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BACKGROUND PAPER

AN ANALYSIS OF OPTIONS FOR CHANGES IN THE LEGAL REGULATION OF CHILD CUSTODY AND ACCESS

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An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access

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The views expressed in this report are those of the author and do not necessarily represent the views of the Department of Justice Canada.

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TABLE OF CONTENTS

INTRODUCTION 1

I OBJECTIVES AND CHALLENGES FOR REFORM 3
Objectives 3
Challenges 5
Other Jurisdictions 33

II OPTION ONE: CUSTODY AND ACCESS 53
Best Interests of the Child 53
Parenting Responsibility 61
Violence, High Conflict and Inadequate Parenting 62
Parenting Plans 72
Reference to Support Services 79
Advantages and Disadvantages of this Option for Reform 83

III OPTION TWO: PARENTING RESPONSIBILITY AND PARENTING ORDERS 86
Parenting Responsibility 87
Parenting Orders 90
Parenting Plans 109
Primary Dispute Resolution and Other Services 115
Advantages and Disadvantages of this Option for Reform 116

IV OPTION THREE: SHARED PARENTING 123
Shared Parenting Responsibility 123
Parenting Orders 132
Parenting Plans 140
Dispute-Resolution Services 143
Advantages and Disadvantages of this Option for Reform 143

V IMPLICATIONS OF REFORM FOR OTHER LEGAL REGULATION 155
Federal Legislation 155
Provincial and Territorial Legislation 161
Conclusion 171

VI IMPACT OF REFORM ON EXISTING ORDERS AND AGREEMENTS 173

VIII CONCLUSION 174
Terminology 174
Balancing Best Interests and Parental Responsibility 175
Decision-Making Authority 176
Residence and Contact 177
Violence, High Conflict and Inadequate Parenting 178
Parenting Plans 179
Divorce-Related Services 180
Reasonable Expectations of Legal Change 180

INTRODUCTION

Separation and divorce are tumultuous for children, as their parents struggle to restructure their parenting relationship. Legal conflicts over parenting arrangements can be protracted and bitter. Increasing public attention has been directed to the question of whether the current legal regime is up to the task of facilitating the restructuring of parental relationships following separation and divorce in a way that promotes the best interests of children.

The federal government established the Special Joint Committee on Child Custody and Access in 1997 to study the issue. The Committee released its report, *For the Sake of the Children*, in 1998, recommending a range of sweeping reforms to custody and access law.[1] The government, in its response, entitled *Strategy for Reform*, endorsed the need for reform to the current law.[2]

The objective of this research paper is to evaluate three options for reform. Option One works within the current language of custody and access. Option Two proposes a neutral model of parenting responsibility and parenting orders. Option Three is based on a model of shared parenting.

The overriding principle guiding the analysis of these three options is the best interests of the child, in accordance with Canada's international obligations under the United Nations Convention on the Rights of the Child. Article 3 of the Convention says that in all actions concerning children, "the best interests of the child shall be a primary consideration." Within each model, the general standard for restructuring parental relationships and resolving parenting disputes must continue to be the best interests of the child. The more difficult question is how this general standard should be given specific content—that is, what exactly is in the best interests of the children when their parents' relationship breaks down?

The paper begins with a discussion of the objectives of reform, and the particular challenges that face any reform of the legal regulation of child custody and access. This initial section reviews a number of themes and issues that run throughout the paper, and that must be addressed in any option for reform. Included among the issues to be considered are the importance of protecting children from violence, high conflict and inadequate parenting, the role of private ordering and parenting plans in the resolution of parenting issues during separation and divorce, and the importance of a range of divorce support services. This section also addresses more general questions raised by each option for reform, such as the potential role of terminological change in reducing conflict and promoting cooperation, as well as the general role of the law in encouraging and promoting attitudinal and behavioural change among divorcing parents.

The second section of the paper examines the ways in which other jurisdictions have attempted to meet the challenges of reforming custody and access laws. Particular attention will be given to the reforms adopted in the United Kingdom, Australia, and the states of Washington and Maine, although examples will also be drawn from a number of other jurisdictions. The paper

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[1] Parliament of Canada, For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access, December 1998.

[2] Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access: Strategy for Reform, May 1999.

subsequently draws on the experience of these other jurisdictions when examining and evaluating the three options for reform.

The third section then turns to the analysis of the three options for reform. The discussion of each option considers questions of design—how could or should each of the options for reform be designed. It explores the choices that need to be considered in designing the options, and attempts to evaluate the advantages and disadvantages of the various policy choices and approaches. The discussion attempts, moreover, to evaluate the relative advantages and disadvantages of each of the options, considering the extent to which each might advance the guiding principles for reform, and the general reform objectives.

The focus of this discussion paper is on reforms to the *Divorce Act*. However, as custody and access is an area divided between federal and provincial jurisdictions, any amendment to the custody and access provisions of the *Divorce Act* could have far-reaching implications for the provinces and territories. While the *Divorce Act* governs custody and access disputes of divorcing couples, the custody and access disputes of unmarried parents, or married parents who have separated without initiating divorce proceedings are regulated by provincial and territorial statutes.[3] Although there are already significant differences between the relevant provincial and territorial statutes and the *Divorce Act* (as well as among the provincial and territorial statutes), the existing laws are all based on the language of custody and access. Any reform to the *Divorce Act* that abandons that language in favour of terms such as parental responsibility or shared parenting could create serious problems for the family justice system if not carefully coordinated with the provinces and territories.

Divided jurisdiction has long created confusion among family law litigants, uncertain about whether their disputes are governed by federal or provincial and territorial law, and confused about whether they should go to provincial or superior courts. Changing the federal law of custody and access without a commitment to similar change at the provincial or territorial level would add to the confusion and frustration so frequently articulated by family law litigants. Unmarried parents and married parents who had separated but not yet initiated divorce proceedings would be covered by provincial or territorial laws of custody and access, whereas divorcing couples would be covered by the federal law based on parental responsibility or shared parenting.

Although it is beyond the scope of this paper to examine provincial/territorial laws in any detail, any reform to the *Divorce Act* can only realistically be pursued in close consultation with the provinces and territories, and each will have to consider the implications of these suggested reforms within its own statutory framework. The policy choices involved in designing and reforming the law of custody and access, and the advantages and disadvantages of these three options for reform would apply to federal and provincial and territorial reform initiatives alike.

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[3] See the Alberta Domestic Relations Act, R.S.A. 1980, the British Columbia Family Relations Act, R.S.B.C. 1979, the Manitoba Family Maintenance Act, R.S.M. 1987, the New Brunswick Child and Family Services and Family Relations Act, S.N.B. 1980, the Newfoundland Children's Law Act, R.S.N. 1990, the Northwest Territories Domestic Relations Act, R.S.N.W.T. 1988, the Nova Scotia Family Maintenance Act, R.S.N.S. 1989, the Ontario Children's Law Reform Act, R.S.O. 1990, the Prince Edward Island Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, the Saskatchewan Children's Law Act, S.S. 1990, and the Yukon Children's Act, N.S.Y. 1986. The legal regulation of parenting disputes in Quebec under the Civil Code of Quebec, S.Q. 1994, is the subject of a separate discussion paper.

I OBJECTIVES AND CHALLENGES FOR REFORM

OBJECTIVES

Any evaluation of the three options for reform must begin with a consideration of the objectives for reform. A number of guiding principles have been identified as a basis for reform. This section begins with a brief review of the guiding principles articulated by the Federal/Provincial/Territorial Family Law Committee, and those articulated in the government's response to the Special Joint Committee. The paper then attempts to pull these principles together, and identify the underlying objectives for reform. It subsequently relies on these guiding principles and objectives for the evaluation and development of any option for reform.

The Federal/Provincial/Territorial Family Law Committee has articulated the following guiding principles for the reform of custody and access laws:

- ensuring that the needs and well-being of children are paramount;
- promoting an approach that recognizes that no one mode of post-separation parenting will be ideal for all children, and that takes into account how children and youth at different stages of development experience separation and divorce;
- supporting measures that protect children from violence, conflict, abuse and economic hardship;
- recognizing that children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so;
- recognizing that children and youth benefit from the opportunity to develop and maintain meaningful relationships with grandparents and other extended family members, when it is safe and positive to do so;
- recognizing the positive contributions of culture and religion in children's lives;
- promoting non-adversarial dispute resolution mechanisms, but retaining court hearings as mechanisms of last resort;
- providing legislative clarity for the legal responsibilities of caring for children; and
- recognizing the overlapping jurisdiction related to custody and access in Canada, and making efforts to provide coordinated and complementary legislation and services.

The government, in *Strategy for Reform,* has identified a number of similar principles to structure and guide the reform of custody and access. These include the following:

- focusing on the child: a child-centred perspective that promotes reforms to minimize the negative impact of divorce on children, and that shifts the focus of family law from parental rights to parental responsibilities;

- maintaining meaningful relationships: recognizing that children benefit from the opportunity to develop and maintain meaningful relationships with both their parents, as well as their extended family;

- managing conflict: promoting an approach that reduces parental conflict and promotes parental cooperation, while recognizing the different levels of conflict that separating and divorcing parents experience, and developing specific responses to deal with them; and

- realizing that one size does not fit all: recognizing that no one model of post-separation parenting will be ideal for all children, and that any reform strategy must allow for flexibility in addressing the unique needs of separating and divorcing families.

Based on these general principles, it is possible to identify a number of general objectives for reforming the legal regulation of child custody and access. The reform is intended to reduce parental conflict and litigation, encourage parental cooperation, and promote meaningful relationships between children and their parents following separation and divorce. At the same time, the reform is intended to address the unique needs of particular families, including the need to protect children from high conflict, violence and inadequate parenting.

At a general level, the objectives of the reform appear to be educational, exhortative and standard-setting: the law of custody and access should establish general standards and principles that guide separating and divorcing parents so they can restructure their parental relationships in a way that promotes the best interests of the children. The law is, in other words, intended to effect attitudinal change in parents. Following the lead of the British and Australian legislative reforms, which are discussed in detail later in this paper, one of the primary aspirations of legislative reform is to make a difference to the way parents approach their children, and their parenting disputes, after separation or divorce.

In particular, the general principles suggest that the aim of the reform is to make a difference in post-separation relationships between parents and children, encouraging parents to continue to be involved in a meaningful way in their children's lives. The reform also aims to help parenting disputes, encouraging parents to reach their own consensual parental agreements. Both of these aims are, however, qualified by the best interest principle—that is, continued relationship and cooperative parenting arrangements are to be encouraged only to the extent that they are consistent with protecting the best interests of children.

At the same time, any reform must also be able to provide for the needs of those children whose separating parents cannot agree or cooperate, and provide the courts with clear principles for resolving ongoing disputes. The legislative reform must, therefore, be guided by an aspiration for legislative clarity, to provide the courts with clear and predictable principles for resolving parenting disputes, in a way that promotes the best interests of the child.

These general objectives, as well as the more specific guiding principles, are considered when examining each of the options for reform, below. The paper evaluates the extent to which each of the options can promote these objectives and principles.

CHALLENGES

In light of these guiding principles and objectives for reform, it is possible to identify a number of questions that must be considered about any reform of the law of custody and access.

- What can reasonably be expected from terminological change?
- What is parental responsibility and how should it be allocated between parents?
- How should decision-making authority be allocated between parents?
- How can children be protected from violence, high conflict and inadequate parenting?
- How can parents be encouraged to resolve their parenting disputes themselves, while retaining the authority of courts to act as a forum of last resort?
- Should the *Divorce Act* specifically include references to parenting plans, or to divorce services, such as parenting education and mediation services?
- And what, ultimately, is the law's role in promoting the more cooperative resolution of parenting disputes, and more cooperative post-divorce parenting?

These are questions and challenges any option for reform must address, and that return throughout the discussion paper.

Terminology

One crucial challenge is deciding on appropriate terminology for the legal regulation of parenting after divorce. Each option for reform involves the question of the appropriateness of various terms: custody and access, parenting responsibility and shared parenting. Indeed, at least as a starting point, the major differences among these three options for reform are differences of terminology. The general question that any reform to the existing law of custody and access must consider is whether terminological change is required, and if so, which terminology will provide the best alternative?

The language of custody and access has come under considerable criticism in recent years. The language, drawn from criminal and property law, is believed by many to be inappropriate when restructuring parenting relationships following marital break down. Many commentators have suggested that the language promotes the win-loss mentality characteristic of custody and access

disputes:[4] parents fight over who gets to be the "real" custodial parent and who must settle for being the second-class "access" parent. The Special Joint Committee commented on the "corrosive impact of the current terminology," and recommended that this language be abandoned in favour of other language that could better describe post-divorce parenting relationships. This movement towards rejecting custody and access has developed considerable momentum, with the federal government's response to the committee also endorsing the need for terminological change.[5]

There is no question that the language of custody and access has become emotionally loaded. Disputing parents may sometimes find themselves fighting about the language, rather than focusing on the interests of, and arrangements for, their children. So there is, then, much to be said for any reforms that might help parents focus their attention on the interests of the children. At the same time, it is important to be realistic about what might be accomplished in and through a change in language.

First, it should be recognized that over the last decade, the courts have been extending the rights of non-custodial parents, and have been promoting the continuous involvement of both parents in the lives of their children.[6] Non-custodial parents are no longer completely excluded from participation in their children's lives. At least part of the critique of the language of custody and access stems from a misrepresentation of the law, which is no longer so starkly characterized by a "winner-takes-all" result.

Second, there is no reason to assume that any new language will not quickly become as emotionally fraught as the language of custody and access. Any assessment of this potential will depend on the specific nature of the reforms adopted. While the language of parenting responsibility may sound more neutral and attractive, the potential of such language to reduce parental conflict cannot be examined in the abstract. Success will depend on the particular nature of the legal regime, and on the type of parenting orders contemplated within the regime. For example, a model that replaced custody and access orders with something such as residence and contact orders (as was done in the United Kingdom, and is discussed in greater detail below), might only displace the location of the conflict. Residence and contact orders might become as emotionally fraught as their predecessors.

There is nothing inherent in the language of custody and access itself that has made it so emotionally loaded. Rather, it is the fact that it is the language within which parental disputes have been cast and fought for many, many years. While it may well be that this history of conflict has rendered the language of custody and access irretrievable, it is important to keep in mind that it is not the language itself, but the years of conflict, that have produced what is now cast as a problem of terminology. And, as such, even though the language of parenting

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[4] See Nicholas Bala and Susan Miklas Rethinking Decisions about Children: Is the "Best Interests of the Child" Approach Really in the Best Interest of Children? (Toronto: Policy Research Centre on Children, Youth and Families, 1993); Rhonda Freeman "Parenting After Divorce: Using Research to Inform Decision-making About Children" (1998) 15, Canadian Journal of Family Law 79.

[5] Strategy for Reform, supra note 2. See most notably Gordon v. Goertz [1996] 2 S.C.R. 27, in which the majority of justices of the Supreme Court of Canada rejected a presumption in favour of the custodial parent to make decisions regarding relocation.

[6] Miklas and Bala, supra note 4 at 95-115.

responsibility, or even shared parenting may appear to hold out new promise of reducing parental conflict, it is quite possible that this new language could also over time become the site of fierce legal battles.[7] Further, the alternative language of parenting responsibility or shared parenting is not without its own negative connotations. Parental responsibility is now often associated with laws intended to make parents liable for their children's negligent or criminal acts. Shared parenting has become very closely associated with the fathers rights groups that have so strongly advocated in favour of mandatory joint custody.

Third, the negative connotations of the words custody and access are not the only, nor necessarily even the most significant, factor leading to disputes between separating or divorcing parents. Richard Chisholme argues, in assessing the potential impact of the terminological change in the Australian *Family Law Reform Act*, 1995, that it is "unlikely that most people's attitudes to their children and their own responsibilities are much influenced by the legal language of guardianship, custody and access. They are more likely to be influenced… by such things as the style of parenting they were exposed to when they were children, attitudes and practices of their peers, the influences of the media, their own individual needs and characteristics, and the emotional consequences of the break down in the relationship."[8] As such, there is not likely to be any magic in changing the language of custody and access. Altering the language may eliminate one source of conflict, but there are many other sources of parental conflict that language alone is unlikely to affect. There is at least one reason, then, to question the extent to which a change in language, in and of itself, is likely to bring about any significant change in parental behaviour on marital break down.

It is also important to consider the broader implications of terminological change for other legislative schemes, at both the federal and provincial/territorial levels. Many statutes incorporate the language of custody and access. If this language was abandoned in favour of some other terminology, it would be necessary to consider the need to reform these other statutes.[9] Some of the required change would be reasonably minor, requiring only minor revisions to the wording; however, there are some implications of replacing custody and access orders with parenting orders that are more serious.

Some legislative schemes require a designation of a custodial parent. The *Ontario Works Act*, for example, which regulates social assistance, only provides assistance to the child's custodial parent. Both parents cannot obtain assistance for the same child, regardless of their custodial arrangement. Further, the Act arbitrarily defines the custodial parent, or primary caregiver, as the person who receives the Federal Child Tax Benefit. If the parent with whom the child is living is not receiving that benefit, then that parent would not be eligible for social assistance.

Provincial government directives further provide that if the Canada Customs and Revenue Agency determines that each parent is an equal primary caregiver, the Federal Child Tax Benefit may be split between them, with each parent receiving it for six months. The parent would be

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7 Brenda Cossman and Roxanne Mykitiuk "Child Custody and Access—Discussion Paper" (1998), Canadian Journal of Family Law 13, at 22.

8 Richard Chisholme "Assessing the Impact of the Family Law Reform Act, 1995" (1996), 10 Australian Journal of Family Law 177, at 193.

9 See Part V below for a discussion of the implications of reform for federal and provincial legislation that uses the term custody and access.

eligible for social assistance in any month in which he or she received the benefit. The problem is that joint custody or shared parenting arrangements rarely, if ever, allocate custody a month at a time. If a parenting regime was adopted in which the language of custody and access were abandoned altogether, in favour of either parental responsibility or shared parenting, these problems would only be intensified for parents requiring social assistance.

The Federal Child Support Guidelines are also based on the designation of custodial and non-custodial parents, in so far as the calculation of child support obligations is based on the income of the non-custodial parent. Moving away from the language of custody and access would require a re-evaluation and possibly a reform of the Guidelines. If a parenting regime was adopted in which it was still possible to identify a residential parent, with whom the child lived more than 60 percent of the time, the Guidelines would only require a minor terminological change.[10] However, if a parenting regime was adopted in which it was no longer possible to identify a residential parent, and/or the child would live with each parent at least 40 percent of the time, the Guidelines would need to be revised. Moreover, any revisiting of the Guidelines would have implications not only for the *Divorce Act*, but also for all the provinces and territories that have brought their laws in line with the Guidelines.

Abandoning the language of custody and access in the *Divorce Act* could also have serious implications if the provinces and territories do not adopt similar changes. Unmarried couples who separated and married couples who separated but did not petition for divorce would be governed by provincial law of custody and access, while divorcing couples would be governed by the new parenting regime. This would not only contribute to the confusion of the family justice system, but could also lead to unintended consequences. The decision of whether to divorce or simply separate could come to be influenced or determined by a parent's view of which law—federal, provincial or territorial—would be more favourable to their circumstances.

It is important to emphasize that this paper is not arguing *against* changing the language. This section is rather an attempt to highlight the potential limitations of such a change. There does appear to be considerable public support for the introduction of new and less adversarial language. If the language of custody and access is operating as an obstacle to separating and divorcing parents, then there may be good reason to abandon it. Family transition experts often attempt to avoid this language when assisting separating and divorcing parents, and try to get these parents to focus on the real needs of their children instead of the abstract legal concepts. But, it is important to be realistic about what such change in terminology will be able to accomplish. Rhonda Freeman, for example, advocates in favour of changing the language. At the same time, she recognizes that "language alone… will not be sufficient to address the inadequacy of the adversarial arena as a means of resolving parenting after divorce dilemmas."[11] Abandoning the language of custody and access may remove one obstacle in the process of resolving parenting disputes, but it will not remove the conflict itself.

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[10] Section 9 of the Federal Child Support Guidelines provides an exception for shared custody, defined as a parent exercising a right of access or having physical custody of a child for not less than 40 percent of the time over the course of a year.

[11] Rhonda Freeman, Families in Transition "Custody and Access: A Response to the Department of Justice Discussion Paper" (unpublished manuscript, 1993), at 4. See also Freeman, supra note 4, at 109 outlining the advantages of terminological change.

In examining the three options for reform, this paper looks more specifically at the relative advantages and disadvantages of the terms *custody and access*, *parenting responsibility* and *shared parenting*, while keeping in mind that there may be limits to what terminology itself can accomplish. Even if a change in terminology cannot in and of itself be expected to bring about a major transformation of parental attitudes and behaviour, reducing conflict and promoting cooperation, the language of each of the options for reform nevertheless has relative strengths and weaknesses that need to be weighed.

Parental Responsibility

A second theme that runs through the analysis of each option for reform is the question of how the law can best promote the idea of parental responsibility. It is an idea intended, in part, to help develop a more child-centred perspective that focusses on parental responsibilities rather than parental rights. It is also intended to help encourage the continued involvement of parents in the lives of their children, by emphasizing that parents continue to be parents, and have responsibilities to their children, after separation and divorce. While Option Two actually uses the term *parental responsibility* to describe the model, each of the options for reform must include consideration of how this idea can be incorporated into the *Divorce Act*. Each option must also review whether and how the idea of parental responsibility can be defined: what parents' responsibilities to their children are, and how specifically these responsibilities should be defined. Further, each option answers the basic question of how the various aspects of parental responsibility should be allocated between the parents. These questions play out differently within each option, raising varying concerns.

The existing regime of custody and access does not mention parental responsibility, and the regime has been criticized for its focus on rights rather than responsibilities. The issue that must be addressed is whether it is possible to bring about a child-centred shift from parental rights to parental responsibilities within a model that continues to allocate parental responsibilities in the language of custody and access.

The second and third options for reform are both based more explicitly on the idea of parental responsibility, although they differ significantly in their approaches to how this responsibility should be allocated. The neutral parental responsibility model makes no assumptions about how the various aspects of parental responsibility should be allocated between parents, but, rather, insists that the allocation be based on the best interests of the child in each case. In contrast, the shared parenting model assumes that it is generally in the best interests of the child that parenting responsibility, or at least some aspects thereof, be shared between the parents. These two models differ in the way in which parenting responsibility is balanced with the principle of the best interest of the child.

The three options for reform differ, then, in the challenges presented by this idea of parental responsibility. In a custody and access regime, the challenge is to decide whether the idea of parental responsibility can be incorporated at all.

In the neutral parenting responsibility model, the challenge is to identify the criteria by which parental responsibility is to be allocated. Should different aspects of parental responsibility be allocated according to different criteria?

In the shared parenting model, the challenge is to identify the aspects of parental responsibility to be shared, and then to establish the criteria by which the non-shared aspects of parental responsibility are to be allocated. Further, if shared parenting is generally assumed to be in the best interests of the child, this model would have to identify the exceptions to the rule that is, the circumstances in which shared parental responsibility should not be assumed to be in the best interests of the child.

Ultimately, the choice to be made among the options for reform will involve promoting, defining and allocating parental responsibility.

Decision-Making Authority

A closely related theme that runs through the analysis of each option for reform is the allocation of a particular aspect of parental responsibility: decision-making authority. The existing regime of custody and access under the *Divorce Act* allows for either sole and joint custody orders. Under a sole custody arrangement, the custodial parent is vested with decision-making authority for the child, although there is an obligation to provide the access parent with information regarding the health, education and welfare of the child. Under a joint custody arrangement, both parents share decision-making authority.

The allocation of decision-making authority within a sole custody order has become the subject of considerable controversy, and is often one of the most contested issues between parents. Non-custodial parents object to the way in which sole custody orders preclude their participation in major decisions regarding their children. One of the demands by these non-custodial parents is that the law be reformed to allow them to continue to participate in decision-making.

While the existing regime does allow parents to negotiate a joint-custody arrangement, in which decision-making authority is in fact shared, it does not require then to do so, and the courts have been reluctant to order joint custody against the wishes of the parents. Any move towards establishing a mandatory regime of joint custody, in which both parents share legal decision-making authority, has also been highly controversial.

A move away from the existing regime of custody and access, in which the custodial parent is vested with decision-making authority over the child, would have to carefully address the allocation of decision-making authority. The movement towards a shared parenting scheme is one largely motivated by the desire to give non-residential parents greater ability to participate in parenting decisions. But, this requirement for shared decision-making authority is what makes this option for reform controversial, in the same way as demands for mandatory joint custody have been controversial in the past.

Even if some consensus was reached on a move towards some shared parenting responsibility, any new laws would need to carefully articulate the nature of shared legal decision-making authority. For example, would shared decision-making require that parents consult each other on all decisions or just major decisions? If the latter, which ones? Typically, parents identify decisions related to medical issues, education and religion as being major decisions. A shared parenting regime could require shared decision-making on these three issues.

Questions would still remain, though, about everyday decision-making. A parent with whom the child is living would need to be vested with day-to-day decision-making authority, but there would need to be limits on this authority. What kinds of decisions need to be reached jointly? What kinds of decisions could be reached independently?

Even in a neutral parenting responsibility model, careful attention would need to be given to the allocation of decision-making authority. This authority would have to be explicitly vested by way of an agreement or court order. These agreements or orders would need to be very specific about the extent to which decision-making authority was vested in one or both parents, and the way in which this decision-making authority was to be shared, if at all.

Further, any model in which some degree of shared decision-making authority was either assumed or possible through agreement or court order, attention would need to be directed to the circumstances in which shared decision-making authority would be inappropriate. In particular, how would family violence, high conflict or inadequate parenting affect the allocation of decision-making authority?

Decision-making authority has become one of the most intractable issues in designing a scheme for the resolution of parenting disputes.

Ultimately, the choice of model will require a choice among three fundamentally different ways of approaching the allocation of decision-making authority, particularly in relation to major decisions. In a custody and access regime, major decision-making authority goes to the custodial parent. In a parenting responsibility regime, all decision-making authority would be allocated between the parents according to the best interests of the child. In a shared parenting regime, the parents would share major decision-making authority, unless there is some demonstrated reason to limit it. In examining the three options for reform, this paper examines, more specifically, the relative advantages and disadvantages of these very different ways of approaching and structuring the allocation of decision-making authority within the *Divorce Act*.

Residence and Contact

Any option for reform must also address the crucial issue of the allocation of a child's residence time. A theme that runs through the analysis of the three options for reform is how the law can best set out how this residential time is to be allocated, in a manner that promotes children's best interests, including their need for stability, physical care and ongoing relationships with both parents.

Residence

Parents with any type of parenting regime must ultimately decide where a child should live. In the current custody and access regime, the child lives with the parent awarded custody. In a joint custody arrangement, residence may be shared, but more frequently it is only decision-making authority that is shared. Typically, the residential schedule in a joint custody arrangement closely approximates that of a sole custody arrangement, with the child residing most of the time with one parent, and visiting the other parent on weekends and holidays. It is not clear that this allocation of a child's primary residence is the major focus of the criticisms directed towards the current regime. Rather, the criticism typically focusses more on the allocation of decision-

making authority and contact. The demand by access parents for greater involvement in their children's lives is sometimes a demand for equal residence, but is more frequently a demand for greater participation in decision-making and more liberal access. As a result, it is not clear that the objectives for reform should actually include changing the way in which residence is allocated.

However, a move away from the current regime of custody and access will continue to require parents to decide about the child's residence. If residence is no longer decided on the basis of custody, then a parenting regime must have some means for determining it. New kinds of parenting orders are required that can specifically cover this dimension of parental responsibility. In a neutral parenting regime, no assumptions are to be made about the kind of residential arrangement that is in children's best interests, but rather, those interests must be determined on a case-by-case basis.

A shared parenting regime, although involving the assumption that it is generally in the best interests of children for both parents to be involved in the lives of the children, does not necessarily presuppose that residence should be shared. Although there is not always consensus on this point, most jurisdictions that have adopted the language or spirit of shared parenting do not require that a child's residence be shared between parents. Rather, as is discussed in greater detail below, each of these jurisdictions allows a child's residence to be allocated to either or both parents. Since there is no requirement that residence be shared, even a shared parenting regime, then, must establish criteria for allocating this aspect of parental responsibility, and deciding where a child will live.

The choice between the options for reform does not significantly revolve around the allocation of a child's residence. While deciding where a child is to live must be included within any parenting regime, and is, therefore, a theme that runs through the discussion of each option for reform, it is not at all clear that the three options for reform conceptualize this issue in vastly different ways.

Contact

Any reform to the law of custody and access must address the contentious issue of access or contact between a child and the parent with whom the child does not live. One of the guiding principles for reform is to recognize that children benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so. The issue for reform is how this principle is best reflected in legislation.

In the past, access was assumed to be the right of the parent. More recently, there has been a shift in the understanding of contact, focussing on the benefits to the children of meaningful relationships with their parents. Sometimes this contact is expressed as a right of the child. For example, Article 9(3) of the United Nations Convention on the Rights of the Child establishes a duty on states to respect "the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is

contrary to the child's best interest."[12] Others resist this rights-based language, framing contact in welfare language—that is, an important component of the best interests of the child.

The *Divorce Act* includes the principle of maximum contact. Section 16(10) provides that the court "shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." Accordingly, the Act provides that the courts must take into account the "the willingness of the person for whom custody is sought to facilitate such contact." The Supreme Court of Canada has held, however, that this principle of maximum contact "is not an unbridled objective and must be curtailed wherever the welfare of the child requires it."[13] The Court has emphasized that access is to be determined according to the best interests of the child. While those best interests generally require a continued relationship with both parents, the right of access must be approached from the point of view of the child. Whenever the relationship to the non-custodial parent conflicts with the best interests of the child, the promotion of the child's best interests must take priority over the desires and interests of the parent.[14]

The question for reform is how to best promote the general principle of maintaining meaningful parent-child relationships, while ensuring that the best interests of children are protected. Some jurisdictions have attempted to promote the policy of frequent and continuing contact by including a presumption in favour of contact in their legislation,[15] while others have expressed contact as a right of the child.[16] The difficulty that has arisen, however, is balancing this presumption or right with other countervailing interests of children. In at least some jurisdictions that have adopted a presumption in favour of contact, commentators have argued that the important objective of protecting children from violence, conflict and abuse has been compromised.[17]

Each option for reform faces the challenge of attempting to achieve an appropriate balance between promoting meaningful relationships and protecting children from harm. Should the *Divorce Act* include a general principle in favour of contact? If so, how should this principle be framed? As a presumption? As general policy statement? As part of the best interests test? Under the existing regime of custody and access, should the friendly parent rule be retained or revised? In a regime of parental responsibility, how would a child's residential time be allocated, and, particularly, what criteria would be used to determined a non-residential parent's time with a child? Similarly, in a regime of shared parenting, what principles and criteria would be used to allocate a child's residential time with their non-residential parent?

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[12] Article 9(3) UN Convention on the Rights of the Child.
[13] Young v. Young [1993], 4 S.C.R.3.
[14] Ibid.
[15] In the United Kingdom, the Family Law Act, 1996 provides for a presumption in favour of contact, confirming the case law, which had also established a strong presumption in favour of contact. See discussion, infra at notes 101-105.
[16] In Australia, the law includes the general principle that "children have a right of contact, on a regular basis, with both parents." See discussion infra at notes 109-110.
[17] Felicity Kaganas. "Contact, Conflict and Risk" in S.A. Sclater and C. Piper (eds.) Undercurrents of Divorce (Aldershot: Dartmouth Publishing, 1999). See discussion infra at 101-105.

While each option for reform must structure an approach to access or contact, there may be some significant differences between the options for reform. A neutral parenting regime, for example, might be difficult to reconcile with a presumption or right of contact. This is a parenting regime that does not assume that any particular allocation of parenting responsibility is always in the best interests of the child, but, rather, insists that these decisions be made according to the best interests of the child on a case-by-case basis. The challenge here would be to identify the criteria by which these decisions regarding contact could and should be made in each case.

By contrast, a shared parenting regime assumes that shared parenting responsibilities between parents and continuing and frequent contact are generally in a child's best interests. The challenge here is twofold. Would a presumption in favour of contact violate the guiding principle that no one model of parenting will be ideal for all children, and accordingly, reject the use of judicial presumptions? How would an approach that assumes that contact is generally in the best interests of the child protect children from the harm that could result from contact in circumstances of violence, high conflict and inadequate parenting?

In reviewing each option for reform, the paper considers the particular ways in which rules regarding contact might be designed to balance the promotion of meaningful parent-child relationships, and the need to protect children from harm.

Family Violence, High Conflict and Inadequate Parenting

Another guiding principle for reform is the protection of children from violence, conflict and abuse. The literature on the impact of separation and divorce on children reports the harmful effects of exposure to violence, conflict and abuse. Any reform to the law of custody and access must, therefore, address the question of how the law should deal with high-conflict families, families with a history of violence, and families with inadequate parenting. Much of the impetus for reform of child custody and access laws in recent years has been the desire to reduce parental conflict and encourage parental cooperation during separation and divorce. But, as legal and child development experts now agree, there are a range of families for whom such cooperation is, at best, elusive and, at worst, a dangerous ideal. Families characterized by high conflict, violence or inadequate parenting or all three cannot be seen through the same lens of cooperation. Rather, specific approaches will need to be designed to deal with these situations.

Violence

The family justice system has been increasingly criticized for its failure to take family violence seriously in the resolution of custody and access disputes.[18] Currently, the *Divorce Act* includes no reference to the relevance of violence in the resolution of custody and access disputes, and judicial approaches to the relevance of violence have been inconsistent.[19]

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[18] In the American context, see Family Violence Project of the National Council of Juvenile and Family Court Judges, "Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice" (1995) 29 Fam.L.Q. 197.

[19] For examples of courts taking violence into account see Young v. Young (1989) 19 R.F.L.(3d) 227, Renaud v. Renaud (1989) 22 R.F.L.(3d) 366. For an example of courts not giving this factor much weight see Allen v. Allen [1995] S.J.410.

However, the literature on the impact of separation and divorce on children has demonstrated the harmful effects of exposure to violence.[20] Witnessing interparental violence can be a terrifying experience for children, and can produce a range of post-traumatic stress disorders. Research began to show more behavioural problems, anxiety and depression, and lower self-esteem among children who witness interparental violence.[21]

The Special Joint Committee stated that there was general agreement that children are negatively affected by exposure to violence:

> Children who witness violence between their parents are affected negatively. Where there is violence between the parents, the risk of escalation at the time of separation is high and poses real safety concerns for both parent and child. The presence or risk of violence is unarguably relevant to decisions about parenting arrangements.[22]
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> Despite this statement, the Special Joint Committee did not make any specific recommendations in relation to violence.[23] It did observe, however, that "most of the witnesses advocated amendments to the *Divorce Act* and provincial family law to make domestic violence expressly relevant to custody/access decisions and a matter that must be considered by the judge"[24].

Going further than the Special Joint Committee, the federal government in its response stated that "it is important to send a message that all aspects of the family law system must take into account incidents of family violence involving the child or member of the child's family. Ensuring the safety of all parties involved must be the guiding principle."[25]

It is, therefore, crucially important that any reform to the law of custody and access specifically address this issue of violence. The question, then, to be addressed in designing and evaluating the three options for reform is how the presence or risk of violence ought to be taken into account in resolving parenting disputes, and how the *Divorce Act* might be amended to do so.

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[20] On the harm to children from exposure to interparental violence and abuse, see P. Jaffe, D. Wolfe and S. Wilson Children of Battered Women (Newbury Park: Sage, 1990), J. Johnston and L. Campbell "Parent-Child Relationships in Domestic Violence Families Disputing Custody" (1993) 31 Family and Conciliation Courts Review 282, E. Peled, P. Jaffe and J. Edelson (eds.) Ending the Cycle of Violence: Community Responses to Children of Battered Women (Newbury Park Ca., Sage, 1995), H.A. Davidson "Child Abuse and Domestic Violence: Legal Connections and Controversies" (1995), 29 Fam.L.Q. 357, D.G. Saunders "Child Custody Decisions in Families Experiencing Woman Abuse" (1994) 39 Social Work 1.

[21] Ibid.

[22] For the Sake of the Children, supra note 1 at 78.

[23] Despite the overwhelming opinion of child experts in this area, the Committee's report notes ibid. at 81, "Some Committee Members noted that insufficient testimony had been presented to the Committee about the actual incidence and role of domestic violence in separation and divorce proceedings. For purposes of this study, however, the most important is research into the effects on children of witnessing violence. This evidence is less equivocal, and the Committee urges all governments to consider it carefully and ensure that the legislation requires that legal and mental health professionals participating in the development of parenting plans do so as well as in relevant cases."

[24] For the Sake of the Children, supra note 1 at 82.

[25] Strategy for Reform, supra note 2 at 19.

Evidentiary Requirements

Any reform option that adopted specific rules or presumptions to deal with the issue of family violence would have to consider the degree of proof of family violence that would be required. Differing degrees of proof of violence are required among the U.S. jurisdictions that have adopted these rules. As the American Law Institute has observed "evidentiary standards with respect to proof of abuse vary widely."[26] In some states, the courts consider "any evidence of domestic violence."[27] Others provide that a finding of domestic violence "shall be supported by credible evidence"[28] or "clear and convincing evidence."[29] The Ohio legislation says that the court must determine if a parent has been convicted or has plead guilty to a charge of domestic violence in order to activate the presumption against shared parenting, but also allows the court to take into account "any history of or potential for… domestic violence" in determining the appropriateness of shared parenting.[30]

The Special Joint Committee recommended that only a "proven history of family violence" be taken into account as a factor when determining the best interests of the child. It is not at all clear what standard of proof would be required for such a "proven history."[31] As the government recognizes in its response to the Committee's report, "a requirement for proof of conviction would be a very high standard for family law, especially in spousal abuse cases, where the abusive conduct often occurs in private and where the victims, for a variety of reasons, tend to hide or deny the abuse."[32]

The *Divorce Act* could include a specific statement of the evidentiary requirement for family violence, stating, for example, that a finding of family violence shall be supported by credible evidence. This would ensure that more than an unsupported assertion of violence by one spouse would be required before a presumption or principle would be activated. Or the Act could specifically mention that the standard of proof is a civil standard, requiring that a finding of family violence be established on a balance of probabilities. Although it is well established that this is the standard of proof under the *Divorce Act*, a specific reference might also help address the concerns that a mere assertion of family violence would suffice to activate the presumptions or principles against violence.

High Conflict

High parental conflict has been identified as a serious risk to children of separation and divorce. There appears to be an increasing consensus among child development experts that parental

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[26] See discussion in the American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations, Tentative Draft No. 3, Part I (March 20, 1998), Chapter 2, "Principles Governing the Allocation of Custodial and Decision-making Responsibility for Children." Submitted by the Council to the Members of the American Law Institute at 224-225.

[27] Alaska Stat. S. 25.20.090(8), 25.24.250(7).

[28] Colorado Rev. Stat. S. 14-10-124. See also North Dakota law, which requires "credible evidence" of domestic abuse, N.D. Cent. Code S. 14-09-06.2(1).

[29] Oklahoma Stat. Ann. Titi. 10, S.21.1.

[30] Ohio Rev. Code Ann. S. 3109.04(F)(1),(2).

[31] For the Sake of the Children, supra note 1, at 45.

[32] Strategy for Reform, supra note 2.

conflict is a major source of reduced well-being among children of separation and divorce.[33] Janet Johnston's work, for example, has estimated that the children of high conflict families are four to five times more likely to have emotional and behavioural problems of clinically significant proportions.[34]

The Special Joint Committee describes high conflict families as those unable to move beyond the difficult transition of separation and divorce.

> Some families seem to get stuck at this point, however, with one parent or both intent on maintaining such a degree of conflict and tension that it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces is estimated at between 10 and 20 percent of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses.[35]
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> These families are characterized by high rates of litigation and relitigation, inability to communicate, rigidity and lack of cooperation, allegations of inadequate parenting, and extremely high degrees of anger, mistrust and embitterment.[36]

The literature on high-conflict families has identified a range of problems and challenges for the resolution of parenting disputes on divorce. Johnston's work on high conflict divorce has suggested that the prognosis is poor for high conflict parents to develop cooperative parenting approaches.[37] Research in the area has begun to reveal that striving for cooperative parenting is increasingly recognized as an inappropriate goal for high conflict families. There is also an emerging consensus within the literature on children and divorce that shared parenting and continued parental contact can have negative effects on children in high conflict families:

> Recent research indicates that joint physical custody and frequent child-nonresidential parent contact have adverse consequences for children in high-conflict situations, and that

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[33] On the harm to children from exposure to high parental conflict, see Janet Johnston "The High Conflict Divorce" (1994) 4 The Future of Children 165; J. Johnston and L. Campbell Impasses of Divorce: The Dynamics and Resolution of Family Conflict (New York: The Free Press, 1988); J. Johnston and V. Roseby In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (New York: The Free Press, 1997). See also Diane Lye, "Scholarly Research on Post-Divorce Parenting and Child Wellbeing," Report to the Washington State Gender and Justice Commission, December 1998, who as part of a study on Washington is Parenting Act has reviewed this research.

[34] Janet Johnston High Conflict and Violent Divorcing Parents in Family Court: Findings on Children's Adjustment and Proposed Guidelines for the Resolution of Custody and Visitation Disputes (San Francisco: Judicial Council of California, 1992).

[35] For the Sake of the Children, supra note 1 at 73.

[36] See Freeman (1998) supra note 4, Lamb, Sternberg and Thompson "The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment" (1997) 35 Family and Conciliation Courts Review 396.

[37] Johnston "High Conflict Divorce" supra note 33.

> joint physical custody and frequent child-nonresidential parental contact do not promote parental cooperation.[38]
>
> Rather, what these families require is a greater severing of the relationship between the disputing parents.

Many experts have also highlighted the challenges that these high-conflict families present to the family justice system, particularly in the context of disputes over custody and access. Johnston and Roseby, for example, have described the challenges that these families present to the family justice system, to themselves and to their children:

> Highly conflictual divorcing families make heavy demands on the energies of family law attorneys, mediators, custody evaluators, counselors, and even judges. Despite the increased attention they receive, these clients are more likely than any other group to be hostile and unappreciative of professional efforts. They may fail to pay assigned fees, allege bias on the part of court officers, and even try to report or sue professionals for malpractice.[39]
>
> What is most troubling is that these families often do not seem to resolve their conflicts despite the increased attention they receive and the unusual amount of private and public resources expended on their behalf. Instead, their children continue to be exposed to the constant stress and disruption of their parents' disputes, unremitting anger, and distrust.[40]

As a result, increasing attention is being directed to developing approaches to address the special needs of high conflict families. These families will not be able to resolve their disputes through cooperation, education and primary dispute resolution. Alternative forms of intervention are, therefore, required to help these families resolve their disputes. Many experts argue for a process of early intervention and streaming. There is a heavy emphasis on developing appropriate services to deal with these high conflict families. The Special Joint Committee, for example, recommended that the "federal, provincial and territorial governments work together to encourage the development of effective methods for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for children."[41] These are important initiatives and ought to be supported.

However, there has been very little attention paid to incorporating references to the needs of high conflict families into legislation. The focus has been almost entirely on services. One of the few statutory regimes to incorporate some reference to the kind of factors that would undermine cooperation in a high conflict family is found in Washington state's *Parenting Act*.[42] The Washington regime, which is examined in greater detail below, identifies a number of circumstances in which the degree of parental conflict should be taken into account when

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[38] Lye, supra note 33 at 25.
[39] Janet Johnston and Vivienne Roseby In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce (New York, The Free Press, 1997), at 222.
[40] Ibid., at 222-223.
[41] Recommendations 32, For the Sake of the Children, supra note 1, at 74.
[42] The Washington Parenting Act does not expressly refer to high conflict families.

resolving parenting disputes. For example, it provides that a court should not order shared decision-making when a parent's conduct may adversely affect a child's best interests, including "the abusive use of conflict by the parent, which creates the danger of serious damage to the child's psychological development."

The emerging consensus on the negative impact of high conflict on children has been recognized and incorporated as a guiding principle for the reform of custody and access law. The federal government concluded in its *Strategy for Reform* that "as a general principle, where there are long term, emotional, high conflict parenting disputes, alternatives to co-parenting arrangements requiring cooperation and joint decision-making may be in the child's best interests."[43]

The question that must be addressed in designing and evaluating the options for reform is how a legal regime of parenting should deal with high conflict families. Can or should the needs of high conflict families be dealt within and through divorce services? Or must the legislation itself also reflect the needs of the families? If so, how? There are many ways in which the unique needs of high conflict families might be incorporated into a legislative scheme. The choices would also depend on the nature of the legislative scheme adopted. For example, a regime that encouraged continued relationships and frequent contact between children and parents following separation or divorce, or established shared parenting as a norm, or both, would need to clearly identify the exceptional needs of high conflict families, and the circumstances in which such continued contact or shared parenting would not be appropriate.

Inadequate Parenting

A third area of concern is the protection of children from inadequate parenting, such as neglect, substantial non-performance of parenting duties and substance abuse. In order to promote the general objective of promoting children's best interests and ensuring that children are not exposed to harmful behaviour, the legislative regime could address the circumstances in which parenting falls below a basic minimum standard. For example, in a regime that generally favoured contact between children and parents following separation or divorce, it would be important to address the circumstances in which the standard of parenting was so poor that it could no longer be said that children's best interests were being served by contact. The regime might identify the specific circumstances in which it could no longer be said that a relationship between a parent and the child was in the best interests of the child, such as neglect, substantial non-performance of parenting responsibilities, emotional, psychological or substance abuse problems or some or all of these.

There is, however, little legislative precedent for addressing this problem. Very few jurisdictions have attempted to incorporate references to the needs of children who have experienced inadequate parenting. The challenge will be to identify and define the circumstances in which inadequate parenting would be a risk to children, and to set out the implications of this inadequate parenting for the allocation of parenting responsibility.

Specifically setting out the evidentiary requirements, such as "credible evidence" may also help address the concerns raised by the Special Joint Committee regarding false allegations of

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[43] Strategy for Reform, supra note 2 at 18.

abuse.[44] While the question of creating offenses for false allegations is beyond the scope of this paper, it may be that reforms can be included in the *Divorce Act* that would reduce any incentives for false allegations. If a finding of family violence requires more than a mere assertion of violence, but, rather, must be supported by "credible evidence," parents may be dissuaded from making allegations that they cannot support.

Summary

Violence, high conflict and inadequate parenting are thus important factors in any reform to legislation that would improve the resolution of parenting disputes during separation and divorce. Including specific references to the needs of children who have experienced family violence, high conflict, inadequate parenting, or some or all of these would also help advance the educational objectives of legislative reform, giving direction and guidance to judges, lawyers and other individuals within the family justice system. It will be important to consider how any option for reform could take the unique needs and circumstances of children who have experienced violence, high conflict or inadequate parenting into account during separation and divorce. In a regime that generally encouraged cooperation between parents, and promoted ongoing relationships between children and parents, specific attention would need to be directed to the unique needs of these families, in which cooperation may, in fact, be impossible, and ongoing relationships may be harmful to children. In reviewing each option for reform, this paper considers the particular ways in which a legal regime might be designed to accommodate the particular needs and dynamics of these families.

Private Choices and Parenting Plans

A sixth theme that runs through the analysis of each option for reform is the appropriate relationship between encouraging parents to reach their own agreements regarding their children, and the need for judicial intervention in decisions regarding the best interests of children. More generally, what is the appropriate relationship between private ordering and judicial discretion. To what extent should the law encourage and respect the private decisions of parents? Should courts be required to defer to the private decisions of the parties? Or do the best interests of the child require that the courts retain their discretionary authority to review these private decisions? And by what criteria would the courts exercise this authority?

