and sale has been filed with a sheriff,

(a) the recipient shall, on the sheriff's request, provide a statutory declaration setting out details of all payments received by or on behalf of the recipient; and
(b) the sheriff shall update the writ accordingly.

WITHDRAWING WRIT

(7) The person who obtained a writ to enforce an order shall immediately withdraw it from every sheriff's office where it has been filed if,

(a) the person no longer wants to enforce the order by a writ;
(b) in the case of a payment order, the payor's obligation to make periodic payments under the order has ended and all other amounts owing under it have been paid; or
(c) in the case of any other order, the person against whom the writ was issued has obeyed the order.

ORDER CHANGING, WITHDRAWING OR SUSPENDING WRIT

(8) The court may, on motion, make an order changing the terms of a writ, withdrawing it or temporarily suspending it, even if the writ was issued by another court in Ontario.

SERVICE OF ORDER

(9) The person making the motion, or another person named by the court, shall serve a copy of the order on,

(a) every sheriff in whose office the writ has been filed; and
(b) if the writ was issued by the court in another place, or by another court, on the clerk of the court in the other place or the clerk of the other court.

WRIT OF TEMPORARY SEIZURE OF PROPERTY

(10) The court may, on motion with special service (subrule 6(3)), give permission to issue a writ of temporary seizure (Form 28C) directing the sheriff to take possession of and hold all or part of the land and other property of a person against whom an order has been made and to hold any income from the property until the person obeys the order.

RULE 29: GARNISHMENT

ISSUE OF NOTICE OR NOTICES OF GARNISHMENT

29. (1) The clerk shall issue as many notices of garnishment (Form 29A or 29B) as a recipient requests if the recipient files,

(a) a request for garnishment (Form 29) or an extra-provincial garnishment process referred to in section 50 of the Family Responsibility and Support Arrears Enforcement Act, 1996; and
(b) a statement of money owed (subrule 26(5)).

ONE RECIPIENT AND ONE GARNISHEE PER NOTICE

(2) Each notice of garnishment shall name only one recipient and one garnishee.

SERVICE ON PAYOR AND GARNISHEE

(3) The notice of garnishment shall be served on the payor and on the garnishee but the payor shall, in addition, be served with the documents filed under subrule (1).

EFFECT OF NOTICE OF GARNISHMENT

(4) A notice of garnishment attaches,

(a) every debt that is payable by the garnishee to the payor at the time the notice is served; and
(b) every debt that is payable by the garnishee to the payor,

(i) after the notice is served, or
(ii)on the fulfilment of a condition after the notice is served.

DURATION

(5) The notice of garnishment continues in effect from the time of service on the garnishee until it is withdrawn or stopped under this rule or until the court orders otherwise under this rule.

GARNISHEE BANK, TRUST COMPANY, ETC.

(6) If the garnishee is a bank, trust corporation, loan corporation, credit union, caisse populaire, the Province of Ontario Savings Office or a similar institution,

(a) the notice of garnishment shall be served at the branch where the debt to the payor is payable; and
(b) subrules (4) and (5) do not apply to money in an account opened after the notice of garnishment is served.

JOINT DEBTS GARNISHABLE

(7) Subrules (4) and (5) also apply to debts owed to the payor and another person jointly.

PROCEDURE WHEN JOINT DEBT GARNISHED

(8) If a garnishee has been served with a notice of garnishment and the garnishee owes a debt to which subrules (4) and (5) apply to the payor and another person jointly,

(a) the garnishee shall pay, in accordance with subrule (11), half of the debt, or the larger or smaller amount that the court orders;
(b) the garnishee shall immediately send the other person a notice to co-owner of debt (Form 29C) by mail, fax or electronic mail, to the person's address in the garnishee's records; and
(c) the garnishee shall immediately serve the notice to co-owner of debt on the recipient or the Director, depending on who is enforcing the order, and on the sheriff or clerk if the sheriff or clerk is to receive the money under subrule (11) or (12).

JOINT DEBT -- MONEY TO BE HELD

(9) Despite subrule (12), if served with notice under clause (8)(c), the sheriff, clerk or Director shall hold the money received for 30 days, and may pay it out when the 30 days expire, unless the other person serves and files a dispute within the 30 days.

PAYMENT OF ARREARS DOES NOT END GARNISHMENT

(10) A notice of garnishment continues to attach future periodic payments even though the total amount owed when it was served is fully paid up.

PERSONS TO WHOM GARNISHEE MAKES PAYMENTS

(11) A garnishee who has been served with a notice of garnishment shall make the required payments to,

(a) the Director, if the notice of garnishment relates to an order being enforced by the Director;
(b) the clerk, if the notice of garnishment does not relate to an order being enforced by the Director.

CLERK OR DIRECTOR TO PAY OUT MONEY

(12) On receiving money under a notice of garnishment, the Director or clerk shall, even if a dispute has been filed, but subject to subrules (9) and (13), immediately pay,

(a) to the recipient, any part of the money that comes within the priority created by subsection 4(1) of the Creditors' Relief Act; and
(b) to the sheriff, any part of the money that exceeds that priority.

ORDER THAT SUBRULE (12) DOES NOT APPLY

(13) The court may, at a garnishment hearing or on a motion to change the garnishment under this rule, order that subrule (12) does not apply.

CHANGE IN GARNISHMENT, INDEXED SUPPORT

(14) If a notice of garnishment enforces a support order that indexes periodic payments for inflation, the recipient may serve on the garnishee and on the payor a statutory declaration of indexed support (Form 29D) setting out the new amount to be paid under the order, and file the declaration with the court.

EFFECT OF STATUTORY DECLARATION OF INDEXED SUPPORT

(15) A statutory declaration of indexed support requires the garnishee to pay the new amount set out in the declaration from the time it is served on the garnishee.

GARNISHMENT DISPUTE

(16) Within 10 days after being served with a notice of garnishment or a statutory declaration of indexed support, a payor, garnishee or co-owner of a debt may serve on the other parties and file a dispute (Form 29E, 29F or 29G).

NOTICE OF GARNISHMENT HEARING

(17) The clerk shall, on request, issue a notice of garnishment hearing (Form 29H),

(a) within 10 days after a dispute is served and filed; or
(b) if the recipient says that the garnishee has not paid any money or has not paid enough money.

SERVICE OF NOTICE

(18) The clerk shall serve and file the notice not later than 10 days before the hearing.

GARNISHMENT HEARING

(19) At a garnishment hearing, the court may make one or more of the following temporary or final orders:

1. An order dismissing the dispute.
2. An order that changes how much is being garnished on account of a periodic payment order and that, at the same time, changes the payment order itself. However, the court may exercise this power only if,

    i. the payment order is one that the court has the authority to change, and
    ii. the parties to the payment order agree to the change, or one of those parties has served and filed notice of a motion to have the change made.

3. An order changing how much is being garnished on account of a non-periodic payment order.
4. An order suspending the garnishment or any term of it, while the hearing is adjourned or until the court orders otherwise.
5. An order setting aside the notice of garnishment or any statutory declaration of indexed support.
6. An order that garnished money held or received by the clerk, Director or sheriff be held in court.
7. An order that garnished money that has been paid out in error to the recipient be paid into and held in court, returned to the garnishee or sent to the payor or to the co-owner of the debt.
8. An order that garnished money held in court be returned to the garnishee or be sent to the payor, the co-owner of the debt, the sheriff, the clerk or the Director.
9. An order deciding how much remains owing under a payment order that is being enforced by garnishment against the payor or garnishee.
10. If the garnishee has not paid what was required by the notice of garnishment or statutory declaration of indexed support, an order that the garnishee pay all or part of what was required.

11. An order deciding who is entitled to the costs of the garnishment hearing and setting the amount of the costs.

CHANGING GARNISHMENT AT OTHER TIMES

(20) The court may also use the powers listed in subrule (19), on motion or on its own initiative, even if the notice of garnishment was issued by another court,

(a) on a motion under section 7 of the Wages Act;
(b) if the court replaces a temporary payment order with a final payment order;
(c) if the court indexes or changes a payment order; or
(d) if the court allows an appeal.

CHANGING GARNISHMENT WHEN ABILITY TO PAY CHANGES

(21) If there has been a material change in the payor's circumstances affecting the payor's ability to pay, the court may, on motion, use the powers listed in subrule (19).

GARNISHEE'S PAYMENT PAYS DEBT

(22) Payment of a debt by a garnishee under a notice of garnishment or statutory declaration of indexed support pays off the debt between the garnishee and the payor to the extent of the payment.

NOTICE BY GARNISHEE -- PAYOR NOT WORKING OR RECEIVING MONEY

(23) Within 10 days after a payor stops working for or is no longer receiving any money from a garnishee, the garnishee shall send a notice as subrule (27) requires,

(a) saying that the payor is no longer working for or is no longer receiving any money from the garnishee;
(b) giving the date on which the payor stopped working for or receiving money from the garnishee and the date of the last payment to the payor from the garnishee; and
(c) giving the name and address of any other income source of the payor, if known.

NOTICE BY GARNISHEE -- PAYOR WORKING OR RECEIVING MONEY AGAIN

(24) Within 10 days after the payor returns to work for or starts to receive money again from the garnishee, the garnishee shall send another notice as subrule (27) requires, saying that the payor has returned to work for or started to receive money again from the garnishee.

NOTICE BY PAYOR -- WORKING OR RECEIVING MONEY AGAIN

(25) Within 10 days after returning to work for or starting to receive money again from the garnishee, the payor shall send a notice as subrule (27) requires, saying that the payor has returned to work for or started to receive money again from the garnishee.

NOTICE BY PAYOR -- NEW INCOME SOURCE

(26) Within 10 days after starting to work for or receive money from a new income source, the payor shall send a notice as subrule (27) requires, saying that the payor has started to work for or to receive money from the new income source.

NOTICE SENT TO CLERK AND RECIPIENT OR DIRECTOR

(27) A notice referred to in subrule (23), (24), (25) or (26) shall be sent to the clerk, and to the recipient or the Director (depending on who is enforcing the order), by mail, fax or electronic mail.

NOTICE BY CLERK

(28) When the clerk receives a notice under subrule (26), the clerk shall immediately notify the recipient or the Director (depending on who is enforcing the order) by mail, fax or electronic mail.

NEW NOTICE OF GARNISHMENT

(29) If no written objection is received within 10 days, the clerk shall,

(a) issue a new notice of garnishment directed to the new garnishee, requiring the same deductions as were required to be made, under the previous notice of garnishment or statutory declaration of indexed support, on the day that the notice under subrule (26) was received; and
(b) send a copy of the new notice of garnishment to the payor and the new garnishee, by mail, fax or electronic mail.

EFFECT OF NEW NOTICE OF GARNISHMENT

(30) Issuing a new notice of garnishment under clause (29)(a) does not cancel any previous notice of garnishment or statutory declaration of indexed support.

NOTICE TO STOP GARNISHMENT

(31) The recipient shall immediately mail a notice to stop garnishment (Form 29I) to the garnishee and payor and file it with the clerk if,

(a) the recipient no longer wants to enforce the order by garnishment; or
(b) the requirement to make periodic payments under the order has

ended and all other amounts owing under the order have been paid.

OLD ORDERS

(32) This rule applies, with necessary changes, to,

(a) an attachment order made under section 30 of the Family Law Reform Act (chapter 152 of the Revised Statutes of Ontario, 1980); and
(b) a garnishment order issued by the court under the rules that were in effect before January 1, 1985.

RULE 30: DEFAULT HEARING

ISSUING NOTICE OF DEFAULT HEARING

30. (1) The clerk shall issue a notice of default hearing (Form 30),

(a) if the support order is being enforced by the recipient, when the recipient files a request for a default hearing (Form 30A) and a statement of money owed (subrule 26 (5));
(b) if it is being enforced by the Director, when the Director files a statement of money owed.

SERVING NOTICE OF DEFAULT HEARING

(2) The notice of default hearing shall be served on the payor by special service (subrule 6 (3)) and filed.

PAYOR'S DISPUTE

(3) Within 10 days after being served with the notice, the payor shall serve on the recipient and file,

(a) a financial statement (Form 13); and
(b) a default dispute (Form 30B).

UPDATING STATEMENT OF MONEY OWED

(4) The recipient shall serve and file a new statement of money owed (subrule 26(5)) not more than seven days before the default hearing.

WHEN DIRECTOR TO UPDATE STATEMENT

(5) Despite subrule 26(10), subrule (4) applies to the Director only if,

(a) the amount the Director is asking the court to enforce is greater than the amount shown in the notice of default hearing; or
(b) the court directs it.

STATEMENT OF MONEY OWED PRESUMED CORRECT

(6) The payor is presumed to admit that the recipient's statement of money owed is correct, unless the payor has filed a default dispute stating that the statement of money owed is not correct and giving detailed reasons.

ARREARS ENFORCEABLE TO DATE OF HEARING

(7) At the default hearing, the court may decide and enforce the amount owing as of the date of the hearing.

CONDITIONAL IMPRISONMENT

(8) The court may make an order under clause 41(9)(g) or (h) of the Family Responsibility and Support Arrears Enforcement Act, 1996, suspending the payor's imprisonment on appropriate conditions.

ISSUING WARRANT OF COMMITTAL

(9) If the recipient, on a motion with special service (subrule 6(3)) on the payor, states by affidavit (or by oral evidence, with the court's permission) that the payor has not obeyed a condition that was imposed under subrule (8), the court may issue a warrant of committal against the payor, subject to subsection 41(13) (variation of order) of the Family Responsibility and Support Arrears Enforcement Act, 1996.

RULE 31: CONTEMPT OF COURT

WHEN CONTEMPT MOTION AVAILABLE

31. (1) An order, other than a payment order, may be enforced by a contempt motion made in the case in which the order was made, even if another penalty is available.

NOTICE OF CONTEMPT MOTION

(2) The notice of contempt motion (Form 31) shall be served together with a supporting affidavit, by special service as provided in clause 6(3)(a), unless the court orders otherwise.

AFFIDAVIT FOR CONTEMPT MOTION

(3) The supporting affidavit may contain statements of information that the person signing the affidavit learned from someone else, but only if the requirements of subrule 14(19) are satisfied.

WARRANT TO BRING TO COURT

(4) To bring before the court a person against whom a contempt motion is made, the court may issue a warrant for the person's arrest if,

(a) the person's attendance is necessary in the interest of justice; and
(b) the person is not likely to attend voluntarily.

CONTEMPT ORDERS

(5) If the court finds a person in contempt of the court, it may order that the person,

(a) be imprisoned for any period and on any conditions that are just;
(b) pay a fine in any amount that is appropriate;
(c) pay an amount to a party as a penalty;
(d) do anything else that the court decides is appropriate;
(e) not do what the court forbids;
(f) pay costs in an amount decided by the court; and
(g) obey any other order.

WRIT OF TEMPORARY SEIZURE

(6) The court may also give permission to issue a writ of temporary seizure (Form 28C) against the person's property.

LIMITED IMPRISONMENT OR FINE

(7) In a contempt order under one of the following provisions, the period of imprisonment and the amount of a fine may not be greater than the relevant Act allows:

1. Section 38 of the Children's Law Reform Act.
2. Section 49 of the Family Law Act.
3. Section 53 of the Family Responsibility and Support Arrears Enforcement Act, 1996.

CONDITIONAL IMPRISONMENT OR FINE

(8) A contempt order for imprisonment or for the payment of a fine may be suspended on appropriate conditions.

ISSUING WARRANT OF COMMITTAL

(9) If a party, on a motion with special service (subrule 6(3)) on the person in contempt, states by an affidavit in Form 32C (or by oral evidence, with the court's permission) that the person has not obeyed a condition imposed under subrule (8), the court may issue a warrant of committal against the person.

PAYMENT OF FINE

(10) A contempt order for the payment of a fine shall require the person in contempt to pay the fine,

(a) in a single payment, immediately or before a date that the court chooses; or
(b) in instalments, over a period of time that the court considers appropriate.

CORPORATION IN CONTEMPT

(11) If a corporation is found in contempt, the court may also make an order under subrule (5), (6) or (7) against any officer or director of the corporation.

CHANGE IN CONTEMPT ORDER

(12) The court may, on motion, change an order under this rule, give directions and make any other order that is just.

RULE 32: BONDS, RECOGNIZANCES AND WARRANTS

WARRANT TO BRING A PERSON TO COURT

32. (1) If a person does not come to court after being served with notice of a case, enforcement or motion that may result in an order requiring the person to post a bond,

(a) the court may issue a warrant for the person's arrest, to bring the person before the court, and adjourn the case to await the person's arrival; or
(b) the court may,

(i) hear and decide the case in the person's absence and, if appropriate, make an order requiring the person to post a bond, and

(ii)if the person has been served with the order and does not post the bond by the date set out in the order, issue a warrant for the person's arrest, on motion without notice, to bring the person before the court.

FORM OF BOND AND OTHER REQUIREMENTS

(2) A bond shall be in Form 32, does not need a seal, and shall,

(a) have at least one surety, unless the court orders otherwise;
(b) list the conditions that the court considers appropriate;
(c) set out an amount of money to be forfeited if the conditions are not obeyed;
(d) shall require the person posting the bond to deposit the money with the clerk immediately, unless the court orders otherwise; and
(e) name the person to whom any forfeited money is to be paid out.

PERSON BEFORE WHOM RECOGNIZANCE TO BE ENTERED INTO

(3) A recognizance shall be entered into before a judge, a justice of the peace or the clerk.

CHANGE OF CONDITIONS IN A BOND

(4) The court may, on motion, change any condition in a bond if there has been a material change in a party's circumstances since the date of the order for posting the bond or the date of an order under this subrule, whichever is more recent.

CHANGE IN BOND UNDER CHILDREN'S LAW REFORM ACT

(5) In the case of a bond under the Children's Law Reform Act, subrule (4) also applies to a material change in circumstances that affects or is likely to affect the best interests of the child.

REMOVAL OR REPLACEMENT OF SURETY

(6) The court may, on motion, order that a surety be removed or be replaced by another person as surety, in which case as soon as the order is made, the surety who is removed or replaced is free from any obligation under the bond.

MOTION TO ENFORCE BOND

(7) A person requesting the court's permission to enforce a bond under subsection 143(1) (enforcement of recognizance or bond) of the Courts of Justice Act shall serve a notice of forfeiture motion (Form 32A), with a copy of the bond attached, on the person said to have broken the bond and on each surety.

FORFEITURE IF NO DEPOSIT MADE

(8) If an order of forfeiture of a bond is made and no deposit was required, or a deposit was required but was not made, the order shall require the payor or surety to pay the required amount to the person to whom the bond is payable,

(a) in a single payment, immediately or before a date that the court chooses; or
(b) in instalments, over a period of time that the court considers appropriate.

CHANGE IN PAYMENT SCHEDULE

(9) If time is allowed for payment under subrule (8), the court may, on a later motion by the payor or a surety, allow further time for payment.

ORDER FOR FORFEITURE OF DEPOSIT

(10) If an order of forfeiture of a bond is made and a deposit was required and was made, the order shall direct the clerk to pay the required amount immediately to the person to whom the bond is made payable.

CANCELLING BOND

(11) The court may, on motion, make an order under subrule (4), or an order cancelling the bond and directing a refund of all or part of the deposit, if,

(a) a payor or surety made a deposit under the bond;
(b) the conditions of the bond have not been broken; and
(c) the conditions have expired or, although they have not expired or do not have an expiry date, the payor or surety has good reasons for getting the conditions of the bond changed.

FORM OF WARRANT FOR ARREST

(12) A warrant for arrest issued against any of the following shall be in Form 32B:

1. A payor who does not file a financial statement ordered under subsection 40(4) of the Family Responsibility and Support Arrears Enforcement Act, 1996 or under these rules.
2. A payor who does not come to a default hearing under section 41 of the Family Responsibility and Support Arrears Enforcement Act, 1996.
3. An absconding respondent under subsection 43(1) or 59(2) of the Family Law Act.
4. An absconding payor under subsection 49(1) of the Family Responsibility and Support Arrears Enforcement Act, 1996.
5. A witness who does not come to court or remain in attendance as

required by a summons to witness.

6. A person who does not come to court in a case that may result in an order requiring the person to post a bond under these rules.
7. A person who does not obey an order requiring the person to post a bond under these rules.
8. A person against whom a contempt motion is made.
9. Any other person liable to arrest under an order.
10. Any other person liable to arrest for committing an offence.

BAIL ON ARREST

(13) Section 150 (interim release by justice of the peace) of the Provincial Offences Act applies, with necessary changes, to an arrest made under a warrant mentioned in paragraph 1, 2, 3 or 4 of subrule (12).

AFFIDAVIT FOR WARRANT OF COMMITTAL

(14) An affidavit in support of a motion for a warrant of committal shall be in Form 32C.

FORM OF WARRANT OF COMMITTAL

(15) A warrant of committal issued to enforce an order of imprisonment shall be in Form 32D.

RULE 33: CHILD PROTECTION

TIMETABLE

33. (1) Every child protection case, including a status review application, is governed by the following timetable:

Step in the case	Maximum time for completion, from start of case
First hearing, if child has been apprehended	5 days
Temporary care and custody hearing	25 days
Service and filing of plan of care or supervision	33 days
Case conference	40 days
Settlement conference	80 days
Protection hearing	120 days

CASE MANAGEMENT JUDGE

(2) Wherever possible, at the start of the case a judge shall be assigned to manage it and monitor its progress.

COURT MAY LENGTHEN TIMES ONLY IN BEST INTERESTS OF CHILD

(3) The court may lengthen a time shown in the timetable only if the best interests of the child require it.

PARTIES MAY NOT LENGTHEN TIMES

(4) The parties may not lengthen a time shown in the timetable by consent under subrule 3(6).

PLAN OF CARE OR SUPERVISION TO BE SERVED

(5) A party who wants the court to consider a plan of care or supervision shall serve it on the other parties and file it not later than seven days before the case conference, even if that is sooner than the timetable would require.

TEMPORARY CARE AND CUSTODY HEARING -- AFFIDAVIT EVIDENCE

(6) The evidence at a temporary care and custody hearing shall be given by affidavit, unless the court orders otherwise.

FORMS FOR CHILD PROTECTION CASES

(7) In a child protection case,

- (a) an information for a warrant to apprehend a child shall be in Form 33;
- (b) a warrant to apprehend a child shall be in Form 33A;
- (c) a plan of care for a child shall be in Form 33B;
- (d) an agreed statement of facts in a child protection case shall be in Form 33C; and
- (e) an agreed statement of facts in a status review application shall be in Form 33D.

FORMS FOR SECURE TREATMENT CASES

(8) In an application under Part VI (secure treatment) of the Child and Family Services Act, a consent signed by the child shall be in Form 33E and a consent signed by any other person shall be in Form 33F.

RULE 34: ADOPTION

CFSA DEFINITIONS APPLY

34. (1) The definitions in the Child and Family Services Act apply to this rule and, in particular,

"Director" means a Director within the meaning of the Act.

MEANING OF "ACT"

(2) In this rule,

"Act" means the Child and Family Services Act.

CERTIFIED COPY OF ORDER FROM OUTSIDE ONTARIO

(3) When this rule requires a copy of an order to be filed and the order in question was made outside Ontario, it shall be a copy that is certified by an official of the court or other authority that made it.

MATERIAL TO BE FILED WITH ADOPTION APPLICATIONS

(4) The following shall be filed with every application for an adoption:

1. A certified copy of the statement of live birth of the child, or an equivalent that satisfies the court.
2. If required, the child's consent to adoption (Form 34) or a notice of motion and supporting affidavit for an order under subsection 137(9) of the Act dispensing with the child's consent.
3. If the child is not a Crown ward, an affidavit of parentage (Form 34A) or any other evidence about parentage that the court requires from the child's parent, the person giving the child up for adoption, or a person named by the court.
4. If the applicant has a spouse who has not joined in the application, a consent to the child's adoption by the spouse (Form 34B).
5. If required by the Act or by an order, a Director's or local director's statement on adoption (Form 34C) under subsection 149(1) or (6) of the Act.
6. An affidavit signed by the applicant (Form 34D) that includes details about the applicant's education, employment, health, background and ability to support and care for the child, a history of the relationship between the parent and the child and any other evidence relating to the best interests of the child, and states whether the child is an Indian or a native person.

REPORT OF CHILD'S ADJUSTMENT

(5) A report under subsection 149(5) or (6) of the Act of the child's adjustment in the applicant's home shall also be filed with the application if the child is under 16 years of

age, or is 16 years of age or older but has not withdrawn from parental control and has not married.

ADDITIONAL MATERIAL -- CROWN WARD

(6) If the child is a Crown ward, the following shall also be filed with the application:

1. A Director's consent to adoption (Form 34E).
2. A copy of any order under subsection 58(1) of the Act ending access to the child.
3. A copy of the order of Crown wardship.
4. Proof of service of the orders referred to in paragraphs 2 and 3, or a copy of any order dispensing with service.
5. An affidavit, signed by a person delegated by the local director of the children's aid society that has placed the child for adoption, stating that there is no appeal in progress from an order referred to in paragraph 2 or 3, or that the appeal period has expired without an appeal being filed, or that an appeal was filed but has been withdrawn or finally dismissed.

ADDITIONAL MATERIAL -- CHILD NOT CROWN WARD

(7) If the child is not a Crown ward and is placed for adoption by a licensee or children's aid society, the following shall also be filed with the application:

1. A copy of any custody or access order that is in force and is known to the person placing the child, or to an applicant.
2. Proof of service of the order referred to in paragraph 1, or a copy of any order dispensing with service.
3. A consent to adoption (Form 34F) under section 137 of the Act from every person, other than the applicant, who is a parent or who has lawful custody or control of the child and of whom the person placing the child or an applicant is aware. Each person's consent may be replaced by a copy of an order under section 137 dispensing with the consent.
4. An affidavit (Form 34G) signed by the licensee or by an authorized employee of the children's aid society (depending on who is placing the child).
5. If the child is placed by a licensee, a copy of the licensee's licence to make the placement at the time of placing the child for adoption.

ADDITIONAL MATERIAL -- RELATIVE OR STEP-PARENT

(8) If the applicant is the child's relative or the spouse of the child's parent, an affidavit from each applicant (Form 34H) shall also be filed with the application.

STEP-PARENT ADOPTION NOT JOINT APPLICATION

(9) An application by the spouse of the child's parent shall not be made jointly with the parent, but shall be accompanied by the parent's consent (Form 34I).

INDEPENDENT LEGAL ADVICE, CHILD'S CONSENT

(10) The consent of a child to be adopted shall be witnessed by a representative of the Children's Lawyer, who shall complete the affidavit of execution and independent legal advice (Form 34J).

INDEPENDENT LEGAL ADVICE, CONSENT OF PARENT UNDER 18

(11) Subrule (10) also applies to the consent of a person under the age of 18 years who is a parent or other person with legal custody or control of the child to be adopted.

INDEPENDENT LEGAL ADVICE, ADULT PARENT'S CONSENT

(12) The consent of an adult parent or other person with legal custody or control of the child to be adopted shall be witnessed by an independent lawyer, who shall complete the affidavit of execution and independent legal advice.

COPY OF CONSENT FOR PERSON SIGNING

(13) A person who signs a consent to an adoption shall be given a copy of the consent and of the affidavit of execution and independent legal advice.

MOTION TO WITHDRAW CONSENT

(14) Despite subrule 5(4) (place for steps other than enforcement), a motion to withdraw a consent to an adoption shall be made in,

(a) the municipality where the person who gave the consent lives; or
(b) in any other place that the court decides.

CLERK TO CHECK ADOPTION APPLICATION

(15) Before the application is presented to a judge, the clerk shall,

(a) review the application and other documents filed to see whether they are in order; and
(b) prepare a certificate (Form 34K).

RULE 35: CHANGE OF NAME

TIME FOR APPLICATION

35. (1) An application under subsection 7(3) (application to court for change of name) of the Change of Name Act shall be made within 30 days after the applicant is notified that the Registrar General has refused to make the requested change of name.

SERVICE ON THE REGISTRAR GENERAL

(2) The applicant shall serve the application and any supporting material on the Registrar General by delivering or mailing a copy of the documents to the Deputy Registrar General.

REGISTRAR GENERAL'S REASONS FOR REFUSAL

(3) Within 15 days after being served under subrule (2), the Registrar General may file reasons for refusing to make the requested change of name.

RULE 36: DIVORCE

APPLICATION FOR DIVORCE

36. (1) Either spouse may start a divorce case by,

(a) filing an application naming the other spouse as a respondent; or
(b) filing a joint application with no respondent.

JOINT APPLICATION

(2) In a joint application, the divorce and any other order sought shall be made only with the consent of both spouses.

ALLEGATION OF ADULTERY

(3) In an application for divorce claiming that the other spouse committed adultery with another person, that person does not need to be named, but if named, shall be served with the application and has all the rights of a respondent in the case.

MARRIAGE CERTIFICATE AND CENTRAL DIVORCE REGISTRY CERTIFICATE

(4) The court shall not grant a divorce until the following have been filed:

1. A marriage certificate or marriage registration certificate, unless the application states that it is impractical to obtain a certificate and explains why.
2. A report on earlier divorce cases started by either spouse, issued under the Central Registry of Divorce Proceedings Regulations (Canada).

DIVORCE BASED ON AFFIDAVIT EVIDENCE

(5) If the respondent files no answer, or files one and later withdraws it, the applicant shall file an affidavit (Form 36) that,

(a) confirms that all the information in the application is correct, except as stated in the affidavit;
(b) if no marriage certificate or marriage registration certificate has been filed, provides sufficient information to prove the marriage;
(c) contains proof of any previous divorce or the death of a party's previous spouse, unless the marriage took place in Canada;
(d) contains the information about arrangements for support of any children of the marriage required by paragraph 11(1)(b) of the Divorce Act (Canada), and attaches as exhibits the income and financial information required by section 21 of the child support guidelines; and
(e) contains any other information necessary for the court to grant the divorce.

DRAFT DIVORCE ORDER

(6) The applicant shall file with the affidavit,

(a) three copies of a draft divorce order (Form 25A);
(b) a stamped envelope addressed to each party; and
(c) if the divorce order is to contain a support order,

(i) an extra copy of the draft divorce order for the clerk to file with the Director of the Family Responsibility Office, and
(ii)two copies of a draft support deduction order.

CLERK TO PRESENT PAPERS TO JUDGE

(7) When the documents mentioned in subrules (4) to (6) have been filed, the clerk shall prepare a certificate (Form 36A) and present the documents to a judge, who may,

(a) grant the divorce as set out in the draft order;
(b) have the clerk return the documents to the applicant to make any needed corrections; or
(c) grant the divorce but make changes to the draft order, or refuse to grant the divorce, after giving the applicant a chance to file an additional affidavit or come to court to explain why the order should be made without change.

DIVORCE CERTIFICATE

(8) When a divorce takes effect, the clerk shall, on either party's request,

(a) check the continuing record to verify that,

(i) no appeal has been taken from the divorce order, or any appeal from it has been disposed of, and
(ii)no order has been made extending the time for an appeal, or any extended time has expired without an appeal; and

(b) if satisfied of those matters, issue a divorce certificate (Form 36B) and mail it to the parties, unless the court orders otherwise.

REGISTRATION OF ORDERS MADE OUTSIDE ONTARIO

(9) If a court outside Ontario has made an order for support, custody or access under the Divorce Act (Canada), a person who wants it registered for enforcement in Ontario under paragraph 20(3)(a) of that Act shall mail a certified copy of the order to the clerk at the office of the Superior Court of Justice in a municipality where the order may be enforced under subrule 5(6).

RULE 37: RECIPROCAL ENFORCEMENT OF SUPPORT ORDERS

DEFINITIONS

37. (1) In this rule,

"confirming court" means,

(a) in the case of an order under section 19 of the Divorce Act (Canada), the court in Ontario or another province or territory of Canada that has jurisdiction to confirm a provisional variation of the order,
(b) for the purpose of section 44 of the Family Law Act,

(i) the Ontario Court of Justice sitting in the municipality where the respondent resides, or
(ii)the Family Court of the Superior Court of Justice, if the respondent resides in an area where that court has jurisdiction, or

(c) for the purpose of the Reciprocal Enforcement of Support Orders Act and any similar Act in a reciprocating state, the court in Ontario or a reciprocating state having jurisdiction to confirm a provisional order under that Act; ("tribunal d'homologation")

"final order" has the same meaning as in the Reciprocal Enforcement of Support Orders Act; ("ordonnance définitive")
"originating court" means,

(a) in the case of an order under section 18 of the Divorce Act (Canada), the court in Ontario or another province or territory of Canada that has jurisdiction under section 5 of that Act to deal with an application for a provisional variation of the order,
(b) for the purpose of section 44 of the Family Law Act,

(i) the Ontario Court of Justice sitting in the municipality where the provisional order is made, or
(ii)the Family Court of the Superior Court of Justice when it makes the provisional order, or

(c) for the purpose of the Reciprocal Enforcement of Support Orders Act and any similar Act in a reciprocating state, the court in Ontario or a reciprocating state having jurisdiction to deal with an application for a provisional order under that Act; ("tribunal d'origine")

"reciprocating state" has the same meaning as in the Reciprocal Enforcement of Support Orders Act. ("État accordant la réciprocité")

DOCUMENTS TO BE SENT TO CONFIRMING COURT

(2) When the court makes a provisional order under section 18 of the Divorce Act (Canada), section 44 of the Family Law Act or section 3 of the Reciprocal Enforcement of Support Orders Act, the clerk shall send three certified copies of the following to the confirming court (if it is in Ontario) or to the Attorney General to be sent to the confirming court (if it is outside Ontario):

1. The application.
2. The applicant's financial statement.
3. The applicant's evidence and, if reasonably possible, the exhibits.
4. The provisional order.
5. A statement giving any information about the respondent's identification, whereabouts, income, assets and liabilities.
6. If the confirming court is in a reciprocating state, a copy of the relevant provisions of the Family Law Act and of the Reciprocal Enforcement of Support Orders Act.
7. If the confirming court is in another municipality in Ontario, proof that the application was served on the respondent.

NO FINANCIAL STATEMENT FROM FOREIGN APPLICANT

(3) When a confirming court in Ontario receives a provisional order made outside Ontario, the applicant does not have to file a financial statement.

NOTICE OF CONFIRMATION HEARING

(4) A clerk of a confirming court in Ontario who receives a provisional order shall,

(a) serve a notice of confirmation hearing (Form 37) and a copy of the documents sent by the originating court on the respondent, by special service (subrule 6(3)); and
(b) mail a notice of confirmation hearing and an information sheet (Form 37A) to the applicant and to the clerk of the originating court.

RESPONDENT'S FINANCIAL STATEMENT

(5) A respondent at a confirmation hearing under section 19 of the Divorce Act (Canada) or under section 5 of the Reciprocal Enforcement of Support Orders Act shall serve and file a financial statement (Form 13) within 10 days after service of the notice of confirmation hearing.

REQUEST FOR MORE EVIDENCE

(6) A clerk of an originating court in Ontario who receives a request for more evidence from the confirming court shall mail to the applicant a notice for taking more evidence (Form 37B) and a copy of the documents sent by the confirming court.

MATERIAL TO ACCOMPANY REQUEST FOR MORE EVIDENCE

(7) If a confirming court sends a case back to the originating court for more evidence, the clerk shall send to the originating court two certified copies of the evidence taken in the confirming court.

CONTINUING THE CONFIRMATION HEARING

(8) The clerk of a confirming court who receives more evidence from the originating court shall serve the respondent with a notice of continuation of confirmation hearing (Form 37C) and a copy of the documents sent by the originating court.

NOTICE OF REGISTRATION OF EXTRA-PROVINCIAL ORDER

(9) A notice of registration of a final order from a reciprocating state under subsection 2(2) of the Reciprocal Enforcement of Support Orders Act shall be in Form 37D.

TURNING AN ONTARIO ORDER INTO A REGISTERED ORDER

(10) A clerk who receives a request under subsection 2(3) of the Reciprocal Enforcement of Support Orders Act,

(a) shall provide a certificate that,

(i) gives the date of registration, which shall be the date that the request is received, and
(ii)says that the final order mentioned in the request is effective from that date as a registered order for all purposes of that Act; and

(b) shall add the request and a copy of the certificate to the continuing record.

RULE 38: APPEALS

APPEALS GOVERNED BY THIS RULE

38. (1) This rule applies to appeals under the following:

Section 48 of the Family Law Act

Section 73 of the Children's Law Reform Act

Section 69 or 156 of the Child and Family Services Act

Section 11 of the Change of Name Act

Section 40 of the Courts of Justice Act

APPEAL TO SUPERIOR COURT OF JUSTICE -- TIME, SERVICE AND FILING OF NOTICE

(2) To start an appeal from the Ontario Court of Justice to the Superior Court of Justice under any of the provisions listed in subrule (1), a party shall,

(a) within 30 days after the date of the order being appealed, serve a notice of appeal (Form 38), by regular service (subrule 6(2)), on,

(i) every other party affected by the appeal or entitled to appeal,
(ii) the clerk of the court in the place where the order was made, and
(iii) in an appeal under section 69 of the Child and Family Services Act, every other person entitled to notice under subsection 39(3) of that Act who appeared at the hearing; and

(b) within 10 days after serving the notice under clause (a), file it.

NAME OF CASE UNCHANGED

(3) The name of a case in an appeal shall be the same as the name of the case in the order being appealed, and shall also identify the parties as appellant and respondent.

GROUNDS STATED IN NOTICE OF APPEAL

(4) The notice of appeal shall state the order that the appellant wants the appeal court to make and the legal grounds for the appeal.

OTHER GROUNDS

(5) At the hearing of the appeal, no grounds other than the ones stated in the notice of appeal may be argued unless the court gives permission.

APPEAL RECORD AND APPELLANT'S FACTUM

(6) The appellant shall, not later than 10 days before the hearing of the appeal, serve on the respondent and file an appeal record (subrule (7)) and an appellant's factum (subrule (8)).

CONTENTS OF APPEAL RECORD

(7) The appeal record shall contain a copy of the following documents, in the following order:

1. A table of contents describing each document, including each exhibit, by its nature and date and, for an exhibit, by exhibit number or letter.
2. The notice of appeal.
3. The order being appealed, as signed, and any reasons given by the court appealed from, as well as a further printed copy of the reasons if they are handwritten.
4. A transcript of the oral evidence (which the parties to the appeal may agree to limit to the portions necessary for the appeal).
5. Any other material that was before the court appealed from and that is necessary for the appeal.

CONTENTS OF APPELLANT'S FACTUM

(8) The appellant's factum shall be not more than 30 pages long, shall be signed by the appellant's lawyer or, if none, by the appellant and shall consist of the following parts,

containing paragraphs numbered consecutively from the beginning to the end of the factum:

1. Part 1: Identification. A statement identifying the appellant and respondent and the court appealed from, and stating the result in that court.
2. Part 2: Overview. A brief overview of the case and the issues on the appeal.
3. Part 3: Facts. A brief summary of the facts relevant to the appeal, with reference to the evi-dence by page and line as necessary.
4. Part 4: Issues. A brief statement of each issue, followed by a brief argument referring to the law relating to that issue.
5. Part 5: Order. A precise statement of the order the appeal court is asked to make, including any order for costs.
6. Part 6: Time estimate. An estimate of how much time will be needed for the appellant's oral argument, not including reply to the respondent's argument.
7. Part 7: List of authorities. A list of all statutes, regulations, rules, cases and other authorities referred to in the factum.
8. Part 8: Legislation. A copy of all relevant provisions of statutes, regulations and rules.

RESPONDENT'S FACTUM AND APPEAL RECORD

(9) The respondent shall, not later than three days before the hearing of the appeal, serve on every other party to the appeal and file,

(a) a respondent's factum (subrule (10)); and
(b) if applicable, a respondent's appeal record containing a copy of any material that was before the court appealed from and is necessary for the appeal but is not included in the appellant's appeal record.

CONTENTS OF RESPONDENT'S FACTUM

(10) The respondent's factum shall be not more than 30 pages long, shall be signed by the respondent's lawyer or, if none, by the respondent and shall consist of the following parts, containing paragraphs numbered consecutively from the beginning to the end of the factum:

1. Part 1: Overview. A brief overview of the case and the issues on the appeal.
2. Part 2: Facts. A brief statement of the facts in the appellant's factum that the respondent accepts as correct and the facts that the respondent says are incorrect, and a brief summary of any additional facts relied on by the respondent, with reference to the evidence by page and line as necessary.

3. Part 3: Issues. A statement of the respondent's position on each issue raised by the appellant, followed by a brief argument referring to the law relating to that issue.
4. Part 4: Additional issues. A brief statement of each additional issue raised by the respondent, followed by a brief argument referring to the law relating to that issue.
5. Part 5: Order. A precise statement of the order the appeal court is asked to make, including any order for costs.
6. Part 6: Time estimate. An estimate of how much time will be needed for the respondent's oral argument.
7. Part 7: List of authorities. A list of all statutes, regulations, rules, cases and other authorities referred to in the factum.
8. Part 8: Legislation. A copy of all relevant provisions of statutes, regulations and rules not included in the appellant's factum.

PROMPT HEARING OF CFSA APPEALS

(11) An appeal under the Child and Family Services Act shall be heard within 30 days after the appellant's factum and appeal record are filed.

APPEALS UNDER CFSA FROM FAMILY COURT TO DIVISIONAL COURT

(12) Subrules (2) to (11) apply, with necessary changes, to an appeal under the Child and Family Services Act from the Family Court of the Superior Court of Justice to the Divisional Court.

MOTION FOR PERMISSION TO APPEAL TEMPORARY ORDER TO DIVISIONAL COURT

(13) On a motion for permission to appeal a temporary order to the Divisional Court under clause 19(1)(b) of the Courts of Justice Act, the following apply:

1. A motion made in Toronto shall be heard by a judge of the Divisional Court (other than the one who made the order to be appealed). A motion made anywhere else may be heard by any judge other than the one who made the order to be appealed.
2. The notice of motion shall be served and filed within 30 days after the date of the order to be appealed.
3. Permission to appeal shall not be given unless,

    i. there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal, or there appears to the judge hearing the motion good reason to doubt the correctness of the order in question, and
    ii. in the judge's opinion, permission to appeal should be granted.

4. The party asking for permission to appeal shall, when filing the notice of motion, request that the continuing record be sent to the judge hearing the motion.
5. Each party shall serve a factum as described in subrule (8) (appellant's factum) and file it not later than 2 p.m. on the day before the motion is heard.
6. The party asking for permission to appeal shall file a confirmation form (Form 14C) not later than 2 p.m. on the day before the motion is heard.
7. The judge shall give brief written reasons if permission to appeal is given.
8. The appellant shall serve and file the notice of appeal within seven days after permission is given.
9. The appeal is governed by the Rules of Civil Procedure and these rules do not apply.

RULE 39: CASE MANAGEMENT IN FAMILY COURT OF SUPERIOR COURT OF JUSTICE

CASE MANAGEMENT IN CERTAIN AREAS ONLY

39. (1) This rule applies only to cases in the Family Court of the Superior Court of Justice, which has jurisdiction in the municipalities listed in subrule 1(3).

ENFORCEMENT AND CHILD PROTECTION EXCLUDED

(2) This rule does not apply to enforcements or to child protection cases.

PARTIES MAY NOT LENGTHEN TIMES

(3) A time set out in this rule may be lengthened only by order of the case management judge and not by the parties' consent under subrule 3(6).

FAST TRACK

(4) Applications to which this rule applies, except the ones mentioned in subrule (7), and motions to change a final order or agreement are fast track cases (subrules (5) and (6)).

FAST TRACK -- FIRST COURT DATE

(5) In a fast track case, the clerk shall, on or before the first court date,

(a) confirm that all necessary documents have been served and filed;
(b) refer the parties to sources of information about the court process, alternatives to court (including mediation), the effects of separation and divorce on children and community resources that may help the

parties and their children;

(c) if no answer has been filed in response to an application, or if no affidavit has been filed in response to a motion to change a final order or agreement, send the case to a judge for a decision on the basis of affidavit evidence; and

(d) if an answer has been filed in response to an application, or if an affidavit has been filed in response to a motion to change a final order or agreement, confirm that the case is ready for a hearing, case conference or settlement conference and schedule it accordingly.

FAST TRACK -- CASE MANAGEMENT JUDGE ASSIGNED AT START

(6) In a fast track case, a case management judge shall be assigned by the first time the case comes before a judge.

STANDARD TRACK

(7) Applications in which the applicant makes a claim for a divorce or a property claim are standard track cases (subrule (8)).

FEATURES OF STANDARD TRACK

(8) In a standard track case,

(a) the clerk shall not set a court date when the application is filed;

(b) a case management judge shall be assigned when a case conference is scheduled or when a notice of motion is served before a case conference has been held (subrule 14(4), (5) or (6)), whichever comes first; and

(c) the clerk shall schedule a case conference on any party's request.

FUNCTIONS OF CASE MANAGEMENT JUDGE

(9) The case management judge assigned to a case,

(a) shall generally supervise its progress;

(b) shall conduct the case conference and the settlement conference;

(c) may schedule a case conference or settlement conference at any time, on the judge's own initiative;

(d) shall hear motions in the case, when available to hear motions; and

(e) may, on motion, set aside an order of the clerk under subrule (12).

SUBSTITUTE CASE MANAGEMENT JUDGE

(10) If the case management judge is, for any reason, unavailable to continue as the case management judge, another case management judge may be assigned for part or all of the case.

NOTICE, CASE NOT SCHEDULED FOR TRIAL AFTER 200 DAYS

(11) If a case has not been scheduled for trial within 200 days after it was started, the clerk shall serve a notice (Form 39) on the parties by mail, fax or electronic mail saying that the case will be dismissed without further notice unless one of the parties, within 30 days after the notice is served,

(a) files an agreement signed by all parties and their lawyers, if any, for a final order disposing of all issues in the case, and a notice of motion for an order carrying out the agreement; or
(b) arranges a case conference or settlement conference for the first available date.

DISMISSAL AFTER NOTICE

(12) If the clerk serves a notice under subrule (11) and no party takes any of the steps set out in clauses (11)(a) and (b) within 30 days after the notice is served, the clerk shall prepare and sign an order dismissing the case, with no costs payable by any party.

SERVICE OF DISMISSAL ORDER BY CLERK

(13) The clerk shall serve the order on each party by mail, fax or electronic mail.

SERVICE OF DISMISSAL ORDER BY LAWYER ON CLIENT

(14) A lawyer who is served with a dismissal order on behalf of a client shall serve it on the client by mail, fax or electronic mail and file proof of service of the order.

TRANSITIONAL PROVISION

(15) If a case was started before these rules come into effect, but a party serves and files a document or requests a case conference after they come into effect,

(a) the clerk shall serve the notice (Form 39) mentioned in subrule (11) if the case has not been scheduled for trial within 200 days after it was started or within 90 days after the party files the document or requests the case conference, whichever comes later; and
(b) once the notice is served, this rule applies with necessary changes.

RULE 40: CASE MANAGEMENT IN ONTARIO COURT OF JUSTICE

CASE MANAGEMENT IN CERTAIN AREAS ONLY

40. (1) This rule applies only to cases in the Ontario Court of Justice.

ENFORCEMENT AND CHILD PROTECTION EXCLUDED

(2) This rule does not apply to enforcements or to child protection cases.

PARTIES MAY NOT LENGTHEN TIMES

(3) A time set out in this rule may be lengthened only by order and not by the parties' consent under subrule 3(6).

FIRST COURT DATE

(4) The clerk shall, on or before the first court date,

(a) confirm that all necessary documents have been served and filed;
(b) refer the parties to sources of information about the court process, alternatives to court (including mediation), the effects of separation and divorce on children and community resources that may help the parties and their children;
(c) if no answer has been filed in response to an application, or if no affidavit has been filed in response to a motion to change a final order or agreement, send the case to a judge for a decision on the basis of affidavit evidence; and
(d) if an answer has been filed in response to an application, or if an affidavit has been filed in response to a motion to change a final order or agreement, confirm that the case is ready for a hearing, case conference or settlement conference and schedule it accordingly.

NOTICE, CASE NOT SCHEDULED FOR TRIAL AFTER 200 DAYS

(5) If a case has not been scheduled for trial within 200 days after it was started, the clerk shall serve a notice (Form 39) on the parties by mail, fax or electronic mail saying that the case will be dismissed without further notice unless one of the parties, within 30 days after the notice is served,

(a) files an agreement signed by all parties and their lawyers, if any, for a final order disposing of all issues in the case, and a notice of motion for an order carrying out the agreement; or
(b) arranges a case conference or settlement conference for the first available date.