A related issue is the extent to which legislation should encourage parents to reach their own agreements. The increasing emphasis on promoting cooperative parental agreements raises a paradoxical question: to what extent should a legislative scheme force parents to agree and cooperate? More often than not, parents find themselves fighting over everything, including their children during separation and divorce. With varying degrees of expert intervention and assistance, many of these parents will be able to develop more cooperative relationships. For example, parenting education that emphasizes that children's best interests are served by reducing parental conflict and that helps parents develop skills for dealing with post-separation parenting can help many parents in the transition to more cooperative relationships. This is also

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[44] For the Sake of the Children, supra note 1, at 85-90. As the Special Joint Committee noted, and as the federal government echoed in its response, the difficulty with this issue is that so little is actually known about the incidence of false allegations in Canada. More research is required into the issue of false allegations to determine their prevalence and to consider an appropriate policy response, if any. These questions are beyond the scope of this paper.

true of mediation and other forms of primary dispute resolution that assist parents in reaching mutual and consensual agreements. The greater concern, however, is the extent to which the legislation itself should attempt to promote such agreement and cooperative relationships. To what extent should the law encourage particular approaches to resolving parenting disputes that require parents to reach consensual agreements on their parenting arrangements?

Parenting Plans

These issues come to the fore in the context of parenting plans. A parenting plan is a written agreement between the parents, setting out the parenting arrangements in relation to the children. Generally, a parenting plan includes a detailed description and allocation of parenting responsibilities, including the children's residential schedule, and the allocation of decision-making authority. It might also include provisions regarding child support.

The Special Joint Committee recognized and affirmed the important role that parenting plans can play in restructuring parenting relationships during separation and divorce. In the Committee's view, parenting plans may help shift parents' attention "away from labels to the schedule, activities and real needs of the child." The Committee emphasized that parenting plans could be "customized to meet the needs of a particular child and family and have the additional advantage of flexibility. Such plans can account for children's specific needs, in terms of activities and schedules, but can also provide for much-needed review as the child develops and his or her needs and interests change."[45]

Parenting plans have become increasingly popular, and have begun to be used within the existing regime of custody and access by many child custody assessors and other family transition experts. These experts work with separating and divorcing parents to reach agreement about the arrangements for their children, and then attempt to set out those arrangements in a parenting plan. The plan itself often avoids the language of custody and access, and, instead, allocates the various dimensions of parenting between the two parents.

Despite the increasing use of parenting plans, there is no specific recognition of such plans in the *Divorce Act*. Plans are neither encouraged nor precluded under the existing regime. And, under current law, courts have the power to review private agreements at the time of divorce to determine whether they serve the children's interests. While courts do not routinely substitute their views for the views of the parents, they do have the authority to do so. The *Divorce Act* provides no guidance on how to treat such privately reached arrangements.

The American Law Institute has observed that, in the United States, "[p]arenting plans are used increasingly both to encourage parents to plan for the children at divorce and to enable settlement of post divorce dispute without necessity of returning to court."[46] Many states have amended their laws, to expressly recognize the role of parenting plans in the resolution of custodial disputes. Many of the states that have incorporated references to parenting plans have done so while abandoning the language of custody and access—a model for reform that will be

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[45] For the Sake of the Children, supra note 1, at 31.

[46] American Law Institute, supra note 26, Introductory Discussion to the Principles Governing the Allocation of Custodial and Decision-making Responsibility for Children, at 75.

examined in more detail in parts II and III of this paper. But, at least some states have recognized parenting plans within a legal regime based on custody and access.

Optional or Mandatory?

Parenting plans could be made optional or mandatory for divorcing parents. The law could be amended to allow parties to enter into parenting plans or to require divorcing parents to file parenting plans, before seeking a custody or access order or both. A third alternative would be to give the courts the discretion to require that divorcing parents seeking a custody and access order file a parenting plan. Illinois for example, requires that parents produce a joint parenting agreement before joint custody is ordered.

In the United States—where parenting plans have become increasingly popular and have been expressly incorporated into state family law—two states, Montana and Washington, require a parenting plan in every case.[47] Several other states require that parents submit a written parenting plan before the court will order joint physical responsibility for the child.[48] In Texas, a parenting plan is required for joint custody, but the court may make an order without the parties having submitted the plan.[49] Yet other jurisdictions give the courts discretion to require a parenting plan, regardless of how the parenting responsibility is going to be allocated.[50]

In an optional scheme, a parenting plan would complement parenting orders. Parents could be encouraged to resolve their disputes themselves using a parenting plan. If they were unable to do so, then the separating and divorcing parents would be able to seek a parenting order. However, in a mandatory scheme, separating and divorcing parents could not seek a parenting order without first filing a parenting plan. Moreover, in existing mandatory parenting schemes, these parenting orders are then issued in the form of a parenting plan. Thus, in a mandatory scheme, parenting plans would not simply complement a regime of custody and access, parenting responsibility or shared parenting, but rather, would become the central instrument in the resolution of parenting disputes—consensual and contested alike.

There are advantages to both optional and mandatory schemes, and either approach could advance the objectives of reform. A mandatory scheme requires parents to at least try to resolve their disputes through a parenting plan. Even if that cooperative effort fails, it forces parents to focus on allocating the specific aspects of parenting responsibility in accordance with the best interests of the children. An optional scheme, while not requiring parents to file plans, could nevertheless encourage parents to at least consider the option of resolving their disputes using a parenting plan. A specific reference to parenting plans within the *Divorce Act* could be an important symbolic endorsement of the efforts of a range of family transition experts—lawyers, mediations and counsellors—to get separating and divorcing parents to try to focus on the real parenting needs of their children.

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[47] Ibid., at 75. Mont.Code Ann. S 4-4-234(1); Wash. Rev. Code Ann. S. 26.09.181(1) (West Supp. 1996).

[48] Ibid., at 75. These states include Alabama, Arizona, Illinois, Massachusetts Missouri, New Mexico, Ohio and Oklahoma.

[49] Ibid.

[50] Ibid., California, Washington D.C., Nevada, Jew Jersey, Pennsylvania and Michigan.

Required Content

If the *Divorce Act* was amended to recognize optional, mandatory or judicially ordered parenting plans, some attention would need to be directed to the required content of those plans. In the U.S., there is considerable diversity in the specific issues that must be addressed, and in the degree of detail required. According to the American Law Institute, "the greatest amount of detail tends to be required in those states that require parenting plans as a condition of joint custody…. States with more discretionary approaches to parenting plans tend to be less directive about what a plan should include".[51] However, there may be advantages to providing more guidance even within an optional scheme. If the objectives of incorporating a reference to parenting plans is to encourage parents to turn their attention to the allocation of their parenting responsibilities, it would be helpful to provide as much guidance as possible to parents about what a parenting plan might include.

Degree of Judicial Deference

If the *Divorce Act* was to be amended to recognize parenting plans (optional, mandatory or judicially ordered), attention would need to be given to the extent that courts would be expected to defer to these parenting plans. Under the current law, courts have the power to review private agreements at the time of divorce to determine whether they serve the child's interests.[52] In practice, however, courts are reluctant to intervene and change a custodial arrangement agreed to by the parties.

The incorporation of specific reference to a parenting plan into the *Divorce Act* raises two questions. Would the courts continue to exercise their general authority to review such agreements according to the best interests of the child, and to set aside any agreement that did not, in their view, meet this standard? Would the courts be required to exercise a higher degree of deference to these private agreements?

These questions, in turn, raise more general issues of the appropriate relationship between judicial discretion and private ordering. Should courts be required to defer to the private decisions of the parties? What standard of review would the courts use in reviewing these plans? Should the courts review these plans on the basis of the best interests of the child test or some higher standard of review, such as harm to the child? In many states, the trend is towards requiring the court to adopt a parenting agreement, unless they find that the agreement is not in

[51] Ibid., at 76, 78.

[52] For example, section 2 of the Manitoba Family Maintenance Act provides that "in all proceedings under this Act the best interests of the child shall be the paramount consideration of the court." The Ontario Children's Law Reform Act similarly provides that all custody and access issues "shall be determined according to the best interest of the child." Separation agreements dealing with the children are also subject to the best interests of the child test under provincial legislation. For example, the Ontario Family Law Act allows a separating couple to enter into a separation agreement that includes provisions for the custody and access of the children. However, section 56(1) provides that any such contract is subject to the best interests of the child. In addition to statutory authority, superior courts have a parens patriae jurisdiction, descending from the English chancery courts, giving the courts broad jurisdiction to protect the welfare of children.

the best interests of the child.[53] The American Law Institute has recommended an even higher degree of deference towards agreements that parents make about their children, requiring the courts to adopt them unless they find that "(a) the agreement is not knowing or voluntary, or (b) the plan would be harmful to the child."[54]

Limitations

If the *Divorce Act* was amended to include a specific reference to parenting plans, as well as to require courts to exercise some degree of deference to these private agreements, it would be important to set out any limitations or restrictions to this private ordering.

For example, it would be important to consider the relevance of violence, high conflict and inadequate parenting in reviewing and enforcing parenting plans. Family violence, high conflict or inadequate parenting could be listed as factors to be taken into account in reviewing parenting plans. Or they could be identified as specific exceptions to a principle of otherwise deferring to the private arrangements of the parties. Or they could be recognized as specific limitations to a general statement of principle that encouraged separating parents to enter into parenting plans.

Variation

Some attention would also need to be directed to the standard of review for a modification or variation of a parenting plan. Section 17 of the *Divorce Act* currently allows for a variation of a custody or access order on the basis of a change in "the condition, means, needs or other circumstances of the child," if the variation is in the best interests of the child.[55] The test applied by the courts has been one of material change of circumstances.[56] Agreements dealing with custody and access cannot, strictly speaking, be varied. If there is no court order, the parties must bring an application under section 16 of the *Divorce Act* (or the corresponding provisions of the provincial statutes). The courts are not bound by the agreements, but have generally applied a similar standard of material or substantial change in circumstances.[57]

The question that needs to be addressed is whether this is the appropriate standard for the variation or modification of a parenting plan. In particular, should the courts also allow a modification to a parenting plan, absent a change in circumstances, based on parental agreement? Any option for reform that includes parenting plans will have to address this question.

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[53] See, for example, the D.C.Code Ann S.16-911(a-2)(6)(A)(Supp.1996), which states that the court shall order "any custody arrangement which is agreed to by both parents unless clear and convincing evidence indicates that such arrangement is not in the best interest of the minor child." The New Jersey statute provides that, "the court shall order any custody arrangement that is agreed to by both parents unless it is contrary to the best interests of the child." (N.J.Stat. Ann S.9:2-4(d) (West 1993). See also, for example, La.Civ.Code Ann art.132 (West Supp. 1996), N.M.Stat. Ann. S.40-4-9.1(D), N.C.Gen.Stat.S.50-13.1(g), Wis.Stat.Ann.S.767.11(112)(a) (West 1993).

[54] S.2.07, American Law Institute, supra note 26, at 81.

[55] Some provincial and territorial legislation explicitly includes this standard of variation for custody and access orders. Section 29 of the Ontario Children's Law Reform Act, for example, provides that a court shall not vary a custody or access order "unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child."

[56] See Gordon v. Goertz [1996] S.C.R.27.

[57] See discussion in Young v. Young.

Summary

In reviewing each option for reform, this paper considers the extent to which each model might achieve an optimal balance between private ordering and judicial discretion, and the challenges that each model presents to achieving this balance. It considers the particular ways in which parenting plans could be incorporated into a legislative scheme based on custody and access, parenting responsibility or shared parenting, and the role of such plans within these schemes. It pays particular attention to the question of whether a parenting plan regime should be optional and added to a regime of parenting orders, or mandatory and, thereby effectively operating as a regime of parenting orders.

Divorce-Related Support Services

Another guiding principle for reform is the promotion of more cooperative, non-adversarial approaches to resolving parenting disputes. Much attention has been given in recent years to a range of support services for divorcing parents that would help reduce conflict. These services, ranging from mediation and arbitration, to parenting education and custody assessments, have become increasingly important in the resolution of custodial disputes. The *Divorce Act* currently provides that a lawyer is under a duty to inform his or her client of the availability of mediation services.[58] There are no other references to support services for divorcing parents within the Act.[59] The question that needs to be answered in relation to any reform is whether the law should be amended to include specific references to these support services, and if so, how? This issue continues the theme raised in the section on private choices and parenting in so far as it too is concerned with the extent to which the *Divorce Act* can encourage parents to cooperate in the resolution of their parenting disputes.

Parenting Education

Parenting education has become increasingly popular in many jurisdictions.[60] In many American jurisdictions, the court may require parents to attend a parenting education program.[61] In Alberta, mandatory parenting education programs have been implemented, which parents are

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[58] According to section 9(2) of the Divorce Act, "it is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters."

[59] Section 9(1) imposes a duty on lawyers to discuss the possibility of reconciliation with their clients, and to advise them of the availability of marriage counselling or guidance facilities that might assist with reconciliation. This is not, then, a reference to service designed to assist divorcing couples with the divorce process, but rather, one designed to prevent the divorce.

[60] See Family Mediation Canada, Families in Transition: Children of Separation and Divorce, discussing parenting education programs available across the country.

[61] American Law Institute, supra note 26, at 97. For example, in Washington D.C., Florida, Hawaii, Illinois, Tennessee and Wyoming, the legislation provides that "the court may order" or "may require" parents to participate in a parenting course. To date, only a few states have mandated that parents participate in such courses. In Iowa, parents must participate in a course "to educate and sensitize the parties to the needs of any child or party" during the proceeding. In New Hampshire, the legislation requires that parents attend a mandatory four-hour course "so that the adverse impact on the children of the litigation process and the family's separation will be minimized." In Utah, there is a mandatory parenting course to sensitize parents to the needs of their children during and after divorce.

required to attend before they can proceed with an application for divorce. This kind of mandatory parenting education is endorsed by a broad range of experts. The National Family Law Section of the Canadian Bar Association (CBA), for example, endorses the Alberta model, and "recommends that separating spouses be required to attend a government-funded parental education program before commencing the litigation process in relation to custody and access."

The Special Joint Committee similarly recommended that all parents seeking parenting orders be required to participate in a parenting education program. These programs would be designed to educate parents about the post-separation reactions of parents and children, children's developmental needs at different ages, the benefits of cooperative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution. Although this recommendation is obviously closely tied to the Committee's overall recommendations to abandon the language of custody and access and to implement a system of shared parenting and parenting plans, it would nevertheless be possible to follow a similar recommendation in the context of the existing custody and access regime.

Many child development experts emphasize the value of parenting education in resolving custodial disputes. Rhonda Freeman argues, for example, that "[e]ducational interventions, introduced early in the separation, can be a useful way of supporting parents to make wise decisions about caring for their children in the post-divorce family."[62] According to Freeman, research suggests that "…for some parents, single-session interviews or providing educational materials was sufficient to prompt limited change. To maximize the likelihood of effectiveness, educational interventions would target variables known to mediate children's adjustment to divorce (e.g. parent conflict, coparenting, grieving, parent/child relationships) and skill building (i.e. negotiation, single parenting)."[63]

Although practices vary widely across the country, information sessions are increasingly becoming mandatory at the beginning of divorce applications. And the content of these sessions varies widely: some provide an overview of the law and process of divorce, while others place more emphasis on the impact of divorce on children.

While there is an emerging consensus that parenting education is a useful and constructive resource in the resolution of the issues between separating and divorcing parents, the question that remains is whether the *Divorce Act* should be amended to specifically recognize or mandate such parenting education sessions.

Moving towards a regime that encourages or requires separating and divorcing parents to attend parenting education courses raises questions of jurisdiction and funding. First, who would be responsible for making the courses available? The current practice varies, with the initiatives involving partnerships among family courts, the Department of Justice Canada, provincial attorneys general and provincial child and family services departments. If these programs were to be court-based, or court-associated, it would fall within the jurisdiction of the provincial governments, and would, therefore, have resource implications for the provinces.

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[62] Freeman, supra note 4, at 109

[63] Ibid., at 125.

Secondly, how would the programs be funded? Many of the existing programs are publicly funded. The CBA recommended that the programs be government-funded. There is a strong argument to be made for government funding, particularly if these programs were mandatory. The additional cost of divorce for low income families is not insignificant. At a minimum, some provision should be made to subsidize the costs of parenting educating programs for low-income families, with the possibility of sliding scale fees for participants. There would, then, be serious resources implications, and again, it would be important to determine which level of government would bear the costs.

Thirdly, some attention would need to be directed to establishing national standards for these programs, in terms of both course content and the qualifications of individuals conducting the programs.

Including specific references to the needs of children who have experienced family violence, high conflict or inadequate parenting will also help advance the general educative objectives of legislative reform, giving direction and guidance to judges, lawyers and other individuals within the family justice system.

Mediation and Primary Dispute Resolution

Mediation is a dispute resolution procedure in which a neutral third party helps disputing parties come to their own agreement. Some experts and commentators have suggested that greater reliance should be placed on mediation in the resolution of family law disputes. Following the increasing emphasis on mediation in civil litigation, some suggest that mediation should be mandatory in family law as well. The Special Joint Committee, for example, recommended that divorcing parents be encouraged to attend at least one mediation session, for the specific purpose of helping them to develop a parenting plan.[64]

The vast majority of family law disputes—including disputes about custody and access—are resolved without court intervention, through various forms of dispute resolution.[65] The administration of family law already places enormous emphasis on the settling of disputes by building many steps into the system. Fewer than five percent of family law disputes actually proceed to trial. Mediation, legal aid settlement conferences and various forms of court-managed settlement conferences are already extensively used. A range of voluntary mediation

[64] Recommendation 14, For the Sake of the Children, supra note 1, at 33.

[65] As the Ontario Civil Justice Review's final report (Toronto: Ontario Court of Justice and Ministry of Attorney General, November 1996) observed at 79, there are already a broad range of alternative dispute-resolution (ADR) techniques in place in family law: "At the present time, there is a veritable melange of ADR service delivery models in existence in the family law field. A few court locations have staff mediators on site. The new Family Court sites (that is, the expanded Unified Family Court sites) feature mediation services contracted for by the government. Differing community resources offer a variety of counseling and mediation services at a wide range of prices, including a number of services which are available for free. Legal Aid now requires settlement conferences as a condition precedent to authorizing a certificate to proceed to court; but in a large number of cases, the parties pay for these services themselves."

services is available across the country to help separating and divorcing parents deal with their custody and access disputes.[66]

Although mediation is an increasingly popular mechanism for resolving family-law disputes, many remain cautious about the role that mediation should be expected to play in these disputes. Various government studies into the role of mediation in family law disputes have concluded that, although mediation should be available, it ought not to be mandatory.[67] Serious concerns have also been expressed about the inappropriateness of mediation when there has been a history of spousal violence.

The only reference to mediation in the *Divorce Act* is section 9(2), which requires that lawyers advise their clients of the availability of mediation services. Several provinces include references to mediation and conciliation services in their legislation. For example, in both Ontario and Newfoundland, the legislative schemes allow a court to appoint a mediator in cases of custody and access, at the request of the parties.[68] In Saskatchewan, the *Children's Law Act* allows a court to appoint a mediator at the request of the applicant or respondent.[69] The New Brunswick legislation allows a court to make an order requiring that conciliation services be made available to the parties. Only in the Prince Edward Island legislation is the court given the authority to order the parties to go to mediation.[70]

Other jurisdictions have gone much further, placing an increased emphasis on mediation and primary dispute resolution as a preferred means of dispute resolution, and incorporating these principles into their legislation. A question that needs to be addressed in any reform to the law

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[66] Many of these voluntary programs are government funded, and directed at assisting low-income parents. For example, in Alberta, government-funded voluntary mediation is available for parties with children younger than age of 18, and incomes of less than $40,000. In British Columbia, Family Justice Centres provide mediation for separating parents with modest incomes. In Manitoba, Family Conciliation offers mediation services to assist in resolving custody and access issues. Individuals may apply directly or may be referred by the courts. Section 47(1) of the Court of Queen's Bench Act S.M.1988-89 authorizes the court to refer any issue to a mediator. In Ontario, mediation services are available to help resolve issues that arise from family breakdown, most with user fees determined by the client's ability to pay. This service is expressly authorized by section 31 of the Children's Law Reform Act, which allows courts to appoint a mediator in cases of custody and access.

[67] For example, the report of the Ontario Attorney General's Advisory Committee on Mediation in Family Law, February 1989, concluded that mediation should be voluntary, and that it should be made available to help resolve any or all family issues, except family violence. The Ontario Civil Justice Review's final report supra note 65 also recognized concerns about the limitations of mediation in the family law context, noting that "one cannot ignore the existence of acrimony between the parties, and the presence of spousal abuse problems and power imbalances, all of which may skew the resolution process away from an alternative dispute resolution focus and even make the circumstances inappropriate for such methods." The Civil Justice Review also concluded that although mediation has a role to play in the resolution of some family law disputes, it should not be mandatory in family law.

[68] S.31 Children's Law Reform Act, R.S.O.1990, and s.37, Children's Law Act, R.S.N.1990, c.C-13, as amended by S.N.1995, c.27.

[69] Section 10(1), Children's Law Act, S.S.1990. Section 37(1) of the Newfoundland Children's Act, s.58(1) of the Northwest Territories Family Law Act, s.10(1) of the Saskatchewan Children's Law Act and s. 42(1) of the Yukon Children's Act similarly allow courts to appoint a mediator at the request of the parties. Section 3 of the British Columbia Family Relations Act allows the court to appoint a family counsellor to assist in the resolution of the dispute.

[70] Section 3, Family Law Reform Act, R.S.P.E.I.1988, c.F-3, Part II.

of custody and access is the extent to which the legislation should specifically address the role of mediation and alternative dispute resolution.

Including some reference to mediation and other non-judicial forms of dispute resolution in the *Divorce Act*, without making mediation mandatory, is consistent with the guiding principles for reform, which include the promotion of non-adversarial dispute resolution mechanisms and retaining court hearings as mechanisms of last resort. Encouraging mediation, without making it mandatory is also consistent with the general policy direction articulated by the federal government: reforming the family law system to better recognize the diverse requirements for dispute resolution, and the importance of developing a range of services to respond to these diverse needs.

In reviewing each option for reform, this paper will consider if and how a reference to these divorce-related services could be incorporated into the *Divorce Act*.

Reasonable Expectations of Legal Change

A final and crucial theme involves the question of what legal reform itself can realistically be expected to accomplish. The objectives of the reform to reduce parental conflict and increase cooperation, particularly by encouraging attitudinal change, although laudable, present a tall order for legislative reform. A central issue that needs to be addressed is the extent to which law reform—in general and the three options for reform under consideration here in particular—can be expected to advance or achieve these objectives.

Other jurisdictions that have implemented significant reforms to the law of custody and access have also set out to change attitudes and behaviors. Jurisdictions that have replaced the language of custody and access with notions of shared or joint parenting or parenting plans or both had all hoped to bring about a fundamental change in the approach that parents take towards their children during separation and divorce. The objectives have been to reduce parental conflict and promote a more cooperative approach to parenting, in which both parents can continue to play an active role in their children's lives following separation and divorce.

It is not at all clear that these objectives have been realized. While the developments in these other jurisdictions will be discussed more extensively below, research on the impact of reforms suggest that, in at least some jurisdictions, there has not been a significant reduction in conflict between separating and divorcing parents. As one commentator has written, the reforms to the U.K. law "ha[ve] not succeeded in taking the heat out of disputes around children on divorce despite its introduction of a concept of 'parental responsibility' which would endure beyond the end of the marriage."[71] Rather, several jurisdictions have experienced an increase in litigation rates following the enactment of these reforms.[72]

[71] Jeremy Roche "Children and Divorce: A Private Affair?" Sclater and Piper, supra note 17.

[72] H. Rhoades, R. Graycar, and M. Harrison, The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectation? Interim Report, April 1999 (University of Sydney and the Family Court of Australia) (hereafter Interim Report). Gwynn Davis "Privatising the Family" [1998] Family Law 614.

Many reasons have been offered for this increase in litigation rates. Any change to a legal regime is likely to produce new ambiguities and confusions about the precise nature of the legal rules that will require judicial clarification. However, another frequently cited explanation is the unrealistic expectations created by the reforms. Contact parents (the new language for parents with access to their children) have often misinterpreted the reforms as giving them more rights, which they are intent on asserting. Many professionals in the family justice system in these jurisdictions have commented on the "increased bitterness" and "unrealized hopes" of these parents, which are, in turn, fueling more litigation.[73]

At the same time, these jurisdictions have not yet witnessed a significant change in the way in which parental responsibility is allocated between the parents. Research into the impact of the reforms in the U.K., Australia and Washington state has revealed that the allocation of parental responsibility remains largely unchanged from its pre-reform allocation.[74] These jurisdictions have all moved away from the language of custody and access, replacing it with notions of parental responsibility or parenting plans or both.

The reforms, then, seem to have increased expectations on the one hand, but not significantly altered the allocation of parental responsibility. And the increased expectations, at least in some contexts, have led not to more cooperative parenting but, rather, to more contested cases and litigation.

A legal regime could be set up that emphasizes the importance of cooperation, and encourages parents to resolve their parenting disputes in as non-adversarial a manner as possible. The law could be reformed so that it is not itself an obstacle to the co-operative resolution of parenting disputes. And it may be that moving away from the language of custody and access or encouraging the use of mediation and other primary dispute resolution techniques rather than litigation could help ensure that the law facilitates rather than obstructs the cooperative resolution of parenting disputes.

There is also an important symbolic role for law reform. By exhortation and standard setting, the law can send powerful messages about the process of separation and divorce—the importance of parental cooperation, of non-adversarial dispute resolution and of ongoing parental involvement—which may have some impact on the attitudes that parents bring to the resolution of their parenting disputes. Richard Chisholme has suggested in relation to the Australian reforms that the greatest potential for the law to bring about the desired attitudinal changes may be in terms of how the new provisions "frame the issues to be considered by parents and others involved in children's cases."[75] The new provisions, with their emphasis on cooperation and ongoing involvement, may frame the issues in a new way, and allow parents and professionals to approach the disputes through a new lens.

However, as Chisholme argued, and as subsequent research has begun to substantiate, the extent to which law reform can bring about such attitudinal change will depend in large part upon the attitudes of lawyers and other professionals. Few separating and divorcing parents sit down to

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[73] In Australia, see Interim Report, ibid. In the U.K., see Roche, supra note 71 and Davis, ibid.

[74] Interim Report, ibid., Dunne, unpublished study is described in the American Law Institute report supra note 26, at 75, Lye, cited in Special Joint Committee.

[75] Chisholme, supra note 8, at 195.

read the law themselves. Rather, they will rely on the representations of their lawyers and other divorce professionals.

> The major variable in determining the success of the Act in achieving its primary objectives will be the enthusiasm, open-mindedness and skill of those who work most directly with parents, notably lawyers, registrars, and community and court based counsellors and mediators.

An important factor, then, in the extent to which law reform can bring about the desired attitudinal change will be the attitudes of divorce professionals. And many of these professionals are already active proponents of cooperative approaches to the resolution of parenting disputes.

It is also important to recognize that no law can *force* people to cooperate. A regime that emphasizes cooperation and the continued involvement of both parents in the lives of their children may work well for some separating and divorcing parents, who are able to work collaboratively notwithstanding their differences. But, no such regime can force individuals who are completely estranged to get along with one another. Neale and Smart have suggested the following, in relation to the U.K. reforms:

> Family law seems to assume that co-parenting will foster collaborative relationships but our evidence suggests that if there is a causal link at all, it operates only in the other direction: collaborative, caring relationships may support the development of co-parenting arrangements and help to sustain them over time.[76]

In the context of separation and divorce, it is important that the law not entirely lose sight of the very real fact that the parents' relationship has broken down. Couples separate because they no longer get along. And the process of separation is frequently accompanied by a range of emotions—denial, anger, guilt and depression—that only further antagonize the dissolving relationship. Many couples can move beyond their emotional turmoil, and develop cooperative parenting relationships. Some will do it on their own, and others will need assistance and encouragement, through lawyers, counsellors or mediators. Many couples cannot, and no amount of encouragement is going to make a difference to high conflict families with individual parents intent on fighting. There is a limit to what law reform can realistically be expected to accomplish. A legal regime can encourage separating parents to cooperate, but it cannot ultimately coerce them to do so.

There may be an important distinction between encouraging a non-adversarial approach to the resolution of parenting disputes, and promoting a cooperative, co-parenting relationship. The legal system can be designed to discourage adversarial approaches to dispute resolution. Parents can be encouraged through a range of divorce-related services to try to resolve their disputes without going to court. And at least some changes to custody law and practice may help reduce the reliance on formal adversarial proceedings in court to resolve parenting disputes. However, it is much less clear that a legal system can be designed to encourage cooperative parenting relationships after divorce. As Maccoby and Mnookin have observed "the co-parental

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[76] Bren Neale and Carol Smart "In Whose Best Interest? Theorising Family Life Following Parental Separation or Divorce" in Sclater and Piper (eds.) supra note 17.

relationship between divorced parents is something that needs to be constructed, not something that can simply be carried over from pre-separation patterns."[77] Their research on the reforms in California divorce law, explicitly authorizing joint custody, found that while most divorcing parents were able to resolve their parenting arrangements through non-adversarial means, "most divorcing parents are unable to develop cooperative co-parental relationships."[78]

Law reform is also unlikely to change the way in which couples structure their lives and their child-care arrangements during their relationships, with the latter continuing to be one of the most important determinants in the restructuring of the parenting relationship after separation. Maccoby and Mnookin have long argued that there are real limits to the role law can play in changing the patterns of post-divorce behaviour.[79] The way in which parents structure their child care during the relationship continues to play a critical role in the allocation of parenting responsibility after divorce. Stability and continuity from the children's perspective, as well as basic social expectations on the part of the parents, are such that parents themselves are likely to replicate pre-divorce child-care arrangements.

> Unless family law can modify the pre-divorce roles, then it is doubtful that it can have a much greater impact on the post-divorce division of parental responsibility: most divorcing couples would still typically end up allocating primary child-rearing responsibility to mothers.[80]

Maccoby and Mnookin recognize that the legal system can make parenting relationships worse, by emphasizing adversarial dispute resolution. They, therefore, support efforts to "dampen the adversarial nature of traditional divorce proceedings."[81] However, they question the extent to which family law can bring about a significant change in "the way most parents allocate basic responsibility for day-to-day care, either before or after separation."[82]

Again, this is not intended as an argument against reform. It is rather an attempt to be realistic about what law reform can reasonably be expected to accomplish. A legal regime can set normative standards; it can attempt to send out a strong message about appropriate forms of behaviour. There is value in this symbolic role of law reform. But, law reform can also create unrealistic expectations that will, in turn, fuel the fires of conflict. And law reform cannot eliminate conflict for all separating and divorcing parents; nor can it transform the way in which couples structure their child-care arrangements during their relationship.

It will be important to keep these limitations in mind in evaluating each option for reform. Any consideration of the extent to which each option can advance the objectives for reform must be balanced with the recognition that no law reform may be able to realize all of these objectives.

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[77] E. Maccoby and R. Mnookin Dividing the Child: Social and Legal Dilemmas of Custody (Cambridge: Harvard University Press, 1992), at 276.
[78] Ibid., at 279.
[79] Ibid., at 279.
[80] Ibid.
[81] Ibid., at 281.
[82] Ibid., at 280.

OTHER JURISDICTIONS

In recent years, many other jurisdictions have attempted to meet similar challenges and undertaken significant reform to the law of custody and access. Many jurisdictions have moved away from the language of custody and access, and set up new regimes to govern the resolution of parenting disputes during separation and divorce. For example, both the United Kingdom and Australia have replaced custody and access with a regime based on residence, contact and orders for specific issues and special purposes. A number of American jurisdictions have also begun to replace custody and access orders with various kinds of parenting orders. Montana, for example, recently substituted the terms *parenting* and *parenting plan* for *custody*, and *parental contact* for *visitation* throughout its domestic relations statutes.[83] Michigan has substituted the term *parenting time* for *physical custody*.[84] Florida has set up a regime based on shared parenting. Washington has replaced custody and access with a regime in which parenting functions are allocated within a parenting plan. The American Law Institute recently recommended that custody and access orders be replaced with a regime that requires the allocation of custodial responsibility and decision-making authority, primarily within parenting plans.

While a comprehensive review of all of these developments is well beyond the scope of this paper, particular attention will be given to the reforms adopted in the United Kingdom, Australia, the states of Washington and Maine, and the proposals of the American Law Institute. This section will also briefly review the impact of these legislative reforms, when information is available. The paper will subsequently draw on the experience of these other jurisdictions in examining and evaluating the three options for reform.

The United Kingdom's *Children Act*, 1989

Overview

In the United Kingdom, the *Children Act* 1989 replaced custody and access with a regime based on parental responsibility, and specific kinds of parenting orders.

Parental Responsibility

Parental responsibility, which was intended to replace the idea of parental rights, is defined as "all rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his or her property."[85] Parental responsibility is acquired automatically by married parents and unmarried mothers. This parental responsibility is unaffected by any change in the marital status of parents. Unmarried fathers can also acquire parental responsibility.[86] Where more than one person has parental responsibility, the Act provides that "each of them may act alone and without the other in meeting that responsibility."[87] The model is described by

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[83] Mont.Code Ann. ss 40-4-201, 40-4-205; 40-4-212 (1997).
[84] Mich. Comp.Laws ss 722.27a (West supp. 1997).
[85] United Kingdom, Children Act, 1989, c.41, S.8.
[86] S.2(1) "Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility." Unmarried fathers do not have parental responsibility unless acquired in accordance with the Act.
[87] S.2(7), Children Act.

commentators as one of "joint but independent responsibility: that is, either parent… may act unilaterally in meeting his or her parental responsibility for the child, without consulting the other."[88]

Parenting Orders

The *Children's Act* provides for residence orders (settling arrangements as to the person with whom the child is to live), contact orders (requiring the person with whom the child lives to allow the child to visit or stay with the person named in the order, or otherwise have contact with that person), prohibited steps order (stipulating that no step which might be taken by a parent in meeting his or her parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court) and specific issue orders (giving directions for the purpose of determining a specific question that has arisen or that may arise in connection with any aspect of parental responsibility for a child).[89]

Presumption Against a Court Order

In its general definition of the welfare of the child, the *Children Act*, 1989 provides that where a court is considering whether or not to make an order, "it shall not make the order… unless it considers that doing so would be better for the child than making no order at all."[90] This presumption of "no order" reflects the philosophy of private ordering of the Act, and the bias against judicial intervention in the resolution of disputes involving children. The scheme is intended to encourage parties to settle their own parenting arrangements, without resort to the courts.[91] It has restructured the relationship between private ordering and judicial intervention in a manner that now strongly favours private ordering.

Presumption in Favour of Contact

The *Children Act* does not establish a presumption in favour of contact. However, the courts have developed a very strong presumption in favour of contact.[92] The English Court of Appeal has held that contact should not be prevented unless there are cogent reasons for doing so. It has stated that the courts should take a medium- and long-term view of the child's development, and not accord excessive weight to short-term problems, such as the contact parent's present psychiatric instability.[93] This presumption has subsequently been confirmed by the *Family Law Act* 1996, which supplements the provisions of the *Children Act* in the context of separation and divorce. Section 11(4)(c) states that the welfare of the child is best served by regular contact with those with parental responsibility.

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[88] Dewar "The Family Law Reform Act 1995 (Cth) and the Children Act 1989 (U.K.) Compare—Twins or Distant Cousins?—A Practitioner's Perspective" (1996) 10 Australian Journal of Family Law 48 at 20. The U.K. Law Commission Report on Family Law, Review of Child Law and Guardianship and Custody (1988), recommended the need for joint but independent parenting: "Whether or not the parties are living together, a legal duty of consultation seems both unworkable and undesirable." In this legislative scheme, then, parents with parenting responsibility each have decision-making authority over the child, but each may exercise this authority independently.

[89] Section 8, Children Act. These orders are known as section 8 orders.

[90] S.1(5), Children Act.

[91] Dewar, "Distant Cousins", supra note 88 at 21-21.

[92] See Re H (Minors) (Access) [1992] 1 FLR 148; Re M (Contact: supervision) [1998] 1 FLR 727.

[93] Re M, Ibid.

Other

The *Children Act* includes no specific reference to the potential relevance of violence to resolving parenting disputes.[94] Despite the emphasis on private ordering, there is also no reference to parenting plans.

Evaluation of the U.K. Reforms

The objective of the U.K. reforms was to promote the ongoing involvement of parents, particularly fathers, in the lives of their children after separation and divorce. It was hoped that the change in terminology would help reduce parental conflict and affirm the ongoing parental responsibility of both parents. It was hoped that the changes would bring about change in attitudes, encouraging non-resident parents to keep in contact with their children.[95]

Many commentators welcomed the change, and at least some evidence suggests that "reactions to date to the change in terminology made in that Act have been positive."[96] However, the Act has also been subject to a number of criticisms. For example, the definition of parental responsibility has been criticized not only for its generality, but also because it "immediately throws one back to the rights and duties concept which 'responsibility' was supposed to replace."[97]

Research has suggested that there has not been a significant reduction in parental conflict following the reforms. There has, for example, been a dramatic increase in litigation over contact orders.

Although the number of contact orders in the first year the *Children Act* was in force was lower than before the Act was passed, between 1992 and 1996 the number of contact orders rose by 117 percent.[98] There has also been an increase in the number of residence and specific-issues orders.[99] Research has suggested that the availability of specific-issues orders may have encouraged greater resort to the courts for trivial disputes.[100]

Concern has also been expressed about the way in which contact has been handled. The English courts have established a strong presumption in favour of contact. A number of studies have found that both lawyers and mediators tend to view domestic violence as irrelevant in making

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[94] The definition of the welfare of the child in S.11(4) of the Family Law Act does, however, include a reference to "any risk to the child attributable to (i) where the person with whom the child will reside is living or proposes to live; (ii) any person with whom that person is living or with whom he proposes to live; or (iii) any other arrangement for his care and upbringing." The Act specifically addresses domestic violence in the context of the matrimonial home. It also provides for non-molestation orders.

[95] See Neale and Smart "Experiments with Parenthood?" (1997) 31 Sociology 201.

[96] Family Law Council, Letter of Advice to the Attorney General on the Operation of the (U.K.) Children Act, 1989, March 1994.

[97] N.V. Lowe "The Meaning and Allocation of Parental Responsibility—A Common Lawyer's Perspective" (1997) 11 International Journal of Law, Policy and the Family 192, 195.

[98] Davis, supra note 72.; Interim Report, supra note 74, at 41.

[99] Davis, Ibid.

[100] Interim Report, p.46.

contact orders, or that they tend to advise clients that the courts will view it so.[101] The courts have also disregarded the relevance of the degree of conflict between the parents, and have cast women who oppose children's contact with their fathers as "implacably hostile."[102] Courts have developed what they have referred to as a "robust approach" to contact, enforcing it notwithstanding the fierce opposition of residential parents, including those parents who have been victims of family violence.[103] More recently, there has been a shift in the courts' approach, with the Court of Appeal accepting that contact may be limited if the father presented a risk of direct physical harm to the children, or indirect harm to the child by a physical risk to the mother.[104] Still, many remain concerned that the presumption in favour of contact outweighs the countervailing interest in protecting children from the harm of violence, high conflict and inadequate parenting.[105]

Australia's Family Law Reform Act

Overview

In Australia, the language of custody and access was also abandoned in favour of a regime based on parental responsibility and parenting orders. The *Family Law Reform Act* 1995 extensively reformed Part VII of the *Family Law Act* dealing with the resolution of parenting disputes during separation and divorce. Although the reform was informed by the U.K. *Children Act*, the legislative regime includes a number of distinct features.[106]

Parenting Responsibility

The *Family Law Reform Act* is based on the idea of parental responsibility, which is defined as "all the powers, duties, responsibilities and authority which, by law, parents have in relation to children."[107] Parental responsibility has replaced the former powers of guardianship (long term responsibility) and custody (day-to-day responsibility). Unlike in the U.K. *Children Act*, the definition of parental responsibility in the Australian legislation excludes any reference to parental rights. Under the new law, all parents are vested with parental responsibility, and this responsibility remains unaffected by separation and divorce. Also unlike the *Children Act*, parental responsibility does not depend on whether the parents were married; rather, all parents have parental responsibility, regardless of marital status.

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[101] Marianne Hester and Lorraine Radford Domestic Violence and Child Contact Arrangements in England and Denmark (Polity Press,1996); C. Smart "Good and Bad Lawyers? Struggling in the Shadow of the New Law" (1997) 19 Journal of Social Welfare Law 377; Viktor Hall "Domestic Violence and Contact" [1997] Family Law 813.

[102] Kaganas supra note 17. See for example Re W [1994] 2 FLR 441 and Re:O [1995] 2 FLR 124.

[103] In Re:P [1996] 2 FLR 314, the Court of Appeal made a supervised access order in favour of a father who has threatened to kill the children, and who had been imprisoned for attempted murder of the mother. The court concluded that the possible detriment to the children of not seeing their father outweighed the possible detriment to them through a threat to their mother's health.

[104] Re: D [1997] 2 FLR 48.

[105] There are, for example, cases in which mothers have been jailed for refusing contact to a father, even a father who has been found guilty of domestic violence. The Court of Appeal has held that the damage to children of not having a relationship with their father outweighs any damage that the children might suffer due to their mother's imprisonment. See Re: N [1996] E.W.J. See Kaganas supra note 17.

[106] Family Law Council, supra note 96.

[107] S.61C, Family Law Act, 1995.

Parenting Orders

The *Family Law Reform Act* has adopted a similar regime, replacing custody and access orders with parenting orders, defined generally as an order made under Part VII of the *Family Law Act* dealing with the person(s) with whom a child is to live, contact between a child and another person(s), maintenance of the child, and other aspects of parental responsibility. It then defines these orders more specifically: residence orders (the person(s) with whom the child is to live), contact orders (contact between a child and another person(s)), child maintenance orders, and special purpose orders (any aspect of parental responsibility other than residence, contact or child maintenance).

Under the new legislation, a parenting order does not take away or diminish parental responsibility, unless expressly provided for in the order or, if necessary, to give effect to the order.[108]

Courts are to make these orders in the best interests of the child. The best interests of the child are defined in section 68F, and include a statutory list of factors that the court must consider, including the following:

- the wishes of the child;
- the nature of the child's relationship with both parents;
- the practical difficulty and expense of a child having contact with a parent;
- the capacity of each parent to provide for the needs of the child;
- the maturity, sex and background of the child;
- the need to protect the child from physical and psychological harm that may be caused by abuse, or by being directly or indirectly exposed to abuse or violence directed towards another person;
- the attitude to and responsibilities of parenthood displayed by the parents;
- any family violence involving the child, or a member of the child's family;
- whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; and
- any other facts or circumstances that the court thinks are relevant.

Objects Clause

The new legislation inserts an objects clause into Part VII of the *Family Law Act*. Section 60B provides that "the object of this Part is to ensure that children receive adequate and proper parenting…, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children."[109] The Act further states that the principles underlying these objects are, "except when it is contrary to the child's best interests," that children have the right to know and be cared for by both parents, that children have the right of contact, on a regular basis, with both parents and any other person significant to the care, welfare and development of the child, that parents share duties and responsibilities

[108] S.61D.
[109] Section 60B(1).

concerning the care, welfare and development of the child, and that parents should agree about the future parenting of the child.[110]

The Act includes a number of additional statements of object and purpose in relation to particular provisions, as discussed below.

Violence

The *Family Law Reform Act* includes a number of provisions to ensure that children are protected from violence. The best interests of the child test includes specific references to violence.[111] Section 68F(2) provides that the court must consider the following:

> (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by
> (i) being subject or exposed to abuse, ill-treatment, violence or other behaviour; or
> (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;"
> (i) any family violence involving the child or a member of the child's family;
> (j) any family violence order that applies to the child or a member of the child's family"[112]

Family violence is expressly defined in the Act as "conduct, whether actual or threatened by a person towards or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal well-being or safety."[113]

The Australian legislation also includes a specific provision addressing family violence and parenting orders. Section 68K provides that in "considering what order to make, the court must, to the extent it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order: (a) is consistent with any family violence order; and (b) does not expose a person to an unacceptable risk of family violence."[114]

The Act includes a number of additional provisions that attempt to ensure that contact orders are not inconsistent with family violence orders.[115] While the best interests of the child test requires that a court have regard to any family violence or family-violence order in making an order

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[110] Section 60B(2).
[111] S.68F.
[112] S.68F(2).
[113] S.60D(1).
[114] S.68K.
[115] Family-violence orders are defined as "any order made under a prescribed law of a state or territory to protect a person from family violence." Division 11 of the Family Law Act dealing with the relationship between contact orders and family-violence orders has as its express purpose "(a) to resolve inconsistencies between Division 11 contact orders and family-violence orders; and (b) to ensure that Division 11 contact orders do not expose people to family violence; and (c) to respect the right of a child to have contact, on a regular basis, with both the child's parents, where: (i) contact is diminished by the making or variation of a family violence order; and (ii) it is in the best interests of the child to have contact with both parents on a regular basis." (Section 68Q, Family Law Act)

under the Act, section 68S provides that contact orders prevail over inconsistent family-violence orders. Section 68R provides that a court making a contact order inconsistent with a family-violence order must provide for a detailed explanation of the purpose of the contact order, the obligation that the order creates, the consequences that may follow if there is failure to comply, the reasons for making the order inconsistent with the family-violence order, and the circumstances in which the *Family Law Act* order may be varied or revoked.[116] Section 68T also allows a court exercising jurisdiction under state law in relation to family violence to vary, discharge or suspend existing provisions for contact whether made by order or plan. It can only do so if, at the same time, it makes a family-violence order.[117]

Mediation and Primary Dispute Resolution

The Australian *Family Law Act* encourages the use of mediation and counselling services to resolve family-law disputes, in general, and parenting disputes, in particular. The Act describes these processes as "primary dispute resolution," to suggest that these forms of dispute resolution should be used by separating and divorcing couples before seeking a court-ordered resolution. Part III of the Act governs the general use of mediation and counselling services. The basic objective of Part III is to encourage people to use primary dispute resolution (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made, provided the mechanisms are appropriate in the circumstances and proper procedures are followed (s.14, 14A). Section 14F requires the courts to consider advising people about primary dispute-resolution methods. This duty is required of courts to ensure that parties, at all stages of their disputes, are advised of the primary dispute-resolution methods available.[118]

Part VII of the Act, specifically dealing with children and parenting disputes, also includes a number of provisions encouraging the use of primary dispute resolution. As noted, the statement of object of the Act includes the phrase "parents should agree about the future parenting of their children." Section 63B further provides that parents are encouraged "to agree about matters concerning the child rather than seeking an order from a court." Part VII includes provisions that encourage the use of counselling. Section 62B imposes an obligation on courts and lawyers to consider advising parents who have commenced proceedings about the availability of counselling for Part VII orders. Section 65F further requires that parents attend a conference with a family and child counsellor to discuss the matter before a parenting order is made.[119] The objective of the conference is to explore alternative ways of resolving the parenting dispute.

Parenting Plans

The *Family Law Reform Act* includes provisions dealing with parenting plans. Under the Australian scheme, parents are encouraged and allowed to enter into parenting plans, although

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[116] Section 68R, Family Law Act.

[117] The law is made more complicated by the fact that orders under 68R are governed by the best-interests-of-the-child standard, whereas for orders under 68T, the best interests of the child are a factor, along with the interests of the afflicted party to be protected against violence.

[118] Section 14G of the Family Law Act imposes a similar duty on legal practitioners.

[119] Unless the court is satisfied that there is an urgent need to make the order, or there is some other special circumstance, such as family violence, that would make the attendance at a conference inappropriate. See section 65F(2), Family Law Act.

these plans are not mandatory. As mentioned, the Act strongly encourages parents to reach their own agreements about the future parenting of their children.[120]

The Australian scheme has no mandatory requirements for plan content. It simply provides that a parenting plan may deal with (a) the person(s) with whom a child is to live, (b) contact between a child and another person; (c) maintenance of a child; (d) any other aspect of parental responsibility. There is no requirement that the parenting plan allocate decision-making authority, nor that the plan include a dispute-resolution mechanism. The Family Law Council considered whether the legislation should provide any further guidance regarding the content of parenting plans. It was the Council's view that, although sample parenting plans might be helpful in providing a checklist of the matters that parents would generally need to address in their plans, it was not necessary "for the legislation to contain any *pro forma* parenting plans. Essentially, the form of individual parenting plans will depend on the wishes of the parents involved."[121]

If parents do negotiate a parenting plan, that plan must then be filed with the Court. According to section 63E, the Court retains considerable discretionary power in reviewing the parenting plan, since it will only register the plan if it is in the best interests of the child. Even if registered, the court must not enforce its provisions if it considers that it would not be in the best interests of the child.

Finally, the Australian legislation does not allow for a variation or modification of a parenting plan that has been registered with the courts, but rather, requires that the parties revoke the agreement.[122] The Act then sets out the court's powers to set aside a parenting plan.[123] If both of the parties want to modify their agreement, they may apply to have their parenting plan revoked, and then enter into a new agreement. If only one of the parties wants a modification to the agreement, he or she may make an application to have the plan revoked (on the basis of fraud, duress or undue influence, or the best interests of the child).[124]

Evaluation

An interim report on the *Family Law Reform Act* has attempted to assess some of the immediate and longer terms effects of the Act, over a three-year period.

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[120] See section 60B(2)(d) and section 63B, at supra notes 109-110.
[121] Family Law Council, supra note 96, at 14.
[122] S.63D, Family Law Act.
[123] S.63H, Family Law Act provides that the court can set aside a registered plan if it is satisfied that the consent of the party was obtained by fraud, duress or undue influence, the parties want the plan set aside, or it is in the best interests of the child to set the plan aside.
[124] S63H(3) provides that a court may, pursuant to S.65D(2), make a parenting order that discharges, varies, suspends or revises provisions of a parenting plan that have effect as if they were a parenting order. S65D(2) provides that a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

Litigated Disputes

Family Court statistics indicate that there has been an increase in the number of applications for residence, contact and specific-issues orders since the Act was passed. These statistics also show a steady increase in applications due to an alleged contravention of a child order (see Table 1).

Table 1 Parenting Orders in Australia

Year	Number of contact orders sought[125]	Number of residence and specific issues orders sought[126]	Number of orders for contravention of child order[127]
1994-95	14,144	13,315	n/a
1995-96	13,814	12,595	786
1996-97	21,897	33,304	1,434
1997-98	23,958	38,411	1,659

Solicitors interviewed in the Australian study were also of the view that there was an increase in disputes between parents following the making of parenting orders.

> The majority of such disputes were said to be instigated by non-resident fathers. Some solicitors said this was a result of the 'unrealized hopes' and 'increased bitterness' of fathers who had expected to obtain greater parenting rights under the reforms, and/or were critical of mothers for failing to share decision-making responsibilities. Others said the increase in disputes stemmed from contact fathers who expected mothers to do 'the lion's share of the work' but 'took every opportunity' to challenge their care of the children and/or the lack of consultation about day-to-day decisions.[128]

The solicitors interviewed in the Australian study also indicated that they were witnessing "applications involving trivial or 'technical' breaches of orders, which had not existed before the reforms."[129]

Contact

The Australian regime states, as a general principle, that "children have a right of contact, on a regular basis, with both parents." This principle is expressed to apply "except when it is or would be contrary to a child's best interest."[130] This right of contact was one of the most contentious aspects of the *Family Law Reform Act*, 1995. While many argued that it was a positive development, ensuring that non-resident parents would be more involved with their children, others were concerned about the potential for abuse.

> First it was thought that the reforms provided a contact parent who wished to harass his former partner with the opportunity to seek orders relating to the minutiae of her care of the child. Second, coupled with the statutory exhortations to 'share' and 'agree' about

[125] Interim Report, supra note 72, at 41.
[126] Ibid., at 46. The increase in the number of these applications since the reforms also represents an increase in such applications as a percentage of all orders sought.
[127] Ibid.
[128] Ibid., at.51.
[129] Ibid., at 51.
[130] Section 60B(2), Family Law Act.

> parenting arrangements, the child's right to contact was seen to have the potential to be used to pressure a mother with legitimate concerns about her child's welfare into an agreement that compromised her own safety and the child's best interests.[131]

In contrast to the U.K. courts, however, the Australian Family Court has held that a child's right to contact is qualified by the best interests principle.[132] The provisions in s.60B(2) were held by the court not to create any presumption in favour of contact, but rather to provide the context for considering the child's best interests.

The *Interim Report* found that the rate of orders refusing contact at interim hearings has dramatically declined since the introduction of the reforms. By way of contrast, the rate of refusing contact in final orders has not markedly changed with the introduction of the reforms.

> Although the majority of interim contact applications involve allegations of potential harm to the child, usually because of domestic violence, it is now rare for contact not to be ordered at an interim hearing. In some regions, post-Reform Act orders for child to live 'week about' with each parent until trial are not uncommon, and have been made despite allegations of domestic violence. Such orders have been made on the basis that it would be unfair to create a status quo in favour of one parent before the allegations are tested at trial.[133]

According to the report, it is clear that this change in interim orders is "at least in part attributable to the Reform Act principles, particularly, the 'right to contact' principle in s.60B(2)(b) and the idea of parental 'equality' which is said to be in keeping with the 'spirit of the reforms.'"[134] While the impact of the principle of contact is not as severe as in the U.K., the findings would suggest that there is at least some reason to be concerned with the way in which the principle in favour of contact is operating in the context of family violence, particularly at the interim stage.

Parenting Plans

The *Interim Report* found that parenting plans are not being used. In fact, the report documents a decrease in the number of private agreements after the enactment of the reforms.

> One area of the Reform Act amendments that appears to have had, at most, minimal impact upon the practice of solicitors, is that dealing with parenting plans. Only three of the solicitors interviewed had assisted parties to draw up a parenting plan, and only one of those plans had been subsequently registered. Similarly, an overwhelming majority of the solicitors who responded to the questionnaires (91 percent) noted that they were using parenting plans less frequently than they had used child agreements under the pre-Reform

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[131] Interim Report, supra note 72, at 14.
[132] In the Matter of B and B: Family Law Reform Act, 1995, Appeal No. NA 35 of 1996 No.TV 1833 of 1996, Full Court of The Family Court of Australia (decision July 1997).
[133] Interim Report, supra note 72 at ix.
[134] Ibid.

> Act legislation. This is supported by Family Court statistics, which show that far fewer parenting plans have been registered than child agreements prior to the reforms.[135]

The solicitors interviewed often referred to the cumbersome registration and amendment requirements required under the Australian scheme as impediments to the use of these parenting plans.

The amendments to the Australian *Family Law Act* to include parenting plans appear, then, to have done little to advance the general objectives of encouraging private agreements and reducing conflict.

Violence Provisions

The provisions are intended to address the interrelationship between orders made by the Family Court and domestic violence orders made under state law by courts of summary jurisdiction, and have been criticized as being unduly complicated. The *Interim Report* found that courts are rarely using the provisions in Division 11 of the Act. Judges and solicitors alike commented that Division 11 is "too complicated" and "too cumbersome." The Report also cited a recent review of the operation of Division 11, which found that s68R "is rarely used."[136] Their review of unreported judgments similarly indicated that "while the existence of family-violence orders is widespread in contact proceedings, Division 11 is rarely referred to when deciding appropriate contact arrangements, and none of the judgments mentioned s.68K."[137]

Maine's Domestic Relations Act

Parental Rights and Responsibilities Orders

The Maine *Domestic Relations Act* replaces the idea of custody and access with that of parental rights and responsibilities orders. The Act provides that a court order awarding parental rights and responsibilities must include allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities.

Allocated parental rights are defined as follows:

> "Allocated parental rights and responsibilities" means that responsibilities for the various aspects of a child's welfare are divided between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. Responsibilities may be divided exclusively or proportionately. Aspects of a child's welfare for which responsibility may be divided include primary physical residence, parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses and any other aspect of parental rights and responsibilities. A

[135] The Interim Report notes that in 1997-98, 352 parenting plans were registered nationally. By comparison, 1,008 child agreements were registered in 1995-96, and 1,088 were registered in 1994-95.
[136] Kearney McKenzie & Associates, Review of Division 11: Report (February 1998), at ii, as cited by the Interim Report supra note 72, at 53.
[137] Interim Report, supra note 72, at 54f.

> parent allocated responsibility for a certain aspect of a child's welfare may be required to inform the other parent of major changes in that aspect.[138]

Shared parental rights are defined as follows:

> "Shared parental rights and responsibilities" means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities, and both parents confer and make joint decisions regarding the child's welfare. Matters pertaining to the child's welfare include, but are not limited to, education, religious upbringing, medical, dental and mental health care, travel arrangements, child care arrangements and residence. Parents who share parental rights and responsibilities shall keep one another informed of any major changes affecting the child's welfare and shall consult in advance to the extent practicable on decisions related to the child's welfare.[139]

The Act further provides that an award of shared parental rights and responsibilities may include an allocation of the child's primary residential care to one parent, and rights of parent-child contact to the other, or a sharing of a child's primary residential care by both parents.[140]

Sole parental rights are defined as follows:

> "Sole parental rights and responsibilities" means that one parent is granted exclusive parental rights and responsibilities with respect to all aspects of a child's welfare, with the possible exception of the right and responsibility for support.

The Act does not establish a presumption or preference in favour of any one of these three orders. Section 1653(D)(1) provides that the court should make its determination on the basis of the best interests of the child.[141] The Act does, however, provide that "[w]hen the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered."[142] The section further provides that the court shall state its reasons for not ordering a shared parental rights and responsibilities award agreed to by the parents. The Maine scheme, thereby, creates a presumption in favour of enforcing shared parenting arrangements voluntarily agreed to by the parents.

Violence

The Maine *Domestic Relations Act* has a number of provisions specifically directed to the issue of family violence. It includes the following general statement of legislative finding and purpose about relationships among family members in determining the best interests of the child:

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[138] Section 1501, Domestic Relations Act.
[139] Section 1501, Domestic Relations Act.
[140] S.1653 D(1), Domestic Relations Act.
[141] The best interests of the child are defined in section 1653(3), and includes a statutory list of factors to be taken into account.
[142] Section 1653(2)(A), Domestic Relations Act.

> The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.[143]

The relevance of family violence is very specifically addressed in section 1653(6):

> A court may award primary residence of a minor child or parent-child contact with a minor child to a parent who has committed domestic abuse *only if* the court finds that the contact between the parent and the child is in the best interest of the child and that adequate provision for the safety of the child and the parent who is a victim of domestic abuse can be made [Emphasis added].

The Act also extensively addresses the conditions of parent-child contact in the context of domestic violence, setting out and authorizing the use of a range of specific protective measures.[144] The court may impose a range of restrictions and conditions on contact, including requiring that the contact be supervised, that exchange occurs in a protected setting, and that overnight visits be prohibited. It also allows a court to order additional protections, such as ensuring that the address of the child and the victim of violence be kept confidential.

No material was available assessing the impact of the Maine legislation.

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[143] Section 1653(1)(B), Domestic Relations Act.

[144] Section 1653(6)(B) provides that in cases involving domestic abuse, a court may "(1) Order an exchange of a child to occur in a protected setting; (2) Order contact to be supervised by another person or agency; (3) Order the parent who has committed domestic abuse to attend and complete to the satisfaction of the court a domestic abuse intervention program or other designated counseling as a condition of the contact; (4) Order either parent to abstain from possession or consumption of alcohol or controlled substances, or both, during the visitation and for 24 hours preceding the contact; (5) Order the parent who has committed domestic abuse to pay a fee to defray the costs of supervised contact; (6) Prohibit overnight parent-child contact; and (7) Impose any other condition that is determined necessary to provide for the safety of the child, the victim of domestic abuse or any other family or household member."
Section 1653(6) further provides that "C. The court may require security from the parent who has committed domestic abuse for the return and safety of the child. D. The court may order the address of the child and the victim to be kept confidential. E. The court may not order a victim of domestic abuse to attend counseling with the parent who has committed domestic abuse. F. If a court allows a family or household member to supervise parent-child contact, the court shall establish conditions to be followed during that contact. Conditions include but are not limited to: (1) Minimizing circumstances when the family of the parent who has committed domestic abuse would be supervising visits; (2) Ensuring that contact does not damage the relationship with the parent with whom the child has primary physical residence; (3) Ensuring the safety and well-being of the child; and (4) Requiring that supervision is provided by a person who is physically and mentally capable of supervising a visit and who does not have a criminal history or history of abuse or neglect."

Washington's *Parenting Act*, 1987

Overview

In Washington, the *Parenting Act 1987* replaced custody and access with a regime based on parenting plans. The law is an extensive code for regulating post-separation and divorce parenting. It sets out the requirements of parenting plans, the criteria by which courts should review and approve these plans or allocate parenting functions in the absence of parental agreement or both. It also includes extensive provisions on the restrictions and limitations to the allocation of parenting functions within parenting plans. The Act begins with the following statement of policy:

> Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

Parenting Plans

The parenting plan is the central feature of the Washington legislation. The statute requires all separating parents to file a parenting plan that allocates their parenting functions.[145]

The Act defines parenting functions as "those aspects of the parent child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child." Parenting functions include the following:

> (a) maintaining a loving, stable, consistent and nurturing relationship with the child;
> (b) attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
> (c) attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

[145] The objectives of the parenting plan are set out in S. 26.09.184(1) as providing for the child's physical care, maintaining the child's emotional stability, providing for the child's changing needs as the child grows while minimizing the need for future modifications to the plan, setting forth decision-making authority and responsibilities of each parent, minimizing the exposure of the child to harmful parental conflict, encouraging the parents, where appropriate to meet their responsibilities though agreement rather than judicial intervention, and to otherwise protect the best interests of the child."

(d) assisting the child in developing and maintaining appropriate interpersonal relationships;
(e) exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
(f) providing for the financial support of the child.[146]

All parenting plans must include the child's residential schedule, the allocation of decision-making authority, and a dispute-resolution mechanism to deal with future disputes between the parents.[147]

In terms of decision-making, the Act provides that the parenting plan "shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan…" It also states that, "[r]egardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child." The Act further provides that "[e]ach parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent" and "[w]hen mutual decision-making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the dispute resolution process."[148]

In terms of residence, the Act provides that the parenting plan "shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions."[149]

Criteria for Allocating Parenting Functions

One of the distinctive features of the Washington *Parenting Act* is that it provides criteria for evaluating the allocation of different aspects of parenting responsibility within a parenting plan. While the best interests of the child remain the general guiding principle, the Act identifies specific factors to be taken into account in the allocation of decision-making authority and in the allocation of the child's residence.

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[146] Section 26.09.004(3) Parenting Act 1987.
[147] Section 26.09.184(2) Parenting Act provides that, "The permanent parenting plan shall contain provisions for resolution of future disputes between parents, allocation of decision-making authority, and residential provisions for the child."
[148] Section 26.09.184(4).
[149] Section 26.09.184(5). The Act also specifies the requirements and principles guiding dispute resolution. S.26.09.184(3) provides that the dispute-resolution process may include counselling, mediation or arbitration by a specified individual or agency, or court action. It then sets out the guiding principles for dispute resolution, as follows: (a) Preference shall be given to carrying out the parenting plan, (b) The parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support, unless an emergency exists, (c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party, (d) if the court finds that a parent has used or frustrated the dispute resolution without good reason, the court shall award attorney's fees and financial sanctions to the prevailing parent, (e) the parties have the right of review from the dispute-resolution process to the superior court, and (f) the provisions of (a) through (e) of this subsection shall be set forth in the decree.

Dispute-resolution process. In ordering a dispute-resolution process, the Act directs the court to consider "all relevant factors including" any "differences between the parents that would substantially inhibit their effective participation in any designated process; the parents' wishes or agreements, and if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process."[150]

Allocation of Decision-making Authority. The Act states that the court shall approve agreements allocating decision-making authority if it finds that the agreement is knowing and voluntary. It provides that the court shall order sole decision-making authority to one parent if it finds that both parents are opposed to mutual decision-making, or that one parent is opposed to mutual decision-making and such opposition is reasonable.

In allocating decision-making authority between the parents, the Act then directs the court to consider the history of participation of each parent in decision-making, whether the parents have a demonstrated ability and desire to cooperate with each other in decision-making, and the parents geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.[151]

Residential Schedule. In terms of the child's residence, the Act directs the court to make residential provisions "which encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." The court is further directed to consider the following:

(i) The relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
(ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
(iii) Each parent's past and potential for future performance of parenting functions;
(iv) The emotional needs and developmental level of the child;
(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school or other significant activities;
(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.[152]

[150] Section 26.09.187(1).
[151] Section 26.09.187(2)(c).
[152] S.26.09.187(3)(a), Parenting Act.

While identifying a long list of factors to be taken into account in determining the child's residence, the Washington schemes gives the greatest importance to the child's relationship with the parent, including a consideration of which parent provides the primary care for the child.[153]

Limitations on Parenting Plans

The Washington *Parenting Act*, 1987 places a number of restrictions on temporary and permanent parenting plans. All of the above provisions dealing with designation of a dispute-resolution process, the allocation of decision-making authority, and the child's residential schedule are subject to these restrictions. The restrictions are intended to ensure that the scheme protects children and vulnerable parents from a range of harms related to violence, emotional abuse, high conflict and inadequate parenting.

The Act provides that the parenting plan "shall not require mutual decision-making or designation of a dispute resolution other than a court" and that "a parent's residential time with a child shall be limited… if it is found that a parent has engaged in any of the following conduct:

(a) willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;
(b) physical, sexual or a pattern of emotional abuse of a child;
(c) a history of acts of domestic violence as defined… or an assault which causes grievous bodily harm, or the fear of such harm."[154]

A parent's residential time with a child is also to be limited if "the parent has been convicted as an adult of a sex offense" under the relevant state laws.[155] The statute further provides that a parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the above mentioned conduct.[156]

Any limitations imposed by the court on the parent's residential time with a child "shall be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." The section provides that if the court finds that the limitation will not adequately protect the child from harm or abuse, the court shall restrain the parent from all contact with the child.[157] The section further provides that if the court expressly finds that contact between the child and the parent will not cause physical, sexual or emotional abuse or harm to the child, and that the probability of

[153] The Washington Supreme Court, however, has found that this provision does not establish a presumption in favour of the primary caregiver. In re Marriage of Kovacs (1993) 121 Wash.2d 795, 854 P.2d 629.
[154] Section 26.09.191(1), (2)(a), Parenting Act.
[155] Section 26.09.191(2)(a).
[156] Section 26.09.191(2)(b). The Act further provides that the court shall restrain contact otherwise allowed under the Act if a parent has been convicted of being a sexual predator under the relevant state law (2)(c). It also includes a rebuttable presumption that a parent convicted of a sexual offense under the relevant state law presents a risk of harm to the child (2)(d). See generally, section 26.09.191(2)(b)-(n).
[157] Section 26.09.191(2)(m)(i), Parenting Act.

recurrence of the harmful or abusive conduct is so remote that it would not be in the best interests of the child to impose the limitations, then the court need not apply the limitations.[158]

The Act also provides that the court *may* limit any provision in a parenting plan, if any of the following factors exist: (a) neglect or substantial non-performance of parenting functions; (b) long-term emotional or physical impairment that interferes with the performance of parenting functions; (c) a long-term impairment resulting from substance abuse that interferes with the performance of parenting functions; (d) the abusive use of conflict by a parent that creates the danger of serious damage to the child's psychological development; (e) a parent has withheld access to the child for a protracted period without good cause; or (f) any other factors or conduct that the court finds expressly adverse to the best interest of the child.[159]

The Washington legislative scheme thus not only addresses violence as a limiting factor, but is also one of the few statutory regimes to incorporate some reference to the kind of factors that would undermine cooperation in a high conflict family. It is also one of the few statutory regimes to specifically address the problems associated with inadequate parenting, such as neglect, substantial non-performance of parenting functions and substance abuse. The designation of a dispute-resolution mechanism other than a court, mutual decision-making, and even a child's residential schedule are expressly limited by the existence of willful abandonment or refusal to perform parenting functions, and physical, sexual or emotional violence or abuse. The Act also gives the court considerable discretion in further restricting the dispute resolution process, shared decision-making and the child's residential schedule if it identifies any of the other listed conduct or harms.

Evaluation of Legislation

A major evaluation of the Washington *Parenting Act* is currently under way, and research results are not yet available. A number of small studies to date have suggested that the Act has brought about some changes in the allocation of decision-making authority, but no significant change in children's residential schedules.

Jane Ellis conducted a study, based on 300 cases, of the impact of the *Parenting Act* in the first few years after the enactment.[160] The study found a significant increase in the number of parenting orders or plans that provided for joint decision-making.[161] Joint residence arrangements had increased from 3 percent to 20 percent; custody to the mother decreased from 79 percent to 70 percent, and custody to the father decreased from 18 percent to 10 percent. However, the study found a limited number of patterns for weekly residential time were being

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[158] In terms of dispute resolution, the Act provides that the court shall not order any dispute-resolution mechanism other than a court if any of the same conditions listed in 26.09.191 are found, or if the court finds that a party cannot afford it. It also provides that in ordering a dispute-resolution mechanism, a court shall take into account "(a) Differences between the parents that would substantially inhibit their effective participation in any designated process; (b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and (c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process."

[159] Section 26.09.191(3), Parenting Act.

[160] Jane Ellis "Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals" 24 U.Mich. J.L.Ref.65 (1990).

[161] Ibid. Ellis found an increase from 27 percent before the Act was passed to 69 percent thereafter.

used by parents. Forty-one percent of the cases involved residential time on alternative weekends, and an additional 26 percent involved residential time on alternate weekends with one daytime visit per week or alternative week. The contact patterns then were not significantly different from those typically negotiated in custody and access regimes.

A more recent, but smaller, study has been conducted by Dr. John Dunne, a psychiatrist and member of the committee that drafted the *Parenting Act*. Dunne's study involved 50 families who divorced during the first year parenting plans were required in Washington, and 50 families who divorced the previous year. The study did not demonstrate any beneficial effects on the post-divorce quality of the child's relationship with either parent.[162] Dunne observes that some of the specific statutory requirements may have undermined the objectives of the legislation, noting specifically the fact that parents must negotiate a temporary and a permanent parenting plan.

Diane Lye is currently conducting a study of the impact of the Washington *Parenting Act*. Lye appeared before the Special Joint Committee on Child Custody and Access. In her submissions, she distinguished between the impact of the Act on "more affluent parents, who have the time and money to meet with experts and develop plans that really meet their needs, and impact on low-income people, for whom the legislation poses a particular disadvantage."[163]

American Law Institute Proposals

The American Law Institute (ALI) has recently published draft proposals for the law dealing with children on family dissolution.[164] The proposals recommend the adoption of a parenting regime quite similar to the Washington *Parenting Act*. The cornerstone of the proposal is the parenting plans. The ALI recommends that all separating and divorcing parents seeking parenting orders file a parenting plan. Joint plans must also be approved by the court. If parents do not agree, the court must formulate a plan.[165]

A parenting plan must set forth the details of the custodial arrangements, specifying the time that the child is to spend with each parent, and the details of decision-making authority, specifying which parent is to make significant decisions regarding the child's education, health care and other important matters. The plan must also provide for the resolution of future disputes.

If parents do not agree to a parenting plan, the ALI proposes criteria that the court should consider in formulating a plan. The allocation of custodial responsibility is to be determined according to the "approximation rule." According to the approximation rule, "the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking

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[162] The unpublished study is described in the American Law Institute report, supra note 26, at 75.
[163] The Committee's Report quotes directly from Lye's submissions: "Low-income people, immigrant people, or people for whom English is not their first language are often said to be disadvantaged by the system because they cannot afford either the time or the money to get the services they need to make the system work for them." For the Sake of the Children, supra note 1, at 29.
[164] ALI, supra note 26.
[165] See S.2.06, ibid.

functions for the child prior to the parents' separation.[166] The allocation of decision-making authority, by contrast, is to be made according to the best interests of the child, with a specific view to "(a) the allocation of custodial responsibility; (b) the level of each parent's participation in past decision-making on behalf of the child; (c) the wishes of the parents; (d) the level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child; (e) prior agreements of the parties; and (f) the existence of any limiting factors."[167]

As with the Washington law, the ALI proposals set out a range of factors that would limit the allocation of parental responsibility. These limiting factors include abuse, neglect and abandonment of a child, domestic abuse, substance abuse and persistent interference with access.[168] If a parent has engaged in any of these activities, "the court should impose limits that are reasonably calculated to protect the child or child's parent from harm." These limitations include a restriction of custodial responsibility, supervised custodial time, protected exchange, denial of overnight custodial responsibility, and the completion of a program for perpetrators of violence or substance abuse. The proposals further recommend that if a parent has engaged in any of these activities, the court may not allocate custodial or decision-making responsibility to that parent without making special written findings that the child and parent can be adequately protected.

[166] Section 2.09. The ALI commentary explains, ibid., at 114. "The approximation standard is… designed to correspond reasonably well to the parties' actual expectations and preferences…. The way the parents choose to divide responsibility when the family lived together anchors the negotiations in their own lived experience." Section 2.09 provides a number of additional objectives, including, for example, ensuring that parent-child contact does not drop below a basic presumptive amount, regardless of the pre-separation division.
[167] Section 2.10(1).
[168] Section 2.13(1).

II OPTION ONE: CUSTODY AND ACCESS

Current common law in Canada is based on the language of custody and access. The *Divorce Act*, 1985, as well as provincial and territorial legislation dealing with parenting disputes.[169] is based on the legal concepts of custody and access. Section 16(1) of the *Divorce Act* allows a court to make an order of custody or access or both in relation to any child of the marriage. Section 16(4) allows the court to make an order of joint custody. The *Divorce Act* does not define the meaning of these terms with much precision. Custody is defined as including the "care, upbringing and any other incident of custody."[170] Access is not defined, but section 16(5) provides that a spouse who is granted access "has the right to make inquiries, and to be given information, as to the health, education and welfare of the child" unless the court orders otherwise.

The *Divorce Act* provides that decisions regarding custody and access are to be made according to the best interests of the children. Provincial laws governing custody and access are also guided by the best-interests-of-the-child standard. The best interests of the child test is discussed in the section that follows.

The first option for reform of the *Divorce Act* would be to continue to work within this model of custody and access. It would retain the existing terminology of custody and access, while identifying the particular aspects of the existing law that are in need of reform. Specifically, this option would explore the possibilities of (1) elaborating the best interests of the child test to provide a more comprehensive statutory list of criteria, (2) including a list of parental responsibilities, (3) incorporating a reference to parenting plans, and (4) incorporating a reference to dispute resolution and other divorce services.

BEST INTERESTS OF THE CHILD

Under the *Divorce Act* 1985, the best interests of the child is the sole criterion for determining child custody and access. Section 16(8) of the *Divorce Act* states that, in making an order for custody or access, "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child". Section 16(9) provides that "the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child." Section 16(10) further provides that, in making an order for custody or access, "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

Many commentators have argued that the best-interests-of-the-child standard is too vague, giving courts little guidance on the kinds of factors that ought to be taken into account and, thereby,

[169] See supra note 3.
[170] Section 2(1), Divorce Act.

allowing courts to make determinations on the basis of their own subjective views.[171] Some have suggested that the standard should be rejected altogether, while others have argued that the standard could be given more specificity, either through the articulation of presumptions, or a comprehensive list of factors.

This section explores this latter option—of providing a more elaborate list of factors to take into account when determining the best interests of the child. It will review the proposals of the Special Joint Committee, as well as factors currently articulated in provincial legislation, the recommendations of the Canadian Bar Association submission, and the ways in which other jurisdictions have attempted to provide a more comprehensive definition of the best interests of the child.

Recommendations of the Special Joint Committee

The Special Joint Committee recommended that the *Divorce Act* be amended to include a list of criteria to be taken into account when determining the best interests of the child. The Report noted that many witnesses were of the view that including a "list of guiding criteria would improve the predictability of results and encourage consideration of factors considered particularly important to the well-being of the child."[172] It recommended the following list of criteria:

16.1 The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;

16.2 The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;

16.3 The views of the child, where such views can reasonably be ascertained;

16.4 The ability and willingness of each applicant to provide the child with guidance and education, the necessaries of life, and any special needs of the child;

16.5 The child's cultural ties and religious affiliation;

16.6 The importance and benefit to the child of shared parenting, ensuring both parents active involvement in his or her life after separation;

16.7 The importance of relationships between the child and the child's siblings, grandparents and other extended family members;

16.8 The parenting plans proposed by the parents;

[171] For a critique of the best interests of the child test, see Robert Mnookin "Child Custody Adjudication: Judicial Functions in the Fact of Indeterminancy" (1975) 39 Law and Contemp. Probls. 226, Jon Elster "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 Chicago Law Review 1, Mary Ann Glendon "Fixed Rules and Discretion in Contemporary Family Law and Succession Law" (1986) 60 Tulane Law Review 1365.
[172] For the Sake of the Children supra note 1, at 43.

16.9 The ability of the child to adjust to the proposed parenting plan;

16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;

16.11 Any proven history of family violence perpetrated by any party applying for a parenting order;

16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;

16.13 The willingness shown by each parent to attend the required education session; and

16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute.[173]

There are some limitations to this list of criteria for the purposes of Option One—that is, reform within the existing regime of custody and access. The list of factors recommended by the Special Joint Committee presupposes a range of other changes to the Act, specifically those to include the ideas of shared parenting and parenting plans. The former is not part of this option for reform, but will be discussed in Option Three below. The latter, which may or may not be part of this option for reform, and the elaboration of the best interests of the child test will depend on the policy decision made on this related, but separate question.

It should also be noted that the list of the Special Joint Committee includes no reference to continuity of care or past caretaking. This is a significant omission, and the importance of this factor when determining the best-interests-of-the-child is discussed further below.

Other Possible Factors

Ontario's *Children's Law Reform Act* provides a more extensive list of factors to be taken into account when determining the best interests of the child for the purposes of custody and access. Section 24(2) directs the court to consider "all the needs and circumstances of the child, including:

(a) the love, affection and emotional ties between the child and each person entitled to or claiming custody of or access to the child
  (i) other members of the child's family who reside with the child, and
  (ii) persons involved in the care and upbringing of the child;
(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;
(c) The length of time the child has lived in a stable home environment;
(d) The ability of each person seeking custody or access to act as a parent;

[173] Recommendation 16, For the Sake of the Children, supra note 1, at 45.

(e) The ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;
(f) any plans proposed for the care and upbringing of the child;
(g) the permanence and stability of the family unit with which it is proposed that the child will live; and
(h) the relationship by blood or through an adoption order between the child and each person who is a party to the application".[174]

In its recommendations, the National Family Law Section of the CBA suggested a list of factors that includes all of those listed in the *Children's Law Reform Act*, as well as these:

- the ability of each person seeking custody or access to act as a parent and fulfil the parental responsibilities set out in this Act;

- the caregiving role assumed by each person applying for custody during the child's life;

- any past history of family violence perpetrated by any party applying for custody or access; and

- the importance and benefit to the child of having an ongoing relationship with his or her parents.

These examples do not in any way exhaust the possibilities of factors that could be included in an elaboration of the best interests of the child test. However, the recommendations of the Canadian Bar Association are useful when considering how to elaborate the best interests of the child test within Option One. Unlike the recommendations of the Special Joint Committee, the elaboration of the best interests test is specifically directed to the current custody and access regime. It builds on the criteria already included in provincial legislation, and it also has the advantage of adding several important factors.

First, it would add a reference to parental responsibilities and is, therefore, intended to bring the best interests of the child test in line with an articulation of parental responsibility (to be discussed in further detail in the next section). This is clearly consistent with the general guiding principle of promoting a child-centred approach by focusing on parental responsibilities rather than parenting rights.

Second, it would add a reference to family violence and is, therefore, consistent with the general guiding principle of protecting children from violence and abuse.

Third, it would add a reference to the importance to the child of having an ongoing relationship with his or her parents and would, therefore, be consistent with the general guiding principle of promoting meaningful relationships with both parents after separation and divorce.

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[174] Section 31(2) of the Newfoundland Children's Law Act provides the same list of criteria for determining the best interests of the child. Section 30 of the Yukon Children's Act includes a very similar list of factors, with the exception of relationships of blood or adoption, as does section 129(2) of the New Brunswick Children and Family Services Relations Act.

Finally, it would add a reference to caregiving. The importance of this factor in the determination of the best interests of the child is discussed in further detail below.

Continuity of Care

Many jurisdictions that have a list of factors to be considered in determining the best interests of the child include a reference to the importance of continuity of care, or the caregiving role assumed by each person applying for custody of the child.

While provincial legislation does not specifically mention past caretaking, there are provisions in several provincial statutes that are directed to issues of continuity and stability. For example, the New Brunswick legislation includes a reference to the "effect upon the child of any disruption of the child's sense of continuity." The Ontario and Newfoundland legislation both include references to "the length of time the child has lived in a stable environment," and to "the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child."

Past and Primary Caregiving

In the United States, while only West Virginia applies a judicial presumption in favour of the primary caretaker, several jurisdictions specifically require a consideration of past caretaking roles when determining parenting disputes. The Louisiana statute requires a consideration of "the responsibility for the care and rearing of the child previously exercised by each party." The New Jersey statute requires a consideration of the "extent and quality of time spent with the child prior to or subsequent to the separation." Virginia requires a consideration of "the role each parent has played and will play in the future, in the upbringing and care of the child."[175] In Minnesota, the statute provides that the court should take into account, when determining the best interest of the child, the child's primary caretaker, but that it ought not operate as a presumption. Several other jurisdictions require a consideration of past caretaking roles when deciding whether to order joint or sole custody.[176] The Washington *Parenting Act* requires the court, when determining the child's residential schedule, to give the greatest weight to "the relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing caretaking functions relating to the daily needs of the child."[177]

Approximation Principle

Recently, the issue of continuity has begun to be addressed through a new concept of approximation.[178] The idea behind the approximation rule is that parenting arrangements after separation and divorce should approximate the parenting arrangements prior to separation and divorce. The American Law Institute has recently recommended the adoption of this approximation rule as the basis for the allocation of custodial responsibility. The Institute is of

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[175] See also Vermont and Arizona.
[176] See ALI supra note 26, at 154.
[177] Section 26.09.187(3)(i) Washington Parenting Act. The state's Supreme Court has ruled that this provision does not amount to a primary caretaker presumption. Kovacs v. Kovacs, 854 P.2d 629. (Wash.1993).
[178] The idea of the approximation rule or principle was first developed by Elizabeth Scott in "Pluralism, Parental Preferences and Child Custody" (1992) 80 Cal.L.Rev.615.

the view that this approach can promote a number of important objectives, including yielding more predictable and easily adjudicated results, and preserving the greatest degree of stability in the child's life. The approach is intended to take into account the importance of past caretaking patterns, and attempts to model the post-divorce family on these patterns.

> The approximation standard is… designed to correspond reasonably well to the parties' actual expectations and preferences…. The way the parents choose to divide responsibility when the family lived together anchors the negotiations in their own lived experience.[179]

The Institute recognizes that neither a parent's nor a child's life can stay the same after separation. Separation may make it necessary for parents to change their work schedules and rearrange other obligations in order to care for their children. As a result, the approach must be flexible, and cannot attempt simply to replicate pre-separation parenting. But, it does use pre-separation parenting as a basis for restructuring the parental relationship.[180]

Importance of Continuity as a Factor

The concepts of past caregiving, primary caregiving or approximation are all intended to take into account the importance of continuity of care for a child following separation and divorce. While there is considerable variation in the particular way in which the legal regimes of different jurisdictions deal with this factor, from establishing a presumption to including it in a list of factors, there is considerable agreement that continuity and stability at least needs to be taken into account when considering the needs of children following separation and divorce.

The importance of continuity and stability is recognized as an important principle by the Canadian federal government. *Strategy for Reform* recognizes, as a general principle, that "the best interests of the child are served by parenting arrangements that best foster the child's emotional growth, health, *stability*, and physical care, taking into account the age and the stage of development of the child"[181] [Emphasis added].

The general guiding principle that no model of post-separation parenting will work for all children, and the resulting rejection of any presumptions in favour of a particular parenting arrangement means that the *Divorce Act* could not be reformed to include a presumption in favour of the primary caregiver. However, there is no compelling reason to reject caregiving as a *factor* in determining the best interests of children. Rather, there is considerable evidence to suggest that children's interests are served and promoted by taking caregiving into account, and that it ought to be included as a factor in the elaboration of the best interests of the child standard.

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[179] ALI, supra note 26, at 114.

[180] As discussed supra at notes 162-168, the recommendations of the American Law Institute have been made in the specific context of replacing custody and access with a regime based on parenting plans and the allocation of custodial responsibility and decision-making responsibility. In the institute's view, it is only to the allocation of custodial responsibility that the approximation rule should be applied. However, the idea of taking past caregiving into account, and attempting to approximate the pre-separation parenting arrangements to the extent possible, could also be applied to a regime based on custody and access, either as a presumption or simply as a factor to take into account.

[181] Strategy for Reform, supra note 2, at 6.

Friendly Parent Rule

Section 16(10) of the *Divorce Act*, known as the friendly parent rule, sets out the principle that "a child… should have as much contact with each spouse as is consistent with the best interests of the child," and requires that the court take into account the willingness of each parent to facilitate contact between the child and the other parent. The provision reflects a general assumption that the needs and interests of a child following separation and divorce are best met when the child maintains significant contact with both parents.

The principle is controversial. Many commentators have argued that the friendly parent rule operates unfairly and dangerously in the context of family violence, when parents who fear abuse from the spouses may remain silent for fear of jeopardizing their chance of obtaining custody.[182] Others argue that the provision attempts to promote an important principle of a child's right to contact with both parents.

Some commentators have argued that the *Divorce Act* ought to contain a presumption of continued parental relationship. Miklas and Bala, for example, have argued that "there should be a presumption that it is in the best interests of the children to have frequent and predictable contact with both parents, on a schedule that accords with the child's developmental needs, unless it can be demonstrated that such involvement poses a significant risk to the child's physical or emotional well-being."[183] As these authors describe it, a continued relationship would be a child's right. Although it would be promoting a similar principle, it would be different from the current friendly parent rule insofar as it "places less of a 'skew' on the litigation and negotiation process, as it reduces the pressure on a parent to demonstrate willingness to facilitate access as a factor in a custody dispute."[184]

The Special Joint Committee was of the view that both arguments for and against the current friendly parent rule had merit, and recommended that "the principle of maximum contact be included in the list of criteria for determining the best interests of the child that the committee proposes be added to the Act. In this way, the principle of maximum contact would be considered by judges and parents and could be weighed against other important criteria related to the best interests of a child."[185]

There is considerable merit to the recommendations of the Special Joint Committee. In contrast to the position advocated by Miklas and Bala, this option is consistent with the "no presumption" principle recommended by the Special Joint Committee and endorsed by the federal government. Moreover, incorporating the general principle of contact within the list of best interest factors would allow the courts to balance competing factors. In this way, the facilitation of contact with the other parent would no longer be singled out but, rather, a child's interest in contact with both parents would be taken into account and, as the Special Joint Committee observed, weighed against other important criteria. In particular, this would allow the courts to balance the principle

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[182] Susan Boyd "Whither Feminism? The Department of Justice Public Discussion Paper on Custody and Access" (1995) 12 Can. J.Fam.L.357.
[183] S. Mikas and N. Bala, supra note 4, at 136.
[184] Ibid., at 136.
[185] For the Sake of the Children, supra note 1, at 52.

of contact with other guiding principles, including the importance of protecting children against violence, conflict and abuse.

Alternatively, the *Divorce Act* could be amended to include a general statement of principle that encouraged ongoing relationships with both parents after divorce. This could be included in a general purpose section, or it could be included in a list of parenting responsibilities, as discussed in the next section. As a general statement, however, it would be important that the principle regarding contact be made subject to the best interests of the child. Otherwise, the principle might come to be plagued by the same problems as the current friendly parent rule. Moreover, the guiding principles make it clear that the best interests test must remain the cornerstone for reform, and specifically provide that the general principle of developing and maintaining relationships with both parents is subject to the qualifier of “when it is safe and positive to do so.”

Assessment

While any such statutory list of factors arguably provides more direction to the court, such a listing also “invariably gives judges as much discretion and flexibility as the shorter statement of principle, since the factors are not prioritized, and since they are clearly stated not to be an exhaustive list, but only *among* the circumstances that the court shall consider.”[186] The American Law Institute recently observed that, “[I]n the last decade, most jurisdictions have attempted to make the best-interest test more concrete by specifying the criteria to consider in applying it. An all-inclusive itemization of the myriad factors that bear on a child’s best interests adds little determinacy, however, if the rule specifies no priorities among these facts.”[187] It is also important to note that in practice, there is little real significance to the differences among provincial, territorial and federal legislation, notwithstanding the considerable differences in the degree of detail provided.[188]

There is, therefore, little reason to believe that elaboration of the best interests of the child test will actually increase the predictability of the outcomes of child-custody disputes and, thereby, reduce litigation.

At a more general level, however, including a more specific list of factors may provide some guidance for parents who are attempting to restructure their parenting relationships without resorting to the courts. To the extent that the objectives of reform are educational and standard-setting, it would be helpful to direct parents’ attention to the particular factors that they ought to be taking into account when setting up their post-divorce parenting arrangements. Similarly, it may be helpful to elaborate the best interests of the child test to give guidance to the courts about the kinds of factors that ought to be taken into account and balanced in each case.

[186] Bala and Miklas, supra note 4, at 12.
[187] American Law Institute, supra note 26, at 3.
[188] Bala and Miklas, supra note 4, at 13.

PARENTING RESPONSIBILITY

The current regime of custody has been criticized for its focus on parental rights in relation to their children, rather than focusing on parental responsibilities in relation to their children. Some have suggested that the idea of parental responsibility introduces a more child centered approach by directing attention towards children's needs and parents' responsibilities to fulfil those needs. While Options Two and Three explore the possibilities of designing legislative alternatives to the custody and access regime based on this idea of parental responsibilities, another option for reform would be to incorporate the idea of parental responsibilities into the existing custody and access regime. More specifically, the *Divorce Act* could be amended by incorporating a reference to and definition of parental responsibilities.

The National Family Law Section of the Canadian Bar Association, in its submission to the Special Joint Committee recommended that a description of parental responsibilities toward children be incorporated into the *Divorce Act*. More specifically, it recommended "that s.16(5) of the *Divorce Act* state that, unless otherwise ordered by the court as in a child's best interests, all parents have responsibilities toward their children which include:

- Maintaining a loving, nurturing and supportive relationship with the child;
- Seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare and supervision, and other activities appropriate to the developmental level of the child and the resources available to the parent;
- Consulting with the other parent regarding major issues in the health, education, religion and welfare of the child;
- Encouraging the child to foster appropriate inter-personal relationships;
- Making the child available to the other parent or spending time with the child as agreed by the parents or ordered by the court and so as not to cause unnecessary upset to the child, or unnecessary cost and inconvenience to the other parent;
- Exercising appropriate judgment about the child's welfare, consistent with the child's developmental level and the resources available to the parent;
- Providing financial support for the child."[189]

Assessment

At a general level, adding such a list of parental responsibilities is intended to advance the educational and exhortative dimensions of reform. A list of parenting responsibilities may help direct parents' attention to particular aspects of parenting, and may provide some guidance in their efforts to restructure their parenting relationships without resorting to the courts. The idea behind such a list is that it may help direct parents' attention towards their children's needs, and towards their own responsibilities to fulfil those needs.

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[189] National Family Law Section, Canadian Bar Association, Submission to the Special Joint Committee.

But, incorporating such a list into the existing statutory framework may create a number of legal complications, and there is reason to be concerned about how well such a list would fit within the custody and access regime.

As recommended by the National Family Law Section of the CBA, the *Divorce Act* would state that all parents have these responsibilities toward their children, unless otherwise ordered by the court. While the list of parental responsibilities may seem innocuous, it would raise significant legal questions. For example, what would be the relationship between these parenting responsibilities and the rights and responsibilities of custody and access orders? Would the addition of this list of parenting responsibilities significantly alter the rights and responsibilities in a sole custody order? Would a sole custody order have to specifically allocate these parenting responsibilities to the custodial parent? For example, among the suggested list of parental responsibilities is consulting with the other parent on major issues of health, education, religion and welfare. Would this responsibility restrict the authority otherwise vested in the custodial parent? Would a court specifically have to allocate this authority to the custodial parent?

These are not incidental questions, but go to the heart of the allocation of parental authority within a custody and access regime. The general statement that all parents have these responsibilities towards their children is an effort to move towards a new kind of parenting regime without actually doing so. In other words, it attempts to advance some of the objectives of a parenting responsibility regime that emphasizes continuing and shared responsibilities towards children, without actually abandoning the language of custody and access. There is, therefore, a question whether a list of parental responsibilities is consistent with and can be made to fit within the existing regime of custody and access. It is important to emphasize that this is not an argument against including a list of parental responsibilities within any reform option but, simply, highlights the problems of doing so within a regime that continues to be based on custody and access.

Much like elaborating on the best interests of the child test, adding a list of parental responsibilities is, thus, not likely to result in more predictable outcomes, thereby reducing litigation. Rather, it might be expected to increase litigation by introducing more uncertainty into the custody and access regime. Beyond having a general educational function, it remains unclear what such a list of parental responsibility would be expected to accomplish, and how the courts would be expected to take this list of factors into account when determining the best interests of the child and awarding custody and access.

VIOLENCE, HIGH CONFLICT AND INADEQUATE PARENTING

One of the challenges that faces any reform to the law of custody and access is the protection of children from violence, conflict and abuse. The current *Divorce Act* does not include any specific reference to violence, high conflict or inadequate parenting in relation to the resolution of custody and access disputes. This section of the paper examines how the *Divorce Act* could be reformed to include a reference to the relevance of violence, high conflict, and inadequate parenting, within the existing custody and access regime.

Violence

The question to be addressed is how the presence or risk of violence ought to be taken into account in resolving parenting disputes, and how the *Divorce Act* might be amended to do so. The following discussion reviews two options for reform: (1) including family violence as a factor in the best interests of the child test; and (2) including specific provisions setting out how courts should deal with family violence. It then considers the inclusion of conditions of access, and the implications of family violence for parenting plans and divorce services.

It should be noted that any reform that specifically addresses the relevance of family violence to a custody and access determination could include a reference to the evidentiary requirements for family violence (such as credible evidence) as discussed above.[190]

As a Factor in the Best Interests of the Child Test

The *Divorce Act* could be amended to include a reference to domestic violence within the elaboration of the best interests of the child, as suggested by the National Family Section of the CBA, and Special Joint Committee.