DISMISSAL AFTER NOTICE

(6) If the clerk serves a notice under subrule (5) and no party takes any of the steps set out in clauses (5)(a) and (b) within 30 days after the notice is served, the clerk shall prepare and sign an order dismissing the case, with no costs payable by any party.

SERVICE OF DISMISSAL ORDER BY CLERK

(7) The clerk shall serve the order on each party by mail, fax or electronic mail.

SERVICE OF DISMISSAL ORDER BY LAWYER ON CLIENT

(8) A lawyer who is served with a dismissal order on behalf of a client shall serve it on the client by mail, fax or electronic mail and file proof of service of the order.

JUDGE MAY SET CLERK'S ORDER ASIDE

(9) A judge may, on motion, set aside an order of the clerk under subrule (6).

TRANSITIONAL PROVISION

(10) If a case was started before these rules come into effect, but a party serves and files a document or requests a case conference after they come into effect,

(a) the clerk shall serve the notice (Form 39) mentioned in subrule (5) if the case has not been scheduled for trial within 200 days after it was started or within 90 days after the party files the document or requests the case conference, whichever comes later; and
(b) once the notice is served, subrules (5) to (9) apply with necessary changes.

RULES 41, 42 AND 43

CONSEQUENTIAL AMENDMENTS AND COMING INTO FORCE

41. Regulation 202 of the Revised Regulations of Ontario, 1990 and Ontario Regulations 72/92, 468/93, 282/95, 429/97, 215/98 and 294/98 are revoked.

42. Regulation 199 of the Revised Regulations of Ontario, 1990 and Ontario Regulations 705/91, 71/92, 467/93, 428/97, 216/98 and 293/98 are revoked.

43. This Regulation comes into force on September 15, 1999.

Syrtash Collection of Family Law Articles
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The Valuation of Employee Stock Options*

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* Posted by John Syrtash with permission of the author.

¶ 1 Corporate employers have traditionally seen them as a no cost way to motivate their senior executives. Some shareholders see them as a costly dilution of their shareholdings. For years, Warren Buffet has called them unrecorded business expenses. Now, the Financial Accounting Standards Board (FASB), who are in charge of setting accounting guidelines in the United States, seems to be coming on board with Mr. Buffet, and it is causing a stir in financial reporting circles in the United States. Time will tell if similar guidelines are introduced in Canada by our accounting standard setters.

¶ 2 What is this source of controversy? The culprit is none other than employee stock options. This article will discuss some general principles related to options and option pricing as well as valuation and reporting issues related to employee stock options.

General Principles of Options and Option Pricing

¶ 3 A stock option gives an investor the right, but not the obligation, to buy or sell a security for a specified price, called the exercise or "strike" price on or before a specified expiration date in the future. Options exercisable on or before the expiry date are known as "American style" options. These options are commonplace on most North American option exchanges. Options that are exercisable only on the expiry date are known as "European style" options. Options are often referred to "derivative securities", as their value is "derived" from the value of underlying securities.

¶ 4 There are two basic types of options that are traded: a "call" option and a put "option". The call option gives the holder the right to buy an underlying security at a certain price in the future. The put option gives the holder the right to sell an underlying security at a certain price in the future. Call options increase in value as the value of the underlying security increases. Conversely, put options decrease in value as the value of the underlying security increases.

¶ 5 Corporations issue stock on the open market in order to raise capital. Corporations do not issue stock options on the open market. Rather, buyers and sellers of options converge on organized options exchanges, a form of secondary market. The largest and

best known option exchange the Chicago Board Option Exchange which commenced trading call options in 1973). For every investor willing to purchase a call option, there must be an investor who is willing to "write a call option". When an investor "writes a call option", that investor receives a premium when the call option is sold for assuming the risk that he will be forced at some later date (on or before the expiry date, in the case of American style options) to sell the underlying security at a price below market value. In a similar fashion, for every investor who purchases a single put option, there is an investor somewhere who is willing to "write the put", that is, receive a premium now in exchange for the risk that he will be forced to purchase the stock at a higher price after it has declined in value.

¶ 6 Let's look at an example. A July 99 call option on Microsoft with an exercise price of $120 entitles its holder to purchase Microsoft stock for $120 at any time up to and including July of 1999 (typical options expire on the Saturday after the third Friday of the month, therefore the holder of July 99 options can exercise them up to and including Saturday, July 19, 1999. Since most exchanges close for weekends, for all practical purposes, options must be exercised by the third Friday of the month in the month that they expire). The holder of the call is not obligated to exercise the option, therefore if Microsoft shares do not rise above $120 before July 1999, the holder of the option simply allows it to expire. If Microsoft shares currently trade for $110, the holder can either sell the option itself, or wait to see if the Microsoft share price rises above $120.

¶ 7 If the price of Microsoft shares rises above $120, the option is referred to as being "in the money" and can be exercised by the holder. The option gives its holder the right to purchase a Microsoft share for $120 anytime prior to expiry, notwithstanding that it may be trading higher than $120. If Microsoft was trading at, say, $130, the holder could exercise the option and buy the share at $120, and immediately sell it for $130, making a $10 profit.

¶ 8 Why buy a stock option? Say you had a hunch that Microsoft would rise from $110 to $130 in the next six months. You could invest $11,000 to buy 100 shares, and if you're right, you would earn $2,000, or about 18% on your money. Not a bad return for six months. Now assume that instead, you purchase July 99 call options at $110 at a price $5 per option. You could purchase 100 options for only $500 and earn the same $2,000, a return of 400%! If the stock rose to $200, the share purchaser's return would be 80% while the option holder's return would be 1800%. As can be seen, the higher the increase in the stock price, the more the option holder's return increases in excess of the stockholder's return. Of course, if the price drops to $100, the stockholder loses 9% on his investment while the option holder loses 100% of his investment. There is no doubt that the option investor experiences more divergent swings. Options allow investors the opportunity to win big while not risking as much capital. Of course, the chance of losing 100% of your investment is much greater with options. Options are often purchased concurrently with their underlying shares to effect what stock traders call "hedging strategies". Hedging strategies refers to the combination of stock and options within a portfolio to decrease risk over holding either one on its own.

¶ 9 If Microsoft is trading at $130, would the option to purchase at $120 be worth $10 on an option market? The answer is generally "no", except on the expiry date. On the expiry date, the option provides the holder with the right to purchase a $130 stock for $120. Accordingly, it would be worth $10. On expiration, a call option is worth:

S - X where,
S = stock price and,
X = exercise price and,
S > X
or
nil where,
X < S

S - X is known as the option's "intrinsic value". However, a number of other factors contribute to the value of stock options. In general, the value of a stock option on a day other than the expiry date is typically higher than its intrinsic value.

¶ 10 What components affect the value of a call option? The most important, and perhaps most obvious component is the underlying security price. A call option tends to rise as the underlying security price rises and conversely falls as the underlying security price falls. In most instances, a small percentage increase in the underlying security price can lead to a larger percentage increase in the option price. Similarly, a small percentage decrease in the underlying security price can lead to a larger percentage decrease in the value of the option. Therefore, options themselves are volatile securities.

¶ 11 Another factor affecting the value of an option in the remaining time to expiry. Consider a call option that is not "in the money" i.e. the underlying security price is below the exercise price. Will the option price be zero? Even though immediate exercise is unprofitable, the call option retains some value due to the possibility of eventual increase in the value of the underlying security above the exercise price on or before the expiry date. The difference between the actual call option price and its intrinsic value is referred to as its "time value", primarily because its value is a function of the time remaining to the expiry date which will allow it to get "in the money". The longer the period of time remaining to expiry, the greater the opportunity for the underlying security price to rise above the exercise price. Accordingly, call option prices proportionately increase with the remaining time to expiry and decrease as the date approaches expiry. This makes intuitive sense since options tend to approach their intrinsic value as time approaches the expiry date.

¶ 12 Another factor affecting the value of options is the volatility of the underlying security. Options increase in value in relation to the volatility of underlying security prices. Consider two stocks, each with a value of $30. It may be that one can be expected to have a value next year of between $20 to $40 while the other could be anywhere from $10 to $50. The second stock is obviously more volatile, as its possible value range is wider. If you held a $30 call option on each, which would be more valuable? At the low end of value for each stock, each option will be valueless on expiry.

However, at the high end, the more volatile stock's option will have an intrinsic value of $20 ($50-$30) while the intrinsic value of the less volatile stock is $10 ($40 - $30). Ceteris paribus, volatility helps increase a call option's value. Investors should remember that this is diametrically opposed to regular investment philosophy where, ceteris paribus, investors prefer less volatility.

¶ 13 Another factor which affects the value of stock options is the current interest rate. This seems like an extraneous issue, but it is not. One advantage of a call option is that it allows an investor to hold an interest in potential stock gains without having to tie up as much money. Remember the Microsoft example from above. If the stock rose in value, both the shareholder and the option holder made money. The percentage increase was higher for the option holder, however because the option holder risked less money to purchase the call option compared to the shareholder who purchased the shares. At today's interest rates, the savings to the option holder may not appear that significant. However, if this was ten years ago, with higher interest rates, holding call options becomes that much more appealing. Accordingly, higher interest rates increase the value of options.

¶ 14 Interestingly, dividend payments, which generally please shareholders, have an adverse effect on the value of call options. Remember that the call option price decreases when the underlying security price decreases. If a corporation pays a dividend, it reduces corporate value. This is illustrated by the fact that shares tend to trade at a lower value once they are ex-dividend. Accordingly, high dividend payments result in lower payback of profits and a lesser likelihood of capital appreciation. Ceteris paribus, the higher the annual dividend payment on a stock, the lower the call option price. Stock dividends or stock splits, however, do not adversely affect option prices, as most options have built in features whereby, if the shares split two for one, the exercise price is split correspondingly.

Valuation and Reporting Issues Related to Employee Stock Options

¶ 15 Since employer corporations wish to focus employee goals on increasing share prices, call options are the option of choice for employee motivation.

¶ 16 Unlike publicly traded options, which typically have expiry dates up to two years from the time of issue, employee stock options are generally issued with much longer expiry dates. This helps to make the long term growth of the corporation's shares the goal of the employee. Employee stock options are issued with expiry dates anywhere from five to ten years from the date they are issued. As indicated earlier, the length of the exercise period is a factor in the determination of a stock option's value. An option which is not in the money and is close to its expiry date, will have very little value. Conversely, the value of an option that is not "in the money" but with a ten-year exercise period will surprise many people.

¶ 17 A publicly traded option is a liquid investment. Whether a publicly traded option is "in the money" or not, it has some value which can always be realized by selling it on

an option exchange. An employee stock option only has liquidity when it is "in the money" (that is, when it can be exercised and the stock immediately sold to realize its intrinsic value). When an employee stock option is not "in the money", notwithstanding that it has value to the owner who holds it, it is not transferable and therefore cannot be converted immediately to cash.

¶ 18 Many employee stock options are issued on the condition that the employee achieve certain goals which may include longevity with the employer (known as "vesting") as well as other thresholds. For example, an employee may be told that the 1,000 options to which he is entitled will only vest (i.e become exercisable) on the fifth anniversary of his employment. Accordingly, the risk of forfeiture during the vesting period effects the value of employee stock options. Forfeiture could be caused by termination of employment, death of the employee, or any number of other factors. As a result of these factors, the value of employee stock options differs from publicly traded options with similar exercise prices on the same underlying security.

¶ 19 When are employee stock options most often required to be valued? In October 1995, the FASB issued its statement entitled "Accounting for Stock Based Compensation". This pronouncement recommends that corporations account for the cost of stock options, based on the fair market value thereof on the date of issue. Prior to this pronouncement, Warren Buffet was one of the loudest proponents of accounting for the cost of stock options at the time they were issued. Recently, the FASB has indicated that they may soften their stance, and require that stock options only be valued when they vest with the employee, however, the debate in the United States rages on. The accounting standard setters in Canada have a habit of playing the waiting game before they make pronouncements on their own. Therefore, whatever is decided in the United States will no doubt have an impact in Canada.

¶ 20 While there is little doubt that stock options have value to employees as a form of compensation, the question arose as to how this should be reported. Originally, the FASB recommended that they be recorded as expenses at the time of issue since they are typically given in lieu of additional salary or bonuses. As an aside, this writer believes that since they represent no cost to the corporation and in fact represent a dilution of share value to other shareholders, they should be recorded as a reduction of shareholder's equity...but I digress. For whatever reason, rightly or wrongly, stock options will have to be valued for reporting in compliance with FASB recommendations in the United States.

¶ 21 Executives are continually seeking ways to improve their "bottom line". Over the years, stock options have proven to be useful tools. Prior to the FASB pronouncement, options were viewed as a "no cost" method of remuneration. The only cost was the dilution of the shares of outside shareholders, and, since the underlying security price had to rise to make the options worthwhile, why would an existing shareholder care about dilution if ultimately the process involved a share price increase? It was a classic case of the ends justifying the means.

¶ 22 As options become more commonplace, financial executives need to know how to value them in order to properly gauge employee remuneration. If an employer believes that a particular executive's compensation should be $150,000 per annum, it could reward the employee with a package consisting of salary, bonus and stock options, only the first two of which are easily quantifiable. Ergo, the need to understand and how to value options.

¶ 23 As a chartered business valuator, this writer has seen the growth and popularity of the issuance of employee stock options over the last few years. Surprisingly, the most common purpose for the valuation of options has been not for accounting requirements, nor for the proper measurement of employee compensation, but for the calculation of one party's net family property upon breakdown of marriage. Now that we understand what stock options are, why employee stock options differ from publicly traded stock options and why we need to value employee stock options, let us examine how these creatures are properly valued.

¶ 24 The most popular method of option valuation remains Black-Scholes method. In 1973, Fischer Black and Myron Scholes developed a formula, now referred to as the Black-Scholes formula where:

Co = SoN(d1) - Xe2rtN(d2), where

$$d1 = \frac{\ln(So/X) + (r + [sigma]2/2)\,T}{[sigma] / T}$$

d2 = d1 - [sigma] / T, and where

Co = current option value
So = current stock price
X = exercise price
r = risk-free interest rate
T = time to maturity of option in years
[sigma] = standard deviation of the annualized continuously compounded rate of return of the stock
ln = natural logarithm function
e = the base of the natural logarithm function, or 2.71828
N(d) = the probability that a random draw from a standard normal distribution will be less than d

¶ 25 It is important to notice that the option value does not depend on the expected rate of return on the underlying security. This information is already built into the formula by using the current underlying security price, which incorporates the market's expectation of the corporation's future performance. The formula assumes that the underlying security price pays no dividends. An adjustment to the formula is required

where the underlying security has a history of paying dividends or where dividends are expected to commence.

¶ 26 The volatility of the underlying stock is probable the hardest variable to determine. The volatility can be determined in a number of different ways. The easy way is to use someone else's research. The Chicago Board Options Exchange website lists the volatility of underlying securities that trade on major US exchanges. Historical volatilities are also published in a number of different investor publications. Where one is valuing options whose volatility is not so readily available, the implied volatility can be calculated if publicly traded options on this stock trade on the open market. Having all the other variables of the formula together with the known prices of the publicly traded options, the implied volatility as determined by the market can be calculated. The implied volatility can then be used to value the employee stock options.

¶ 27 For those who may not have attended every one of their statistics lectures in University, there is a simpler (and I mean simpler in that there are no Greek letters in the formula) model, known as the binomial model, which involves certain assumptions. In the binomial option pricing model, one attempts to create a perfectly hedged portfolio.

Consider the following example.

¶ 28 Suppose an underlying security currently trades for $100. By year-end, it is expected the price will either increase to $200 or decrease to $50 (which, by the way, makes this a very volatile stock). Let's also assume we are trying to value a one-year call option with an exercise price of $125. We must also assume a current interest rate, so let's use 5%.

¶ 29 Because of the high volatility of the underlying security, the intrinsic value of this option at expiry will be either $75 if the underlying security goes to $200 or nil if the underlying security falls to $50.

¶ 30 Compare this to a portfolio of one stock and borrowing $50 that has to be repaid next year, which at 5%, amounts to $47.60 today. If the stock rises to $200 in one year, the stock less the debt has a net value of $150 ($200 - $50). One option would be worth $75 ($200 - $125 exercise price), therefore, the portfolio of one stock and $50 of debt is worth the value of two options. If the stock drops to $50, the stock less the debt has a nil value ($50 of stock - $50 of debt). One option is also worth nil, therefore, the portfolio is still worth two options. Based on this, we can conclude that at these two extremes we have the following equation:

2 call options = stock - debt 2 call options = $100 - $47.60 2 call options = $52.40
1 call option = $26.20

¶ 31 While the value of this call option may seem high, given that the option is still $25 away from being "in the money", consider the very high volatility of the stock. It

should make intuitive sense. It should also reinforce the impact of volatility on the value of stock options.

¶ 32 Now that the most common formula to value stock options has been explained and, after collecting all the necessary information, we can plug the numbers in and, by using Black-Scholes or the binomial model, we can arrive at a value for the call option. This, of course, is not the value of our employee stock option. Remember earlier, the issue was raised that, unlike publicly traded options, employee stock options are non-transferable. In addition, a vesting period may be required after issuance before the options can be exercised.

¶ 33 How much is a ten dollar stock worth? This is not a trick question. The answer is $10. How much is a $10 dollar stock worth if ownership requires that it cannot be sold for say two years? This is a bit of a trick question. Studies have shown that for a two-year restriction period, a security's value is reduced on average between 25% and 35%. The discount increases with the length of the restriction period.

¶ 34 Employee stock options can be very valuable because they tend to have long exercise periods. Conversely, the discount for their restricted nature also increases because of the non-transferable nature of the investment. Accordingly, we have countervailing forces both increasing and decreasing the value of the option as a result of the long exercise period.

¶ 35 The discount for the vesting period is a function of employee turnover. If an employee must work five more years before options vest, there is a risk that they will never vest because of voluntary or involuntary termination of the employee. Furthermore, even if they vest and are not yet "in the money", the restriction continues to exist as the terms of the option generally require. Typically, they must be surrendered on termination. Accordingly, the risk of termination during the vesting and post-vesting periods must be considered.

¶ 36 While these two discounts affect the value of the employee stock option itself, income tax effects, while separate from the option, should be considered when valuing them for family law or compensation purposes. Employee stock options are taxable on exercise, not on issuance as long as the exercise price is above the market price at the time of issue. The gain on exercise is treated as employment income and must be T4'ed with all the usual taxes withheld at source. As an incentive to taxpayers, Revenue Canada will tax employee stock options at rates akin to capital gains if the exercise price is not below the stock price at date of issuance. That is, as long as options are not "in the money" when issued, they will qualify to be taxed as capital gains, which means 25% of the gain will be effectively non-taxable.

¶ 37 For family law purposes, what this means is, when asked to value options for a employee who is experiencing a matrimonial dispute, don't forget when considering all of the discounts to incorporate the income tax discount also, as this is probably the easiest of the discounts to explain as well as calculate.

¶ 38 When considering employee stock options for the purposes of compensation, remember that issuing options worth $10,000 can be more valuable to an employee than salary of $10,000. As explained earlier, the income tax on the stock options may be lower as they may be subject to capital gains tax rates. Furthermore, stock options are only taxable when exercised. Accordingly, income tax is deferred until the employee chooses to trigger it. A prudent employee may choose to intentionally trigger options in a year of low income resulting from other investment losses, perhaps in order to minimize the income tax effect.

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A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act*

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June 1, 1999

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Abstract: In the early 1990's Canada moved towards adoption of some form of child support guidelines. Major proponents for the guidelines were women's groups, supported by governments that hoped to get more child support paid and thereby reduce child poverty as well as government welfare expenditures. In 1997, at the same time as the federal government introduced the Guidelines, it ended the regime of tax deductibility of child support and taxation in the hands of recipients, increasing government revenue. Fathers' groups attacked the Guidelines, which primarily use the payer's income to determine child support, and argued that the family law system is biased against them. To assuage the critics of the Guidelines and gain the support for their adoption from conservative politicians, the government promised to hold hearings on the reform of the child related provisions of the Divorce Act. The hearings of the Parliamentary Special Joint Committee on Child Custody and Access often degenerated into a highly publicized "gender war zone," with fathers' groups being especially successful in putting stories of false allegations of abuse and access denial before a generally sympathetic Committee. The Committee Report was not well written and had a clear "profather" slant.

The Committee Report (December 1998) recommended: the new concept of "shared parenting" to replace concepts of "custody and access" (but not a presumption of 'joint custody'); parenting education at the time of divorce; use of parenting plans to structure post-divorce relationships; notification and court hearings before a custodial parent can move; changes to the support Guidelines to recognize expenses of non-custodial parents; and the possibility of lawyers for children. The Report promoted a less adversarial approach, and greater rights for noncustodial parents, though some of the most radical proposals of fathers, such as the creation of an offences for access denial, were not endorsed. Given the linkage between child support and other child related issues, it is not

surprising that fathers' lobbied for changes and that there was significant receptivity to some of their demands. Some parts of the Report give insufficient attention to the concerns of women, especially in regard to spousal abuse and its effect on children.

In her relatively brief and vague Response (May 1999), the Minister of Justice gave cautious support to the Report. She recognized the concerns of fathers, but she not as supportive as the Committee. She endorsed having new concepts to replace "custody and access," but feels that the specifics of the new terminology requires more study. Better enforcement of access, parenting plans and encouragement of less adversarial methods of dispute resolution were also endorsed. But there will remain a number of high conflict divorces that need judicial resolution, and issues such as spousal violence need to be better addressed than they were in the Committee Report. The issues are complex and contentious, and intergovernmental coordination would be desirable. The federal government plans to consult further as it develops a coordinated response to all child related issues in the Divorce Act by 2002. While broader consultation and coordination are necessary, it should not take three years to develop a legislative response to a set of issues that has been under study for almost a decade. Even without federal legislation, the Report may encourage greater use of parenting plans, parental education at divorce, shared parenting and other innovations.

A Report from Canada's 'Gender War Zone': Reforming the Child Related Provisions of the Divorce Act

Nicholas Bala

Introduction

¶ 1 This paper explores the on-going process of reforming the child-related provisions of Canada's Divorce Act, focussing particularly on the 1997 changes to the child support laws and the 1998 Parliamentary proposals for the reform of what is presently called custody and access law. This process has been highly contentious, first with women's groups mobilizing to seek changes to the child support laws, and then fathers' groups seeking changes to the custody and access laws. Although at least in theory, these are viewed as quite separate legal issues in Canada, [See Note 1 below] the reform process reflects the reality that these are inevitably intertwined issues, both for parents and for policy makers. For many parents there is clearly a psychological link between the issues.

Note 1: See e.g McIvor v British Columbia Director of Maintenance and Enforcement (1998), 40 R.F.L. (4th) 407 (B.C.C.A.)

¶ 2 From a policy perspective, there have been profound changes in roles and social expectations for parents that are reflected in the pressures for both more responsibilities and rights for fathers. There are also strong pressures to reduce the amount and bitterness

of litigation between separated parents, and to increase the focus of parents on the needs of their children.

Historical Context

¶ 3 During the first half of the twentieth century Canada had an explicitly gendered and fault based family law, though divorce was relatively rare. Courts operated on the basis of the "tender years doctrine" presuming that if parents separated, then children, especially young children, should remain in the care of their "natural" caregivers, their mothers, unless a mother demonstrated moral unfitness by committing an act of adultery.

¶ 4 In 1968 the federal Parliament enacted Canada's first national divorce law, allowing for termination of marriage on such fault-based grounds as adultery and cruelty, or on three years separation if there was no "desertion." The 1968 Divorce Act adopted gender neutral language, but gave judges no real direction about how to deal with the issues of spousal and child support or custody and access, leaving this to a discretionary judicial assessment of the arrangements considered "fit and just having regard to the conduct of the parties, and the condition, means and other circumstances of each of them". [See Note 2 below]

Note 2: Divorce Act, S.C. 1967-68, c. 24, s. 11.

¶ 5 In the 1970s and 80s the divorce rate more than doubled, levelling off in the 1990's with about one marriage in three ending in divorce. [See Note 3 below] In the 1970s Canadian courts began to move away from the maternal presumption of the "tender years doctrine" and to adopt the "best interests of the child" test for resolving disputes between parents about custody and access. Although in practice mothers continued to have custody in the vast majority of cases, usually on the basis of an arrangement made by the parties rather than imposed by a judge, in litigated cases the best interests of the child test gives judges substantial discretion and in effect requires them to rely on personal experiences, values and assessments to make decisions about children, and inevitably results in some inconsistencies between judges. Similarly in determining child support, judges were required to make individualized assessments of the "needs" of a child and the "means and circumstances" of the parents to pay resulted in substantial variation in judicial approach. One of the dominant themes of legal reforms in child related issues in the 1990s has been an effort to structure and reduce judicial discretion in dealing with these issues.

Note 3: Gentleman & Park, "Divorce in the 1990s" (Autumn 1997), 9(2) Health Reports 53 - 57 (Statistics Canada, Cat. 82-003-XPB) estimate a 31% chance that a couple who married in 1991 will divorce.

¶ 6 In 1986 the federal Divorce Act was again amended, with adultery and cruelty retained as fault based grounds for granting a divorce. In practice, however, the principal ground for obtaining a divorce in Canada has become the no fault ground of one year living separate and apart, which was added as a ground in the 1986 Divorce Act reform. [See Note 4 below] The 1986 Act also required lawyers to specifically mention to clients the value of mediation and negotiation for resolving disputes, [See Note 5 below] though the federal government has spent only limited sums to support this form of less adversarial dispute resolution and the provincial governments have primary jurisdiction over family mediation. The 1986 Act also provided a clearer statement of the need for courts to recognize domestic and child care responsibilities in establishing the amount of spousal support. The 1992 Supreme Court of Canada decision in Moge v Moge reinforced the trend towards awarding spousal support as a means of recognizing domestic contributions and career sacrifices. [See Note 6 below]

Note 4: R.S.C 1985, (2nd Supp.), c. 3. , s. 8(2)(a)

Note 5: R.S.C 1985, (2nd Supp.), c. 3. , s. 9(2)(b)

Note 6: (1992), 43 R.F.L. (3d) 345 (S.C.C.)

¶ 7 In child related matters the 1986 Divorce Act largely codified judicial practices, explicitly adopting a "best interests of the child test." The 1986 Act, however, gives little direction as to what factors are to be taken into account in making a "best interests" determination, though a provision was added to that "past conduct" of a parent (like adultery) is not to be taken into consideration "unless the conduct is relevant to the ability... to act as a parent." [See Note 7 below] At the time of the enactment of the 1986 Act, fathers groups and some lawyers were advocating a presumption in favour of joint custody, which a number of American states had adopted. [See Note 8 below] The government was not prepared to have a presumption in favour of joint custody, though the Act explicitly recognizes joint custody as an option, and requires that courts should give effect to the "principle that a child ... should have as much contact with each spouse as is consistent with the best interests of the child." [See Note 9 below] The Act also gives a non-custodial parent the presumptive right to information about the child. [See Note 10 below]

Note 7: R.S.C 1985, (2nd Supp.), c. 3., s. 16(9).

Note 8: See e.g. "New Divorce Act sidesteps some contentious issues," The National [Canadian Bar Association], February 1986, p. 6.

Note 9: R.S.C 1985, (2nd Supp.), c. 3., s. 16(10).

Note 10: R.S.C 1985, (2nd Supp.), c. 3., s. 16(5).

¶ 8 By late 1980's, advocates for women were expressing grave concerns about issues related to child support. The amounts were too low to meet the needs of children. There were inconsistencies between judges in dealing with the issue, as well as significant problems of enforcement. Concerns were also expressed about the tax treatment of child support, which was taxable in the hands of custodial parents and deducted from the income of payers.

¶ 9 It was not easy for Canadian governments to deal with child support, but it was a less challenging issue than custody and access. There was strong political support to address the plight of mothers and children who were abandoned by "Dead beat Dads." Further, the more child support that is paid to low income parents, the less is their need for government welfare support. Since the provinces bear the primary burden for welfare support, they were relatively sympathetic to taking action on child support.

¶ 10 Under Canada's complex division of jurisdictional responsibility for family law, the federal government has responsibility for divorce and the "ancillary issues" of child and spousal support, and resolution of child related issues, provided the parents are getting a divorce. The provincial (and territorial) governments have jurisdiction over property in all cases, and if parents are not obtaining a divorce (for example because they were not married) the provinces have exclusive jurisdiction over all issues. The provinces also have responsibility for issues related to the administration of justice, including enforcement of support. As a result of the overlapping jurisdiction, it was important to try to establish a coordinated approach to child support issues.

¶ 11 A federal-provincial working group was established and prepared discussion papers on models for child support guidelines, advocating that Canada follow the lead of many other countries and adopt guidelines in order to increase amounts of child support and reduce inconsistencies and costs of obtaining child support. Discussion papers on child support guidelines were released in 1991 and 1995, [See Note 11 below] as the federal and provincial governments moved towards adoption of a coordinated approach to guidelines. As a result of discussions and research related to the possible adoption of child support guidelines, lawyers and judges became increasingly aware of problems with child support. In a number of decisions in the early 1990's Canadian courts began to award larger amounts of child support and move towards "judicial child support guidelines." [See Note 12 below]

Note 11: Federal/provincial/territorial Family Law Committee, Child Support: Public Discussion Paper (Ottawa, 1991) and Report and Recommendations on Child Support (Ottawa, 1995)

Note 12: See e.g Levesque v Levesque (1994), 4 R.F.L. (4th) 375 (Alta. C.A.); Willick v Willick (1994), 6 R.F.L. (4th) 161; and Davies, "The Emergence of Judicial Child Support Guidelines" (1995), 13 Can Fam. L.Q. 89.

¶ 12 In March of 1996 the federal Justice Minister Allan Rock announced that the government would introduce a package of child support reforms. [See Note 13 below] The new federal Child Support Guidelines set the monthly amount of child support being determined by reference to the payor's annual income. [See Note 14 below] Though parents could agree to a different amount, the Guidelines are binding on the courts. There is some structured judicial flexibility to modify the amount of child support, for example to add to the basic monthly amount if there are "special or extraordinary expenses" or to vary the amount in cases of "undue hardship." There were also measures to assist in the enforcement of child support, such as allowing for the suspension of passports for defaulting payors, though the primary responsibility for enforcement rests with the provincial governments. The government also announced very significant changes to the tax treatment of child support.

Note 13: Justice Canada, The New Child Support Package (Ottawa, 1996).

Note 14: Provinces are permitted to establish their own models for child support guidelines to apply to divorces and other cases. Only Quebec has its own model, with child support determined by reference to the income of both parents.

¶ 13 By the early 1990's women's groups were mounting a serious challenge to the tax treatment of child support. Under Canada's tax laws, both child and spousal support were deductible for the payor and included in the income of the recipient. Since in most situations payors have a higher income and marginal tax rate, this served as a "subsidy" to "divorced families." Provided that recipients of support (almost all women) had adequate legal representation and understood their position, there was usually a significant tax savings which could be used to increase the amount of support.

For a variety of reasons, women's groups challenged this regime. One reason is that there is only an advantage if the recipient has a lower income and tax rate; in the relatively rare cases where the recipient of child support has a higher income, there could actually be a tax cost. Further, many women lacked adequate legal representation and the amount of support was set without taking account of the fact that the recipient would be paying tax, and that the payor would have a tax savings. Finally, one cannot ignore the reality that this was a complex scheme and often misunderstood.

¶ 14 The legal challenge to the tax treatment of child support was framed on the basis of discrimination based on gender, since the vast majority of recipients were women, and on the grounds that recipients of support from a former spouse (or parent) had to pay tax, and on other discrimination based grounds. The Supreme Court of Canada rejected this challenge in its controversial 1995 decision in Thibaudeau v MNR, [See Note 15 below]

with the two women members of the Court dissenting to support the claim of women recipients of support.

Note 15: Thibaudeau v Minister of National Revenue Decision" (1995), 12 R.F.L.(4th) 1(S.C.C).

¶ 15 The federal government was very concerned about the principles in Thibaudeau, since it did not welcome the prospect of constitutionally based judicial revisions to the tax law. However, in this situation the end of tax deductibility for child support would actually have increased tax revenue for the federal government by an estimated $400 million a year, [See Note 16 below] and given the provinces about $200 million. So the government was quite willing to "give in" to the women's groups on this issue, since it meant an increase in government revenue. Shortly after Thibaudeau the government announced a new tax regime would be introduced for child support along with guidelines. The change in tax laws meant that there was "money on the table" for governments. While most of the increase in federal tax revenue has gone for general purposes, [See Note 17 below] the federal government was able to establish a $50 million fund to pay a range of costs in the justice system for the federal and provincial governments associated with the implementation of the Guidelines. In effect the provinces could be "bribed" to help support the Guidelines with the money of separated families. There have been relatively large sums available to help provide educational materials, research and support on Guidelines implementation. This money, however, is not directly available to address other concerns in the family law system.

Note 16: The figure for the federal revenue gain is from Justice Canada, The New Child Support Package (1996). The provincial figure is an approximation based on the fact that all provinces (except Quebec) have tax schemes based on the federal rules for determining tax payable, but charge a percentage equal to about 50% the federal rate. These figures, totalling $600 million a year, represent the amounts that will be saved by the time the new scheme is fully phased in. In the initial years those with pre-implementation child support remain under the old tax regime so the amounts are much smaller and will gradually grow.

Note 17: It should be noted that at the same time as the new tax treatment for child support was introduced, the federal government introduced a substantially more generous Child Tax Benefit scheme to increase support for the "working poor" with children. This new scheme was much more costly than the increase in revenue from the change in tax treatment to child support. In effect, there was less money for "divorced families" and more for "poor families" (many of which are divorced). This is socially justifiable, but understandably controversial with those losing the tax benefits - largely payer fathers.

¶ 16 While it is clear that the Child Support Guidelines have resulted in more consistency and less litigation over child support, it is less clear that the new regime has, on average, produced greater amounts of child support. [See Note 18 below] Although

the amounts of child support set by the Guidelines were relatively high compared to the amounts of child support that were being awarded by the courts in the early 1990s, when governments embarked on the project to introduce the Guidelines, by the time that the Guidelines were introduced the amounts of child support being ordered by the courts were increasing. Further in a majority of cases, the changes in the tax treatment of child support has meant that payors have substantially less ability to pay, which is reflected in the amounts of child support that can be awarded.

Note 18: See e.g. Paetsch, Bertrand & Hornick, Consultation on Experiences and Issues Related to the Implementation of Child Support Guidelines (Canadian Research Institute for Law & the Family, prepared for Justice Canada, September 1998)

Increasing Opposition From Fathers

¶ 17 At the same time as the federal and provincial governments were moving towards introducing child support guidelines, non-custodial parents [See Note 19 below] - almost all fathers - began to organize into groups to express deep concerns about how they were treated by the family law system.

These groups were galvanized by the prospect of the introduction of the Guidelines. These groups complained that all of the staff lawyers in the federal Department of Justice who were dealing with the development of child support guidelines were women (ignoring that at that time the Minister, the Deputy Minister and the head of the family law section were all men.). The fathers' groups were offended by the rhetoric around the issue of "Dead beat Dads" (men not paying child support) in the enforcement context. The Guidelines model of support, with a focus on the income of the payor, also became a lightening rod of concern. The focus on the payor's income was chosen to simplify the determination of the amount of child support, and in practice in many situations the recipient's income is relevant to the determination of support under the Guidelines, for example when undue hardship, special expenses or shared custody are at issue. Understandably there were political and psychological difficulties with the focus on the payor's income. And the changes in the tax law increased the burden of child support payments, though the new tax treatment only applies to orders or agreements after or varied since the new regime came into effect.

Note 19: It is difficult to obtain accurate information about most of the "fathers" groups that were involved in the Committee hearings. Many are small and not easy to contact. Some have names that frankly acknowledge that they exist to advance the cause of fathers, like "Fathers for Justice." Other groups are clearly dominated by men but have more ambiguous names, like "In Search of Justice" and the "Mississauga Children's Rights" group. Still other groups of non-custodial parents try to get women involved. Although most of their members would appear to be men, they make an effort to feature women as spokepersons. Sometimes these women are the rare female non-custodial parents, but most commonly

they would appear to be stepmothers. The "fathers groups" that include women as spokepersons include the National Shared Parenting Association and Stepfamilies of Canada

In this paper all of these groups will generally be collectively referred to as "fathers rights" groups. Despite the fact that some of these organizations involve women, they all tend to take positions that are adverse to the positions advanced by custodial mothers and women's groups.

Groups representing custodial parents rarely if ever involve men.

¶ 18 While the introduction of the Guidelines was a focus of concern, for a number of years separated fathers had been expressing dissatisfaction with the justice system. They were most concerned about issues of denial or restriction of access to their children, and more generally had a sense that the courts were (and are) "biased against fathers." Data from 1995 indicated that at the time of divorce, mothers got in custody 86% of cases, while fathers got custody in 7% of cases (often with older children or boys). In another 7% of cases there was some form of joint custody, usually with the children having primary residence with their mother. [See Note 20 below] It must be emphasized that these figures represent cases resolved by settlement as well as litigation. Indeed although there is no reliable data, it is clear that parents, mediators and lawyers resolve the vast majority of cases, with fathers typically agreeing that mothers should have custody as a reflection of the caregiving roles assuming during marriage.

There are no studies that give an accurate sense of how Canadian judges deal with the relatively small number of cases that they resolve.

Note 20: Statistics Canada, Divorces 1995, Table 8 p.20

¶ 19 In the early 1990s the Supreme Court of Canada rendered a couple of decisions that seemed to modestly favour the position of fathers. In its 1993 decision in Young v Young [See Note 21 below] the majority of the Supreme Court upheld the right of a Jehovah's Witness father to share his religious beliefs with his children during access visits, despite evidence that the children were feeling the stress of his expressing religious views that were quite different from their own, and from those of the dominant society. The majority of the Court emphasized the important role and rights of noncustodial parents. In its 1996 decision in Gordon v Goertz [See Note 22 below] the majority of the Supreme Court held that a custodial mother did not have a "presumptive right" to move with her child. Any decision to permit a move would have to be based on an assessment of the "best interests of the child," including consideration of the desirability of maximizing contact between the child and both parents.

Note 21: (1993), 49 R.F.L. (3d) 117 (S.C.C.)

Note 22: (1996), 19 R.F.L. (4th) 177 (S.C.C.)

¶ 20 Despite these decisions, fathers' groups remain deeply suspicious of bias in the courts. A particular focus of their concern is Madam Justice L'Heureux-Dubé of the Supreme Court, one of two women on the Court in the mid 1990's. She wrote dissenting opinions in Young and Gordon v Goertz that emphasized the importance the child's primary care-giver, recognizing "research uniformly shows that men as a group have not yet embraced responsibility for child care." [See Note 23 below] This type of rhetoric has been seized upon by fathers' rights groups as evidence of bias. Their concerns about judicial bias culminated in a 1999 complaint by the National Shared Parenting Association to the Canadian Judicial Council against the entire Supreme Court of Canada, and L'Heureux-Dubé J. in particular, claiming that it had a 'feminist' slant that results in fathers being denied access. [See Note 24 below] Although these complaints were dismissed, the fact that they were made suggests a deep distrust by some men of how they are treated in the courts.

Note 23: (1993), 49 R.F.L. (3d) 117, at 186 (S.C.C.)

Note 24: "Fathers' group to file complaint against highest court," National Post, March 13, 1999. The primary complaints were against Madame Justice Claire L'Heureux-Dubé, the Supreme Court Justice with the clearest support for custodial parents, as well as for women in a range of contexts. The filing of the complaints with the Canadian Judicial Council by the National Shared Parenting Association (a fathers' rights group) and REAL Women (a conservative 'profamily" women's group) arose of controversy surrounding the application of Canada's sexual assault laws. In a highly publicized case in the Alberta Court of Appeal, Justice John McClung had upheld the trial judge's acquittal of man charged with sexual assault, writing that the female victim did not present herself "in a bonnet and crinolines" and that she had impliedly consented to his sexual touching despite repeatedly saying "No." In the Supreme Court of Canada in R v. Ewanchuk, [1999] S.C.J. 10, the Court unanimously overturned the acquittal, with L'Heureux-Dubé J. criticizing McClung J.A. for his "archaic and stereotypical" judicial attitude. The complaint to the Judicial Council about L'Heureux-Dubé J. was dismissed; "Council rejects complaint against L'Heureux-Dubé" National Post, April 2, 1999.

¶ 21 The federal government was aware of the concerns of fathers while the guidelines were being formulated, though also facing pressure from women's groups to deal more effectively with issues like spousal abuse in the context of divorce. In 1993 the Department of Justice released its Public Discussion Paper on Custody & Access [See Note 25 below] that reviewed the various concerns by expressed by both women's and men's groups. The Paper was non-committal about how to deal with various controversial issues. The Department continued to consult with professional groups and academics about the reform of the custody and access provisions. [See Note 26 below] There was, however, at that time only limited political pressure and no real political will to confront the problems, especially those being raised by fathers. By way of contrast, governments were prepared to take action on child support, which was largely seen as a "mother's issue," though as noted above, governments have an enormous financial stake in child support.

Note 25: Department of Justice, Custody and Access: Public Discussion Paper (Ottawa, March 1993)

Note 26: See collection of articles by Cossman, Mykitiuk & Freeman in vol. 15:1 of the Canadian Journal of Family Law (1998); they were prepared for a Consultation Session sponsored by the Department of Justice in May 1997 .

¶ 22 The federal government proceeded with its plans for child support reforms in this increasingly charged environment. With its majority in the House of Commons, the Liberal government was easily able to pass its reform package through that body in the fall of 1996. Normally in Canada, once legislation is passed by the elected House of Commons, it is approved by the appointed Senate after perfunctory hearings. But the Senate has become an increasing source of opposition to government measures that are perceived to be unpopular.

¶ 23 After the House of Commons passed the amendments that would allow adoption of the Child Support Guidelines, [See Note 27 below] fathers began an intensive lobbying campaign to persuade the Senate Committee that was studying the issue to amend the package. Some of the criticisms focussed on the Guidelines, but many related to broader child related issues of custody and access. The fathers' groups were concerned that resolution of child support issues was receiving attention while their concerns over access related issues seemed to be ignored by the federal government. Fathers were joined by grandparents, who had their own concerns about family law, in particular about their lack of access to grandchildren. These advocates found some of the Conservative Senators were sympathetic to their concerns, though the most outspoken Senator to support fathers was the Liberal, Anne Cools, a black Canadian and a former social worker, and one of the first women appointed to the Senate.

Note 27: S.C. 1997, c. 1, in force May 1, 1997. Almost all of the Guidelines are in the Regulations SOR /97-563

¶ 24 In order to obtain the support of the Senate Committee and secure passage of the Guidelines legislation, the Liberal government had to make some concessions. A few relatively small changes were made to the actual Guidelines. The threshold for a possible exercising of judicial discretion in situations of joint custody was reduced from a requirement that there be "substantially equal" time spent with each parent to a requirement that a parent have care of the child at least 40% of the time. While the basic model for the Guidelines still established child support solely by reference to the payor's income, the legislation was amended to include a symbolic statement the in

"principle...spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities." [See Note 28 below]

Note 28: S.C. 1997, c. 1, enacting Divorce Act, s. 26.1(2)

¶ 25 To secure passage of the Child Support Guidelines the government had to agree that a Special Joint Committee with representation from both the Senate and the House of Commons would be established to study the Divorce Act, with a focus on child related issues. The legislation also included a provision that requires that the government present a report on the Guidelines to Parliament by May 2002. [See Note 29 below]

Note 29: S.C. 1997, c. 1, enacting Divorce Act, s. 28.

The Committee Hearings: The 'Gender War Zone'

¶ 26 After the election of June 1997, a new Justice Minister was appointed, Anne McLellan, a former law professor.

The Department of Justice negotiated with concerned Senators and members of the House of Commons about the appointment of the Special Committee. The Committee's terms of reference and membership were established in October 1997. The terms of reference expected the Committee to examine and analyze issues relating to custody and access issues after separation and divorce, and in particular to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on the child's needs and best interests.

¶ 27 While these terms of reference are broad, they demonstrate a particular focus on the concerns of fathers, while the concerns of mothers, for example about domestic violence issues, were unmentioned.

¶ 28 The Committee had 23 members, six senators and 17 members of the House of Commons (M.P's). The Committee was had two joint Chairs: Senator Landon Pearson, a woman with a long history of involvement with children's issues, and Roger Gallaway, an outspoken backbench Liberal M.P. A few of the Committee members had professional experience in the family law system, such as Reform M.P. Paul Forseth, who had been a divorce mediator.

¶ 29 While the Committee was not deeply divided along party lines, there were profound differences in terms of "gender politics." Some of the M.P's seemed quite sensitive to the concerns of women, such as Liberal M.P. Sheila Finestone, a former Cabinet Minister dealing with women's issues. However, the Committee hearings tended

to be dominated by members who were sensitive to the concerns of fathers. Liberal Senator Anne Cools was described by one reporter as a "dominant and sometimes disruptive force, leaving her chair during testimony to consult with men's groups in the audience" who cross-examined female witnesses. [See Note 30 below] At one point Senator Cools remarked: "Men and women are not treated equally before the law. Children are not the possession of any one parent. They are not the possession of the mother." [See Note 31 below] The Co-Chair of the Committee, Roger Gallaway, did not seem unhappy that the Committee came to be referred to as the "Politically Incorrect Committee" because of its sympathy to men and hostility to advocates for women. After one session where women witnesses were treated rudely, one female Senator lamented that the hearings were degenerating into a "war zone" of gender politics. [See Note 32 below]

Note 30: Anne McIlroy, "Child custody: The Great Divide," Globe & Mail, December 5, 1998, p. D2

Note 31: "Custody not warded fairly," Halifax Daily News, April 27, 1998, p. 10.

Note 32: Senator Ermine Cohen, quoted in "Women heckled," Canadian Press, March 31 1998.

¶ 30 The Committee met 55 times, holding public hearings from February 1998 to the beginning of November 1998.

The hearings began in Ottawa. The first witnesses were mainly government officials, representatives of national professional organizations and academics. The Committee then travelled across Canada, hearing from various professionals, representatives of local organizations and individuals with divorce related experiences. Altogether the Committee heard from over 500 witnesses. The Committee also received hundreds of letters and briefs from individuals and organizations. Many of the professionals and academics who testified proposed reforms to reduce the adversarial nature of the divorce process. The Committee listened to their ideas with interest, but the most gripping testimony came from individuals telling their stories about their experiences with the justice system and their former spouses.

¶ 31 There were about the same number of men and women witnesses before the Committee, but the stories of men tended to attract more attention from the Committee and dominate the media coverage. Women presenters often raised concerns about wife battering and its effects on children. [See Note 33 below] But the hearings were not a sympathetic environment for women. [See Note 34 below] Female witnesses were sometimes heckled by men in the audience, even when discussing issues such as spousal abuse and homicide, and the most outspoken Committee members were more aggressive with women witnesses.

Note 33: Some men also raised concerns about spousal abuse and its effects on children. For example, I was a witness on February 25, 1999, and presented a report by Bala et al, Spousal Violence in Custody and Access Disputes: Recommendations for Reform(Ottawa, Status of Women Canada, 1998). This report specifically recognizes the gendered nature of spousal abuse.

Note 34: See e.g "Women rattled by custody hearings," Globe & Mail, June 15, 1998.

¶ 32 Male witnesses tended to focus on issues of denial of access by mothers, arguing that the justice system deals aggressively with default in support payments, but most ineffectively with situations where fathers are denied the opportunity to see their children. Fathers also claimed that mothers were making false allegations of wife battering or child sexual abuse in order to deny fathers access rights. Roger Galloway, the Committee Co-Chair was clearly sympathetic to these "shocking revelations" of "blatantly false allegations" [See Note 35 below] against innocent father, and at one point remarked: "I have come to the conclusion...that the whole [family law] system has broken down." [See Note 36 below]

Note 35: Quoted in "Child abuse Lies rife: Most foes in custody wars make false allegations," Toronto Sun May 10, 1998, p. 2.

Note 36: Quoted in "The politically incorrect committee," Ottawa Citizen, April 27, 1998, p.A5.

¶ 33 One of the serious limitations of this kind of hearing is that Committee members seemed to accept that witnesses were telling "the truth" about what happened, while in reality most of them were giving their perspectives of what happened. As is often the case in family law litigation, the stories told by only one side are often a very limited version of "the truth." It is apparent that many of the presenters before the Committee gave very partial and one sided descriptions, that could not be challenged in the context of the hearings.

¶ 34 One interesting example of the distorted picture presented to the Committee was provided by an enterprising reporter. As happened at many of the hearings, a divorced father who was not seeing his children came before the Committee, saying he was the President of a group called Mississauga Children's Rights. He complained about the discrimination in the legal system against fathers, and about his former wife thwarting his access to his two teenaged daughters. He also stated that his wife was violent, and had assaulted him. His testimony received media coverage. Later a newspaper reporter followed up on his testimony. [See Note 37 below] The group he claimed to represent had a nice child focussed sound to it, but the phone number he gave the Committee for the Group was disconnected and there was no way to verify whether such a group exists. His former wife, who was not a witness, had a very different story of their relationship. Although it was true that on one occasion she was convicted of assaulting

him, this occurred only when she came to his house after their daughter phoned the mother and said she was afraid the father would hurt her. Further, the father had a history of violence (which he never mentioned to the Committee) including an assault on the mother's sister, which occurred while she was pregnant and looking after his daughters. He received a jail sentence for this assault. The mother said that she encouraged access, but that it was the daughters who did not want to visit with him. The reporter interviewed the 15 year old daughter who confirmed that she did not want to see her father: "He sure made our life really, really bad." Whatever the "truth" about this father's loss of contact with his daughters, it is clear that the Committee received at best a very incomplete picture.

Note 37: Anne McIlroy, "Child custody: The Great Divide," Globe & Mail, December 5, 1998, p. D1

¶ 35 One of the themes of the hearings was "professional bashing." Understandably, the individuals who were most likely to testify were those who were most dissatisfied with their experiences. The Committee heard from some individuals who were sharply critical of judges, lawyers, mediators, assessors, and other professionals in the "divorce industry," as well as profoundly angry with their former spouses.

¶ 36 In one of the hearings a prominent Regina family lawyer was explaining the difficulties of practice in this area, and cautioning against making radical changes. One of the Senators was sharply critical, remarking [See Note 38 below]: "It's going to help you [profit] if we don't change things."

Note 38: Quoted in Barb Pacholik, "Child access beefs heard," Regina Leader Post, May 1, 1998.

¶ 37 The Committee's final Report contains a page of allegations about unethical practices by family lawyers, suggesting that they regularly escalate the conflict between parents and encourage the making of false allegations of domestic violence and spousal abuse. [See Note 39 below] However, the Report was inconclusive as to how much validity or how widespread these problems are, and made no recommendations to deal with the alleged incompetence or lack of ethics of family lawyers. While there are undoubtedly some lawyers who do increase the tension between the parties, and at least a few who are unethical, it is all too easy for witnesses before a Committee like this to make unsubstantiated allegations of professional incompetence. There is an understandable tendency for individuals who were involved in a bitter family breakup to look back and blame the professionals involved, and "the system" rather than reflecting on how their own conduct or attitudes contributed to the situation.

Note 39: Report of the Special Joint Committee on Child Custody and Access, For the Sake of the Children(December 1998) , p.16 &17. [cited here as Report(1998)]

¶ 38 In addition to fathers and mothers, a number of grandparents and their organizations [See Note 40 below] testified that they should have clearly recognized rights to visit with their grandchildren and be involved in their lives.

Most of their complaints tended to be directed at mothers, who usually have care of children. Most of the Parliamentarians were close in age to the grandparents who appeared before the Committee, and the members of the Committee were generally sympathetic to the grandparents stories of loss of contact with their grandchildren.

Note 40: There were a number of organizations of representing grandparents and retired persons that presented witnesses and briefs to the Committee. The best represented group was G.R.A.N.D., (Grandparents Requesting Access and Dignity), with five chapters making oral presentations.

¶ 39 As the hearings progressed, some of the Committee members began to condemn the entire justice system. One member of the opposition Reform Party, Paul Forseth, commented: "The family law system in Canada is in an absolute mess." [See Note 41 below] There were indications that there might be recommendations for dramatic changes to increase the rights of fathers, such as a presumption of joint custody and the creation of new criminal offences for denial of access or making false allegations of abuse.

Note 41: Quoted in Barb Pacholik, "Access beefs heard," Regina Leader Post, May 1, 1998, p. A5

¶ 40 In the final weeks before the Report was released, Cabinet Ministers and representatives of the Department of Justice began to pressure the Liberal majority on the Committee to back away from some of the most radical "profather" positions. [See Note 42 below] In the end, although the recommendations dealt with a number of the concerns raised by fathers in the hearings, the final Report also tried to focus on the interests of children and on diminishing the adversarial nature of the divorce process.

Note 42: See e.g "Liberal Mps lash back at divorce law attack: Minister's op ed article," National Post, November 21, 1998

¶ 41 Before discussing the major recommendations of the Committee, it is worthwhile to try to understand why the Committee may not have got an accurate picture of how the family law system in Canada operates, and to try to briefly assess the validity of some of the major claims made to the Committee.

The Family Law System: Failings in Policies & Politics

¶ 42 Canada has a very complex family law system. It is often difficult to determine where responsibility for the system lies, and difficult to effect change. As a result too often problems have not received the attention that they deserve.

¶ 43 The federal and provincial governments have overlapping constitutional responsibilities. Judges and other professionals like lawyers have considerable autonomy within the justice system. A range of other independent professionals such as mediators, assessors, physicians and mental health workers may have important roles in child related cases. In complex cases where allegations of abuse or domestic violence arise, various agencies including police, child protection workers and Crown prosecutors may also become involved.

¶ 44 While some of the professionals have skill, knowledge and sensitivity, clearly some of them do not. It is, however, difficult to hold professionals accountable in this context, and education, at least for the independent professionals, is rarely mandatory.

¶ 45 In comparison to areas like Criminal Law, the family law area has received only limited attention from Justice Canada over the years. Relatively little empirical research has been done, and even court based statistical data is sparse. As a result, it is impossible to get an "objective" picture of how the family law system is operating.

The Parliamentary Committee was forced to rely on anecdotal evidence, and on the speculation of professionals and academics.

¶ 46 Given the complexity of the issues and its limited authority, it is not surprising that the federal government has been cautious about acting in the family law area. However, it is unfortunate that as it began to work on the issue of child support, the government failed to take leadership on the issues related of custody and access. The priority given to reform in the child support area can be explained by considering its relatively uncontentious nature, and by the financial incentives for governments to act on child support. By dealing only with issues of primary concern to mothers, the government understandably provoked an angry response from fathers, and the result was the highly contentious Committee hearings.

¶ 47 It was perhaps inevitable that once the hearings began, they started to resemble the highly contentious cases that where the subject of the hearings, with exaggerated claims and angry denunciations. At least some of the politicians involved in the Committee process tended to look for relatively simple solutions to complex problems. For example, as the Committee heard from men that they had been victims of false allegations of child abuse, some of the politicians quickly seized on the simplistic and inexpensive solution of enacting a law to make if a criminal offence for a parent to make of a false allegation of abuse. While arguably there may be symbolic value to enacting such a law, it will not "solve" the problem of false allegations. Rather education for parents and professionals, and improvements in the functioning of the justice system are needed to properly address the problem of false allegations. [See Note 43 below]

Note 43: See e.g Bala et al, Allegations of Child Abuse in the Context of Parental Separation (Canadian Research Institute for Law and the Family, for Department of Justice Canada, 1999).

Putting the Claims of Fathers Into Context

¶ 48 While there is a definite need for more research into how family law cases are dealt with by the justice system and how divorce affects children, [See Note 44 below] there is sufficient information available to begin to assess the concerns raised by fathers.

Note 44: Some very interesting research is underway into the long term effects of divorce on children in a study being sponsored by Health Canada, the National Longitudinal Survey of Children. See "Divorce hitting children younger," Toronto Star, June 3, 1998,

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¶ 49 First of all, as the Committee recognized, only 10% -20% of divorces are considered "high conflict." [See Note 45 below] In most cases parents resolve disagreements themselves, often with help of lawyers or mediators. Even in "high conflict" situations, contested trials are rare, due to financial and emotional costs. Only a very small portion of parents rely on judges to resolve their disputes. Canadian data suggests that under 3% of divorces end up in trial over any issue, although these high conflict cases can use up substantial amounts of court time. [See Note 46 below]

Note 45: Report (1998), p.75

Note 46: Bureau of Review, Evaluation of the Divorce Act (Ottawa: Department of Justice, 1990)

¶ 50 The concerns raised by some fathers about the lack of adequate legal means for the enforcement of access rights have significant validity. Research indicates that over 40% of children of divorce see the non-custodial parent less than once a month. [See Note 47 below] However, the available Canadian research suggests that access denial by the custodial parent is a serious problem in only 2% - 5% of separations. [See Note 48 below] On the other hand the problem of the 'disappearing father' who neither pays regular support nor visits regularly is a much more widespread problem, and also one with serious effects on children.

Note 47: See "Divorce hitting children younger," Toronto Star, June 3, 1998.

Note 48: Debra Perry, Access to Children Following Parental Relationship Breakdown in Alberta(Calgary, Alta.: Canadian Research Institute for Law & the Family, 1992). 70% of custodial parents and 63.6% of noncustodial parents reported no concerns over access denial. 57.9% reported custody provisions reasonable for them; 36.8% of non-custodial parents wanted more access, but 54.5% of custodial parents also wanted more (presumably not the spouses of each)

¶ 51 The law is a very blunt tool, and judges are understandably very reluctant to send custodial parents to jail for not allowing access. It is comparatively easy for a judge to jail a parent who is not paying support. It is much easier to assess whether there has been "wilful non-compliance" with child support obligations and the consequences for the child are much less negative. There appears to be no effective legal remedy for the parent who fails to visit; no attempt to coerce visits (even by a comparatively mild sanction like increased child support) is likely to improve the welfare of children.

¶ 52 Fathers are right to point out that in general children of divorce benefit from greater contact with the noncustodial parent. Frequent contact reduces the child's sense of disruption and children benefit from having two adults caring about them and serving as roles models. However the most important predictors of long term positive outcomes for children of divorce are their relationships with their primary post-divorce caregiver. In general, children suffer from high conflict divorces. In high conflict situations, it would seem that the advantages of increased contact are outweighed by the negative effects of heighten conflict. In other words, there is considerable value to children in encouraging situations where both parents remain involved in their children's lives after separation, but in high conflict situations, court ordered access is of limited psychological value to children. [See Note 49 below]

Note 49: See e.g . Goodman, Emery & Haugaard, "Developmental Psychology and Law: Divorce, Child Maltreatment, Foster Care and Adoption" in William Damond, editor- in-chief, Handbook of Child Psychology, 5th edition, vol. 4, chapter 12 (New York: John Wiley, 1998), p. 791-92.

¶ 53 Research about different forms of joint custody or shared parenting is generally positive, but it must be approached with real caution when trying to assess policy implications. Parents who chose joint custody generally have less conflict and higher incomes than those who do not, so positive outcomes are to be expected; joint custody is more likely to be chosen than court imposed. However, the few studies that tried to control for these factors still found some modest positive effects, suggesting that there may be some psychological benefits for parents, and consequently children, from establishing a relationship that legally acknowledges a parental role for each spouse, though clearly more research is required. [See Note 50 below]

Note 50: Goodman (1998), p. 793.

¶ 54 One of the claims made by some non-custodial fathers is that the mothers are "alienating" children, causing the children to fear or hate their fathers. There is little doubt that in high conflict divorces, many parents (both custodial and non-custodial) tend to communicate their feelings of distrust and hostility about their former partners to their children. But it is wrong to refer to this as "parental syndrome" as some fathers claim, since it is not a clinically diagnosable condition. [See Note 51 below] Further, there are cases in which children have legitimate fear of a non-custodial parent, based on incidents of violence or child abuse in the home.

Note 51: Smith & Cuckos (1997)

¶ 55 One of the major themes advanced by fathers in the Committee hearings is that mothers frequently make false allegations of spousal abuse or child abuse to gain a tactical advantage in custody and access proceedings, or to seek revenge. The issue of false allegations is an important one for the justice system, and there is no doubt that there are cases of false or exaggerated allegations, but they must be seen in context.

¶ 56 In as many as half of all divorces, there has been at least one incident of spousal assault in the course of the marriage, but it would appear that the issue of spousal abuse is raised in under 20% of all custody and access cases litigated in Canada. [See Note 52 below] It is true that in some relationships, women can be the perpetrators of violence in relationships. [See Note 53 below] However, abuse of women by their male partners is a more serious and prevalent problem. Most allegations of domestic violence are true. Research suggests that the incidence of exaggerated or false allegations of domestic violence in custody and access cases might be about of 10% of litigated cases. More common than false allegations of spousal abuse are false denials or minimization of abusive acts by perpetrators. Further, courts are justified in considering issues of spousal abuse in cases of parental separation. Men who engage in serious repetitive spousal abuse during a relationship are likely to also abuse their children, and children suffer emotional damage from living in a family where there is spousal abuse even if they are

not direct victims. In a significant number of cases, threats of violence to a woman and children can increase after separation, as the man is threatened with a loss of control. Access exchange may be a time when abuse occurs and it may be necessary to supervise or terminate access in cases of real risk. [See Note 54 below]

Note 52: M. Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision Making" (1997), 14 Can J. Fam L. 31 reveals that only 16 out of 103 custody and access decisions in the Reports of Family Law from 1992-94 raised issues of spousal violence. In 15 out of 16 reported cases the father was the alleged perpetrator, and in the 16th it was the mother's boyfriend.

Note 53: For a case where police and prosecutors were insensitive to this reality, see R v. Arsenault, [1998] B.C.J. 2990 (Prov. Ct.).

Note 54: Bala et al, Spousal Violence in Custody and Access Disputes: Recommendations for Reform (Ottawa: Status of Women Canada, 1998)

¶ 57 Another contentious and difficult issue raised in the Committee hearings was false allegations of child abuse, especially of sexual abuse. Some studies suggest that allegations of physical or sexual abuse are made in only 1% - 2% of litigated cases, though other studies suggest that in some locales as many as 8%-10% of litigated cases may raise abuse allegations at some point. In the divorce context, the rate of unfounded or unproven allegations of child abuse seems much higher than the rate of unproven allegations of domestic violence. [See Note 55 below] Research suggests that in the context of parental separation as many as 25% - 75% of allegations of abuse are unproven. However, unfounded allegations of child abuse are mainly due to poor communication and misunderstanding rather than deliberate manipulation or a desire for revenge. Among unproven allegations, the category of "intentionally false" allegations is in the range of 2% - 30% of unproven cases. In sum, although the issue of false allegations of abuse is not widespread, it is a legitimate interest of concern; when abuse allegations are made, they tend to overshadow other issues in a custody or access case. [See Note 56 below]

Note 55: It is also apparent that the rate of unfounded allegations of sexual abuse in is higher in the context of parental separation than in other contexts, such as in intact families.

Note 56: Bala & Schuman, "Allegations of Sexual Abuse When Parents have Separated" forthcoming 1999, Can. Fam. L.Q.

¶ 58 Clearly better research is needed to determine what is happening in child related proceedings in Canada, as well as to better understand the effects of divorce on children and what can be done to limit their negative impacts.

The Committee recognized the need for better information and research, and made recommendations for better tracking of cases where abuse allegations are made. [See Note 57 below] It was disappointing that the Committee did not appreciate the broader need for research about divorce, but its narrow research concerns reflect the Committee's preoccupations.

Note 57: Report (1998), Recommendations 36 (p.77) & 44 (p.93)

The Committee's Major Recommendations - December 1998

¶ 59 The Committee's Report provides a useful summary of much of the evidence presented at the hearings, though it is not a well crafted document. [See Note 58 below] The staff researchers, who wrote most of the text, did not know until the very end of the process what the recommends were going to be. The Liberal majority on the Committee could barely agree on the recommendations, so it is not surprising that there are inconsistencies in the text. In some places the recommendations do not flow from the textual discussion. There are some issues, such as the allegations about unethical conduct by lawyers, that are discussed in an inconclusive fashion without any assessment or recommendations being made.

Note 58: The Committee issued a very brief pro forma First Report, November 17, 1998, indicating when it would issue its final Report. Technically the Report of December 10, 1998 is the Second Report; in this paper it will be referred to as the Report.

¶ 60 The Report makes 48 recommendations intended to improve how child related issues are dealt with when parents separate or divorce. The recommendations are directed to federal and provincial governments, and to various agencies and professional groups involved in the divorce process. As its title For the Sake of the Children indicates, the Report purports to take a child focussed approach. Generally, an effort is made in the Report to link the recommendations to the objective of promoting the "best interests" of children. However, the concept of the "best interests of the child" is highly malleable and advocates for almost any position in this area can usually cast their arguments in terms of promoting this objective.

¶ 61 Upon its release, the Report was criticized by some advocates for its pro-father positions. For example, Judith Huddart, the chair of the Family Law Section of the Canadian Bar Association - Ontario commented: "My sense of this report is that it very much reflects the concerns fathers were raising. You can hear the parents' voices in that report, but I am not hearing the children's voices." [See Note 59 below] While the Report did address some of the concerns of fathers, it also tried to promote a less adversarial approach, and some of the most contentious recommendations of fathers and grandparents were not endorsed but referred for further study.

Note 59: "Custody & access report draws mixed reaction," Lawyers Weekly, February 5, 1999, p.7

¶ 62 It is possible to identify four major objectives in the Report:

1) to try to reduce conflict between parents;
2) to give more rights to non-custodial parents (fathers) and increase their involvement in the lives of their children;
3) to give more recognition to the rights of children;
4) to give limited attention to the concerns of women about violence.

¶ 63 The major recommendations of the Committee are discussed in this paper under these headings, though in it is apparent some of the recommendations have more than one objective.

Reducing parental conflict

¶ 64 Perhaps the most prominent objective of the Report is to encourage parents to resolve their differences without resort to an expensive and embittering judicial process, in a way that continues to have both parents actively involved in their children's lives. In promoting this objective, the Committee acknowledged that there would be some cases where a judicial resolution was necessary.

-- A central recommendation is the abandonment of "custody & access" terminology and adoption of "shared parenting" as a central concept. [See Note 60 below] "Shared parenting" is never clearly defined, but it is to include all of the rights and responsibilities that parents presently have. Parents are to be encouraged to jointly formulate parenting plans to divide their parental responsibilities between them in a way that they consider appropriate.

The new concepts are intended to move parents away from the idea that one parent "wins custody" and the other gets what is left over. It is intended to encourage the involvement of both parents. However, the

Committee did not support a presumption in favour of joint custody as many fathers urged. The adoption of new language follows similar reforms in jurisdictions such as England and Washington state, which were considered by the Committee.

Further research is needed to fully assess the impact of developments in jurisdictions that have changed their concepts, and one should not imagine that a change in language will be eliminate all conflicts. However, the concept of shared parenting, and especially parenting plans, seem to accord more closely to actual needs of parents and children than the archaic concepts of custody and access. Lawyers, judges and mediators can encourage use of parenting plans and similar concepts without waiting for legislative change.

-- If parents cannot formulate a parenting plan, courts will continue to have responsibility to make a decision for them on the basis of the "best interests" of the child. [See Note 61 below] The Committee proposes the adoption of a list of 14 "child focussed best interests" factors for courts to consider. Consistent with its definition change, the Committee recommends that courts also use the concept of "shared parenting" to fashion orders, though it does not explain how this will be done.

-- For cases that are proceeding through the courts, the Committee makes a number of recommendations to improve the administration of justice, including more Unified Family Courts, better access to legal aid for family law cases, identification and case management for high conflict families, giving scheduling priority to family law matters, and more support services for the courts. [See Note 62 below] These are sound recommendations, though it remains to be seen whether governments will give funding priority to the addressing of these issues.

-- If a court order is sought and the parents have not reached an agreement at the time of filing of the application, the Committee recommends mandatory parenting education. [See Note 63 below] This type of program is intended to help parents understand the impact of their separation on their children and to encourage and assist in the development of parenting plans. Parenting education programs have already been established in a number of places in Canada. These programs seem to be a cost effective way of improving relationships between parents after separation and have recently been made mandatory in British Columbia. [See Note 64 below]

-- The Report also encourages mediation as a way of promoting settlements for separating couples, as well as marital counselling for couples wishing to avoid separation. [See Note 65 below] This includes recommendations for financial support, as well as encouragement of accreditation for mediators. The Report does not, however, recommend that mediation should be mandatory. The Committee recognized that mediation may not

be appropriate if there is a "proven history of violence." The expectation that violence must be "proven"at this stage is inappropriate. Any concerns about violence, abuse or power imbalances should be sufficient to raise serious concerns about the inappropriateness of mediation.

Note 60: Report (1998), Recommendations 5, 6 & 7, p. 27 -28.

Note 61: Report (1998), Recommendations 15 & 16 (p.44 - 45)
Note 62: Report (1998), Recommendations 23, 24 25 (p.63-64)

Note 63: Report (1998), Recommendations 10 (p.30) & 28 (p.68).

Note 64: See "B.C. family law changes include mandatory parent counselling," Lawyers Weekly, Feb. 20, 1998

Note 65: Report (1998), Recommendations 14 (p.33), 29 (p.68) and 31 (p.72).

Increasing the Rights and Role of Non-custodial parents:

¶ 65 The major impetus for having Committee hearings came from fathers rights groups. A significant number of recommendations address the concerns of non-custodial parents, though some of the more radical proposals of fathers have not been accepted. A number of the recommendations in the Report do not pay sufficient attention to the concerns of custodial parents, and the children whose welfare depends primarily on their relationship to that parent.

-- The Committee begins it recommendations by advocating that a Preamble should be added to the Divorce Act. The Preamble should "allude to the general principles of the United Nations Convention on the Rights of the Child, and "contain... the principle that divorced parents and their children are entitled to a close and continuous relationship with one another." [See Note 66 below] By implication, the major new focus in this statement is on the rights of the non-custodial parent. While children, in general, benefit from the active involvement of both parents in their lives, it is distressing that this general statement makes no reference to the welfare of children. Children with abusive or neglectful parents may not benefit from continued contact. If there is to be a general statement of principle, the focus should be on the rights and needs of children, and the responsibilities of parents.

-- The Committee heard many complaints by men that judges are biassed against fathers. A frequently cited example of judicial bias was the "tender years" doctrine, a judicially created presumption that children of "tender years" (7 years or under) should be in the custody of their mothers. The

Committee recommended that "the 'tender years' doctrine should be rejected as a guide to decision making about parenting." [See Note 67 below] The "tender years" doctrine should not be used, but the reality is that very few judges in Canada have used this type of explicitly gendered and sexist assumption in the past decade. [See Note 68 below]

It is unfortunate is the Committee did not give more serious consideration to the use of a "primary caregiver" presumption for young children. There should be no presumption in favour of mothers per se. However, it is legitimate for courts to take account of the fact that the one who has had the primary responsibility for the care of young children, knows them better and has closer psychological ties with them. In fact Canadian courts do recognize the importance of the role of the primary caregiver, [See Note 69 below] and the Committee recommends that the first 'best interests" factor should be "the relative strength, nature and stability of the child's relationship" with each parent. [See Note 70 below] The problem with not specifically recognizing the "primary caregiver" role is not that courts will make bad decisions. Rather it is that in negotiations, parents who have made career sacrifices to assume the primary caregiver role may feel inclined to make unfavourable settlements on economic issues in order to ensure that they maintain this role after separation. [See Note 71 below] The lack of a clear statutory recognition of this factor may contribute to favourable property settlements for non-custodial parents in some cases.

-- Another Committee recommendation is more judicial education about...the importance of maintaining relationships between children and their parents and extended family members" and the impact of divorce on children. There is no doubt a need for judicial education about family law issues and the effect of divorce on children. But there are other important issues that need to be addressed in these programs, such as the impact of spousal abuse on children who live in families where this has occurred. There may be a perception of Committee bias in emphasizing the concerns non-custodial parents in judicial education.

-- The Committee recommended that if a parent with whom the child resides plans a move that might affect the arrangements in a parenting plan, that parent must give the other parent 90 days notice and seek judicial permission before relocating. [See Note 72 below] The issue of court approval for parental relocation is complex, and the Committee did not suggest what criteria a court should employ in deciding whether to allow relocation. [See Note 73 below] This recommendation is procedural, but would impose a significant burden on custodial parents since they would have the onus of making a judicial application, presumably in any case where the nonocustodial parent does not explicitly agree to the move. While some mobility cases are now litigated, in the absence of a

clause in an order or agreement restricting mobility, there is no positive requirement for the parent seeking to relocate to provide prior notification and obtain court approval. [See Note 74 below] In the absence of a specific clause, the non-custodial parent has the onus to bring the matter to court, which may limit the number of court applications.

-- The biggest concern that fathers raised at the Committee hearings was the denial of visitation rights with their children. The Committee made a number of recommendations to facilitate and better enforce the rights of non-custodial parents through the "development of a nationwide co-ordinated response...involving both therapeutic and punitive elements." [See Note 75 below] This would include counselling, parenting education and mediation, but for "persistent intractable cases, punitive solutions" are needed for parents who wrongfully disobey access orders. Although the Committee did not go so far as to adopt the proposal that there should be a new criminal offence for denial of access rights, it made recommendations to facilitate police enforcement of parenting orders (including access rights) and the prevention of child abduction. [See Note 76 below]

-- Although a review of the federal Child Support Guidelines was not within its mandate, the Committee chose to express "concerns" about certain provisions. [See Note 77 below] The concerns related to a number of situations in which payor parents believe that the burden of child support is too great. It is notable that the Committee did not make recommendations about Guidelines issues which may be of concern to recipients, about inadequacies in the amounts of child support or enforcement problems.

Note 66: Report (1998), Recommendations 1& 2 (p. 23)

Note 67: Report (1998), Recommendation 8, p.28

Note 68: See e.g. R. v. R. (1983), 34 R.F.L. (2d) 277 (Alta. Ca.) and Tyabji v. Sandana (1994), 2 R.F.L. (4th) 265 (B.C.S.C.), but judgess occasionally still view the tender years doctrine as a rule of 'common sense': S. v S. (1991), 35 R.F.L. (3d) 400 (Ont. C.A.)

Note 69: See e.g. Harden v Harden (1987), 6 R.F.L. (3d) 147 (Sask. C.A.); and K.v.K. (1990), 28 R.F.L. (3d) 189 (Alta. C.A.)

Note 70: Report (1998), Recommendation 16.1, p. 45

Note 71: For a fuller discussion, see Bala & Miklas, Rethinking Decisions about Children: Is the 'Best Interests of the Child Test' Really in the Best Interest of Children (Toronto: Policy Research Centre on Children, Families & Youth, 1993)

Note 72: Report (1998), Recommendation 30 (p.70)

Note 73: See D.A.R. Thompson, "Relocation and Relitigation:

After Gordon v. Goertz" (1999)16 Can. F.L.Q. 461

Note 74: See discussion in B. Hovius, "Case Comment on Litgate v. Richardson and Pisko v. Pisko"(1998), 32 R.F.L. (4th) 9.

Note 75: Report (1998), Recommendation 19 (p.55).

Note 76: Report (1998) Recommendations 27 (p.67), 37 - 42 (p. 84).

Note 77: Report (1998), Recommendation 18 (p.51)

Rights of Children

¶ 66 The Report contains a number of recommendations that are intended to increase the rights and protections afforded children in the divorce process and Canadian society.

While some of these are purely symbolic, some could have a real impact, if implemented.

-- The Committee recommends that children should have the "opportunity to be heard" when decisions are made that affect them. The Committee recognized that children will generally be unable or unwilling to appear to take sides by testifying or communicating with the judge. It recommends that skilled professionals, trusted friends or relatives, and lawyers might be involved in communicating a child's wishes to the courts. The Report includes a proposal that judges should have the power to appoint a lawyer to represent a child involved in a divorce proceeding. [See Note 78 below] In Ontario judges can request that legal representation or other services should be provided for a child by the Office of the Children's Lawyer. In most jurisdictions in Canada, there is little if any legal representation for children in divorce proceedings. Resource constraints often make it difficult to obtain an assessment of the child's needs or views from a social worker or other skilled professional. [See Note 79 below]

-- The Committee endorsed a recommendation that has been made by others who have studied child related issues, that there should be a Children's Commissioner appointed to superintend and promote the welfare of children, with responsibility to report to Parliament. [See Note 80 below]

-- The Committee also endorsed statutory adoption of a Preamble to the Divorce Act that would "allude to the relevant principles of the United Nations Convention on the Rights of the Child." [See Note 81 below] Although this is Recommendation 1 in the Report, it is largely symbolic.

Note 78: Report (1998), Recommendations 3 (p.23) & 22.4(p.59).

Note 79: Sections 89 & 112 of Courts of Justice Act, R.S.O. 1990. Chap. C.43, as amended by S.O. 1994, c. 12, s. 37

Note 80: Report (1998), Recommendation 22.3 , p. 59. A similar recommendation was made by Rix Rogers, Reaching For Solutions: Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada (Ottawa: Department Health & Welfare, 1990).

Note 81: Report (1998), Recommendation 1, p.23

Spousal Abuse

¶ 67 Although the Committee heard from both victims of spousal abuse and those who work with them, the Committee was more sympathetic to fathers who appeared before the Committee to raise issues of false allegations. The most inadequate aspects of the Report are its treatment of spousal violence issues, which reflect the "profather" tone of the hearings and the sympathies of many of the Committee members. The Report deals more extensively with the issue of false allegations and abuse perpetrated by women, than with the more prevalent and serious problem of male abuse of women and children. There are some recommendations that address spousal abuse concerns, but they are not adequate.

-- The Committee recommends that the best interests test should include "proven family violence" as a factor in making determinations about children. [See Note 82 below]

It is not clear what is the significance of the qualifier "proven," though it is not used to qualify any other best interests factors. Clearly the Committee was influenced by the stories of fathers who claimed that mothers frequently make false allegations of spousal abuse. It may be that the Committee expected a criminal conviction before this factor would be taken into account. Spousal abuse is usually kept hidden by victims and their terrified children. Victims generally do not call the police and so requiring proof to a criminal standard would be unfair and inappropriate for a proceeding where the child's best interests is at stake.

If there is a history of violence, Canadian legislation should be modelled on that of England, Australia and other countries. Violence should not just be a "best interests" factor; courts should be satisfied that any parenting arrangements do not pose a significant risk to the safety of a parent or child.

-- The Committee made a number of recommendations to expand the availability of supervised parenting programs, which would help facilitate continued parental involvement where there are concerns about abuse. [See Note 83 below]

Such programs can help ensure child safety while contact is maintained,

and can be used to help educate parents about appropriate child care methods. Though not significantly discussed by the Committee, in addition to supervised visits, such programs can have an important role in supervising the exchange of care of the children; in abusive relationships, this can be an explosive situation.

The Committee should have also supported legislative reforms that would have explicitly allowed judges to require that parent undergo counselling or take parenting courses as a condition of continued involvement in a child's life.

-- The Committee recognized that mediation is not appropriate in situations where there has been spousal abuse. [See Note 84 below] However, it again used the unfortunate expression "proven history of violence" to describe situations where mediation is not appropriate. Mediation should be a voluntary process involving parties on a relatively equal footing, where or when neither party is feeling intimidated by the other. It should be sufficient for a spouse to claim that there is a history of violence or other concerns about abuse or power inequality to raise concerns about the inappropriateness of mediation.

-- The Committee heard some heart rending stories about parental child abduction, in particular by parents who lose custody taking the children and disappearing. It made a number of recommendations to deal more effectively with parental child abduction, both within Canada and internationally. [See Note 85 below]

Note 82: Report (1998), Recommendation 16.11 (p.45)

Note 83: Report (1998), Recommendations 22.6 (p.59) & 34 (p.76)

Note 84: Report (1998), Recommendation 14 (p.33)

Note 85: Report (1998), Recommendations37-42 (p.84)

'Referred for Study'

¶ 68 While many of the concerns raised by fathers and their supporters were recognized, some of the most controversial of their proposals were not adopted by a majority of the Committee. They were not, however, totally rejected either, but were referred for further study.

-- One of the major concerns that fathers raised was the making of false allegations, especially of abuse, arguing that there should be a specific criminal offence for making a false statement in a family law proceeding. The Committee recommended that the federal government "assess the adequacy" of existing laws and policies on false allegations.

[See Note 86 below] At present a person who knowingly makes a false allegation in a civil proceeding can be charged with such Criminal Code offences as mischief, obstruction of justice or perjury. The reason that there are so few charges relates to the difficulty in proving that a false statement was made knowingly. Also at the end of often bitter litigation it is rarely to anyone's advantage to call the police to try to prove that another party lied. Extending litigation to punish one parent is likely to harm the child.

-- Perhaps the greatest concern expressed by fathers at the Committee hearings was their difficulty in securing access, and many advocated the enactment of a criminal offence for denial of access. While the Committee was very sympathetic to these concerns, it advocated the "development of a coordinated response." The Committee wisely focussed on education, mediation and counselling as the best responses. Although it also recognized a role for "punitive solutions," the Committee did not advocate immediate enactment of a criminal offence for access denial. [See Note 87 below]

-- The Committee received many submissions that the Divorce Act should be amended to encourage or at least explicitly allow access by grandparents. The present Divorce Act does not mention grandparents, though it allows a court to permit custody or access to "any person." The majority Report responded weakly to grandparents concerns, recommending that the provinces "consider" amending their laws to recognize that relationships with grandparents and other extended family members should only be disrupted for a "significant reason." The Committee also recommended that, where consistent with a child's best interests, parenting plans should include provisions to foster a child's relationship with grandparents, and that courts should consider relationships with extended family members in assessing a child's best interests. [See Note 88 below]

The cautious approach of the Committee reflects the way that judges are interpreting the 1997 amendment to Alberta's Provincial Court Act. This provision, the first in Canada, is modelled on many American statutes that specifically allow grandparents access. The law is a very blunt instrument for the regulation of family affairs, and judges have indicated that they will use "extreme caution" when considering whether to disrupt "the peace and harmony of the child's nuclear family" by ordering grandparents access [See Note 89 below]

Note 86: Report (1998), Recommendation 43, p. 90

Note 87: Report (1998), Recommendation 19, p.55

Note 88: Report (1998), Recommendations 12 (p.32), 16.2 (p.45) & 21 (p. 57).

Note 89: Cook-Stanhope Prov. J., in Bridgewater v. Lee, [1998] ACWSJ 5244 (Prov. Ct.)(Lexis).

Dissenting opinions in the Report:

¶ 69 Although the Report was not unanimous, the opposition parties supported many of the recommendations. Not surprisingly, the dissents were consistent with the broader political orientations of the opposition parties.

¶ 70 The conservative Reform Party has the most explicitly "pro[traditional]-family" platform. It is its dissent to the Report, the Reform Party expressed general support, but argued that not enough is done to recognize the concerns of fathers. The Reform dissent begins by affirming that the "ideal...is the conventional stable two parent family where there is a loving father and mother. If families dissolve, then a legal climate that facilitates the ongoing involvement of children with both parents in a full and meaningful way should be the preferred outcome of parenting plans." [See Note 90 below] The Reformers wanted to add a few pro-father recommendations, such as the creation of criminal offences for the making of false allegations of abuse and better enforcement of access rights. They also favour more explicit recognition of the rights of grandparents and the abolition of child support obligations for adult children attending university or college.

Note 90: Report (1998), p.106

¶ 71 Consistent with its general orientation, the separatist Bloc Québécois dissent begins by emphasizing the problems that arise from overlapping federal and provincial jurisdiction and advocating the transfer of all responsibility for divorce to the provinces. This dissent lamented the fact that the Committee hearings degenerated into a "polarized... battle of the sexes" and was especially critical of the attacks on women. Of particular concern, the majority report failed to deal adequately with violence against women.

¶ 72 The leftist New Democratic Party generally supported the recommendations, though expressing concerns about the 'perceived [pro-male] bias' and poor treatment of witnesses of some Committee members. The majority report was criticized for not giving enough attention to violence against women and children, and lack of access to legal aid. This dissent also raised broader concerns about child poverty, and its relationship to family breakdown.

The Response of the Minister of Justice - May 1999

¶ 73 After the Joint Committee Report was released in December 1998, the Minister of Justice, Anne McLellan, was cautiously supportive of the Report, and of the need for

more recognition of the role of fathers: "We talk about support and ensuring that a custodial parent has rights to enforce his or her rights to support for either themselves or their children. But we haven't as a society focussed very much on the rights and responsibilities of the non-custodial parent." [See Note 91 below] While the Report was criticized by some lawyers and women's groups, [See Note 92 below] the Minister's support for the principle of encouraging involvement of fathers after divorce was not politically controversial. According to public opinion polls, 70% of Canadians believe that fathers get too littler attention in the divorce courts. [See Note 93 below]

Note 91: "Minister's response is a cautious one," Lawyers Weekly, January 15, 1999, p. 7

Note 92: See e.g. "Custody & Access Report Draws Mixed Reaction," Lawyers Weekly, Feb. 5, 1999, p.7

Note 93: "Needs of children and fathers ignored: poll," Southam Newspapers, November 23, 1998

¶ 74 As required by Parliamentary rules, on May 10, 1999, 150 days after the release of the Report of the Special Joint Committee, the Minister released a formal Response on behalf of the government. [See Note 94 below]

Note 94: Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access (Ottawa: Department of Justice, May 10, 1999) website http://canada.justice.gc.ca/publications/sjcarp02

¶ 75 The Response gave qualified support to the broad objectives of the Report, but was vague on many specific issues. It is a relatively brief document, dealing explicitly with only 16 out of the 48 recommendations, and even then only in general terms. The vague and non-committal nature of the Response reflects the government's sense that it is dealing with controversial issues, about which "at present there is no clear consensus." The vagueness of the response reflects a desire to avoid angry confrontations with gender based interest groups. The federal government also wants to leave itself room to shape more detailed responses in consultation with provincial politicians and bureaucrats, who have responsibility for many of the issues in this area. It is also reluctant to base major policy decisions on a process that seemed to have been swayed by highly emotional presentations from aggrieved individuals. The government wants an opportunity to undertake more systematic research and consultation with professionals who work in this area, most notably judges. Judges views on law reform need to be canvassed in a sensitive fashion. Judges have a unique vantage point on the family law system; their views were not sought out by the Joint Committee.

¶ 76 The Response, a comparatively brief document, is frustratingly vague, but it suggests a process and time-line for reform, and gives a sense of how the Minister feels on some of the issues raised. The Response recognizes the validity of some of the claims of fathers, though it is clearly less supportive of them than the Committee Report was.

The major themes of the Response are:

-- The Response calls for a further process of consultation with provincial governments, with the objective of formulating a coordinated strategy for dealing with child related issues. The strategy would include child support as well as what is now called custody and access. Ideally, as with child support, the federal and provincial governments can take a coordinated approach to dealing with all these issues, or should at least avoid having conflicting policies.

The three year time frame would allow the dovetailing of a detailed response on custody and access issues with the time frame for the required filing of a report to Parliament on the Child Support Guidelines. This time frame would also allow further research to be carried out on a range of child related issues. The Committee's sense of issues that need research was skewed by its profather bias, for example focussing on tracking of false allegation of abuse cases, and ignoring research into the appropriate responses to founded allegations of family violence. The Response calls for a research agenda that will include issues raised by the Committee, but the government will look at a broader range of related issues.

There is also the expectation that professional groups will be involved in the consultations and research. While the public will not be ignored, it is apparent that the government does not want to repeat the high profile, factious Committee public hearing process.

-- The Response indicates that the introduction of new terminology "will be a high priority," and endorses the use of terminology that will be "child-centred," place an emphasis on parental responsibilities and reduce the conflict between parents. While the term "shared parenting" may ultimately be used the Response was non-committal about specific language. Any concepts employed will have to be carefully defined and there will not be any presumption equivalent to joint custody. Indeed the Response emphasized that there should be no legislative presumptions of any sort as individual children deserve individual solutions. Though not expressly stated, it is also clear that presumptions are too politically contentious.

-- The Response also endorses greater use of a range of measures to reduce the adversarial nature of the divorce process and encourage greater co-operation between parents, including use of parenting plans, mediation and parenting education, which the federal government is already starting to

fund and evaluate on a pilot project basis.

-- The Response recognizes that there will be some high conflict situations that cannot be resolved by non-adversarial means. In the only quotation in the Response from a source other than the Committee, the government cites a group of American researchers who observe: [See Note 95 below]

> [Some divorcing parents] remain embittered and actively hostile for many years, and this places their children at a considerably higher risk of psychosocial problems. These high-conflict parents and couples are identified with multiple characteristics: high rates of litigation and relitigation, high degrees of anger and distrust, intermittent verbal and/or physical aggression, difficulty focusing on their children's needs as distinct from their own, and chronic difficulty cooperating and communicating about their children after divorce. Their interparental struggle assumes center stage and, as a consequence, children's personal circumstances and developmental needs are often given inadequate attention.

While the Committee Report identified the issue of high conflict divorces, it was less willing to recognize their potentially intractable nature. The Response realistically recognizes that the courts and clear judicially imposed solutions will be needed in some situations. "Alternatives to co-parenting" will be needed in some of these cases. The issue of whether parenting plans are appropriate for all such cases requires "further study." If they are used, they will need to be "very specific."

-- While not as supportive of fathers and grandparents as the Report, the Response recognizes the benefit, for most children, of maintaining relationships with both parents as well as members of extended families following separation. The Response also pledges to take steps to deal with access denial, emphasizing the non-court responses wherever possible, but recognizing the need "for persistently intractable cases , [of] punitive solutions for parents who wrongfully disobey parenting orders." However, the Response also notes that there may be "relevant reasons" for non-compliance with access orders.

The Response also appears to endorse the Committee idea that relationships with grandparents might be a "best interests" factor, but does not seem enthusiastic about giving grandparents broader rights.

-- Perhaps the clearest difference between the Committee Report and the government Response is in regard to domestic violence, and especially spousal abuse. Even here, the Response is quite general, and tries not to emphasize differences with the Report, but it is clear that the government

believes that the Report did not deal adequately with the issue of violence, in particular violence against women. The Response indicates that further research needs to be done about the issue of spousal violence and its effects on children. The Response raises concerns about the problematic nature of the Committee's expectation that there must be a "proven history" of family violence before the courts take account of this factor.

Note 95: Quoting from Lamb, Sternberg & Thompson, "The Effects of Divorce and Custody arrangements on Children's Behavior, Development, and Adjustment" (1997) 35 Family and Conciliation Courts Review 396.

Assessing the Response

¶ 77 Opposition Reform Party members criticized the government for not taking fast action on the recommendations of the Special Joint Committee. Fathers groups have vowed to exact political revenge if the Justice Minister does not proceed more quickly than the planned three years time frame, though the Minister's cautious response received quiet support from women's groups. [See Note 96 below] It is understandable that the government would not rely exclusively on a Report that focussed so much on responding to the testimony of aggrieved fathers. The voices of those who are angriest and most outspoken must be heard, but in the Committee process their voices seemed to have become dominant. It is important to now broaden the dialogue.

Note 96: See e.g "Ottawa buries plan for equal parenting rights" & Donna Laframboise, "Feminist lobby prevails again", National Post, May 11, 1999, p.A1; "Divorce fathers angry over 3 year delay in custody law reform," Globe & Mail, May 11, 1999; and "CBA Likes Stance on Custody, Access" Lawyers Weekly, May 21, 1999, p.1.

¶ 78 It is also important to try to engage the provinces in a dialogue about reform of legislation and the administration of justice in this area, since there is so much overlapping and concurrent jurisdiction. This may be a good time to attempt such a collaborative exercise, as some provinces, like Alberta, are already studying the issues [See Note 97 below] and a number of provinces are experimenting with parenting education and family mediation. However, experience with the Child Support Guidelines suggests obtaining a degree of consensus will be difficult. Indeed child support was probably an easier issue to deal with, since there were fewer variables and ultimately there was money from the change in the tax laws available to assist with implementation of the new child support regime.

Note 97: At the same time as the federal government was undertaking a law reform process led by politicians, the Alberta Law Reform Institute has been undertaking a project led by senior lawyers, academics and judges to propose legal reforms in this area. The Institute released a public discussion paper in October 1998, a few weeks before the federal Parliamentary report: see Alberta Law Reform Institute, Family Law Project: Child Guardianship, Custody and Access -Report for Discussion No. 18.4 (Edmonton, October 1998). The Alberta Report is amore detailed and comprehensive document, but develops some of the same themes as the federal report, in particular facilitating non-adversarial dispute resolution and "parenting agreements" [plans], and that the "law should encourage parents who are living separate ... to enter into consensual arrangements for shared parenting." (p. 3) The Alberta Report did not stress the "rights" of non-custodial parents as much as the federal report, recommending that "legislation should specify that access is the right of the child" and there should be no presumption of access.

¶ 79 Clearly if there are to be significant changes in this area, the federal government will have to be prepared to make significant expenditures, though this may be viewed as an investment in Canada's children, and eventually there should be savings from the reductions in the use of expensive court resources. Further, one could argue that these expenditures should be funded from the increase in government tax revenues resulting from the change in the tax treatment of child support; that money has come from divorced families and should be spent on them.

¶ 80 It is also wise to try to link the government response on child support to the other child related issues. These issues are conceptually distinct, and there should not be an explicit quid pro quo in individual cases. However, all of the child related issues are psychologically and politically intertwined, as the Committee process revealed.

¶ 81 It must be recognized that there is unlikely to be unanimity among the provinces about how to proceed. And there will never be a consensus among parents who have become embittered with each other. Government action may need to be taken even without a "clear consensus." While the broad principles set out in the Response are sound, three years is a lengthy period to formulate a federal legislative response to a report that was produced in a year. The Department of Justice issued its first consultation paper on this issue in 1993. Fathers groups and editorial writers are understandably frustrated with the delay. [See Note 98 below] From a political perspective three years is very likely to be after the next election, and the next government may not have the political will to carry out a reform package formulated under a prior government. While the child support and other child related issues should be dealt with together in any legislative reform process, there is no valid reason for not presenting legislative reforms to Parliament before 2002, and the Minister has left herself the flexibility to do so. [See Note 99 below] It would be good if she did.

Note 98: See e.g, "Who is Acting for the Children? The Justice Minister is Curiously reluctant to amend the Divorce Act," Globe & Mail, May 12, 1999.

Note 99: In her public response to the criticism, the Minister stated that she hoped that it might take less than three years to respond."Divorce fathers angry over 3 year delay in custody law reform," Globe & Mail, May 11, 1999.

Conclusion: Trying to Establish Peace in a Gender War

¶ 82 Family laws have always had adifferential impact on men and women, though when the rate of family breakdown was relatively low and there was little controversy about gender roles, this was not a significant political issue. The rise in the divorce rate and the rise of feminism in Canada in the 1970s brought pressure to make the laws more responsive to the concerns of women. By the 1990s the organized women's movement has become a much weaker political force, while fathers have begun to organize to demand legal change. [See Note 100 below]

Note 100: Interestingly, these men's groups sometimes use the same deconstructionist arguments that feminists used, looking to the gender of judges, politicians and bureaucrats to explain their positions. Rhetorical excess and alck of regard for empirical data mark the extremes of both movements.

¶ 83 Fathers groups have considerable public support, especially in issues that relate to their involvement in their children's lives after separation, and the legal system must respond to their legitimate concerns. This response, must however, be balanced. While some fathers have valid concerns about access denial and false allegations of sexual abuse, there are many women who also have valid concerns about spousal abuse.

¶ 84 While it is frustrating that the pace of legal change seems so slow, a federal legislative response is only part of that process of change. Even without legislative change, governments and justice system professionals are working towards developing a more flexible, and often less adversarial approach to child related issues.

¶ 85 In particular, there is increasing use of family mediation and parenting education. And practitioners and judges seem increasingly receptive to parenting plans and different forms of shared parenting. [See Note 101 below] In that sense, the advocacy of fathers and the work of the Joint Committee is already having an effect. But these innovations are properly implemented only if they take account of the concerns of both fathers, for meaningful involvement with their children, and mothers, about such issues as economic support and spousal abuse.

Note 101: See e.g. Mudie v Post (1998), 40 R.F.L. (4th)151 (Ont. Gen. Div.); Lockman v. MacNair (1997), 12:002 Ont. Fam. L. Rep. (Gen. Div.) and Meenink v. Meenink (1998), 12:014 Ont. Fam. L. Rep. (Gen. Div.)

¶ 86 These developments cannot resolve all family disputes. Some cases will require judges to make clear decisions. But there is scope for developing a more child centred approach to resolving disputes between mothers and fathers, and reducing, but not eliminating, "gender wars."

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Syrtash Collection of Family Law Articles
SFLRP/1999-019

M. v. H.: Case Commentary

by John Syrtash

May 25, 1999

¶ 1 The headnote to the M. v. H. case recently released by the Supreme Court of Canada neatly summarizes the issues and decision in that case, as well as the dissenting opinion of Mr. Justice Gonthier. This headnote and the full text of the case can be found at M. v. H., [1999] S.C.J. No. 23. This brief commentary attempts to raise but a few questions left unanswered that legislators and the public must answer to in considering how to refashion Ontario's Family Law Act, Canada's Divorce Act, and similar family law legislation across the country.