A number of jurisdictions have taken this approach, and included violence and abuse as factors to be taken into account when determining the best interests of the child. The Australian *Family Law Act*, for example, includes the following as factors in the best interests of the child test:

> (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by (1) being subject or exposed to abuse, ill-treatment, violence or other behaviour; or (2) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person…;
>
> (i) any family violence involving the child or a member of the child's family;
>
> (j) any family violence order that applies to the child or a member of the child's family".[191]

Similarly, the Maine *Domestic Relations Act* includes the following:

> (L) The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects: (1) the child emotionally; and (2) the safety of the child;
>
> (M) The existence of any history of child abuse by a parent;
>
> (N) All other factors having a reasonable bearing on the physical and psychological well-being of the child;[192]

New Jersey, Michigan, Montana, Pennsylvania, Rhode Island, Vermont and Wyoming also provide that the courts shall take domestic violence into account when determining the best interests of the child or in making a custody award or both. Several states have further provided

[190] See discussion supra at notes 26-32.
[191] S.68F(2), Australia Family Law Act, 1995.
[192] S.1653(3), Maine Domestic Relations Act.

that a finding of domestic violence should be the primary factor in determining the best interests of the child and the awarding of custody.[193]

Section 31(3) of the Newfoundland *Children's Law Act* specifically addresses the issue of violence:

> In assessing a person's ability to act as parent, the court shall consider whether the person has ever acted in a violent manner towards:
>
> (a) his or her spouse or child;
>
> (b) his or her child's parent; or
>
> (c) another member of the household,
>
> otherwise a person's past conduct shall only be considered if the court thinks that it is relevant to the person's ability to act as a parent.[194]

This provision could be used as a model for incorporating a reference to violence into the definition of the best interests of the child in the *Divorce Act*.

Including violence as a factor that should be taken into account in the best-interests test would be an important improvement over the current regime. But, the disadvantage with this approach is that it does not specify how violence should be taken into account.

Specific Provisions Addressing Domestic Violence

Alternatively, or additionally, the *Divorce Act* could be amended to include more specific provisions dealing with the relevance of domestic violence.

Presumptions and Principles

One approach that has been adopted in other jurisdictions has been to establish a rebuttable presumption that violence is not in the best interests of the child, and a mandate against the award of custody to a perpetrator of violence or both. A number of American jurisdictions have done this, and several also presume that an award of sole custody to a perpetrator of domestic violence is not in the best interests of a child.[195] Jurisdictions with a presumption against joint custody being awarded upon a finding of domestic violence include Arizona, Colorado, Florida,

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[193] In Iowa, a finding of a "history of domestic abuse… shall outweigh" all other factors in awarding custody. Iowa Code Ann. S.598.41(2)(c) (West Supp. 1997). In Georgia, the statute provides that where a court has made a finding of family violence, the court "shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence." (Ga.Code Ann S.19-9-1(2) (Supp. 1997).

[194] Section 31(3), Newfoundland Children's Law Act. Several years ago, amendments to the Ontario Children's Law Reform Act were passed by the legislature, but have never been proclaimed into force. Among the amendments is a provision specifically addressing violence, which is very similar to the Newfoundland provisions: "In assessing a person's ability to act as a parent, the court shall consider the fact that the person has at any time committed violence against his or her spouse or child, against his or her child's parent or against another member of the person's household." Section 77, revising section 24(3) of the C.L.R.A.

[195] ALI, supra note 26, at 219.

Idaho, Iowa, Minnesota, Texas and Washington DC. States with a presumption against both sole and joint custody upon a finding of domestic violence include Alabama, Delaware, Hawaii, Oklahoma and North Dakota.[196]

One of the guiding principles for reform is the recognition that no one model of post separation parenting is ideal for all children. The Government of Canada and the Special Joint Committee agree "that no one model of post-separation parenting will be ideal for all children and reject the use of legislative presumptions."[197] This position was adopted specifically in relation to presumptions in favour of particular parenting arrangements, such as joint custody and a primary caregiver rule. The Special Joint Committee was of the view that any such presumption would obscure differences between families, as well as encourage otherwise amicable families to litigate their parenting issues in order to avoid the presumption.

One reading of this position is that it would preclude any further consideration of presumptions in the context of violence. However, there is a significant distinction in the reasoning behind presumptions regarding custody arrangements, such as joint custody or primary caregiver, and presumptions regarding violence. The former is a general presumption that would apply to the parenting arrangements of all Canadian families. The latter is a highly specific presumption that would apply only to families that have experienced violence. In the context of violence, it would be appropriate to consider the possibility that children do not, in general, benefit from continued exposure to a violent parent or, at a minimum, not without supervision. It is, therefore, quite consistent to conclude that the general position against statutory presumptions on custodial arrangements does not apply to the narrow issue of violence.

The *Divorce Act* could then be reformed to include a presumption that violence is not in the best interests of the child, or against the award of custody to a perpetrator of violence or both. This could include a presumption against the award of joint custody in the context of family violence.

Alternatively, the *Divorce Act* could be reformed to include a strong statement of principle against family violence, short of a presumption. This could be done in the form of a general statement of objectives or, as discussed above, in the best interests of the child test. It might also be accomplished through a specific statement of objectives dealing with family violence. Several jurisdictions, most notably Australia, include numerous statements of purpose in their legislation. Each division of the Act is preceded with a statement of its object. A specific section dealing with violence in the *Divorce Act* could include such a statement of objective to the effect that children must be protected from family violence and threats of family violence. This might be a way of avoiding an actual legal presumption, but still providing the courts with guiding principles to take violence seriously.

For example, the Maine *Domestic Relations Act* includes the following general statement of legislative finding and purpose about relationships among family members when determining the best interests of the child:

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[196] Ibid., at 219-221.
[197] Strategy for Reform, supra note 2, at 10.

> The Legislature finds that domestic abuse is a serious crime against the individual and society, producing an unhealthy and dangerous family environment, resulting in a pattern of escalating abuse, including violence, that frequently culminates in intrafamily homicide and creating an atmosphere that is not conducive to healthy childhood development.[198]

It is unclear, however, how the courts would interpret such a general statement of principle. For example, would the courts interpret it, alongside the specific factors listed in the best interests of the child test, to mean that joint custody is not generally a wise order in the context of family violence? Or the granting of sole custody in favour of a violent parent is not generally a wise order in the context of family violence? One of the objectives of legislative reform in the area of family violence is to "increase public and professional awareness and assist in the education of judges, lawyers and other individuals involved in the justice system as well as victims, perpetrators and the public."[199] While a general statement of principle would be an important advance over the current statutory violence, by effectively telling the courts that they must take family violence seriously, it would not provide guidance on how that violence is to be taken into account.

The highest level of protection could therefore be provided by a presumption that indicated how violence ought to be taken into account. However, any reform to the *Divorce Act* that included a strong statement against violence would be a substantial improvement over the current regime. While it would remain within judicial discretion to determine how a general statement of principle against violence would be taken into account, it is possible in practice that if courts took the statement seriously, there might be very little difference between a presumption and a principle.

Joint Custody

If the custody and access regime within the *Divorce Act* continued to allow for an order of joint custody, family violence could be included as a specific factor that would limit the appropriateness of joint custody. Family violence seriously compromises the cooperative conditions that are necessary for a joint custody arrangement to work.[200] Moreover, joint custody can create a situation in which a spouse or child is placed at serious risk. As noted above, a number of U.S. jurisdictions have established a presumption against the award of joint custody in the context of violence. This presumption would provide the highest level of protection for children.

Alternatively, the amended *Divorce Act* could include a general statement of principle such as "the court shall not order joint custody when a parent's conduct may adversely effect a child's best interests." The Act could then include family violence within a list of factors that would not be in the child's best interests, or simply within a list of factors that the court must take into account when determining the appropriateness of joint custody. Again, if the statutory framework included a strong statement of principle, and specifically included family violence as a factor that the court must take into account when considering joint custody, it may be that, in

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[198] Section 1653(1)(B), Maine Domestic Relations Act.

[199] Strategy for Reform supra note 2, at 20.

[200] For a detailed discussion, see Lee Khachaturian "Domestic Violence and Shared Parental Responsibilities: Dangerous Bedfellows" (1999) 44 Wayne Law Review 1745. See supra note 20.

practice, there would be little difference between a presumption and a principle. This would ultimately depend on judicial interpretation.

Friendly Parent Rule

Within the existing custody and access regime, family violence would have important implications for the friendly parent rule. The research on family violence suggests that the friendly parent rule in section 16(10) is highly inappropriate for separating and divorcing families that have experienced violence. If section 16(10) was retained within a reformed *Divorce Act*, it might be desirable to include a specific reference to the unique needs of these families.

Alternatively, if section 16(10) was incorporated in the best interests of the child test, reworded as a general statement of principle that encouraged ongoing relationships with both parents after divorce, or both, it would again be important to include a specific reference to the unique needs of families that have experienced violence.

Conditions of Access

The *Divorce Act* could also be amended to include more specific provisions for the conditions of access in the context of family violence. Several states provide that if custody or visitation is to be ordered when domestic violence has occurred, the court must ensure appropriate protective measures for the child and the parent.[201] Other states provide that the courts must make arrangements for visitation that best protect the child and parent from harm.[202]

A few jurisdictions impose supervised access requirements in the case of domestic violence. Louisiana provides that when a parent has a history of perpetrating family violence, the court will only allow supervised visitation with that parent upon proof that the parent has participated in and completed a suitable treatment program. In Minnesota, the law states that the court must consider supervised visitation if the visiting parent is under a domestic protection order for domestic violence. North Dakota law provides that only supervised visitation is allowed to a parent who has perpetrated one serious incident of domestic violence, or there is a pattern of domestic violence within a reasonable time of the proceedings.

Another model is found in the Maine *Domestic Relations Act,* which extensively addresses the conditions of parent-child contact in the context of domestic violence, setting out and authorizing the use of a range of specific protective measures. The Act provides conditions that a court may attach to parent-child contact, including ordering that any exchange of a child take place in a protected setting, that contact be supervised, and that the person who has committed the domestic abuse pay a fee to defray the costs of the supervised contact.[203] The court may also prohibit

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[201] For example, the Alabama legislation provides that visitation may be awarded "only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made." The Washington D.C. legislation similarly provides that visitation may only be awarded if "the child and custodial parent can be adequately protected from harm inflicted by the other party."

[202] For example, the Arizona statute provides that the "court shall make arrangements for visitation that best protect the child and the abused spouse from further harm." Very similar provisions have been adopted in Missouri, New Hampshire, North Dakota, Rhode Island and Wyoming.

[203] Section 1653(6)(B), Maine Domestic Relations Act.

overnight visitation, order that a person who has committed domestic abuse attend a domestic-abuse intervention program or other counselling, that a parent abstain from the possession or consumption of alcohol or controlled substances during and immediately preceding visitation periods. It further provides that the court may require security from the parent who has committed domestic abuse for the return and safety of the child[204] or order that the address of the child and the victim be kept confidential.[205] The Act specifically provides that the court may not order a victim of domestic abuse to attend counselling with the parent who has committed domestic abuse. Finally, it sets out further conditions that the court can order in the event that it allows a family or household member to supervise contact.[206]

The New Hampshire legislation similarly outlines specific protective measures that can be ordered to protect the safety of domestic abuse victims.[207]

The *Divorce Act* could, thus, be amended to include a list of similar protective measures that the court could order in order to protect the safety of family violence victims, with the same focus on conditions of access.

Violence, Parenting Plans and Services

It might also be necessary to include specific provisions relating to evidence if the *Divorce Act* were reformed to include some reference to parenting plans, resolution services or both, as discussed below. Violence might be identified as a specific limitation to a principle of otherwise deferring to the private arrangements of the parties, a specific limitation to the principle of otherwise mandatory parenting education, or both. Or it might be that families that have experienced violence ought to be provided with special parenting education programs that address their unique problems and challenges related to separation and divorce. Similarly, in the context of mediation and other services, violence might be identified as a specific limitation to a principle of encouraging primary dispute resolution. The particular way in which violence was addressed and included would, however, depend on the particular way in which a range of policy choices about parenting plans was resolved, which is discussed in further detail in the sections below on parenting plans and resolution services.

High Conflict

Although growing attention has been directed to designing appropriate services and interventions for high conflict families, there has been very little attention paid to incorporating the needs of high conflict families into legislation. As discussed above, one of the few statutory regimes to incorporate some reference to the kind of factors that would undermine cooperation in a high conflict family is Washington's *Parenting Act*.[208] The Act states that in making an order for mutual decision-making in a permanent parenting plan, the court must consider whether the parents have a demonstrated ability and desire to cooperate with one another in decision-making regarding the child. In the limitation sections, it further states that a court shall not order shared decision-making when a parent's conduct may adversely affect a child's best interests, including

[204] 1653(6)(C) Domestic Relations Act.
[205] S.1653(6)(D) Domestic Relations Act.
[206] Section 1653(6)(F) Domestic Relations Act, see discussion supra at note 144.
[207] New Hampshire N.H.Rev.Stat. Ann. S458:16.
[208] The Washington Parenting Act does not expressly refer to high conflict families.

"the abusive use of conflict by the parent, which creates the danger of serious damage to the child's psychological development." The Washington scheme is, however, one in which the idea of parenting plans has replaced the language of custody and access. There is very little other guidance, and virtually no precedent, for incorporating a reference to the needs of high conflict families within the existing custody and access regime. The following outlines several options for doing so.

Best Interests of the Child

The idea that children are harmed by exposure to high degrees of conflict could be incorporated into the best interests of the child test.

General Statement of Principle

Alternatively, the idea that children are harmed by exposure to high degrees of conflict could be included in the *Divorce Act* in a statement of principle or objective, using the Maine legislation in the context of violence as a model.

Joint Custody

If the custody and access regime within the *Divorce Act* continued to allow for an order of joint custody, the considerations found in the Washington regime might be incorporated as a limitation on the conditions in which such a joint-custody order would be appropriate. For example, it could specifically include as a factor whether the parents have a demonstrated ability and desire to cooperate with one another, an express limitation on an award of joint custody when a parent's conduct may adversely affect the child, including an abusive use of conflict, or both.

Friendly Parent Rule

Within the existing custody and access regime, a specific area of concern for high conflict families is the friendly parent rule. The research on high-conflict parents would suggest that the friendly parent rule in section 16(10) is highly inappropriate for these separating and divorcing families. If section 16(10) was retained within a reformed *Divorce Act*, it might be desirable to include a specific reference to the unique needs of high conflict families.

Alternatively, if section 16(10) was incorporated into the best-interests test, replaced by a general statement of principle that encouraged ongoing relationships with both parents after divorce, or both, it would again be important to include a specific reference to the unique needs of high conflict families.

Parenting Plans and Resolution Services

It might also be necessary, or desirable, to provide specific provisions addressing the unique needs of high conflict families if the *Divorce Act* were reformed to include parenting plans or services, as discussed below. For example, if a reference to parenting plans or mediation services were incorporated into the Act, it would be important to include some reference to the unique needs of high conflict families. These families ought not to be encouraged to form cooperative parenting arrangements, nor to resolve their disputes in a cooperative forum. High

conflict then, might be identified as a specific limitation to a principle of encouraging parents to enter parenting plans or resolving their disputes through primary dispute resolution.

Inadequate Parenting

The *Divorce Act* could be reformed to specifically address the problem of inadequate parenting. In order to promote the general objective of promoting children's best interests and ensuring that children are not exposed to harmful behaviour, the legislative regime could address the circumstances in which parenting falls below a basic minimum standard, such as neglect, substantial non-performance of parenting responsibilities, emotional, psychological or substance abuse problems or some or all of these.

Both the Washington *Parenting Act* and the ALI proposals address this issue. Although neither expressly use the language of inadequate parenting, they both do address and define parental conduct that would limit the allocation of parental responsibility within a parenting plan. The Washington law states that the court shall not order mutual decision-making, and that a parent's residential time with a child shall be limited if a parent has engaged in "willful abandonment of children that continues to an extended period of time or substantial refusal to perform parenting functions."[209] The Act further provides that the court *may* limit any provision in a parenting plan if there has been (a) neglect or substantial non-performance of parenting functions, (b) long-term emotional or physical impairment that interferes with the performance of parenting functions, or (c) a long-term impairment resulting from substance abuse that interferes with the performance of parenting functions.[210] The ALI proposals would allow the court to limit the allocation of parental responsibilities upon the finding that a parent "(a) has abused, neglected or abandoned a child, as defined by state law," or "(c) has abused drugs, alcohol, or another substance in a way that interferes with the parent's ability to perform caretaking functions."[211]

Similarly, the *Divorce Act* could be reformed to include a reference to these kinds of parental conduct that could be considered to be inadequate parenting.

The options for incorporating a reference into the existing regime of custody and access parallel the options discussed in relation to violence and high conflict. Inadequate parenting could be included as one, some or all of the following:

(a) a factor in the best interest of the child;
(b) a general principle or objective;
(c) a factor operating against the award of joint custody;
(d) a factor limiting the operation of the friendly parent rule;
(e) a factor limiting a principle of encouraging parents to enter parenting plans or resolving their disputes through primary dispute resolution and parenting plans.

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[209] These factors are included in S.26.09.191(1), (2), Parenting Act, limiting an award of mutual decision-making, and limiting a parent's residential time with a child.

[210] The subsection also ends with a general provision, "(f) any other factors or conduct which the court expressly finds adverse to the best interest of the child."

[211] Section 2.13(1) ALI proposals, supra note 26 at 210. The ALI proposals would require that a court then "impose limits that are reasonably calculated to protect the child from harm," and include a list of the kind of conditions or limits that could be imposed.

Finally, the Act could also include a list of potential conditions of access, in which inadequate parenting could be identified as a situation in which some form of supervised access might be appropriate.

Assessment

The choices for incorporating violence, high conflict and inadequate parenting into the *Divorce Act* within the existing regime of custody and access are thus very similar.

Factor in the Best Interests of the Child Test

Violence, high conflict and inadequate parenting could be listed as factors that should be taken into account when determining the best interests of the child. Although this would be a substantial improvement to the current regime, including these issues within the best interests of the child test might not be the most effective approach to ensuring that children are protected from harm. The disadvantage with this approach is that it does not specify *how* violence, high conflict or inadequate parenting should be taken into account. Rather, the particular relevance to be given to these issues when determining custody and access would remain within judicial discretion.

Specific Section or Subsection

Violence, high conflict and inadequate parenting could be addressed in a specific section or subsection. The text could include a general statement that violence, high conflict and inadequate parenting are not in the best interests of children, and then specify the particular way in which these issues should be taken into account.

The highest level of protection could be provided by way of presumptions. For example there could be a presumption against awarding custody to a parent who has committed family violence or is guilty of inadequate parenting. There could also be a presumption against awarding joint custody if there has been violence, high conflict or inadequate parenting.

Alternatively, the section could include a strong statement of principle that violence, high conflict and inadequate parenting are not in the best interests of children, and that a court *will* take these factors into account in determining custody and access. The section could provide more guidance by also stipulating the range of orders or limitations that might be appropriate in these circumstances (such as limiting sole custody, joint custody or access).

Such a specific provision has the advantage of specifically directing the attention of courts, lawyers and parties to the particular needs of children with a violent parent, with high conflict parents or with parents with inadequate parenting skills. The objective of protecting children from harm would be best advanced by an approach than included either the presumptions discussed or, at a minimum, a strong statement of principle that children's interests are not served by exposure to violence, high conflict and inadequate parenting. Any such provision should also address the particular challenges that these issues present to joint custody and to the friendly parent rule, both of which emphasize maximum contact with both parents. The objective of protecting children from harm would be best advanced by including either a presumption or a general statement of principle against joint custody or maximum contact in situations of violence, high conflict and inadequate parenting.

Conditions of Access

Regardless of whether references to violence, high conflict and inadequate parenting were incorporated within the best interests of the child test, or as a specific section, the *Divorce Act* could also be reformed, within the existing regime of custody and access and without difficulty, to include a list of possible conditions of access that the court could consider. The advantage of this approach is that it specifically directs courts, lawyers and parties to consider the kinds of restrictions and protective measures that could be ordered.

Family Violence and Evidentiary Requirements

Regardless of whether references to violence, high conflict and inadequate parenting were incorporated within the best interests of the child test, or as a specific section, the *Divorce Act* could include definitions of violence, high conflict and inadequate parenting. It could also set out the evidentiary requirements, such as credible evidence, for a finding of violence, high conflict or inadequate parenting.

PARENTING PLANS

Parenting plans have become increasingly popular, and have begun to be used within the existing regime of custody and access by many child custody assessors and other family transition experts. These experts work with separating parents to reach agreement about the arrangements for the children, and then attempt to set out those arrangements in a parenting plan. The plan itself often avoids the language of custody and access and, instead, allocates the various dimensions of parenting between the two parents. Despite the increasing use of parenting plans, there is no specific recognition of such plans within the *Divorce Act*.

The current regime of custody and access in the *Divorce Act* could be amended to include a reference to parenting plans.

Several related issues would need to be addressed when deciding how to incorporate such a reference to parenting plans: (1) whether plans should be optional or mandatory, (2) what required content of parenting plans should be, (3) the degree of judicial deference to parenting plans, (4) the limitations to plans, and (5) the process for variation.

Optional or Mandatory?

The *Divorce Act* could be amended to allow parties to enter into parenting plans, or to require divorcing parents to file parenting plans before seeking a custody and access order. A third alternative would be to give the courts the discretionary power to require that separating and divorcing parents seeking a custody and access order file a parenting plan.

A mandatory scheme would be the most difficult to incorporate into the existing regime of custody and access. A parenting plan is intended to encourage parents to allocate their parenting responsibility in a way that best fits the unique circumstances of their family and children.
A mandatory regime, such as the Washington *Parenting Act*, is intended to move away from the language of custody and access, and to encourage parents to focus on allocating their parenting responsibility in a way that best fits the unique circumstances of their children. A regime that continues to use the language of custody and access could certainly encourage parents to enter

into their own agreements. But, it would be difficult to insist that parents file parenting plans, and if the parents did not agree, to then require the courts to decide on the basis of custody and access. The idea of a mandatory parenting plan regime is to move beyond custody and access even when parents do not agree. The Washington regime, for example, requires that courts issue their orders in terms of a permanent parenting plan, and specifies the kinds of factors that the courts should take into account in allocating parenting responsibilities within such plans.

Moreover, a mandatory scheme would require a detailed elaboration of the required content of the plan, the criteria to be used in reviewing the plan, the restrictions on parenting plans, and the criteria for modification. While some of these issues might be addressed within an optional plan, as a rule optional plans have not required the same kind of statutory detail. It is not clear that such comprehensive statutory reform is consistent with, or contemplated by, this option for reform.

While there are a number of advantages to a mandatory parenting plan regime, such a regime fits better within Option Two or Option Three, and will be discussed in further detail below. Only an optional or judicially ordered parenting plan regime would be consistent with the current custody and access regime.

The *Divorce Act* could, then, be reformed to allow parents to enter into parenting plans, or to give the courts the discretionary power to request that parents file a parenting plan. This discretionary power might be general (for parents seeking any custody or access order), or might be made to apply specifically to applications for joint custody.[212]

Required Content

The content requirements for parenting plans tends to be directly related to whether the plans are optional or mandatory. Optional schemes tend to have few mandatory requirements for content, while mandatory schemes tend to require more detail.

For example, the Australian scheme—an optional scheme—has no mandatory requirements for content. Rather, it provides that a parenting plan may deal with (a) the person(s) with whom a child is to live, (b) contact between a child and another person(s), (c) maintenance of a child, and (d) any other aspect of parental responsibility. There is no requirement that the parenting plan allocate decision-making authority, nor that the plan include a dispute-resolution mechanism.

By way of the contrast, the Washington *Parenting Act*, 1987—a mandatory scheme—requires that a plan set out the child's residential schedule, the allocation of decision-making authority, and a dispute-resolution mechanism.[213] The Act then sets out, in some detail, the requirements

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[212] As mentioned above, a number of American jurisdictions require that parents seeking joint custody orders file parenting plans. See supra at notes 48-49.

[213] Section 26.09.184(2) of the Parenting Act provides that "the permanent parenting plan shall contain provisions for resolution of future disputes between parents, allocation of decision-making authority, and residential provisions for the child."

for each of these aspects.[214]

Assuming that an optional (or judicially ordered) approach was adopted, there may still be some advantage in setting out, in a general way, the kinds of issues that a parenting plan *could* include. The *Divorce Act* could be reformed to include a statutory provision that stated that divorcing parents may enter into an agreement in which they agree on the parenting arrangements for their children, including the child's residential schedule (residence/contact schedules), the allocation of decision-making authority (about major medical issues, education and religion), support obligations and a dispute-resolution mechanism.[215] While these issues would not be mandatory, a statutory list may help direct parents' attention to their children's needs, and encourage cooperation in meeting these needs. In this way, the statutory provisions may help advance the educational and exhortative objectives of the reform.

Degree of Judicial Deference

If the *Divorce Act* was amended to recognize parenting plans (optional, mandatory or judicially ordered), attention would need to be given to the extent that courts would be expected to defer to these parenting plans. As mentioned above, under the current law, courts have the power to review private agreements at the time of divorce to determine whether they serve the child's best interests.[216] In practice, however, courts are extremely reluctant to intervene and change a custody arrangement agreed to by the parties.

In the Australian legislation (an optional parenting plan scheme), the court retains considerable discretionary power when reviewing the parenting plan. The Act provides that the plan be registered in a court, but only if the court, having considered the relevant information filed, considers it to be in the best interests of the child to do so.[217] Even if registered, the court must not enforce its provisions if it considers that it would not be in the best interests of the child.

A much higher threshold for review is recommended by the American Law Institute (recommending a mandatory parenting plan scheme). The ALI recommends that if parents agree to one or more provisions of a parenting plan, the court should so order, unless it makes the specific findings that (a) the agreement is not knowing or voluntary or (b) the plan would be harmful to the child. This provision would require greater deference toward parental agreements than does the existing law, which allows the court to review all private agreements to determine whether they are in the best interests of the child. However, in practice, the courts are reluctant

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[214] For example, in terms of decision-making, the Act provides that the plan "shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan." Section 26.09.184(4), Parenting Act, 1987. In terms of residence, the Act states that the plan "shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions." Section 26.09.184(5).

[215] In this way, the inclusion of a reference to parenting plans could be modelled on the provisions in Part IV of the Ontario Family Law Act, which define marriage contracts, cohabitation contracts and separation agreements. The provisions state that a couple may enter into such an agreement, and set out the specific issues that such an agreement could (but need not) include.

[216] See discussion supra at note 52.

[217] S.63E, Australia Family Law Act.

to alter consensual parenting agreements. The ALI observes that courts "have neither the time nor the resources for substantial examination of the divorcing parents' agreed arrangements for their children, often resulting in only *pro forma* review." The ALI recommendations recognize that there may be little value in the courts attempting to second guess the parents' opinions about the best interests of the children. The exceptions to the general rule of deference, then, focusses the court's attention on the issues that should be of most concern. The court must ensure that the agreement is not coerced, and that the agreement is not harmful to the child.

The ALI threshold for intervention—unless harmful to the child—is high. A number of U.S. jurisdictions have attempted to establish some degree of deference to consensual agreements, while still retaining the best interests of the child standard. For example, a number of states provide that a court shall order any custody arrangement that is agreed to by both parents, unless it is contrary to the best interests of the child.[218] Under this standard of review, there is, in effect, a presumption in favour of enforcing the consensual agreement, unless the court finds that the agreement would not meet the best-interests test. This standard for review, then, is higher than Australia's (only enforce if in the best interest) and lower than the ALI's (enforce unless harmful).

The law should provide for some degree of deference to consensual parental agreements. If parents are to be encouraged to resolve their disputes themselves, and to enter into parenting plans, they will need to be assured that the courts are not then routinely going to intervene and set aside these plans. If courts routinely overturn these agreements, parents will have little or no incentive to undertake the often difficult negotiations of reaching an agreement on their own.

However, there is also reason to want to retain the court's overriding authority to set aside those agreements, or provisions thereof, that are not in the best interests of the child. This is particularly true since the best interests test is, according to the guiding principles, to remain a cornerstone of any legislative reform. The approach adopted in a number of American jurisdictions of enforcing a private parenting agreement unless it is not in the best interests of the child may then represent a reasonable balance of these competing interests. Courts would generally be expected to defer to the private arrangements, unless there is a good reason not to do so.

Some legislative schemes have further identified specific limitations and restrictions that would justify a court intervening in and setting aside a parenting plan, or a provision therein. These are discussed in the next section.

[218] Many states provide that the court shall defer to a mutually agreed custody arrangement, unless it is contrary to the best interests of the child. The New Jersey law provides that the "the court shall order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child." N.J.Stat. Ann S. 9:2-4(d). The Louisiana statute provides that if the parents agree on which of them is to have custody, the court shall award custody in accordance with their agreement unless the best interests of the child require a different award. La.Civ.Code Ann Art.132. Washington D.C. similarly provides that the court shall order "any custody arrangement which is agreed to by both parents unless clear and convincing evidence indicates that such arrangement is not in the best interest of the minor child." D.C.Code Ann S.16-911(a-2)(6)(A). Some states, including Georgia, Kansas and Massachusetts, require specific findings that must be stated in writing in order to reject a parental agreement.

Limitations

If the *Divorce Act* was amended to include a specific reference to parenting plans, as well as to require that the courts exercise some degree of deference to these private agreements, it would be important to set out any limitations to this private ordering.

As alluded to above, it would be important to consider the relevance of violence, high conflict and inadequate parenting when reviewing and enforcing parenting plans. The existence of family violence, high conflict and inadequate parenting could be listed as factors to be taken into account in reviewing parenting plans. Alternatively, these factors could be identified as specific limitations to parenting plans. For example, the Act could specifically state that the courts should not, or need not, enforce a parenting plan, or any provision thereof, if it finds that a parent has engaged in violence, emotional abuse, high conflict or inadequate parenting.

Variation

If parenting plans were to be incorporated into the *Divorce Act*, it would be necessary to consider the appropriate standard for variation or modification of such plans. As discussed above, the current law requires a material change in circumstances before an existing order or agreement can be varied.[219]

The question that needs to be addressed is whether this is the appropriate standard for variation of a parenting plan, which is, in effect, a specialized separation agreement.

The approach to modification of parenting plans differs considerably across jurisdictions. The Australian legislation does not allow for a variation or modification of a parenting plan that has been registered with the courts but, rather, requires that the parties revoke the agreement.[220] If both of the parties want to modify their agreement, they may apply to have their parenting plan revoked, and then enter into a new agreement. If only one of the parties wants a modification to the agreement, he or she may make an application to have the plan revoked, seek a parenting order or both.[221]

The American Law Institute has recommended that a court should modify a parenting plan "in accordance with parental agreement, unless it finds that the agreement is not knowing and voluntary or that it would be harmful to the child."[222] In the absence of parental agreement, the ALI proposals suggest that a court should modify a parenting plan if it finds a substantial change in circumstances, and that the change is necessary to the child's welfare. It also suggests that in exceptional circumstances, a court should be able to modify a plan if it finds that the plan is not working as intended, and in some specific way is manifestly harmful to the child, even in the absence of a substantial change in circumstances.

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[219] If the parties want to change a provision contained in a separation agreement, they have to bring an application under section 16 of the Divorce Act (or the corollary provisions of the provincial acts) for a custody order. If there is an existing agreement, the courts will generally require that there is a material change in circumstances to justify a change in the existing arrangements. See discussion supra at notes 55-57.

[220] S.63D, Family Law Act. See discussion supra at 122.

[221] S.63H(3), S65D(2) Family Law Act.

[222] Section 2.19, ALI supra note 26, at 331. This is the same standard of review applied by the courts for approving the initial parenting plan.

The Washington *Parenting Act* provides that a court shall not modify a parenting plan unless it finds a substantial change in circumstances of the child or non-moving party, and the modification is necessary to serve the best interests of the child.[223] The Act then sets out specific criteria to take into account when applying this standard to the modification of the specific aspects of the parenting plan. The regime is most restrictive in terms of modifications to residence, in which case it only allows the court to modify a residential schedule in limited circumstances, including parental agreement.[224] Changes to dispute resolution, and minor modifications to residential schedules are permitted on the basis of a substantial change of circumstances alone.[225]

As the ALI has observed, the "rules for modifying a parenting plan must balance the benefits of stability against the costs of rigidity." The Australian approach of not allowing any modification and requiring instead that the parties revoke their agreement and, effectively, start over again, is unduly cumbersome and rigid. Some modifications of the parenting plans should be allowed. It would be consistent with current practice to allow a parenting plan to be modified when there has been a material change in circumstance. The standard of material change of circumstances is well established in law, and could easily be applied to a regime of mandatory or optional parenting plans.

However, two additional questions need to be addressed. First, should there be any additional restrictions on modification of particular aspects of parenting plans, such as the child's residential schedule? The Washington legislation provides an interesting example of attempting to balance the particular interests of stability of residence with flexibility of adjusting to new circumstances, and could be a useful model.

Second, should modification be allowed based on parental consent, but absent a material change in circumstances? If the purpose of a parenting plan is to provide a flexible instrument, specifically designed by and for the unique needs of particular separating families, this purpose is likely to be advanced by allowing parents to change their agreement on a consensual basis (subject to the general limitations and restrictions discussed above). The parents should be allowed to make the changes and modifications that they agree are in the best interests of their children. The recommendations of the American Law Institute, therefore, seem compelling. Parents could be allowed to modify their parenting plans based on mutual agreement, if the

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[223] S.26.09.260(1), Parenting Act.

[224] S.26.09.260(2) Parenting Act provides that the court shall retain the residential schedule established by the parenting plan, unless (a) the parents agree to the modification, (b) the child has been integrated into the family life of the petitioner on the consent of the other party, in substantial deviation from the parenting plan, (c) the child's present environment is detrimental to his or her physical, mental or emotional health, and the harm likely to be caused by a change of environment is outweighed by the advantage of a change, (d) the court has found the non-moving parent in contempt of court at least twice in three years, for failure to comply with a residential time provision, or the parent has been convicted of custodial interference. The Act provides that a conviction of custodial interference will be considered to be a substantial change in circumstances.

[225] Section (4)(a), (b), Parenting Act. A minor modification to the residential schedule is defined as a change that does not change the residence at which the child is scheduled to live in the majority of the time, and does not exceed 24 full days in a calendar year, or five full days in a calendar month. A minor modification could also be based on a change of residence or involuntary change in work schedule by a parent, which makes the residential schedule in the parenting plan impractical to follow.

change is not harmful to the child. Or, the courts could retain more discretion, and allow modifications on mutual consent, provided that the change is in the best interests of the child.

Options for Reform

The particular way in which the *Divorce Act* should be amended to recognize parenting plans would depend on how the above issues are resolved.

Factor in the Best Interests of the Child Test

The *Divorce Act* could be reformed to simply include a reference to parenting plans in the list of factors to be considered in the best interests of the child. Such a reform would signal that separating and divorcing parents could enter into parenting plans, and those parenting plans would be considered by the courts. Without additional reform, parenting plans would remain optional in this approach, and there would be no requirements regarding content nor any requirements that the courts defer to the private arrangements of the parties. This approach would not, however, provide much guidance to separating parents, and would therefore be of limited educational value.

New Section on Parenting Plans

The *Divorce Act* could be reformed to include a new section (or subsection) that provided more details about the legal regulation of parenting plans. While this more detailed approach would be necessary if parenting plans were made mandatory, it could also be used in the context of an optional scheme of parenting plans. The section could set out the required content, the degree of judicial deference (if any), the limitations and the standard for the variation of parenting plans.

It should be noted that options (a) and (b) are not mutually exclusive. If a new section was adopted setting out specific provisions for the regulation of parenting plans, the best interests of the child test could also include a reference to the parenting plans submitted by the parties.

Summary and Assessment

If a reference to parenting plans was to be incorporated into the *Divorce Act* within the existing regime of custody and access, the general objectives of reform would be best advanced by a new section specifically dealing with parenting plans. Such an approach would provide more guidance to separating parents and the courts as to both the role and limitations of parenting plans in resolving parenting disputes.

As suggested in the above discussion, parenting plans would be best incorporated into the existing regime on an optional basis. A mandatory approach does not fit well with a regime that ultimately falls back on language of custody and access in contested cases. The section on parenting plans could provide a general definition of the nature of parenting plans, setting out the particular issues that could be included in a parenting plan. It would be consistent with the general educational objectives of reform to try to direct separating and divorcing parents' attention to the issues of the child's residential schedule, the allocation of decision-making authority and a dispute resolution process.

The section could also set out the standard for judicial deference (such as "knowingly and voluntarily entered," and "in the best interest of the child" or "not harmful to the child"), the

specific limitations on parenting plans (violence, high conflict and inadequate parenting), and the standard for modification.

It should also be noted that adding a list of parenting responsibilities to the *Divorce Act*, as discussed above, could be particularly useful if the idea of parenting plans were also incorporated into the legislation. Notwithstanding some of the other difficulties associated with incorporating a list of parenting responsibilities into the Act, such a list could provide guidance to separating and divorcing parents about the kinds of issues that could or should be included in a parenting plan.

REFERENCE TO SUPPORT SERVICES

Much attention has been given in recent years to a range of support services for divorcing parents. These services, ranging from mediation and arbitration to parenting education and custody assessments, have become increasingly important in the resolution of custodial disputes. The *Divorce Act* currently provides that lawyers have a duty to inform their clients of the availability of mediation services.[226] There are no other references to support services for divorcing parents within the Act.[227] The question to be addressed in this section is whether the *Divorce Act* should be amended to include a reference to such support services.

Parenting Education

While there is an emerging consensus that parenting education is a useful and constructive resource for divorcing parents, the question that remains is whether the *Divorce Act* should be amended to specifically recognize and mandate such parenting education sessions.

Options for Reform

Mandatory Programs

The *Divorce Act* could be amended to require all parents seeking a custody or access order to participate in a parenting education program.

As discussed above, moving towards a regime that encourages or requires separating and divorcing parents to attend parenting education courses raises questions of jurisdiction and funding. It would be difficult to make the attendance at parenting education courses mandatory within the *Divorce Act* if the federal government could not ensure that these courses were, in fact, readily available and accessible across the country.

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[226] According to S.9(2) of the Divorce Act, "It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters."

[227] Section 9(1) imposes a duty on lawyers to discuss the possibility of reconciliation with their clients, and to advise them of the availability of marriage counselling or guidance facilities that might assist with reconciliation. This is not, then, a reference to a service designed to assist divorcing couples with the divorce process, but rather, one designed to prevent the divorce.

Court Ordered Where Available

Alternatively, the *Divorce Act* could be amended to allow the courts to require parents to attend a parenting education program, along the lines found in many American jurisdictions. For example, the Florida legislation provides that a court may require parents to complete a parenting course to "educate, train, and assist divorcing parents in regard to the consequences of divorce on parents and children."[228] The American Law Institute similarly recommends that "the court should exercise its discretion and order services only when they are feasible and appropriate in light of the local availability, quality or cost of those services."[229] In light of the serious jurisdictional and resource implications of establishing mandatory programs, the American Law Institute proposal may be the reasonable alternative.

Mediation and Primary Dispute Resolution

Mediation has become increasingly popular as a method of resolving parenting disputes. The vast majority of family law disputes, including those about custody and access, are resolved without court intervention, through various forms of dispute resolution.[230] A range of voluntary mediation services is available across the country to help separating and divorcing parents deal with their custody and access disputes.[231] As noted above, however, the only reference to mediation in the *Divorce Act* is s.9(1), which requires that lawyers advise their clients of the availability of mediation services. Several provinces include references to mediation and conciliation services in their legislation. Other jurisdictions, such as Australia, have placed much greater emphasis on the use of mediation, counselling and other primary dispute-resolution

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[228] Fla.Stat.Ann S.61.21(2) (West.Supp. 1996).

[229] ALI supra note 26, at 93.

[230] As the Ontario Civil Justice Review observed, there are already a broad range of ADR techniques in place in family law: "At the present time, there is a veritable melange of ADR service delivery models in existence in the family law field. A few court locations have staff mediators on site. The new Family Court sites (that is, the expanded Unified Family Court sites) feature mediation services contracted for by the government. Differing community resources offer a variety of counseling and mediation services at a wide range of prices, including a number of services which are available for free. Legal Aid now requires settlement conferences as a condition precedent to authorizing a certificate to proceed to court; but in a large number of cases, the parties pay for these services themselves." Civil Justice Review, Supplemental and Final Report, at 79.

[231] Many of these voluntary programs are government-funded, and directed at assisting low-income parents. For example, In Alberta, government funded voluntary mediation is available for parties with children younger than 18 and incomes of less than $40,000. In British Columbia, Family Justice Centres provide mediation for separating parents with modest incomes. In Manitoba, Family Conciliation offers mediation services help resolve custody and access issues. Individuals may apply directly or may be referred by the courts. In Ontario, mediation services are available for issues that arise from family break down, most with user fees determined by a client's ability to pay. This service is expressly authorized by S.31 of the Children's Law Reform Act, which allows courts to appoint a mediator in cases of custody and access.

mechanisms. Separating and divorcing parents are encouraged to use primary dispute resolution to resolve their parenting disputes before seeking the intervention of the courts.[232]

The issue to be addressed is whether and how the *Divorce Act* could be reformed to place greater emphasis on mediation and other forms of primary dispute resolution within the existing custody and access regime.

Options for Reform

There are a number of ways in which the *Divorce Act* could be amended to encourage, but not require, parties to consider mediation or other forms of primary dispute resolution.

Information Sessions

First, as discussed above, if the Act was amended to require separating parents to attend a general information or parenting education session, parents would then be exposed to information regarding the advantages and disadvantages of mediation. It may be that a mandatory information session would suffice to encourage separating parents to consider the possibility of resolving their parenting disputes in and through mediation, and that no further reform would be required.

Alternatively, the *Divorce Act* could be amended to allow the courts to specifically require that the parents be informed about mediation. Following the ALI recommendations, the Act could state that "The court may inform the parents, or require them to be informed about… mediation or other non-judicial procedures designed to help them achieve an agreement." The ALI recommendations further provide that such services should not be ordered unless they are "available at no cost or at a cost that is reasonable in light of the financial circumstances of each parent. Where one parent's ability to pay for such services is significantly greater than the other, the court may order that parent to pay some or all of the expenses of the other."[233]

Statement of Principle

The Act could also, or alternatively, be amended to include a general statement of objectives, which includes the principle that parents should be encouraged to reach their own agreements. The Australian *Family Law Act* includes a similar statement of principle in the section dealing

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[232] As discussed above, the Australia Family Law Act encourages the use of primary dispute resolution to resolve family disputes in general and parenting disputes in particular. Part III of the Australian Family Law Act encourages people to use primary dispute-resolution mechanisms (such as counselling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made, provided the mechanisms are appropriate in the circumstances and proper procedures are followed. Part VII of the Act, specifically dealing with children and parenting disputes, also includes a number of provisions encouraging the use of primary dispute resolution. The Act includes the general principle that "parents should agree about the future parenting of their children," and that parents are encouraged "to agree about matters concerning the child rather than seeking an order from a court." The Australian regime imposes duties on the courts and legal practitioners to consider advising people about primary dispute-resolution methods. The Act also requires that parents attend a conference with a family and child counsellor to discuss the matter before a parenting order will be made. The objective of the conference is to explore alternative ways of resolving the parenting dispute. See discussion supra at notes 118-119.

[233] ALI supra note 26, at 92-93.

with the resolution of parenting disputes.[234] Although this would not in any way require that separating parents use mediation to resolve their disputes, it might assist in the general educational and exhortative objective of the legislation.

Appointing Mediators

Finally, the Act could also, or alternatively, be amended to allow the courts to appoint a mediator in the cases of custody and access, *at the request of the parties*. The legislation in Ontario and Newfoundland could be used as a model for this amendment.

Assessment

In many respect, the courts already rely heavily on a range of services that encourage parties to resolve their disputes without further litigation. Short of requiring mandatory mediation, it is not clear that any of these proposed amendments would actually change the current practice in contested custody and access cases, when the parties are given ample opportunities to resolve their disputes in mediation. However, there may nevertheless be some advantages to including a reference to mediation and other services within the *Divorce Act*. First, it might promote the educational objective of legislative reform in this area, by encouraging all separating and divorcing parents to at least think about the possibility of mediating their custody disputes. Including a reference to these kinds of mediation services in the *Divorce Act* might also contribute to establishing a more consistent national standard for the availability of mediation and other services across the country.

Summary and Assessment: Divorce-Related Services

The *Divorce Act* could be amended to include a reference to parenting education, mediation or both within the existing regime of custody and access. Both of these services could be included in a new section dealing with divorce-related services. The section could set out the court's discretionary authority to require parents to attend a parenting education program and be informed about mediation services. It could also include a reference to the court's authority to appoint a mediator at the request of the parties. The section could further deal with the jurisdictional and cost implications by providing that the court should only exercise its discretion and order services when they are feasible and appropriate in light of the local availability, quality or cost of the services. The text could also specifically deal with the cost implications of the services, by providing that the services should only be ordered if they are available at a cost that is reasonable in light of the financial circumstances of each parent, and allow the court to order that one parent pay some or all of the costs of the other.

These changes to the *Divorce Act* are not likely to significantly change existing practice, with parenting education programs increasingly becoming mandatory, and parents being strongly encouraged to consider mediating their parenting disputes. In this respect, these reforms are not, strictly speaking, necessary. However, there are some advantages to making these changes. Including specific references to parenting education and mediation in the Act could assist in the general educational and exhortative objectives of legislative reform. Although these changes would do no more than bring the *Divorce Act* in line with existing practice, this may be helpful in educating separating and divorcing parents about the merits of parenting education and

[234] S.63B, Family Law Act.

mediation. Moreover, there may be symbolic value in reform that allows the *Divorce Act* to better reflect existing practice.

ADVANTAGES AND DISADVANTAGES OF THIS OPTION FOR REFORM

The general objectives of legislative reform to custody and access are, as outlined above, to encourage parental cooperation, promote meaningful relationships between children and their parents following separation and divorce, and reduce parental conflict and litigation. The objectives are partially educational and exhortative—that is, the law of custody and access should establish general standards that guide and encourage separating and divorcing parents to restructure their relationships in a way that best promotes the best interests of children. At the same time, the reform must ensure that children are protected from violence, conflict, abuse and other harmful behaviour. The reform should encourage parents to reach their own agreements, but must also provide the courts with clear principles for resolving ongoing disputes when parents are unable to cooperate and agree.

This option for reform can advance at least some of these objectives. It would be possible to provide some encouragement for parental cooperation in the resolution of parenting disputes. Including an elaboration of the best interests of the child test, a list of parental responsibilities, a description of parenting plans, as well as a reference to divorce-related services, may help parents better focus their attention on the needs of their children. These reforms within the existing regime of custody and access could help advance the educational and exhortative objectives of reform by setting out some general standards to guide separating and divorcing parents in restructuring their parenting relations. Further, the reforms could certainly advance the general objective of protecting children from harm by including specific references to the unique needs of children who have experienced family violence, high conflict families or inadequate parenting.

The more challenging question is whether this reform can advance these objectives enough—that is, whether the reform goes far enough in addressing the concerns within the existing law, or whether more substantial reform, as contemplated by Options Two or Three is required. This question can only be answered by balancing the advantages and disadvantages of this option for reform, with the advantages and disadvantages of each of the other options for reform.

This option for reform retains the language of custody and access. Somewhat paradoxically, this is both its greatest strength and most serious weakness.

Fraught and Conflictual Language?

As discussed above, the language of custody and access has come under increasing criticism. The language is said to promote a win-loss mentality about parenting disputes and to be a source of parental conflict. The problem is said to be one of status—that the parent who gets custody is the “real” parent of the child, while the parent with access is relegated to the status of second-class parent, with few rights, entitlements or responsibilities. Parents fight over the children precisely because, within the existing language of custody and access, the stakes are so high.

Over the past decade, the courts have been extending the rights of non-custodial parents, and promoting the continuous involvement of both parents in the lives of their children. Non-

custodial parents are no longer completely excluded from participation in their children's lives. However, notwithstanding this change, there is a social perception, however mistaken, that non-custodial parents are relegated to second-class status. The perception of the stakes may, therefore, be a more important determinant than a realistic assessment of the stakes themselves.