¶ 2 Interdependency is the primary characteristic of the "non-compensatory" model for establishing spousal support (i.e. needs and means) as per the Court's recent decision in Bracklow v. Bracklow. If the entitlement does not necessarily have to arise from the relationship but rather because of the interdependency that the relationship engenders (whether heterosexual or same-sex) then this Court's view of section 29 of the Family Law Act as redefined in M. v. H. may be inconsistent. In M. v. H., what is so central about the relationship having to be either conjugal or permanent if interdependency is the key factor of non-compensatory support? According to the Court in M. v. H. the policy behind the support provisions of the Family Law Act is "the equitable resolution of economic disputes that arise upon the breakdown of financially interdependent relationships and reducing the burden on the public purse." If so, then why stop with same-sex couples? What if heterosexual "couples" who were roommates decided to split after, say seven years (same as Bracklow) and one of them became "dependent" on the other? Is the fact that they would never think of having sex with each other and that they date only members of the opposite sex stop the Court from awarding support? If so, would the Court then not be imposing the very type of discrimination that section 15(1) addresses: i.e. depriving an individual from a benefit because of some stereotype, i.e. of a heterosexual who never got married?

¶ 3 Does the decision put unmarried spouses in the same position as married spouses? What's "marriage" got do with it? If the conscious decision to go through a ceremony invokes an automatic right to a property split on separation then why not impose the same rights and responsibilities for unmarried couples, heterosexual or same-sex? What is it about a ceremony that allows for such "extra' rights and is it not discriminatory for the ceremony to confer such proprietary rights? And if the marriage ceremony can lead to property splits, then should the legislature not recognize marriage for same-sex couples forthwith, including all rights to adoption of children? And if not, why would the absence of formal marriage for same-sex partners not be considered

discriminatory under the section 15(1) of the Charter and H. v. M., unless property rights were also automatically granted to unmarried couples on separation.

¶ 4 The Court's view is that one of the dual policies behind section 29 and support provision in general is to protect the "public purse". However, this decision may make it much harder for governments to deny assistance to those seeking welfare on the basis that they had become dependent on their "spouses" and therefore unemployable. This will become particularly apparent where the "dependent" spouse has mothered or fathered a child and stayed at home to fulfill domestic chores, as in the traditional heterosexual marriage. Moreover, the burden on the severely overburdened government enforcement agencies across Canada will, of course, be further worsened by extending the right of entitlement.

¶ 5 Other sections within the Family Law Act and common law that will have to be redrafted to include same-sexes include the following (not exhaustive):

(a) Section 61: a same-sex spouse will now presumably be entitled to sue in tort for negligence for pecuniary loss resulting from his or her partner's injury or death if he or she suffers economically as a result. Insurance premiums for everyone will, presumably, be affected.
(b) In Loco Parentis: pursuant to the recent Supreme Court of Canada decision in Chartier there is no reason why a same-sex spouse who helped look after her partner's children should not become legally obliged to support them under the Child Support Guidelines.

Syrtash Collection of Family Law Articles
SFLRP/1999-017

Relocation and Relitigation: After Gordon v. Goertz* [See Note 1 below]

by D.A. Rollie Thompson

Received May 1999

* Posted by John Syrtash with permission of the author.

1. A Long Wait, But Not Home Yet

¶ 1 Almost three years ago, I published a paper on parental mobility, [See Note 2 below] ending with an invocation for the Supreme Court of Canada and Ontario Court of Appeal justices to watch "Star Trek: Voyager" for inspiration in "finding their way home" on these hard issues. The Star Trek parallel came from the three "generations" of mobility cases to 1996: first, the "original series" of Wright and Blois [See Note 3 below], then the "Next Generation" of Carter v. Brooks [See Note 4 below], then the "Deep Space Nine" of MacGyver v. Richards. [See Note 5 below] I thought the new series, "Voyager", might provide an apt metaphor, a ship lost in space with a diverse crew held together only by their common desire to return home.

Note 1: This is a revised and updated version of a paper presented at the National Family Law Program 1998, Federation of Law Societies and Canadian Bar Association, Whistler (30 June 1998). Earlier versions of the paper were also presented at the Family Law Seminar, National Judicial Institute, Toronto (12 February 1998) and at Family Law 1996, Continuing Legal Education Society of Nova Scotia, Halifax (22 November 1996).

Note 2: "'Beam Us Up Scotty': Parents and Children on the Trek" (1996), 13 C.F.L.Q. 219.

Note 3: Wright v. Wright (1973), 12 R.F.L. 200 (Ont.C.A.); Blois v. Blois (1988), 13 R.F.L. (3d) 225 (N.S.S.C.A.D.).

Note 4: (1990), 30 R.F.L. (3d) 53 (Ont.C.A.).
Note 5: (1995), 11 R.F.L. (4th) 432 (Ont.C.A.).

¶ 2 After the last few years of appellate relocation decisions, after Gordon v. Goertz, [See Note 6 below] after Woodhouse [See Note 7 below], after Ligate v. Richardson [See Note 8 below], I now feel lost in space, as do most lawyers and judges, I suspect. In this sense, "Star Trek: Voyager" does provide a parallel.

Note 6: (1996), 19 R.F.L. (4th) 177, [1996] 2 S.C.R. 27, 134 D.L.R (4th) 321 (S.C.C.).

Note 7: Woodhouse v. Woodhouse (1996), 20 R.F.L. (4th) 337 (Ont.C.A.) and, decided the same day, Luckhurst v. Luckhurst (1996), 20 R.F.L. (4th) 373 (Ont.C.A.).

Note 8: (1997), 34 O.R. (3d) 423 (Ont.C.A.).

¶ 3 On May 2, 1996, the Supreme Court of Canada handed down its decision in Gordon v. Goertz, upholding the lower courts' permission to the mother to move with the 7-year-old daughter from Saskatchewan to Australia. Although the Court was unanimous in the result, there were two distinct -- and I will argue, extremist -- camps: that of McLachlin J. and six others, supporting an unconstrained "best interests" approach; and that of L'Heureux-Dube J. and one other, advocating a strong primary caregiver presumption. [See Note 9 below] Framed in terms of the pre-existing mobility debate, sparked by competing Ontario Court of Appeal decisions, the majority went for Carter v. Brooks, with only a minority attracted to MacGyver v. Richards.

Note 9: Gonthier J. agreed with McLachlin J. on best interests and the absence of any presumption, but agreed with the explanation of factors respecting best interests by Justice L'Heureux-Dube: above, note 6 at 235.

¶ 4 As I will explain, however, the extremism and impracticability of both Supreme Court positions strips Gordon of any real precedential value. Gordon stands mostly for a negative proposition -- the rejection of any primary caregiver presumption, the rejection of MacGyver. We will all quote the list of factors from the majority reasons in Gordon, but little practical guidance can be found there.

¶ 5 Two Ontario relocation appeals were reserved until the release of Gordon, with further submissions by counsel afterwards. In Woodhouse, a three-Judge majority attempted at length to interpret Gordon and to situate its reasoning within the prior Carter-vs.-MacGyver debate in Ontario. [See Note 10 below] In my view, Woodhouse is more useful for post-Gordon cases than is Gordon itself, odd as that may seem.

Note 10: A five-Judge panel sat on both appeals, because of the conflicting Ontario authorities, but Dubin C.J.O. took no part in the final judgment. In Woodhouse, Osborne J.A. dissented, offering a number of helpful comments as well.

¶ 6 There are three reasons. First, Gordon was an atypical mobility case, a mother who had already moved to Australia to pursue her studies, leaving an after-the-move change of custody as the only alternative. Woodhouse is the more typical before-the-fact application, where "the third option" of "no-change-in-custody-but-no-move" is available. Second, thanks to Gordon itself, I think more moves will be restrained on an interim basis. Third, Woodhouse signifies a return to Carter reasoning, even though the necessary lip service is given to Gordon.

¶ 7 A review of the considerable case law since Gordon, 119 cases in 32 months, reveals that trial judges have lapsed back to Carter reasoning, much like the Ontario Court of Appeal in Woodhouse, unencumbered by most of the less practical aspects of Gordon. The moving parent's plans are subjected to detailed scrutiny. Courts have said "no" to moves in 40 percent of all cases, about the same proportion as after Carter and before MacGyver.

¶ 8 I predict that there will be another relocation case making its way to the Supreme Court within the next few years, thanks in part to Gordon itself. [See Note 11 below] Gordon creates new incentives to litigate, in an already litigious field of family law. And Gordon's vast trial discretion leaves room for much ill-conceived judicial second-guessing and interventionism. Once confronted with the results under the Gordon regime, I believe the Court will have to reconsider its "fresh inquiry" approach.

Note 11: Not so far though, as the highest Court has refused leave in two leading cases: Woodhouse, [1996] S.C.C.A. No. 402 (Feb. 6, 1997) and Chilton, [1996] S.C.C.A. No. 574 (Mar. 13, 1997).

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2. Gordon v. Goertz: Two Universes Apart

¶ 9 Gordon can and will be cited for its strong negative holding: there is to be no primary caregiver presumption, in relocation cases or, by implication, in any other variation or custody cases. Its factual holding will not carry much weight, as the relocation issue was practically moot: the dentist mother had already moved from Saskatchewan to Australia with the then six-year-old daughter the year before. [See Note 12 below]

Note 12: The move was approved in a trial decision dated December 30, 1994 and the expedited appeal was decided on January 20, 1995. Somewhere after that, as there was no stay, the mother moved to Australia. The Supreme Court of Canada heard the appeal on December 6, 1995 and handed down its decision on May 2, 1996.

¶ 10 What the majority said seems straightforward enough, but its reasons are extremist theoretically and unworkable practically. No better is the minority judgment, which has a more open ideological agenda. Both judgments have sent lower courts back to Carter v. Brooks for help.

(a) What The Majority Said

¶ 11 In her majority judgment, McLachlin J. kindly summarises "the law", in what has already become a standard passage in most relocation trial decisions:

> The law can be summarized as follows:
>
> 1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in circumstances affecting the child.
> 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
> 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
> 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
> 5. 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.
> 6. The focus is on the best interests of the child, not the interests and rights of the parents.
> 7. More particularly the judge should consider, inter alia:
>
> (a) the existing custody arrangement and relationship between the child and the custodial parent;
> (b) the existing access arrangement and the relationship between the child and the access parent;
> (c) the desirability of maximizing contact between the child and both parents;
> (d) the views of the child;
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
> (f) disruption to the child of a change in custody;
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
>
> In the end, the importance of the child remaining with the parent to 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 the circumstances, old as well as new? [See Note 13 below]

Note 13: Gordon, above, note 6 at 201-2.

¶ 12 Buried within the majority reasons are another series of propositions, some express but some implied, of equal importance, paraphrased by me:

(8) Where a parent's access is specified in precise terms, or is frequent and meaningful, or assumes the child's principal residence will remain near the access parent, an intended move by the custodial parent will be a material change of circumstances. [See Note 14 below]
(9) A custodial parent's reason or motive for moving is "conduct", to be considered only if relevant to the ability of that parent to act as parent of the child under s. 16(9) of the Divorce Act. [See Note 15 below]
(10) Where a child's best interests are in issue, neither party bears a burden of proof, but each parent bears an evidential burden of leading evidence relevant to the trial judge's inquiry. [See Note 16 below]

Note 14: Ibid. at 191, 202.
Note 15: Ibid. at 192-3.
Note 16: Ibid. at 198, 199.

(b) What the Majority Didn't Say, So We Have to Guess

¶ 13 It seems that the analysis in every mobility case so far has been a hostage to its facts and its procedural setting. Carter was an initial custody hearing, with no agreement or court order in place before the proposed move by the mother's new family. [See Note 17 below] MacGyver was a strong set of facts in support of the move, whatever conceivable principles or burdens were applied, but in form an application to vary by the father. No less bound and gagged is Gordon, where mother and daughter were already "down under" and the father's application to vary custody was his only remaining hope.

Note 17: "Trek", above, note 2 at 224-5.

¶ 14 Here I wish to draw out some of the unmentioned or inadequately-considered relocation issues lurking within the majority judgment. [See Note 18 below]

Note 18: For an excellent summary and analysis of the implications of Gordon, see Hovius, "Mobility of the Custodial Parent: Guidance from the Supreme Court" (1996), 19 R.F.L. (4th) 292, as well as his subsequent comment, "Case Comment: Woodhouse v. Woodhouse and Luckhurst v. Luckhurst" (1996), 20 R.F.L. (4th) 376.

See also Davies, "Mobility Rights and Child Custody: A Contradiction in Terms?" (1997), 15 C.F.L.Q. 115 and Bailey, "Developments in Family Law: The 1995-96 Term" (1997), 8 S.C.L.R. (2d) 446, esp. 457-476; Boyd, "Child Custody, Relocation, and the Post-Divorce Family Unit: Gordon v. Goertz at the Supreme Court of Canada" (1997), 9 C.J.W.L. 447; Goldwater, "'Long Distance' Custody Cases: Are the Child's Best Interests Kept at a Distance?" (1998), 116 C.F.L.Q. 145.

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(1) Who Has to Apply for What?

¶ 15 In Gordon, the mother had been granted sole custody in February 1993. Her plan to move to Australia in January 1995 generated the father's application to vary custody or, alternatively, an order restraining the move. The mother then cross-applied to vary access.

¶ 16 Despite the majority's discussion of the threshold "material change" requirement, [See Note 19 below] it is never clear who must prove the change, not helped by the two applications to vary before the Court. In the end, the Court is quick to find the move to be a change, seemingly from the perspective of the father's application to vary. [See Note 20 below] On Justice McLachlin's approach, any order specifying access or providing for frequent contact will give rise to a material change in the face of a proposed move. The threshold is set so low, that almost every mobility case generates a fresh, de novo inquiry into the child's best interests. [See Note 21 below]

Note 19: Gordon, above, note 6 at 189-91.

Note 20: Ibid. at 202. McLachlin J. refers to the change as "the mother's intended move to Australia and the consequent disruption of the child's life and diminution of the father's contact with her".

Note 21: Only where there is little access relationship or a very minor move will the threshold requirement not be met: ibid. at 190. Interestingly, the minority is also quick to agree that the father had proved the necessary change by reason of the move: ibid. at 234.

¶ 17 A proposed move is usually significant enough that it does not much matter who bears this modest little threshold burden. Nor does it then matter whether access is specified or not, liberal or not, so long as there is some regular access. Nor does it matter whether there is a residence restriction or not, or joint legal custody, or joint physical custody. Nor, in the end, does it matter whether it's an application to vary, an application after a separation agreement, or an initial custody application. [See Note 22 below]

Note 22: For more detailed analysis on this issue, which treats it more seriously than me, see Hovius, "Mobility", above, note 18 at 302-4. The one approach that is plainly wrong is the odd comment of Weiler J.A. in Woodhouse, above, note 7 at 347, suggesting that "The onus of meeting the threshold requirement is on the access parent." See Hovius, "Comment", above, note 18 at 384.

¶ 18 On the bright side, this leaves one less item to litigate about. The parties can get right into the best interests inquiry.

(2) The Relevant Factors

¶ 19 Every appellate court emphasises that a list of non-exhaustive factors should not be treated as gospel... and then every counsel and every trial judge repeats them like the Ten Commandments. Those factors listed in Gordon are no different. If anything, the vagueness of the best interests standard makes us all hang on to this "list" for dear life.

¶ 20 I offer here a chart comparing the two tablets, from Gordon and Carter:

Carter	Gordon
(1) the existing custody arrangement	(a) the existing custody arrangement
(2) an incident of custody, where to live	
(2a) the views of the custodial parent	(a1) the views of the custodial parent
"a reasonable measure of respect"	"great respect"
(3) the well-being of the new family unit	(b) the existing access arrangement
(4) relationship of the child to access parent	
(5) the reason for the move (to frustrate access? necessary?	(e) reason for moving only in exceptional case
(6) the distance of the move	(g) disruption consequent on removal
(7) the child's views	(d) the views of the child

(8) the maximum contact principle	(c) the desirability of maximizing contact
	(f) disruption to child of change in custody

¶ 21 A few differences should be noted. First, the "new family unit" appears in Carter, as the mother was intent on remarrying. A single mother with a child is not seen to be a "new family unit" by McLachlin J. Second, no express reference is made by the Supreme Court to the notion of where to live as an "incident of custody". Third, the disruption of a change of custody appears on Gordon's list, as that was an option, the only option, there, whereas the restraint on the move was the issue in Carter. Fourth, Carter presumed that the greater the distance of the move, the more severe the impact upon the access relationship, whereas no presumption flows from Gordon. Both, however, note that the access parent's financial resources can soften the impact of distance.

(3) Demolishing Any Presumptions

¶ 22 Most important for Canadian custody law is the majority's rejection of any presumptions of any kind, in the course of dismissing any presumption in favour of the custodial parent in relocation cases. Fuelling this sweeping rejection is probably the separate, pro-custodial-parent opinion of L'Heureux-Dube J.

¶ 23 The arguments of McLachlin J. could equally be arrayed against any subsidiary rule in custody cases, whether on relocation, variation, initial custody or even interim hearings. The "best interests" determination by the judge must not be defined or constrained. Individualised, inquisitorial, purely discretionary justice is required, we are told. Certainly the Gordon decision means that any broader form of primary caregiver presumption is a non-starter. Not even in a relocation case, where there is an existing custodial or residential parent and a variation application, perhaps the strongest possible situation, is the Court prepared to use any form of presumption.

¶ 24 The result is uncertainty and the encouragement of litigation and relitigation over children. [See Note 23 below] The "right" decision in this particular case for this particular child takes priority over any systemic concerns. [See Note 24 below] The anti-presumption language of Gordon makes one hanker for the more balanced tone of Carter.

Note 23: Gordon, above, note 6 at 197, where McLachlin J. states, amazingly: "Even if it could be shown that a presumption in favour of the custodial parent would reduce litigation that would not imply a reduction in conflict. The short-term pain of litigation may be preferable to the long-term pain of unresolved conflict. Foreclosing an avenue of legal redress exacts a price;; it may, in extreme cases, even impel desperate parents to desperate measures in contravention of the law."

Note 24: Ibid. at 199-200.

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(4) The Reason for the Move

¶ 25 Justice McLachlin's attempt to restrict scrutiny of the custodial parent's reason for the move, while retaining a wide-open, individualised best interests inquiry, is theoretically untenable and practically unworkable.

¶ 26 First, it is impossible to discern how "the custodial parent's reason or motive for moving" amounts to "past conduct" under s. 16(9) of the Divorce Act. The "past conduct" rule was intended to exclude evidence of adult misconduct, usually adultery or desertion, to "discourage parents from using custody cases to expose sordid details of alleged matrimonial misconduct that had no relevance to parental capacity". [See Note 25 below] And, if anything, a pending move is "future" conduct.

¶ 27 Second, these "no-fault" provisions have been thoroughly unsuccessful in preventing adultery or unjustified departure from the home from being considered "relevant to parenting ability", thanks to what I have described elsewhere as "the squishy notions of relevance prevalent in custody litigation". [See Note 26 below] Sometimes past conduct has been treated as relevant "indirectly", i.e. a parent is prepared to put his or her own interests ahead of the child's best interests [See Note 27 below], or as "valuable insight into a person's character and sense of responsibility". [See Note 28 below] McLachlin J. herself suggests either of these lines of relevance in Gordon: "Occasionally, however, the motive [for moving] may reflect adversely on the parent's perception of the needs of the child or the parent's judgment about how they may be best fulfilled." [See Note 29 below]

Note 25: Boody v. Boody (1983), 32 R.F.L. (2d) 396 (Ont.Dist.Ct.) per Perras D.C.J. For the history of provisions like s. 16(9), see Thompson, below, note 26.

Note 26: See Thompson, "Is Character Always (Sometimes? Never?) Relevant in Custody Cases?" in Federation of Law Societies and Canadian Bar Association, 1994 National Family Law Program (Victoria, 1994) at pp. 27-33.

Note 27: E.g. Weaver v. Tate (1990), 28 R.F.L. (3d) 188 (Ont.C.A.), affirming (1989), 24 R.F.L. (3d) 266 (Ont.H.C.).

Note 28: Kraynyk v. Kraynyk (1978), 5 R.F.L. (2d) 17 (Man.C.A.).

Note 29: Above, note 6 at 193.

¶ 28 Besides, the reason for the move does have direct relevance to parenting and the best interests of the child, in a number of ways:

(i) The Benefits for the Child. The moving parent will point to the benefits to the child flowing from the move, as in Woodhouse, where the economic benefits were emphasised. As Osborne J.A.

pointed out, "there is a manifest connection between the expected effects of the move and the custodial parent's reasons for proposing the move in the first place". [See Note 30 below]

(ii) To Frustrate Access. Justice McLachlin gives this very "motive" as an example relevant to parenting ability. [See Note 31 below] Few parents openly state this to be their "reason". How does one then prove or infer this motivation? By past denials of access, by judging credibility on the stand, by hasty and ill-planned moves and, yes, by proving the absence of any particular reason for a move. To show the absence of a reason for a move, one must sometimes inquire into the stated reasons for the move.

(iii) The "Happy Mother". On this thesis, a happy adult makes a happy parent, all to the benefit of the child in her care. The gender-specific phrase captures its use in the case law, as it is tied closely to the "primary caregiver" label. By this chain of relevance, the benefits of the move to the custodial parent, i.e. the reason for the move, can come under scrutiny, usually at the insistence of the custodial parent.

Note 30: Above, note 7 at 363-4.

Note 31: Above, note 6 at 193.

¶ 29 Why then is the reason for the move branded as "not relevant"? I believe the majority wanted to restrain the detailed second-guessing of the custodial parent's decision to move. The custodial parent's view, to quote Justice McLachlin, is "entitled to great respect and the most serious consideration". [See Note 32 below] One method of doing that would have been to institute a presumption in favour of the custodial parent, but that was rejected. It is a much weaker -- and I believe, more erratic -- technique to define the reason as "legally irrelevant", [See Note 33 below] thereby removing it from the factors to be weighed. This technique can permit not only moves which lack some level of "necessity", but also moves which have "no good reason" at all, hardly good policy. And a rigid approach to Gordon could equally remove a good reason for the move from the scale of positive factors too. [See Note 34 below]

Note 32: Ibid. at 201.

Note 33: In Simmons v. Henshall, [1997] O.J. No. 4650 (GDFC), Aston J. captures the intention of Gordon, by mentioning "the relative insignificance of the reason for the move as a matter of law" (para. 10).

Note 34: In Chambers v. Chambers, [1997] O.J. No. 4387 (Gen.Div.), the mother argued that hers was "one of the exceptional cases where the court should consider the parent's reason for moving", namely to move to a short-term job (3 months) that would take her off social assistance (at para. 29).

¶ 30 Maybe Hovius is right, that this part of Gordon too is tied to its unique facts. In Gordon, the move was a fait accompli and the reason for the move no longer mattered, unless it might affect parenting ability and warrant a change of custody. [See Note 35 below]

Note 35: Above, note 18 at 308-9.

¶ 31 Whatever the rationale, this prohibition from Gordon has simply been ignored in practice by most lower courts.

(c) A Parallel Universe: The Minority Reasons

¶ 32 Justice L'Heureux-Dube states a very strong version of the custodial parent presumption, stronger than that found in MacGyver and stronger than that espoused by many (like myself) who support a primary caregiver presumption for younger children. The minority finds the mother here to be "the primary caregiver" [See Note 36 below] of a child who was only two at the time of the 1990 separation, even if it appeared the father took on a larger role after 1993.

Note 36: Ibid. at 234. By contrast, the codeword "primary caregiver" is never used by McLachlin J. in reference to the mother here. From an early age, the child here was in the care of a local day care, while the mother, a dentist, worked, as did the father, a developer. Outside of day care, prior to separation in 1990 (when the child was two), the mother was "the chief care giver to the child, when she was home", to quote Carter J. in Gordon v. Goertz (1993), 111 Sask.R. 1 (U.F.C.) at 7. After the separation, the father took a larger role, although still less than half the time, but we are not given these details at any level in this case.

¶ 33 At the end of her reasons, L'Heureux-Dube J. summarises her six "guidelines", [See Note 37 below] which are shot through with strong language. Where to live is an incident of custody, such that the non-custodial parent bears the burden of showing the move will be "detrimental to the best interests of the child". A change of custody requires "cogent evidence" and a restraint upon removal should be even more "exceptional". Moreover, the cogent evidence must be focussed on the impact of the move upon the existing order and not a de novo appraisal of all the circumstances. Even an express residence restriction only serves to shift a subsidiary onus onto the custodial parent, that of showing the move is "not made in order to undermine the access rights of the non-custodial parent" and a willingness to restructure access. [See Note 38 below]

Note 37: Gordon, above, note 6 at 232-3.

Note 38: L'Heureux-Dube J. does not explain her "guideline" on residence restrictions, with its very limited onus upon the custodial parent. (This limited onus on the custodial parent is similar to one that I suggested should fall upon the custodial parent in every relocation case: Thompson, above, note 2 at 242-4.) A failure to enforce residence restrictions at the variation stage may result in more contested custody trials in initial proceedings, for reasons I explained earlier: Thompson, above, note 2 at 245.

¶ 34 What is even more surprising in the minority reasons is their "back to the future" air, using a traditional notion of custody as a fixed, all-encompassing body of parental rights, more in the nature of "custody labelling" than any idea of primary caregiving. [See Note 39 below] The analysis here is legalistic, looking to the "custody" order, rather than the realities of child care and rearing. [See Note 40 below] But all this heavy-handed "law" seems intended to strengthen the presumption beyond what would be warranted by our current knowledge of children and divorce.

Note 39: On this point more generally, see Shear, "Life Stories, Doctrines and Decision Making: Three High Courts Confront the Move-Away Dilemma" (1996), 34 F.C.C.R. 439.

Note 40: Her reasons in the companion Quebec case of W.(V.) v. S.(D.) (1996), 19 R.F.L. (4th) 341 demonstrate the same fixed reading of custody concepts in the Civil Code.

¶ 35 If the majority decision appears unduly abstract, [See Note 41 below] the minority opinion is equally extremist and impractical. The two judgments appear to inhabit parallel universes, in terms of law, social science and the facts.

Note 41: For example, one can read the whole of the majority reasons and never even discover how old the daughter is. That fact is only supplied by L'Heureux-Dube J.: above, note 6 at 204.

¶ 36 The majority emphasises: a thoroughly-individualised, fresh "best interests" assessment each time; the importance of "maximum contact" and access to the child's well-being; and an abbreviated factual analysis. [See Note 42 below]

Note 42: This last is truly ironic. After espousing the importance of a fresh, detailed factual assessment, in a case where the trial judge's reasons are held to "fall short", the majority then gives a one-paragraph, elliptical assessment of its own factors and the facts: ibid. at 203, para. 53. Were the majority's reasons a trial judgment, they would likely have fallen short of demonstrating that they "engaged in the full and sensitive inquiry into the best interests of the child required by s. 17 of the Divorce Act", to paraphrase the majority's criticism of the trial judge: ibid. at 202.

¶ 37 The minority stresses: a presumption-driven approach that strongly favours the legal powers of the custodial parent; the relative importance of the custodial parent and the modest, secondary role of access to the child's well-being; and an equally abbreviated factual analysis.

3. Woodhouse: Back to Carter

¶ 38 As I have earlier indicated, Woodhouse is an important and useful case. First, it is a considered attempt by a four-Judge [See Note 43 below] Ontario Court of Appeal bench to make sense out of Gordon, thus offering explanation and guidance to other courts. Second, Woodhouse is the more typical "before-the-fact" case, where no move has yet taken place and the focus of the argument is not a change of custody, but the relocation itself. Third, the reasoning in Woodhouse reflects a return to Carter v. Brooks, rather than adherence to Gordon. The mother's plan to move is subjected to strict scrutiny and is ultimately rejected.

Note 43: Woodhouse, above, note 7. Dubin C.J.O. took no part in the final judgment, as the appeal was first heard in October 1995 and only decided in June of 1996, because of the wait for the Supreme Court decision in Gordon.

¶ 39 Woodhouse involved, not the Divorce Act, but the Ontario Children's Law Reform Act, [See Note 44 below] as the parents' separation agreement was not incorporated in the divorce judgment. The "considerations" were held to be the same, making Gordon applicable to provincial custody legislation, a holding of note. [See Note 45 below]

Note 44: R.S.O. 1990, c. C.12.
Note 45: Above, note 7 at 353.

¶ 40 The mother wished to move from Hamilton to Scotland, with her new husband, a Scot. Under the terms of the agreement, the mother had custody of the two boys, aged 6 and 4 at the time of the 1994 trial decision. The father exercised access, including alternate weekends. [See Note 46 below] The new Scottish husband was a carpenter: employment prospects in Canada were "very grim", but there was a job waiting for him in Glasgow. The mother had worked as a dance instructor, but had sold her dance studio in preparation for the move, with the intention of becoming a full-time homemaker in Scotland. Perhaps most importantly, the mother had been allowed to take the children with her for a visit to Scotland and then failed to return the children, forcing the father to obtain an order to compel their return, described kindly by the trial judge as

"a foolish act". [See Note 47 below] And an assessor concluded that the children's access to their father should not be reduced but should be increased, and recommended against the move.

Note 46: Ibid. at 352. The father did not have overnight access until the decision under appeal, in April 1994, when his access was increased to complete weekends, with Monday nights on the alternate week and one half of all holiday periods (school break, summer, Christmas). Thus, the father's original access was less than "standard" access.

Note 47: Ibid. at 359.

¶ 41 What is most interesting about the majority reasons of Weiler J.A. is her gathering of all the Gordon and Carter factors here into just two groups:

(1) "the existing custody arrangement, the existence of a new family unit, the position of the custodial parent, and the ability of the custodial parent to meet the needs of the child", and
(2) "the proposed relocation and the effect of this disruption on the children, the relationship between the children and each of their parents, the views of the children, and the desirability of maximizing contact between the child and both parents".

In the end, despite Gordon, these two groups become "the reason for the move" versus "the detrimental effect of the move on access".

¶ 42 The Court dares not use the first term, preferring to call it "the economic effect of its decision on the children", [See Note 48 below] but then the mother had dressed up her reason for the move in economic terms. On the other end of the balance, the access end, the majority starts from the general proposition that "the more frequently access has been, and can be, exercised, the stronger that relationship will be". [See Note 49 below]

Note 48: Ibid. at 356.

Note 49: Ibid. at 360. By contrast, those who favour a presumption in favour of the custodial parent emphasise other literature doubting the link between duration or frequency of visits and quality of the access parent relationship: see the reasons of L'Heureux-Dube J. in Gordon, above, note 6 at 226; Bruch and Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present" (1996), 30 Fam.L.Q. 245 at 262-3; and Wallerstein and Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996), 30 Fam.L.Q. 305 at 311-2. The latter two articles were originally amici briefs to the California Supreme Court in In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996), cited by Justice L'Heureux-Dube in Gordon, above, note 6 at 219-20.

¶ 43 As in Carter, [See Note 50 below] the many factors reduce to "a straight two-way test: does the benefit or 'necessity' of the move outweigh the impact upon the access relationship?" [See Note 51 below]

Note 50: See "Trek", above, note 2 at 226.

Note 51: Ibid.

¶ 44 Keep in mind that Ms. Woodhouse was not just the custodial parent, but the "primary caregiver", both before and after separation, even though neither majority nor minority dared apply that label, not even Osborne J.A. in dissent. The father's access or involvement was nothing out of the ordinary. So what tipped the balance against the mother? Two explanations can be offered. First, the trial judge was much influenced by an assessor's report, recommending against the move of the children, [See Note 52 below] too much so according to the dissenting justice. [See Note 53 below] Second, one can see in the mother's selling her business and leaving her job, her "foolish act" of not returning the children from Scotland, and her obtaining an interim order from the Scottish courts, as did the majority, a predictor of future non-compliance, a troubling attitude towards the father and a doubtful grasp of the children's best interests. [See Note 54 below]

Note 52: Above, note 7 at 356-8 per Weiler J.A.

Note 53: Ibid. at 370-1. Jeffery Wilson is highly critical of this use of assessments: "How and why such mobility rights disputes become the subject of routine custody assessments and hearings is somewhat perplexing as there appears to be no separate clinical literature or expertise that validates the notion of an 'expert' in a mobility rights case, or supports any analytic connection between the former and latter issues." Wilson on Children and the Law (3rd ed.) at p. 2.41.

Note 54: This last point is stressed by Hovius, "Comment", above, note 18 at 381-2. Hovius reads the mother's errors as undermining the court's deference upon judicial review of the custodial parent's assessment of the children's best interests, another way of conceptualising the impact of the "foolish act" upon the result. Carnwath J. was "troubled by [the mother's] attitude towards her husband's desire to continue in a significant role as the children's father" (para 31, trial decision).

¶ 45 The second explanation accords with what emerged from the earlier experience with Carter v. Brooks in lower courts, as I have explained previously: "a well-behaved primary caregiving parent will be allowed to move, provided she or he is patient enough to plan the move with care". [See Note 55 below] Ms. Woodhouse was neither "well-behaved", nor "patient enough".

Note 55: "Trek", above, note 2 at 228-9.

¶ 46 Many counsel, and courts, will find the dissenting reasons of Osborne J.A. quite helpful. First, he observed that "a full-blown custody hearing" will be unnecessary in most mobility cases, as both parties will advance "conditional positions": the custodial parent won't move without the children and the access parent doesn't really want to claim custody, unless the children are going to move. [See Note 56 below] An early assessment of "true" parental positions will make "the move" the real issue, rather than custody. Also instructive is Justice Osborne's emphasis, at the end of his reasons, that "each case must be examined on its own facts to determine each parent's post-separation caregiving importance". [See Note 57 below] In many ways, Justice Osborne better reflects the older balance found in Carter than did either his colleagues in Woodhouse or the Supreme Court in Gordon.

Note 56: Above, note 7 at 366, 367.

Note 57: Ibid. at 372. His stress upon actual caregiving contrasts with the use of labels and abstract notions by the Supreme Court in Gordon.

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4. After Gordon: The "Yes" Cases

¶ 47 Much to my surprise, when I searched the QuickLaw annals for cases citing Gordon or Woodhouse, since May 1996, I found 119 relocation cases, a remarkable number over 32 months to the end of 1998. To cut to the results, we see a restoration of the Carter proportions, roughly 60 percent of those cases saying "yes" to the move and 40 percent "no". [See Note 58 below]

Note 58: The precise numbers are 73 "yes" cases, 45 "nos" (plus 1 new trial, or "no" for now), for a 39 percent proportion of "no's". Compare the results from earlier periods: moves were denied in 40 percent of the cases after Carter and before MacGyver between 1990 and 1995 (9 of 23 cases) and in 40 percent outside of Ontario (where Carter was still preferred) in 1995-96 (8 of 19 cases): Thompson, above, note 2 at 226-8, 234-6. As cases have continued to come in since Gordon, the "no" proportion has consistently moved up and down within the 35 to 40 percent range.

¶ 48 Remember, these are the contested relocation cases. Left out of the pool are three important groups of cases: (i) unreported decisions, usually oral ones; (ii) cases where the custodial parent moves and the other parent does not object or renegotiates access; and (iii) cases where a custodial parent decides not to move rather than face proceedings.

¶ 49 In reviewing the "yes" cases, [See Note 59 below] a number of patterns emerge:

Note 59: See the cases listed in Appendix A. The cases are listed in chronological order and I cite the cases in that same order in the notes to this part, but I do not provide full citations, which can be found in the Appendix.

¶ 50 (1) Custody/Access Arrangements. In 60 of the 73 "yes" cases, i.e. 82 percent, the mother was the custodial parent or residential parent, as well as the custodial parent to 2 of 3 children in the two split custody cases. In four cases, the father was the custodial parent. There were seven shared parenting cases in this group. As for the legal form of order, over 40 percent were "joint custody", while 55 percent were sole custody, mostly mothers.

¶ 51 Only in a minority of these cases was there anything beyond "standard" access, i.e. something more than every second weekend.

¶ 52 (2) A "Primary Caregiver" Presumption. Despite our denial of any "primary caregiver presumption" after Gordon, there is a presumption at work in these cases: if a mother is described as "primary caregiver", the court says "yes" to the move almost every time. [See Note 60 below] As cases accumulate, it now appears that courts simply do not use the term "primary caregiver" when the father is either the custodial parent or the residential parent. [See Note 61 below] I tentatively suggested, in my earlier paper:

> Those decisions that say "yes" to the move universally emphasize the mother's (for they are all mothers) role as primary caregiver. In many of these cases, the diminished role played by the father is also noted, i.e. not only is the mother the primary caregiver, but the father has played a "less than traditional access parent" role. It may be, although I cannot be firm on this point, that the "primary caregiver" code-word contains both a positive and a negative assertion, i.e. the caregiver is the dominant figure in the child's life and the non-custodial parent is much less important. [See Note 62 below]

Note 60: See Lundy, Poirier, Berrie, Lougheed, Scheetz, Sibley, Aldred, Chilton, Anderson, Mathwich, Lloyd, Gentle, Brown, Bruce, Mills, Niewerth, Watkins, Picken, Buist, Linnell, F.B., Kelly, Dorosh, Lang, Herman, Griffin, Newel, Csank, Creighton, Gabourie, A.M.W., Minogue, Totten, Chambers, Doro, Kennedy, Schioler, Carette, Armstrong, MacDonald, Allen, Makaryk, Lamoureux, D.C.D., Haikalis, Wudy, Elliot, Zeaton. The only cases to the contrary amongst all the "no" cases are Simpson (multiple moves), S.A.H. (one child developmentally delayed and "badly-behaved" mother) and Davies and Salvadori (both cases where the father moved). In Wudy v. Wudy, [1998] B.C.J. No. 2403 (S.C.), the mother was found to be "more of a primary care-giver" than the father who had his 4-year-old daughter with him two nights per week, but at least Meiklem J. added the proviso, "granted that I do not accede that all the loading that goes with that definition applies in this case".

Note 61: E.g. Woods, S.F., K.J.B., and, among the "no" cases, LaFrance, L.A.W..

Note 62: "Trek", above, note 2 at 228.

It is increasingly clear, if it wasn't before, that the code-word is only applied to mothers, not fathers, and then primarily to mothers who are full-time homemakers or employed less than full-time outside the home. The courts look, not to some child-centred notion of "caregiving", I would suggest, but to a stereotyped, gendered view of parental roles.

¶ 53 (3) A Move Off Welfare. Another recurring factor in these recent "yes" cases is a move which results in the parent getting off welfare, either by employment [See Note 63 below] or remarriage/cohabitation. [See Note 64 below] While a kindly view would suggest that these are just "necessity" cases, I discern a less benign "public purse" mentality at work as well. [See Note 65 below] Whatever the underlying reason, it is apparent that "moving to end welfare dependence" is an especially potent argument. Also more common in these cases is explicit comment on the non-custodial father's failure to pay support. [See Note 66 below]

Note 63: Scheetz, Woods, Chilton (spousal maintenance of $3,200 a month to end, leaving only $700 a month in child support), S.F., Mathwich, Watkins, A.M.W., Chambers, Schioler, Carette, J.L. (education), D.C.D., G.W.B., Lowther.

Note 64: Lundy, Sibley, Chand, Allen. Added to this list should be three cases where mothers moved back home to be supported by family: Gentle, D.T., Kennedy.

Note 65: Further, it is clear that a move off social assistance to work is an even stronger argument for a single father, another example of gendered roles: Woods, S.F.

Note 66: Lundy, Poirier, Scheetz, Chand, D.T., A.M.W., Kennedy, Schioler, Allen, J.L., D.C.D.

¶ 54 (4) Delayed Moves. In five of the "yes" cases, moves were delayed. In three cases, a primary caregiver mother proposed a move that was not carefully planned, with delays ordered of one year in one case [See Note 67 below] and six months in two others. [See Note 68 below] The one-year delay was to permit the five-year-old to spend more time with her father in her last year before school started, but the move from Ontario to Florida was still permitted. [See Note 69 below] In two other cases, children were left with the non-moving father for a period, to the end of the school year or until the end of a summer access. [See Note 70 below]

Note 67: Mathwich.

Note 68: Lougheed, Zeaton.

Note 69: Although the mother can be characterised as the primary caregiver, in this case the child had spent half her time with each parent from age 2 to 4, with a shift to 4 days every two weeks thereafter for the next year prior to the proposed move. That arrangement was ordered to continue for the further year before the move.

Note 70: Allen (to end of school year), Niewerth (finish school and part of summer). For a voluntary example of the same idea, see Law, where the mother who had already moved left the teenage children with the father for four months, until the end of the summer.

¶ 55 (5) Interim Moves. In 1996 and again in 1998, most attempts to move at the interim custody stage were refused. But there was an anomalous burst of cases in 1997, some ten in all, where interim moves were allowed. In Kelly, Aitken J. suggested that "an interim order allowing a change in residence of children should only be made in exceptional circumstances", [See Note 71 below] probably an accurate statement of the law. In Kelly, the matrimonial home was being sold and the mother wished to move back to live near her wealthy parents. In two of the cases, military transfers were in process, [See Note 72 below] in another a medical school awaited, [See Note 73 below] and jobs were about to start in two others. [See Note 74 below] In Dorosh, the father had been informed in early June by the mother of her move scheduled for August, but his interim application was commenced only weeks before the move. (6) Reason for the Move. Of the 73 "yes" cases, fully 69 of them involve "good reasons" for the move: 18 to jobs for the custodial parent, 32 for remarriage, [See Note 75 below] 10 to a job and extended family and another 9 to live near extended family. In most of these cases, the custodial parent would want the court to consider the "reason", in order to strengthen arguments in support of the move. In three of the remaining four cases, the move was to get away from a hostile parent or a conflicted family setting, accepted as a reasonable purpose on the facts by the courts. [See Note 76 below]

Note 71: Kelly, at para. 40.

Note 72: Picken and Lang (where an interim application was converted into a trial).

Note 73: Herman.

Note 74: Newel, Gabourie. In Ellis, the mother's common-law husband had already moved from Nova Scotia to Winnipeg to take a new job, as the matter dragged through 6 chambers appearances.

Note 75: A subset of these cases do involve, not moves to marry, but moves with a new husband to his new job.

Note 76: K.J.B., Mills, Totten. In Elliot, Wood J. accepted as a secondary reason the mother's desire to avoid an abusive and manipulative father. The only "yes" case with no reason apparent on the record, but some misgivings about the mother, is L.M.

¶ 56 (7) "Happy Mother". The most recent "yes" cases reveal a resurgence of the "happy mother" argument, in support of the move. Makaryk offers a good example of the logic involved, where a mother wished to move from Ontario back to Calgary for job and family:

> I find that the wife's emotional and financial well-being will be attainable in Calgary. And, because the wife is the person most involved in identifying and meeting Lauren's day to day needs, I find that enabling the wife's move which has the effect of promoting the wife's emotional and financial well-being is in Lauren's best interests. [See Note 77 below]

Certainly, no support for this logic can be found in the majority reasons in Gordon, and surprisingly not even in the minority reasons. Yet the argument flows inevitably from Justice McLachlin's attempt to exclude the reason for the move. A moving parent will want to come within the exception for reasons "relevant to the custodial parent's parenting ability".

Note 77: Makaryk v. Makaryk, [1998] O.J. No. 2069 (Gen.Div.) at para. 34 per Kiteley J.

¶ 57 A growing number of "yes" cases demonstrate the effectiveness of the argument, [See Note 78 below] and the B.C. Court of Appeal did not find any error in its consideration in Rockwell. [See Note 79 below]

Note 78: D.C.D., Haikalis, Wudy, G.W.B., Rockwell, Zeaton.

Note 79: Rockwell v. Rockwell, [1998] B.C.J. No. 2718 (C.A.) at paras. 31 to 36 per Hollinrake J.A.

¶ 58 (8) Access Plans and Expenses. A review of the most recent "yes" cases reveals a clear pattern. Where a custodial parent is permitted to move, the moving parent will often pick up a proportion of the increased access expenses, either sharing equally [See Note 80 below] or paying all the expenses. [See Note 81 below] In another group of cases, spousal support, [See Note 82 below] or child support, [See Note 83 below] is reduced.

Note 80: Watkins, Linnell (1 1/2 trips per year, $50 telephone per month), F.B., Csank, Doro, Simmons, Kennedy, Wudy.

Note 81: Lloyd, Niewerth, Kelly, Creighton, Proctor.

Note 82: Brown, Mills, Newel, Makaryk, D.C.D., Zeaton.

Note 83: Mills, D.T., Pisko, Totten, Armstrong, Allen, Lamoureux, P.C., C.A.S. of Halifax.

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5. After Gordon: The "No" Cases

¶ 59 If the "yes" cases have a certain consistency or pattern to them, the same cannot be said of the "no" cases. These 45 cases are very much a "mixed bag" and, accordingly, any conclusions are more tentative.

¶ 60 (1) Custody/Access Arrangements. Mothers were the custodial parents in 32 of the 45 cases, or 71 percent, fathers in four cases. One case had split custody. What's different here is the eight cases of shared parenting or joint physical custody, where the parents spent roughly equal time with the children. [See Note 84 below] That amounts to 18 percent of the "no" cases, compared to 11 percent of the "yes" cases. But even in these cases, it will be seen, moves were denied because of both shared parenting and lack of sufficient reason.

Note 84: Benson, Kane, McLean, Busniuk, Birch, M.J.F.W., Gader. In Ross, custody was split, with the two older children with the father and the two younger with the mother, who was seeking to move.

¶ 61 If one looks at the legal labels on the orders, however, the "no" cases were evenly split, 49 percent each, between "joint custody" and "sole custody". Contrast this with the proportions for the "yes" cases: 42 percent joint custody, 55 percent sole custody. The form of the order is less telling than the substance of the parenting arrangements, a point of significance.

¶ 62 (2) Changes in Custody. Even in the "no" category, changes of custody are rare. Custody was actually changed in nine of 45 cases: two from father to mother, [See Note 85 below] three from mother to father, [See Note 86 below] one from shared to mother, [See Note 87 below] one from shared to father, [See Note 88 below] two split with one child moving with mother and the other staying with father. [See Note 89 below] In another four cases, a contingent custody change was ordered, i.e. in the event the custodial parent moved, custody would revert to the remaining parent: from father to mother once [See Note 90 below] and from mother to father three times. [See Note 91 below] It is impossible to discern any pattern to these "change of custody" cases. The intended move precipitates a "fresh inquiry" and a wholesale reconsideration of best interests, often just tilting the balance enough towards the other parent.

Note 85: LaFrance, Bradley.
Note 86: Hamilton, S.M.G., Weinrauch.
Note 87: Benson.
Note 88: Kane.
Note 89: Jewer, Davies.
Note 90: L.A.W.
Note 91: Reed, Gader, Grady.

¶ 63 (3) No "Material Change". In three recent "no" cases, courts have begun to question the moving parent's claim of "material change". The "mere desire" to move is not always sufficient, especially where a parent has sought to move once already. [See Note 92 below] Even more interesting is a recent B.C. case where the mother consented to a joint custody order including a residence restriction and then eleven months later sought to vary, to be with her family in Calgary and to take a job in a family business: "simply changing one's mind" was not a material change, stated Rounthwaite Prov.Ct.J. [See Note 93 below]

Note 92: I.P. (mother made unilateral move to Greece previous year, child returned under Hague Convention, subsequent application to vary interim order rejected); Stead (mother's application 5 years earlier to move to Ontario, same arguments again, "reluctant" finding of material change).

Note 93: Popowich v. Rossi, [1998] B.C.J. No. 1714 (Prov.Ct.) at para. 14.

¶ 64 (4) The Reason for the Move. The post-Gordon "no" cases make clear that the moving parent's "reasons" will not only be scrutinised, but scrutinised closely. In few of these cases can the refusal of the move be linked primarily to past "misbehaviour" of the custodial parent, as was true of the 1995 post-MacGyver non-Ontario cases. [See Note 94 below] The recent cases resemble much more the pattern which appeared after Carter and before MacGyver, where every "no" case turned upon the reason for the move. [See Note 95 below] Not only the "necessity" of the move, but a detailed analysis of its alleged benefits, is quite common, starting with Woodhouse itself. In 31 of these cases, the reasons offered were vague or the benefits were dubious, not holding up under scrutiny. [See Note 96 below]

Note 94: "Trek", above, note 2 at 236-7, summarised at 236:

"In six of the eight 'no' decisions, by contrast, the
custodial parents engaged in behaviour which ranged from
contemptuous to duplicitous to merely strategic." Note 95: Ibid. at 228-9.