The language of custody and access has become emotionally loaded. Disputing parents may sometimes find themselves fighting about language, rather than focussing on the interests of and arrangements for their children. There is, then, much to be said for any reforms that might be able to help parents focus their attention on the interests of the children. At the same time, it is important to be realistic about what might be accomplished in and through a change in language. At least part of what has made the terms *custody* and *access* so loaded is that it has been the language in which parental disputes have been cast and fought for many, many years. If parents continue to fight over their children, new terminology could become as emotionally fraught as the old. And language is not the only source of conflict. Parents fight over their children for many reasons—fear, anger, revenge, anxiety, insecurity and guilt, as well as love and attachment. It is not at all a foregone conclusion that changing the language will be able to address these underlying sources of conflict.

Some of the problems of language and second-class parental status could be addressed by a regime that encouraged parents to enter into parenting plans, in which they allocated parental responsibility according to their own assessment of the best interests of the child. These parenting plans would not have to use the language of custody and access. And the use of parenting plans could, in turn, be promoted by encouraging parents to resolve their own disputes, through parenting education and primary dispute resolution.

However, the language of custody and access would be retained for those separating and divorcing parents who could not agree on their parenting arrangements. Custody and access would remain the language of contested disputes and the language of court orders. As a result, the court-ordered access parent may continue to feel like a second-class parent. Incorporating a list of parental responsibilities, then, does little to address the problem of language for *contested* custody and access cases. While adding a list of parental responsibilities, incorporating a reference to parenting plans and encouraging parenting education and primary dispute resolution might help more parents resolve their disputes themselves, the language of custody and access could continue to fan the flames in contested cases.

Avoiding Uncertainty and Litigation

The disadvantages of retaining the language of custody and access must be balanced against the disadvantages of changing the language. Abandoning the language of custody and access will create a range of unanticipated uncertainties and ambiguities in the legislative regime, which will, in turn, give rise to an increase in litigation. Admittedly, any reform creates uncertainty, and even the reforms directed at the best interests of the child—parental responsibilities, parenting plans and protecting children from harm—can be expected to create such uncertainty. However, the problems associated with reform within the existing regime of custody and access

are nothing like the degree of uncertainty that will in all likelihood be produced by abandoning the language of custody and access altogether.[235]

Avoiding Broad Implications for Other Legislation

Working within the existing regime of custody and access avoids the need for the major legislative reforms that would otherwise be required in a broad range of federal and provincial legislation that relies on the language of custody and access. If this language was abandoned, it would be necessary to review these laws, and consider whether all of them would need to be reformed. In many instances, the reform would simply be terminological.[236] However, there are a number of laws that would require more substantial reform in order to be made consistent with a new parenting regime. For example, and of particular importance in the area of family law, the Federal Child Support Guidelines, have been structured around the existing regime of custody and access. International and interprovincial child abduction laws have similarly been structured around the existing regime. While this will be discussed in further detail in Options Two and Three as well as in Part V below, abandoning the language of custody and access might require a broad ranging reform to a substantial number of laws.

[235] See supra at notes 95-105, and 125-129 discussing the studies on the impact of the reform in the U.K. and Australia, which demonstrate a significant increase in applications for parenting orders.
[236] See Part V for a discussion of laws that rely on the existing language of custody and access.

III OPTION TWO: PARENTING RESPONSIBILITY AND PARENTING ORDERS

Several jurisdictions have moved away from the custody and access model, adopting a model based on parenting responsibility, parenting plans and parenting orders. Parenting responsibility is a broad concept intended to get at the range of powers and obligations parents have in relation to their children. This second model for reform would set out the range of parenting responsibilities, and allow the parties and the courts to allocate those responsibilities between the parents. The allocation of parenting responsibilities could be done by court order with a parenting order or by private agreement with a parenting plan. Under this model, there would be no presumption in advance of how parenting responsibilities should be allocated. It would, rather, contain a list of factors (presumably set out as a statement of the child's best interests) that the parties and the courts should take into account when allocating parenting responsibilities.

This section addresses three distinct but related issues: (1) the definition of parenting responsibility, (2) the nature of parenting orders and (3) the role of parenting plans. It sets out the different ways in which parenting responsibility, parenting orders and parenting plans could be defined and elaborated within a reformed *Divorce Act*. It highlights the choices and challenges in the design of a model based on a neutral concept of parental responsibility. And it assesses the advantages and disadvantages of this model for reform.

By way of a caveat, it should be noted that this section relies on the experience in a number of other jurisdictions that have replaced the idea of custody and access with the concepts of parental responsibility, parenting orders and parenting plans. As a result, the comparative analysis frequently borrows from jurisdictions that have not, strictly speaking, adopted a *neutral* model of parenting responsibility but, rather, have included references to shared parenting in their legislation. For example, the U.K. *Children Act* 1989 and the Australian *Family Law Reform Act* 1995 are both based on the language of joint or shared parenting. The Maine *Domestic Relations Act* also includes a reference to shared parenting as one among various types of orders that can be made. While at first glance, then, the experience of these jurisdictions might be better left to a discussion of Option Three, there is much to be gained from also looking at these legislative schemes in the design of Option Two. The experience of each of these jurisdictions may be very helpful in elaborating the scope, content and allocation of parenting responsibility under the second option for reform.[237] The particular ways in which these jurisdictions have modelled their schemes on the concept of shared parenting is examined in the discussion of Option Three below. In this section, the paper uses these, and other jurisdictions, as a basis for exploring the

[237] In some respects, the applicability of these regimes may, in fact, be limited for a neutral parenting responsibility model. However, there are still significant ways in which these regimes might be helpful in designing and evaluating a regime based on parenting responsibility. For example, these regimes may be helpful in considering how to define parental responsibility. They may, however, be less helpful in the ways in which this parental responsibility is allocated, in and through parenting orders. This is discussed in greater detail below.

range of possibilities for and obstacles to designing a legislative scheme based on a neutral model of parenting responsibility.[238]

PARENTING RESPONSIBILITY

As discussed under Option One, introducing the concept of parenting responsibility is designed to bring a more child-centered approach, to divorce legislation by directing attention towards children's needs and parents' responsibilities to fulfil those needs. But, unlike under Option One, in this model parenting responsibility is intended to replace the concepts of custody and access as the basis for restructuring parenting during separation and divorce. The central issue to be addressed in this section is how parenting responsibility should be defined. The text begins by examining how parenting responsibility has been defined in other jurisdictions, and considers whether the term should be given a general or specific definition.

Other Jurisdictions

At its most general, "parenting responsibility" is a broad concept, intended to describe the range of powers and obligations that parents have in relation to their children. As discussed above, in the U.K. *Children's Act*, for example, parental responsibility is defined as "all rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his or her property."[239] In the Australian legislation it is similarly defined as "all the powers, duties, responsibilities and authority which, by law, parents have in relation to children."[240] The U.K. definition has been criticized not only for its generality, but also because it "immediately throws one back to the rights and duties concept which 'responsibility' was supposed to replace."[241] The Australian definition is said by some to be an improvement over the U.K. definition, in its omission of the term "rights," but that it, too, suffers from the same degree of generality.[242]

In contrast, the Scottish *Children Act*, despite also being modelled on the U.K. legislation, contains a more comprehensive, and considerably less general, definition of parental responsibility. Section 1(1) reads as follows:

> A parent has in relation to his child the responsibility:
> (a) to safeguard and promote the child's health, development and welfare;
> (b) to provide, in a manner appropriate to the stage of development of the child-
> (i) direction;
> (ii) guidance,
> to the child;
> (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

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[238] The discussion will also be careful to highlight the ways in which particular provisions in legislative schemes in jurisdictions such as the U.K. and Australia are intricately tied to the concept of shared parenting and, therefore, of limited use in the elaboration of this model.
[239] U.K. Children's Act, 1989, c.41, S.8.
[240] Section 61C, Australia Family Law Reform Act 1995.
[241] N.V. Lowe "The Meaning and Allocation of Parental Responsibility—A Common Lawyer's Perspective" (1997) 11 International Journal of Law, Policy and the Family 192, 195.
[242] Lowe, ibid.

(d) to act as the child's legal representative,
but only in so far as compliance with this section is practicable and in the interests of the child.

The Maine *Domestic Relations Act* uses the language of "allocated parental rights and responsibilities," and includes within the definition the specific kinds of responsibilities that can be allocated between parents:

> Aspects of a child's welfare for which responsibility may be divided include primary physical residence, parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses and any other aspect of parental rights and responsibilities.

Along similar lines, the National Family Law Section of the Canadian Bar Association recommendations on parental responsibilities provide a more comprehensive list of factors to be taken into account. As discussed in relation to Option One above, they recommended that the *Divorce Act* be amended to include a statement that, unless otherwise ordered by the court as in the best interests of the child, all parents have responsibilities toward their children. Although the CBA's recommendation was made in relation to Option One—that is, within the existing regime of custody and access—it may nonetheless be quite helpful when considering how parenting responsibilities might be defined for the purposes of Option Two as well.[243] This list provided by the CBA appears to be closely modelled after the Washington *Parenting Act* 1987, which defines parenting functions as "those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child." Those parenting functions include the following:

(g) maintaining a loving, stable, consistent and nurturing relationship with the child;
(h) attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;
(i) attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
(j) assisting the child in developing and maintaining appropriate interpersonal relationships;
(k) exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and
(l) providing for the financial support of the child.[244]

Although the Washington scheme is one that places priority on the use of parenting plans as a way of allocating parenting functions, it would be possible to use this definition of parenting functions as the basis for a detailed definition of parenting responsibility.

[243] See supra at note 189.
[244] Section 26.09.004(3) Parenting Act 1987.

Assessment: General or Specific Definition?

When considering how the concept of parental responsibility ought to be defined under Option Two, it is useful to consider the U.K. and Australian experience. As noted, both the U.K. and Australian schemes include a very general definition of parental responsibility, with no elaboration of its particular dimensions. The generality and vagueness of the concept has been the subject of considerable criticism. In the U.K. context, John Eekelaar, for example, has observed that, "parental responsibility has been one of the more elusive concepts of the *Children's Act* 1989."[245] The courts have been called upon, time and again, to determine the scope and content of parental responsibility. In one case, L.J. Ward observed that appeals from applications by unmarried fathers to be granted parental responsibility under the Act "have become one of those little growth areas born of misunderstanding."[246] The Australian Family Court has also observed that the definition of parental responsibility in the *Family Law Act*, as amended by the *Family Law Reform Act* 1995, "provides little guidance, relying as it does on the common law and relevant statutes to give it content."[247]

There are compelling reasons to provide a more elaborate definition of parenting responsibility in a neutral model. First, a more specific definition may help promote the general objective of reducing conflict and litigation. A vague definition of parental responsibility is more likely to give rise to litigation regarding its scope and content. This may be particularly heightened in the context of a legal regime, such as that in the U.K. and Australia, that provides that parenting responsibility is shared. If parenting responsibility is to be shared between parents, then parents need to know, with some degree of clarity, what exactly it is that they are sharing. In a neutral model of parenting responsibility, there is also reason to be concerned about an overly general definition. As discussed in the sections that follow, parenting responsibility in this model is to be specifically allocated by the courts in a parenting order, or by the parties in a parenting plan.

A vague definition may also give rise to more litigation. Separating parents uncertain as to the scope and content of parenting responsibility may be more likely to seek court orders than resolve the matter themselves in and through a parenting plan. A vague definition will require that the scope and content of parental responsibility be articulated, over time, by the courts. Until such time as the meaning of the concept is clearly articulated by the courts, uncertainty over its meaning may well be an encouragement to litigate. Further, a definition articulated by the courts is also subject to change by the courts, leading to the possibility of relitigation in the future. In the short term, a certain amount of litigation will be unavoidable in light of such a major legislative reform. Courts will inevitably be called upon to interpret the precise meaning of and relationships between the new provisions. However, the more precise content that can be given to concepts—particularly one as central to this model as parenting responsibility—the more guidance will be given to courts and parents in making these orders and plans.

Second, a more specific definition may help promote the general educational objective of legislative reform to encourage and guide parents to consider how best to restructure their

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[245] John Eekelaar "Parental Responsibility—A New Legal Status?" (1996) 112 The Law Quarterly Review 233

[246] These particular appeals are related to the particular features of the Children's Act, which grants only those fathers who are married to the mothers of their children parental responsibility. Unmarried fathers can, however, apply to be granted parental responsibility. See discussion supra at note 86.

[247] In the Matter of B and B, supra note 132.

parenting relationships upon separation and divorce. The introduction of the concept of parenting responsibility is intended to help separating parents focus on their children's needs and parents' responsibilities to fulfil those needs. The extent to which this objective can be realized within legislative reform is itself a controversial question, which will be revisited below. However, it is an objective that can only be assisted by a concept of parenting responsibility that articulates those needs and responsibilities in as much detail as possible.

PARENTING ORDERS

In this option for reform, custody and access orders would be replaced by parenting orders. This section examines the range of policy choices and challenges in the design of a legislative scheme of parenting orders. The section examines the different types of parenting orders that such a scheme might adopt, the relationship between parenting orders and parenting responsibility, and the criteria for making and modifying parenting orders, including a specific consideration of relevance of violence, high conflict and inadequate parenting in such orders.

Types of Orders

Jurisdictions that have replaced custody and access orders with parenting orders have tended to break parenting orders down into several kinds of orders. In this section, three possible models for types of parenting orders are identified. The first is based on the U.K. and Australian models of residence, contact and specific-issues orders. The second is based on the Maine model of allocated-parental-responsibilities orders. The third is loosely based on the Washington and American Law Institute models of residential-schedule orders and decision-making-authority orders.

Residence, Contact and Specific-Issues Orders

Both the U.K. and Australia have adopted a regime that replaces custody and access orders with residence, contact, and specific-issues and special-purpose orders.

The U.K. *Children's Act* provides for residence orders (settling arrangements as to the person with whom the child is to live), contact orders (requiring the person with whom the child lives to allow the child to visit or stay with the person named in the order, or otherwise have contact with that person), prohibited-steps order (stipulating that no step that might be taken by a parent in meeting his or her parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court); and specific-issue orders (giving directions for the purpose of determining a specific question that has arisen or which may arise in connection with any aspect of parental responsibility for a child.)

The Australian *Family Law Reform Act* replaces custody and access orders with parenting orders, defined generally as an order made under Part VII of the Act dealing with the person(s) with whom a child is to live, contact between a child and another person(s), maintenance of the child, and other aspects of parental responsibility. The Act also includes more specific orders: residence orders (the person(s) with whom the child is to live), contact orders (contact between a child and another person(s)) and special-purpose orders (any aspect of parental responsibility other than residence, contact or child maintenance).

Allocated Parental Rights and Responsibilities Orders

The Maine legislation provides that a court order awarding parental rights and responsibilities must include allocated parental rights and responsibilities shared parental rights and responsibilities or sole parental rights and responsibilities. Allocated parental rights and responsibilities are defined as meaning that

> … responsibilities for the various aspects of a child's welfare are divided between the parents, with the parent allocated a particular responsibility having the right to control that aspect of the child's welfare. Responsibilities may be divided exclusively or proportionately. Aspects of a child's welfare for which responsibility may be divided include primary physical residence, parent-child contact, support, education, medical and dental care, religious upbringing, travel boundaries and expenses and any other aspect of parental rights and responsibilities. A parent allocated responsibility for a certain aspect of a child's welfare may be required to inform the other parent of major changes in that aspect.

Residential-Schedule Orders and Decision-Making Authority Orders

A third model for allocating parental responsibility is loosely based on the Washington *Parenting Act*, and the recommendations of the American Law Institute. The Washington regime requires that parenting plans allocate the child's residential schedule and decision-making authority for the child. The ALI scheme similarly requires the allocation of "custodial responsibility" for the child (that is, physical custody and supervision of the child) and of significant decision-making authority for the child. Although both of these models give priority to parenting plans, it is possible to design a regime of parenting orders that could be based on the allocation of these two dimensions of parenting responsibility: residential-schedule orders, in which the court allocates the child's residential time between the parents and decision-making-authority orders, in which the court allocates responsibility for making significant decisions for the child.

A residential schedule order has the advantage of avoiding the language of residence and contact orders, which could potentially become as emotionally fraught as the existing custody and access orders. A residential schedule order would effectively incorporate both residence and contact within the same order, by specifying the time that the child is to live with each parent.
A decision-making-authority order would then specify and allocate major decision-making authority for the child, separate from the child's residential schedule.

Parenting Plans

A fourth approach to parenting orders would be a mandatory parenting plan regime, in which all separating and divorcing parents would be required to submit parenting plans. In the event that parents did not agree on their plans, courts would then be required to issue their parenting orders in the form of a parenting plan. This is a regime that would fundamentally reconfigure the existing system, placing primary emphasis on parents resolving their own disputes through parenting plans. Courts would be required to approve the plans, and impose orders only as a last resort. As such, this option is considered further below, in the discussion of parenting plans, rather than in the current discussion of parenting orders.

In the discussion that follows, the paper explores how a regime of parenting responsibility based on three models of parenting orders could be designed.

Assessment

A regime based on residence, contact and specific-issues orders does not specifically require the allocation of decision-making authority. Although decision-making authority can be included with a specific-issues order, and day-to-day decision-making follows the child, this approach otherwise assumes that parental responsibility in general, and major decision-making authority in particular, will be shared.[248] In this respect, this regime of parenting orders does assume in advance that a particular parenting arrangement in which major decision-making is shared is in the best interests of children. As such, it may be the type of parenting orders least compatible with a neutral model of parenting responsibility. Further, the language of residence and contact bears a striking resemblance to the language of custody and access, and it may be that the language of these new orders could quickly become as emotionally fraught as the current language.

A regime based on allocated-parenting-responsibility orders does not presuppose that any particular parenting arrangement is in the best interests of the child but, rather, allows parents and courts to allocate parenting responsibility as they see fit. In this respect, it is an approach to parenting orders quite consistent with a neutral model of parenting responsibility. Similarly, a regime based on residential-schedule and decision-making-authority orders does not presuppose that any particular parenting arrangement is in the best interests of the child and is also, then, consistent with a neutral model of parenting responsibility. Both of these approaches to parenting orders avoid the potentially loaded language of residence and contact, which could become associated with first and second-class parenting status.

Relationship Between Parenting Responsibility and Parenting Orders

In designing a model based on parenting responsibility, it would be important to address the issue of the relationship between parenting orders and parenting responsibility. Would parenting responsibility exist prior to, and survive, a parenting order unless otherwise ordered? Would parenting responsibility follow from certain kinds of parenting orders? Or would parenting orders be required to specifically allocate the various dimensions of parenting responsibility?

The question of the relationship between parenting orders and parenting responsibility is most important in the specific context of decision-making authority. If parenting responsibility is defined as "all the powers, duties, responsibilities and authority which, by law, parents have in relation to children," then parenting responsibility clearly includes decision-making authority over a child. And the allocation of decision-making authority is a crucial and often controversial issue when resolving parenting disputes. Attention must, therefore, be given to how parenting orders affect the allocation of this authority between the parents. Would this authority survive a parenting order, unless otherwise ordered? Would this authority follow from certain kinds of parenting orders? Or would parenting orders be required to specifically allocate this decision-making authority?

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[248] The relationship between these parenting orders and parenting responsibility is discussed in the section that follows.

Given that one of the guiding principles of legislative reform is to provide legislative clarity to the legal responsibility of caring for children, these crucial details need to be addressed in the design of a legislative model. Failure to address these details will result in unnecessary confusion, and invariably, become the subject of litigation.

Parenting Responsibility Surviving Parenting Orders

One approach would be for parenting responsibility and decision-making authority to survive a parenting order, unless otherwise ordered. In the Australian scheme, for example, "each of the parents of a child who is not 18 has parental responsibility for the child" and this parental responsibility continues to exist "despite any changes in the nature of the relationships of the child's parents."[249] The Act specifically provides that this parental responsibility is not affected by the making of a residence, contact or other order except to the extent, if any, as is expressly provided in the order or is necessary to give effect to the order.

The problem with this approach, for the purposes of this second option for reform, is that it assumes that parental responsibility should be shared and, therefore, more closely approximates the idea of shared parenting of Option Three. It assumes, *prima facie*, that parenting responsibility in general and decision-making authority in particular are to be held by each parent, and assumes that parenting responsibility will continue to be held by each parent after separation unless a court order provides otherwise.

But, the very definition of this second option for reform is that that there would be no presumption in advance of how parenting responsibilities should be allocated between the parents. A *neutral* model of parenting responsibility and parenting orders—that is, one that does not presuppose that parenting responsibility is and should be shared—would then need a different relationship between parenting responsibility and parenting orders. This approach of parenting responsibility and decision-making authority surviving parenting orders will be re-examined in the discussion of Option Three.

Parenting Responsibility Following Certain Parenting Orders

A second approach that could be adopted would be one in which parental responsibility in general or decision-making authority in particular followed upon certain kinds of orders, most likely residence orders.

This approach, in which all decision-making authority followed a residence order, would be highly controversial and unlikely to help promote the general objectives of reducing conflict. The very idea of residence would quickly come to resemble the existing legal concept of custody. A residential parent would in effect have both physical and legal custody of the child. A residence order would thus become the "winner takes all" type of order that a custody order now represents in the law. As a result, a separating parent may contest an application for a residence order, not because he or she wants the child to live with him or her, but because he or she wants to continue to participate in decision-making in relation to the child.

[249] S.61C(1), (2) Australia Family Law Act.

However, a person with physical care of a child would need authority over everyday decision-making, and should not be required to consult with the non-residential parent on such day-to-day matters. While this would most clearly need to be associated with a residence order, a person with a contact order would also need to be able to make day-to-day decisions.[250]

A model based on residential schedule orders and decision-making authority orders would similarly need to confer day-to-day decision-making authority to the person with physical care of the child so he or she would not have to consult with the other parent. Major decision-making authority would be allocated in a separate order. Parental responsibility would not be said to follow any particular type of order in this approach.

Parenting Responsibility Allocated in Parenting Orders

A third approach would be one in which parental responsibility would have to be expressly allocated in a parenting order. The legislation would make no assumptions about how parenting responsibility should be allocated following separation and divorce. There would be no assumption that parenting responsibility in general or decision-making authority in particular would be shared by parents, or would follow particular kinds of parenting orders. Rather, the various dimensions of parenting responsibility, including decision-making authority, would have to be expressly addressed and allocated in a parenting order. The courts would then allocate decision-making authority on the basis of the best interests of the child (the specific criteria for which are discussed in the next section).

However, under this approach, the parent with physical care of the child would still need to be able to exercise authority over day-to-day decision-making without consulting the other parent. This approach would need to specify, in the allocation of decision-making authority, what if any authority was to be shared between the parents (such as that over issues such as major medical problems, education and religion), and the day-to-day authority that would necessarily be within the purview of the parent with physical care of the child.

This approach is the one most consistent with a neutral model that makes no presumptions in advance about the allocation of parenting responsibility. Thus, in a parenting responsibility model, parenting orders should be required to expressly address and allocate parenting responsibility, including the allocation of decision-making authority.

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[250] In both the U.K. and the Australian schemes, parenting responsibility survives parenting orders; however, provision is made for day-to-day decision-making. In the U.K. Children Act, either parent with parental responsibility may act independently and without consultation. This does allow the parent with physical care of the child to make any and all decisions regarding the child.
Under the Australian legislation, a residence order does not vest a person with sole decision-making power for day-to-day matters. In order to give one parent sole day-to-day or long-term parental responsibility, a specific-issues order to that effect would need to be made. But, the full Family Court in Australia has held In the Matter of B. v. B, supra note 132 that both the residence and contact parent need to be able to make day-to-day decisions when they have sole physical care of the children without having to consult one another. However, the parents have an obligation to consult with one another in relation to major medical, educational, and religious decisions. The scheme is, therefore, one in which this day-to-day decision-making authority follows the children, rather than any particular parenting order, while major decisions remain shared.

A model of parenting orders based on either allocated parental rights and responsibilities or residential schedule and decision-making-authority models, is most consistent with this neutral approach, in which there are no presumptions in advance of the allocation of parental responsibility. Rather, within both of these models, parenting orders would expressly address and allocate parenting responsibility, including the allocation of major decision-making authority.

Parental Responsibility in the Absence of a Parenting Order (or Agreement)

Another issue that would need to be addressed within such a model is the implications for parenting responsibility in general and decision-making authority in particular in the absence of a court order or private agreement. For example, what would happen when the parties take no action—that is, when they have not made a private agreement and do not seek a court order? Similarly, what would the legal status be during the interval period—that is, when a separating or divorcing couple is attempting to negotiate a private agreement but has not yet reached an agreement and there is no court order?

Under provincial legislation, custody or guardianship is generally shared equally by both parents, (particularly by those parents who have lived together and are now separating) unless a court order or agreement provides otherwise.[251]

The parenting responsibility model could work on a similar basis. Parenting responsibility would be jointly held by both parents, and would remain so until an order or agreement provides otherwise. If the parents separate, there could be similar provisions for parenting responsibility in general, or decision-making authority in particular, to follow the child's residence (based on the consent, implied consent or acquiescence of the other parent). Parenting orders (or agreements, discussed below in the section on parenting plans) would then be required to expressly allocate the various aspects of parenting responsibility.

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[251] For example, Section 3 of the Saskatchewan Children's Law Act provides that "unless otherwise ordered by the court and subject to ss.(2) and an agreement pursuant to ss.(3), the parents of a child are joint legal custodians of the child with equal rights, powers and duties."
Section 20(1) of the Ontario Children's Law Reform Act provides that "except as otherwise provided in this Part, the mother and father are equally entitled to custody of the child." The Ontario Act further provides in section 20(4) that when parents separate, and the child lives with one of them with the consent, implied consent or acquiescence of the other, the right of the other to exercise the entitlement of custody and the incidents of custody, but not access, is suspended until an agreement or order provides otherwise.
Section 21 of the British Columbia Family Relations Act provides that the mother and father are the joint legal guardians of the child, unless a court orders otherwise. It further provides that a mother and father who have lived together and separated remain joint guardians of the estate of the child, but the parent with care and control of the child is the sole legal guardian unless a court orders otherwise.
Some provinces specifically provide for circumstances in which the parents have not lived together after the birth of the child. For example, Section 3(2) of the Saskatchewan legislation provides that "where the parents have never cohabited after the birth of the child, the person with whom the child resides is sole legal custodian of the child." Section 39 of the Manitoba Family Maintenance Act provides that "subject to ss.(2), rights of parents in the custody and control of their children are joint but where the parents have never cohabited after the birth of the child, the parent with whom the child resides has sole custody and control of the child." Section 21 of the British Columbia Act provides that if the mother and father have not lived together since the child was born, or 10 months before the child was born, the mother is the sole legal guardian.

While this approach may appear to bear considerable resemblance to a shared parenting model—that is, parenting responsibility is shared until an order provides otherwise—there are some subtle, but significant differences. The Australian legislation provides that parental responsibility is shared *unless* otherwise ordered. This parental responsibility model could provide that parental responsibility is shared *until* otherwise ordered. The scheme could also require that a parenting order clearly set out the allocation of parenting responsibilities, including decision-making authority. Moreover, as noted, this approach is consistent with current practice under which parents do share custody until a court order, agreement (or implied consent) provides otherwise.

However, this question is complicated by the divided jurisdiction in this area. The *Divorce Act* only has jurisdiction over custody and access disputes respecting a child of the marriage upon or after the granting of a divorce. Prior to an application for divorce, custody and access disputes are governed by provincial legislation. If a divorce judgment is silent on the issue of custody and access, an order under provincial legislation remains valid. Further, if there is no order, either under provincial or federal law, then the default position would be whatever provincial law established. In other words, the default position under federal law (i.e. the situation in the absence of an agreement or order) is the provincial law.[252]

There are limits, then, to the extent that federal legislation alone could address the question of parental responsibility in the absence of a parenting order. It could not apply to separating couples who have not yet initiated divorce proceedings. Rather, parents who did not have an agreement or an order under provincial law would be governed by the default position of the provincial law.

The *Divorce Act* could, theoretically, have jurisdiction once a divorce action was initiated. But, it would be important that any attempt to establish a default position under the federal law not automatically invalidate the orders that separating parents may have received under provincial law.[253] This would create profound confusion and chaos among all those couples who have chosen to settle their parenting arrangements under provincial law. The *Divorce Act* could establish a default position that would apply to separating couples who have no agreement, and no order under either provincial or federal law. It could establish a federal default.[254]

However, to say that the *Divorce Act* could have jurisdiction to establish such a default position is not to suggest that it should do so. It is not clear that there would be any advantages in displacing the provincial default. It would be important to know with whom parental responsibility was vested in the absence of a court order or agreement. However, it is not at all clear that this can or should be done in the federal legislation.

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[252] This issue raises a range of challenging questions about federal and provincial jurisdiction, including the tests for federal paramouncy in the context of family law, which are beyond the scope of this discussion paper.

[253] Many couples use the provincial legislation to settle their parenting disputes. They can then initiate divorce proceedings simply to obtain a divorce, and not revisit their parenting arrangements. If the Divorce Act attempted to establish a default position—that is, the allocation of parental responsibility in the absence of an agreement or order—it would be crucial that this default position not override provincial orders.

[254] The Divorce Act could attempt to address this issue by establishing a framework for interim orders, or interim parenting plans, that divorcing parents could seek to govern their parenting arrangements on an interim basis. This would specifically require a court order and would not apply in the absence of such an order.

Moreover, the issue highlights the importance of federal-provincial-territorial cooperation and consensus in any reform to the law of custody and access. If the federal, provincial and territorial governments agree to reform their laws on the basis of the parental responsibility model, provincial and territorial laws could be amended to reflect the desired default position (of joint parental responsibility until an agreement or order provides otherwise). However, if the federal government decided to move to such a model but the provinces and territories did not, then the default position would continue to be framed in terms of custody and access under provincial law.

Before establishing parental responsibility in the absence of a court order or agreement in the *Divorce Act* there would need to be a careful examination of the interaction of federal-provincial-territorial legislation in an area of divided jurisdiction. It would require substantial consultation and collaboration between the federal, provincial and territorial governments. The federal *Divorce Act* cannot establish this default position alone.

Summary and Assessment

A neutral model of parenting responsibility would be best promoted through a regime in which parental responsibility had to be specifically allocated in a parenting order. Such a regime would still have to address parenting responsibility in the absence of a parenting order or agreement. However, because of the complications of divided jurisdiction, this will require substantial tripartite consultation and collaboration.

Criteria for Orders

The general criteria for making a parenting order must be the best interests of the child. The issue of concern is the extent to which this best interests of the child test should be further articulated. In many respects, the discussion here parallels that of the best interests of the child test in Option One; the list of factors that go to the best interests of the child would not necessarily be any different. There are, however, a number of questions that are unique to the design of a parenting-responsibility and parenting-order model under Option Two. Should such a regime include a general statutory list of factors to be considered for all parenting orders, or should it identify specific factors for specific kinds of parenting orders?

Factors in the Best Interests of the Child

One approach would be to provide a list of factors to be taken into account in making any and all parenting orders. The Australian *Family Law Act*, for example, provides an extensive list of factors to be taken into account when determining the best interests of the child for the purposes of a parenting order.[255] Similarly, the U.K. *Children Act* provides a statutory list of factors, although the criteria are somewhat less extensive.

This option for reform could adopt a list of factors similar to that discussed in relation to the best interests of the child test in Option One (with the requisite revisions to the language of custody and access). The list of factors from the *Children's Law Reform Act*, or the recommendations of the National Family Law Section of the CBA, as set out in detail above, could provide the basis

[255] S.68F, Australia Family Law Act.

for this best interests of the child test. The importance of at least taking continuity of care into account would similarly apply.

Specific Factors for Specific Orders

A second approach would be to set out the specific factors that would need to be taken into account in relation to *specific* kinds of parenting orders. This approach can be seen in the Washington *Parenting Act*, which provides criteria for evaluating the allocation of different aspects of parenting responsibility within a parenting plan.

For example, among the factors to consider in the allocation of decision-making authority, the Act directs the court to the history of participation of each parent in decision-making, whether the parents' have a demonstrated ability and desire to cooperate with each other in decision-making, and the parents geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

In terms of the child's residence, the Act directs the court to make residential provisions "which encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances." The court is further directed to consider a range of factors, including any agreement between the parties, each parent's past and potential for future performance of parenting functions, the emotional needs of the child, the child's relationship with siblings and other adults, the wishes of the parents and the child, and the parents' employment schedule. But greatest weight is to be given to one factor, namely, "the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child." [256]

The particular factors that the Washington scheme considers in relation to the allocation of residence and allocation of decision-making authority are echoed in the recent recommendations of the American Law Institute. In terms of the allocation of the child's residential schedule (or what the ALI refers to as custodial responsibility), the ALI recommends the use of the approximation rule—that is, of trying to approximate the parenting arrangements that existed prior to separation and divorce. In this respect, the ALI recommendations are remarkably similar to the Washington scheme, which places the greatest emphasis on "the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child" in the allocation of the child's residential schedule. In both schemes, then, continuity and stability for children in terms of patterns of caregiving are given particular weight.

But, neither the Washington scheme nor the ALI recommendations emphasize this continuity of care in the allocation of decision-making authority. Rather, the Washington scheme focusses on whether the parents have a demonstrated ability to cooperate with one another. The ALI recommendations similarly focus on the extent to which parents have participated in decision-

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[256] S.26.09.187(3)(a), Washington Parenting Act. It should be noted that, notwithstanding this provision, the Washington Supreme Court has held that the Parenting Act does not establish a presumption in favour of the primary caregiver. See In re Kovacs (1993) 854 P.2d 629.

making in the past, and their ability to cooperate with one another in decision-making.[257] While the ALI recommendations again attempt to approximate the pre-separation arrangements, here the emphasis is on the pre-separation decision-making arrangements.

The advantage of this approach is that it allows the factors to be more precisely designed and directed to particular dimensions of parenting responsibility. The kind of factors that would be in a child's best interests when making a residential order may well be different from the kinds of factors that should be taken into account when making a specific-issues order or a decision-making order. The approach would, then, have the advantage of reducing at least some of the problems of indeterminacy associated with an elaborate list of factors to be taken into account in the best interests of the child test.[258]

While the elaboration of specific factors for specific aspects of parental responsibility may fit most easily within a model based closely on the Washington and ALI schemes (i.e. residential-schedule orders and decision-making-authority orders), this approach could be applied to a regime based on other types of parenting orders as well. For example, a regime based on allocated parental rights and responsibilities could be designed to include factors to apply to different aspects of parental responsibility.

Specific factors could also be included within a regime based on residence, contact and specific-issues orders. However, it may be somewhat more challenging within such a regime to distinguish between factors relevant for residence and factors relevant for decision-making authority. In the U.K. and Australian schemes, decision-making authority is assumed to be shared, unless a court order provides otherwise. As noted above, this assumption that parental responsibility survives a parenting order may make this approach inappropriate for Option Two. On the other hand, it would certainly be possible to distinguish between at least some specific factors that ought to be taken into account in making residence orders, contact orders and specific-issues orders. Some such factors are discussed below.

Presumption or Principle in Favour of Contact

Several jurisdictions have moved towards a presumption or principle in favour of contact. In the U.K., the *Family Law Act* 1996 specifically provides for a presumption in favour of contact. Section 11(4)(c) states that the welfare of the child is best served by regular contact with those with parental responsibility. The legislation simply endorsed what was already a trend in family law. The English Court of Appeal has developed a "very strong" presumption in favour of contact.[259] The Court has held that contact should not be prevented unless there are cogent reasons for doing so, and that the courts should take a medium and long term view of the child's development, and not accord excessive weight to short term problems, such as the contact

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[257] The ALI recommendation 2.10(1), supra note 26, states that the court "should allocate responsibility for making significant life decisions on behalf of the child, including the child's education and health care, to one parent or to both parents jointly, in accordance with the child's best interests in light of (a) the allocation of custodial responsibility; (b) the level of each parent's participation in past decisionmaking on behalf of the child; (c) the wishes of the parents; (d) the level of ability and cooperation the parents have demonstrated in decision-making on behalf of the child; (e) prior agreements of the parties; and (f) the existence of any limiting factors."

[258] See discussion supra at notes 186-188.

[259] See Re H (Minors) (Access) [1992] 1 FLR 148; Re M (Contact: supervision) [1998] 1 FLR 727.

parent's present psychiatric instability.[260] Many commentators have been highly critical of this approach to contact, arguing that the best interests of children have often been compromised in the pursuit of maintaining contact. In particular, there is a concern that the general principle of maintaining contact has not been appropriately balanced with the equally important objective of protecting children from harm.[261]

The Australian regime states, as a general principle, that "children have a right of contact, on a regular basis, with both parents." This principle is expressed to apply "except when it is or would be contrary to a child's best interest."[262] This right of contact was one of the most contentious aspects of the *Family Law Reform Act* 1995. While many argued that it was a positive development, ensuring that non-resident parents would be more involved with their children, others were concerned about the potential for abuse.[263] The Australian Family Court, however, has been more insistent that a child's right to contact is qualified by the best interests principle.[264] The Act was not held to create a presumption in favour of contact, but rather to provide the context for considering the child's best interests.

As discussed above, there has been a significant decrease in Australia in the rate of orders refusing contact at interim hearings, but not in the rate of refusing contact in final orders, which has remained unchanged.[265] This change in interim orders is partially attributable to the right-of-contact principle contained in the legislation.[266] While the impact of the principle of contact in Australia is not as severe as it is in the U.K., the findings would suggest that there is at least some reason to be concerned with the way in which the principle in favour of contact is operating in the context of family violence, particularly at the interim stage.

If the *Divorce Act* is to be reformed according to a neutral model of parental responsibility, it should not include a presumption in favour of contact. There is tension between a neutral model of parental responsibility, which makes no assumptions about how parental responsibility ought to be allocated, and a presumption in favour of contact, which is based on the presumption that a particular kind of parenting arrangement is always in the best interests of the children. Moreover, the experience in the U.K. suggests that there is reason to be concerned that a presumption in favour of contact may not achieve the ultimate balance between promoting meaningful relationships and protecting a child from harm.

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[260] Re M, ibid.
[261] See generally Kaganas, supra note 17, C. Smart and B. Neale "Arguments Against Virtue—Must Contact be Enforced?" [1997] Fam Law 332. Contact is generally ordered, notwithstanding what the English courts have labelled "implacable hostility" on the part of the residential parent, most frequently the mother.
[262] Section 60B(2), Family Law Act.
[263] "First it was thought that the reforms provided a contact parent who wished to harass his former partner with the opportunity to seek orders relating to the minutiae of her care of the child. Second, coupled with the statutory exhortations to 'share' and 'agree' about parenting arrangements, the child's right to contact was seen to have the potential to be used to pressure a mother with legitimate concerns about her child's welfare into an agreement that compromised her own safety and the child's best interests." Interim Report, p.14.
[264] In the Matter of B v. B, supra note 132.
[265] As discussed above, the courts are reluctant to establish a status quo in an interim order on the basis of untested allegations of violence at the interim stage. Interim Report, supra note 72, at ix.
[266] Ibid.

The question of whether the *Divorce Act* should include any statement of principle in favour of contact is more difficult to answer. Such a statement could be consistent with the guiding principle that reform should recognize that children benefit from the opportunity to develop and maintain meaningful relationships with both parents.

However, it is important to consider how such a principle in favour of contact might operate in practice. It must be noted that the U.K. *Children Act* did not actually contain a presumption in favour of contact, nor even a statement of right of contact. Rather, the "very strong presumption" is a creation of the courts, (subsequently confirmed by the *Family Law Act*). The incorporation of a right of contact in the *Divorce Act* creates a risk that the courts could create a similar "very strong presumption." By contrast, the Australian courts have been more cautious and have not endorsed a presumption. However, the statement of the right of contact has made the courts more reluctant to deny contact. Although it falls short of a presumption, the legislative scheme, and the courts' interpretation thereof, does still seem to be based on the assumption that a particular kind of parenting arrangement is in the best interests of children. It also effectively creates the need to establish in law that contact is not, in fact, in the best interests of the child, if contact is to be denied.

While a right of contact might be seen to help promote meaningful relationships with non-residential parents, the experience in other jurisdictions suggests that when stated as a presumption, principle or right, countervailing interests, such as protecting children from violence, conflict and abuse, can be compromised. A right of contact may increase a child's actual contact with the non-residential parent. However, it is not clear that such a right would promote meaningful relationships only *when it is safe and positive to do so.* If a general statement in favour of contact was to be included in the statute, it would then be important that the statute also specifically address the limitations to this right. These limitations are addressed in further detail in the section on violence, high conflict and inadequate parenting below.

A third option would be to include the principle of maintaining meaningful relationships within the best interests of the child test. As discussed above, the Special Joint Committee recommended that the principle of maximum contact currently found in section 16(10) of the *Divorce Act* incorporated into the best interests of the child test, so it can be weighed and balanced against other competing factors. A neutral model of parenting responsibility could adopt a similar approach, including the principle of contact in a list of statutory factors to be taken into account in determining the best interests of the child, and in allocating specific aspects of parenting responsibility. The idea of promoting meaningful relationships between parents and children, when it is safe and positive to do so, could then be included in a statutory list of best interest factors.

Presumption For or Against a Court Order

In its general definition of the welfare of the child, the U.K. *Children Act* 1989 provides that when a court is considering whether or not to make an order, "it shall not make the order… unless it considers that doing so would be better for the child than making no order at all."[267] This presumption of "no order" reflects the philosophy of private ordering in the U.K. Act, and the bias against judicial intervention in the resolution of disputes involving children.

[267] S.1(5), Children Act.

The U.K. scheme is intended to encourage parties to settle their own parenting arrangements, without resort to the courts.[268] The U.K. scheme has restructured the relationship between private ordering and judicial intervention in a manner that now strongly favors private ordering.[269]

There is no similar provision in the Australian legislation. The Family Law Council recommended against the adoption of the *Children Act*'s "no order" principle, on the basis that it was "too inflexible."[270]

An important objective of any reform is to encourage separating and divorcing parents to enter into cooperative and consensual arrangements for the children without resort to the courts. In directing the court not to make an order unless it is in the best interests of the child, the U.K. legislative provision is sending a message that the courts should not become involved in the micro-management of trivial issues between parents. Rather, the legislation requires that parents sort out these issues between themselves, and not resort to the courts for every small parenting disagreement. However, it is not clear that this objective is best achieved with a presumption against judicial intervention. The U.K. scheme has arguably swung too far in the direction of private ordering.

In this respect, the Australian legislation may provide a better model for balancing private ordering and judicial intervention. The *Family Law Act* includes a number of provisions that expressly encourage parents to cooperate and reach consensual arrangements for their children. Section 60B states that one of the objects of the Act is that "parents should agree about the future parenting of the children," and section 63B states that "parents of a child are encouraged (a) to agree about matters concerning the child rather than seeking an order from a court." However, in the criteria for making a parenting order, there is no presumption in favour of private ordering or against judicial intervention. Once a parent has sought a parenting order, then there is no presumption against making such an order but, rather, a requirement that the order be made in the best interests of the child.

If the *Divorce Act* is reformed to include provisions that encourage parents to enter into cooperative arrangements (as discussed in the sections on parenting plans and primary dispute resolution below), then there is no compelling policy reason to include a presumption against orders in the criteria for the best interests of the children. Rather, it is important that the legislation continue to ensure that resort to the courts is available for those parents who are unable to reach their own agreements. The increasing emphasis within the family justice system on settlement, mediation and other forms of primary dispute resolution is such that by the time parents come to court seeking a parenting ordering, alternatives for resolving their disputes have been exhausted. If efforts to settle disputes have failed, there should be no presumption against

[268] Dewar, "Distant Cousins", supra note 88.
[269] As discussed above, there is also evidence that the number of court orders has increased since the enactment of the reforms. There has been a substantial increase in the number of contact orders and specific-issues orders. See Davis supra note 72, at 615, 617.
[270] Family Law Council, Letter of Advice to the Attorney General on the Operation of the (U.K.) Children Act 1989, March 1994, at 5. "Council is of the view that the U.K. provision is too inflexible and considers that it would be preferable to require the Court to consider whether not making an order would be preferable having in mind the best interests of the child."

courts making parenting orders. There is a limit to the extent to which the statute should force the parties to resolve their disputes privately. Once parents end up in court seeking parenting orders, the court should then make whatever order(s) it concludes is in the best interests of the child. A presumption against judicial intervention would also be extremely inappropriate in the context of high conflict families, which often require considerable intervention, as discussed in further detail below.

Summary and Assessment

To the extent possible, general statutory criteria should be eschewed in favour of criteria more closely tailored to specific aspects of parenting responsibility. A general list of equally weighted statutory criteria does not promote certainty or predictability, but specific criteria for specific aspects of parenting responsibility will. Both parties and courts will be able to focus on the particular factors that are relevant in the allocation of particular aspects of parenting responsibility.

A regime based on parenting responsibility should not include a presumption in favour of contact. A presumption in favour of contact is based on the presumption that a particular kind of parenting arrangement is always in the best interests of the child. As such, it is not consistent with a neutral parenting responsibility model that does not make any assumptions about how parental responsibility should be allocated.

Nor should a regime based on parenting responsibility include a presumption against court orders. While parents should be encouraged to resolve their parenting disputes on their own, and should be discouraged from turning to the courts to micro-manage their parenting arrangements, courts should retain their authority to make orders in the best interests of children.

Violence, High Conflict and Inadequate Parenting

Given the guiding principles and objectives of protecting children from violence, high conflict and inadequate parenting, the criteria for parenting orders would also need to address the unique needs of children from these separating and divorcing families. While the particular needs of children who have experienced violence, high conflict or inadequate parenting are unique, and the statutory language would need to specifically address these needs, the policy options for incorporating a reference to violence, high conflict and inadequate parenting are similar.

First, the criteria for parenting orders would have to include a reference to violence, high conflict and inadequate parenting. This could be done either as part of a general list of statutory factors setting out the best interests of the child or as specific factors or limitations when allocating specific aspects of parenting responsibility. Second, and as discussed in the section on Option One, the *Divorce Act* could include specific provisions regarding the conditions of access in the context of violence, high conflict and inadequate parenting. Third, and as also discussed in the section on Option One, the *Divorce Act* could include specific provisions addressing the relevance of violence for the purposes of parenting plans and divorce-related services.

Criteria for Parenting Orders

References to violence, high conflict and inadequate parenting could be included in the *Divorce Act* either as a part of a general list of statutory factors setting out the best interests of the child or as specific factors for specific parenting orders.

General List of Statutory Factors

In the first approach, references to violence, high conflict and inadequate parenting could each be incorporated into a statutory list of the factors to be taken into account in determining the best interests of the child. This general statutory list of factors would be taken into account by the court in allocating parenting responsibility within any and all parenting orders.[271]

Violence. A number of jurisdictions have included violence and abuse as factors to be taken into account in determining the best interests of the child.[272] As discussed above, the Australian *Family Law Act*, for example includes the following as factors: "(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by (1) being subject or exposed to abuse, ill-treatment, violence or other behaviour; or (2) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;… (i) any family violence involving the child or a member of the child's family; (j) any family violence order that applies to the child or a member of the child's family."[273]

The Maine legislation similarly provides that in making an award of parental rights and responsibilities, the court shall consider the best interests of the child, which include: "(L) The existence of domestic abuse between the parents, in the past or currently, and how that abuse affects: (1) the child emotionally; and (2) the safety of the child; (M) The existence of any history of child abuse by a parent; (N) All other factors that have a reasonable bearing on the physical and psychological well-being of the child."[274]

The *Divorce Act* could be reformed to include similar references to violence within the general definition of the best interests of the child.

High Conflict. The unique situations of high conflict families might be taken into account in a general list of factors. Although there is no statutory precedent for including a reference to high conflict within the general definition of the best interests of the child, the *Divorce Act* could include a general statement that a child's best interests are not served by exposure to high parental conflict.

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[271] In other words, this general list of factors would be taken into account in a regime based on residence, contact, special-purpose and specific-issues orders, allocated-parental-rights and responsibility orders, or residential-schedule and decision-making-authority orders.

[272] See discussion supra at notes 18-25 and notes 190-194.

[273] S.68F(2), Australia Family Law Act 1995. Family violence is also expressly defined in the Act as "conduct, whether actual or threatened by a person towards or towards the property of, a member of the person's family that causes that or any other member of the person's family to fear for, or to be apprehensive about, his or her personal wellbeing or safety." S.60D(1), Family Law Act.

[274] S.1653(3), Maine Domestic Relations Act.

Inadequate Parenting. Again, although there is no statutory precedent for including a reference to inadequate parenting within the text on the best interests of the child,[275] the *Divorce Act* could include the problems associated with inadequate parenting as a factor to be taken into account when determining the best interests of the child. It could include, as a general statement of principle, that a child's best interests are not served by exposing children to inadequate parenting. Borrowing from the Washington *Parenting Act*, inadequate parenting could be more specifically defined to include, for example: (a) neglect or substantial non-performance of parenting functions; (b) long-term emotional or physical impairment which interferes with the performance of parenting functions; and (c) a long-term impairment resulting from substance abuse that interferes with the performance of parenting functions.[276]

Specific Factors for Specific Orders

A second approach would be to include references to violence, high conflict and inadequate parenting with the specific factors that would need to be taken into account in the allocation of particular aspects of parenting responsibility within particular kinds of parenting orders.

Violence. Violence could be included as a specific factor to take into account in allocating specific aspects of parenting responsibility and awarding specific types of parenting orders. It could be specified as a factor that the court shall take into account in allocating a child's residential time (within residence and contact orders, residential-schedule orders or allocated parental responsibility orders) and in the allocation of decision-making authority (within specific-issues and prohibited-steps order, decision-making authority orders, or allocated parental responsibility orders).

In terms of residential time, the *Divorce Act* could include a presumption that residence or contact will not be ordered in favour of a perpetrator of family violence. Or it could provide that a parent's residential time shall be limited. The Washington *Parenting Act*, for example, provides that a parent's residential time with a child *shall* be limited if it is found that a parent has physically, sexually or emotionally abused a child, or has a history of acts of domestic violence, or an assault or sexual assault causing grievous bodily harm, or fear of such harm.[277] Or the *Divorce Act* could provide that a court shall only order residence or contact if it is in the best interests of the child, and adequate protection can be made for the child and the parent. [278] Or, the Act could simply provide that a finding of domestic violence could result in a reduction of residential time. Each of these options differs in the degree of protection provided, and the extent to which the statutory framework assumes that parenting time should or could be restricted in light of a finding of violence.

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[275] The Washington Act includes a reference to inadequate parenting, but not within a general list of factors for determining the best interests of the child. Rather, it is included as part of the limitations or restrictions on the allocation of parenting functions within parenting plans.

[276] Parenting Act. See also discussion of inadequate parenting in the ALI proposals, supra note 168.

[277] Further, if the court finds that limitations on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent, the court shall restrain the parent from all contact with the child.

[278] A similar provision is found in the Maine Domestic Relations Act, S. 1653(6).

A similar range of options is available regarding the allocation of decision-making authority. The Act could establish a presumption against the allocation of decision-making authority to a perpetrator of violence. Or it could establish a presumption against shared decision-making. The Washington Act, for example, provides that a court shall not require mutual decision-making if it is found that a parent has physically, sexually or emotionally abused a child, or has a history of acts of domestic violence, or an assault or sexual assault causing grievous bodily harm, or fear of such harm.[279] Or the *Divorce Act* could provide that a court shall consider violence in the allocation of decision-making authority, that the court may limit the allocation of decision-making authority to a parent who has committed family violence or both. Again, the options differ in the degree of protection considered appropriate, and the extent to which the statutory framework is prepared to assume that decision-making authority should, or could, be restricted in light of a finding of violence.

High Conflict. High conflict could similarly be incorporated as a specific factor to take into account in allocating parenting responsibility within parenting orders.

The range of options for doing so is similar to that for violence. For example, in terms of residence, the *Divorce Act* could establish a presumption against shared residence in situations of high conflict. Or it could provide that a parent's residential time with a child be limited in situations of high conflict, including the possibility of restricting contact altogether.

In terms of decision-making authority, the Act could similarly establish a presumption against shared decision-making in situations of high conflict. For example, the Washington *Parenting Act* provides that a court shall not order shared decision-making when a parent's conduct may adversely affect a child's best interests, including "the abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development."[280] Following this example, the *Divorce Act* could then be amended to include a provision that stated that a court should not order mutual or shared decision-making when the parent has similarly engaged in an abusive use of conflict. Or a slightly lower threshold could be used, such as not ordering shared decision-making when parents have demonstrated a serious inability to cooperate or communicate.

The degree of conflict could also be identified as a factor to be taken into account in allocating decision-making authority. Again, the Washington *Parenting Act* states that in making an order for mutual decision-making in a parenting plan, the court shall consider whether the parents have a demonstrated ability and desire to cooperate with one another when making decisions regarding the child. The *Divorce Act* could similarly be reformed to include a demonstrated ability to cooperate as a factor in the allocation of decision-making authority in a parenting order.

Inadequate Parenting. The *Divorce Act* could identify inadequate parenting as a factor to taken into account in allocating parenting responsibility within parenting orders. Inadequate parenting could be identified as relevant for an allocation of either residential time or decision-making authority.

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[279] Section 26.09.191

[280] S.26.09.191(3)(e), Parenting Act.

In terms of residence, following the Washington regime, the *Divorce Act* could provide that a parent's residential time with a child *shall* be limited if a parent has engaged in the following conduct: (a) "willful abandonment of children that continues to an extended period of time or substantial refusal to perform parenting functions."[281] It could also give the court discretion to limit the allocation of any aspect of parenting functions in a number of circumstances, including the following: (a) neglect or substantial non-performance of parenting functions; (b) long-term emotional or physical impairment that interferes with the performance of parenting functions; (c) a long-term impairment resulting from substance abuse that interferes with the performance of parenting functions. Or, the *Divorce Act* could provide that a parent's residential time *could* be restricted.

In terms of decision-making authority, the Act could provide that a court shall not order shared decision-making if a parent has engaged in the same above listed conduct. Or, it could provide that a parent's decision-making authority *could* be restricted.

Assessment: General or Specific Factors?

Although any reference to violence, high conflict and inadequate parenting within the *Divorce Act* would be a substantial improvement, including these issues within the best interests of the child test may not be most effective approach to ensuring that children are protected from harm. The disadvantage of this approach is that it does not specify *how* violence, high conflict or inadequate parenting should be taken into account. Rather, the question of the particular relevance to be given to these issues in allocating parental responsibility and awarding parenting orders would remain within judicial discretion.

The advantage of the second approach is that it does not simply state that violence, high conflict and inadequate parenting are relevant in the allocation of parenting responsibility but, rather, that it provides more guidance as to *how* these issues should be taken into account. Regardless of the particular type of parenting order adopted, this approach would have the advantage of specifying the circumstances under which it would appropriate to restrict residence and contact. Specifying in the legislative scheme that residence and contact could, in fact, be restricted, and even prohibited in situations of violence, high conflict and inadequate parenting, would go a long way to advancing the general objectives of protecting children from harm. For example, it would recognize within the statute the possibility of denying contact, rather than simply assuming that it is always in the child's best interests to have contact with a parent, including a violent, abusive or neglectful one.

The particular ways in which violence, high conflict and inadequate parenting should be taken into account in allocating parenting responsibility should be clearly and specifically articulated. The more guidance that can be given, the more effectively the statutory framework will advance the general objectives of protecting children from harm.

Violence should be relevant in the allocation of residence and contact and decision-making authority. The strongest protection would be provided by stating, as a general presumption or principle, that the child's best interests are not served by exposure to family violence, and that a

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[281] These factors are included in S.26.09.191(1), (2), limiting an award of mutual decision-making and limiting a parent's residential time with a child.

violent parent's residential time, contact and decision-making authority can be limited. The statute should recognize the *possibility* of denying contact, unless the child and parent can be adequately protected from harm. The statute should also include a list of the protective measures that could be attached to contact.

High conflict should be identified as being detrimental to children. Further, cooperation should not be expected or encouraged in the context of high-conflict families and, as a general rule, shared decision-making authority should not be ordered. The statute should recognize the possibility of restricting decision-making authority in the event of high conflict.

Inadequate parenting should also be recognized as a factor that can limit a parent's residential time, contact and decision-making authority.

Conditions of Contact

The *Divorce Act* could also provide that if a contact order was to be made in a case in which family violence or inadequate parenting has occurred, the court must ensure appropriate protective measures for the child and the parent.[282] As discussed for Option One, the Act could set out a range of specific protective measures that could be attached to a contact order. For example, the Maine *Domestic Relations Act,* extensively addresses the conditions of parent-child contact in the context of family violence, authorizing the use of a range of specific protective measures. It allows the court to order, among other things, the exchange of the child in protected settings, mandatory counselling, supervised access, costs for supervised access, and conditions for supervised access if supervision is to be provided by a family member.[283]

Including a list of the kinds of protective measures that might be appropriate in situations of violence, high conflict or inadequate parenting could promote the educational objective of reform. This list of conditions may help focus the courts' attention on a range of protective measures that might otherwise not be considered, and encourage the courts to carefully tailor an order to the particular needs of the particular child.

Parenting Plans and Divorce Services

As discussed in Option One, the *Divorce Act* could also specifically address the relevance of violence, high conflict and inadequate parenting for parenting plans and divorce-related services. If the Act was reformed to include a reference to parenting plans, divorce related services or both, it would be important for the Act to also consider the extent to which the existence of violence, high conflict and inadequate parenting might represent an exception to the general rule of encouraging parents to resolve their disputes themselves through parenting plans, parenting education and mediation.

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[282] As discussed in Option One, a number of American states have included references to domestic violence for the purpose of visitation or access orders. Some provide that the courts must make arrangements within a contact order that best protect the child and parent from harm. Some require that a contact order include some degree of supervision of contact between the child and the perpetrator of the violence (see, for example, the laws in Lousiana, Minnesota and North Dakota). See supra at note 201-207. A regime based on parenting orders could borrow from the particular way in which violence is addressed in these custody and access regimes.

[283] The sections of the Maine Domestic Relations Act are discussed above, supra at notes 143-144.

Modification of Parenting Orders

Currently, section 17(4) of the *Divorce Act* allows for a variation of a custody or access order on the basis of a change in "the condition, means, needs or other circumstances of the child," if the variation is in the best interests of the child. Most U.S. jurisdictions use a similar standard of modifying a custody order if there is a substantial or material change in circumstances, and the modification is in the best interests of the child.[284] There is no compelling reason to change the existing standard. No particular problems have been identified with this standard, and there is considerable advantage to retaining a well established and reasonably predictable standard.

PARENTING PLANS

In this second option for reform, parenting plans would not simply be added to the custody and access regime but, rather, would be part of an overall scheme that replaced the language of custody and access.

As discussed above, any reform that attempts to incorporate parenting plans into the *Divorce Act* needs to consider a number of related issues: (1) whether parenting plans would be optional or mandatory, (2) the required content of parenting plans, (3) the degree of judicial deference to parenting plans, and the criteria against which such plans would be reviewed by the courts, (4) the limitations or restrictions on parenting plans, and (5) the variation or modification of parenting plans.

Optional or Mandatory?

As discussed in the section on Option One above, the *Divorce Act* could be amended to allow or encourage parties to enter into parenting plans. Or, the *Divorce Act* could be amended to require divorcing parents to file parenting plans before, or instead of, seeking a parenting order. A third alternative would be to give the courts the discretionary power to require that divorcing parents seeking a parenting order file a parenting plan.

The Australian legislation is an example of the first approach, which encourages parents to reach their own agreements about the future parenting of their children. The Washington regime is an example of the second approach, which requires that all separating parents file parenting plans. Several American states have pursued the third approach, giving the courts the authority to require a parenting plan.[285]

Both optional and mandatory approaches can be seen to fit within the spirit of a neutral parental responsibility model. Neither approach presupposes a particular allocation of parenting responsibility but, rather, both approaches allow the parties themselves to work out their own parenting arrangement. Both approaches are consistent with the general objectives of reform—encouraging parents to resolve their own parenting disputes with a process that is sufficiently flexible to address the unique needs of each family.

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[284] See discussion ALI, supra note 26.

[285] In California, Nevada, New Jersey, Pennsylvania and Michigan, the courts have the discretionary power to require that divorcing parents seeking an order file a parenting plan.

The early research in jurisdictions that have included parenting plans in their legislation does not clearly show whether the plans should be optional or mandatory. In the Australian regime, optional parenting plans are not being used, although this may be due to the highly complicated system of registration.[286] In the Washington regime, mandatory parenting plans have not significantly altered the outcome of parenting disputes.[287] However, the mandatory schemes have transformed the process for the resolution of parenting disputes. The process is one in which parents must file detailed parenting plans, and in which parents are thus forced to focus on the allocation of particular aspects of parenting responsibility.

A mandatory regime of parenting plans, modelled on the Washington *Parenting Act*, could advance many of the objectives of legislative reform within a neutral model of parenting responsibility. It could encourage parental cooperation in the resolution of parenting disputes and encourage the use of primary dispute resolution, while still retaining the authority of the court as a forum of last resort, and as a forum to ensure that the best interests of children are protected. A mandatory regime obviously provides a stronger incentive for parents to try to cooperate, but it does not force them to do so. Rather, parents who are unable to agree on a parenting plan may file their own parenting plans with the court, and seek a court order in the form of the parenting plan.

An optional parenting plan scheme could be integrated into the *Divorce Act* in the same manner as discussed in Option One. The Act could contain a provision encouraging parents to file parenting plans, and then set out the general framework for these plans: their suggested content, the criteria for review, the restrictions and the standard for modification.[288] If parents did not agree, and did not file parenting plans, then they would be able to seek a parenting order. This approach is consistent with any of the three approaches to parenting orders discussed above, and would be a meaningful complement to a regime of parenting responsibility.

However, a mandatory approach to parenting plans represents a very different model for parenting responsibility. In this approach, parenting plans would become the primary vehicle for the resolution of parenting disputes. In the two U.S. jurisdictions that have adopted a mandatory parenting-plan approach, courts must issue their orders in the form of parenting plans.
A mandatory approach to parenting plans, then, rather than simply complementing one of the three approaches to parenting orders discussed above, represents an alternative. A mandatory parenting scheme would need to be designed as its own approach to parenting responsibility.

In the discussion of parenting plans that follows, the paper attempts to highlight the extent to which the design of such a mandatory approach would differ from an optional approach as discussed in Option One.

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[286] Interim Report, supra note 72. The Interim Report notes that in 1997-98, 352 parenting plans were registered nationally. By comparison, 1,008 child agreements were registered in 1995-96, and 1,088 were registered in 1994-95. See discussion supra at notes 125-134.

[287] The unpublished study is described in ALI supra note 26 at 75. See discussion supra at notes 160-163.

[288] See discussion supra at notes 212-225.

Content

The content requirements for parenting plans have tended to be related to whether the plans are optional or mandatory. As discussed above, optional schemes have fewer content requirements than mandatory schemes.[289]

The Washington *Parenting Act*, 1987, which requires all separating parents to file a parenting plan, requires that a plan set out the child's residential schedule, the allocation of decision-making authority and a dispute-resolution mechanism.[290] The Act then sets out, in some detail, the requirements for each of these aspects. For example, in terms of decision-making, the Act provides that the plan "shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan."[291] In terms of residence, the Act states that the plan "shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provisions for holidays, birthdays of family members, vacations, and other special occasions."[292]

If parenting plans were made mandatory, then it would be appropriate to set out the content requirements for them in some detail. The content requirements could be modelled on the Washington *Parenting Act*. It would also be helpful to include the detailed definition of parenting responsibilities (or what the Washington Act calls "parenting functions"), in order to help turn parents' attention to the specific kinds of responsibilities that need to be allocated.

As discussed in Option One above, even if parenting plans were made optional, there may still be some advantage in setting out, in a general way, the kinds of issues that a parenting plan *could* include. The *Divorce Act* could provide that divorcing parents may enter into an agreement in which they agree on the parenting arrangements for their children, including the child's residential schedule (residence and contact schedules), the allocation of decision-making authority (for issues such as major medical problems, education and religion), support obligations and a dispute-resolution mechanism. While these would not be mandatory, a statutory list may help direct parent's attention to their children's needs, and encourage cooperation in meeting these needs.

Judicial Deference: Criteria for Review

If the *Divorce Act* was amended to allow or require parenting plans, attention would need to be given to the degree of deference that the courts would be expected to give these private

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[289] As discussed above, the Australian scheme, which allows but does not require separating and divorcing parents to enter into parenting plans, has no mandatory requirements for content. Rather, it provides that a parenting plan may deal with residence, contact, maintenance and any other aspect of parental responsibility. There is no requirement that the parenting plan allocates decision-making authority, nor that the plan includes a dispute-resolution mechanism. See discussion supra at notes 120-124.

[290] Section 26.09.184(2) Washington Parenting Act provides that "The permanent parenting plan shall contain provisions for resolution of future disputes between parents, allocation of decision-making authority, and residential provisions for the child."

[291] Section 26.09.184(4), Parenting Act.

[292] Section 26.09.184(5) Parenting Act.

arrangements. Under the current law, courts have the power to review private agreements at the time of divorce to determine whether they serve the child's interests. A shift to a parenting responsibility model could continue to provide courts with this authority or, alternatively, could require greater deference towards the agreements that parents make about their children within a parenting plan. The standard of review of, and degree of deference to, these private agreements would need to be articulated; a shift to a model of parenting responsibility would not, in itself, resolve these issues.

As discussed in Option One, it would be important to balance some degree of deference to the consensual agreements of the parties with the court's overriding interest in protecting the best interests of the child. If the standard of review is too low and courts routinely overturn consensual parenting plans, separating and divorcing parents will have little incentive to undertake the often difficult negotiations to reach an agreement on their own.[293] At the same time, it is also important that all parenting arrangements continue to be governed by the general standard of the best interests of the child. The approach adopted in a number of American jurisdictions, which provides that the courts shall enforce a consensual parenting agreement unless it is not in the best interests of the child, may then represent a reasonable balance of these competing interests. Courts would generally be expected to defer to the private arrangements, unless there is a good reason not to do so.

The legislative framework could further specify the circumstances in which parenting plans, or provisions thereof, may be set aside by the court. The Washington *Parenting Act* sets out a range of mandatory and discretionary restrictions on parenting plans. These are addressed in further detail under "Limitations" in the section below.

In a mandatory regime, attention must also be given to the appropriate criteria for review when the parents do *not* agree. When parents fail to reach a consensual parenting plan, the court must then make its order in the form of parenting plan. The Washington and Montana regimes both generally provide that a parenting plan must be determined according to the best interests of the child. As discussed above, the Washington regime sets out highly specific criteria by which the court is to approve and order each of the three aspects of a parenting plan: the child's residential schedule, the allocation of decision-making authority and a dispute resolution process.[294]

If a mandatory parenting plan were adopted, the legislative framework would similarly have to set out the criteria by which a court could order a parenting plan, absent parental agreement. The policy considerations here are very similar to those discussed under the criteria for parenting orders above, in which the best approach would be one that provides the most specific guidance for the allocation of specific aspects of parenting responsibility. If a parenting plan had content requirements similar to those in the Washington Act—requiring a residential schedule, an allocation of decision-making authority, and a dispute resolution mechanism it would be extremely helpful if the scheme included specific criteria to guide the court when allocating each

[293] This question of incentive also applies to mandatory schemes. Although parents are required to file a parenting plan, they are not required to file a joint plan. It would, therefore, be important not to provide a standard of review that operated as a disincentive for parents to attempt to negotiate their own parenting arrangements in a joint parenting plan.
[294] See discussion supra at 147-149.

of these three factors. Again, the specific criteria set out in the Washington regime, which have been extensively reviewed above, provide an extremely useful model for doing so.

Limitations

If the *Divorce Act* was amended to include a specific reference to parenting plans, as well as to require courts to exercise some degree of deference to these private agreements, it would be important to set out any limitations to this private ordering. As discussed above, it would be important to consider the relevance of violence, high conflict and inadequate parenting when reviewing and enforcing parenting plans. The existence of family violence, high conflict and inadequate parenting could be listed as factors to be taken into account in reviewing parenting plans, or these could be identified as specific limitations to a principle of otherwise deferring to the private arrangements of the parties. These limitations could be mandatory or discretionary.

The Washington *Parenting Act* sets out both mandatory and discretionary restrictions on parenting plans in considerable detail. For example, the Act provides that the parenting plan "*shall not* require mutual decision-making or designation of a dispute resolution other than a court," and that "a parent's residential time with a child *shall be* limited if it is found that a parent has engaged in any of the following conduct" [Emphasis added]:

> (d) willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;
> (e) physical, sexual or a pattern of emotional abuse of a child;
> (f) a history of acts of domestic violence as defined… or an assault or sexual assault which causes grievous bodily harm, or the fear of such harm.[295]

The Act also provides a list of factors that may have an adverse impact on the child's best interests and that, if any exist, allow a court to preclude or limit any provision of the parenting plan, including neglect, long-term emotional impairment, substance abuse, the absence or substantial impairment of emotional ties between the parent and child, the abusive use of conflict, and the denial of access for a protracted period of time without good cause.[296]

It is precisely because the parenting plan is mandatory in all cases, and the content requirements of the plan set in such detail, that the Washington scheme has been very careful to delineate the particular circumstances in which parenting plans may deviate from the otherwise strict requirements, and the circumstances in which courts may set aside provisions of the plans. If a similar mandatory parenting plan scheme was adopted, it would be important to set out the circumstances limiting parenting plans and private ordering. In this respect, the Washington legislation provides an excellent model.

While an optional scheme would generally require less detail, there would still be considerable advantage to setting out a similar set of restrictions to parenting plans. While separating parents with any of these circumstances may be considerably less likely to file parenting plans in the first place, it would still be important to provide the court with the authority to override particular provisions of parenting plans in the event that these circumstances were found to exist.

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[295] Section 26.09.191(1), (2), Parenting Act.
[296] Section 26.09.191(3), Parenting Act 1987.

Variation and Modification

As discussed above, an issue that needs to be addressed if parenting plans are to be expressly included in the *Divorce Act* is the standard of variation.

The rules for modification must balance the benefits of stability, with the need for flexibility and adaptability. As discussed in Option One, this balance is best achieved by allowing some modification of parenting plans. It would be consistent with current practice to allow a parenting plan to be modified when there has been a material change in circumstance. The standard of material change of circumstances is well established in law, and could easily be applied to a regime of mandatory or optional parenting plans.

Further, it would be consistent with the general objectives of encouraging parental cooperation, and flexibility of parenting arrangements, to allow a modification based on parental consent. Parents should generally be allowed to make the changes and modifications that they agree are in the best interests of their children. However, the court should retain its authority to review these requests, to ensure that the modification is knowing and voluntary, and that it is in the best interests of the children.

Assessment

There are few negative aspects to incorporating parenting plans into a parental responsibility scheme on an optional basis. Optional parenting plans can encourage separating and divorcing parents to negotiate their own parenting arrangements, reflecting the particular needs of their children. Optional plans can be seen to reflect a number of the guiding principles of reform—encouraging parents to resolve their disputes through non-adversarial means, as well as accommodating the diversity of Canadian families and their children's needs. The only real disadvantage of an optional regime is the risk that parenting plans will be ignored. The Australian experience, in which the use of parenting plans has declined since the reforms, suggests that it would be important to guard against setting up an overly burdensome regime that could operate as a disincentive. In particular, the Australian experience suggests that the cumbersome process of the registration of parenting plans has been a disincentive and should not be required. As discussed in Option One, if the *Divorce Act* was reformed to incorporate parenting plans on an optional basis, it should specify the suggested content of the plan and the standard of review, including the specific restrictions on parenting plans.

A mandatory approach to parenting plans represents a very different approach to the resolution of parenting disputes. If all parenting orders were to be made in the form of parenting plans, the *Divorce Act* would have to include the kind of detail currently found in the Washington *Parenting Act*, and the American Law Institute proposals. Such a regime would require a more detailed regime, with stricter content requirements, more attention to the criteria for review and a detailed description of restrictions to parenting plans.

There are many advantages to a mandatory approach to parenting plans. The approach could encourage parental cooperation, help focus parents' attention on the allocation of parental responsibility, while at the same time providing parents with considerable flexibility to design a parenting arrangement according to the unique needs of their children. While strongly encouraging parents to reach their own agreements through non-adversarial means, the approach

maintains courts as a forum of last resort for those separating and divorcing couples who are unable to agree on their parenting arrangements. It is, moreover, an approach that can protect children from the harm of violence, high conflict and inadequate parenting, providing that the statutory framework sets out these restrictions in sufficient detail. It is an approach that promotes the spirit of a neutral parenting responsibility model. It is not based on an ideal model of post separation parenting but, rather, allows and encourages parents to negotiate an individualized arrangement.

PRIMARY DISPUTE RESOLUTION AND OTHER SERVICES

A statutory regime designed on the basis of this parenting responsibility and parenting order model could also include a range of references to dispute resolution and other services. The policy choices for doing so are very similar to those reviewed in Option One. A shift towards a parenting responsibility model does not appear to raise any unique challenges for incorporating a reference to these services.

Parenting Education

The *Divorce Act* could be amended to require all parents seeking a parenting order to participate in a parenting education program, or to allow the courts to require parents to attend a parenting education program. As discussed above, in light of the serious jurisdictional and resource implications of establishing mandatory programs, the most realistic approach for the legislative framework is to give the courts the discretionary authority and specify that they exercise their discretion and order services only when they are feasible and appropriate in light of the local availability, quality or cost of those services.

Mediation and Other Primary Dispute-Resolution Services

The *Divorce Act* could be amended to place greater emphasis on mediation and other primary dispute-resolution mechanisms. As discussed in Option One, it may be that any reform that encourages or requires separating and divorcing parents to attend a parenting education program that includes a discussion of the advantages of these primary dispute-resolution procedures would suffice.

The Act could be amended to include a general statement of objective, that parents should be encouraged to reach their own agreements, and that they should consider the use of primary dispute resolution before seeking parenting orders from the court. This general objective may fit well within a parenting responsibility regime that places considerable emphasis on parenting plans—either optional or mandatory—in which parents would be encouraged to consider using primary dispute resolution to negotiate parenting plans before seeking parenting orders from the court. The general encouragement of the use of primary dispute resolution would, thus, be connected with the use of parenting plans.

As discussed in Option One, it is not clear that any of these reforms would actually result in a significant change in current practice in contested custody and access cases, in which the parties are already given ample encouragement and opportunity to resolve their disputes through mediation. There may, nevertheless, be some advantages to including a reference to mediation and other services within the *Divorce Act*. It might promote the educational objective of

legislative reform in this area by encouraging separating and divorcing parents to consider the possibility of mediating their parenting disputes. And there may be symbolic value in reforming the *Divorce Act* to reflect existing practice.

ADVANTAGES AND DISADVANTAGES OF THIS OPTION FOR REFORM

The objectives of legislative reform include reducing parental conflict and litigation, encouraging parental cooperation and promoting meaningful relationships between children and their parents following separation and divorce. Legislative reform is also intended to protect children from the harm associated with violence, high conflict and inadequate parenting. The objectives of the reform are educational and standard-setting: the law should establish principles that help separating and divorcing parents restructure their parenting relationships in a way that most effectively promotes the best interests of their children. The reform should encourage parents to resolve their parenting disputes through their own cooperative parental agreements, and should encourage parents to continue to be involved in a meaningful way in their children's lives. At the same time, the reform must also be able to provide for the needs of those children whose separating and divorcing parents are unable to agree or cooperate, and provide the courts with clear principles for resolving ongoing disputes. Finally, the reform must be guided by a recognition that no one model of post-separation parenting will meet the needs of all children, and that the law must allow for flexibility to address the diversity of families.

As discussed above, there are questions about the extent to which any legislative reform will be able to bring about the desired result, as there are limits to what legislative reform can accomplish. Terminological and legislative change is unlikely to be able to eliminate the conflict that underlies parenting disputes. And virtually any legislative reform is likely to, at least initially, increase rather than decrease litigation. Changing the law invariably creates uncertainty and a new set of expectations (realistic or not) that lead to more litigation. There are also tensions within and between many of the principles for reform. A regime that emphasizes flexibility may fail to promote clarity and predictability. A regime that attempts to set cooperative standards for post divorce parenting may have difficulty responding to high conflict parents who are unable to cooperate.

With these limitations in mind, the issue that must be addressed is the extent to which a regime based on parental responsibility might be able to promote the general objectives of reform.

Two very different models for a parental responsibility model emerge from the discussion. One model is based on parenting orders, with the possibility of optional parenting plans. The second model is based on mandatory parenting plans, in which all parents would be required to file a plan, and all parenting orders would be issued in the form of parenting plans. Both of these models can be designed to be consistent with the spirit of parenting responsibility, and both models could substantially promote the objectives of reform. But, the models diverge in the prominence of the role given to the parenting plan when resolving parenting disputes. The following discussion of the advantages and disadvantages of this option for reform attempts to highlight the relative merits of each of these models.

Terminology

Many of the advantages and disadvantages of abandoning the language of custody and access, and adopting the language of parenting responsibility have, in many respects, been reviewed in the general discussion of the advantages and disadvantages of terminological change above.

The advantages of the language of parenting responsibility can be seen against the backdrop of the main disadvantages of the other options for reform: parenting responsibility may provide less conflictual language than does custody and access, and more flexibility than does shared parenting.

The main disadvantages of this option for reform are the degree of uncertainty this change would introduce, and the potential implications for a broad range of other federal and provincial legislation.

Less Fraught and Conflictual?

The advantages associated with a model based on parental responsibility must be seen against the backdrop of the disadvantages of the existing custody and access regime. As discussed above, the language of custody and access has come to be seen as emotionally and legally fraught, producing parental conflict and alienation because of its winner-takes-all structure. Accordingly, a main advantage of a shift to a model based on the language of parenting responsibility is the move away from this contested language.

The question, then, is whether the language of parenting responsibility is likely to be less fraught and conflictual than the language of custody and access. To the extent that parental conflict is actually produced by the fight over which parent gets to be the custodial parent, and which parent must settle for the second-class status of access parent, the language of parenting responsibility may be a marked improvement. By simply allocating this responsibility between parents, this model may be able to avoid the highly contentious labels. Both parents remain parents, although they may be allocated differing aspects and degrees of parenting responsibility.

However, the extent to which a parenting responsibility model will be able to reduce this conflict will depend on the particular type of parenting orders adopted. For example, the language of residence, contact and specific-issues orders may quickly become as emotionally and politically loaded as the language of custody and access. Residence and contact orders, in many respects, sound a lot like custody and access orders. To the extent that the conflict is about labels that confer primary and secondary status, residence and contact orders are not likely to represent a significant improvement. The question then is whether these residence and contact orders will actually produce different results. Would the new regime result in more contact for non-residential parents? Would the new regime result in a different allocation of parental responsibility? If, in fact, the new regime did not result in any significant change, then the process of reform may do no more than unrealistically raise expectations and create more frustration.

A regime based on allocated parental rights and responsibility might be able to avoid replicating the labelling problem of the custody and access regime. Within this regime, a parenting order would simply allocate the various dimensions of parental rights and responsibilities. Similarly, a

regime based on residential-schedule and decision-making authority orders requires that these dimensions of parenting responsibility are allocated between parents. Both sets of parenting orders avoid imbuing the orders themselves with the connotations of first and second class parental status.

A regime based on mandatory parenting plans is also able to avoid contentious labels. Parenting responsibility is allocated within a parenting plan, without the language of residence and contact. In a contested dispute, a court must allocate the child's residential schedule and the decision-making authority in a parenting plan.

At the same time, however, any parenting order (including a parenting order issued as a parenting plan) must ultimately include where a child is to live. While the order can try to avoid contentious labels, there is no getting around the fact that a child is likely to reside with one parent and have contact with the other. The effect is that there will be a residential parent and a contact parent. A regime based on parenting responsibility cannot avoid making this difficult, and often, contentious decision.

Similarly, a regime based on allocated parental responsibility orders, residential schedule and decision-making authority orders, or court ordered parenting plans must also allocate decision-making authority. While it can allow for a sharing of major decisions, day-to-day decision-making authority invariably must be vested in the parent with whom the child is residing. Further, neither of these types of parenting orders presuppose that decision-making will be shared but, rather, specifically contemplate a range of circumstances in which shared decision-making would be inappropriate. As a result, neither set of parenting orders avoids the difficult and contentious issue of deciding which parent has decision-making authority over the child.

A parenting responsibility model cannot, ultimately, help parents avoid the contested issues when resolving parenting disputes. As a result, the new language could become as emotionally and legally fraught as the language of custody and access that it is replacing. But, the advantage of a parenting responsibility model, particularly one that is not based on residence and contact orders, is that it tries to avoid the use of labels in the order itself. Further, by not articulating the various components of parenting responsibility, this model at least begins to get away from the winner-takes-all structure of custody and access. Although day-to-day decision-making authority necessarily follows a child's residence, major decision-making authority need not. Rather, decision-making authority can be determined separately and according to a different set of criteria.

More Flexible and Accommodating?

Another advantage of the language of parental responsibility is that it avoids many of the limitations of the language of shared parenting (discussed in greater detail below). The language of parental responsibility does not presuppose how that responsibility ought to be allocated between parents. It does not presuppose that the responsibility should be shared. Nor does it presuppose that the responsibility should never be shared. Rather, it simply directs parties and courts to allocate these responsibilities, according to the best interests of the child. It is an approach that accommodates family differences by allowing parents considerable latitude when tailoring their parenting arrangements. It is an approach that can accommodate diversity, including cultural, religious and ethnic differences in understandings of appropriate parenting.

Insofar as this parenting responsibility model does not promote any particular parenting arrangement but, rather, allows parents and courts to determine the particular arrangement that is in the best interests of the children, it can be said to generally promote the idea that "no one size fits all." Both the parenting-order and mandatory parenting-plan models embrace diversity and flexibility in parenting arrangements.

However, what parenting responsibility gains in flexibility, it risks losing in predictability and certainty. An approach to parenting disputes that allows a wide range of possible parenting arrangements may do little to increase the predictability of the outcomes of parenting disputes and, thereby, do little to reduce parental conflict and litigation. This lack of predictability would only be heightened if the criteria for allocating parenting responsibility were included as a statutory list of factors in the best interest of the child test. As discussed in Option One, a list of equally weighted factors does little to increase predictability of outcome.

A model of parenting responsibility could attempt to minimize this uncertainty by setting out the specific factors that need to be taken into account in allocating the different aspects of parental responsibility. In this way, the particular criteria could be more closely tailored to the particular order (including orders issued in the form of parenting plans). For example, when allocating a child's residential schedule, factors such as past and future performance of parenting functions, stability and continuity of care should be given considerable weight. But, in allocating decision-making authority, factors such as the history of participation of each parent in decision-making and the demonstrated ability of parents to cooperate with each other in decision-making should be given more weight. By carefully identifying the specific factors that need to be taken into account in the allocation of particular dimensions of parenting responsibility, a model of parenting responsibility could thus maintain its flexibility for parenting arrangements without sacrificing the reform objective of clarity and predictability.

Not Entirely Neutral

While the language of parental responsibility may be preferable to that of custody and access, and more neutral than shared parenting, it should be noted that there is at least one unfortunate connotation of the term. The language of parental responsibility is increasingly being used in the context of parental liability for their children's criminal acts. Parental responsibility statutes, also known as parental liability statutes, typically hold parents liable in some way for their children's actions. For example, the Manitoba *Parental Responsibility Act* holds parents liable for the activities of their children in relation to other people's property.[297] In the U.S., the statutes typically hold parents liable for negligence for failing to control and supervise their children.[298] Parental responsibility in this context has a rather more sinister connotation,

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[297] Section 3, Parental Responsibility Act, S.M. 1996, c.61 provides that "the parent of a child who deliberately takes, damages or destroys the property of another person is liable for the loss suffered by the owner of the property as a result of the activity of the child, and the owner of the property may commence a civil action under this Act against the parent of the child to recover damages in an amount not exceeding $5,000 in respect of the owner's loss."

[298] Many U.S. states have adopted parental responsibility statutes. For a general discussion of these statutes, see Jason Dimitri "Parental Responsibility Statutes—and the Programs that Must Accompany Them" 27 Stetson L.Rev 655.

referring not to parents' general duties, obligations and authority in relation to their children but, rather, to their failure to exercise sufficient control over their delinquent children.

Uncertainty, Conflict and Litigation

Two major objectives of the reform of child custody and access is to reduce the conflict between separating and divorcing parents, and to establish a legal regime that better allows parents to focus on, and cooperate in relation to, the interests of their children. A major disadvantage of this option for reform is that it will invariably introduce a range of uncertainties and ambiguities into the law that will, in turn, result in increased litigation. There are a number of steps that could be taken to try to minimize the ambiguity, confusion and uncertainty that may arise with this reform. For example, the regime could attempt to define parental responsibility with some degree of precision, as well as set out the specific criteria to be taken into account in allocating particular aspects of parenting responsibility. However, no amount of attention to detail can prevent the uncertainty that accompanies major reform.

There is considerable evidence of this impact in other jurisdictions that have undertaken similar reforms to the law of custody and access. As discussed above, research in both the U.K. and Australia has shown that the reforms do not appear to have significantly reduced conflict between divorcing parents. Disputes over residence and contact orders have intensified.[299] As Jeremy Roche has observed, the reforms have "not succeeded in taking the heat of disputes around children on divorce."[300] Applications for contact orders have increased dramatically, as have applications regarding violations of parenting orders.[301] Some of the increase is believed to be related to the unrealistic expectations produced by the reforms, particularly on the part of contact parents. Some of the continued conflict and litigation is also no doubt due to the confusion and ambiguity created by the change in the law, and the failure of the law to address a range of difficult questions, from the meaning of parental responsibility to the allocation of day-to-day decision-making to relocation.

Broad Implications of Reform for Other Legislation

Finally, any change in the language of custody and access has serious implications for a broad range of federal and provincial legislation. This is among the most serious disadvantage of any reform that moves away from the language of custody and access, as much federal and provincial legislation relies on the language of custody and access. If the *Divorce Act* abandoned this language in favour of that of parenting responsibility and parenting orders, it might be necessary to reform all legislation that included references to custody and access.[302] While some of these laws would require only a minor change in language, there are some implications of a much more serious nature.

The Federal Child Support Guidelines, for example, presuppose a regime of custody and access, in which the calculation of child support obligations are based on the income of the non-custodial parent. The Guidelines allow for a deviation from the specified amounts in the event of shared custody—that is, when a child lives with the other parent for not less than 40 percent of

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[299] Roche supra note 71.
[300] Ibid.
[301] See discussion supra at notes 98-100, and 125-129.
[302] For a discussion of federal and provincial legislation affected by these changes, see Part V below.

the time. A regime based on the allocation of parental responsibility would need to consider the implications of the allocation of the child's residential time on the Guidelines. If a child continued to live with a residential parent for more than 60 percent of the time, then the Guidelines could continue to apply. If, however, in allocating the child's residential time, one parent is not the residential parent for more than 60 percent of the time, there would be a variation in the Guideline amounts.

Other laws are similarly based on the language of custody and access, distributing rights or responsibilities to "custodial parents" and "access parents." For example, current laws on international and interprovincial child abduction are based on the concepts of custody and access. Both the *Hague Convention on the Civil Aspects of International Child Abduction*, and sections 282 and 283 of the *Criminal Code* on interprovincial abductions are designed to protect against the wrongful removal of a child in contravention of custody or access orders. Any move to abandon the language of custody and access and move towards a regime of parental responsibility would need to carefully consider the implications for these child-abduction laws. This is discussed in greater detail in Part V below.

Other laws effectively require the designation of a custodial parent or primary caregiver. For example, benefits under the *Ontario Works Act* depend on the identification of a custodial or primary caregiver parent. Joint custody arrangements, wherein a custodial or primary caregiver parent is not identifiable, are already causing problems for parents who are seeking benefits under this Act. An allocated-parental-responsibility scheme could make it more difficult to identify a custodial or primary caregiver parent and, thereby, present further obstacles for parents seeking social assistance benefits.

However, a parenting-responsibility model does not preclude one parent being identified as a custodial-like parent. For example, if the language of residential-parent and residence orders was adopted, much of the legislation could be reformed to reflect this language. The term *residential parent* could replace *custodial parent*, without seriously compromising the integrity of the schemes. In this respect, the language of parenting responsibility may be more easily adaptable than the language of shared parenting, as will be discussed in Option Three below.

One option would be to include a provision that allows parents to identify a custodial parent for the purposes of those provincial and federal laws that require a determination of custody. The Washington *Parenting Act* includes a provision that allows a designation of custody for the purposes of other state laws. The provision states that "solely for the purpose of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is to reside the majority of the time as the

custodian of the child."[303] The provision specifically states that "the designation shall not affect either parents' rights and responsibilities under the parenting plan."[304]

Such a designation provision would be helpful for separating and divorcing parents who were able to agree, and as such, it could be useful as part of a list of provisions that may be included in a parenting plan. However, it might prove to be highly contentious for those parents who are unable to agree on their parenting arrangements. By effectively returning to the language of "custodial parent," such a provision would reintroduce the very language that is said to produce parental conflict. This deeming provision is discussed in greater detail in Part V below.

[303] Washington Parenting Act, section 26.09.285.

[304] The section further provides that, in the absence of such a designation, the parent with whom the child is to reside the majority of the time shall be deemed to be the custodian of the child for the purpose of such federal and state statutes. Montana, which has a mandatory parenting-plan regime, similarly provides that a final parenting plan may include a "designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan." Montana Code, Title 40 Family Law, Chapter Four Termination of Marriage, Child Custody, Support, Part 2, Support, Custody, Visitation and Related Provisions, s. 40-4-234(2)(a).

IV OPTION THREE: SHARED PARENTING

The third option for reform is a shared parenting model, as recommended in the *Report of the Special Joint Committee on Child Custody and Access*. Several jurisdictions have recently replaced their custody and access regime with the idea of shared parenting. This model has many similarities to the parenting responsibility option, insofar as it abandons the language of custody and access and, instead, contemplates the allocation of parenting responsibilities within parenting orders and parenting plans. But, unlike the parenting responsibility option, the shared parenting model begins from the assumption that these parenting responsibilities are and should be *shared*.

One of the most challenging issues that must be addressed when considering this option for reform is the meaning of shared parenting. It is not at all clear what shared parenting means and, yet, if it is to be the basis of statutory regime, it must be concisely defined. A regime of shared parenting is based on the idea that parental responsibilities should be shared by the parents. This begs a range of questions. Which aspects of parental responsibilities should be shared? Are parents expected to share all parental responsibilities? Are they expected to share equally in the physical care of the child, as well as the decision-making authority over the child? Or, are some aspects of parental responsibility singled out for sharing? If so, which ones? And if parents only share some aspects of parental responsibility, how would the other aspects of parental responsibility be allocated? These are difficult and crucial questions that need to be answered when designing and evaluating a model for reform based on the idea of shared parenting.

This section begins with an analysis of the scope and meaning of the term *shared parenting*. It then examines the role of parenting orders and parenting plans within this model. The section explores the ways in which shared parenting responsibility, parenting orders and parenting plans could be defined and elaborated within a reformed *Divorce Act*. The text highlights the choices and challenges of designing a model based on this concept of shared parenting. And, it assesses the advantages and disadvantages of this model for reform.

Despite the important differences, many of the general questions to be addressed by this model of shared parenting are quite similar to those considered in the parenting responsibility model. Both involve a consideration of the scope and content of shared parenting, shared parenting orders and shared parenting plans. As discussed in Option Two above, this section also considers the range of potential relationships between shared parenting orders and shared parenting plans. Although some jurisdictions that have adopted a shared parenting approach have placed primary emphasis on private ordering through parenting plans, there is nothing inherent in this model that would require that. This section draws on examples from many of the same jurisdictions as in the parenting responsibility model, but now emphasizing the shared parenting dimensions of the legislative schemes.

SHARED PARENTING RESPONSIBILITY

The Special Joint Committee recommended that “the terms ‘custody’ and ‘access’ in the *Divorce Act* be replaced with the term ‘shared parenting’, which shall be taken to include all the meanings, rights, obligations and common-law and statutory interpretations embodied previously

in the terms 'custody' and 'access.'"[305] A number of other jurisdictions have also adopted a model based on shared parenting responsibility. Australian law, for example, which has replaced the language of custody and access with that of parenting responsibility, provides that parents share these parental responsibilities. The U.K. scheme uses the language of joint parental responsibilities. This section explores the potential scope and meaning of the term *shared parenting*.

Meaning of Shared Parenting

Distinguishing Shared Parenting from Joint Custody

The crucial issue to be addressed in this third option is the meaning of the term *shared parenting*. In particular, it is important to determine whether it has a meaning different from joint custody. "Joint legal custody" describes a custodial arrangement in which both parents retain decision-making authority over a child.[306] "Joint physical custody" describes an arrangement in which children spend roughly equal amounts of time residing with each parent.

While the literature suggests that joint custody is often a beneficial arrangement for children, the literature also indicates that these arrangements work best when they are voluntary.[307] Joint custody requires a high degree of cooperation and communication between the parents. Although divided, expert opinion appears to support the position that this kind of cooperation and communication cannot be forced onto separating and divorcing parents against their will. And, parents who contest custody to the point of litigation are unlikely to be able to develop the kind of collaborative and trusting relationship that is required to make an arrangement of joint custody work for the children. These concerns are reflected in the courts reluctance to order joint custody against the wishes of the parents. Appellate decisions in the late 1970s and early 1980s expressed reservations about ordering joint custody.[308] Since that time, the clear trend in

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[305] Recommendation 5, For the Sake of the Children, supra note 1, at 27-28.

[306] Typically, joint legal custody does not affect the residential arrangements of the child—that is, the child continues to reside with one parent, and has significant access to the other parent.

[307] See, for example, Maccoby and Mnookin, Dividing the Child, supra note 77, who conclude at 284-285 that "joint custody can work very well when parents are able to cooperate." Judith Wallerstein and Sandra Blakeslee, in Second Chances: Men, Women and Children a Decade After Divorce (New York: Ticknor and Fields, 1989), similarly write at 304 that "joint custody… can be helpful in families where it has been chosen voluntarily by both parents and is suitable for the child…. Sadly, when joint custody is imposed by the court on families fighting over custody of children the major consequences of the fighting are shifted onto the least able members of the family—the hapless and helpless children." Frank Furstenberg and Andrew Cherlin, in Divided Families: What Happens to Children When Parents Part (Cambridge: Harvard University Press, 1991), write at 75-76 that "joint physical custody should be encouraged only in cases where both parents voluntarily agree to it." See also J. Goldstein "In Whose Best Interest?" in J. Folberg ed. Joint Custody and Shared Parenting (New York; Guildford Press, 1991). Bala and Miklas, supra note 4, have similarly observed at 114 that "there is significant evidence that where parents are coerced into entering into this type of arrangement, whether by a judge or some other professional, this may be a less satisfactory arrangement than where there is a degree of willingness of the part of the parents to try this arrangement."