Note 96: Campbell, Woodhouse, Kane, Robinson, Cote, M.A., Carlacci, I.D.N., Hamilton, Macklin, Levin, L.A.W., McLean, Nay, Reed, Cockerill, Busniuk, Innes, Birch, M.J.F.W., Simpson, Ross, Dhaliwal, Stead, R.A., S.M.G., Western, Popowich, Grady, Carson, S.D., Wilson.

¶ 65 Only a small subset of these cases can be seen as falling within the narrow Gordon exception, namely a parent whose reason for moving is to frustrate access. In only three cases did the trial judge expressly find this to be the parent's "real motive" for

the move. [See Note 97 below] In six other cases, judges were troubled by the attitude of custodial parents towards the other parent, [See Note 98 below] in each case coupled with doubts about the parent's stated reason for the move. This latter would appear to fall short of the Gordon requirements for open consideration of the reason for the move. In five cases, concern was expressed for the haste, lack of planning or prematurity involved in the move, [See Note 99 below] which could conceivably fall within the Gordon exception.

Note 97: In Chapman, [1997] A.J. No. 706, 203 A.R. 295 (Q.B.), Nash J. concluded, at para. 15, "The move to Vancouver, in my view, is simply another way of limiting the access." And, in M.J.F.W., [1997] O.J. No. 4265 (Gen.Div.), Clarke J. applied the Gordon exception: "J.C.W.'s reason for moving are relevant because they reflect adversely on her ability to recognize and meet the needs of the children. Despite her denial (which I cannot accept), I find that unresolved anger and her own convenience and peace of mind constitute the main reason for the move." In S.A.H. v. A.D.S.L., [1998] M.J. No. 330 (QBFD), the mother announced during her direct evidence that she was moving to Kitchener and left without notice after the evidence was heard and before the decision was rendered. Noted Little J., at para. 47, "there is no question that the collateral benefit of a denial of access is one enhancing element of the move for Ms. A.L."

Note 98: At trial, in Woodhouse, [1994] O.J. No. 3921 (Gen.Div.), Carnwath J. stated, at para. 31: "I am more troubled by her attitude towards her husband's desire to continue in a significant role as the children's father. I find she doesn't place as much importance on that role." In Macklin, [1996] B.C.J. No. 2121 (S.C.), the mother stated to the assessor that she wanted the father "out of my life", a statement denied at trial but found to describe "her motivation for the move" by Preston J. at para. 9. In Cockerill, [1997] A.J. No. 659 (Q.B.), Kenny J. sets out the problems with the mother's access proposals and states: "This does not appear to indicate a desire on her part to foster the continuing relationship between the husband and the children but rather a desire to inhibit it." In S.M.G. v. J.E.F., [1998] N.S.J. No. 331 (Fam.Ct.), Daley Fam.Ct.J. held that the mother put her interests before the child's and many missed or late visits led him to say "the mother has a track record that leads to the conclusion that access with the father was not a priority for the mother." The custodial father in Bradley v. Ripley, [1998] O.J. No. 3013 (Gen.Div.), had disappeared with the child to B.C. at one point, out of "a desire for revenge" against the mother, and he remained unlikely to facilitate access, leading to a change in custody. In Weinrauch, [1998] A.J. No. 1446 (Q.B.), the mother had moved to Ontario without notice, depriving the father of access, leading to a change in custody.

Note 99: I.D.N., Levin, Nay, M.J.F.W., Dhaliwal.

¶ 66 Not that many trial judges seem encumbered by any need to explain their detailed scrutiny of the custodial parent's reason for moving. In eight cases, the custodial parent's employment prospects after the move seemed weak. [See Note 100 below] In another six cases, the custodial parent had failed to check out the employment or education alternatives within the local community. [See Note 101 below]

Note 100: Kane, Cote, L.A.W., McLean, Ross, R.A., Popowich, Bradley.

Note 101: Nay, Chapman, Birch, M.J.F.W., S.M.G., Western.

¶ 67 More interesting has been the emphasis upon the status, decisions and prospects of the new partners of custodial mothers (for that is who is involved). In five cases, moves were rejected for lack of information about a new husband or husband-to-be. [See Note 102 below] In an interesting development, there were six cases where the court expressed misgivings about the necessity for the career move or distant job chosen by the mother's new partner. [See Note 103 below]

Note 102: Busniuk, Innes, Stead, S.A.H. (adverse inference drawn where fiance not called as witness), Grady.

Note 103: Campbell, Woodhouse, Jewer, Carlacci, Reed and Cockerill.

¶ 68 On this last issue, it is clear that Woodhouse and Ligate v. Richardson are seriously at odds with each other, with the Ontario Court of Appeal again producing two apparently irreconcilable decisions, much like the previous Carter versus MacGyver conflict. A close look at Ligate is in order.

6. Ligate v. Richardson: An Anomaly or A Principled Application of Gordon?

¶ 69 One of the toughest cases to locate within these "yes" and "no" patterns is the Ontario Court of Appeal's decision in Ligate v. Richardson. [See Note 104 below] Despite pre-dating Gordon, [See Note 105 below] Justice Greer's trial decision in Ligate would fit comfortably within the above "no" cases and the Carter-like approach espoused in Woodhouse.

Note 104: Above, note 8: (1997), 34 O.R. (3d) 423 (Ont.C.A.), reversing [1995] O.J. No. 533 (Gen.Div.). For a helpful exploration of the issues in this case, see Hovius, "Case Comment: Ligate v. Richardson and Pisko v. Pisko" (1997), 32 R.F.L. (4th) 9.

Note 105: In fact, the trial decision in Ligate was released after Carter v. Brooks, but before MacGyver v. Richards, thus reflecting the older Carter analysis.

¶ 70 Ligate, a psychiatrist, and Richardson, a family law lawyer, married in 1987, adopted an infant child in December 1989, separated and negotiated an agreement in October 1990, and divorced in December 1993. The separation agreement provided for sole custody to the wife, subject to a residence restriction to Metro Toronto. The parties, and then Ligate, had a nanny, with Richardson playing a minor role in child care. Richardson's "reasonable access" steadily expanded: first, for a few hours on Sunday, then overnight weekend access in 1992, then one mid-week evening every other

week in 1993, plus the usual holidays. Richardson's extended family had contact with Ashley, who was raised in the Jewish faith by agreement of the parties.

¶ 71 Ms. Ligate then commenced a relationship with Peter Hume in late 1992. By December 1993, Ligate and Hume commenced looking for a new home together. On January 18, 1994, Ligate informed Richardson that they had found a large home in Cambridge, 100 kilometres from Richardson's apartment in downtown Toronto. Richardson did not consent and his counsel confirmed that in writing the next day. On February 2, Hume and Ligate made an offer on the Cambridge home, which was accepted, to close at the end of March. In March 1994, Ligate applied under the Children's Law Reform Act for an order permitting the move. Richardson responded with a cross-application for an order enjoining the move and specified access or, in the alternative, a change to joint custody and principal residence with himself. In June 1994, Ligate sold her Toronto home and moved to a rented apartment in Toronto. A trial was ordered, which took place over 9 days in October and November of 1994 and a trial decision released March 2, 1995. Greer J. dismissed the mother's application and enjoined the move. [See Note 106 below]

Note 106: [1995] O.J. No. 533 (Gen.Div.).

¶ 72 The Court of Appeal handed down its decision on June 23, 1997, over two years later, allowing the appeal and permitting the move, by a 2-1 decision. Dissenting was Justice Blair (ad hoc) and the majority reasons were written by Moldaver J.A., with the concurrence of Morden A.C.J.O. (the author of Carter v. Brooks). The majority agreed with the appellant, [See Note 107 below] that the trial judge had committed three errors of Gordon principle, in summary:

> the trial judge improperly took into account and placed great weight on the lack of a compelling reason for the move; placed undue emphasis on the residence clause in the separation agreement and misapprehended its purpose and effect; and failed to give adequate weight to the views of Ligate. [See Note 108 below]

Note 107: The one common ingredient in all three Ontario Court of Appeal decisions -- Woodhouse, Luckhurst, Ligate -- is that Professor James McLeod acted for the mothers in each case. There was a common panel for Woodhouse and Luckhurst: Houlden, McKinlay, Osborne and Weiler, JJ.A. (with Dubin C.J.O sitting but taking no part in the final judgment). Apart from Morden A.C.J.O., none of the other appeal court judges from Carter or MacGyver took part in these post-Gordon decisions.

Note 108: Above, note 8 at 443.

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(1) No "Compelling Reason"

¶ 73 There was no compelling reason for the move to Cambridge, that much is not disputed. Both of the adults wanted to work from home (Hume was a market researcher), so a large house was required, but not necessarily in Cambridge. [See Note 109 below] Equally, as Moldaver J.A. states, "there can be no suggestion that the reason for the move reflected adversely on Ligate's parenting ability", and "[l]ikewise, it cannot be said that the move was designed to frustrate Richardson's access". [See Note 110 below] Greer J. described the move as "a move to suit the convenience of Ligate and Hume, not the child". [See Note 111 below]

Note 109: And quarters were required for the nanny. There was no synagogue in Cambridge, the nearest being in Kitchener.

Note 110: Id. at 434.

Note 111: Above, note 101 at para. 63.

¶ 74 According to Moldaver J.A., the trial judge "should not have taken the lack of compelling reason for the move into account in assessing the child's best interests", calling the reason for the move "this irrelevant consideration". [See Note 112 below] Only a "narrow window of relevance" ought to be permitted to the reason for the move under Gordon, and one cannot use the "impact" or "disruptive effects of the move upon the child" to widen that exception. [See Note 113 below]

Note 112: Above, note 8 at 434.

Note 113: Id. at 436-7.

¶ 75 The effect of a pure Gordon analysis can be seen here. No compelling reason, in fact no reason at all, is required for a move, because it is "legally irrelevant". The reason for the move can only become "relevant" if one can prove a desire to frustrate access or, possibly, some other adverse reflection upon parenting ability. Contrast Woodhouse and Luckhurst, where the mothers had "good reasons" and wanted those reasons considered by the courts.

¶ 76 Further, Ligate shows the dual impact of "legal irrelevance" as to reason and, at the same time, "great respect" to the "views of the custodial parent" concerning the effects of the move. What did the trial judge fail to consider sufficiently here? Ligate's "new and promising relationship", a move "advantageous in terms of their own personal and professional needs", and the "belief" by Ligate "that the move would be advantageous to Ashley". [See Note 114 below]

Note 114: Above, note 8 at 442.

¶ 77 The combined effect of the two "factors", if strictly applied, looks remarkably like a primary caregiver presumption. An access parent cannot make "the reason for the move" a negative factor weighing against the move, absent proof of the bad faith purpose of access denial. But the custodial parent can make it a positive factor in favour of the move.

(2) The Residence Restriction

¶ 78 I have argued, as have others, that true shared parenting or a residence restriction should place the burden of proof upon the moving parent to prove the move to be in the child's best interests. [See Note 115 below] Following Carter, the majority in Gordon rejected the use of presumptions or burdens of proof to resolve relocation cases, preferring an unconstrained "best interests" determination.

Note 115: I did argue that residence restrictions should not be placed in orders except by agreement of the parties: above, note 2 at 242-3.

¶ 79 On the Ligate appeal, the residence restriction was held not to place an onus upon the custodial parent, nor even was it a factor deserving special or added weight:

> Rather, the terms of the agreement are to be considered as a factor, along with all of the other facts and circumstances, old as well as new, in the determination of the child's best interests. [See Note 116 below]

In light of this holding, it is clear that a residence restriction will have little or no impact upon the outcome of the relocation decision. In my view, only "true shared parenting" is likely to have any braking effect upon the best interests analysis after Gordon.

Note 116: Id. at 440.

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(3) The Outcome in Ligate

¶ 80 On its facts, Ligate can be summarised simply: whatever the terms of an agreement, a custodial parent can move whatever maximum distance still permits alternate weekend access for the "access" parent. That's the result here, as well as in Luckhurst. Mid-week access or frequent and regular contact, count for little or nothing in the relocation calculus, when weighed against the interest of the custodial parent. But move farther away, as in Woodhouse, and a larger loss comes into play, and perhaps a closer scrutiny of the move. Or, if the other parent approaches the ideal of "true shared parenting", then that places the interests of both parents evenly in the scale. In its

outcome, Ligate is not anomalous, but its strict application of Gordon principles sticks out. [See Note 117 below]

Note 117: One other decision not only follows Ligate, but adheres to a similar "strong" Gordon analysis: Simmons v. Henshall, [1997] O.J. No. 4650 (GDFC Aston J.). Simmons too was a "short-distance" move, from London to Barrie, with a consequent loss of mid-week access, made up for by 3 weekends a month access.

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7. Some Tentative Conclusions So Far

¶ 81 From a review of these post-Gordon cases, certain trends emerge, some clear, some tentative, both in the "yes" cases and in the "no" cases. Linking back to the Gordon decision, what do these cases tell us?

¶ 82 (1) Material Change of Circumstances. Until recently, not one variation decision debated the threshold issue of whether there is a change of circumstances. As a consequence, the procedural form of the proceeding does not appear to matter, thus avoiding the vacuum on this topic left by Gordon. A few recent "no" decisions have doubted proof of a "material change" and then gone on to analyse the factors and reject the move.

¶ 83 (2) Fresh Inquiry. Contrary to Gordon, many judges limit the inquiry to the impact of the move itself, as both parties adopt conditional positions, consistent with the analysis of Justice Osborne in Woodhouse.

¶ 84 (3) Reciting the Litany. Almost every case cites Gordon and most quote Justice McLachlin's summary (even if it isn't followed).

¶ 85 (4) The Relevant Factors. The actual analysis adopted by most courts more closely approximates that found in Carter than that in Gordon. The "well-being of the new family unit" is an important consideration, from Carter, especially where the custodial parent can "get off welfare" by the move.

¶ 86 (5) The Reason for the Move. The unworkability of Gordon is evident here, as the reason for the move is central to the analysis in almost every single case, starting with Woodhouse. If anything, the lack of sufficient reason lies at the root of most "no" cases, rather than any significance to the access relationship. The reason for the move is so important that there is a creeping tendency to cast upon the moving parent an evidential burden to explain the move, which can easily become a legal burden, whether consciously or unconsciously.

¶ 87 (6) Primary Caregiver Presumption. Despite the rejection of presumptions in Gordon, the affixing of the "primary caregiver" label to a mother guarantees approval of

the move. To be called a "primary caregiver" involves more of a value judgment about the role adopted by the mother, i.e. a full-time homemaker, than the specifics of caregiving. Women who work full-time outside the home and yet are primary caregivers within the home are disadvantaged here. [See Note 118 below]

Note 118: So too are men who assume that caregiving role, but can't attract the gendered label. But men make up the difference as their move for employment purposes seems to attract a similar presumption, call it the "primary breadwinner" presumption.

¶ 88 (7) Shared Parenting. I have distinguished between those cases which take the legal form of "joint custody" and those cases where there is a truly shared pattern of parenting. In the latter "shared parenting" cases, moves were denied in 8 of the 15 cases, or 53 percent of the cases, [See Note 119 below] effectively a reversal of the over-all pattern. Of the seven "yes" cases, the move was delayed for one year in Mathwich and voluntarily for four months in Law. [See Note 120 below]

Note 119: Benson, Kane, McLean, Busniuk, Birch, M.J.F.W., Gader, Davies.

Note 120: Mathwich, Watkins, Lang, Armstrong, Selby, Law, Proctor. In Watkins, Lang and Armstrong the mother was characterised as the "primary caregiver", even though the father had the children for more than 40 percent of the time in Lang and Armstrong.

¶ 89 By contrast, labelling an order "joint custody" does not appear to have any significant impact upon relocation decisions. Once the "shared parenting" cases are removed from the "joint custody" pool, it turns out that moves are refused in 35 percent of the remainder, the same proportion as for sole custody cases.

¶ 90 (8) Few Assessments. In only a minority of cases -- about 20 percent -- was there expert evidence available to the court. In the nine "no" cases, experts in eight recommended against the move, although there were competing experts in two cases. [See Note 121 below] More mixed were the recommendations of the experts in the thirteen "yes" cases: two recommended delays in the move, [See Note 122 below] four recommended in favour, [See Note 123 below] two against, [See Note 124 below] one case had duelling experts, [See Note 125 below] one expert equivocated on the move, [See Note 126 below] another gave no opinion, [See Note 127 below] and two expert's reports were given no weight. [See Note 128 below] One of my fears with the "fresh inquiry" approach of Gordon was that relocation cases would be delayed by judges ordering assessments. [See Note 129 below] It seems that the sheer exigencies of relocation do not permit waiting for reports.

Note 121: Campbell, Woodhouse, Kane, Macklin, M.J.F.W., Dhaliwal. In T.B. and Gader, each party retained an expert, with the predictable conflicting recommendations. In S.A.H., the expert supported a "trial" move.

Note 122: One recommendation was accepted, in Lougheed, but the other was rejected, in F.B.

Note 123: Scheetz, D.T., Csank, A.M.W..

Note 124: Rockwell, Zeaton.

Note 125: Ligate v. Richardson.

Note 126: Creighton.

Note 127: Buist. The expert had recommended joint custody, which was rejected in favour of sole custody.

Note 128: Kelly, where the social worker had failed to follow proper procedures and lacked necessary expertise, and Allen, for similar reasons.

Note 129: In Macaulay v. Gaetz, [1997] B.C.J. No. 2918 (S.C.), Lander J. did adjourn the hearing for a report, where the couple had joint legal custody of the 9-year-old girl, the father had access 45 percent of the time, and the mother wished to move from the Lower Mainland to Calgary where her new husband had obtained a job.

¶ 91 (9) More Interventionism. My impression, and only that so far, is that courts now appear more willing to "manage" the relocation process, with five cases where courts ordered delays in moves and another where a residence restriction was partially lifted on an interim basis. Courts are beginning to look for "compromise" or intermediate solutions.

¶ 92 (10) The "Fourth Option". In a couple of cases, courts have addressed what might be called the "fourth option", [See Note 130 below] that of a "parallel move" by the non-custodial parent. In one case, an RCMP officer was able to request a posting to the Lower Mainland of B.C., to follow the child. [See Note 131 below] In another case, the father worked near the new residence of the mother and the court suggested he consider moving from Orillia to northwest Toronto himself. [See Note 132 below] In one other case, where the court refused a further move to Calgary, the notary father had already relocated his practice from Chilliwack to Burnaby to follow his wife and daughter to Vancouver. [See Note 133 below]

Note 130: The first three options being: (i) leaving the child with the custodial parent and allowing the move; (ii) changing custody from the moving parent to the staying, access parent; or (iii) the custodial parent maintaining custody, but not being allowed to move: see the comments of Osborne J.A. in Woodhouse, above, note 7 at 365-6.

Note 131: Newel. To similar effect is Zeaton, where the father could seek a transfer back to Saskatoon with CN Rail.

Note 132: Gabourie v. Turner.

Note 133: Simpson.

¶ 93 It may be that we should make room for a "fifth option", were the courts to consider the dissenting opinion of Southin J.A. in Rockwell. [See Note 134 below] The majority of the B.C. Court of Appeal in that case permitted the mother to move with two boys, 6 and 4 years old, to live with her husband-to-be, an Edmonton business executive. The Edmonton man was never asked, noted Justice Southin, whether he was prepared to move to the Lower Mainland to marry Mrs. Rockwell. The case proceeded

> upon the unspoken assumption that if lovers live in different places, upon marriage it is for the woman to move and not the man. In this case, such an assumption means that Mr. Russell cannot be expected to make a sacrifice for the woman he loves. [See Note 135 below]

Note 134: Rockwell v. Rockwell, [1998] B.C.J. No. 2718 (C.A.).

Note 135: Ibid. at para. 55. This would be the mother's third marriage, the first having lasted ten months and the second five years, according to Southin J.A. Also of concern for Justice Southin was the visiting every second weekend between Vancouver and Edmonton: "simply too physically wearing. Furthermore, forced into such travelling, [the children] will come hate it." (ibid. at para. 64).

¶ 94 Not only parties, but their partners too, must be forced to consider their options, by counsel and courts. Can the non-custodial parent move too? Can the new partner move to the children and the custodial mother (or father)? Would it be better for the adults, instead of the children, to do the commuting?

¶ 95 (11) Impact in Ontario. After MacGyver and before Gordon, moves were allowed in 10 of 11 Ontario cases, [See Note 136 below] not surprisingly. In the 31 Ontario cases since Gordon, moves were allowed in 20, delayed in one and denied in 10, [See Note 137 below] or 32-35 percent "no", in the range experienced under Carter and elsewhere in Canada.

Note 136: "Trek", above, note 2 at 233.

Note 137: Yes: Luckhurst, Sibley, S.F., K.J.B., Gentle, Mills, Ligate, Buist, Kelly, Herman, Gabourie, Minogue, Totten, Chambers, Simmons, Carette, Macdonald, Allen, Makaryk, Elliot. Delay: Mathwich. No: Woodhouse, Cote, Hamilton, L.A.W., Busniuk, Innes, Birch, M.J.F.W., Davies, Bradley.

¶ 96 (12) Divorce Act vs. Provincial Statutes. Indicative once again of the Divorce Act's ability to "federalise" family law, through the Supreme Court, Gordon has been applied to cases under provincial family law statutes, now in British Columbia, Alberta, Saskatchewan, Ontario, New Brunswick, Nova Scotia and Newfoundland.

¶ 97 (13) Affidavits vs. Trial. Many mobility cases arise on applications to vary or interim applications, with affidavits becoming the basis for decision. Is it possible to conduct the necessary "full and sensitive inquiry" into best interests on affidavits, without a trial?

¶ 98 The answer is clearly yes. Worth noting is that Gordon itself was decided on affidavits. [See Note 138 below] This very issue was raised in Luckhurst, where the Ontario Court of Appeal noted the procedural setting in Gordon and stated: [See Note 139 below]

> we are of the opinion that the trial judge did not err in the manner in which he exercised his discretion in refusing to order the trial of an issue. The fact that the affidavits contain conflicting statements is a factor to be considered very carefully but it is not in itself determinative of the question of whether the trial of an issue ought to be directed. The main facts are not in dispute. Where, as here, the affidavits contain sufficient information for the trial judge to weigh the relevant factors and to come to a decision concerning the best interests of the children, it is not necessary to order the trial of an issue.

Note 138: Above, note 6 at 235 per L'Heureux-Dube J.

Note 139: Above, note 7 at 374.

¶ 99 In Loder v. Holland, the Newfoundland Court of Appeal agreed with this approach, while indicating a strong bias in favour of hearing oral evidence given the "finality" of a relocation decision. [See Note 140 below] Many of the post-Gordon cases are clearly decided on the basis of affidavits alone, [See Note 141 below] and in a few cases, trial judges point out their unease with this method of proceeding in mobility cases. [See Note 142 below] In one Alberta case, a trial of the issue was ordered, where the mother wished to move to Iran. [See Note 143 below]

Note 140: [1997] N.J. No. 204, 154 Nfld. & P.E.I.R. 261 (C.A.) at paras. 28 and 29 per Green J.A.

Note 141: Yes: Scheetz, Luckhurst, Bruce, Picken, Kelly, Dorosh, Newel, Totten, Wudy, Elliot. No: Robinson, Carlacci, Cockerill, Busniuk, Birch, Deptuck.

Note 142: Cockerill, above, note 92 at para. 3 per Kenny J.; Birch v. McGregor, [1997] O.J. No. 3342 (Prov.Div.) at para. 7 per Little Prov.J.

Note 143: Heydari v. Heydari, [1996] A.J. No. 469 (Q.B.). Further, custody of the two children was split, the 15-year-old boy living with his father and the 8-year-old girl living with the mother. The mother wished to return to Iran, where her family lived, effectively terminating any regular contact with the brother and father, as Nash J. recognised. The mother and daughter were to remain in Alberta pending the trial.

¶ 100 (14) Age Does Matter. Age of the child is not mentioned in any of Carter, MacGyver or Gordon as a relevant factor, oddly enough. It may not be a surprise to learn that 63 percent of moves are denied for children 12 and over, in part because of child preferences. [See Note 144 below] What did surprise me was the higher "no" rate for children under the age of six, both in the recent cases and in the post-Carter cases generally. Since Gordon, children under the age of six have not been allowed to move in 45 percent of cases, compared to 29 percent for those aged 6 to 11. [See Note 145 below] The children most likely to be allowed to move are in the 6-to-11 age group, with 71 percent of moves approved.

Note 144: Teenage preferences determine the "yes" cases too, in those cases where the children want to move: E.A.S., L.M., Csank, Law.

Note 145: In the pre-Gordon period, after Carter but prior to MacGyver (1991-1995) and in the rest of Canada after MacGyver (1995), 50 percent of moves for those 12 and over were refused, down to 31 percent for those 6 to 11, but 47 percent for those under six.

¶ 101 I can hazard a number of explanations. First, the younger children involve more recent separations and interim arrangements, where denials are higher. Second, the youngest children create greater opportunities for shared parenting and hence restraints upon moves. Third, the middle age group are more capable of adjusting to longer periods of block access, or at least judges seem to think so. Fourth, the 6-to-11 group likely involve more distance from separation, more drift towards increased maternal caregiving and reduced access, thereby easing the relocation decision.

8. To Be Continued: Wait for the Next Episode

¶ 102 Despite my own scepticism, some academic commentators and courts have supported the Supreme Court's decision in Gordon v. Goertz. The Gordon approach was readily adopted and the reasons of McLachlin J. quoted at length by the Full Court of the Family Court of Australia in B. v. B., a 1997 decision. [See Note 146 below] For Prof. Davies, the Court "set out clear principles that govern the question of mobility". [See Note 147 below] In a recent substantial research work, Professors Bailey and Giroux agree: "Relocation disputes should be resolved in accordance with the best interests of the

child standard. This standard should not be modified by the introduction of presumptions in favour of one parent or another." [See Note 148 below] But Hovius calls the Gordon decision "disappointing", with its impact to "depend on how it is interpreted and applied in the inevitable next round of appellate court decisions". [See Note 149 below]

Note 146: Unreported slip opinion, dated July 9, 1997. There the mother intended to remarry and wished to move from Cairns, Queensland to Bendigo, Victoria, with the two girls aged 12 and 10. The mother was at home with the children, living on child support, some part-time work and social welfare payments, and was identified as "primary carer" in the reasons. She and her solicitor husband had divorced 6 years earlier, and he had exercised liberal access of more than half the weekends. The mother had been supportive of the father's relationship with the girls, but was very unhappy at the prospect of remaining in Cairns. The trial judge's decision in favour of relocation was upheld on appeal.

Note 147: Above, note 18 at 131.

Note 148: Bailey and Giroux, Relocation of Custodial Parents: Final Report (Ottawa: Status of Women Canada, March 1998) at 64.

Note 149: "Guidance from the Supreme Court", above, note 18 at 293.

¶ 103 Not just trial decisions, but appellate decisions too, reveal the lack of guidance from the Court's "fresh inquiry" approach. One need only compare the differing results on similar facts for two courts of appeal in Woodhouse [See Note 150 below] and Pisko [See Note 151 below], or the two differing approaches of the same Court of Appeal in Woodhouse and Ligate. However attractive the Court's approach may be at an abstract level, lower courts have struggled to apply Gordon's open-ended "principles" and "factors". In commenting upon a New York appeal, Tropea, Professors Bruch and Bowermaster commented, in terms applicable to Gordon:

> The experience of other jurisdictions also suggests that asking the trial court in its discretion to weigh all appropriate factors fails to provide a workable long-term solution. As this survey of sister-state case law reveals, most jurisdictions that have considered relocation issues have ultimately delineated guidelines, presumptions or rules to assist in their analysis. [See Note 152 below]

According to Bruch and Bowermaster, the trend of American case law continues towards a presumption in support of a custodial parent's decision to relocate, subject to proof of prejudice to the child's welfare. [See Note 153 below]

Note 150: Above, note 7.

Note 151: Pisko v. Pisko, [1997] A.J. No. 810, 151 D.L.R. (4th) 189, 200 A.R. 330 (C.A.). There are a few distinguishing factors in these two "move-to-Scotland-with-the-new-husband" cases: (i) the move was "temporary" (2 years) in Pisko; (ii) an expert assessor recommended against the move in Woodhouse (no expert in Pisko); and (iii) the mother in Pisko didn't go off to Scotland first, unlike the mother's "foolish act" in Woodhouse.

Note 152: Bruch and Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present" (1996), 30 Fam.L.Q. 245 at 300. In Tropea v. Tropea, 665 N.E.2d 145 (N.Y. 1996), the New York Court of Appeals jettisoned the strict "special circumstances" test that made New York one of the most strongly anti-relocation states, replacing it with a wide-open best interests test, shorn of any presumptions.

Note 153: Ibid. at 302-3. Bailey and Giroux take a different view, incorrectly I believe: above, note 148 at 25-36. Bailey and Giroux conclude, at 26: "The general trend in the U.S., however, is toward an individualized, best interests of the child test, a rejection of presumptions, and a recognition the importance of the views of the custodial parent." Many American states have started from an anti-removal position, using the best interests test as a vehicle to shift the balance in favour of the custodial parent.

¶ 104 The most recent example of this trend is the California Supreme Court decision in Burgess, [See Note 154 below] cited by Justice L'Heureux-Dube in Gordon. [See Note 155 below] A custodial parent was held to have a presumptive right to change the children's residence, forcing the burden upon the non-custodial parent to show prejudice to the child's best interests. The statutory policy of encouraging "frequent and continuing contact with both parents" did not bar the creation of such a presumption. The presumption would minimise costly litigation and avoid requiring "the trial courts to 'micromanage' family decisionmaking by second-guessing reasons for everyday decisions about career and family". [See Note 156 below]

Note 154: In re Marriage of Burgess, 913 P.2d 473 (Cal. 1996).

Note 155: Above, note 6 at 219-220.

Note 156: Above, note 151 at 481.

¶ 105 Specifically cited in Burgess is an amica curiae brief filed by Judith Wallerstein and Tony Tanke, published in the Family Law Quarterly. [See Note 157 below] Wallerstein and Tanke favour a presumption in favour of relocation "when a child is de facto in the primary residential or physical custody of one parent", "except in unusual circumstances". [See Note 158 below] But, where a child is in the joint physical custody of both parents, the parent proposing the move should prove the move to be in the best interests of the child. [See Note 159 below] Above all, "courts should be sensitive to the actual roles assumed by parents in providing stable and continuous care to the child on a day-to-day basis", [See Note 160 below] at least in the year immediately preceding the relocation request. [See Note 161 below] Most significantly, suggest the authors, "relocations should be undertaken honestly, carefully and in good faith". [See

Note 162 below] Moves should be planned, with attention to process and preparation. [See Note 163 below]

Note 157: "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce" (1996), 30 Fam.L.Q. 305.

Note 158: Ibid. at 318.
Note 159: Ibid. at 318-9.
Note 160: Ibid. at 319.
Note 161: Ibid. at 317.

Note 162: Ibid. at 321. Wallerstein and Tanke would demand more than just good faith reasons for the move, but more, reasons that are "sound and substantially based".

Note 163: Ibid. "Where court authorization is required, a relocation request should also be accompanied by reasonably detailed plans that show: (1) the reason for the intended move; (2) a proposal of new access arrangements to substitute for the current arrangement; and (3) plans which show how the moving parent intends to help mitigate the losses incurred by the child and the attenuation of the parent-child relationship involved in the move-away. Appropriate time should be provided for both parents and the child to deal with the move."

¶ 106 On this last point, there seems to be a substantial consensus, on relocation procedure. The custodial parent should be required to give notice of the intended move to the other parent, along with a proposal for new access arrangements. [See Note 164 below]

Note 164: See Bailey and Giroux, above, note 148 at 8-9, noting the importance of an exception "where notice would create a risk of domestic violence"; "Trek", above, note 2 at 243-4. This point was accepted by L'Heureux-Dube J. in Gordon, above, note 6 at 218.

¶ 107 One substantive point has also acquired broad consensus, explicitly from academics and implicitly from lower courts: Gordon is wrong to exclude consideration of the reason for the move. [See Note 165 below] It is impossible to engage in a "full and sensitive inquiry into the best interests of the child", [See Note 166 below] without including the reason for the move in that inquiry. That simple fact has been demonstrated over and over again in the decided cases after Gordon. And it is this point which will likely bring a relocation appeal back before the Supreme Court, but I wouldn't expect the Court to grant leave readily on any relocation case in the next year or two, given the divisiveness of the issues and the Court's steadfast adherence to an unconstrained best interests test.

Note 165: Academics: Wallerstein and Tanke, above, note 157 at 321; Hovius, "Woodhouse", above, note 18 at 382-3 and "Ligate", above, note 18 at 13-16; Davies, above, note 18 at 124-5; Bailey and Giroux, above, note 148 at 13-14. Courts: B. v. B., above, note 146 at paras. 9.62, 9.63; Woodhouse, above, note 7; Tropea, above, note 152; Pisko, above, note 151.

Note 166: The phrase is that of McLachlin J., in Gordon, above, note 6 at 202.

¶ 108 Absent judicial reconsideration, only by legislative amendment might we develop some greater predictability and guidance for parents, lawyers and trial courts. Some subordinate principles are needed, to reduce relitigation of custody issues. [See Note 167 below] In my view, for reasons I have elaborated upon previously, [See Note 168 below] we should use the law to allocate proof of critical substantive issues in relocation cases, as follows:

1. The moving "custodial" parent should be required to give advance notice of an intended move, to propose revised access arrangements, and to show the absence of "bad faith", i.e. no motivation to frustrate access.
2. Once that initial burden has been met, the "non-custodial" parent should be required to prove that the move is not in the best interests of the child. The Supreme Court's factors, plus the reason for the move, ought to be considered.
3. Where there is a true shared parenting arrangement of rough equality in caregiving,, or a consensual residence restriction, [See Note 169 below] then the moving parent ought to bear the burden of proving the move is in the best interests of the child.

Those who feel squeamish about "burdens of proof" should remember that the flexibility of the "best interests" test will not allow injustice in individual cases. This is, after all, little more than a framework for resolution of the issues, not the legal straightjacket attempted by Justice L'Heureux-Dube in her dissent.

Note 167: On this point, I clearly disagree with Bailey and Giroux, above, note 148, esp. at 43-60. Bailey and Giroux believe that no primacy should be given to any one of the three leading "factors associated with positive outcomes": continuing contact with both parents, a well-functioning custodial parent, and avoidance of parental conflict. Their position seems to flow from the absence of any definitive guidance from social science evidence.

Note 168: "Trek", above, note 2 at 241-6. I have revised some of the elements, but the basic idea is the same.

Note 169: Residence restrictions should only be inserted in custody orders if the parties agree, but once agreed upon, such restrictions should shift the burden of proof, in order to encourage settlement of custody matters at first instance: ibid. at 245.

¶ 109 Contrary to Justice McLachlin, if there is any area where a presumption is warranted, it is here, on a variation proceeding where the only change is relocation of the custodial parent. Relitigation is clearly not in the best interests of children generally, or their parents. If the Supreme Court doesn't see that point, then perhaps Parliament will, in the current review of custody and access laws. After Gordon v. Goertz, we have been left to drift, lost in space, thanks to the Supreme Court.

* * * * *

APPENDIX A

"YES" CASES

Lundy v. Lundy, [1996] B.C.J. No. 1073 (S.C. Satanove J.) (May 7)

> 2 boys 12 and 8 in interim custody of mother, subject to consent restraining order, allowed to move from B.C. to Sudbury to be with fiance school janitor there, mother on welfare and father not paid child support.

Poirier v. Heron, [1996] B.C.J. No. 1045 (S.C. Collver J.) (May 9)

> 2 boys 8 and 4 move with custodial mother from Vancouver to Nelson to obtain full-time job, father paying irregular support.

Berrie v. Rollins, [1996] B.C.J. No. 1054 (S.C. Levine J.) (May 14)

> boy 8, joint custody, principal residence with mother, mother married U.S. Navy officer, located in Washington (3 1/2 hours away), mother primary caregiver, expecting another child, move allowed at trial, no stay pending father's appeal.

Lougheed v. Lougheed, [1996] A.J. No. 511, 188 A.R. 387 (Q.B. LoVecchio J.)(May 24)

> 2 boys 11 and 9, custodial mother moving from Calgary to Victoria, B.C., for new relationship, premature move and need for comprehensive plan, 6-month delay.

Scheetz v. Scheetz, [1996] A.J. No. 499, 185 A.R. 368 (Q.B. Nash J.)(May 27)

> girl 3 allowed to move from Edmonton to Kelowna, B.C., with unemployed custodial mother who had family and new job there, father not

paying support.

Luckhurst v. Luckhurst (1996), 20 R.F.L. (4th) 373, [1996] O.J. No. 1972 (Ont.C.A.)(June 4), affirming [1995] O.J. No. 1525 (Gen.Div. Hockin J.)(May 24)

joint custody of 8-year-old twins, primary residence with mother in London, Ontario, her new common-law husband found better job in Coburg, move allowed at trial, appeal dismissed, "some inconvenience" to access parent).

E.A.S. v. L.A., [1996] Q.J. No. 1616 (S.C. Rousseau J.) (June 14)

boy and girl 12 and 9, custodial mother a social worker, remarried to psychiatrist, move from Montreal to Vancouver for employment for both, father no real custody plan and "immature" and "bully", children wish to go.

Woods v. Woods, [1996] M.J. No. 324, 110 Man.R. (2d) 290 (C.A.)(June 19)

2 boys 6 and 9, father the residential parent under interim joint custody order, move proposed to B.C. for father to get off welfare and into apprenticeship, move allowed on appeal.

R.L. v. D.P., [1996] A.Q. no. 1626, [1996] R.D.F. 556 (C.S. Lemelin J.)(June 19)

girl 11 resident with mother, 1/3 of time with father, under joint custody, move of mother from Montreal to Toronto to accept work promotion (turned down once), careful planning by mother, wish of child to move, both parents with new partners.

Sibley v. Sibley, [1996] O.J. No. 2669 (Prov.Div. Downie Prov.J.)(July 18)

girl 3, joint custody, with 1/3 of time to father, homemaker mother allowed to move from Kitchener to Owen Sound, to sell crafts and be closer to boyfriend.

Aldred v. Aldred, [1996] S.J. No. 484, 147 Sask.R. 1 (QBFLD Archambault J.)(Aug. 7)

2 children 4 and 5, interim joint custody, resident with mother, move proposed from Regina to London, Ontario, because RCMP officer boyfriend transferred.

Chilton v. Chilton, [1996] B.C.J. No. 3177, 26 R.F.L. (4th) 124 (C.A.)(Oct. 2), affirming [1996] B.C.J. No. 1757 (S.C. Bauman J.)(Aug. 8)

boy 7, primary residence with mother under joint custody, move from

Vancouver to Hawaii for job in travel industry, father with means and reduced airfares through mother, upheld on appeal.

Anderson v. Case, [1996] N.B.J. No. 402 (QBFD Guerette J.)(Aug. 26)

girl 9 in mother's custody, move from Saint John to Bridgewater, Nova Scotia, with common-law husband for employment with mother's father, also father's misbehaviour.

S.F. v. P.F., [1996] O.J. No. 3278 (Prov.Div. Guay Prov.J.)(Aug. 29)

2 girls, 5 and 3, father with custody, mother with generous access, mother a recovering alcoholic, father allowed to move from Sudbury to Sarnia to take further training and get off welfare.

Mathwich v. Jackson, [1996] O.J. No. 3142 (GDFC Wood J.) (Sept. 9)

girl 5, joint custody, primary residence with mother, 4/14 of time with father (50/50 earlier), move from unemployment in Collingwood to Florida for 2-year job as nurse, but lack of planning by mother, one-year delay of move.

K.J.B. v. B.G.B., [1996] O.J. No. 3335 (Gen.Div. Stach J.)(Sept. 20)

2 girls 9 and 8, father with custody moves from Thunder Bay to B.C. with no notice, ex parte order to return children, but then move later approved, access mother hostile and malicious.

L.M. v A.M., [1996] A.Q. no. 3442 (S.C. Beaudoin J.)(Oct. 7)

girls 15 and 11, shared parenting at first, then primary residence with mother, every weekend with father, Montreal to Florida, 2 children wish to go, father no income and no support.

Chand v. Chand, [1996] B.C.J. No. 2228 (Prov.Ct. Rae Prov.Ct.J.)(Oct. 15)

boy 3, mother and father from Fiji, mother with custody, mother to remarry and move to Sydney, Australia, new husband established there, father's access sporadic, no child support paid and mother on social assistance, relatives in Vancouver and Fiji.

Gentle v. Gentle, [1996] O.J. No. 3697 (Gen.Div. D.S. Ferguson J.)(Oct. 21)

3 girls 7,4 and 3, mother with custody moves from Oshawa to Saskatchewan to live on maternal grandmother's farm, mother on social assistance in Ontario, father convicted of 3 assaults on mother with child

present.

Lloyd v. Earle, [1996] B.C.J. No. 2274 (S.C.Master Joyce)(Nov. 14)

boy 7, "interim" order, custody to mother, alternating weekend access to father, mother moved to Edmonton from Vancouver with no notice to father, to live with new fiance with job, "not justified", but bona fide reasons for move, block access with mother to pay transportation.

Brown v. Brown, [1997] M.J. No. 53, 116 Man.R. (2d) 229 (QBFD Mullally J.)(Feb. 7)

boy 5, girl 3, interim custody with mother (primary caregiver), move from Portage La Prairie to New Mexico, her family there and job as dental assistant.

Bruce v. Bruce (1997), 26 R.F.L. (4th) 219, 29 B.C.L.R. (3d) 378, [1997] B.C.J. No. 396 (S.C. Warren J.)(Feb. 14)

girl 7, sole custody to mother, father regular access, mother primary caregiver, move from Vancouver Region to Vancouver Island, with new common-law husband, mother leaving good job, move made in December before hearing (!).

Mills v. Gibbs, [1997] O.J. No. 1977 (Prov.Div. de Sousa Prov.J.)(May 1)

girl 4, unmarried parents, interim custody to mother, mother to Comox, B.C. from Ottawa, her family there and better employment opportunities as nurse, mother's reason not of concern, but extensive job search efforts in Ottawa area, separate child from family conflict, mother primary caregiver.

Niewerth v. Niewerth, [1997] B.C.J. No. 1091 (S.C. Baker J.)(May 12)

boy 10, custody of mother, Vancouver to England, her family there, mother as primary caregiver, expert evidence she "psychological parent", to stay with father until end of school year and summer access, then move.

Watkins v. Watkins, [1997] N.J. No. 193, 154 Nfld. & P.E.I.R. 218 (SCTD Schwartz)(May 27)

2 girls 8 and 4, joint custody, primary residence with mother, Lewisporte to Barrie, Ontario, to seek employment, mother on social assistance, primary caregiver, father visits every 2nd day, both sets of grandparents in Lewisporte.

Clarke v. Houslow, [1997] A.J. No. 544 (Q.B. Perras J.)(May 28)

girl 10, unmarried parents, mother with de facto custody, move from Edmonton to New Brunswick, to follow new husband who lost job, 2 additional children, father in Brooks, Alta.

Picken v. Pratt, [1997] A.J. No. 661, 149 D.L.R. (4th) 347, 203 A.R. 399 (Q.B. Nash J.)(June 20)

girl 3, mother with custody and primary caregiver, move from Edmonton to Comox, B.C., armed forces posting, father in forces too, maternal grandparents move with mother, father away extended periods.

D.T. v. C.B., [1997] A.Q. no. 2435 (C.S. Melancon J.)(June 27)

boy 9, interim custody to mother, move from Pointe Claire to Rouyn, to be with her extended family, mother on social assistance, father in financial difficulty, devoted father, child's wish to stay with father, expert report recommending custody to mother and move, child support reduced from table amount of $260 to $170 because of travel costs.

Ligate v. Richardson (1997), 34 O.R. (3d) 423, [1997] O.J. No. 2519, 101 O.A.C. 161 (C.A.)(June 23), reversing [1995] O.J. No. 533 (Gen.Div. Greer J.)(March 2)

girl 8 (5 at trial), custody of mother, residence clause in agreement, mother moves from Toronto to Cambridge with new partner, 2 experts - 1 each, opposing opinions, trial judge refused move, overturned on appeal

Buist v. Greaves, [1997] O.J. No. 2646 (Gen.Div. Benotto J.)(June 25)

boy 4, same-sex couple, Greaves primary caregiver, Buist regular access after separation, G to Vancouver from London for major career promotion, expert evidence against move, child with learning and speech disabilities, sole custody to Greaves.

Linnell v. Linnell, [1997] B.C.J. No. 1579 (S.C. Bauman J.)(July 3)

girls 7 and 5, joint custody, mother primary caregiver, mother a U.S. citizen, moving from Vancouver to Lancaster Co., Pennsylvania, where her family and better employment as physiotherapist, sole custody to mother, block "holiday" access, mother to pay 1 1/2 air fares per year and $50/mo. for telephone.

F.B. v. M.M., [1997] Q.J. No. 2682 (S.C. Rousseau J.)(July 29)

girl 9, joint custody, mother primary caretaker, father access, move from Montreal to Toronto to increase income and her family there, father bankrupt and paying little support, assessment recommends no move until

child 12.

Kelly v. Kelly, [1997] O.J. No. 4261 (Gen.Div. Aitken J.)(July 30)

3 girls 10, 8 and 5, interim divorce application, mother primary caregiver, move from Russell, Ont., to Waterford, Ont., where mother's family and wealth, father's family in Russell, expert report by social worker for father given no weight, unsubstantiated allegations by father, interim moves only in exceptional circumstances.

Dorosh v. Dorosh, [1997] S.J. No. 455, 159 Sask.R. 30 (QBFLD McIntyre J.)(July 31)

girl 7, mother primary caregiver, custody to mother and interim move allowed from Regina to Kelowna, B.C., late application by father to halt, no particular reason for move, issue to be tried.

Lang v. Racine, [1997] N.S.J. No. 344 (S.C. Kennedy A.C.J.)(Aug. 20)

girl 7, mother with new husband, both DND, move from Nova Scotia to Winnipeg, father exercising 40% access, but mother primary caregiver, postings a fact of military life, joint legal custody with liberal access, move allowed.

Herman v. Rathbone, [1997] O.J. No. 4726 (GDFC Cosgrove J.)(Aug. 27)

girl 5 and boy 4, mother with custody and primary caregiver, move from Hamilton to Madison, Wisconsin, for medical school, her parents and extended family in Madison, father's access supervised.

Griffin v. Griffin, [1997] P.E.I.J. No. 88, 155 Nfld. & P.E.I.R. 81 (S.C.T.D. MacDonald C.J.T.D.)(Aug. 27)

girls 8 and 6, joint custody, principal residence with mother, mother primary caregiver, father's access "erratic" due to work as master mariner, mother moving from P.E.I. to Sweden with new common-law husband going there for job.

Newel v. Newel, [1997] B.C.J. No. 2004 (S.C. Master Donaldson)(Sept. 9)

boy 3, interim divorce hearing, mother working part-time in Cranbrook, move to White Rock, B.C. (12-hr. drive) for full-time job and her parents there, father RCMP officer to be reposted in 1998, with ability to get time off for access and even arrange Lower Mainland posting, joint custody with primary residence with mother, spousal support reduced for access costs.

Csank v. Csank, [1997] N.S.J. No. 378, 161 N.S.R. (2d) 185 (S.C. J.M. MacDonald J.)(Sept. 10)

> boys 16, 13 and 10, older with father, 2 younger with mother, joint custody, mother meets husband-to-be on internet, move from Halifax to Durham, North Carolina, 13-year-old's wishes in favour via doctors and psychiatrist, costs of access shared equally.

Creighton v. Creighton, [1997] B.C.J. No. 2081 (S.C. Humphries J.)(Sept. 12)

> 2 girls 6 and 4, mother remarried US Marine, move from White Rock to 29 Palms, California, further 2 postings for him before retirement (incl. Virginia), mother pregnant, father access 3 days/2 days week, mother primary care, expert report equivocal, joint custody with primary residence to mother, access at her expense.

Gabourie v. Turner, [1997] O.J. No. 3698 (GDFC Wood J.)(Sept. 12)

> boy 5, joint custody, primary residence with mother, move from Orillia to northwest Toronto, both new partners, move made by hearing, for employment reasons, father consider moving residence closer to his work in same area of Toronto?, interim order to allow move, mediation re continued joint custody, residence and access.

A.M.W. v. L.A.W., [1997] N.S.J. No. 383, 163 N.S.R. (2d) 81 (S.C. Edwards J.)(Sept. 15)

> boy 9, mother custody, limited access to father, mother joins Armed Forces and moved to either New Brunswick or Ontario, expert evidence from psychiatrist in support, father on social assistance, no support, mother hostile to father, mother "primary attachment figure".