[308] Baker v. Baker, (1979) 23 O.R.(2d) 391 (OCA); Kruger v. Kruger (1979), 25 O.R. (2d) 673; Zwicker v. Morine (1980) 38 N.S.R.(2d) 236. (N.S.C.A.)

the case law has been not to impose joint custody when there is serious conflict between the parties.[309]

The debate about joint custody has increasingly focussed on presumption that a particular parenting arrangement is always in the best interests of children. Again, while expert opinion is divided, there appears to be a growing recognition that no one post-divorce parenting arrangement is most beneficial for children.[310] This approach has been expressly endorsed by the federal government. One of the basic principles endorsed in its response to the report of the Special Joint Committee is that “one size does not fit all.” The response states that “it is essential to recognize that no one model of post-separation parenting will be ideal for all children.”[311] Accordingly, the response further states that it does not support any presumptions, including a presumption in favour of joint custody.[312]

If shared parenting is to be a basis for the reform of custody and access, it would, therefore, be important to determine whether it can be differentiated from joint custody, specifically from a presumption in favour of joint custody.

In the next section, the paper examines the recommendations of the Special Joint Committee. It will consider the extent to which the Special Joint Committee’s recommendations can be distinguished from a model based on a presumption of joint custody. In the sections that follow, the paper examines the particular ways in which the idea of shared parenting has been incorporated into other statutory regimes. Again, the analysis looks at the extent to which statutory models have been, or could be, devised that use the language of shared parenting in a way that is distinguishable in some way from a presumption in favour of joint custody.

Special Joint Committee

The Special Joint Committee recommended that:

> The terms ‘custody’ and ‘access’ no longer be used in the *Divorce Act* and instead that the meaning of both terms be incorporated and received in the new term ‘shared parenting’, which shall be taken to include all the meanings, rights, obligations and common-law and statutory interpretations embodied previously in the terms ‘custody’ and ‘access’.[313]

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[309] Archer v. Cornfoot (1990) 28 R.F.L.(3d) 447. However, the case law is somewhat more divided on whether the court will order joint custody in the absence of parental agreement. There are a number of cases that have been willing to impose an order for joint custody in contested cases. See Nurmi v. Nurmi (1988) 16 R.F.L.(3d) 201, Surka v Surka (1992) 40 R.F.L.(3d) 208.

[310] See Diane Lye “Scholarly Research on Post-Divorce Parenting and Child Wellbeing,” Report to the Washington State Gender and Justice Commission, reviewing the research on the post-divorce parenting. At 25, she concludes “The lack of clear and compelling evidence from currently available scholarly research to support any particular scheme of post-divorce parenting arrangements suggests the following policy considerations: (i) “One size fits all” approaches, such as legal presumptions in favor or certain specified arrangements are likely to be harmful to some families. Many researchers explicitly warn against this type of approach.”

[311] Strategy for Reform, supra note 2, at 3.

[312] Strategy for Reform, supra note 2, at 10-11.

[313] Recommendation 5, For the Sake of the Children, supra note 1, at 27-28.

The Committee does not provide a clear definition of shared parenting. It describes 'shared parenting' as combining "in one package all the rights and responsibilities that are now embodied in the two existing terms—custody and access—and leave decisions about allocating the various components to parents and judges." The Committee also attempts to distinguish shared parenting from a presumption in favour of joint physical custody. It states that it is not recommending that "a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of children. The Committee recognizes that the details of time and residence arrangements for children will vary with the family involved."[314] According to the Committee "Whether an equal time-sharing arrangement is in the interests of a particular child would have to be determined on a case-by-case basis, with a full evaluation of the child's and parents' circumstances."[315] Later in the report, the Committee again emphasizes that children are not served by legal presumptions in favour of either parent, or any particular parenting arrangement. After discussing the advantages of joint custody, the Committee concludes that "legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles."

At the same time, the Committee also describes the new regime of shared parenting in the following terms:

> Under the new regime and terminology formulated by this Committee, in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles with respect to their children.[316]

While the Special Joint Committee is careful to say that it is not establishing a presumption in favour of joint *physical* custody, this passage does suggest that shared parenting, as envisaged by the Committee, is a presumption in favour of joint *legal* custody. The concept of shared parenting that the Committee endorses is one in which there is shared legal decision-making, and shared legal decision-making is, in effect, the very definition of joint legal custody. The recommendations are, then, a presumption in favour of a particular kind of custodial arrangement—shared legal decision-making—despite the Committee's claims to the contrary. It is difficult, therefore, to reconcile this basic tenet with the Committee's simultaneous insistence that the *Divorce Act* ought not to include any presumptions.

There is a lack of clarity in the meaning of the concept of shared parenting. Some advocates of shared parenting envisage a regime of joint physical custody, while others seek only joint legal custody. These divisions may account for the absence of a clear definition of the meaning of shared parenting, even among its major advocates. The ambiguity surrounding the term is also directly related to its proximity to the idea of joint custody, and to the apparent consensus rejecting a presumption in favour of joint custody. It would seem that shared parenting has not been more closely defined precisely because its definition would too closely approximate the very idea that has been rejected.

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[314] Ibid.
[315] Ibid. at 31.
[316] Ibid., at 27.

The Meaning of Shared Parenting in Other Jurisdictions

The language of shared parenting has been incorporated in very different ways into the laws of a number of other jurisdictions. Some of these jurisdictions have done so in a way that appears to closely resemble a presumption in favour of joint custody. Other jurisdictions have included the language of shared parenting in ways that more clearly differentiate it from a presumption in favour of joint custody.

Florida

The Florida statute provides that a "court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."[317] Shared parenting responsibility is defined as a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.[318] While the statute uses the language of shared parenting, it is generally described as a presumption in favour of joint legal custody.[319]

The statute does not mandate that the physical residence of the child be shared.[320] Rather, the child's residence continues to be allocated to a custodial or primary residential parent.[321]

United Kingdom

In the United Kingdom, the allocation of parenting responsibility is dependent on the marital status of the parents. The *Children Act* does not use the language of shared parenting, but incorporates the idea of shared parental responsibility, when the child's mother and father are married.[322] The Act provides that when more than one person has parental responsibility, "each of them may act alone and without the other in meeting that responsibility."[323] The model is described as one of "joint but independent responsibility," in which each parent may act unilaterally in meeting their parental responsibility.[324]

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[317] Fla.Stat.Ann.S.61.13(2)(a)(2) (West Supp.1998).

[318] Section 61.046(11)).

[319] See, for example, the discussion by the ALI, supra note 26, at 200, listing Florida among the states with a presumption in favour of joint legal custody.

[320] See Frey v. Wagner (1983) 433 So.2d 60. Prior to July 1, 1997, the Florida courts held that there was a presumption that rotating physical custody was not in the best interests of the child. The statute has been reformed to now authorize the court to order rotating custody if it is in the best interests of the child. Commentators have stated that it is not yet clear whether this reform has reversed the presumption.

[321] See Florida Statutes 1995, S.61.046(3) , which defines custodial parent as "the parent with whom the child maintains his or her primary residence." Non-custodial parent is defined as the "parent with whom the child does not maintain his or her primary residence." These parents are generally referred to as residential and non-residential parents, or primary and secondary residential parent.

[322] S.2(1) U.K. Children Act. "Where a child's father and mother were married to each other at the time of his birth, they shall each have parental responsibility." Unmarried fathers do not have parental responsibility unless acquired in accordance with the Act.

[323] S.2(7), Children Act.

[324] Dewar, supra note 88, at 20.

The statute does not mandate shared physical custody or residence. Residence continues to be decided separately from parental responsibility in and through residence orders.

Australia

In Australia, the *Family Law Act* does not actually use the term *shared parenting*, but does incorporate the idea that parenting responsibility is shared. The Act includes the statement of principle that "parents share duties and responsibilities concerning the care, welfare and development of their children" and that "parents should agree about the future parenting of their children."[325] It provides that "each of the parents of a child who is not 18 has parental responsibility for the child." Subsection (2) provides that this parental responsibility continues to exist "despite any changes in the nature of the relationships of the child's parents."[326] The law further provides that parental responsibility is not affected by the making of a residence, contact or other order except to the extent, if any, as is expressly provided in the order or is necessary to give effect to the order.[327]

Like the U.K. Act, the Australian regime does not mandate shared physical custody or residence. Residence continues to be decided separately in and through residence orders.

There has also been some debate within the literature as to whether the *Family Law Act* has created a presumption in favour of shared parenting.[328] Richard Chisholme, for example, argues that there is great doubt about whether the act actually imposes a presumption of shared parenting, and about the strength of the presumption created, if any.[329] The extent to which the legislation can be said to impose this presumption may depend on the implications of parenting orders for parenting responsibility. As mentioned, the Act provides that parental responsibility is not affected by a parenting order, unless expressly provided by such order. As such, parenting responsibility continues to be shared after a parenting order, except to the extent that the order itself qualifies the parenting responsibility of the parent(s). This could be seen to create at least a weak presumption in favour of shared parenting: parenting is shared unless a court order or private agreement provides otherwise. It is not, however, a strong presumption, as found in the Florida legislation, since it does not in any way stipulate that the courts shall order shared parenting. Nor does it stipulate that parties should negotiate shared parenting in the parenting plans. Rather, shared parenting can perhaps be better described as the default position under the Australian Act.

There has also been a debate about whether the Australian scheme imposes a model of joint or independent shared parenting—that is, whether parents can exercise their decision-making authority independently of the other parent, or whether they must consult with the other parent. The issue has been addressed by the Australian Family Court:

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[325] Section 60B(2)(c), (d), Australia Family Law Act.
[326] S.61C(1), (2) Family Law Act.
[327] S.61D(2) Family Law Act.
[328] See Chisholm supra note 8. See also Dewar supra note 88 discussing the confusion regarding how parental responsibilities are intended to be shared, and Richard Ingleby "The Family Law Reform Act—a Practitioner's Critique" (1996) 10 Australian Journal of Family Law 48, discussing the confusion over the term parenting responsibility.
[329] Chisholme, supra note 8, at 181.

> In the absence of a specific issues order, we think it unlikely that the Parliament intended that separated parents could only exercise all or any of their powers or discharge all or any of their parenting responsibilities jointly in relation to all matters. This is never the case when parents are living together in relation to day-to-day matters, and the impracticability of such requirement when they are living separately only has to be stated to be appreciated.
>
> As a matter of practical necessity either the residential parent or the contact parent will have to make individual decisions about such matters when they have the sole physical care of the children. On the other hand, consultation should obviously occur between the parents in relation to major issues affecting the children such as major surgery, place of education, religion and the like. We believe that this accords with the intention of the legislation.[330]

As interpreted by the Court, then, the Australian scheme allows for independent decision-making on day-to-day matters, but requires joint decision-making on, for example, major medical, educational and religious decisions. If this was considered to be a desirable outcome, this particular allocation of parental responsibility could be made more clear on the face of the statutory regime itself.

Maine

The Maine *Domestic Relations Act* provides a rather different model that uses the language of both sole, allocated and shared parental rights. Shared parental rights are defined in s.1501(5) as follows:

> (5). "Shared parental rights and responsibilities" means that most or all aspects of a child's welfare remain the joint responsibility and right of both parents, so that both parents retain equal parental rights and responsibilities, and both parents confer and make joint decisions regarding the child's welfare. Matters pertaining to the child's welfare include, but are not limited to, education, religious upbringing, medical, dental and mental health care, travel arrangements, child care arrangements and residence. Parents who share parental rights and responsibilities shall keep one another informed of any major changes affecting the child's welfare and shall consult in advance to the extent practicable on decisions related to the child's welfare.

The statute does not, however, include a presumption in favour of such shared parenting. Rather, it contrasts shared parenting with sole parental rights and responsibilities, which means "that one parent is granted exclusive parental rights and responsibilities with respect to all aspects of a child's welfare, with the possible exception of the right and responsibility for support."[331]

The Act further provides that, "when the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered." The section provides that the court shall state its reasons for not ordering a shared parental rights and responsibilities award agreed to by

[330] In the Matter of B and B, supra note 132.
[331] Section 1501(6) Maine Domestic Relations Act.

the parents. The Maine *Domestic Relations Act*, thereby, creates a presumption in favour of enforcing shared parenting arrangements voluntarily agreed to by the parents. In this respect, the Maine legislation is a hybrid, combining some of the potential advantages of shared parenting, while stopping short of establishing it as a legal presumption to be imposed even against the wishes of the parents. Nor does it establish shared parenting as a default position. Rather, it simply endorses shared parenting to be one among a range of possible parenting arrangements, and tells the courts to defer to shared parenting arrangements agreed to by parents.

Summary and Assessment

It should be noted that in all of these approaches, the aspect of parenting responsibility that is to be shared between the parents is decision-making authority. None of the three models specifically mandate or contemplate shared residence. Both Florida and Maine specifically define shared parenting as joint decision-making authority over the child. While the U.K. and Australian legislation defines parenting responsibility more vaguely, commentators and case law have suggested that it includes joint decision-making authority. It does not include or require shared or joint physical residence. As a result, all of these approaches to shared parenting require that the child's residential time be allocated separately, according to the best interests of the child criteria.

Based on these jurisdictions, it is possible to identify three models for a regime that incorporates some notion of shared parenting.

A Presumption of Shared Parenting (Florida)

The legislative schemes that have incorporated the language of shared parenting in a way that most closely resembles a presumption in favour of joint legal custody are questionable models on which to base reforms to the *Divorce Act*. The guiding principles for reform stipulate that the *Divorce Act* should not be reformed to include presumptions. The Florida legislation clearly establishes a presumption in favour of joint legal custody.

Default Position

The legislative schemes that have incorporated the language of shared parenting in a way that involves a weak presumption, or a default position, in favour of shared parenting might be more appropriate models. The U.K. and the Australian Acts can both be seen as examples of these weak presumptions, or default approaches, to shared parenting. However, these schemes are not without their disadvantages.

As discussed in relation to Option Two, both the U.K. and Australian schemes include a very general definition of parental responsibility, with no elaboration of its particular dimensions. This generality and vagueness have been the subject of considerable criticism. In the U.K. context, John Eekelaar, for example, has observed "parental responsibility has been one of the more elusive concepts of the *Children's Act* 1989."[332] As a result, the courts have been called upon to determine the scope and content of parental responsibility.

[332] John Eekelaar "Parental Responsibility—A New Legal Status?" (1996) 112 The Law Quarterly Review 233.

The same can be said in the Australian context. While many commentators welcomed the effort to shift the focus of Australia's child custody law to a more child-centred approach that encouraged parents to reach their own cooperative agreements, commentators have also been critical of the many uncertainties created by the legislative reforms. Many have been critical of the vague definition of parenting responsibility. As Ingleby argues, no one really knows what parenting responsibility means.[333] Dewar has similarly argued that the Act is unclear as to how parenting responsibility is to be shared. The Act is also unclear as to whether parenting responsibility is independent or cooperative, and whether the residential parent has any sphere of freedom of unilateral action, independent of joint decision-making and joint parenting.[334] The Australian Family Court has also observed that the definition of parental responsibility in the *Family Law Act*, as amended by the *Family Law Reform Act* 1995, "provides little guidance, relying as it does on the common law and relevant statutes to give it content."[335]

However, as also discussed in Option Two above, it would be possible to design a regime based on the idea of parental responsibility, with a more comprehensive definition of what that parental responsibility entails. The Scottish legislation provides an elaborate definition of parental responsibility, and the Washington legislation provides a very detailed description of parenting functions.[336] Either could be used as the basis for a more comprehensive definition of parental responsibility.

Moreover, the limitations of this approach discussed in relation to Option Two are no longer obstacles in relation to Option Three. One of the problems that a residence and contact order regime presented to a neutral model of parenting responsibility was the extent to which it presupposed a certain degree of shared parenting responsibility. A regime based on residence and contact orders, therefore, fits better within Option Three's shared parenting model.

No Presumption

The hybrid approach, which uses the language of shared parenting alongside the language of sole and allocated parenting responsibilities, may also provide a useful model. The Maine legislation, which sets out shared parenting responsibilities as one among a range of possible parenting arrangements, is a model for incorporating the language of shared parenting into a statutory regime, without establishing any presumption in favour of any particular parenting arrangement. In this respect, the model may more closely approximate Option Two, but it does so in a way that expressly uses the language of shared parenting. It incorporates the language of shared parenting, but does not create a general presumption in favour of it. As noted, the statute does, however, provide a presumption in favour of private agreements to shared parenting—that is, when parents have agreed to shared parenting, the court should award it, unless there is substantial evidence to the contrary.

Models Compared

The first option establishes a strong legislative presumption in favour of shared decision-making authority. It would appear to violate the guiding principle that the *Divorce Act* should not

[333] Richard Ingleby, supra note 328.
[334] Dewar, supra note 88.
[335] In the Matter of B and B, supra note 132.
[336] See discussion supra note 146.

include any presumptions. The second option can be seen to establish a weaker presumption, or default position, in favour of shared decision-making authority. Although a case could be made that it would not, strictly speaking, establish a presumption in favour of joint legal custody, this approach would likely prompt parents to expect to share major decision-making authority, unless an agreement or court order provide otherwise. The effect is the same as a presumption in favour of joint legal custody. The third option simply establishes shared decision-making as one possible parenting arrangement, and does not represent much of a departure from the current regime.

Thus, the two options that would result in a significant change from the existing regime would both appear to violate the guiding principle that the *Divorce Act* should not include any presumptions. The first option is a presumption. The second option is not worded as a presumption, but the effect is the same. While it may be possible to frame shared decision-making as a principle rather than a legal presumption, it is important to acknowledge that it would still, in effect, be establishing one particular type of parenting arrangement as the model for post-divorce parenting.

PARENTING ORDERS

The Special Joint Committee has recommended a regime of shared parenting and mandatory parenting plans. It has not specifically addressed the question of parenting orders, other than to say that all parenting orders should be made in the form of parenting plans. The recommended regime is one in which parents are encouraged to reach their own agreement through parenting plans. If they are unable to agree, then they should be able "to make an application under the *Divorce Act* for a shared parenting determination. Judges making such determinations will be able to give consideration to proposed parenting plans filed with the court by each parent, and guided by the best interests of the child test, make a court order in the form of a parenting plan. Such a plan, although judicially imposed, will retain the benefits of being focused on the child's needs and interests, as well as the advantages of flexibility and adaptability." The Committee further recommended that any such "shared parenting determinations" be made on the basis of a revised list of criteria in determining the best interests of the child.[337]

The approach of the Special Joint Committee does not distinguish between parenting plans and parenting orders. Rather, it appears to be following the approach of the Washington *Parenting Act*, in which all parenting orders take the form of parenting plans. However, the *Parenting Act* does not endorse a shared parenting approach. It does not use the language of shared parenting and does not, in fact, require that any particular dimensions of parenting be shared. The Special Joint Committee appears to be confusing and conflating different legislative approaches. It wants to endorse a shared parenting approach (as per Australia and the U.K.), and a mandatory parenting plan approach (as per Washington). It fails, however, to address the details of precisely how such a regime would be designed, and the problems and tensions associated with attempting to merge these two very different approaches.

It would be possible to design a regime based on the Washington *Parenting Act*, in which parenting plans are the primary instrument for resolving parenting disputes. It is not, however,

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[337] Recommendation 15 and 16, For the Sake of the Children, supra note 1, at 44-45.

an approach that mandates shared parenting, but allows separating parents to decide for themselves how best to allocate the various aspects of their parenting responsibility. Nor does it contemplate the making of "shared parenting determinations." Any attempt that requires decision-making to be shared in a parenting plan would be a very significant departure from a regime that emphasizes the importance of private choices and flexibility to adapt to the unique circumstances of individual families.

Conversely, it would also be possible to design a regime based on the U.K. and Australian approaches to shared parenting, which provide that parenting responsibility is shared, unless a parenting plan or parenting order provides otherwise. But, neither the U.K. nor Australia require that separating parents file parenting plans, nor do the regimes require that parents who do file parenting plans necessarily share parenting responsibility or decision-making authority.

The recommendations of the Special Joint Committee for mandatory parenting plans, shared parenting responsibility and parenting orders as parenting plans are not workable as a legal model. Rather, a much more detailed analysis of, and relationship among shared parenting responsibility, shared parenting orders and the potential role of parenting plans is required. It may be possible to capture the spirit of the Committee's recommendations—of a regime that includes the language of shared parenting, and that encourages separating and divorcing parents to cooperate and reach their own agreements in parenting plans but such a legal regime needs to be more carefully and precisely designed. In the sections that follow, the paper attempts to identify the options for designing such a model.

The questions about the nature and role of parenting orders under a shared parenting model are very similar to those about parenting orders raised under the parenting responsibility model discussed in detail in Option Two. The model would also have to address the questions of the different types of parenting orders that such a scheme might adopt, the relationship between parenting orders and shared parenting responsibility, and the criteria for making and modifying parenting orders, including specific consideration of the relevance of violence, high conflict and inadequate parenting in such orders.

Types of Orders

Other jurisdictions that have experimented with shared parenting provide three models for types of orders.

Presumption in Favour of a Shared Parenting Order

The Florida statute allows the courts to make shared parental responsibility orders and sole parental responsibility orders. Under this statute, the court can consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare, or may divide those responsibilities between the parties based on the best interests of the child. Areas of responsibility may include primary residence, education, medical and dental care, and any other responsibilities that the court finds unique to a particular family. However, it provides that the "court shall order that parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."

Again, it is to be noted that shared parenting applies to decision-making authority not residence. A child's residence continues to be decided according to the best interests of the child,[338] and the statute continues to include the language of custodial and non-custodial parents, specifically when dealing with the allocation of the child's residential time. A custodial parent is the parent with whom the child maintains his or her primary residence.

Range of Specific Parenting Orders

In Australia and the U.K., which have adopted the language of shared or joint parenting responsibility, parenting orders are broken down into specific kinds of orders. The Australian legislation provides for residence, contact and special-purpose orders. The U.K. legislation provides for residence, contact, prohibited steps and specific-issues orders. Both of these statutory regimes have been discussed in detail in Option Two above.

No Shared Parenting Responsibility; Shared-Parenting Order One Possibility

The Maine *Domestic Relations Act* provides that the court may make an order awarding parental responsibilities on the basis of allocated parental rights and responsibilities, shared parental rights and responsibilities, or sole parental rights and responsibilities. In this hybrid legislative scheme a shared-parenting order is simply one among a number of orders that a court may award. In terms of an award for shared parental rights and responsibilities, the statute provides that it "may include either an allocation of the child's primary residential care to one parent and rights of parent-child contact to the other parent, or a sharing of the child's primary residential care by both parents." A shared parenting order within this scheme, thus, does not require shared residence, although it does allow for it.

Models Compared

The strongest presumption in favour of shared parenting orders is found in the Florida legislation. In contrast, neither the Australian nor the U.K. schemes include a presumption in favour of shared parenting orders. Indeed, neither scheme contemplates shared parenting *orders per se*. Rather, both schemes begin from a presumption that parenting responsibility is shared or joint. Both schemes allow, and encourage, the parents to reach agreements in which they share parenting responsibilities. But, both schemes provide that parenting orders can expressly limit this shared parenting under a prohibited steps or special-purpose order (U.K.) and a special-purpose order (Australia).

Unlike the Australian law, the U.K. Act also includes, as discussed above, a "no-order presumption."[339] As a result, the U.K. regime has a strong preference in favour of private ordering, whereas the Australian legislation retains a greater role for the courts in resolving parenting disputes, notwithstanding the legislative encouragement of shared parenting. The stronger preference for private ordering, alongside the joint allocation of parenting responsibility, might be seen to create a slightly stronger presumption in favour of joint or shared parenting. If joint parenting is effectively the default position under the legislation (that is, the legal position unless courts order otherwise), and the courts are told to make no order unless it is in the best

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[338] Section 61.13, 3 sets out the criteria that the courts are to take into account in determining the welfare and interests of the child.
[339] See discussion supra notes 90-91.

interests of the child, then the scheme may be one in which it is more likely that parenting will remain shared. But, under the scheme, parents are free to make other kinds of parenting arrangements, and, when the courts do in fact act, they too are authorized to make orders that limit or alter joint parenting.

Once again, the Maine legislation is a model that incorporates a reference to shared parenting orders in a manner that does not presume any particular type of parenting arrangement. However, the scheme does allow the court to make a shared parenting order. The legislation provides a presumption in favour of enforcing shared parenting arrangements agreed to by the parents. There is no presumption—in favour or against—of shared parenting in the absence of such parental agreement. Rather, the court must then decide which order is appropriate, based on the best interests of the child. It is the model that, despite the difference in language, most closely resembles the existing *Divorce Act*, which allows the court to make sole and joint custody orders, to be determined according to the best interests of the child.

Finally, each of the regimes require, in their own unique way, that a separate decision be made regarding the child's residence. A shared parenting order under the Florida and Maine models does not require that residence be shared but, rather, requires a determination of the child's residence, and allows residence to be allocated to one or both parents. Similarly, the U.K. and Australian schemes require that a child's residence and contact with the non-residential parent be determined in parenting orders, independent of the assumption of joint or shared parenting responsibility.

Relationship Between Parenting Order and Parenting Responsibility

The three models differ in the relationship between parenting orders and parenting responsibility, and in the degree of clarity with which this relationship is set out.

Presumption of Shared Parenting Order

In the Florida scheme, shared parenting is a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to the child. It is the result of a court order, and does not appear to exist independent of it.[340]

Shared Parenting Responsibility, with Range of Specific Parenting Orders

Under the U.K. and Australian legislation, parental responsibility begins as joint or shared. The Australian Act provides that each parent has parental responsibility, that this responsibility continues despite any change in the relationship between the parents, and that this responsibility is not affected by a residence, contact or other order, except to the extent, if any, as is expressly provided in the order, or necessary to give effect to the order. Thus, under this regime, parenting responsibility continues to be shared unless a court order or private agreement provides otherwise.

[340] However, in Florida, like in many other jurisdictions, prior to the dissolution of marriage, both parents are considered to be the joint natural guardians of a minor child, and have joint and equal rights of custody, care and control. Florida Statute, S.744.301(1).

The relationship between parental responsibility and parenting orders under the U.K. *Children Act* is similar, although it does not set out this relationship in the same statutory detail. A person with parental responsibility can act unilaterally in meeting that responsibility, provided that he or she doesn't violate any court order.[341] A parent with a residence or contact order in his or her favour would be authorized to make independent decisions regarding the child, unless a prohibited steps or specific-issues order otherwise limited this authority.

No Shared Parenting Responsibility; Shared Parenting Order One Possibility

Under the Maine legislation, parental responsibility is not assumed to be shared but, rather, is specifically allocated within one of the three available orders. In this scheme, shared parental responsibility is a specific allocation of parental responsibility in which decision-making authority is shared, and in which physical residence could, but need not, be shared. However, parental responsibility could also be granted to one parent in a sole parental responsibility order, or otherwise allocated between the parents as an allocated-parental-responsibility order. The default position under the Act—the situation before any court orders—does appear to be one of joint parental responsibility.[342]

The relationship between parenting responsibility and parenting orders should be made very clear within the legislation.

Criteria for Parenting Orders

Once again, the general criteria for making a parenting order must be the best interests of the child. As discussed in Option Two above, the issue that arises, then, is the extent to which this best interests of the child test should be further articulated. Many of the policy questions and choices directly parallel those in Option Two. The specific question that needs to be answered is whether the criteria for making parenting orders under a shared parenting model need to differ in any significant way from the criteria discussed in Option Two.

General vs. Specific Criteria

As per Option Two, the criteria for making parenting orders could be set out as a general list of statutory factors to take into account in determining the best interests of the child (as per the U.K. and Australian models). Or, the statute could set out the specific factors that would need to be taken into account in relation to *specific* kinds of parenting orders and the allocation of specific dimensions of parenting responsibility (as per Washington state law). The way in which specific criteria would be set out would depend, in part, on the particular approach to parenting orders adopted.

Presumption in Favour of a Shared Parenting Order

This model, which defines shared parenting as being in the best interests of the child, may seem the least likely candidate for specific criteria. The presumption is that decision-making authority will be shared by the parents. In the Florida statute, however, there is no similar presumption regarding the child's residence. This model could, then, still benefit from the identification of

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[341] Section 2(7), U.K. Children Act.

[342] Section 1651, Maine Domestic Relations Act states that parents are the joint legal guardians of the child and "are jointly entitled to the care, custody, control, services and earnings of their children."

specific criteria in relation to the child's residence. Further, despite the presumption, the Florida statute allows the court to allocate specific aspects of decision-making. It would be possible, then, to include a reference to specific factors that the court should take into account when allocating decision-making authority.

Shared Parenting Responsibility with A Range of Specific Parenting Orders

As noted, the U.K. and Australian schemes do not identify specific criteria for specific dimensions of parenting responsibility but, rather, rely on a general list of factors to be taken into account when determining the best interests of the child. However, it would be possible within this model to identify specific factors that the courts would need to take into account when making specific kinds of parenting orders. For example, if the U.K. and Australian approach to parenting orders was adopted, it would be possible, as discussed above in Option Two, to identify specific criteria for the courts to take into account in making residence and contact orders, and specific issues, prohibited steps and special purpose orders.[343]

The advantages of identifying specific criteria within a shared parenting model would be the same as those discussed in Option Two.

Shared Parenting Order as a Possible Order

If a shared parenting order was one among a number of possible orders that a court could award, the legislative scheme could identify the specific contexts in which such an order would be appropriate. The Maine legislation provides that a court should make an award of shared parental rights when the parties have agreed to it, unless there is substantial evidence that it should not be ordered. However, it does not provide any specific guidance on if and when such shared parenting orders should be made against the wishes of the parents. Rather, the legislation simply directs the court to make an award of sole parenting, allocated parenting or shared parenting based on the best interests of the child.

This model would again raise the question of whether it would be appropriate to order shared parenting against the wishes of the parties. As mentioned above, the courts have been reluctant to order joint custody against the wishes of the parents. Experts agree that joint custody works best when it is voluntary, since it requires a high degree of cooperation and communication.[344] A statutory regime that allows a court to make a shared parenting order might, then, want to identify the particular circumstances in which such shared parenting is, or is not, appropriate. It could specifically identify the factors that the court should take into account in ordering shared decision-making authority.

A regime based on a shared parenting order as one among a number of possible orders could also identify the factors to be taken into account in allocating the child's residence.

As discussed above, the advantage of criteria for ordering the specific dimensions of shared parenting is that it directs the courts' attention to the particular factors that might facilitate, or undermine, shared decision-making and shared residence. Again, the more specific the criteria, the more guidance the courts and the parties will be given when resolving parenting disputes.

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[343] See discussion supra notes 89 and 101.
[344] See discussion supra note 307.

Specific Criteria for Specific Aspects of Parenting Responsibility

All three models could then be designed to include specific criteria for the allocation of particular dimensions of parenting responsibility. In so doing, a shared parenting regime could borrow from the factors identified in the Washington *Parenting Act*.

Decision-Making Authority

As discussed above, the Washington scheme provides that the court shall order sole decision-making authority to one parent when it finds that both parents are opposed to mutual decision-making, or one parent is opposed to mutual decision-making and the opposition is reasonable. The Act further provides that in allocating decision-making authority, the court shall consider the history of participation of each parent in decision-making, whether the parents have a demonstrated ability and desire to cooperate with one another in decision-making, and the parents' proximity to each other, to the extent that it affects their ability to make timely mutual decisions.

Identifying this criteria would be most important in the context of the Maine model, in which a shared decision-making order was simply one of three orders that a court could make. By way of contrast, both the Florida and U.K.-Australian models assume shared decision-making. Specific criteria could be identified that would rebut the presumption of shared decision-making, and that would operate, then, as limitations on this assumption of shared decision-making. These limitations are discussed further below in the section on violence, high conflict and inadequate parenting.

Residence

All three approaches to shared parenting require a separate determination of the child's residential time (residence and contact or residential schedule). It would, therefore, be important for the statutory framework to set out carefully the factors to be taken into account in allocating this aspect of parental responsibility. A shared parenting regime could similarly borrow from the specific factors identified in the Washington scheme in relation to the allocation of the child's residence.[345] As discussed above, stability and continuity of care should at least be one of the relevant factors in this allocation.[346]

Violence, High Conflict and Inadequate Parenting

As with the other options for reform, the general guiding principles and objectives of protecting children from violence, high conflict and inadequate parenting, require that the *Divorce Act* address the unique needs of children from these separating and divorcing families. Indeed, the importance of addressing the needs of children from violence, high conflict or inadequate parenting families is heightened in the context of a legal regime based on the idea of shared parenting. This option for reform presupposes that some degree of shared parenting is in the best interests of children, that both parents should continue to have some kind of parenting responsibility after divorce, and that the law should encourage continued relationships with both parents. This option places a premium on cooperation and continuity, emphasizing that parents

[345] See discussion supra note 146.
[346] See discussion supra notes 175-181.

should be encouraged to reach their own agreements about their children and that both parents should continue to have meaningful relationships with the children following separation and divorce. All of these assumptions are profoundly challenged by the existence of violence, high conflict and inadequate parenting.[347] The existence of any of these three factors will make cooperation difficult if not impossible. Research also suggests that continued contact with both parents may not, in fact, be in the best interests of the child. It will, therefore, be very important to specifically identify the ways in which families that have experienced violence, high conflict and inadequate parenting ought to be treated within a regime that otherwise emphasizes cooperation and continuity.

The particular ways in which a reference to these factors could be incorporated into the statutory regime depends, in part, on the particular model for shared parenting. The approaches do share a general theme of limiting the application of shared parenting in the context of violence, high conflict and inadequate parenting and then providing some guidance for the determination of an alternative parenting arrangement.

Presumption of Shared Parenting Order

In a model that establishes a presumption in favour of a shared parenting order, the existence of family violence, high conflict and inadequate parenting should be specifically identified as a factor that would rebut the presumption.

These factors could then be taken into account in order to determine the alternative-parenting arrangements. The options would be similar to those discussed in Option Two—establishing a presumption against residence and contact, or giving the court discretion to restrict residence or contact. This approach could also set out the range of possible protective conditions for contact.

Shared Parenting with Parenting Orders

In a model based on the U.K.-Australian scheme, violence, high conflict and inadequate parenting could be identified as factors to be considered in making parenting awards.

As discussed in Option Two above, violence, high conflict and inadequate parenting could either be included as general factors in the best interests of the child, or they could be included as factors for specific parenting orders. Again, the options would be similar to those discussed in Option Two—establishing a presumption against residence and contact, or giving the court discretion to restrict residence or contact. The legislative framework could also address the limitations on decision-making authority, setting out either mandatory or discretionary limits on shared decision-making in the context of violence, high conflict and inadequate parenting. It could also set out the range of possible conditions for contact.

[347] For a discussion of the problems of shared parenting and domestic violence, see Khachaturian supra note 200, arguing that all of the assumptions about the advantages of shared parenting and joint custody break down in the face of domestic violence. Khachaturian specifically examines this dilemma in the context of proposed shared-parenting legislation in the state of Michigan.

Optional Shared Parenting Order

In a model based on the Maine scheme, violence, high conflict and inadequate parenting could be identified as factors to be considered when choosing among the sole, shared or allocated parental rights and responsibility orders.

This approach could include a general limitation on shared parenting orders, stating, for example, that the court shall not make a shared parenting rights and responsibility order in cases involving family violence, high conflict or inadequate parenting. Or, the limitation could be put more narrowly, stating, for example, that the court shall only order shared parenting if it is in the best interests of the child, and adequate provision can be made for the safety of the child and the parent.

As with the other models of shared parenting, the statutory regime could further elaborate on the relevance of violence, high conflict and inadequate parenting. Again, it could establish a presumption against residence and contact, or give the court discretion to restrict residence or contact. It could address similar limitations on decision-making authority. This approach could also set out the range of possible protective conditions for contact.

PARENTING PLANS

The questions about the nature and role of parenting plans under a shared parenting model are very similar to the questions about parenting plans under the parenting responsibility model discussed in detail in Option Two. The model would have to address the same issues namely, (1) whether parenting plans would be optional or mandatory, (2) the required content of parenting plans, (3) the degree of judicial deference to parenting plans, and the criteria by which such plans would be reviewed by the courts, (4) the limitations or restrictions on parenting plans, and (5) variation or modification of parenting plans. Most of these parenting plan issues do not differ in any significant way from the approaches discussed and recommended under Option Two. There is, however, one issue specific to a shared parenting responsibilities regime, namely, the extent to which it is or could be compatible with mandatory parenting plans.

Optional or Mandatory?

The regime recommended by the Special Joint Committee is one in which parenting plans would become the central instrument in the resolution of parenting disputes. It recommends that the *Divorce Act* be amended to require that all parties applying to a court for a parenting order be required to file a proposed parenting plan with the court.[348] It also recommends that all parenting orders be made in the form of parenting plans.[349]

The recommendations of the Special Joint Committee, coupled with the adoption of the language of shared parenting, are unprecedented. The only two jurisdictions that have imposed mandatory

[348] Recommendations 11, 13, For the Sake of the Children, supra note 1, at 32.
[349] Recommendation 11, Ibid.

parenting plans do not use the language of shared parenting,[350] and the jurisdictions that use the language of shared parenting do not have mandatory parenting plans. Australia, for example, allows and encourages the use of parenting plans, but does not require them. Ironically, despite the U.K. Act's presumption in favour of private ordering, the legislation does not specifically mention parenting plans.

Further, as mentioned above, the Special Joint Committee does not distinguish between parenting plans and parenting orders but, rather, says that all parenting orders should be made in the form of parenting plans. In this respect, the Committee appears to be following the Washington *Parenting Act*, in which all parenting orders are made in the form of parenting plans. But, as mentioned, the *Parenting Act* is not based on the language of shared parenting, and does not require that parents share any particular parenting functions.

In a mandatory regime of parenting plans, such as those established in Washington and Montana, it may be sensible for parenting orders to take the form of parenting plans. However, it is not clear that a mandatory parenting plan regime is entirely compatible with a shared parenting regime. One of the key objectives of a mandatory parenting-plan regime is to give parents considerable flexibility in tailoring their post-divorce parenting arrangements to suit their children's needs. By contrast, one of the key objectives of a shared parenting regime is to insist that parents share their parental responsibility in a particular way. While a mandatory parenting plan regime allows parents to divide their decision-making authority however they see fit, a shared parenting regime tends to insist (or allow, in the Maine approach) that major decision-making authority be shared between the parents.

What then would be the role or meaning of shared parenting within a mandatory parenting plan regime? Would parenting plans start from an assumption that major decision-making would be shared (major medical, education and religious decisions), and then allocate other aspects of parenting responsibility? Would parents be allowed to deviate from shared decision-making authority? On what basis? And how would the courts allocate decision-making authority in the absence of parenting agreement? Would the courts simply return to the presumption of shared decision-making?

An approach to parenting plans that insisted that certain aspects of parenting responsibility be shared (i.e. major decision-making) would represent a significant departure from the idea that parents should be able to tailor their post-divorce parenting according to the unique needs of their children. Even if parents were allowed to depart from the assumption of shared decision-making authority, there would be little or no incentive for them to do so. If courts returned to shared decision-making authority in the absence of parental agreement, then there would be no incentive for a parent to agree to less than shared decision-making.

An optional approach to parenting plans within a shared parenting regime might generate similar results (parents not agreeing to anything less than shared decision-making authority). But, by

[350] As discussed above, Washington and Montana both have mandatory parenting plans, but neither use the language of shared parenting. Rather, the statutes use the language of parenting and parenting functions, and allow the separating parents to allocate and divide the various dimensions of parenting.

definition, this approach would only apply to parents who could agree on their parenting arrangements in any case, and the tension between the approaches may be less conspicuous.

Parenting plans, within a shared parenting model, would lose some of the flexibility that they would have within the parenting responsibility model. Parents would start from the presumption that major decisions would be shared, and could then negotiate the other significant details of their parenting arrangements. The plans could set out the child's residential schedule or residential time, the allocation of other non-major decision-making authority, as well as the proposed dispute-resolution process. As such, parenting plans could still perform an important role.

Another approach might be to adopt a mandatory parenting plan regime, in which parents are required to allocate their parental responsibility, and simply call it "shared parenting." In this approach, there would be no requirement that any particular aspect of parenting responsibilities be shared. If parents did not agree, then the court would be required to allocate the various aspects of parental responsibility according to the relevant criteria. This approach would, in effect, be adopting that of the Washington *Parenting Act*, and calling it "shared parenting." However, it would be an approach that more closely resembled a mandatory parenting plan regime within Option Two—that is, a neutral parental responsibility model. The only difference would be one of labelling. It is not clear that this would capture the spirit of shared parenting, and it would certainly not satisfy the constituency pushing for shared parenting.

Content

The Special Joint Committee has recommended a parenting plan set out "details about each parent's responsibilities for residence, care, decision-making and financial security for the children, together with the dispute resolution process to be used by the parties."[351] Again, the Committee seems to be following, in a very general way, the Washington *Parenting Act*, which requires that a parenting plan include the child's residential schedule, decision-making authority and a dispute resolution process.

As discussed in Option Two above, while a mandatory parenting plan regime would need to set out the content requirements for those plans in some detail, an optional parenting plan regime would also benefit from providing at least some general guidance on the kinds of issues that a parenting plan could or should include.[352] The content suggested by the Special Joint Committee appears to be appropriate.

Criteria for Review and Limitations on Private Ordering

The question of judicial deference to parenting plans and the appropriate criteria for approving a plan have been extensively discussed above. The standard of review of, and degree of deference to, these private agreements needs to articulated with the statutory framework. Further, as also discussed above, the legislation would need to set out carefully the limitations to private ordering

[351] Recommendation 11, For the Sake of the children, supra note 1 at 32.
[352] See discussion supra notes 231-215 and 291-294.

and the specific circumstances in which a court would be required or have the discretion to set aside a parenting plan or a particular provision therein.[353]

As discussed in Option Two above, the Washington *Parenting Act* provides a good model for the limitations on private ordering and for specifying the circumstances in which a court could override the provisions of a parenting plan. The same criteria for review and restrictions would be appropriate under Option Three.

Variation and Modification

The issue of variation and modification of parenting plans has been extensively discussed in Option Two. The approach and standard for variation discussed under Option Two should also apply to Option Three.

DISPUTE-RESOLUTION SERVICES

A statutory regime designed on the basis of shared parenting could also include a range of references to dispute-resolution and other services. The policy choices and challenges of doing so are the same as those reviewed in Option One, and echoed in Option Two. In a shared parenting regime, there might be expected to be an even greater emphasis on the cooperative resolution of parenting disputes; however, the options for reform are the same as those discussed above. Both parenting education and mediation and primary dispute-resolution services could be integrated into the *Divorce Act* in a manner that encouraged parents to consider these options and gave the courts the discretion to require parents to attend parenting-education programs, information sessions about the advantages of primary dispute resolution or both when such programs were available.

ADVANTAGES AND DISADVANTAGES OF THIS OPTION FOR REFORM

The objectives of legislative reform includes an effort to reduce parental conflict and litigation, encourage parental cooperation and promote meaningful relationships between children and their parents following separation and divorce, while protecting children from high conflict, violence and inadequate parenting. In this section, the paper evaluates the extent to which a regime of shared parenting might reasonably be expected to advance these objectives.

Less-Fraught Language?

A central argument in favour of the language of shared parenting is that it will help reduce parental conflict, by moving away from the emotionally fraught, winner-takes-all language of custody and access. As discussed above, the language of custody and access is said to have become too emotionally loaded, and to actually promote conflict and disputes between parents.

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[353] The Special Joint Committee does not address any of these questions. It is silent on the issue of criteria that a court should use in reviewing a parenting plan. The emphasis that the Committee gives to parenting plans, and to parents reaching their own cooperative agreements, suggests that courts ought to defer to these privately reached agreements, but it does not specifically say so. Nor does the Special Joint Committee address any of the possible limitations to parenting plans or the discretion of the court to set aside any provision in a parenting plan in light of the existence of such limitations.

In this view, the language of shared parenting, by contrast, would help reduce parental conflict and promote a cooperative approach to the resolution of parenting disputes. The Special Joint Committee, for example, was of the view that "a shift to new, less loaded terminology is critical to reducing conflict in divorce." And, in its view, "shared parenting" is just such "less loaded" terminology.

Many of the limitations of terminological reform have been discussed above. There are reasons to question whether a mere change in language would be able to eliminate the conflict that underlies many parenting disputes.[354] However, the language of custody and access may be one obstacle in the process of resolving parenting disputes, and it is worth exploring whether alternative language can be identified that is conducive to a less fractious resolution of parenting disputes. The issue to be addressed then is whether the terminology of shared parenting is such language.

The argument in favour of the language of shared parenting is that it is less emotionally fraught or loaded than the current language of custody and access and, therefore, more amenable to a cooperative resolution of parenting disputes. The problem with this argument is that the Special Joint Committee may have underestimated just how loaded this new terminology has already become.

First, the connotations of the term *shared parenting* make it very difficult to distinguish it from the language of joint custody. As discussed above, shared parenting is very closely tied to the idea of joint legal custody—that is, a presumption in favour of shared decision-making authority. Even if it is possible to differentiate shared parenting from such a presumption for legal purposes, it may be difficult to overcome the public perception, which closely associates these two terms. As well, the language of joint custody is extremely fraught and controversial.

Second, the language of shared parenting is language very closely associated with a particular stakeholder in the public policy debates, namely, fathers' rights groups. It will be very difficult to disassociate the language of shared parenting from the political agenda of this stakeholder. If the objective of reform is to find new, less emotionally fraught terminology within which separating parents can resolve disputes regarding their children, the language of shared parenting does not appear to be up to the task.

Third, the language of shared parenting may not be as child-centred as the language of parental responsibility. Although subtle, there continues to be a parental rights connotation to this language, in which parents are entitled to a share of the child. It is language that is reminiscent of the property connotations of the language of custody and access.

As the Government of Canada's response to the Special Joint Committee observes, "[t]he challenge is to identify a term that would meet those requirements yet avoid the problems currently associated with the terms custody and access as well as possible diverse connotations and understandings of the word 'shared'. The term would need to be consistent with a child-centred approach and would have to be carefully defined to have a clear and accepted

[354] See discussion supra notes 4-8.

understanding and use by both the courts and public."[355] The response further states that, "It may be that new child-centred words will need to be identified to describe a variety of particular parenting responsibilities and arrangements for use in parenting plans and court orders."[356]

It may be that the spirit of shared parenting—the idea that both parents continue to be parents after separation and divorce, and continue to have parental responsibility—can be captured without using the language of shared parenting itself. For example, both the U.K. and Australian schemes fall short of establishing a regime explicitly based on a presumption in favour of shared parenting. Both use the language of parental responsibility. The U.K. scheme states that this parental responsibility is joint, while the Australian scheme states that parents share this parental responsibility. Both regimes embrace the idea that parents continue to be parents after separation and divorce, and continue to have parental responsibility. It may be possible to advance this idea without relying on the qualifying terms *shared* or *joint*. Indeed, a neutral model of parenting responsibility can affirm this principle without using the language of "sharing" and without in any way presupposing that particular aspects of parenting should be allocated in particular ways. It might capture some of the spirit, without all of the terminological risks.

Shared Parenting as Norm: Promoting Meaningful Relationships or Inflexible Legislation Presumption?

Another argument in favour of shared parenting is that it is said to capture the idea that parenting survives separation and divorce and that both parents continue to have important responsibilities in their children's lives. Shared parenting is intended to affirm the parenting status of both parents after separation and divorce, to recognize that both parents are and continue to be "real" parents. Shared parenting, then, is preferred because of its normative content—that is, because of the norm for post-divorce parenting that it establishes. It is intended to influence how parents restructure their parenting relationships after separation and divorce, in a way that promotes meaningful relationships with both parents.

The norm of shared parenting is, then, intended to be part of the educational or standard-setting function of legislative reform. It is hoped that the exhortative language, as contained, for example, in the Australian legislation, which states that parents should cooperate, share and agree on their parenting, will influence and guide the actions of separating and divorcing parents.[357] As the Australian Family Court has stated:

> …the aims of the Reform Act are long term, educative and normative. That is, they are directed towards changing the ethos where parents separate in the ways in which they think and act in their role as parents, in the approaches to resolving disputes about their children, in the ways in which lawyers act for the parents (and the children), in the approach taken by the Court in the adjudication of disputes and, more broadly, in the attitudes of society generally.[358]

[355] Strategy for Reform, supra note 2, at 13.
[356] Ibid.
[357] See Chisholme, supra note 8.
[358] In the Matter of B and B, supra note 132.