Minogue v. Minogue, [1997] O.J. No. 3930 (GDFC Wood J.)(Sept. 15)

> boy 11 and girl 7, mother a nurse, father not paying child support, moves from Barrie to Saskatchewan, to marry a farmer and look for nursing jobs, restraining order granted, mother moves in Sept. 1996, children prefer to stay, then go, according to Children's Lawyer, father left child care to new partner, mother described as primary caregiver.

Totten v. Hannan, [1997] O.J. No. 4051 (GDFC Wood J.)(Sept. 24)

> boys 9 and 4, mother primary caregiver, father little parenting role, but active extended family, father's physical and psychological abuse of mother, move from Barrie to Kelowna, B.C., leaving job in Ontario with none in B.C., but relatives there, "secretive" move, "no escape without

physical separation" for mother.

Chambers v. Chambers, [1997] O.J. No. 4387 (Gen.Div. Murphy J.)(Oct. 23)

girl 6 (half-sister too), mother primary caregiver, Peterborough to Richmond Hill (2 1/2 hr. drive), mother on social assistance, 3-month job for mother in Richmond Hill (with possible part-time thereafter), mother asks court to consider "reason", joint custody, primary residence with mother.

Doro v. Doro, [1997] B.C.J. No. 2407 (B.C. Loo J.)(Oct. 31)

boy 7, twin girls 5, joint custody, boy with father, twins with mother (3 days of 8 with father), homemaker mother remarries to farmer, move from Vancouver to his parent's farm in Prince Albert, Sask., mother primary caregiver, twins move, cost of access shared equally.

Simmons v. Henshall, [1997] O.J. No. 4650 (GDFC Aston J.)(Nov. 7)

boy 3, unmarried parents (4 mos. cohab), mother as primary caregiver, sole custody, move from London to Barrie (3 hr. drive), mother new common-law partner with job in Barrie, 6-mo. twins, father close personal relationship, reason for move "insignificant as matter of law", no more mid-week access, 3 weekends/mo., transportation shared equally.

Kennedy v. Kennedy, [1997] B.C.J. No. 2572 (S.C. McEwan J.)(Nov. 18)

girl 3, mother Australian, father works in mill in B.C., $100 child support, mother on social assistance, father "faithful" re access, move from Vancouver to Melbourne where family.

Schioler v. Schioler, [1997] M.J. No. 590 (QBFD Guertin-Riley J.)(Nov. 24)

3 girls aged 6 and boy 7, joint custody, primary residence with mother, frequent access with father, father not comply with access order, on social assistance, mother on social assistance, job offer in B.C., move from Winnipeg to Penticton, B.C., block access paid by father.

Ellis v. Ellis, [1997] N.S.J. No. 486 (C.A. Flinn J.A.)(Dec. 1)

girl 6 and boy 4, interim order of custody to mother, father regular access, mother to move from Halifax to Winnipeg, to go with common-law husband for his new job, 6 appearances in chambers from September to November, full trial scheduled for end December, stay pending appeal refused.

Carette v. Barton, [1997] O.J. No. 5451 (Gen.Div. Aitken J.)(Dec. 16)

girl 6, mother sole custody, move from Ottawa to Ghent, New York, to job, friends, Waldorf school, off welfare, interim motion to vary after October move, mother primary caregiver, no variation of interim custody, on grounds of disruption, but strong disapproval of move, access every 4th weekend, driving to be alternated.

Armstrong v. Read, [1998] B.C.J. No. 891 (Prov.Ct. White Prov.Ct.J.)(Feb. 25)

girl 6, joint custody, mother primary caregiver, move from Vancouver to Calgary, with new husband transferred, mother lost her job, child with father 40 % of time, father already moved from Victoria to Vancouver to maintain contact, move found to be "reasonable" and "necessary", block access with travel costs set off against $300/mo. child support.

MacDonald v. Cross, [1998] O.J. No. 1036 (Gen.Div. Stong J.)(Mar. 11)

girl 4, mother sole custody, new husband with job in Winnipeg, move from Bowmanville, father only lived with child for 9 months, father knew in September 1997 of move and appeared to acquiesce, then moved for interim order to restrain move, but move allowed.

Allen v. Allen, [1998] O.J. No. 1853 (GDFC Wood J.)(May 1)

Boys 10 and 7, joint custody, primary care with mother, parents extraordinarily cooperative in shared care of children, CLRA variation by mother, to move from Borden to Petawawa (5 hour drive) as her common-law Armed Forces husband posted there, mother then able to stay at home with children, father paying little support ($100/mo.), expert social work report (vs. move) given no weight as deficient.

Selby v. Selby, [1998] B.C.J. No. 1271 (S.C. Melnick J.)(May 11)

Boy 5, joint custody, primary residence with mother in order, but de facto 50/50 residence, mother Australian, earlier attempt to move to Australia denied, now move sought from Cranbrook to Lethbridge, Alberta (3 1/2 hour drive), to join fiance, access every second weekend plus block access.

Makaryk v. Makaryk, [1998] O.J. No. 2069 (Gen.Div. Kiteley J.)(May 20)

Girl 6, both parents still living in family home, "reason" relevant as part of plan of care, mother primary caregiver, move from Aurora to Calgary (where mother and child lived during previous separation) where job and family, "happy mother", fresh application under CLRA, joint custody, primary residence with mother, move allowed, access expenses to affect

spousal support.

Law v. Law, [1998] S.J. No. 386 (QBFLD Dawson J.)(May 20)

Boys 15 and 12, joint custody, alternating weeks of residence, mother moved from Regina to Calgary the month before for better job, both children (especially older boy) prefer to move with mother, application to vary by mother, father's request for assessment rejected.

Lamoureux v. Lum, [1998] B.C.J. No. 1899 (Prov.Ct. Pendleton Prov.Ct.J.)(June 2)

Boy 7, joint custody, primary residence with mother, father's access every weekend (1 or 2 days), mother primary caregiver, both parents remarried, mother's new husband has new job requiring move from Lower Mainland to Kelowna, mother to stay home, no second-guessing of mother and new husband's financial decisions, extended families in Lower Mainland, access to change to alternate weekends by air, father pays air fares and deducts from child support.

J.L. v. G.G., [1998] A.Q. no. 2183 (C.A.)(June 11)

Children 12, 9 and 7, mother with custody, moves unilaterally from Montreal to Toronto, ordered back, moving to Toronto for family and employment possibilities (anglophone), father not employed, mother on social assistance in Montreal, good mother but lacking in credibility, children wish to be in Montreal, but move permitted.

D.C.D. v. M.J.W., [1998] B.C.J. No. 1645 (S.C. Hood J.)(July 8)

Girl 3, mother to move from Victoria to England, mother English and regular return trips there, mother and father actors, met while mother on tour in Canada, mother primary caregiver and full-time mother, move to be with family and job in Kindermusik business in England, father on UI, actor, not willing to work more, no spousal support, child support of $250/mo., mother on social assistance, "happy mother".

P.C. v. P.P., [1998] Q.J. No. 2339 (SCFD Kennedy J.)(July 17)

Boy 11, mother with custody on divorce, remarried, move with husband from Montreal to Chicago, father unemployed and freelancing, no child support payable, $20,000 in arrears cancelled, father to pay access travel costs for block access.

Haikalis v. Boutsakis-Haikalis, [1998] B.C.J. No. 2259 (Prov.Ct. Gillis Prov.Ct.J.)(July 27)

Boy 4, initial application, both parents seeking custody, joint plan to go to Crete (her family there), then separation and change of plan, mother still wants to go from Vancouver to Crete, father sold business and now on UI, mother primary caregiver, father access on weekends but not overnight, mother substitute teacher, spent 2 to 3 months a year in Crete, mother's family supporting her in Canada, reason for move "more social than economic", "happy mother".

Proctor v. Proctor, [1998] B.C.J. No. 2171 (S.C. Oppal J.)(Aug. 20)

Boy 5, joint custody, alternating 3 days, then mother remarried and moved to Bahamas in 1996, so alternating three months, now starting school, mother wants in Bahamas, application to vary, father bitter towards mother, mother more constructive, young child resilient, joint custody retained, father access 2 weeks at Christmas and 2 months in summer.

Wudy v. Wudy, [1998] B.C.J. No. 2403 (S.C. Meiklem J.)(Sept. 17)

Girl 4, mother granted sole custody on divorce in July 1998, father alternate weekends and two evenings per week, mother "more primary caregiver", mother moving from Vancouver to Calgary to be with fiance, "happy mother", joint custody ordered with principal residence with mother in Calgary, access one week every fourth week and long weekends, mother and father share costs equally.

Re G.W.B., [1998] B.C.J. No. 2560 (Prov.Ct. Auxier Prov.Ct.J.)(Sept. 28)

Boy 21 months, residing with mother, father sees 3 times week (not overnight), mother moving from Vancouver to Revelstoke where family and employment, mother freelance casting director on social assistance, father has anger problem and misled court, detailed analysis of benefits of move, "happy mother", sole custody to mother, access 3 days every 2 weeks to father, lump sum child support of $20,000 from father's inheritance.

Lowther v. Ontiveros, [1998] B.C.J. No. 2650 (S.C. Collver J.)(Oct. 30)

Girl 6, sole custody of mother by separation agreement, father from Mexico, met in Mexico, moved to B.C. in interests of child, mother wants to move from Victoria to Puerto Vallarta for job offer, mother's family in Victoria, father's family in Mexico, mother on social assistance in B.C., mother's brother and sister opposed to move.

Elliot v. Elliot, [1998] O.J. No. 4827 (GDFC Wood J.)(Nov. 4)

Girl 6, interim custody with mother, father access every second weekend

and one mid-week, mother moving from Barrie to Toronto to be closer to employment and family, mother primary caregiver, father abusive (assault charge) and manipulative, father re-employed at lower salary, secondary reason for mother's move to avoid father, variation of interim order to allow move, access continued.

Soucy v. Varma, [1998] S.J. No. 815 (QBFLD Wimmer J.)(Nov. 10)

Boy 5, joint custody, residence with mother in Calgary, father in Regina, mother began spending with child in Texas with fiance, father went to police and mother charged with abduction, custody in interim to father (living with his parents in Regina), father's history of cocaine problems, sole custody to mother, block access to father, fiance expected transfer back to Calgary within 2 years.

Rockwell v. Rockwell, [1998] B.C.J. No. 2718 (C.A.)(Nov. 24)

Boys 6 and 4, mother with interim custody, father with liberal access, interim "no removal" order, mother to move from Vancouver to Edmonton to be with fiance, fiance established business in Edmonton, expert's report against move, "happy mother", access every other weekend.

Children's Aid Society of Halifax v. T.M., [1997] N.S.J. No. 576 (Fam.Ct. Daley Fam.Ct.J.)(Dec. 18)

Boy 18 months, child protection proceeding ended after 6-month supervision order and child with mother, mother to move from Halifax to Port aux Basques, Nfld., parents and family there and employment prospects, Family Maintenance Act custody application, custody to mother, father serious hash and marijuana problem, access to be supervised in Nfld., father on social assistance, no child support payable, but money to be used for visits.

Zeaton v. Zeaton, [1998] M.J. No. 577 (QBFD Allen J.)(Dec. 29)

Boys 8 and 7, joint custody agreed upon divorce, primary residence with mother, but issue of where, mother primary caregiver and "stay-at-home mother", move from Saskatoon to Winnipeg at time of separation at mother's insistence, then mother's new boyfriend in Saskatoon and mother wishes to move back, bitter father, mother's family in Winnipeg, assessment against move and not enough of a plan, "happy mother", less disruption for children to move back to Saskatoon, father has CN rail pass, block access including long weekends, father could seek transfer back to Saskatoon with CN, move delayed 6 months to end of school year, spousal support reduced by access expenses.

APPENDIX B

"NO" CASES

Benson v. Benson, [1996] N.J. No. 141, 140 Nfld. & P.E.I.R. 196 (SCTD Wells J.)(May 23)

> girl 3 in joint custody, after custody to father, now spending equal time, father in Armed Forces transferred from Goose Bay to Richmond, B.C., father remarried to doctor, mother now a soapstone carver with excellent prospects, custody to mother.

Campbell v. Campbell, [1996] B.C.J. No. 1235 (S.C. Harvey J.)(May 30)

> children 6, 4 and 2, interim custody to mother, move from B.C. to Australia with boyfriend offered employment there, detailed review of his employment prospects and net gain, homemaker mother, sole custody to mother with generous access to father, no move.

Woodhouse v. Woodhouse (1996), 20 R.F.L. (4th) 337, [1996] O.J. No. 1975, 29 O.R. (3d) 417, 136 D.L.R. (4th) 577, 91 O.A.C. 161 (Ont.C.A.)(June 4), affirming [1994] O.J. No. 3921 (Gen.Div. Carnwath J.)(Feb. 8).

Jewer v. Jewer, [1996] N.J. No. 163, 142 Nfld. & P.E.I.R. 115 (SCTD Roberts J.)(June 14)

> boy 13 stays with father, girl 11 moves with mother, both previously in custody of mother, mother remarried, new husband moving from Corner Brook to new job in Saint John, N.B., father and new wife actively involved with both children's extracurricular activities, wishes of children followed.

Kane v. Kane, [1996] N.J. No. 198 (S.C.T.D. Russell J.)(June 17)

> boy 12 and girl 9, joint custody, alternating weeks, both parents seek principal residence order, mother wishes to move from Birchy Bay to St. John's, uncertainty in mother's plans for employment and place to live, no move, principal residence to father, recommended by home assessment, liberal contact with mother.

Robinson v. Beertema, [1996] B.C.J. No. 1498 (S.C. Boyle J.)(June 25)

> 2 girls 4 and 2, in mother's custody, mother wishing to move from Terrace to New Brunswick to take degree and be near family for nine-month period, father of younger child but not older, older girl just learning from mother that he not "father", concern re older girl's mental state, interim

application to remove residence restriction denied.

Cote v. Cote, [1996] O.J. No. 2552 (Gen.Div. LaForme J.)(July 9)

2 girls 8 and 9, interim joint custody, residing with mother, move from Oshawa to Gaspe, for speculative employment reasons.

M.A. v. K.Z., [1996] A.Q. no. 2324 (C.S. Morneau J.)(July 31)

children 11 and 3, custody with mother, mother proposes to move from Montreal to Toronto, at same time as her parents, mother arranging job transfer, dubious lack of employment or means of father, custody stays with mother.

Carlacci v. Carlacci, [1996] A.J. No. 748 (Q.B. Cooke J.)(Aug. 22)

girl 4, joint custody, residence with mother, mother's common-law husband moving to Vancouver for business, but plans vague, interim interim custody to father with generous access to mother, pending assessment and trial.

I.D.N. v. S.M., [1996] Q.J. No. 2161 (S.C. Zerbisias J.)(June 13)

boy 4 in interim joint custody, primary caregiver mother wishing to move back to her family in New York City from Montreal, move considered "premature", but partial lifting of residence restriction to allow mother to spend one week each month in New York).

LaFrance v. LaFrance, [1996] B.C.J. No. 1947 (S.C. Sigurdson J.)(Sept. 11)

children 15 and 12 in "joint guardianship", residing with father in matrimonial home, father moving from Surrey to Falkland, B.C., both parents remarried, mother the more stable and structured home, older son wanted to go with mother, daughter less certain, custody varied to mother.

Hamilton v. Hamilton, [1996] O.J. No. 3767 (Gen.Div. Valin J.)(Oct. 24)

3 girls, 15, 5 and 5, custody to mother, denials of access by her, denials for 3-year involving 15-year-old, interim custody changed to father, inappropriate discipline by mother, likely marriage and move by her to New York State, change of custody to father and stay in Toronto.

Macklin v. Macklin, [1996] B.C.J. No. 2121 (S.C. Preston J.)(Oct. 25)

boys 7 and 5, girl 3, mother with interim custody, move from Vancouver to California, "to get father out of her life", to be near her mother and possible

job, custody assessment recommended stay in B.C., father to make medical care decisions because of mother's "unusual views", joint custody, with primary residence with mother in B.C.

Levin v. Levin, [1996] B.C.J. No. 2496, 84 B.C.A.C. 73 (C.A.)(Nov. 22)

3 children 11, 10 and 7, many attempts by mother to move, joint guardianship order, wife remarries, move from Port Alberni to Campbell River (few details).

L.A.W. v. S.C.W., [1996] O.J. No. 4501 (Prov.Div. Schnall Prov.J.)(Dec. 12)

boys 7 and 3, interim joint custody with primary residence with father, animosity between parties and father not encouraging access, mother new partner and pregnant, father moving from Woodstock to Kitchener, father on social assistance and "better" employment opportunities, financial benefits to father not significant, if father moves, primary residence to mother.

McLean v. Williams, [1996] N.J. No. 339, 150 Nfld. & P.E.I.R. 128 (Prov.Ct. Power P.C.J.)(Dec. 20)

girl 5, common law couple, joint custody order, equal time, mother from Goose Bay to Halifax, N.S., for family and better opportunities, nothing certain, father employed and his family in Goose Bay, "non-custodial order", weekdays with mother, weekends with father.

Nay v. Carroll, [1997] M.J. No. 188, 117 Man.R. (2d) 174 (Q.B. Clearwater J.)(Apr. 22)

girls 6, 4 and 17 months, mother suddenly leaves Winnipeg for Thompson and job there, children returned to Winnipeg, interim care to father, reason analysed, mother prepared to return to Winnipeg if no to move, expert evidence against move, joint custody in Winnipeg ordered, minimum 40 percent each.

T.B. v. S.R., [1997] A.Q. no. 1449 (C.S. Downs J.)(Apr. 29)

boys 11, 9 and 6, interim custody to mother, liberal access to father, father a pathologist and time away from family, mother primary caregiver, her family in Denmark and education and employment there, two experts say custody to mother, not necessary to go to Denmark.

Reed v. Reed, [1997] S.J. No. 356 (QBFLD Kyle J.)(June 6)

girls 13 and 8, boy 11, custody to mother under separation agreement, residence restricted to Regina for 5 years to 1999, mother's new partner a

doctor and relocates to Kentucky, 2 older children wish not to go, youngest uncertain, father authoritarian, custody to change to father if mother moves.

Cockerill v. Cockerill, [1997] A.J. No. 659 (Q.B. Kenny J.)(June 19)

girls 12 and 8, boy 10, mother custody, interim restraining order, move from Lacombe, Alta. to Yorkton, Sask., for common-law partner and possible employment, analysis of reason for move.

Chapman v. Chapman, [1997] A.J. No. 706, 203 A.R. 295 (Q.B. Nash J.)(June 30)

boys 13 and 9, parenting agreement, primary residence with mother, liberal access to father, mother job offer in Vancouver, from Fort Saskatchewan, evidence of job ads in Edmonton, expert report that both parents important, mother's purpose to limit access, sole custody refused.

Busniuk v. Moore, [1997] O.J. No. 3216 (Gen.Div. Kozak J.)(July 3)

girl 9, joint custody, weekdays with mother, weekends with father, mother from Thunder Bay to Duluth, Minn. (3 hours), to marry, little info re new husband, impulsive marriage, no primary caregiver, grandparents in Thunder Bay.

Innes v. Innes, [1997] O.J. No. 4260 (Gen.Div. Aitken J.)(July 28)

girl 7, joint custody, primary residence with mother, move from Ottawa to Oregon, remarriage of mother, father's parents provide day-time care, father unemployed and no child support, little info re husband-to-be or life in Oregon, mother employed in Ottawa.

Birch v. McGregor, [1997] O.J. No. 3342 (Prov.Div. Little Prov.J.)(Aug. 1)

boy 5, unmarried parents, joint custody, shared time, father "close", mother to move from Kenora to Edmonton, to go to community college, no consideration of local alternatives, no access proposal, no assumption that best interests lie with residential parent where child in both homes.

M.J.F.W. v. J.C.W., [1997] O.J. No. 4625 (Gen.Div. Clarke J.)(Sept. 23)

2 children 5 and 4, joint custody, shared time, mother move from Oakville to Ottawa, her family and job there, move not thought out, expert evidence from father re mother's career opportunities in Oakville, no access plan, mother's animus against father and his family behind move, expert evidence against move.

Gader v. Gader, [1997] S.J. No. 789 (Q.B. Baynton J.)(Nov. 28)

boy 11, girls 9 and 8, joint custody order, alternating weeks, mother's new partner moved from Swift Current to Calgary to take new job, no "custodial parent", 2 experts, one recommending for each party, status quo maintained, children not move, change of principal residence to father if mother moves.

Simpson v. Simpson, [1997] B.C.J. No. 2885 (S.C. Drost J.)(Dec. 23)

girl 6, sole interim custody to mother, mother primary caregiver, move from Chilliwack to Vancouver and now wants to move from Vancouver to Calgary, where her 22-year-old daughter lives, father a notary and moved practice to Burnaby to be nearby, sole custody to mother, liberal and generous access to father, no move.

Ross v. Mathieu, [1997] N.S.J. No. 555 (S.C. Haliburton J.)(Aug. 19)

boy 16, girls 14, 11 and 10, 2 older children with father, 2 younger with mother, mother to move back to Quebec, to be with family, mother's English poor, affecting job prospects, children reluctant to speak French, struggling in school, lack of plan by mother, remain in Yarmouth with no change in custody as mother not prepared to move without children.

Dhaliwal v. Dhaliwal, [1998] B.C.J. No. 129 (S.C. MacKinnon J.)(Jan. 15)

boy 7 and girl 2, sole custody with mother, "weeks later" mother moves from Lower Mainland to Edmonton, mother on social assistance and part-time work, seeking more hours of employment and her family in Edmonton, paternal grandparents in B.C., assessment says contact with father important.

Davies v. Davies, [1997] O.J. No. 5558 (Gen.Div. Cosgrove J.)(Aug. 21)

Twin boys 7, joint physical custody, alternating weeks, father in Armed Forces posted from Kingston to North Bay, older boy goes with father based upon preference, mother "primary nurture giver", access one week every six weeks with father, with school adjustments by parents.

I.P. v. A.M., [1998] Q.J. No. 1538 (S.C. Bishop J.)(April 30)

Girl 4, mother with interim custody, father access 2 days/week, application to vary interim order, to move from Montreal home to Greece, previous unilateral trip by mother and father used Hague Convention to bring child back, no material change from one year earlier when restriction imposed.

Stead v. Greening, [1998] N.J. No. 146 (S.C. Easton J.)(May 21)

> Boy 9, application to vary by mother, previous mobility restriction, mother with custody to move from Gander, Nfld., to Fort Simpson, NWT, to join new partner with new job there, doubt whether "material change", detailed analysis of factors and close look at finances, uncertainties re new partner and his employment security, once a year visits insufficient to keep father-child relationship alive.

R.A. v. K.C., [1998] Q.J. No. 1747 (S.C. Wery J.)(May 21)

> Boy 5, unmarried parents, mother with custody, move from Montreal to Calgary with boyfriend, both unemployed and seeking work, mother on social assistance, no French, access by father two evenings per week and alternate weekends, joint custody ordered, physical custody to mother.

S.M.G. v. J.E.F., [1998] N.S.J. No. 331 (Fam.Ct. Daley Fam.Ct.J.)(June 16)

> Girl 4, joint custody, care with mother, access 2 eves/week and alternate weekends, mother moving from Halifax to Montreal to attend fashion college, moving with new common-law partner, unsettled plans, mother not honoured access, paternal grandparents close to child, father's new partner, little notice of move to father, child's interests "incidental" to mother's plan, custody changed to father's sole custody.

Salvadori v. Kebede, [1998] B.C.J. No. 1993 (S.C. Hood J.)(June 16)

> Girl 6, joint custody, residence with mother, generous and lengthy access by father in Vancouver and Texas, mother primary caregiver, father moved to Texas with new wife and seeking custody, mother in Vancouver with new husband and pregnant, non-school periods to be spent by child in Texas with father.

Western v. Young, [1998] B.C.J. No. 1686 (S.C. Cowan J.)(June 25)

> Girls 11 and 9, interim joint custody, primary residence with mother, move by mother from Victoria to Ontario, both sets of grandparents there, "better" economic opportunities and upgrading, but retraining available in B.C. and previous minimal contacts with grandparents, joint custody ordered on divorce, day-to-day care with mother, residence restricted.

Popowich v. Rossi, [1998] B.C.J. No. 1714 (Prov.Ct. Rounthwaite Prov.Ct.J.)(June 26)

> Girl 2, joint custody by consent, primary residence with mother, liberal access to father, residence restricted to B.C., application to vary by mother one year later, move from Vancouver to Calgary, where mother's family

and better employment opportunities, mother working part-time and receiving social assistance, father's access every Wednesday and alternate weekends, at his parent's house, no material change, not in best interests to move.

S.A.H. v. A.D.S.L., [1998] M.J. No. 330 (QBFD Little J.) (June 30)

Girls 5 1/2 and 3 1/2, older girl developmentally delayed, divorce, mother primary caregiver, older child doing well at day care, mother announces during her direct evidence that moving from Winnipeg to Kitchener, to marry fiance who has job there, fiance not called and adverse inference drawn, sexual abuse allegations made by mother against father, period of supervised access, allegations not proven and coached, mother leaves after trial and before decision, overriding concern for stability and progress of older girl, also time needed to "rehabilitate" father's access, removal would end father's role, assessment recommended "trial" move.

Grady v. Grady, [1998] N.W.T.J. No. 85 (S.C. Schuler J.) (July 2)

Boy 7, joint custody, care with mother, alternate weekends with father, mother primary caregiver, mother wants to move from Yellowknife to Louisiana to marry husband met on the Internet, application to vary by mother, reasons for move "relevant", new relationship "untested", large role of paternal grandmother, both families in Yellowknife, change of "care" under order to take place if mother moves to Louisiana.

Bradley v. Ripley, [1998] O.J. No. 3013 (Gen.Div. Fleury J.)(July 21)

Boy 5, unmarried parents, depressed mother gives up custody to father by consent, father disappears to B.C., revenge the motive, child with mother for 2 years and then with father for next 2 years, father now seeks to move from Hamilton to Stouffville, for alleged employment possibilities, extended families of both parents in Hamilton, mother once employed with escort service, father no genuine desire to facilitate access, child needs "a mother image", custody returned to mother, alternate weekend access to father.

Carson v. Anctil, [1998] N.B.J. No. 295 (QBFD Savoie J.) (Aug. 5)

Boy 2, unmarried parents, cohabited for 2 years, interim joint custody, physical care to mother, ever Saturday and Wednesday access to father, mother to move from Moncton to Goose Bay, Labrador, 22-year-old mother to move with her Armed Forces parents for 3-year posting, mother on social assistance, restriction maintained, child support at table amount plus 75% child care.

S.D. v. D.M., [1998] A.Q. no. 2706 (SCCF Poulin J.)(Aug. 25)

> Girl 7, boy 5, mother with custody, father access alternate weekends and Tuesday and Thursday evenings, mother to move from Montreal to Toronto because her father employer wants her at head office, move only to satisfy her father, not compelling, won't lose job in Montreal.

Deptuck v. Witting, [1998] A.J. No. 1212 (Q.B. Veit J.)(Nov. 9)

> Boy 3, coparenting agreement upon divorce, then mother moved to Saskatchewan from Alberta, father with care, 9 months later mother applies to remove child to Saskatchewan where she married prosperous farmer, no removal clause in corollary relief judgment, no change pending trial, access for mother every fourth week, mother pays cost.

Wilson v. Daffern, [1998] B.C.J. No. 2899 (S.C. Davies J.)(Dec. 10)

> Boy 3 1/2, separation agreement, primary residence with mother, father access every second weekend, both with drug and alcohol problems, mother into detox after separation, after out move from Squamish to Ontario, her 15-year-old daughter there with mother's sister, mother on social assistance in B.C., paternal grandparents in B.C., move "speculative" and no "concrete benefit" to cild, mother given leave to apply for spousal support.

Weinrauch v. Weinrauch, [1998] A.J. No. 1446 (Q.B. Trussler J.)(Dec. 29)

> Boy 5, girl 3, de facto care of mother after separation, mother moves without notice from Calgary to Peterborough, Ontario, her mother ill (but not close), mother on social assistance there, child returned to Alberta, joint custody, residential care changed to father, father responsible for paying cost of access if mother stays in Ontario.

New Trial

Loder v. Holland, [1997] N.J. No. 204, 154 Nfld. & P.E.I.R. 261 (C.A.)(Aug. 15)

> boy 3, extensive access by father, move with mother to Alberta, with her boyfriend and to take fashion design studies, no proper inquiry by trial judge, approached with pro-custodial parent view, need for proper hearing in mobility case, mother not yet moved, rehearing will delay plans.

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Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative*

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¶ 1 We -- and I mean all of us, courts and lawyers, parents and spouses -- find ourselves at an awkward moment in the evolution of family law. Family law is statute law. But the legislators often appear deer-like, frozen in the bright headlights of divided public opinion and gender politics. Those same "political" disputes are then played out, one case at a time, before trial and appeal courts, and even the Supreme Court of Canada. Constitutional challenges are raised to the differential treatment of family forms by government, whether in the distribution of benefits or the imposition of "family" rights and obligations through legislation. No less "political", however, are difficult questions of property division, spousal support, child custody and child protection.

¶ 2 Buried within each case is the larger question for judges, especially appellate judges: in the absence of clear legislative "rules", should the court enunciate a ruling any broader than this individual case? If not, is it possible to maintain the legitimacy of family law in this state of "rulelessness"?

¶ 3 I will review recent cases before the Supreme Court of Canada within the past year, ten in total, indicative of the significance of family law within the Court's docket. Five appeals have been decided, [See Note 1 below] three decisions reserved [See Note 2 below] and two appeals are yet to be heard. [See Note 3 below] But I want to review these decisions in the context of broader developments within family law, beyond the past twelve months and outside of the Supreme Court building. My primary theme will be the increasingly uneasy juxtaposition of rules and rulelessness in family law.

Note 1: Nouveau-Brunswick (Ministre de la sante & des services communautaires) c. L.(M.) (1998), 41 R.F.L. (4th) 339 (appeal heard and allowed, June 23, 1998, written reasons October 1, 1998); Chartier v. Chartier, [1998] S.C.J. No. 79 (appeal heard and allowed, November 12, 1998, written reasons January 28, 1999); N.H. v. H.M., [1999] S.C.J. No. 8 (appeal allowed, oral reasons, February 17, 1999); Hickey v. Hickey, [1999] S.C.J. No. 9 (appeal allowed, February 19, 1999, written reasons to follow); Bracklow v.

Bracklow, [1999] S.C.J. No. 14 (appeal heard, November 6, 1998, appeal allowed, for reasons released March 25, 1999).

Note 2: M. v. H., appeal heard and decision reserved, March 18, 1998; New Brunswick (Minister of Health and Community Services) v. J.G., appeal heard and decision reserved, November 9, 1998; Best v. Best, appeal heard and decision reserved, February 17, 1999.

Note 3: Francis v. Baker, [1998] S.C.C.A. No. 191 (appeal to be heard April 27, 1999); Winnipeg Child & Family Services (Central Area) v. K.L.W., [1998] S.C.C.A. No. 361 (leave granted October 8, 1998, notice of appeal filed October 26, 1998, no hearing date set).

¶ 4 After a brief foray into the competing rationales for rules and rulelessness, I will start from our most recent massive experiment with "rules", namely the Child Support Guidelines (Chartier, Francis). Next along the continuum is pension division (Best). Situated in the middle of the spectrum, but uncertainly so, are spousal support (Bracklow) and child protection (M.L.). At the other extreme, that of rulelessness, lies child custody (N.H. v. H.M. and the older Gordon v. Goertz). Last of all are those challenging the very legislative definitions of "spouses" and "families", using section 15 of the Charter to rewrite the "rules" (H. v. M.), or those seeking to protect existing family relationships under s. 7 (J.G., K.L.W.).

1. Rules and Rulelessness in Family Law

¶ 5 Family law provides a distinctive setting in which to hash out the arguments for and against rules. [See Note 4 below] A large number of cases. Issues as disparate as custody and property division. Shifting social attitudes towards the rights and obligations of family members. Even disagreements over what are and are not "family relationships". Setting out these pros and cons for rules at the outset will help to organise my case-specific comments later.

Note 4: A recent article provides a rich source of ideas on this topic, from which I have drawn many of the points that follow: Cass Sunstein, "Problems with Rules" (1995), 83 Cal.L.R. 953. For the seminal article in the difficult field of child custody law, see Robert Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 Law & Contemporary Problems 226. See also Bala, "Judicial Discretion and Family Law Reform in Canada" (1986), 5 C.J.F.L. 15.

¶ 6 I should state my bias at the outset. I prefer "rules", for many of the reasons set out in the next section. Further, even if we feel uneasy about "rules", I prefer "presumptions" over the now-prevailing "factors" and "standards", terms described below.

(a) Why Rules?

¶ 7 (1) A Large Number of Cases. One of the strongest arguments for rules is the large number of family law cases, leading to concerns about uniformity and predictability. On many issues, the inaccurate "fit" of a rule in some cases is more tolerable when it works well for the bulk of "typical" cases, the Child Support Guidelines being an example.

¶ 8 (2) "Small" Cases. Where individual cases involve "small" amounts (or "small" issues), there is a low cost to error, if a rule doesn't quite fit right.

¶ 9 (3) High Transactions Costs. Where "transaction costs" -- read legal fees -- are high in relation to the value of the matters at issue, as well as the resources of the litigants, there is more pressure to generate rules to resolve disputes. What is lost in inaccurate results is usually gained in reduced legal fees. Rules can avoid the public and private cost of revisiting the fundamental issues in every case -- think of custody or spousal support.

¶ 10 (4) Encouraging Settlement. Legal rules effectively specify outcomes in advance, leaving only a limited range of facts to be determined. Once those facts are known to the disputants, they too can predict the outcome and fashion their own settlement. In family law, there is an extra fillip to the usual dispute settlement rationale for rules. Anything that can be done to reduce conflict in family law should be encouraged, especially in the interests of children.

¶ 11 (5) Allowing Individuals to Plan Their Lives. Clear rules allow individuals to know their rights and obligations in advance, thereby permitting them to plan and live their lives, without fear of subsequent upset. In my opinion, this aspect of family law has been forgotten in recent years, especially by the Supreme Court of Canada.

¶ 12 (6) Equal Treatment, Less Bias and Arbitrariness. As Sunstein says, "rules are impersonal and blind", [See Note 5 below] thereby counteracting both the reality and the appearance of bias, favouritism or discrimination on the part of decision-makers. Rules are general and in that sense can promote equal treatment.

Note 5: Ibid. at 974.

¶ 13 (7) Emboldening and Constraining Decision-Makers. Sunstein argues that rules can embolden judges to stick with difficult, unpopular decisions. So too, rules constrain judges, but in a helpful way, avoiding the need to return to first principles in every case and reducing the range of arguments that can be made by the parties.

¶ 14 (8) Increased Visibility and Accountability. "When rules are at work, it is clear who is responsible and who is to be blamed if things go wrong," suggests Sunstein. [See Note 6 below] Given the number of unhappy litigants in family cases, rules can make more clear what part of the decision flows from the legislation and what part from the

judge. Loose standards or multi-factor tests leave the impression that it is this particular judge, not the legislature, that has made "the law". Rules also permit appeal courts to identify those judges or decision-makers who fail to comply with the rules.

Note 6: Ibid. at 976.

¶ 15 (9) Rules Create Rights. "Rules turn citizens into right-holders, able to expect certain treatment as a matter of right." [See Note 7 below] Sunstein might have added that those rights create correlative obligations, especially in family law. By contrast, standards, factors or discretion make citizens "supplicants, requesting official help".

Note 7: Ibid. at 977.

¶ 16 (10) Rules Promote Equality. Case-by-case, individualised decision-making favours the well-to-do. Litigation is expensive and good lawyers are even more expensive, creating the appearance and even reality of pervasive inequality. Rules may not be perfect, but for the vast majority of parties rules may be superior to individualised hearings which they can't afford. Cutbacks in family law legal aid, and an increase generally in self-represented parties, may thus encourage rules to fill the gap.

(b) Why Not Rules?

¶ 17 At the other extreme from "rules" lies "broad discretion" or "case-by-case decision-making" or "rulelessness", depending upon how provocatively you wish to phrase it.

¶ 18 (1) No Social Consensus. It is hard to fashion a rule where there is no consensus, whether amongst society or the legislators or the judges. [See Note 8 below] Better to express a broad standard upon which many can agree, e.g. the best interests test, without operational particulars. Or, better to provide a list of factors, upon which people can agree, with room to add to the list and no ex ante weighting of any particular factor. In fact, a wide cross-section of people can often agree on the result in a particular case, even if they do not agree on the reasons for that particular result.

Note 8: Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L.R. 477.

¶ 19 (2) Rules Are Inaccurate and Both Overinclusive and Underinclusive. Rules will not "fit" particular cases, causing erroneous and arbitrary results in cases around the edge.

¶ 20 (3) High Costs of Error. Where rules cause large errors in certain cases or when any error is unacceptable, there will be much pressure in those individual cases, and hence over all cases, to dispense with application of the rule or the rule itself. Being off by a few dollars in a support order is one thing. Consigning a child's custody to the "wrong" parent is entirely unacceptable.

¶ 21 (4) Small Numbers of Cases. If only a few contested cases reach the court, e.g. custody, then it is possible to "do justice" through individualised decisionmaking. But it must be remembered that these few cases can have a "radiating" effect throughout the system, affecting settlements.

¶ 22 (5) Rules Can Be Anachronistic. Where social conditions or circumstances are changing quickly, rules can soon lose their rationale and become outmoded. Fixity and stability are the virtues and the vices of rules. The speed with which rules can be revised becomes a relevant consideration here.

¶ 23 (6) Rules Can Cause Unequal Treatment. General rules always run the risk of treating differently situated individuals the same, with no opportunity to speak to their distinctive circumstances.

¶ 24 (7) Rules Allow Evasion by Wrongdoers. "Because rules have clear edges, they allow people to 'evade' them by engaging in conduct that is technically exempted but that creates the same or analogous harms." [See Note 9 below] Rules are often underinclusive and some individuals can work around the edges of even the best-designed rules.

Note 9: Sunstein, above, note 4 at 995.

¶ 25 (8) Rules Can Deny Individuality and Appear Procedurally Unfair. The stronger the rule, the less it is open to argue the particulars of one's own case. In a democratic sense, those who must live under the rule should have the chance to participate in its formulation and application to their own cases.

(c) Intermediate Solutions: Presumptions, Factors, Standards

¶ 26 I am, of course, drawing out the extremes of the rules-to-rulelessness continuum. Situated in between are a variety of alternatives -- presumptions, factors, standards. At the "rule-like" end of the middle lie presumptions, which can vary in strength. A presumption that places a burden on a party to prove a difficult fact can approach a "rule", e.g. that a move is against the best interests of a child apart from a reduction of access.

¶ 27 At the "rulelessness" end in the middle would be standards. Standards are broadly framed, refusing to specify outcomes in advance and even refusing to enumerate factors.

¶ 28 Towards the middle lie "factors", an attempt to specify relevant factors in advance of a decision, but with no advance weighting of those factors in advance of the particular case. "To a considerable extent, we do not know what the law is until the particular cases arise." [See Note 10 below] There may be a partial consensus, that these few enumerated factors are relevant and must be considered. Almost invariably the list of factors is treated as non-exhaustive, with freedom to add in the particular case. Decisions are thus not precedents, as each case is "fact-bound". But analogical reasoning does bring some coherence, as parties argue why this case is much like this or that decided case.

Note 10: Ibid. at 964.

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2. Child Support: The Impact of the Guidelines

¶ 29 Canada undertook a massive rule-based reform of our child support system, with the advent of the Federal Child Support Guidelines, [See Note 11 below] effective May 1, 1997. The starting point (and for many the ending point) is the child support table amount. To establish the table amount under the federal formula, you need only know the relevant provincial table, the number of children "to whom the order relates", and the annual income of the payor or non-custodial spouse. What could be more "rule-like" -- not even the income of the recipient or custodial spouse is necessary to generate the table amount. Variations from this table amount, up or down, are themselves circumscribed and defined. As many have observed, working out child support now resembles doing your income tax, the ultimate example of rule-based decision-making.

Note 11: SOR/97-175, as amended by SOR/97-563, effective December 9, 1997.

¶ 30 In my view, and that of most others too, [See Note 12 below] the Guidelines have been remarkably successful in achieving the objectives for the new system, set out in s. 1 of the Guidelines: adequacy, [See Note 13 below] objectivity, efficiency, and consistency. Quibble as we might about this or that sub-area of child support law, few would suggest now that we go back to the "old", individualised system.

Note 12: Bala, "First Impressions of the Implementation of the Guidelines" in Federal Child Support Guidelines Reference Manual (Ottawa: Department of Justice, looseleaf), K-7 at K-18; Thompson and Rockman, "Practitioner's View of the Guidelines" in ibid., K-57; and Bala, "Reforming the Child Support Guidelines" in ibid., K-63. For a somewhat different view, see McLeod, "A Perspective on the Child Support Guidelines" in Continuing Legal Education Society of Nova Scotia, Child Support Guidelines Conference (Halifax, N.S., December 4, 1998).

Note 13: "Adequacy" is admittedly difficult to assess, in the absence of careful empirical studies comparing pre and post Guidelines awards, information which will be forthcoming from the federal Department.

¶ 31 By and large, the courts have readily accepted the new child support "rules", in both letter and spirit. If anything, the major interpretive problems so far have flowed from too little willingness to build flexibility into the basic rules, even where that flexibility would better achieve the objectives of the Guidelines. It's not often that we can complain about excessive judicial rigidity in family law cases, and I almost hesitate to do so.

¶ 32 I do want to review some of the major issues under the Guidelines: section 7 expenses, incomes over $150,000, undue hardship, shared custody, in loco parentis.

(a) Section 7 Extracurricular Expenses: What's "Extraordinary"?

¶ 33 Under the presumptive rule found in s. 3 of the Guidelines, child support is to be the table amount plus any section 7 expenses. Section 7(1) sets out an exhaustive list of "special or extraordinary expenses", the cost of which is to be shared by the spouses in proportion to their incomes according to s. 7(2). Clauses (a) (child care), (b) (child's health insurance premiums), (c) (health-related expenses), and (e) (post-secondary education) are to be added, subject to the requirements of necessity and reasonableness. Clauses (d) (primary or secondary education expenses) and (f) (extracurricular activities) add one more requirement: they must be "extraordinary".

¶ 34 The only real area of difficulty here has been the interpretation of "extraordinary" extracurricular expenses. [See Note 14 below] The architects of the Guidelines did it to themselves, thanks to the misleading little notes found in Schedule I preceding the provincial tables:

> 5. The amounts in the tables are based on economic studies of average spending on children in families at different income levels in Canada....
> 6. The formula referred to in note 5 sets support amounts to reflect average expenditures on children by a spouse with a particular number of children and level of income....

Note 5 is plainly incorrect, while note 6 must be understood as aspirational. After a long wait, the federal government released its so-called "technical report" on the construction of the table amounts, [See Note 15 below] a slim 8-page explanation of a mathematical formula. The formula is based upon a series of assumptions, built around equivalence scales, not any "economic studies of average spending", as none of the latter produced reliable numbers. [See Note 16 below]

Note 14: A reading of the cases reveals a different, less demanding standard for various kinds of "extraordinary" educational expenses, most of which derive from a need for tutoring or other form of remedial assistance. In a subset of cases over private school tuition, there are disagreements, but mostly around reasonableness and prior spending patterns.

Note 15: Department of Justice Canada, Formula for the Table of Amounts Contained in the Federal Child Support Guidelines: A Technical Report (December 1997).

Note 16: See Federal/Provincial/Territorial Family Law Committee's Report and Recommendations on Child Support (Ottawa: Department of Justice Canada, January 1995) at 52-56, 59-61. At 55, the Report states: "In Canada, there are no accurate empirical data on the costs of raising children."

¶ 35 Courts were left by the federal Guidelines to assume that the table amounts actually included average expenditures on children, so that some clear line could be drawn between "ordinary" extracurricular expenses and those described as "extraordinary" in s. 7(1)(f). It turned out, of course, that the courts had to draw that line, on their own, unassisted by any "studies". Eventually the issue worked its way to the appeal courts.

¶ 36 The two basic approaches were defined by the majority and minority judgments in the Nova Scotia Court of Appeal in Raftus. [See Note 17 below] Through Flinn J.A., the majority favoured certainty, uniformity and "objectivity", limiting the availability of extracurricular expenses. What must be "extraordinary" was the nature of the activities or the nature of the expenses, [See Note 18 below] without reference to parental incomes. The appellant was denied all her s. 7(1)(f) expenses. Concurring in that result was Bateman J.A., who took a different approach. Justice Bateman expoused a "subjective" approach and considered joint parental income to determine whether the expenses were "extraordinary": "there is no 'usual' that cuts across income levels." [See Note 19 below] While the majority approach might reduce litigation and promote efficiency, suggested Bateman J.A., the child would be denied individual fairness and the full benefit of available parental means.

Note 17: Raftus v. Raftus (1998), 37 R.F.L. (4th) 59.

Note 18: It is hard to discern what s. 7(1)(f) expenses would meet these requirements. Plainly a child with special needs or a child of exceptional talents would fall within the majority's narrow test. Such special needs or talents do not vary across income levels, encompassed within "the nature of the activities". But what of the expense of the activities? In Andries, below, note 20, Twaddle J.A. gave the example of downhills skis, where $1,000 would be an extraordinary expense where the average cost of downhill skis is $500. But this example, or the $500 per year for baseball travel expenses in rural Manitoba allowed in the case, would not appear to meet the requirements set out in Raftus.

Note 19: Ibid. at 69.

¶ 37 The terms "subjective" and "objective" are ill-chosen. Both approaches are objective, in that the availability of s. 7(1)(f) add-ons turns upon a measurable variable: how "unusual" is the activity or expense itself, for the majority, or how "unusual" are the expenses in relation to joint parental income, for the minority. Both approaches are seeking a "rule", the only difference being what that rule should be. The majority "rule" would narrow the potential for s. 7 expenses, thus reducing the amount of support and incentives to litigate, compared to the minority "rule".

¶ 38 The majority Nova Scotia approach was adopted by the Manitoba Court of Appeal in Andries. [See Note 20 below] The minority approach has attracted far broader appellate support: in Saskatchewan in Kofoed v. Fichter, [See Note 21 below] in Alberta in Sanders, [See Note 22 below] and in British Columbia in McLaughlin. [See Note 23 below]

Note 20: Andries v. Andries (1998), 36 R.F.L. (4th) 175.

Note 21: (1998), 161 D.L.R. (4th) 189, 168 Sask.R. 149.

Note 22: [1998] A.J. No. 565.

Note 23: [1998] B.C.J. No. 2514.

¶ 39 In my opinion, the reasons of Justice Prowse in McLaughlin provide a complete answer to the narrow approach of Raftus and Andries, carefully reviewing the prior case law and the structure of the Guidelines. The more flexible approach "permits justice to be done on an individual basis" and "certainty of result should not be elevated to the paramount objective of the Guidelines". [See Note 24 below]

Note 24: Ibid. at para. 80.

¶ 40 McLaughlin should become the new starting point for the assessment of add-ons, especially extracurricular activities, for those provinces which have not yet resolved these issues. [See Note 25 below] The general trend of the trial decisions in the remaining provinces, including Ontario, appears to follow the "joint income" rule.

Note 25: I have one minor criticism of McLaughlin. There is much to be said for using the custodial parent's income as a secondary, if not primary, factor in assessing whether an expense is "extraordinary", as developed by Webber J. in Ellis v. Ellis (1997), 158 Nfld. & P.E.I.R. 193 (P.E.I.S.C.) and Campbell v. Martijn (1998), Nfld. & P.E.I.R. 126 (P.E.I.S.C.). Where there is a large disparity in income between the custodial parent and the typically higher-income non-custodial parent, joint parental income may be a less reliable guide to "extraordinary" expenses, mostly because only a small portion of the payor's parental income is transferred by means of the table amount of child support. Remember that the table amount formula is built around two assumptions: (i) both parent have equal incomes; and (ii) the payor parent lives alone and the recipient parent has only the children in the household: Research Report, above, note 15 at 2.

¶ 41 At this point, there are only two routes to national uniformity: an amendment to section 7 to define "extraordinary", or a Supreme Court of Canada decision. [See Note 26 below] It is important to appreciate that s. 7(1)(f) expenses are of greatest importance for custodial parents in the middle income brackets. For the lowest income parents, add-ons are a fond wish, since covering basic expenses is such a struggle and the limited ability to pay of the payor will foreclose any add-ons. At the upper income end, as we shall see, the courts tend to assume that the table amounts include most expenses. So the narrow approach in Nova Scotia and Manitoba really disadvantages the middle of the income range, those where there is ability to pay and extracurricular activities are common.

Note 26: Nick Bala has suggested the preferable approach would be to eliminate paragraphs 7(1)(a) and 7(1)(b), day care and extracuricular expenses, but provide for an automatic 25 percent increase in table amounts for preschool children and 20 percent for children twelve and older: "Reforming the Child Support Guidelines" in Reference Manual, above, note 12 at K-69. Some have gone further and suggested that all s. 7 expenses be removed and the table amounts increased across the board.

(b) Incomes Over $150,000: A Rule or a Discretion?

¶ 42 For those payors earning more than $150,000, the Guidelines offer two alternatives in section 4: (a) follow the table formula right on up, plus add-ons; or (b) "if the court considers that amount to be inappropriate", the table amount for $150,000 (e.g. one child, $1131 per month in the Nova Scotia table) plus an "appropriate" amount on the balance of the income plus add-ons.

¶ 43 What if the payor makes $945,538 a year and has two children? The table says $10,034 monthly. That was the result in Francis v. Baker, [See Note 27 below] both at trial and on appeal. The case will be heard in the Supreme Court of Canada on April 27, 1999, its first case under the Guidelines. [See Note 28 below] I would expect that the Court will uphold the result, on its facts, as Mr. Baker is hardly a sympathetic figure (who failed to testify at trial) and the monthly amount could be justified, with only a modest struggle, on a Paras formula.

Note 27: (1998), 34 R.F.L. (4th) 317 (Ont.C.A.)

Note 28: No reasons have yet been released in Hickey v. Hickey, [1999] S.C.J. No. 9 (February 18, 1999), reversing (1997), 37 R.F.L. (4th) 193 (Man.C.A.), but it does not appear that any Guidelines issues arise in this case.

¶ 44 That said, the critical and controversial holding of Francis will likely be reversed. Abella J.A. held that the word "inappropriate" in s. 4(b) must be read to mean "inadequate", [See Note 29 below] such the table amount under paragraph (a), here $10,034, becomes a "floor". In doing so, the Court saw itself as following the Guidelines' "intention to impose certainty" and to "offer few exceptions to their formulaic application". [See Note 30 below]

Note 29: Ibid. at 337.

Note 30: Ibid. at 333. Ironically, this same comment was used by the majority in Raftus, above, note 18 at 78, to reduce child support by narrowing the availability of s. 7(1)(f) expenses.

¶ 45 Francis has been reluctantly applied in Ontario [See Note 31 below] and generally not followed elsewhere. [See Note 32 below] If there is any area of child support where a more flexible approach is warranted, it is here, for many of the reasons concerning rules and rulelessness. First, the custodial parent is guaranteed, as a floor, the table amount for $150,000. Second, at some point, the income-sharing rationale of the tables must be softened by the actual costs of child-rearing. Third, for the most part, these are parties who can afford the litigation expense of individualised decision-making.

Note 31: E.g. Cosma v. Cosma, [1998] O.J. No. 3130 (Gen.Div.) and, more recently, Tauber v. Tauber, [1999] O.J. No. 713 (C.A.) (partial stay pending appeal).

Note 32: E.g. Plester v. Plester, [1998] B.C.J. No. 2438 (S.C.); Salvadori v. Kebede, [1998] B.C.J. No. 1819 (S.C.); Penner v. Penner, [1998] M.J. No. 353 (QBFD).

(c) Undue Hardship

¶ 46 In an article in the Reference Manual, [See Note 33 below] I have analysed the case law on undue hardship up to October 16, 1998, just before the release of the first appellate decision, that of the B.C. Court of Appeal in Van Gool. [See Note 34 below] There has been a clear trial court consensus on the interpretation of section 10 [See Note 35 below] and Van Gool adopts that consensus view. The drafting of section 10 is quite clear as long as the issue before the court is whether or not undue hardship warrants a reduction from the table amount. Most importantly, as Van Gool is a second family case under s. 10(2)(d), Prowse J.A. sets out the clear three-step approach: (i) an undue hardship circumstance under s. 10(2); (ii) a lower household standard of living for the payor under s. 10(3); and (iii) a residual discretion to grant the remedy of reduced support. [See Note 36 below]

Note 33: "Of Camels and Rich Men: Undue Hardship, Part II", above, note 12 at H-25.

Note 34: [1998] B.C.J. No. 2513, released October 30, 1998.
Note 35: Above, note 33 at H-26 to H-30.
Note 36: Above, note 34 at para. 45.

¶ 47 Two areas of less certainty should be identified. First, in only one case so far has undue hardship been used successfully as an "offence", on behalf of the child, to increase support above the table amount, in Scharf. [See Note 37 below] One would have thought it possible to look past the appropriately tough "rule" for hardship as a defence, to see the rationale for a more flexible use of hardship to increase support, but not so far. Second, not much help is to be found in the Guidelines for the amount of departures downwards, especially in the difficult second family cases. [See Note 38 below]

Note 37: Scharf v. Scharf (1998), 40 R.F.L. (4th) 422 (Ont.Gen.Div.). As I explain in my paper, above, note 33 at H-42 to H-48, such claims were rejected in the other ten cases. For a good argument on hardship by reason of the non-exercise of access, also before Metivier J., see Schotcher v. Hampson, [1998] O.J. No. 3700 (Gen.Div.).

Note 38: Above, note 33 at H-39 to H-40.

(d) Shared Custody: Thresholds and Set-offs

¶ 48 Although no shared custody case under section 9 has yet made its way to an appeal decision, there are two complaints so far. [See Note 39 below] First, the "40 percent" threshold is too rigid, leading to strategic litigation in custody cases. Second, the courts have been too quick to use a set-off rule using table amounts, thus producing inadequate net amounts of support. [See Note 40 below]

Note 39: These concerns are carefully presented in Rogerson, "Child Support Under the Guidelines in Cases of Split and Shared Custody" (1998), 15 C.J.F.L. 11. For an interesting analysis of American guidelines on this issue, see Morgan, "Shared Custody: The American Experience" in Reference Manual, above, note 12 at D-17.

Note 40: Through various formulas, including straight set-off of table amounts, set-off prorated for amounts of time, or set-off plus a 50 percent "multiplier". For a thoughtful use of the pro-rate set-off plus multiplier, see the reasons of Brockenshire J. in Hunter v. Hunter, [1998] O.J. No. 1527 (Gen.Div.).

¶ 49 Both complaints are about the use of "rules", rules which don't adequately fit "the enormous variation in shared custody situations", to quote Prof. Rogerson. [See Note 41 below] While the quantitative 40 percent threshold may cause problems, just imagine the potential for litigation over a more qualitative test. [See Note 42 below] The use of set-off formulas, once again, reflects the zealousness of trial judges in pursuing the objectives of predictability and consistency, eschewing the old child support discretion.

Note 41: Above, note 39 at 93.

Note 42: Earlier drafts of the Guidelines had tried other language: "where both spouses share physical custody of a child in a substantially equal way" (June 27, 1996) or "where both spouses equally share overnight physical custody of a child" (December 13, 1997).

(e) In Loco Parentis: Chartier and Section 5

¶ 50 In Chartier, to no one's surprise, the Supreme Court unanimously ruled that "once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult". [See Note 43 below] The Chartiers cohabited from 1989 to 1992, marrying in 1991. Mr. Chartier played an active parental role towards his wife's daughter Jessica. After separation, he exercised access to Jessica, but in 1995 he "repudiated" his relationship and sought to avoid payment of child support upon divorce. No support for Jessica was awarded at trial or on appeal.

Note 43: Chartier v. Chartier, [1998] S.C.J. No. 79 at para. 32. The appeal was allowed at the hearing on November 12, 1998, with written reasons released January 28, 1999. The lower court decisions are found at (1997), 118 Man.R. (2d) 152 (C.A.), affirming (1996), 111 Man.R. (2d) 27 (Q.B.F.D.).

¶ 51 The proper time to determine the existence of the parental relationship, according to Justice Bastarache, is "as of the time the family functioned as a unit", not after separation. [See Note 44 below] A multi-factor test is suggested to determine the relationship at that time, but the Court describes as a "key factor" "the actual fact of forming a new family". [See Note 45 below] I would suggest that the other factors listed appear to be limiting factors, after proof of the "key factor". [See Note 46 below]

Note 44: Ibid. at para. 36.

Note 45: Ibid. at para. 41.

Note 46: The other factors listed are: the opinion of the child, the child's participation in the family, financial provision, discipline, representing self as parent, the child's relationship with the absent biological parent.

¶ 52 The Court seems to favour a low threshold to stand in the place of a parent and has certainly raised a higher threshold to end such status, to quote Prof. McLeod. [See Note 47 below] Put differently, case-by-case decision-making determines entry to the status, but a clear rule bars unilateral departure from that status, at least by the non-custodial parent.

Note 47: On this point, see McLeod, "Annotation: Johb v. Johb" (1998), 40 R.F.L. (4th) 380 at 382.

¶ 53 What of the conduct of others -- the custodial parent? the child? In the Johb case, [See Note 48 below] the custodial mother's conduct was found capable of terminating the relationship, by telling the step-father to have no contact with the two children. I doubt that this holding survives Chartier, in light of Chartier's broad language, e.g. "the breakdown of the parent/child relationship after separation is not a relevant factor". [See Note 49 below] Further, the Court specifically mentions possible "rejecting" behaviour of an older child, implying that it should be discounted. [See Note 50 below]

Note 48: Johb v. Johb (1998), 40 R.F.L. (4th) 379 (Sask.C.A.), decided before Chartier. Jackson J.A. dissented, accepting the trial judge's view that the evidence on this interim order was insufficient to support termination of the relationship.

Note 49: Above, note at para. 37 and, to the same effect, para. 45.

Note 50: Ibid. at para. 38. Bastarache J. acknowledges "the opinion of the child" is "important", but "only one of many factors" and most of his reasons places the step-parent in the identical position to the natural parent (where conduct is almost never a factor for children under the age of majority).

¶ 54 Some of the broad language in Chartier has potential implications for section 5 of the Child Support Guidelines. Section 5 creates a wide-open discretion for these cases, within an otherwise-rulebound system: "such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child".

¶ 55 First, Bastarache J. states broadly and unequivocally:

> Once it is shown that the child is to be considered, in fact, a "child of the marriage", the obligations of the step-parent towards him or her are the same as those relative to a child born of the marriage with regard to the

application of the Divorce Act. [See Note 51 below]

Many echoes of this statement can be found in the existing appellate case law. [See Note 52 below] Cast in Guidelines terms, the amount of support -- table plus add-ons -- ought not be different for a step-parent.

Note 51: Ibid. at para. 39.

Note 52: E.g. Leveque v. Leveque (1990), 25 R.F.L. (3d) 1 (B.C.C.A.).

¶ 56 Second, "the concern that a child might collect support from both the biological parent and the step-parent" is not accepted as a valid objection to entitlement. Justice Bastarache states:

> The contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent.... The obligations of parents for a child are all joint and several. The issue of contribution is one between all of the parents who have obligations towards the child, whether they are biological parents or step-parents; it should not affect the child. [See Note 53 below]

Read broadly, a child may receive table amounts from two "parents", each according to their ability to pay. It is up to one or the other of the "parents" to demonstrate that this might lead to excessive child support, with obligations then readjusted as between the payors. Read more narrowly, Bastarache J. is simply stating that the step-parent's obligation to pay is not to postponed by arguments about the custodial parent's failure to obtain support, or adequate amounts of support, from the biological parent.

Note 53: Ibid. at para. 42.

¶ 57 One of the most thoughtful s. 5 cases is Bevand v. Bevand, [See Note 54 below] an early decision by Perkins J. that raises most of these hard issues of entitlement, duration and quantum. The step-father "could not eliminate his obligation to pay child support merely by cutting off all contact" with the 12-year-old daughter. That said, the existence or absence of a continuing relationship was a relevant "factor" in determining duration, along with the length of time of the original cohabitation and the availability of other reliable sources of support:

> I hesitate to propose a rule of thumb, but it seems to me that, as a starting point, a stepfather who no longer has any contact at all with the child and who is able to point to a father who has means to pay support, could

> reasonably be expected to pay child support after separation for at least as long as the parties and the child lived together before separation. [See Note 55 below]

Whether this sensible rule, or more accurately presumption, [See Note 56 below] can survive Chartier, I am not sure. Chartier might have a Moge-like impact upon any attempts to time-limit child support.

Note 54: [1997] O.J. No. 2661 (GDFC).

Note 55: Ibid. at para. 26. On the facts of Bevand, this meant the obligation would last almost to age 18, as the parties had cohabited for 7 years, so that the "normal termination events" would resolve the issue.

Note 56: For the earlier cases that developed this "rule", see Siddall v. Siddall (1994), 11 R.F.L. (4th) 325 (Ont.Gen.Div.) and Spring v. Spring (1987), 61 O.R. (2d) 743 (U.F.C.).

¶ 58 But Moge adjusted by producing low amounts of indefinite spousal support. Despite s. 5, the Guidelines make it more difficult to produce lower amounts of child support. And Chartier appears to accept independent assessment of each parent's quantum, in the quote above. [See Note 57 below] In Bevand, Justice Perkins required the step-father to pay the table amount, as his income was more than half of the combined income of the three parents and he was the only "father" the child had really known. [See Note 58 below] The child support payable by another parent under the Guidelines will be "generally irrelevant". [See Note 59 below] Practically, for a single child as in Bevand, the table amounts are low enough that more than one order will not add up to an excessive amount, and the same is true over much of the two-child range too.

Note 57: Above, note 53.
Note 58: Ibid. at para. 40.
Note 59: Ibid. at para. 38.

¶ 59 Chartier has made it harder to terminate the child's entitlement to support from a person who has stood in the place of a parent. Whether Chartier will make it harder or easier to develop "rules" governing duration and quantum, like those suggested in Bevand, is yet to be determined.

3. More Rules: Property Division and Pensions

¶ 60 Another island of "rules" in the sea of family law "rulelessness" has been the division of property upon marriage breakdown. Property statutes start from a strong presumption of equal division, on the premise that marriage is an equal partnership. [See Note 60 below] Any departure requires the claimant to show an equal division would be

"unconscionable" in Ontario [See Note 61 below] or "unfair and unconscionable" in Nova Scotia. [See Note 62 below] A mere disparity in marital contributions, apart from extreme imbalances as in LeBlanc, [See Note 63 below] is not enough.

Note 60: E.g. Matrimonial Property Act, R.S.N.S. 1989, c. 275, s. 12(1); Family Law Act, R.S.O. 1990, c. F.3, s. 5.

Note 61: Ibid., s. 5(6).

Note 62: Above, note 60, s. 13.

Note 63: (1988), 12 R.F.L. (3d) 225 (S.C.C.).

¶ 61 Sitting uncomfortably within marital property have been pensions, for two reasons. First, pensions are family property, as the Supreme Court made clear in Clarke. [See Note 64 below] But they are a unique kind of property, posing special valuation problems. Second, in Canada, most pensions are based upon employment with a particular employer, creating practical problems of division and enforcement for the non-member spouse.

Note 64: [1990] 2 S.C.R. 795.

¶ 62 How are we to apply the rule-based property division scheme to the unique pension asset? These issues are raised in Best v. Best, [See Note 65 below] an appeal heard by the Supreme Court on February 17, 1999. The four fundamental pension issues are raised in Best:

(a) valuation: what method? what retirement date?
(b) apportionment between marital and pre-marital periods: pro-rata vs. value-added?
(c) division: off-set, if-and-when, lump-sum transfer?
(d) double-dipping: spousal support from the pension income?

Note 65: (1997), 31 R.F.L. (4th) 1 (Ont.C.A.), upholding (1993), 50 R.F.L. (3d) 120 (Ont.Gen.Div.).

¶ 63 In the Ontario Court of Appeal, the first issue was once again left unclear, the second was clearly resolved, the third is now more unsettled than ever, and the fourth is ignored. These results are unfortunate, for all the reasons that "rules" make sense in property division cases.

¶ 64 Mr. Best had a teacher's pension, contributing to the fund for 32 years, 20 before marriage and 12 after, a defined benefit plan, benefits of 2 percent per annum on the average salary for his five best years, indexed to the CPI and receivable at age 65 or without penalty when age and years of service total 90. Mr. Best was 53 years old at separation, 58 at trial and 62 by the appeal, retiring at age 61.

¶ 65 At trial, Rutherford J. accepted "a hybrid termination/retirement" valuation method, fixed the age of retirement at 57.4 (the earliest date for an unreduced pension), apportioned pension value on the "value-added" method, and then opted for an equalisation payment spread over the next ten years. All of this was upheld on appeal.

(a) Valuation: What Method? What Retirement Date?

¶ 66 The valuation method issue here is really not much of an issue, despite much tossing about of terms. At trial, both actuaries described their methods as "termination method". [See Note 66 below] Justice Rutherford called the method "really a hybrid termination/retirement method". [See Note 67 below] On appeal, Charron J.A. used the term "termination method", noting that this method "requires that the lump-sum value of the pension as at valuation date be calculated as if the employee had terminated employment on that date". [See Note 68 below] In his annotation on the appeal, Prof. McLeod is quite critical of the appeal court for not addressing the method question, saying the court "has avoided explaining how to value a defined-benefit pension in each case where pension valuation has been at issue". [See Note 69 below]

Note 66: Ibid. at 138 (trial).

Note 67: Ibid. at 140. The term is one used by Prof. McLeod.

Note 68: Ibid. at 13 (appeal).

Note 69: "Annotation: Best v. Best" (1997), 31 R.F.L. (4th) 4 at 5. McLeod even criticises the Court's use of the term, "termination method", especially as "the likely date of retirement is irrelevant on a pure termination method of pension valuation". According to McLeod, the Court really meant the "hybrid termination" method.

¶ 67 A closer look at Best reveals that the method issue is not raised on these facts, for the reasons that have been developed by Jack Patterson, an actuary. [See Note 70 below] Mr. Best's pension was fully-indexed, which means that the "termination method" employed by the competing actuaries produced the same results as the "retirement method". [See Note 71 below] Why? Because even if Mr. Best had terminated his teaching employment on the date of separation (February 1988), his benefits upon retirement would reflect increases in the cost of living, under the terms of his public sector pension. Full indexing for pre-retirement inflation is rare in private sector pensions, but widespread in public sector plans.

Note 70: Patterson, "Confusion Created in Pension Valuation for Family Breakdown Case Law by the use of the Expressions 'Termination Method' and 'Retirement Method'" (1998), 16 C.F.L.Q. 249; Patterson, "Lawyers Should be Careful of the Termination Method for Valuing Private Sector Pension Plan Entitlements for Family Law Equalization Purposes -- Bascello v. Bascello Solution, Ontario Law Reform Commission Solution" (1996), 14 C.F.L.Q. 145. See also Bascello v. Bascello (1995), 26 O.R. (3d) 342 (Ont.Gen.Div.) at 353-362 per Kurisko J.

Note 71: On the assumption that both actuaries excluded salary increases for productivity, promotions and any other reasons over and above inflation.

¶ 68 The choice of retirement age, i.e. when the pension will start being paid, makes a significant difference to the pension's present value. [See Note 72 below] "The probable age of retirement as contemplated by the pension holder on valuation date" is a finding of fact, says the Court of Appeal, to be made on all the evidence, including post-valuation-date events within the pension holder's contemplation and post-valuation-date conduct that sheds light on this issue. [See Note 73 below]

Note 72: On this point, as with so many others, Bascello offers invaluable guidance, above, note 70 at 387. Justice Kurisko's decision in Bascello remains essential reading for any one interested in pensions.

Note 73: Above, note 65 at 16-7 (appeal).

¶ 69 Then comes the factual twist in Best: the trial judge found Mr. Best would probably retire on September 9, 1992 (the first date he could take an unreduced pension), even though Mr. Best was still working as of the October 15, 1993 judgment. [See Note 74 below] In fact, Mr. Best did not retire until 1996, when he was 61 years old, before the appeal was heard.

Note 74: Ibid. at 138 (trial).

¶ 70 The choice of the earliest date, as in Best, works to the advantage of the non-member spouse in the valuation of the pension, while admittedly the latest date, i.e. normal retirement at age 65, works to the pension member's advantage. For the reasons explained by Kurisko J. in Bascello [See Note 75 below] and the Ontario Law Reform Commission in its 1995 Report on Pensions, [See Note 76 below] the simplest solution would be a presumption (Bascello) or a rule (O.L.R.C.) using a mid-point between the two dates. Ironically, in Best, that would have been almost exactly the time Mr. Best actually took retirement.

Note 75: Above, note 70 at 392-3.

Note 76: Ontario Law Reform Commission, Report on Pensions as Family Property: Valuation and Division (1995) at 129-30.

¶ 71 A rule would simplify the valuation process in advance of trial, and avoid the need to hear much self-serving, ex post evidence at trial, all with only a small loss of accuracy in most cases. To turn retirement date into an individualised finding of fact, without even any presumption, brings us the worst of all possible worlds.

(b) Apportionment: Value-Added or Pro-Rata on Service?

¶ 72 Apportionment raises the tricky question of how to apportion the pension value between the period of cohabitation, to be divided between the spouses, and the periods of pensions contributions before and after cohabitation, which remain with the pension member. The issue only arises if any period of pensionable service falls outside of the period of cohabitation, from marriage to separation.

¶ 73 Under the "value-added" method, the pension is valued as of two points, the date of marriage and the date of separation, and the difference is the pension value to be divided. Under the competing "pro rata on service" method, the pension is valued as of one date, the date of separation, and then its value is pro-rated by the ratio of years of cohabitation to years of total pensionable service. The difference between the two methods is considerable -- in Best, value-added was $372,041 while pro-rata was $151,480. [See Note 77 below]

Note 77: Above, note 65 at 18 (appeal). These were before-tax values.

¶ 74 On this point, the Ontario Court of Appeal was clear, upholding the trial judge:

> The value-added approach is entirely more consistent with the formula set out in the Act for the calculation of net family property and with the methodology used with respect to other assets. [See Note 78 below]

Here one can only agree with Charron J.A. that "the choice of a single consistent approach furthers the legislative objective to provide an 'orderly' settlement of affairs". [See Note 79 below] In short, whatever the merits of the rule we have chosen, it's more important to choose one rule.

Note 78: Above, note 65 at 21.
Note 79: Ibid. at 22.

¶ 75 Like any "rule", however, there are "winners" and "losers" from the choice of one rule or the other. The chosen method, value-added, favours "late" marriages, i.e. marriages late in the life of the pension member, when contributions are greatest and retirement is closer. [See Note 80 below] The "pro-rata" method favours "early" marriages, i.e. marriages early in the pension member's service when contributions are smaller, because each year is treated the same. Equal treatment arguments can be made in support of each method: value-added treats contributions equally, pro-rate treats years of service equally. The final pension is a product of both contributions and years of service.

Note 80: Best, above, note 65 at 140-1 (trial).

¶ 76 And there are problems with both methods. The value-added method ignores the importance of the early years of service to the value of the later years of service. Further, the value-added method does not always adequately adjust for inflation, as the date of marriage valuation reflects "old" dollars. [See Note 81 below] In some cases, the necessary data for the date of marriage valuation are not available.

Note 81: Patterson, Pension Division and Valuation: Family Lawyer's Guide (Aurora: Canada Law Book, 1991) at 159-60.

¶ 77 The pro-rata method is simpler, but appears "artificial". [See Note 82 below] It would require a different rule for apportionment of value for the pension than for other assets. [See Note 83 below] It ignores the higher value of later-year contributions. It produces a lower pension value for a large number of cases, as late marriages by definition are more common before the courts. [See Note 84 below] Finally, the pro-rata method only treats the years before separation equally, as post-separation years are left to accrue their higher values under what amounts to the value-added method. [See Note 85 below]

Note 82: Best, above, note 65 at 18 (appeal).
Note 83: Ibid. at 19 (appeal).

Note 84: When I suggest that the pro-rata method favours "early" marriages, I am speaking as a matter of policy and systemic results. By definition, cases before the courts will involve "late" marriages, i.e.

marriages that come late in the years of pensionable service. Accordingly, the choice of rule is affected by what the court sees.

Note 85: This point is made by Burrows, Getting the Most Out of Your Divorce Financially (Peterborough: Pension Valuators of Canada, 1997) at 66.

¶ 78 The choice is not an easy one. The Ontario Law Reform Commission in its exhaustive 1995 Report opted for the pro rata method, noted by Charron J.A. in Best. [See Note 86 below] The Court of Appeal ultimately tied its choice of the value-added method to Ontario's "net value added" scheme of family property division. [See Note 87 below] Whether the Supreme Court will impose this same choice across Canada, across all property regimes, is yet to be seen. The worst possible result, in my view, would be a refusal to choose one or other of the "rules", leaving it to case-by-case determination. In the end, the Ontario Court of Appeal is right: "a single, consistent approach" is required. [See Note 88 below]

Note 86: Above, note 65 at 20 (appeal).
Note 87: Ibid. at 21-2.

Note 88: The Court reaffirmed its rule in Munro v. Munro, [1997] O.J. No. 4194 (C.A.).

(c) Division: If-and-When, or What?

¶ 79 Having brought order to the apportionment issue, the Court in Best then threw another important pension issue into confusion. Charron J.A. held that the trial judge was free to consider and reject an "if-and-when" division as an "exercise of discretion", as such divisions "often give rise to problems". [See Note 89 below] To make matters worse, Justice Charron appeared to doubt whether the Family Law Act provided for an "if-and-when" division. [See Note 90 below]

Note 89: Above, note 65 at 23 (appeal). The wife's expert testified that an "if-and-when" division "was too complex and should not be used" (ibid. at 23).

Note 90: Ibid. First, in the text of her reason, Charron J.A. states, "Assuming that an 'if-and-when' arrangement could be devised within the confines of the Act", and then in the accompanying note states: "The Act does not expressly provide for this type of order,...."

¶ 80 In Best, the trial judge ultimately ordered an equalisation payment to be paid over the next ten years, to recognise the "hardship" caused to Mr. Best by any immediate

payment. [See Note 91 below] At the time of trial, Mr. Best was close to retirement and his pension was almost three-quarters of his net property. [See Note 92 below] One would have thought this to be an appropriate case for an "if-and-when" division, or at least a case which deserved some careful explanation for rejection of that alternative. [See Note 93 below]

Note 91: Ibid. at 142 (trial).

Note 92: The equalisation payment was $147,649, of which $60,065 was satisfied by transfer of the husband's interest in the matrimonial home. The balance of $87,584, plus interest, was to be paid by monthly payments over ten years, secured by life insurance: ibid. at 142.

Note 93: A point also made by Prof. McLeod in his annotation to the appeal, above, note 69 at 8.

¶ 81 For those jurisdictions without statutory schemes of pension division, most notably Ontario and Alberta, the Best case may have important implications for the availability of "if-and-when" divisions. [See Note 94 below] A clear statement on the availability and enforceability of this method could have a dramatic impact for those jurisdictions, while upholding the Court of Appeal would make this method even rarer.

Note 94: In Moro v. Miletich (1998), 40 R.F.L. (4th) 115 (Ont.Gen.Div.) at 121, Campbell J. read Best as holding the "if-and-when" method to be "no longer an acceptable method of equalizing that pension asset", an overly-broad reading of Best, but one left open by its general language.

(d) Double-dipping: Spousal Support from the Pension?

¶ 82 At trial in Best, the husband had not yet retired and spousal support of $2,500 per month was ordered out of his $100,000-plus income, to be adjusted up or down in proportion to his salary changes. [See Note 95 below] Mrs. Best was not working and had some health problems. By the time of the appeal, Mr. Best had retired and thus his income would consist largely of his pension.

Note 95: Above, note 65 at 143-4 (trial).

¶ 83 Mr. Best argued that the spousal support order should terminate upon his retirement, a losing argument. [See Note 96 below] An indefinite order was held appropriate and the possibility of variation was mentioned.

Note 96: In accordance with the formula at trial, it appears that the support was decreased proportionately to the reduced pension income: above, note 65 at 24 (appeal).

¶ 84 But nothing was said of double-dipping. Mr. Best was paying monthly instalments on his equalisation payment, mostly to reflect the pension division. [See Note 97 below] At the same time, he was now paying spousal support out of his after-equalisation pension income, a liquidating asset. While the issue could easily be -- as it was -- pushed off to a variation application, it deserved some comment.

Note 97: And Mrs. Best had received the whole house, including Mr. Best's interest of $60,065. These facts present a situation where double-dipping is almost inevitable, absent careful calculations: see Walker, "Double Dipping -- Can a Pension Be Both Property and Income?" (1993), 10 C.F.L.Q. 315.

¶ 85 In one previous case, Strang, [See Note 98 below] the Supreme Court was able to avoid the double-dipping issue. On the facts there, "no true division of the value of the pension" had taken place, as only the after-tax value of employee contributions had been split. In Best, there can be no doubt that the full value of the pension was divided.

Note 98: (1992), 39 R.F.L. (3d) 233 (S.C.C.).

¶ 86 The double-dipping issue arises in Best, but perhaps not directly, not unless the Supreme Court wishes to venture into the topic. After its decision in Bracklow, however, it may be better if it does not.

4. Spousal Support: Compensatory, Non-Compensatory, Whatever

¶ 87 Every five or six years, it seems, the Supreme Court makes a wrenching change in the law of spousal support: Pelech [See Note 99 below] in 1987, Moge [See Note 100 below] in 1992, and now Bracklow [See Note 101 below] in 1999. From "causal connection" to "compensation" to "basic social obligation".

Note 99: Pelech v. Pelech (1987), 7 R.F.L. (3d) 225 (S.C.C.), accompanied by Richardson v. Richardson (1987), 7 R.F.L. (3d) 304 (S.C.C.) and Caron v. Caron (1987), 7 R.F.L. (3d) 274 (S.C.C.).

Note 100: Moge v. Moge (1992), 43 R.F.L. (3d) 345 (S.C.C.). Moge was decided on December 17, 1992.

Note 101: Above, note 1, [1999] S.C.J. No. 14, released March 25, 1999.

¶ 88 Bracklow is a deeply-disappointing decision, on many fronts. First, the parties spent five years before the courts, only to be sent back to the trial judge, for further hearing and assessment of duration and amount, with virtually no direction from the Court. [See Note 102 below] Second, the Court's reasons are almost impenetrable, full of buzzwords and factors and abstract language, but no concrete guidance. Third, Bracklow offers a prime example of "rulelessness", of what's wrong with case-by-case decisionmaking. The Supreme Court has "exported" the costs of rulelessness to provincial appellate courts, trial judges, counsel and the parties, leaving us all to guess for the next five or six years what the law of spousal support might be. [See Note 103 below]

Note 102: See the Globe and Mail, March 26, 1999, page A16.

Note 103: Sunstein, above, note 4 at 973.

¶ 89 It is hard to be other than critical of Bracklow, but I will try to make some sense of it, and to make it fit with Moge. Bracklow must be understood as a large second shoe dropping, after Moge.

¶ 90 In Moge, the Supreme Court set out an admittedly broad framework, based upon compensatory principles. It appeared to begin the process of rehabilitating the law of spousal support, providing a defensible conceptual underpinning. [See Note 104 below] "Marriage per se does not automatically entitle a spouse to support", stated L'Heureux-Dube J. [See Note 105 below] But the economic disadvantages arising from the marriage definitely do give rise to compensatory support, and perhaps even the economic advantages to the other spouse. There were many suggestions scattered throughout Moge suggesting that non-compensatory approaches still survive in some form. [See Note 106 below] Bracklow suggests a far broader role for "non-compensatory" support than we might have expected.

Note 104: For a superb review of Moge and subsequent appellate cases, see Carol Rogerson, "Spousal Support After Moge" (1997), 14 C.F.L.Q. 281. Prof. Rogerson's earlier work was relied upon heavily by Justice L'Heureux-Dube in Moge. I have been less positive about Moge, emphasising its failure to adhere consistently to compensatory principles: Thompson, "Spousal Support In, Around and After the Guidelines" in National Judicial Institute, Atlantic Courts Seminar, Halifax, N.S., October 30-31, 1997, repeated in Family Law Seminar, Toronto, Ontario, February 10-11, 1998.

Note 105: Above, note 100 at 386.

Note 106: Rogerson, above, note 104 at 307-11.

(a) Bracklow's Ratios

¶ 91 Marie and Frank Bracklow began cohabiting in 1985, married in 1989, separated in 1992 and were divorced in 1995. It was a second marriage and Mrs. Bracklow's two children lived with them earlier in the relationship. Mr. Bracklow worked throughout as a heavy duty mechanic, earning $45,000 a year at the time of the divorce trial. Mrs. Bracklow initially earned more than Mr. Bracklow, working full time for most of the marriage, but then fell ill in October of 1991, never to return to work. [See Note 107 below] Mrs. Bracklow suffered from a number of physical and psychological problems, the foremost of which was fibromyalgia. Mr. Bracklow paid interim support of $275 per month and then $400 per month. At the 1995 trial, Justice Boyle would have found no obligation to pay support, but accepted Mr. Bracklow's offer to pay $400 a month for another 18 months. [See Note 108 below] That support ran out in September of 1996, before the Court of Appeal decision in 1997. [See Note 109 below] The appeal was dismissed.

Note 107: By my calculation, of the 7 years (88 months) together from 1987 to 1992, Mrs. Bracklow worked full-time for 51 months, collected unemployment insurance for 12 months (1987-88), worked at various odd-jobs for 11 months (1989-90) and was ill for the last 14 months (1991-92).

Note 108: (1995), 13 R.F.L. (4th) 184 (B.C.S.C.).

Note 109: (1997), 30 R.F.L. (4th) 313 (B.C.C.A.).

¶ 92 The Supreme Court unanimously allowed the appeal, finding entitlement to support, but leaving the amount and duration to be determined by the trial judge. The Court accepted the lower court findings that there was no disadvantage arising from the marriage and no express or implied agreement for intra-marital support. [See Note 110 below]

Note 110: Above, note 1 at para. 58.

¶ 93 It would be tempting to characterise Bracklow as an illness case, where the onset of the illness came during cohabitation, while there were mutual obligations of support, giving rise to a post-marital entitlement to support. [See Note 111 below] But illness is almost never mentioned in the reasons of Justice McLachlin [See Note 112 below] and nothing in her language suggests such a narrow reading should be considered.

Note 111: For a review of the illness cases after Moge, see Rogerson, above, note 104 at 378-84.

Note 112: The judgment opens with the question, "What duty does a healthy spouse owe a sick one when the marriage collapses?" (above, note 1 at para. 1) and the issue is framed in similar terms, "Is a sick or disabled spouse entitled to spousal support when a marriage ends, and if so, when and how much?" (above, note 1 at para. 13). The answer is "in the affirmative", but the reasons for the answer are not tied back to the question.

¶ 94 What "ratios" I can discern look like this:

(1) No single objective in the support statutes is paramount, such that the non-compensatory model of support co-exists with the compensatory model. Moge has not made compensation the sole basis for support. [See Note 113 below] "[T]he legislation can be seen as a sensitive compromise of the two competing philosophies of marriage, marriage breakdown, and spousal support." [See Note 114 below]

(2) Section 15.2(6)(c) of the Divorce Act refers to "economic hardship... arising from the breakdown of the marriage", which is capable of encompassing "the mere fact that a person who formerly enjoyed inter-spousal entitlement to support now finds herself or himeself without it". [See Note 115 below]

(3) Marriage per se does not create an obligation to pay spousal support, but the obligation may flow "from the marriage relationship itself". [See Note 116 below]

(4) "[C]ompensation now serves as the main reason for support", but "where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role", revived from its underlying "dormant" state. [See Note 117 below]

(5) "[T]he same factors that go to entitlement have an impact on quantum", [See Note 118 below] which includes both amount and duration. "While some factors may be more important than others in particular cases, the judge cannot proceed at the outset by fixing on only one variable." [See Note 119 below] Variables include length of relationship, need, limited means to pay, new relationships, and other factors.

(6) "It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need." [See Note 120 below] Amount and duration can be interrelated, with a modest amount for an indefinite duration or a substantial lump-sum payment.

(7) "Marriage, while it may not prove to be 'till death do us part', is a serious commitment not to be undertaken lightly. It involves the potential for lifelong obligation. There are no magical cut-off dates." [See Note 121 below]

Note 113: The analysis of "models" of support is the most confusing, least satisfactory part of the reasons. McLachlin J. posits three models of support: compensatory (which is described, oddly enough, as including the clean break or self-sufficiency model and the transition payments model), the contractual model (a new creature), and non-compensatory (which is described as the "basic social obligation" model, with no real mention of the traditional "needs-and-means" model). Much of the language is drawn from the work of Prof. Rogerson, but the models are shuffled into odd new categories with little explanation.

Note 114: Ibid. at paras. 43.

Note 115: Ibid. at para. 41.

Note 116: Ibid. at paras. 44, 46, 49. At para. 53, it is repeated "it is not the act of saying 'I do', but the marital relationship between the parties that may generate the obligation of non-compensatory support".

Note 117: Ibid. at para. 49.

Note 118: Ibid. at para. 50.

Note 119: Ibid. at para. 53.

Note 120: Ibid. at para. 54.

Note 121: Ibid. at para. 57.

(b) Bracklow's "Result"

¶ 95 In some cases, however difficult may be the reasoning, the result clarifies the reasoning. Not so in Bracklow. States Justice McLachlin, on the issue of entitlement:

> Bearing in mind the statutory objectives of support and balancing the relevant factors, I conclude that Mrs. Bracklow is eligible for support based on the length of cohabitation, the hardship marriage breakdown imposed on her, her palpable need, and Mr. Bracklow's financial ability to pay. While the combined cohabitation and marriage of seven years were not long, neither were they (by today's standards) very short. Mrs. Bracklow contributed, when possible, as a self-sufficient member of the family, at times shouldering the brunt of the financial obligations. These factors establish that it would be unjust and contrary to the objectives of the statutes for Mrs. Bracklow to be cast aside as inelegible for support, and for Mr. Bracklow to assume none of the state's burden to care for his ex-wife. [See Note 122 below]

Note 122: Ibid. at para. 60.

¶ 96 The determination of quantum, i.e. amount and duration, was remitted to the trial judge, with the general direction to consider "all the relevant statutory factors" [See Note 123 below] and this parting specific direction:

> I therefore do not exclude the possibility that no further support will be required, i.e., that Mr. Bracklow's contributions to date have discharged the

just and appropriate quantum. [See Note 124 below]

Note 123: Ibid. at para. 61, including "the length of the marital relationship", "the relative independence of the parties throughout that marital relationship", and "the amount of support Mr. Bracklow has already paid".

Note 124: Ibid.

¶ 97 Whatever one may think of the reasons, this result forgets that there are parties to this family law dispute, parties who deserve an answer. And I find it hard to imagine what further facts are needed to answer questions of duration and amount, nor does the Court tell us.

¶ 98 The situation is unlikely to change in the near future: Mrs. Bracklow is 50 years old, will not return to work, with defined needs and income; Mr. Bracklow is 43 years of age, remarried, working at the same job, with known income and expenses. To an extent that is often rare, there are few unknowns in this factual equation.

¶ 99 Duration, surely, could have been fixed. Do these facts warrant an indefinite order or not? If limited in duration, as implied in the parting direction above, how much beyond 3 3/4 years should Mr. Bracklow pay support after a relationship of 7 years?

¶ 100 For that matter, some direction as to amount was warranted. Mrs. Bracklow's need was clearly defined and Mr. Bracklow's income and expenses were known. Again, on these facts, ought Mrs. Bracklow's full need be covered? Or, if only a part, what proportion?

(c) Fitting Bracklow With Moge

¶ 101 There is nothing in Bracklow to suggest any major retrenchment from Moge. Compensation is still the primary basis for support, with the non-compensatory approach a secondary basis, called in aid only where compensation does not generate a support entitlement. Too broad a reading of Bracklow, with its status-based support obligation, [See Note 125 below] would otherwise swamp Moge's principles.

Note 125: Since most spouses have a "relationship" after the exchange of vows, in all but the briefest of marriages there will be a potential non-compensatory basis for support.

¶ 102 If the non-compensatory model is to be a secondary or back-up model, then its availability arises when there is no economic disadvantage that might generate a larger amount of support. Bracklow sends the message that non-compensatory entitlement is

extremely broad, with any limitation to come through "quantum", i.e. amount and duration. By the use of the term, "basic social obligation", McLachlin J. has impliedly suggested that only a very modest or basic standard of living is to be provided through non-compensatory support. [See Note 126 below] That approach would be consistent with a desire to restrict the use of the non-compensatory model, mostly to "hard cases" left stranded by Moge.

Note 126: A point made clearly in the prior case law, as Rogerson observes: above, note 104 at 383.

¶ 103 Supporting this "modest amount" analysis is the likely indefinite duration of such orders. In these "hard cases", need is fixed and unlikely to change, with no reason for support to end. Moreover, the one lesson all courts seem to have drawn from Moge itself -- rightly or wrongly -- is that limited-term orders should be the exception, not the rule. Cautious courts will likely take the same tack to Bracklow orders.

¶ 104 It is hard to tell how much of Bracklow is driven by the older "charge upon the public", poor law concerns. Justice McLachlin does come out and say that Frank Bracklow must assume some of the state's burden to care for his ex-wife. [See Note 127 below] It's not suggested that he should pay all of the cost, such that less than welfare rates might be payable by way of spousal support, which would further reduce the monthly amount. [See Note 128 below]

Note 127: Above, note 1 at para. 60.

Note 128: Note that Mrs. Bracklow was receiving Canada Pension Plan disability payments. Unlike welfare, CPP does not deduct support payments dollar-for-dollar.

¶ 105 On a closing note, the public reaction to Bracklow has been interesting, reviving the debate over the legitimacy of spousal support. With Moge, modern support law was moving towards conceptual justification. Although nothing like a rule, Moge gave a gender-free, functional explanation for spousal support. Unfortunately, any coherent rationale for spousal support would produce "losers" as well as "winners". Some spouses who would obtain support under a conventional "needs-and-means" analysis would not receive support on the application of compensatory logic. [See Note 129 below] There were strong hints in Moge that there were to be no "losers" from the adoption of a compensatory model.

Note 129: See Thompson, above, note 104 at 24-25.

¶ 106 Bracklow now makes that abundantly clear. No needy spouse is to be deprived of entitlement to support. But status-based support, even as a backup and modest in amount, raises a raft of new and difficult questions, [See Note 130 below] questions for which Bracklow does not offer answers.

Note 130: Well-stated by Rogerson, above, note 104 at 384-5.

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4. Child Protection: Access After Wardship, After Adoption

¶ 107 Starting in Alberta and Ontario in 1984, and spreading across Canada, child protection laws were rewritten to restrict state intervention, to subject discretionary social work decisions to judicial review, and to lay down subsidiary "rules" governing a child's best interests. The Supreme Court has acknowledged Ontario's Child and Family Services Act [See Note 131 below] to be "one of the least interventionist regimes", [See Note 132 below] but all jurisdictions moved in the direction of less intervention and more legalistic statutes.

Note 131: R.S.O. 1990, c. C.11.

Note 132: Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.) (1994), 2 R.F.L. (4th) 313 (S.C.C.) at 336, citing a 1986 article by Richard Barnhorst, one of the architects of the Ontario Act.

¶ 108 In "private" custody matters, starting in 1982, an unfettered "best interests" test has been determinedly applied by the Supreme Court of Canada, shorn of any subsidiary rules or presumptions. [See Note 133 below] Early on, in 1988, the Court extended this same broad test to the child protection context, in C.(G.C.) v. New Brunswick (Minister of Health & Community Services). [See Note 134 below] More importantly, in the 1994 M.(C.) case, a case involving the detailed prescriptions of Ontario's status review procedure, the Court read in its broad, unfettered best interests analysis:

> In determining what is in the child's best interest, the Act provides extensive guidance. Notwithstanding the specific provisions of the Act, however, traditional discussions with respect to best interests remain highly relevant. [See Note 135 below]

In M.(C.), the Court used "best interests" to undercut the non-interventionist policy and intent of the Ontario Act, to give decisive weight to "bonding" or "attachment" to foster parents.

Note 133: The modern origins of the Court's best interests jurisprudence is an awkward trilogy of unusual cases: D.B. v. Director of Child Welfare for Newfoundland (1982), 30 R.F.L. (2d) 438; R.(N.A.) v. W.(J.L.) (1983), 36 R.F.L. (2d) 1; and K.(K.) v. L.(G.) (1985), 49 R.F.L. (2d) 133. The Court has continued to knock down any and all barriers to the application of the best interests test in other contexts: C.(G.) v. V.-F.(T.) (1987), 9 R.F.L. (3d) 263; Young v. Young (1993), 49 R.F.L. (3d) 117; Gordon v. Goertz (1996), 19 R.F.L. (4th) 177.

Note 134: (1988), 14 R.F.L. (3d) 1.

Note 135: Above, note 132 at 343. On this point, see my "Case Comment: C.C.A.S. of Metropolitan Toronto v. M.(C.)" (1994), 12 C.F.L.Q. 45.

¶ 109 Now we have another example of the Court's "best interests" analysis, in a case involving the courts' jurisdiction under protection statutes to make orders for access after permanent guardianship or wardship. In Nouveau-Brunswick (Ministre de la sante & des services communautaires) c. L.(M.), [See Note 136 below] the trial judge prohibited any access or contact by the parents with their three children after an order of permanent guardianship, a prohibition overturned by the Court of Appeal, which directed that an access plan be developed. [See Note 137 below]

Note 136: (1998), 41 R.F.L. (4th) 339.

Note 137: (1997), 197 N.B.R. (2d) 113 (C.A.).

¶ 110 For a unanimous Court, Justice Gonthier had little trouble finding a jurisdiction to order access after guardianship, read into the interstices of the Family Services Act. [See Note 138 below] Statutory interpretation begins from the paramountcy of the best interests test, which means one presumes the legislature intended to give the courts the jurisdiction to do what is best for an individual child. [See Note 139 below] If any individual child's best interests would be furthered by access after guardianship, then the jurisdiction exists, unless closed off specifically and clearly by the statute.

Note 138: S.N.B. 1980, c. F-2.2.

Note 139: Above, note 137 at 379: "Denying the courts the opportunity to decide whether an access order should be made could prevent them from performing their duty of acting in the best interests of the child."

¶ 111 The Court proceeded to set out the principles that should govern access after guardianship:

> First, there is no inconsistency in principle between a permanent

> guardianship order and an access order. Second, access is the exception and not the rule. Third, the principle of preserving family ties cannot come into play in respect of granting access unless it is in the best interests of the child to do so, having regard to all the other relevant factors. Fourth, an adoption, which is in the best interests of the child, must not be hampered by the existence of a right of access. Fifth, access should not be granted if its exercise would have negative effects on the physical or psychological health of the child. [See Note 140 below]

In the end, the trial judge's denial of access was restored by the Supreme Court.

Note 140: Above, note 136 at 380-1. Gonthier J. relies heavily upon the Ontario Act for these principles, yet Ontario has moved to make access after Crown wardship more difficult to obtain and easier to terminate, in Bill 73, introduced in 1998 and to be reintroduced in this sitting of the Ontario legislature. On recent reform proposals, in Ontario and British Columbia, see Bala, "Rethinking Child Welfare Reform at the End of the 21st Century: Don't Throw Out the Baby with the Bathwater", in 1998 National Family Law Program (Whistler, B.C., July 1998).

¶ 112 The most breathtaking example in L.(M.) of the Court's intepretive approach is the reference to a New Brunswick power to preserve access even after adoption, read into an awkwardly-worded adoption provision in the Family Services Act. [See Note 141 below] Following hard on the heels of this passing remark is the Ontario Court of Appeal's decision in Ramcharitar v. Ramcharitar. [See Note 142 below] The Court of Appeal held that access could survive adoption, where the mother had continuing access after the adoption of her child by her sister and brother-in-law:

> If there remained any doubt about whether an access order could survive an order for adoption, New Brunswick (Minister of Health and Community Services) v. M.L., a judgment of the Supreme Court of Canada, delivered October 1, 1998, definitively articulates the possibility that in exceptional circumstances, access and adoption orders can co-exist. [See Note 143 below]

Note 141: Section 85(2) states the severing effect of an adoption order, "divesting the parent, guardian or other person of all parental rights in respect of the child, including any right of access that is not preserved by the court". The language of this provision is unusual.

Note 142: [1998] O.J. No. 5127 (C.A.), dated December 9, 1998.

Note 143: Ibid. at para. 10.

¶ 113 "Best interests" can thus be used to "bend" statutory rules, provided two requirements are met: (i) the statute states "best interests" to be the paramount or guiding principle, a provision commonly found in every statute affecting children; and (ii) nothing in the statute clearly prohibits or denies the specific power or remedy sought. In L.(M.) and Ramcharitar, this broad power was used to maintain a child's ties to his or her parent, consistent with much of our modern learning about the child's need for such "lifelines" to family members, to maintain stability and identity.

¶ 114 But broad power of this kind can be used for ill, as well as good. Modern child protection statutes are long, detailed and carefully-constructed, to accomplish the best interests of children, systemically as well as individually. "Rules" and "presumptions" are common in such statutes, to accomplish systemic goals. Further, greater precision is necessary in protection statutes which permit the termination and creation of parental relationships through protection orders and adoptions. Courts tend to focus upon the individual case, with a great temptation to "bend" the rules for just this one case, often to the detriment of many other children within the system.

5. Custody: The Domain of Utter Rulelessness

¶ 115 "Private" custody legislation does not contain anything like the detail found in child protection statutes. Even as the Supreme Court of Canada has extended the "best interests" test into every conceivable setting where a child is affected, the Court has refused to read any substantive content into the test. Consider the comment of Justice McLachlin in Gordon v. Goertz: [See Note 144 below]

> The [Divorce] Act contemplates individual justice. The judge is obliged to consider the best interests of the particular child in the particular circumstances of the case. Had Parliament wished to impose general rules at the expense of individual justice, it could have done so. It did not.

Note 144: (1996), 19 R.F.L. (4th) 177 at 197.

¶ 116 Legislators and courts avoid rules in custody cases for many of the reasons set out earlier -- no social consensus, inaccuracy, high costs of error, anachronism, denial of individuality and participation in one's own case. The lack of social consensus in custody matters was driven home to those of us who attended at the Special Joint Senate-House Committee on Child Custody and Access. [See Note 145 below] As George Thomson, then Deputy Minister of Justice, put it in a speech to the 1996 National Family Law Program, when child support guidelines were being discussed, there was general agreement that guidelines were necessary, but in the field of custody and access, there is no consensus about the most basic of issues.

Note 145: The Committee's report reflects those divisions:

For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access (Ottawa, December 1998).

¶ 117 What are courts to do in the face of the legislated indeterminacy that is the best interests "standard"? Should the courts build up a series of subsidiary "rules" or more accurately, "presumptions" to guide decision-making? Or perhaps just a non-exhaustive list of unweighted "factors"? Or nothing but the basic "standard", without even factors?

(a) Relocation and Relitigation: After Gordon v. Goertz

¶ 118 That was the very issue placed before the Supreme Court in Gordon, decided in 1996, but still reverberating through the lower courts: how should a court decide a relocation case, a case where the custodial parent wishes to move away, in the face of an objection from the access parent? Should the courts follow a presumption, of whatever strength, in favour of the custodial parent? Or should the courts simply re-open the best interests inquiry, without any onus upon either parent? We all know how it ended: by a 7 to 2 margin, the Supreme Court opted for the latter and forcefully rejected the former.

¶ 119 The majority reasons of McLachlin J. amount to an attack upon presumptions in cases involving children, not just in relocation cases, but in any cases involving children. [See Note 146 below] Once the minimal burden of a change of circumstances has been met, as it is in almost every relocation case, [See Note 147 below] "the judge must embark on a fresh inquiry" into the child's best interests and then both parties "bear an evidentiary burden" to bring forward evidence concerning the child's best interests. [See Note 148 below] "Each case turns on its own unique circumstances" and we are given a non-exhaustive list of seven "factors". [See Note 149 below]

Note 146: Above, note 144 at 194-201.

Note 147: Thompson, "Relocation and Relitigation: After Gordon v. Goertz" (1999), 16 C.F.L.Q. 461 at 489.

Note 148: Above, note 144 at 201 and 198. The latter phrase repeats and approves the comment of Morden A.C.J.O. in Carter v. Brooks (1990), 30 R.F.L. (3d) 53 at 63.

Note 149: Ibid. at 201-2.

¶ 120 In a recent article, [See Note 150 below] I have reviewed the consequences of Gordon, 119 contested relocation cases in 32 months, with 40 percent of moves rejected. Patterns have emerged, and not always what one might expect. [See Note 151 below] Fully eleven relocation cases have gone before appeal courts, with eight allowing the move, [See Note 152 below] two refusing the move, [See Note 153 below] and one ordering a new trial. [See Note 154 below]

Note 150: Above, note 147. The cases are listed in the appendices to the article.

Note 151: For example, the age of the child makes a difference to the result, although no case mentions age as a consideration. Moves are denied in 63 percent of cases for children 12 and over, not a surprise. What was a surprise is that the courts say "no" to moves for children under 6 in 45 percent of cases, compared to 29 percent for those aged 6 to 11: above, note 147 at 495.

Note 152: Luckhurst v. Luckhurst (1996), 20 R.F.L. (4th) 373 (Ont.C.A.); Woods v. Woods (1996), 110 Man.R. (2d) 290 (C.A.); Chilton v. Chilton (1996), 26 R.F.L. (4th) 124 (B.C.C.A.); Brown v. Brown (1997), 123 Man.R. (2d0 166 (C.A.); Ligate v. Richardson (1997), 34 O.R. (3d) 423 (C.A.); Pisko v. Pisko (1997), 151 D.L.R. (4th) 189, 200 A.R. 330 (C.A.); L.(J.) v. G.(G.), [1998] A.Q. no. 2183 (C.A.); Rockwell v. Rockwell, [1998] B.C.J. No. 2718 (C.A.).

Note 153: Woodhouse v. Woodhouse (1996), 20 R.F.L. (4th) 337, 29 O.R. (3d) 417 (Ont.C.A.); Levin v. Levin (1996), 84 B.C.A.C. 73 (C.A.).

Note 154: J.L. v. W.H. (1997), 154 Nfld. & P.E.I.R. 261 (Nfld.C.A.).

¶ 121 Two different panels of the Ontario Court of Appeal have produced dramatically different interpretations of Gordon. The panel in Woodhouse [See Note 155 below] read Gordon as a return to the older Ontario analysis of Carter v. Brooks, weighing the mother's reasons for the move against the detrimental effect of the move on access. By contrast, the panel in Ligate v. Richardson [See Note 156 below] took Gordon at face value, refusing to consider the exceedingly-weak reason for the move and treating a negotiated residence restriction as a mere "factor". Or compare the different results of two appeal courts on similar facts -- the "move-to-Scotland-with-the-new-husband" -- Ontario's Woodhouse (no) and Alberta's Pisko (yes). [See Note 157 below]

Note 155: Above, note 153, discussed in Thompson, above, note 147 at 473-7.

Note 156: Above, note 152, discussed at greater length in Thompson, above, note 147 at 485-9.

Note 157: Above, note 152. I would note the minor differences: (i) the move in Pisko was "temporary" (2 years); (ii) in Woodhouse, an expert assessor recommended against the move, while there was no expert evidence in Pisko; and (iii) the mother in Pisko didn't take off to Scotland first, unlike the mother's "foolish act" in Woodhouse.

¶ 122 I cannot do better here than to quote from an extensive analysis of the American case law on the same topic:

> The experience of other jurisdictions also suggests that asking the trial cour

> in its discretion to weigh all appropriate factors fails to provide a workable long-term solution. As this survey of sister-state case law reveals, most jurisdictions that have considered relocation issues have ultimately delineated guidelines, presumptions or rules to assist in their analysis. [See Note 158 below]

Eventually, I expect, we will have to delineate some form of guidelines, presumptions or rules too, but we will face much litigation and relitigation first.

Note 158: Bruch and Bowermaster, "The Relocation of Children and Custodial Parents: Public Plicy, Past and Present" (1996), 30 Fam.L.Q. 245 at 300.

(b) N.H. v. H.M.: What of the Status Quo? Or Aboriginal Culture? Or Reasons?

¶ 123 On February 17, 1999, the Supreme Court overturned the B.C. Court of Appeal and directed that a four-year-old boy be removed from the custody of his aboriginal biological grandfather (where he had lived for 3 of his 4 years) and be confided to the custody of the Connecticut-based grandparents by adoption (of the mother). The two-paragraph oral decision in N.H. v. H.M. [See Note 159 below] gives no reasons, just directs the transfer of the child "in an orderly fashion".

Note 159: [1999] S.C.J. No. 8. H.M. sought a stay on March 19, 1999, which was dismissed, and has recently brought a motion for a rehearing.

¶ 124 The complex facts can be boiled down. Two aboriginal girls from Manitoba were adopted by white parents in Montreal in 1980. Two years later D.H. and N.H. moved to Connecticut with the girls. The H.'s experienced problems with both girls, but especially with M.H., the eventual mother of I., the little boy at the centre of the case. I. was born to M.H. on March 8, 1995. For the first 8 months of his life, I. resided with his mother and the adoptive grandparents in the H.'s home in Connecticut. One day M.H. took the boy out and did not return, but travelled with I. to Vancouver, where M.H. had earlier made contact with her biological father. The B.C. child welfare authorities became involved and apprehended I. in December of 1995. By a February 1996 order, I. was placed in the interim custody of H.M., the biological grandfather. He was now living in Vancouver, where he had raised his 17-year-old daughter by an earlier relationship and a 5-year-old daughter, with his new common-law spouse. The H.'s contested custody. The child's mother, M.H., supported her biological father, H.M.

¶ 125 After a trial in September 1997, Bauman J. ordered custody to the H.'s, downplaying the significance of aboriginal heritage and minimising the detrimental effects of altering the status quo. [See Note 160 below] The trial order was stayed pending appeal and the appeal was allowed in February of 1998. [See Note 161 below] For the Court of Appeal, Hall J.A. held "that the trial judge placed undue emphasis on economic matters and underemphasised ties of blood and culture that bind I. to H.M.". [See Note 162 below] The child remained in the care of H.M., who subsequently moved back to a reserve in Manitoba. [See Note 163 below]

Note 160: D.H. v. H.M., [1997] B.C.J. No. 2144 (S.C.).

Note 161: N.H. v. H.M., [1998] B.C.J. No. 221, 156 D.L.R. (4th) 548.

Note 162: Ibid. at para. 13.

Note 163: The Court's decision and its after-effects have been reported: Globe and Mail, February 23, 1999 at A1, A10; Halifax Daily News, March 13, 1999 and March 21, 1999.

¶ 126 We are left to wonder at the Supreme Court's decision. How to explain this result? The Court didn't.

¶ 127 What about "bonding"? By the time the case made it to the Supreme Court, the boy had been with his biological grandfather for three of his four years. Remember the M.(C.) case, where the girl had been out of his immigrant mother's care and in foster care for the previous 5 of her 7 years by the time the appeal got to the Supreme Court, thanks in large measure to stays pending appeals. The Court rejected the mother's appeal. [See Note 164 below] Remember the Racine case, in 1983, where the child had been with the prospective adoptive parents for four of her six years. Wilson J. accepted that "the significance of cultural background and heritage as opposed to bonding abates over time". [See Note 165 below] An adoption order was granted. Or, remember K.(K.) v. L.(G.), where the child had been with the adoptive parents for all of his two or three years by the time the case reached the Supreme Court. Bonding again carried the day. [See Note 166 below] On the basis of the Supreme Court's bonding analysis, the only possible result in N.H. would be custody to the biological grandfather.

Note 164: Above, note 132.

Note 165: Above, note 133 at 13.

Note 166: Above, note 133.

¶ 128 Maybe it's just a determination to uphold trial judgments, whatever their merits and whatever the child's bonds. But, if that were true, the Court in M.(C.) should have

returned the child to the mother, consistent with the trial judge's decision, irrespective of the passage of time and bonding.

¶ 129 In the end, the N.H. case epitomises all the problems with a pure "best interests" standard. Based upon the Court's previous decisions, one would have thought that bonding, the status quo and aboriginal heritage all predetermine the result. But no, the Court inexplicably produces the opposite result, without explaining its volte-face. This isn't just "rulelessness", but something very close to "lawlessness". [See Note 167 below] If we are to have utterly individualised justice in custody cases, then surely a duty is cast upon the court to explain its individual result, with some care, in order for its decision to acquire any sort of legitimacy.

Note 167: There is one factor which wends its way through all these cases, consistently in favour of the successful litigants -- class. In N.H., the Connecticut grandparents are very well off, while the aboriginal grandfather was on social assistance, perhaps the single largest class "gap" of any custody case.

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6. Section 15: M. v. H., Taylor v. Rossu

¶ 130 The decision in M. v. H. has been reserved since the appeal was heard on March 18, 1998. M. has claimed discrimination, on the grounds that s. 29 of the Ontario Family Law Act excludes same-sex couples from the right to claim spousal support. There can be little doubt, as two levels of court have said so far in this case, [See Note 168 below] that s. 15(1) is infringed by the exclusion of same-sex couples and the exclusion cannot be saved under s. 1. If anything, two intervening cases from the Supreme Court -- Vriend [See Note 169 below] and Law [See Note 170 below] -- would seem to solidify the conclusions reached by the majority of the Ontario Court of Appeal. Vriend laid to rest many of the arguments of incrementalism and legislative silence. Law offers a clear "consensus" exposition of s. 15(1) "guidelines", with Justice Iacobucci helpfully synthesising the equality rights cases to date. There is a remedial issue still alive in M. v. H., one that also arose in a leading "common-law" case, Taylor v. Rossu in the Alberta Court of Appeal. [See Note 171 below]

Note 168: M. v. H. (1996), 25 R.F.L. (4th) 116 (Ont.C.A.), affirming (1996), 17 R.F.L. (4th) 365 (Gen.Div.).

Note 169: Vriend v. Alberta (1998), 156 D.L.R. (4th) 385 (S.C.C.).

Note 170: Law v. Canada (Minister of Employment and Immigration), [1999] S.C.J. No. 12, released March 25, 1999.

Note 171: (1998), 39 R.F.L. (4th) 242.

¶ 131 The Supreme Court's reasons and remedy in M. v. H. will have important implications for the continued impact of s. 15 upon family law statutes. In conventional terms we may think of family law as "private law", but family law is all statute law, and statutes are subject to Charter scrutiny. [See Note 172 below] In other papers I have reviewed the impact of the Charter upon family law, most notably in 1988 [See Note 173 below] and again in 1996. [See Note 174 below] We have now embarked upon a constitutional jurisprudence of the family, most notably through the use of s. 15 in respect of public benefits, [See Note 175 below] spousal support and eventually property division.

Note 172: In Vriend, above, note 169 at 416, Cory J. notes that "private activity" is not subject to the Charter, but "laws that regulate private activity" obviously are, a distinction sometimes forgotten.

Note 173: Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy" (1988), 3 C.F.L.Q. 315.

Note 174: Thompson, "Revenge of the Charter: 'Public' and 'Private' in Family Law" in 1996 National Family Law Program (Ottawa, 1996) ("Revenge of the Charter").

Note 175: Such statutes have fed much of the s. 15 "family" litigation, e.g. Miron v. Trudel (1995), 13 R.F.L. (4th) 1 (S.C.C.) and Egan v. Canada (1995), 12 R.F.L. (4th) 201 (S.C.C.), but I intend to focus upon "private" family law remedies here.

¶ 132 A short aside first. Section 15 can add little to existing custody and child support law. Family law statutes have opened up standing to seek custody or access, [See Note 176 below] thanks to notions of "psychological parent", the individualising power of the "best interests" test and the practical demands of diverse family structures. [See Note 177 below] Similarly, the child-centred notion of "in loco parentis" casts a broad net for child support purposes, even wider after Chartier. Only in adoption statutes, where precision is essential because of finality, is there scope for s. 15 arguments: successfully for same-sex "family" adoptions [See Note 178 below] and unsuccessfully for unmarried fathers left out by modern definitions of "parent" for consent purposes. [See Note 179 below]

Note 176: E.g. Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(1) and (3); Nova Scotia Family Maintenance Act, R.S.N.S. 1989, c. 160, s. 18(2); Ontario's Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 21. Leave of the court is required, but the threshold for leave is usually not substantial.

Note 177: "Revenge of the Charter", above, note 174 at 24.

Note 178: Re K. (1995), 15 R.F.L. (4th) 129 (Ont.Prov.Div.).

Note 179: Ontario (A.G.) v. Nevins Prov.J. (1988), 13 R.F.L. (3d) 113 (Ont.Div.Ct.) and C.A.S. and Family & Children's Services of Colchester County v. D.T. (1992), 113 N.S.R. (2d) 74 (C.A.).

¶ 133 I will therefore confine my comments to matters of spousal support and property division, starting with M. v. H., then Taylor v. Rossu, and closing with some wider observations.

(a) M. v. H.: Spousal Support for Same-sex Couples

¶ 134 M. and H. lived together from 1982 to 1992, happily for the first five years and less so thereafter. After separation, M. sought spousal support amongst other relief from H., bringing into question the definition of "spouse" in s. 29 in the Family Law Act. Section 29 included "either of a man and woman who are not married to each other and have cohabited, (a) continuously for a period of not less than three years". Section 1(1) of the Act defines "cohabit" to mean "to live together in a conjugal relationship, whether within or outside marriage".

¶ 135 Epstein J. in motions court ruled s. 29 unconstitutional, severed the words "a man and a woman" and "read in" "two persons", effective immediately to permit M. to seek her individual remedy. [See Note 180 below] The Court of Appeal split, with Finlayson J.A. finding no violation of s. 15(1) or salvation through s. 1. The majority of Charron J.A., Doherty J.A. concurring, found a s. 15(1) violation and no saving s. 1 justification. [See Note 181 below] But the majority was troubled by the remedial issue.

Note 180: Above, note 168. The interim support issue was to be brought, after filing of a financial statement.

Note 181: H. and the Attorney General of Ontario had both conceded the s. 15(1) violation, leaving the real debate to s. 1: above, note 168 at 137. The Supreme Court's decision in Vriend, above, note 169 at 431, would require a revision of the s. 1 analysis, as Vriend makes clear that what must be "pressing and substantial" is the objective, not of the statute as a whole, but of the specific infringing limitation. The s. 1 question, now a much harder question, is: what is the objective of the omission of same-sex couples?

¶ 136 The decision of the motions judge was upheld, but the reading in remedy was temporarily suspended for one year, with no exemption for M.'s claim. [See Note 182 below] The primary concern of Justice Charron was the need for a comprehensive legislative review of the Family Law Act, as well as other relevant statutes. [See Note 183 below] Her secondary concern was that the proposed remedy not only benefited support claimants, but also burdened potential support payors, individuals who might wish to arrange their affairs in anticipation. [See Note 184 below]

Note 182: Above, note 168 at 160-4.

Note 183: Ibid. at 162-3.

Note 184: Ibid. at 163.

¶ 137 In my view, the Ontario Court of Appeal was wrong to back off the "reading in" remedy. The principles of Schachter [See Note 185 below] apply to allow reading in: a clear legislative desire to maintain support for legally-married and common-law spouses, remedial precision in the choice of language, no budget implications, no great effects on the general thrust of the legislation (the relief of dependency), especially given the small size of the group added, and no interference with the legislative objective. Those principles were recently reaffirmed by the Court in Vriend, another case of underinclusive legislation, leaving sexual orientation out of the prohibited grounds of discrimination in the Alberta Individual Rights Protection Act. [See Note 186 below]

Note 185: Schachter v. Canada (1992), 93 D.L.R. (4th) 1 (S.C.C.).

Note 186: Above, note 169 at 436-449.

¶ 138 But in Vriend, there was a passing reference by Iacobucci J. to a ground for delaying the effect of reading in: "There is no risk in the present case of harmful unintended consequences upon private parties or public funds (see, e.g. Egan...)." [See Note 187 below] Obviously, unlike in Egan, public funds would be saved by the creation of spousal support rights.

Note 187: Ibid. at 448.

¶ 139 But is the imposition of a support burden a "harmful unintended consequence upon a private party"? I think not. Inclusion under the statute does not create an automatic obligation to pay spousal support. [See Note 188 below] As should be clear from the earlier section on spousal support, the statute and the case law makes clear that assessment of entitlement, duration and amount is to be done on a case-by-case basis, thereby minimising any concerns about ex post imposition of obligations upon differently-structured gay and lesbian relationships. These kinds of "internal balancing mechanisms" were important to the result in Vriend [See Note 189 below] and should also carry the day in most family law settings.

Note 188: Although one could use Bracklow to raise that very spectre.

Note 189: Above, note 169 at 442.

¶ 140 In M. v. H., the legislature has already written the non-marital "rule" for spousal support and "reading in" same-sex couples is a simple solution. In British Columbia, family statutes were easily rewritten, in similar fashion, to include same-sex couples. [See Note 190 below] From a remedial perspective, it's easy to "read in" same-sex couples.

Note 190: Family Relations Amendment Act, S.B.C. 1997, c. 20. "Spouse" is defined in s. 1(1) to be a person who "lived with another person in a marriage-like relationship for a period of at least two years... and for the purposes of this Act, the marriage-like relationship may be between persons of the same gender". The expanded definition of "spouse", beyond those legally married, does not apply in Part 5 (Matrimonial Property) or Part 6 (Division of Pension Entitlement). Only by way of property agreements pursuant to s. 120.1 can common-law and same-sex spouses "opt in" to those parts.

(b) Taylor v. Rossu: What If Common-law Couples Are Left Out?

¶ 141 In my 1996 Charter paper, I predicted that Alberta's exclusion of common-law spouses from the Domestic Relations Act [See Note 191 below] could be challenged after Miron. [See Note 192 below] Sure enough, along came one of those perfect test cases. Ms. Taylor lived with Mr. Rossu for nearly thirty years. Ms. Taylor's daughter from a previous relationship lived with them until the daughter was 24. The parties appear to have adopted "traditional" roles. At separation, Taylor was 54 years old, receiving social assistance and living with her daughter, while Mr. Rossu was 68 years old, collecting his pensions and living alone in the house. Presented with these facts, the trial judge found the term "spouse" to infringe s. 15(1) of the Charter, reading in the Miron "three-year" definition of common-law spouse. [See Note 193 below] Power J. granted interim support of $750, approximately half of Rossu's pension income. Awaiting trial were claims of permanent support, constructive trust and a constitutional challenge to the Matrimonial Property Act.

Note 191: R.S.A. 1980, c. D-37.

Note 192: Above, note 174 at 46.

Note 193: (1996), 140 D.L.R. (4th) 562 (Q.B.). Power J. also order Rossu not to dissipate his assets pending trial.

¶ 142 In per curiam reasons, the Alberta Court of Appeal upheld almost all of this. [See Note 194 below] After a lengthy review of demographic data, other provincial legislation and various Alberta Law Reform Institute proposals, the definition of "spouse" was held unconstitutional. But the Court of Appeal refused to "read in", instead striking down all of Parts 2 and 3 of the Domestic Relations Act and then suspending the declaration of invalidity for 12 months. With no explanation, and unlike the Ontario

Court of Appeal in M. v. H., the Court affirmed the interim support order for Taylor. [See Note 195 below]

Note 194: Above, note 171.

Note 195: Ibid. at 295. Whatever definition of "common law spouse" is adopted, it would appear that Ms. Taylor would meet it. Mind you, the same point might have been made in M. v. H., given their ten years together.

¶ 143 The appeal court's remedial concerns were: (i) assorted other marriage-based preconditions to support; (ii) no universally-accepted definition of common law spouse; (iii) possible further revisions to the support regime required by inclusion of common law spouses; (iv) the need for comprehensive statutory reform, rather than piecemeal changes; and (v) the issue of capacity to enter legally-recognised common law relationships. In my view, only the second of these is a real objection.

¶ 144 In any event, the Alberta government has introduced the necessary amendments to the Domestic Relations Act, [See Note 196 below] but now faces controversy for the continued exclusion of same-sex couples. Ironically, the proposed amendments are very simple and implement the three-year definition that had been "read in" by the trial judge in Taylor. [See Note 197 below]

Note 196: Bill 12: Domestic Relations Amendment Act, 1999.

Note 197: Adding, in the alternative, "if there is a child of the relationship by birth or adoption", if the parties "cohabited in a relationship of some permanence".The amendments would apply to common law relationships arising before or after the amendments come into force. Also, a new spousal support section, s. 16.1, is to be added, which applies to both legally-married and common-law spouses.

(c) Where to From Here?

¶ 145 Both of these are spousal support cases. For reasons set out above, section 15 of the Charter is rarely necessary to create standing or obligation for purposes of custody, access or child support claims. "Family status" claims under public benefits statutes will continue, attacking every use of marital status or sexual orientation or other family status stereotypes as "markers" to condition or deny benefits.

¶ 146 A major issue will be the use of family status as a condition of entitlement to the division of property. If challenges to spousal support provisions are successful and many pension division statutes already acknowledge common law couples [See Note 198 below] and others are being amended, legislatively [See Note 199 below] or judicially

[See Note 200 below] to add same-sex couples, why should property regimes be immune?

Note 198: E.g. Nova Scotia Pension Benefits Act, R.S.N.S. 1989, c. 340, s. 61(1)(b)(ii) (three years' cohabitation); Pension Benefits Division Act, S.C. 1992, c. 46, Schedule II, s. 2 (one year's cohabitation).

Note 199: The federal government has recently announced its intention to revise a raft of federal statutes to include same-sex couples, including a number of pension statutes.

Note 200: Rosenberg v. Canada (Attorney General) (1998), 158 D.L.R. (4th) 664 (Ont.C.A.) (definition of "spouse" in Income Tax Act unconstitutional for purposes of private-sector registered pension plans).

¶ 147 The arguments in favour of expanding family property laws are cogently set out in the Ontario Law Reform Commission's 1993 Report on the Rights and Responsibilities of Cohabitants under the Family Law Act. [See Note 201 below] In my 1996 Charter paper, I offered a number of reasons why the courts might be slow to take this next step, a prediction (but not a prescription):

> First, most Canadian property regimes create a presumption of equal division, with little room for judicial discretion to divide unequally. Unlike support or custody laws, there is much less room to adjust to a wider range of relationships, once the couple gets in the door. Second, support compensates for the kind of day-to-day interdependence that arises in most relationships, in terms that are fairly simple to understand, precisely because there is evidence of a functioning household to draw upon. Property relationships have the potential to be far more complex, as property represents the accretions of economic activities in the past, a "stock" rather than a current "flow". Third, the legal system has historically existed to "serve and protect" property and thus form and status are still still more important than function and contract in property law. Like tax law, property law is littered with absurd, arbitrary, unfair rules, all of which we tolerate more readily. Fourth, some judges will draw solace from the availability of constructive trust remedies for those excluded from the marital property regimes, trust remedies that allow greater flexibility to adjust for the wide range of possible relationships. Fifth, a number of statutes allow cohabitants to "contract in", to enter into domestic contracts that deal with property. The availability of this option may mollify some courts, undercutting the drive to impose the available marital property regime. [See Note 202 below]

Sooner or later, though, these practical and inertial concerns will have to give way to the Charter's demand for equal treatment of functionally-similar family forms. At a

minimum, the utter exclusion of common-law and same-sex couples from property regimes cannot survive.

Note 201: (Toronto, 1993).

Note 202: Above, note 174 at 48-9.

¶ 148 Common-law and same-sex partners have substantial incentives to litigate their entrance into marital property regimes: the equal division rule and rights to the matrimonial home. [See Note 203 below] Access to property "rules" looks more attractive to one or both parties than the uncertainty of discretionary constructive trust remedies. [See Note 204 below] In turn, however, the inclusion of common-law and same-sex couples may alter or even dilute the "equal division rule", as the courts accommodate the greater diversity of relationships in property division.

Note 203: Or, if not a rule, then certainly a strong presumption.

Note 204: Or an award of money as an alternative remedy for unjust enrichment.

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7. Protecting Family Relationships Through Section 7: J.G., K.L.W.

(a) B.(R.): The Foundation for Section 7 Arguments

¶ 149 The Supreme Court's decision in B.(R.) v. Children's Aid Society of Metropolitan Toronto [See Note 205 below] was a landmark decision, most notably for the clarity and breadth of Justice La Forest's leading judgment, which attracted a five-judge majority on s. 2(a)'s freedom of religion and what I have called "a four-and-three-eighths majority on s. 7". [See Note 206 below] In issue was a 1983 blood transfusion administered to the infant child of Jehovah's Witness parents, while the child was subject to temporary wardship orders under Ontario's old Child Welfare Act. The five-judge majority held that the Child Welfare Act infringed the parents' s. 2(a) rights, but the detailed legislative provisions satisfied s. 1. The near-majority held that the parent-child relationship was part of a parent's liberty interest under s. 7, but the Act's procedures fulfilled the demands of "the principles of fundamental justice". In his concurrence with La Forest J., Justice Sopinka held "it was unnecessary to determine whether a liberty interest was engaged" as there was no breach of those principles. [See Note 207 below]

Note 205: (1995), 9 R.F.L. (4th) 157.

Note 206: "Case Comment: B.(R.) v. C.A.S. of Metropolitan Toronto" (1995), 9 R.F.L. (4th) 345.

Note 207: Above, note 205 at 248.

¶ 150 Stated La Forest J., unequivocally, "I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters, such as medical care, are part of the liberty interest of a parent". [See Note 208 below] This "protected sphere of parental decision making" is subject to state intervention "necessary to safeguard the child's autonomy or health", but that state intervention must be justified under s. 7 by reference to "the principles of fundamental justice. [See Note 209 below] In B.(R.), those principles were satisfied: notice, adversarial hearing before a judge, access to agency information, rights of representation, burden of proof upon agency, heightened standard of proof, circumscribed wardship order, and full status review. [See Note 210 below]

Note 208: Above, note 205 at 206.
Note 209: Ibid. at 207.
Note 210: Ibid. at 209-14.

(b) J.G.: A Right to State-Funded Counsel Under Section 7?

¶ 151 What uncertainty may have been left by B.(R.) will have to be cleared up in New Brunswick (Minister of Health and Community Services) v. J.G., heard by the Court on November 9, 1998. Two issues arise, both important:

(i) does the state's seeking to suspend or terminate a parent's custody of his or her children engage the parent's liberty interest under section 7?
(ii) if so, does the failure to provide state-funded counsel to an indigent parent in these circumstances infringe section 7?

New Brunswick's legal aid plan refused to provide counsel to the mother, as the skeletal family law coverage extended only to permanent "guardianship" hearings and not any prior temporary "custody" hearings. [See Note 211 below]

Note 211: New Brunswick is unusual amongst Canadian legal aid plans, all of which give high priority to coverage for child protection cases, treating them almost like criminal cases.

¶ 152 By a 3-2 decision, the New Brunswick Court of Appeal answered an emphatic "no" to both questions. [See Note 212 below] In an odd reading, B.(R.) was interpreted as a 4-4 split, such that Chief Justice Lamer's reasons should be followed. Lamer C.J.C. was the only one of nine to reject outright any role for s. 7, following his lone view that s. 7 only protects "physical liberty" in the criminal or penal setting. The majority

considered the legal aid question to be "a legislative policy making function and not a Charter question". [See Note 213 below]

Note 212: New Brunswick (Minister of Health and Community Services) v. G.(J.) (1997), 145 D.L.R. (4th) 349 (N.B.C.A.), affirming (1995), 131 D.L.R. (4th) 273 (N.B.Q.B.).

Note 213: Ibid. at 356.

¶ 153 In a lengthy and carefully-researched dissent, Bastarache J.A. (as he then was) [See Note 214 below] analysed B.(R.) in some detail, eventually ruling that the liberty interests of both the mother and the children were engaged in this case. Sifting through the criminal "right to state-funded counsel" cases, Justice Bastarache concluded that s. 7 does not guarantee "a general right to funded counsel", but does require "the provision of paid counsel where it is necessary to guarantee a fair trial according to the principles of fundamental justice", "in a serious and complex case". [See Note 215 below]

Note 214: As a result, only seven judges sat on the Supreme Court appeal.

Note 215: Ibid. at 376.

¶ 154 Turning to the facts of this case, the minority had little difficulty -- unlike the trial judge -- finding this to be an appropriate case for funded counsel. The temporary custody hearing had proceeded after the Charter motion was first made and the custody order was extended for another six months. [See Note 216 below] The hearing lasted three days. Fifteen affidavits were filed, including expert psychological and sociological reports. All the other parties were represented, including the Ministry, the father of one child, and counsel for the children, requested by the court and paid by the Minister of Justice. [See Note 217 below] J.G., the mother of the three children, was receiving social assistance. According to the psychologist, J.G. had "great difficulty coping with stressful situations" and was not seen as very rational. [See Note 218 below]

Note 216: Eventually, in June of 1995, the three children were returned to J.G.

Note 217: At the custody hearing, J.G. was represented by duty counsel, without prejudice to her position on the Charter motion: ibid. at 360 per Bastarache J.A.

Note 218: Ibid. at 381. The trial judge had held the mother did not need counsel, as she "appeared to be able to communicate her own position and adequately state her case", the wrong test according to Bastarache J.A.

¶ 155 On these facts, it is hard to imagine any kind of fair trial. [See Note 219 below] In my experience in this field, it is impossible to have a fair trial without counsel for parents, in light of the complexity of protection cases, the state's favoured access to expert and other evidence, the seriousness of the consequences for the parents and children, and the deprived backgrounds of most parents. A constitutional "rule" is justified for protection cases, [See Note 220 below] but I recognise that to be unlikely. [See Note 221 below]

Note 219: If the adversaries are this unequal, concluded Bastarache J.A., "the procedure is in danger of degenerating into one of moral ambivalence": above, note 212 at 381.

Note 220: See "Charter Galaxy, above, note 1 at 374-5 and the minority reasons in the leading U.S. constitutional decision, Lassiter v. Department of Social Services, 452 U.S. 18 (1981).

Note 221: Largely because of the likely cross-over impact of such a rule in criminal cases. In my view, child protection can be seen as a unique situation, one where the state takes its most drastic sanctions against parents in the interests of children, the most serious consequences imaginable in any civil proceeding. A "rule" requiring counsel in protection cases should be seen as akin to a "rule" that required counsel in murder cases.

¶ 156 The Supreme Court's decision in J.G. will determine whether the section 7 family jurisprudence, only just begun by B.(R.), will continue to develop. [See Note 222 below] If the approach of Justice Bastarache were followed, not only child protection, but also adoption, paternity and some custody cases could also give rise to constitutional arguments. As can be seen above, section 15 has become a powerful force for rewriting family law rules where the law burdens or benefits different classes of persons unequally. But only section 7 can be employed where a law burdens all persons equally in the exercise of a specific right.

Note 222: It may also have a cross-over impact on the criminal right-to-funded-counsel cases.

(c) K.L.W.: Warrantless Apprehensions?

¶ 157 The issue of warrantless apprehensions is raised by a recent Manitoba case, for which leave was granted last October: Winnipeg Child and Family Services (Central Area) v. K.L.W. [See Note 223 below] The Court of Appeal accepted B.(R.) and the engagement of s. 7, but held the Child and Family Services Act complied with the principles of fundamental justice, "even though there is no prior notice or judicial review

of the decision to apprehend, so long as the subsequent proceedings are fair". [See Note 224 below] Prior warrants to apprehend have been a live issue, with such warrants only required by statute in Alberta, Ontario and P.E.I., the latter because of a s. 8 Charter decision. [See Note 225 below]

Note 223: [1998] S.C.C.A. No. 361.

Note 224: Winnipeg Child & Family Services (Central Area) v. W.(K.L.) (1998), 41 R.F.L. (4th) 291 (Man.C.A.).

Note 225: M.(H.) v. Director of Child Welfare (1989), 22 R.F.L. (3d) 399 (P.E.I.T.D.).

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8. Conclusion: The Homogenisation of Canadian Family Law

¶ 158 Thanks to the federal divorce power, the Supreme Court of Canada, and the Charter, Canadian family law is becoming homogenised, one law from sea to sea, for better or worse.

¶ 159 The federal divorce power encompasses corollary relief, including custody and access, child support and spousal support. The Federal Child Support Guidelines offer a classic example of how the federal government can reform the whole of federal and provincial family law, through its mixture of policy-making resources and spending power. Once "federal" family law has changed, there are strong practical pressures for the provinces to "get into sync", so as not to confuse those parents and spouses who must live under both laws. No doubt the same will hold true once the federal government completes its review of custody and access law. And, sadly, the federal vagueness on spousal support equally infects the interpretation of provincial law, as happened in Moge and more pointedly in Bracklow.

¶ 160 The Supreme Court uses the national impact of the Divorce Act as one of its anchors for "national significance" or "public importance" in giving leave for family law cases. A case like Gordon v. Goertz then permits the Court to set out relocation law for the whole of Canada, a marvel to an American who must cope with 50 state laws and 50 state courts on the same mobility issue. But the Court is not confined to federal statutes. Thanks to our unitary court structure, the Supreme Court of Canada is also the last court of appeal for the interpretation of provincial statutes, including such areas as child protection, property division and pensions. No field of family law is exempt from Supreme Court review and hence national direction.

¶ 161 Finally, the Charter of Rights is forcing both courts and legislatures to reduce disparities in the treatment of different family forms. Section 15 is a driving force for national homogenisation. If all Canadian provinces extend support rights to common law spouses, then why not Alberta? If same-sex couples are read in to Ontario's family legislation, then so too in other provinces. Even section 7 is a homogenising

force. What's shocking about the absence of counsel in New Brunswick child protection cases is that every other Canadian province treats such cases as a priority within their legal aid plans. When the Supreme Court does interpret sections 15 or 7, then the Charter makes it apply across the whole country, as a minimum minimum content of provincial family laws.

¶ 162 All of these changes leave less and less room for experimentation, for the development of provincial family law "rules", whether legislative or judicial.

¶ 163 The Supreme Court appears to prefer "contextualism" and "standards" and "discretion" in family law, the costs of which fall upon lower courts, counsel and parties. In some areas of law, like child custody and spousal support, the Supreme Court -- and courts generally -- can fall back upon the "rule-less" legislation. But that's only a partial defence, as the courts can still develop intermediate solutions, something more like presumptions or even tighter and shorter lists of factors. In the area of child protection, the legislation is clear, but the Supreme Court and many appellate courts have moved away from rules and towards greater discretion through the interpretive vehicle of "best interests".

¶ 164 Most important will be the signals sent by the Supreme Court in Best and Francis v. Baker. Are judicial "rules" of pension division and legislative "rules" of child support determination to be supported? Or, are we to see "discretion" -- or, "rulelessness" to some of us -- invade these areas too?

Syrtash Collection of Family Law Articles
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Reply Evidence*

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¶ 1 I will divide this subject into 2 broad categories: technical considerations and practical considerations.

TECHNICAL CONSIDERATIONS

1. Splitting Case

¶ 2 The basic and most important rule to remember about reply evidence is that the Plaintiff (or in the Family Law trials, often the Petitioner) is not permitted to "split his case". What does this mean? It simply means that the Plaintiff is obliged to put in all of the evidence that she reasonably believes is helpful and relevant to her case as part of the case in chief. One is only permitted to lead reply evidence to rebut or qualify new facts or issues raised by the defence. The evidence must not be simply confirmatory of the Plaintiff's case-in-chief. [See Note 1 below.]

Note 1: See, generally, Sopinka, Lederman, Bryant, The Law of Evidence in Canada (Butterworths Canada Ltd., 1992) pp. 880-890.

¶ 3 If you are in doubt, lead the evidence as part of your case-in-chief, rather than waiting to see if the issue is raised by the defence. If the trial judge asks why this evidence is being led, tell him that you anticipate the defence dealing with this issue, and so you are putting the evidence in now. If, at that point, counsel for the defense is prepared to stipulate that he will not call evidence on the point, then fine: you don't need to deal with it in your case-in-chief, and you don't have to worry about having to deal with it in reply. Just be vigilant that your friend does not then try to slip in some evidence bearing upon that point, having stipulated that she would not do so.

2. Failure to Cross-Examine

¶ 4 Failure to cross-examine on the particular point may preclude the right to lead reply evidence on that point. The reason is apparent: if the witness whose evidence is to now be impugned has not been given the opportunity in cross-examination to address the issue, then he is never going to have that right, because the Plaintiff has no opportunity for "re-reply". Thus, it would be manifestly unfair to "spring" a reply witness to contradict a defence witness who has not been afforded the opportunity to explain or qualify her evidence given in chief.

¶ 5 So if you plan to contradict something a defence witness has said via a reply witness or witnesses, be sure to raise the controversial issue in cross-examination of that witness, to avoid being barred from leading your contradictory evidence in reply.

3. The Collateral Fact Rule

¶ 6 There is a general rule that answers given by a witness to questions put to him on cross-examination concerning collateral facts are treated as final, and cannot be contradicted by extrinsic evidence. [See Note 2 below.] It is said that absent such a rule, the litigation might well become prolonged, sidetracked and involved in myriad subsidiary issues.

Note 2: The leading case is A.G. v. Hitchcock (1847), 1 Exch. 91, 154 E.R. 38.

¶ 7 The rule does permit reply evidence to contradict a witness who has made a statement in cross-examination which is relevant to the substantive issue or issues. If, however, one merely wishes to attempt to impeach a witness' credibility, and attempts to do so on a collateral issue, the question will not permitted.

¶ 8 The difficulty, of course, is in deciding whether a question goes merely to a collateral issue or whether it goes to a substantive one.

¶ 9 The test has been stated to be as follows:

> "... the test, whether the matter is collateral or not, is this: the answer of a witness is a matter which you would be allowed on your part to prove in evidence - if it has such a connection with the issue, that you would be allowed to give it in evidence - then it is a matter on which you may contradict him. [See Note 3 below.]

Note 3: A.G. v. Hitchcock, supra, at p. 99 (Exch.) or p. 42 (E.R.).

¶ 10 The rule is actually quite stringent. In Piddington v. Bennet and Wood Proprietary Ltd., [See Note 4 below] a witness under cross-examination accounted for his presence at the scene of a motor vehicle accident by saying that he had been to the bank on behalf of a friend. The trial judge then allowed a manager of the bank to testify that no business was done on that day on behalf of the friend named by the witness. On appeal, a new trial was ordered on the ground that the judge had wrongly permitted this evidence to be admitted. The evidence, in the view of the appellate court, offended the collateral fact rule, in that the presence or not of the witness at the bank was a collateral fact only, and did not go to any substantive issue regarding the motor vehicle accident itself.

Note 4: (1940), 63 C.L.R. 533.

¶ 11 There are three general exceptions to the collateral fact rule:

1. You may call reply evidence to prove that a witness has been convicted of a crime;
2. you may call reply evidence to prove that the witness is biased in favour of the party calling him or her; and
3. you may confront a witness with a previously made inconsistent statement. [See Note 5 below.]

Note 5: But this must be done in accordance with the provisions of the appropriate legislation. See the Ontario Evidence Act, s. 20, Canada Evidence Act, s. 10.

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4. Nature of Examination

¶ 12 If you do call reply evidence, bear in mind that the rules regarding the eliciting of evidence during reply are precisely the same as in your case-in-chief. Accordingly, you cannot lead your witness and you cannot contradict anything your witness says (unless you go to the extreme of attempting to have the witness declared adverse).

5. Trial Judge's discretion

¶ 13 Notwithstanding each of the above rules, it appears clear that a judge has discretion to admit evidence which technically offends any one or more of the rules, if the judge is of the opinion that the evidence is sufficiently material to a determination of the matter that it ought to be introduced.

¶ 14 So, for example, in Lowe v. Jenkinson [See Note 6 below], the Plaintiff presented witnesses and records which indicated that the Defendant's breath had smelled of alcohol at the scene of an accident. The Defendant's expert's report did not mention any smell of

alcohol, but in giving testimony, the Defendant's expert did address this issue. The trial was adjourned, and during the adjournment the Plaintiff obtained a report from a second expert regarding the smell of alcohol, and the Plaintiff sought to have this report entered. The Defendant argued that the Plaintiff had already closed his case. In spite of the fact that the Plaintiff has been forewarned about the testimony of the Defendant's expert, the reply evidence was allowed on the basis that it could be of assistance in determining an "important factual issue".

Note 6: (1995), 5 B.C.L.R. (3d) 195 (S.C.).

PRACTICAL CONSIDERATIONS

6. Whether to call Reply Evidence

¶ 15 There is an almost overwhelming temptation to call reply evidence after the Defendant or Respondent closes her case. You have just heard hours, perhaps days, of evidence all of which is designed to support the defence case and destroy your own. My advice is this: resist the temptation to call reply evidence unless you consider it absolutely necessary.

¶ 16 Bear in mind that the poor trial judge who has had the case inflicted upon her has now spent a considerable amount of time hearing evidence, and is going to be reluctant to hear any more. You can assume that, by this late stage of the trial, the judge has a reasonable idea of what the issues are and what evidence is of use in determining them. Many of you have probably risen to lead reply evidence and observed a look on the judge's face which says "this had better be good".

¶ 17 Therefore, unless you believe that it is really critical that certain evidence go in by way of reply, I believe that you are better to let the matter rest. There is merit in projecting to the court the view that the defence case was so weak that you would not flatter it by calling anyone in reply.

¶ 18 Also, unless you are certain that your evidence is proper reply evidence (bearing in mind the rules discussed above), you should resist the temptation to call it. At this point in the proceedings, you do not want to incur the wrath of the trial judge by having him or her rule against the appropriateness or relevance of the reply evidence that you are seeking to adduce.

7. Calling your Client in Reply

¶ 19 More times than not, your client will want to give reply evidence. This is simply human nature at work: your client has been sitting for hours or days listening to the defence malign her, attacking her case, make scurrilous remarks about her and so on (at least in your client's mind).

¶ 20 You should be even more reluctant to call your client in reply than to call any other witness. The reason is that it will be almost impossible to control your client in the witness box. He will most likely be outraged at the terrible things that the either side has been saying about him, and will want to set the record straight. Further, he may still be seething from the cross-examination that he withstood during the case-in-chief.

¶ 21 Also, of course, layman generally have difficulty with the rules of evidence to begin with, and are going to be even more baffled by the rules relating to evidence in reply.

¶ 22 A party who has sat through the defence case is going to find it almost impossible to simply answer your questions, particularly as you cannot lead. My experience is that it is extremely difficult for clients to resist getting in the box and saying "that's not true" about virtually everything put into evidence by the defence. I've even seen Plaintiffs in reply begin to vilify counsel for the defence, blaming her for the scurrilous things that have been said about the plaintiff.

¶ 23 In addition, it is difficult to restrain the plaintiff from repeating evidence which she has already given in chief, and if she attempts to do so, it will only annoy the trial judge.

¶ 24 Further, once you produce your client for examination in reply, you open him up once again to cross-examination, and at this point he is probably upset about the defence evidence, and will be easily led into sounding outraged, unreasonable, petty or some combination of those and other dislikable traits.

8. Disclosure Before Trial

¶ 25 In theory, you should never be in the position of having to call reply evidence, because of the rules regarding disclosure. If you have conducted proper and thorough examinations for discovery, served your Notice to Admit, and carefully reviewed the answers to the Notice to Admit, then you should not be surprised by anything that comes out during the defence case.

¶ 26 Of course, inevitably there will be times when some one or more pieces of defence evidence take you by surprise, but on those occasions you must seriously consider whether you need to address them. In doing so, bear in mind the collateral fact rule: even though this evidence took you by surprise, is it really relevant to the substantive issue? If not, then you are not permitted to lead evidence to contradict it in any event. Even if you decide that it does go to a substantive issue, you must still consider the weight of the evidence in relation to all of the other evidence, and gauge whether or not you believe that it is going to have such a significant impact on the trial judge's decision that you cannot leave it uncontradicted or unqualified.

9. Be Ready

¶ 27 Oftentimes, you do not know exactly when the defence case is going to end. There may be other witnesses still on the defence witness list when counsel for the defence announces that he is closing his case.

¶ 28 That moment in time is not the appropriate moment to decide whether or not to call reply evidence: you should have made that decision well before the Defendant had finished her case.

¶ 29 Generally (although not always) the Defendant is the first witness for the defence. If evidence is going to take you by surprise and be so significant that you feel obliged to call reply evidence to it, that evidence is likely to come from the Defendant. Therefore, you should consider well before the close of the defence case whether or not you feel it imperative to call reply evidence, and ideally to spend some time preparing that evidence. This isn't always possible, but if there is an opportunity, even if only during a recess or a luncheon break, some preparation should take place. I can think of few things more dangerous than putting your client (for example) back in the box, without having prepared him or her for giving evidence in reply.

CONCLUSION

¶ 30 Frankly, I believe that reply evidence is called far too often in Family Law matters. More than once, I have had the impression that an opponent has put his or her client back in the box to give reply evidence only because the client has insisted upon it. This should never happen: you are the counsel, and it is your decision whether or not your client or anyone else is going to go into the box to give reply evidence.

¶ 31 Therefore, I believe that the best advice with which I can leave you is to call reply evidence only in the rarest of circumstances, and only when you deem it absolutely necessary.

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