The language of shared parenting is intended to encourage parents to remain involved in their children's lives, and to adopt cooperative attitudes and behaviours that allow them to accomplish this long term goal.

Shared parenting is a valuable norm for many separating and divorcing parents. As with joint custody, it is an idea that works well for many families. The more difficult issue is whether shared parenting is a valuable norm for all or most separating and divorcing parents, and whether it should, therefore, be incorporated as a general statutory norm for post-separation parenting.

Accommodating a Diversity of Family Forms or Legislative Presumption?

Both the Special Joint Committee and the government's response concluded that no one model of post-separation parenting will be ideal for all children. Both, therefore, reject the use of legislative presumptions. A condition precedent, then, for any approach to reform is that it not establish a legislative presumption, and that it be capable of accommodating the diversity of separating and divorcing families.

It is not at all clear that a model of shared parenting can meet this criteria. As discussed above, it is very difficult to distinguish shared parenting from joint legal custody—that is, it is a model that presupposes that decision-making authority be shared between parents. As such, it is difficult not to conclude that a model of shared parenting would be a model based on a legislative presumption. The model assumes that a particular form of parenting, in which decision-making is shared between parents, is going to be in children's best interests.

As discussed above, it is possible to identify at least three approaches to incorporating the language of shared parenting into law: a presumption in favour of shared parenting, a default position of shared parenting, and optional shared parenting.

An approach based on a presumption in favour of shared parenting clearly violates the injunction on presumptions, and assumes that a particular model of parenting (in which decision-making is shared) is generally in a child's best interests.

An approach based on a default position of shared parenting may have somewhat more flexibility in parenting arrangements. As discussed above, under such a regime parenting responsibility begins as shared and continues to be shared unless a court order or private agreement provides otherwise. It does, however, at least provide the possibility that a court order or private agreement could provide otherwise, in the form of a special purpose or special issues order. This approach perhaps falls short of establishing a legal presumption in favour of joint legal custody or shared legal decision-making. It could be framed as a principle, rather than as a legal presumption. But, the effect of such a principle would be to establish one particular form of parenting in which decision-making is shared as the model for post-divorce parenting, and to assume that this parenting arrangement is ordinarily in a child's best interests. While the assumption could be qualified within a statutory regime that set out the specific kinds of circumstances in which shared decision-making would not be appropriate, it would still be setting up a general model for post-divorce parenting.

An approach based on optional shared parenting, in which shared parenting is one among a range of possible arrangements, is most consistent with the injunction against presumptions and the

need for flexibility to accommodate the diversity of separating and divorcing families. However, it is the approach that most closely approximates the existing law, in which joint custody is simply one among a number of possible court orders available. In this approach, then, shared parenting is not established as a norm, but one of a range of possible parenting arrangements.

Valuable Norm for the Promotion of Meaningful Parent-Child Relationships?

Even if it could be established that a norm of shared parenting did not violate the injunction on legislative presumptions, the issue that would need to be addressed is whether shared parenting is in fact a valuable norm for the diverse range of separating and divorcing families.

As mentioned above, shared parenting, like joint custody, may be a very helpful norm for some separating parents, but it is far from clear that it is helpful for all. Separating and divorcing families come in many varieties, and have been subject to many different typographies, by their degree of conflict, for example. The Australian Family Law Council describes three different kinds of separating parents: (1) parents who are able to make arrangements for the ongoing care of their children, (2) parents who need assistance through mediation, conciliation and other support services, and (3) parents who are unable to cooperate to the extent that they can agree on arrangements for the ongoing care of their children.[359]

Shared parenting is an idea that is most likely to work well for parents in the first category—parents with an ability to communicate, cooperate and agree on the arrangements for their children.

By way of contrast, shared parenting is an idea that will not work for parents in the third category—parents who have little or no demonstrated ability to communicate and cooperate in relation to their children. Research clearly demonstrates that shared parenting does not work for high conflict families. This category would also include families that have experienced violence or inadequate parenting. Indeed, shared parenting is an extremely inappropriate legal norm for these families. While any statutory regime needs to carefully address the unique needs of these families, a regime based on the norm of shared parenting may present particular obstacles in accommodating these families. It may inadvertently lead to the problems of these families being underestimated, downplayed or obscured. These families may find themselves, from the beginning, encouraged into cooperative processes and arrangements. If they are not able to satisfactorily prove that they are high conflict, they will fall into a system that insists on the very thing that these families are unable to do—share and cooperate.

It is unclear whether shared parenting is a useful norm for parents in the second category, by far the largest category of separating and divorcing parents. These families may experience a medium degree of conflict, but those conflicts may not be intractable. Rather, these are families whose disputes can be resolved through various types of intervention. A regime that encourages the use of primary dispute-resolution techniques and early intervention may be very effective in helping these parents reach agreements regarding their disputes without resorting to litigation. In

[359] The Council was of the view that the objective of the reforms to Part VII of the Family Law Act should be to increase the number of cases in which "separating parents are able to agree on arrangements for the ongoing care of their children, either on their own or with assistance which is less costly and less damaging that litigation." Letter of Advice to the Attorney General, supra note 270, at 6.

this respect, it might be possible to achieve the objective of encouraging parents to reach their own cooperative parental agreements. This begs the question, however, of whether these families would be assisted by a norm of shared parenting. Rather, a general approach to dispute resolution that encourages early intervention and the development of cooperative dispute-resolution skills could be promoted within Options One and Two.

The idea that parents continue to be parents and have parental responsibility to their children after separation and divorce may help these families reach workable parenting arrangements, avoid becoming enmeshed in a conflict about who gets to be the "real" parent, and it may help parents focus on allocating the various aspects of parental responsibility between them, focussing on their children's needs, rather than their own "right" to be a parent. It is a useful norm that may help promote meaningful parent-child relationships for these families after separation and divorce. The question, however, is whether this norm is best expressed in the language of shared parenting. The problem lies in the confusion that continues to plague the term. For some, shared parenting may capture this idea of continuing parental responsibility. For others, shared parenting means mandatory joint legal custody. For yet others, it means mandatory joint physical custody. The problem comes back, then, to one of terminology: the language of shared parenting is both confusing and loaded.

Once again, it may be that the norm of promoting meaningful parent-child relationships after separation and divorce can be better captured by other language. For example, both the U.K. and Australian legislation aim to promote cooperative parenting and meaningful parent-child relationships after divorce. The U.K. regime speaks of parental responsibility and provides that this parental responsibility is held jointly and independently. The Australian regime includes a statement that both parents have parenting responsibility and that this responsibility is unchanged by virtue of any change in the status of the parents' relationship. It also includes a statement that "parents share duties and responsibilities concerning the care, welfare and development of the child."[360]

Similarly, the Washington *Parenting Act*, although more accurately located within a neutral parenting responsibility model, includes a preamble that begins with the statement: "Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children." It further emphasizes the importance of fostering the parent-child relationship, unless it is inconsistent with the child's best interests.

It would be possible to adopt similar policy statements that emphasize the idea of parental responsibility without labelling the overall regime as one of shared parenting nor establishing a presumption in favour of shared parenting. The underlying norm of affirming the parental status of both parents after separation and of encouraging parent-child relationships could be promoted within a legal regime that does not specifically use the language of shared parenting.[361]

Finally, it is important to consider the limitations of law reform. Promoting norms of cooperation and ongoing parental involvement in the law does not guarantee that parents will, in

[360] Commentators have suggested that there is considerable ambiguity as to whether the regime did, in fact, establish a presumption in favour of shared parenting. See Chisholme, supra note 8, at 180-181.
[361] The risk would be that it would produce ambiguities about whether or not the regime did establish a presumption in favour of shared parenting, which would then be left to the courts to determine.

fact, change their attitudes and behaviour accordingly. The research to date has not demonstrated that a norm of shared parenting is likely to influence the way in which parental responsibility is allocated between parents. Rather, research into the impact of both the U.K. and Australian legislation suggests that the allocation of parental responsibility remains largely unchanged from its pre-reform allocation. Nor has the research yet revealed a significant reduction in parental conflict. A legal regime can encourage separating parents to cooperate, but it cannot ultimately coerce them to do so.

The spirit of shared parenting—of encouraging cooperative parenting and ongoing parental involvement in the lives of children—may be a positive norm worth promoting for many separating and divorcing families. But, any attempt to do so must recognize the limitations of law, and provide a means of addressing the not insignificant number of cases in which cooperation and ongoing involvement are nothing more than elusive ideals.

Reducing Parental Conflict and Litigation

One of the objectives of reform, closely tied to the above discussion of increasing parental cooperation, is to reduce litigation over parenting disputes. An important question then is whether a regime of shared parenting is likely to reduce parental conflict and litigation.

Legislative Clarity and Predictability

One of the guiding principles of reform is to provide legislative clarity to the legal responsibilities of caring for children. If and when parenting disputes are litigated, and the courts are called upon to decide these disputes, it is important that the legislation provide as much guidance as possible. Moreover, clarity and predictability are likely to only decrease the need to resort to litigation.

One of the key problems that other jurisdictions that have moved to a model of shared or joint parenting responsibilities have experienced is the confusion over the precise meaning of the term *shared parenting*. This lack of clarity about the term and about the particular way in which that responsibility is to be shared between parents has, at least in the short term, resulted in continuing litigation, in which the courts have been called upon to interpret and clarify the new legal rules. Without greater clarity on the scope and content of parental responsibility—what it is and how it is to be shared—the very real risk is that the reform will create more problems than it resolves. Indeed, without greater clarity, there is a real risk that the introduction of the concept of shared parenting will undermine one of the very objectives of legislation reform, namely, to reduce conflict and litigation. Any legislative reform must, to the extent possible, avoid enacting a new regime that will create incentives for parents to litigate their disputes.

While the problem of legislative clarity, and the potential ambiguity created by the introduction of major reforms is common to all the options for reform, the problem may be heightened in the context of shared parenting, precisely because of the confusion that surrounds the term. There is a striking lack of clarity in the way in which the term is used. For some, shared parenting means joint legal custody. For others it means joint physical custody. For yet others, it has something vaguely to do with keeping parents involved in the lives of their children after divorce. Even among its advocates, shared parenting is rarely carefully and precisely defined, possibly masking differences of opinions within this constituency.

The use of shared parenting by the Special Joint Committee only exemplifies this problem. The Committee defines shared parenting as "including all the rights, obligations and common law and statutory interpretations embodied previously in the terms custody and access." As a definition, this provides absolutely no guidance as to how this parenting authority ought to be shared between parents. As used by the Committee, the term *shared parenting* has something to do with shared decision-making authority ("parental decision-making roles should, in most cases, continue beyond divorce") and with keeping parents involved in the lives of their children ("the Act must ensure that parent-child relationships survive marital break down"). At the same time, the Committee insists that shared parenting is not about joint physical custody (the Committee is not recommending a presumption that equal time-sharing is in the best interests of children), nor about establishing a formula for the allocation of parenting responsibility ("the new term… leave(s) decisions about allocating the various components to parents and judges"). Again, the meaning of shared parenting remains extremely unclear—it is not clear what is to be shared, nor how it is to be shared.

These problems with the lack of precision in the term's scope and content, and its relationship with parenting orders could, theoretically, be specifically addressed in and through careful legislative drafting. Shared parenting would need to be more carefully defined, and its relationship with parenting orders more carefully articulated. But, it may be very difficult to reach such a consensus on the precise meaning of shared parenting. As discussed above, there is no consensus around the idea of joint physical custody, and even the Special Joint Committee rejected the idea that shared parenting should mean joint physical custody. Joint legal custody is also an extremely controversial idea.

Shared parenting could be defined as sharing major decision-making authority (decisions about major medical problems, education and religion) with day-to-day decision-making vested in the parent with whom the child resides. Although this approach would have the virtue of some clarity, it is an approach based on the controversial idea of joint legal custody. At a minimum, such an approach would have to delineate very carefully the limits to this shared decision-making—that is, the circumstances in which shared decision-making would be inappropriate.

Alternatively, it would be possible to follow the U.K. and Australian models, which are not seen to establish a presumption in favour of either joint physical or legal custody. However, as discussed above, there has been considerable confusion within the case law over what the idea of shared or joint parenting does actually mean. Following the U.K. and Australian models, therefore, is not a solution to the problems of legislative ambiguity and confusion.

Legislative Reform and Litigation

As discussed above, any major legislative reform is likely to generate, at least in the short term, an increase in litigation. This prediction is consistent with the experience of several jurisdictions that have experimented with shared parenting.

In the U.K. and Australia, which have both adopted regimes of shared parenting with a range of parenting orders, there has been no reduction in parental conflict and litigation. Studies on the impact of the *Children Act* 1989 in the U.K. found the following:

> ...disputes over what are now termed residence and contact orders appear to have intensified. In the 1990s we have seen the development of the 'implacably hostile' parent and the parent who 'alienates' the child's affection for the other parent. The *Children Act* 1989 has not succeeded in taking the heat out of disputes around children on divorce despite its introduction of a concept of 'parental responsibility' which would endure beyond the end of the marriage.[362]

As discussed above, the number of contact orders made in the U.K. between 1992 and 1996 increased by 117 percent.[363] Initial research on the impact of the reforms in Australia has similarly revealed an increase in the number of applications for parenting orders, and an increase in the number of litigated disputes arising out of alleged breaches of parenting orders.[364]

A number of reasons have been offered for this increase in litigation. Many lawyers, counsellors and mediators in Australia have commented on the unrealistic expectations the reforms create. Even those professionals who were most supportive of the reforms (counsellors and mediators) have commented that many contact parents, who are still overwhelmingly fathers, have misinterpreted the reforms, which has "led to anger and frustration and to increased litigation by fathers seeking to assert their rights. This view relates to the perception of some contact parents that the Reform Act had 'promised' them 'equal time' or 'half time' with the children."[365] Lawyers were also of the view that the majority of disputed cases were instigated by non-resident fathers.

> Some solicitors said this was a result of the 'unrealised hopes' and 'increased bitterness' of fathers who had expected to obtain greater parenting rights under the reforms, and/or were critical of mothers for failing to share decision-making responsibilities. Others said the increase in disputes stemmed from contact fathers who expected mothers to do "the lion's share of the work" but "took every opportunity" to challenge their care of the children and/or the lack of consultation about day-to-day decisions.[366]

Solicitors and judges have also commented on a significant increase in trivial and unmeritorious applications, described as "a waste of time." A number of judges similarly described contravention applications as "brought predominantly by fathers who act for themselves and interpret the Reform Act as giving them 'more rights than they have', particularly in relation to day-to-day matters."[367]

Similar observations have been made about the increased litigation in the U.K., where commentators have suggested that these reflect "a change in parental attitudes—especially,

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[362] Roche supra note 71.
[363] See Davis supra note 72.
[364] Interim Report supra note 72.
[365] Ibid., at 28. This passage specifically describes the responses of counsellors. However, the Interim Report has found similar responses by lawyers and mediators, who have also commented on the unrealistic expectations of equal time created by the reforms.
[366] Ibid., at 51.
[367] Ibid., at 52.

perhaps, a change in fathers' attitudes—contributing to a growing tendency to assert the importance of their role in their children's lives."[368]

Any legislative reform invariably creates new legal ambiguities and uncertainties that will produce increased litigation in the short term. It remains to be seen whether the increased litigation rates in these other jurisdictions are simply short-term adjustments to a new legal regime, or whether the reforms will ultimately prove unable to take the conflict out of the resolution of parenting disputes for many separating and divorcing parents.

Protecting Children from Harm

A shared parenting regime presents particular challenges to the general legislative objective of protecting children from harm. Cooperative dispute resolution and decision-making are simply not appropriate norms for these families. Indeed, there may be circumstances in which it would not be possible to promote meaningful parent-child relationships among these families, and that parent-child contact may not be in the best interests of the child. A regime that focusses on promoting parental cooperation, joint decision-making and meaningful relationships runs the risk of marginalizing the needs of these children.

Any regime that attempts to promote some idea of shared parenting must make a clear and cogent exception for violence, high conflict families and inadequate parenting. It would be crucial, as discussed above, that the legislative framework ensure that these families do not inadvertently fall into the shared parenting stream.

The U.K. legislation fails on this front. It does not specifically address the needs of children who have experienced violence, high conflict or inadequate parenting, and the results under the legislation illustrate the dangers of failing to do so. The presumption of joint parental responsibility has become a presumption in favour of contact, and contact orders are routinely made in circumstances of violence, high conflict and inadequate parenting. The Australian legislation scores considerably better, insofar as the legislative regime specifically addresses the unique needs of children who have experienced family violence. However, the legislation does not address high conflict or inadequate parenting.

The Washington *Parenting Act*, although not based on a model of shared parenting, continues to represent the best model for protecting children from these harms in the allocation of parenting responsibility. It could be used as the basis for establishing the exceptions to the presumption in favour of shared decision-making authority, as well as the basis for restrictions in the allocation of the child's residential schedule in a shared parenting regime.

Broad Implications of Reform for Other Laws

Finally, a move towards a shared parenting regime has serious implications for a broad range of federal and provincial legislation, which relies on the language of custody and access. If the *Divorce Act* abandons this language in favour of shared parenting, it would be necessary to consider, and possibly reform, all legislation that includes references to custody and access.[369]

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[368] See Davis supra note 72.
[369] For a discussion of federal and provincial legislation affected by these changes, see Part V.

While many of these laws would require only a minor change in language, there are some that would have to be changed more drastically.

The Federal Child Support Guidelines, for example, presuppose a regime of custody and access, in which the calculation of child support obligations is based on the income of the non-custodial parent. The Guidelines allow for a deviation from the prescribed amounts in the event of shared custody—that is, for when a child lives with the other parent for not less than 40 percent of the time. A regime based on shared parenting could mean that this exception to the Guidelines would become the norm for parenting arrangements.

The sustainability of the existing Guidelines depends on whether a shared parenting regime resulted in a substantially different allocation of a child's residential time between the parents. If a shared parenting regime simply resulted in increased decision-making authority for the non-residential parent, the existing Guidelines could be maintained. A regime of shared parenting in which a residential parent was still identifiable (and the child spent more than 60 percent of the time with that parent) could also be consistent with the existing Guidelines.

However, if shared parenting resulted in a substantial increase in the amount of time a child spends with the non-residential parent, so that it would no longer be possible to identify a residential parent, then the Guidelines would need to modified. If most parenting arrangements came to look like shared physical custody, with the child spending no more than 60 percent of the time with one parent, the existing Guidelines would no longer be sustainable. In a regime in which children spent roughly equal amounts of time with both parents, the Guidelines would need to take both parents' incomes into account, and would have to be based on a formula different from that in the existing Guidelines.

Other laws are similarly based on the language of custody and access, distributing rights or responsibilities to custodial parents and access parents. As discussed above, shared parenting presents a serious challenge to a number of legislative schemes, including, for example, the *Ontario Works Act*, which depends on the identification of a custodial or primary caregiver parent. Joint custody arrangements, wherein a custodial or primary caregiver parent is not identifiable, are already causing problems for parents who are seeking benefits under this Act. A shared parenting regime would only intensify the problems, by increasing the frequency of shared parenting arrangements.

A shared parenting regime could include a provision that allowed one parent to be identified as a custodial or residential parent for the purposes of other federal and provincial laws. However, a parenting responsibility model does not preclude one parent being identified as a custodial-like parent. As mentioned above, it would be possible to allow the parents in a shared parenting regime to designate one parent as the custodial or residential parent "solely for the purpose of other provincial and federal statutes that require a designation of custody but the designation would not affect either parent's rights or responsibilities under this Act." Such a provision might be helpful for separating and divorcing parents who were able to agree on their parenting arrangements, and able to agree on such a designation, but it would likely prove to be highly contentious for those parents who are unable to agree on their parenting arrangements. By effectively returning to the term *custodial parent* such a provision would reintroduce the very language that is said to produce parental conflict.

Moreover, it is not a provision that fits well with the spirit of shared parenting. The basic idea of a shared parenting regime is that all parenting responsibilities—generally defined as "all the powers, duties, responsibilities and authority which, by law, parents have in relation to children"—are shared between the parents, except to the extent that a parenting order or parenting plan provides otherwise. The designation provision described above can be seen to be significantly qualifying this assumption of shared parenting responsibility, by deeming one parent as the custodial parent, and, thereby, vesting him or her with all the powers, duties, responsibilities and authority created by those laws that require a custodial parent.

A shared parenting regime would, therefore, likely require a significant review and reformulation of a number of federal and provincial laws that currently rely on the language of custody and access.

V IMPLICATIONS OF REFORM FOR OTHER LEGAL REGULATION

This section examines the implications for major pieces of federal legislation of any reform to the *Divorce Act* that moves away from the language of custody and access. It also considers some of the implications of such change at the provincial level. However, the examples in this section are not intended to represent a comprehensive review of all legislation that relies on the language of custody and access. As discussed below, each government would have to undertake a statutory audit of all of its laws that currently rely on the language of custody and access, and examine if and how these laws could or should be brought in line with the new language of post-separation parenting. The objective of this section is to illustrate the complexity of the task at hand, and to suggest some of the options for reform.

FEDERAL LEGISLATION

A number of federal statutes use the language or framework of child custody and access.

Family Law

Federal Child Support Guidelines

The Federal Child Support Guidelines in the *Divorce Act* are based on the designation of custodial and non-custodial parents, insofar as the calculation of child support obligations are based on the income of the non-custodial parent. The Guidelines allow for a deviation from the prescribed amounts in the event of shared physical custody—that is, for when a child lives with the other parent for not less than 40 percent of the time.[370]

Moving away from the language of custody and access would require a re-evaluation and possibly a reform of these Guidelines. The sustainability of the existing Guidelines depends on whether a new parenting regime resulted in a substantially different allocation of a child's residential time between the parents. If a new parenting regime simply changed the language of post-divorce parenting, resulted in increased decision-making authority for the non-residential parent or both, the existing Guidelines could be maintained. As long as it is possible to identify a residential parent, with whom the child lives more that 60 percent of the time, the Guidelines would only require a minor terminological change. The reference to physical custody could be changed to that of a child's residence.

However, if the new parenting regime resulted in a substantial increase in the amount of time a child spends with the non-residential parent, so that it would no longer be possible to identify a residential parent, then the Guidelines would need to modified. If most parenting arrangements came to look like shared physical custody, with the child spending no more than 60 percent of the time with one parent, then existing Guidelines would no longer be sustainable. In a regime in which children spent roughly equal amounts of time with both parents, the Guidelines would need to take both parents' incomes into account, and would have to be based on a formula different from that of the existing Guidelines.

[370] Section 9, Federal Child Support Guidelines.

As discussed above, however, even regimes that have established a presumption in favour of shared parenting have not implemented joint physical custody, and most jurisdictions that have moved towards some form of shared parenting have not witnessed a significant transformation in the allocation of parental responsibility for the day-to-day care of the child. Even in these shared parenting regimes, it continues to be possible to identify a residential parent.

Assuming that the Guidelines themselves were sustainable, the issue that must be addressed is how the statutory language of the Guidelines could be made compatible with the new parenting language of the *Divorce Act*.

Many of the federal and provincial statutes discussed below that rely on the language of custody and access could be dealt with through a deeming provision—that is, a provision that allowed one parent to be designated as custodian of the child for the purposes of other provincial and federal statutes. However, such a deeming provision would not work in the context of child support; child custody and child support are too closely intertwined. A child's residential schedule and financial provision are both important aspects of parental responsibility that need to be allocated between parents upon separation and divorce. In addition, child support has proven to be every bit as controversial and contested as child custody. Indeed, in any given parenting dispute, it is often difficult to determine which aspect of parenting responsibility the couple is actually fighting about. A custodial dispute may actually be a dispute over financial responsibility.

At both a principle and practical level, child support is an issue in which a deeming provision would simply be unworkable. Rather, the language of the child support provisions in the *Divorce Act* would have to be amended. The language of custodial and non-custodial parent would have to be replaced with language that reflected the new parenting regime. The particular way in which this would be done would depend, of course, on the particular terminology adopted within the new regime. However, as discussed, the nature of the existing Guidelines would clearly favour the adoption of a regime that could identify a residential parent.

Further, if the *Divorce Act* abandoned the language of custody and access and the Guidelines were amended accordingly, and some or all of the provinces did not follow suit, difficulties could arise for separating and divorcing parents who resolved some of their parenting issues under provincial law and then petitioned for divorce. For example, a parent could obtain a custody order under provincial legislation, then petition for divorce and make an application for a child support order under the federal legislation. If custody is not at issue, then the new language and orders of the *Divorce Act* would have no jurisdiction. The question of child support would have to be determined according to a custody order. Therefore, any change to the language in the *Divorce Act* would need to reflect that, due to the interaction between federal and provincial legislation in this area of divided jurisdiction, parents with custody and access orders could still make applications for child support under a reformed *Divorce Act* that had abandoned this language. This is simply one of the many difficulties that would be created if the federal government acted alone in abandoning the language of the custody and access.

Enforcement

The *Family Orders and Agreements Enforcement Assistance Act*, R.S.C.1985, c.4 (2nd Supp.), allows individuals with family orders to apply to a court for the release of information that will

assist in the enforcement of that order. Those family orders include a custody provision (defined as a provision of an order or agreement awarding custody of a child) and an access right (a right, granted in an order or agreement, of access to or visitation of a child).

If the language of custody and access was abandoned in the *Divorce Act*, this statute could be amended to include a reference to this new language. For example, the definitions of a custody provision and access right could be amended to include a reference to the new language of parenting orders (such as residence or contact orders). As long as some of the provinces continued to use the language of custody and access, it would be important that the new parenting language not replace the language of custody and access, but simply supplement it.

Alternatively, a deeming provision could be included in the *Divorce Act* that allowed one parent to be designated a custodial parent for the purposes of all other federal law.

International and Interprovincial Child Abduction

The current law on international and interprovincial child abduction is based on the legal concepts of custody and access. If the *Divorce Act* is reformed, and the language of custody and access is abandoned in favour of either that of parenting responsibility or shared parenting, it will be important to consider the impact on this legal regulation of child abduction.

International Child Abduction

The *Hague Convention on the Civil Aspects of International Child Abduction*, 1983 is an international treaty designed to address the removal of a child from one country to a foreign jurisdiction. It is intended to ensure prompt return of a child wrongfully removed or retained and to ensure that custody and access rights under the law of one state are respected in other states.

According to Article 3, the removal or retention of a child is considered wrongful when it is "in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention," and when "those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Generally speaking, wrongful removal refers to the act of taking a child from a person who was actually exercising custody of the child. Wrongful retention refers to the act of keeping the child without the consent of the person who was actually exercising custody.

The Convention provides that a person whose custody rights have been violated by wrongful removal or retention may seek the immediate return of the child (Article 12,29). Access rights are also protected by the Convention but to a lesser extent. Article 21 allows a parent whose access rights have been infringed to receive assistance in securing the exercise of his or her access rights.

Custody and access are defined in Article 5. Rights of custody are defined to include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Rights of access are defined to include "the right to take a child for a limited period of time to a place other than the child's habitual residence."

The Hague Convention, thus, not only uses the language of custody and access, but also provides different levels of relief on the basis of this language. If the language of custody and access was abandoned in the *Divorce Act*, the Act would have to specify how the new language would operate for the purposes of the Hague Convention.

Other jurisdictions that have moved away from the language of custody and access have faced similar challenges. In Australia, for example, where the language of custody and access has been replaced with that of residence and contact orders, the *Family Law Reform Act* contains provisions which make it clear that the provisions of the Hague Convention still apply to Australian parents. Section 111B(4) of the *Family Law Reform Act* states the following:

> s.111B(4) For the purposes of the Convention:
> (a) each of the parents of a child should, subject to any order of a court for the time being in force, be regarded as having custody of the child; and
> (b) a person who has a residence order in relation to a child should be regarded as having custody of the child; and
> (c) a person who, under a specific issues order, is responsible for day-to-day care, welfare and development of a child should be regarded as having custody of the child; and
> (d) a person who has a contact order in relation to a child should be regarded as having a right of access to the child.

Under the Australian legislation, if both parents have parental responsibility, the abduction of the child by one parent prevents the other parent from exercising his or her responsibilities in relation to the child. Accordingly, parental child abduction involves the taking over of all responsibilities for a child's care without regard for the other parent who shares those responsibilities.[371]

The *Divorce Act* could be amended to include a similar provision. It could provide that "for the purposes of the Convention," a person with a particular kind of parenting or shared parenting order would be considered to have custody or access. The Act would need to specify which kinds of parenting or shared parenting orders would confer custody rights for the purposes of the Convention, and which kinds of parenting or shared parenting orders would confer access rights for the purpose of the Convention.

Interprovincial Abductions

Interprovincial abductions are dealt with by the *Criminal Code*. Section 282 of the *Criminal Code* prohibits the parent, guardian or person having lawful care or charge of a person under the age of 14 to take that person in contravention of a custody order in relation to that person. Section 283 prohibits a parent, guardian or person having lawful care or charge of a person under the age of 14 to take that person, whether or not there is a custody order, with intent to deprive a parent or guardian or person having the lawful care or charge of the person.

[371] Family Law Council, Parental Child Abduction, A Report to the Attorney General Prepared by the Family Law Council, January 1998, sections 4.24-4.27.

Again, if the language of custody and access was abandoned in favour of parenting or shared parenting responsibilities, some provision would have to be made regarding interprovincial abductions as regulated by the *Criminal Code*. The words *custody order* could be replaced with, or (absent a similar change in provincial legislation) supplemented by, the words *parenting order*. While a parenting order is potentially much broader than a custody order, section 282 only prohibits the taking of a child "in contravention of" that order.

However, the problem remains for the language of "lawful care or charge," which, under the current law, would be the status of the custodial parent. The *Divorce Act* could provide that "for the purposes sections 282 and 283 of the *Criminal Code*," a person with a particular kind of parenting or shared parenting order would be considered to have "lawful care or charge" of the child. The Act would need to specify which kinds of parenting or shared parenting orders would confer this lawful care or charge for the purposes of the *Criminal Code*.

Other

There are a number of other federal statutes that rely on the concept of custody and access of a child, and that would require consideration if the language of custody and access was abandoned in the *Divorce Act*.

A number of federal statutes use the language of child custody in relation to the payment of benefits. Where monies are to be paid to a person under the age of 18, several statutes provide that the payment should be made "to the person having custody and control" of the child.[372]

The *Income Tax Act* 1985, c.1 (5th Supp) refers to "children in the person's custody" and "children in a taxpayer's custody" in setting out how income related to support is to be taxed.

Several federal statutes use the language of "custody and control" in relation to the rights or obligations of a child's parent or guardian. For example, the *Young Offenders Act* defines a parent of a child as "any person who has, in law or in fact, the custody or control of that person." Similarly, the *Royal Canadian Mounted Police Act* defines the guardian of a child as "any person other than a parent of the child who is under a legal duty to provide for the child or who has in law or in fact custody and control of the child."[373]

Still other federal statutes use the language of custody and control of children to deal with the rights and obligations of institutions, such as child welfare authorities, who have care and control of a child.[374] This particular use of custody and control of a child has close parallels within provincial child welfare statutes, discussed in greater detail below.

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[372] See Canadian Forces Superannuation Act R.S.C. 1985 c-17, Garnishment, Attachment and Pension Diversion Act, R.S.C. 1985 G-2, Judges Act, R.S.C. 1985, J-I, Pensions and Supplementary Benefits R.S.C. 1985 C-8, Public Service Superannuation Act R.S.C. 1985, P-36, and Royal Canadian Mounted Police Superannuation Act R.S.C. 1985, R-11.

[373] R.S.C. 1985, R-10.

[374] See, for example, the Children's Special Allowances Act 1992, c.48, Sch and the Canada Assistance Plan Act R.S.C. 1985, c-1.

Reform Options: Changing the Language?

These various federal provisions could not simply be dealt with by replacing the language of custody and access with the new parenting language. Rather, the use of the terminology of custody raises more complex questions and involves the interaction between federal and provincial laws. Any new parenting language adopted in the *Divorce Act* can only apply to post-divorce parenting. All other parenting (including both unmarried cohabiting parents, married parents and never married nor cohabited parents) continues to be governed by provincial laws. If some or all of the provinces continued to use the language of custody and access in their family laws dealing with children, then the language of custody and control of a child could not be abandoned in any of these federal statutes, since these provisions are intended to apply irrespective of the marital status of a child's parents.

Consider the statutory provisions that allow the payment of monies to be made to the person with custody and control of the child. These provisions could not simply be replaced by the new parenting language of the *Divorce Act*, such as the term *residential parent*. The language of custody and control of the child in these statutory provisions is intended to apply to whomever has the legal rights and responsibilities for a child, married, cohabiting, single or divorced. The term *residential parent*, however, applies only to post-divorce parenting. As long as the provinces continued to use the language of custody, it would have to be retained in the federal statutes.

It might be possible to *add* a reference to the new language of parenting to some of these federal statutes. For example, for the purposes of the payment of monies, custody and control of a child could include a residential parent. However, the particular language to be added would depend on a range of factors, and might not be the same for all the statutory provisions. While it might make sense to designate the residential parent as the appropriate recipient of monies, it might make considerably less sense in the context of the *Young Offenders Act*, when any parent with decision-making authority might be included. Moreover, it is not at all clear that the new language of post-divorce parenting would be at all appropriate in the context of children in institutional care, an issue which is discussed in further detail below.

General Deeming Provision

An alternative approach would be to use a general deeming provision in the *Divorce Act* that allowed one parent to be designated a custodial parent for the purposes of other federal and provincial laws. Parents and courts could be allowed to identify a custodial parent for the purposes of those provincial and federal laws that require a determination of custody. The Washington *Parenting Act* includes a provision that allows a designation of custody for the purposes of other state laws. The provision states that "solely for the purpose of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is to reside the majority of the time as the custodian of the child."[375] The provision specifically states that "the designation shall not affect either parents rights and responsibilities under the parenting plan." The section further provides that in the absence of such a designation, the parent with whom the child is to reside the majority of the time shall be deemed to be the custodian of the child for the purpose of federal and state

[375] Washington Parenting Act, section 26.09.285.

statutes. Montana, a mandatory parenting plan regime, similarly provides that a final parenting plan may include a "designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan."[376]

Such a designation provision would be helpful for separating and divorcing parents who were able to agree and, as such, it could be useful as part of a list of provisions that may be included in a parenting plan. However, it might prove to be highly contentious for those parents who are unable to agree on their parenting arrangements. By effectively returning to the language of custodial parent, such a provision would reintroduce the very language that is said to produce parental conflict.

Moreover, as mentioned above, it is not a provision that fits equally well with the various models for reform. In particular, it is not clear that it is compatible with the spirit of shared parenting. The basic idea of a shared parenting regime is that all parenting responsibilities—generally defined as "all the powers, duties, responsibilities and authority which, by law, parents have in relation to children"—are shared between the parents, except to the extent that a parenting order or parenting plan provides otherwise. The designation provision can be seen to be significantly qualifying this assumption of shared parenting responsibility, by deeming one parent as the custodial parent and, thereby, vesting them with all powers, duties, responsibilities and authority created by those laws that require a custodial parent. A shared parenting regime might then require a more significant revisiting and reformulation of the federal laws that currently rely on the language of child custody.

PROVINCIAL AND TERRITORIAL LEGISLATION

Family Laws

Custody and Access Laws

Abandoning the language of custody and access in the *Divorce Act* would have serious implications if the provinces and territories did not adopt similar changes in their legislation dealing with custody and access.[377] The confusion and difficulties created by divided jurisdiction in family law would only be exacerbated if the *Divorce Act* abandoned the language of custody and access without a similar commitment from the provinces and territories. Unmarried couples who separated and married couples who separated but did not petition for divorce would be governed by provincial or territorial law of custody and access, while divorcing couples would be governed by the new parenting regime. This would significantly contribute to the confusion related to the divided jurisdiction of the family justice system, which is already difficult for separating couples to negotiate. Indeed, the trend in the family justice

[376] Montana Code, Title 40 Family Law, Chapter Four Termination of Marriage, Child Custody, Support, Part 2, Support, Custody, Visitation and Related Provisions, S. 40-4-234(2)(a).

[377] See the Alberta Domestic Relations Act, R.S.A.1980 (Alberta), the British Columbia Family Relations Act, R.S.B.C.1979, the Manitoba Family Maintenance Act, R.S.M.1987, the New Brunswick Child and Family Services and Family Relations Act, S.N.B. 1980, the Newfoundland Children's Law Act, R.S.N. 1990, the North West Territories Domestic Relations Act, R.S.N.W.T. 1988, the Nova Scotia Family Maintenance Act; R.S.N.S. 1989, the Ontario Children's Law Reform Act, R.S.O. 1990, the Prince Edward Island Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, the Saskatchewan Children's Law Act, S.S. 1990, and the Yukon Children's Act, N.S.Y. 1986.

system in recent years has been towards more uniformity, as seen, for example, in the Federal Child Support Guidelines and the move towards unified family courts. While federal, provincial and territorial laws on custody and access do diverge, they at least have been based on the same legal concepts. Reforming the federal legislation without a similar commitment from the provinces and territories would be a significant departure from this trend towards greater uniformity, and the efforts to make the family justice system more user-friendly.

Reform at the federal level only could introduce negative incentives into the family justice system. The decision of whether to divorce or simply separate could come to be influenced or determined by a parent's view of which Act would be more favorable to his or her circumstances. If a parent was of the view that his or her position would be more favorable under the federal *Divorce Act* than provincial or territorial legislation, he or she may decide to proceed to divorce, rather than simply separate. This could have the unintended consequence of encouraging precipitous divorces, rather than encouraging trial separations.

Further, reform at the federal level only might skew decisions regarding the most desirable way to resolve parenting disputes. Many married couples who separate resolve their support, custody and access disputes through provincial or territorial laws. Many negotiate separation agreements under provincial or territorial legislation. Others who are unable to resolve their own dispute resort to courts under provincial or territorial legislation. These courts are generally less formal, less expensive, and more accessible for unrepresented litigants. Reforming custody and access law at the federal level only could distort these decisions. However, if one parent was of the view that his or her position was more favourable under federal law, he or she may be encouraged to initiate court proceedings rather pursuing the preferable option of negotiating his or her own settlement. Similarly, a parent who believed that his or her position was better under federal law might be encouraged to bring a petition for divorce. In the absence of a unified family court, the dispute would then end up in the more formal and expensive superior court.

Default Positions

Default positions—that is, custody rights in the absence of a court order or agreement—could also become more confusing. As described above, this question of default positions is already quite complex under the existing law. The *Divorce Act* has jurisdiction only over custody and access disputes respecting a child of the marriage upon or after the granting of a divorce. Prior to an application for divorce, custody and access disputes are governed by provincial or territorial legislation. If a divorce judgment is silent on the issue of custody and access, an order under provincial or territorial legislation remains valid. Further, if there is no order, either under provincial-territorial or federal law, then the default position would be whatever provincial and territorial law established. In other words, the default position under federal law (i.e. the situation in the absence of an agreement or order) is the provincial or territorial law.[378]

If the federal, provincial, and territorial governments agree to reform their laws on the basis of the parental responsibility model, provincial and territorial laws could be amended to reflect a desired default position (of joint parental responsibility until an agreement or order provides otherwise). However, if the federal government decided to move to such a model, but the

[378] This issue raises a range of challenging questions about federal and provincial jurisdiction, including the tests for federal paramountcy in the context of family law, which are beyond the scope of this discussion paper.

provinces and territories did not, then the default position would be continue to be framed in terms of custody and access under provincial and territorial law. In other words, the default position in a regime that abandoned custody and access would still be custody and access. In the absence of a court order or agreement, divorcing parents would be governed by the provincial and territorial default position, which continues to be framed in the language of custody and access.

As discussed above, the *Divorce Act* could establish a default position that would apply once a divorce action was initiated. However, it would be crucial that such a default position not automatically invalidate separation agreements and court orders that separating parents may have obtained under provincial and territorial law. Given the principle of federal paramouncy (according to which custody and access agreements or orders under provincial and territorial legislation are only valid to the extent that they are not in conflict with federal legislation), this would have to be made explicit. And, as also discussed above, it is not particularly clear that there is any advantage to establishing a default position in the federal law. While it is important to know in whom parental responsibility would be vested in the absence of a court order or agreement, this need not be done within a federal statute. The point is not to argue for or against the establishment of a federal default position but, rather, to highlight the confusion that could be created if the federal *Divorce Act* is reformed without a similar commitment to reform by the provincial and territorial governments.

Pre-Separation Parenting

Any attempt to move away from the language of custody and access in post-separation parenting would have to consider the broader impact on the legal regulation of parenting. Provincial and territorial legislation dealing with custody and access regulates not only post-separation parenting, but also pre-separation parenting, and parenting involving parents who have never lived together. While some provinces use the language of guardianship, many use the language of custody to describe the rights of parents who live together. All of these laws would need to be reformed to reflect the new language. In this regard, the language of joint parental responsibility would likely be equally appropriate for pre-separation parenting.

Custody and Access Enforcement Laws

Provincial and territorial legislation dealing with the enforcement of custody and access orders uses the language of custody and access. If federal and provincial and territorial laws abandoned the language of custody and access, then the laws would need to include the new language of parenting orders.

In Manitoba, for example, the *Child Custody Enforcement Act*, R.S.M. 1987, c.C360, allows the court to take action to enforce custody orders, including orders to prevent a child from being removed from the province, and to locate and take a child from a person who is unlawfully withholding the child. The Act allows the court to enforce an order made by an extra-provincial tribunal, but it also allows the court to make a new order in place of an extra-provincial order when it is satisfied that the child does not have a real and substantial connection with the local in which the custody order was made. In making such a new order, the Act specifies that the court shall "treat the question of custody as of paramount importance and the question of access or

visitation as of secondary importance."[379] The legislation, thus, grants differing degrees of protection to custody rights and access rights.

Abandoning the language of custody and access would require a re-examination of this provision. If custody and access orders were replaced with residence and contact orders, the language could be changed or added accordingly.[380] However, if the language of residence and contact was not used within a new parenting responsibility regime, it would be difficult to sustain this provision. For example, if the legislation used the language of a child's residential schedule, it would be difficult to sustain the distinction in the existing provision.

Child Support

Changing the language of custody and access would have a similar impact on the provincial and territorial laws of child support as discussed in relation to the Federal Child Support Guidelines. Provincial and territorial laws dealing with child support are all currently based on the framework of custody, and most have been reformed according to the Federal Child Support Guidelines.[381] The implications of abandoning the language of custody and access at the federal and provincial and territorial levels, therefore, raise similar challenges for these child support laws.

If the provinces and territories also abandoned the language of custody and access, they would have to consider similar amendments to their child support laws, as discussed above. If, on the other hand, the provinces and territories did not reform their custody laws alongside the federal reforms (and, therefore, not did reform their support laws either), separating parents could once again face the problem of divergent federal, provincial and territorial regimes. Changing the federal laws without a similar change at the provincial and territorial level would significantly undermine the advancements that have been made towards uniformity in child support law as a result of the adoption of the Guidelines.

Other Family Laws

If the provinces and territories abandoned the language of custody and access, they would have to undertake a review of all other family laws that incorporate this language. For example, the Ontario *Family Law Act* provides that a separation agreement may include provisions dealing with a right to custody and access. This provision, which is directed to post-separation parenting, could be easily reformed to reflect the new language of post-separation parenting. Laws that are specifically directed to post-separation parenting could, and should, be changed to reflect this new language. The more challenging laws, however, are those that are not specifically directed to post-separation parenting, but to parenting rights and responsibilities more generally, as discussed further below.

[379] Section 4(3)(b), Child Custody Enforcement Act.

[380] As mentioned above, as long as some provincial jurisdictions continued to use the language of custody, it would be important that the new parenting language be added to the existing language, not replace it.

[381] See, for example, the Ontario Child Support Guidelines (Family Law Act) O.Reg. 391/97, which are based on the Federal Child Support Guidelines.

Child-Protection Legislation

The language of custody and access appears in the context of provincial and territorial child-welfare legislation. While child welfare legislation varies considerably across jurisdictions, the language of custody often appears in these statutes. Sometimes, it is used in relation to parental rights in child protection proceedings. In other child-protection statutes, the language of guardianship is used rather than that of custody, and guardianship means all the rights, duties and obligations of parents in relation to their children. The language of custody also appears in child-protection statutes in relation to a child being in the care and control of child-welfare authorities.

For example, the Ontario *Child and Family Services Act* uses the phrase "lawful custody" of a child to deal with children in their parent's custody, as well as children in the custody of child-welfare authorities. Similarly, the British Columbia *Child, Family and Community Services Act*, RSBC 1986, Chapter 46, uses the language of custody, care and guardianship. A "child in care" is defined as a child who is in the custody, care or guardianship of the child-welfare authorities. "Custody" includes care and guardianship. Guardianship is, in turn defined as including "all the rights, duties and responsibilities of a parent." Parent is defined to include "a person to whom a custody of a child has been granted by a court of competent jurisdiction or by agreement."

The concept of custody, then, runs throughout the child-protection regime, which sets out the framework for taking children into care, the rights of those children and their parents, and the responsibilities of child-welfare authorities. Custody is the overriding concept that includes both physical care and legal control. It is used not only to describe the rights and responsibilities of parents, but also to describe those same rights and responsibilities when children are in the care of the child-welfare authorities. In this context, the word *custody* describes much more than the phrase *post-separation parenting*. Custody is, rather, the whole package of rights and responsibilities in relation to children that can be held by parents or child-welfare authorities.

Several child-protection statutes use the language of access to deal with the rights of parents to see children who are under a temporary care order.[382]

Unlike the family laws examined above, child-protection legislation is not specifically directed to post-separation parenting. It is intended to include all parents—single, married, cohabiting, separated and divorced. Language appropriate for post-separation parenting may not be equally appropriate for pre-separation parenting, and it may not be particularly appropriate for the regulation of children in the custody of the state. Indeed, if the language of custody is appropriate anywhere in relation to children, it is in the context of children in the care of state institutions.

Child-protection legislation needs language to represent the package of rights and responsibilities for children. Any provisions in child-protection legislation that are specifically directed to the rights and responsibilities of parents over their children must be able to take into account the way in which parental responsibility may be allocated after separation (for example, when parents share decision-making authority). For example, under the Ontario *Child and Family Services*

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[382] See for example, the Manitoba Child and Family Services Act R.S.M. 1987, and the Ontario Child and Family Services Act.

Act a parent is defined to include both parents when both have custody of the child, or one parent when that parent has lawful custody of the child. If the language of post-separation parenting moved away from the idea of custody, there would have to be some way to clearly identify who was a parent under this legislation. The least complicated way of doing so would be through a deeming provision within the parenting legislation. Alternatively, the language could be changed to specify that a parent was a person with specific parenting responsibility over a child, such as legal decision-making authority. However, the child-protection legislation would still need language to describe the full package of rights and responsibilities over children, specifically in relation to children in care of child-welfare authorities. But, it may be difficult finding language that is equally appropriate in all of these contexts.[383]

The use of the language of access in child-protection legislation raises similar dilemmas. Any move to abandon the language of access in the context of separation and divorce cannot assume that the same considerations would apply in the context of child protection. Although in both contexts access deals with the rights of parents to visit their children when those children are in someone else's custody, state custody and parental custody raise altogether different issues. A child is in the state's custody because he or she is in need of protection from his or her parents. A child is in one parent's custody because the parents have separated, and a court order or agreement has decided that it is in the best interests of the child. Changing the language of access in the context of post-separation parenting, to affirm parental status and their ongoing involvement in the lives of the children, would not work in the child-protection context.

A province or territory committed to abandoning the language of custody and access in the context of post-separation parenting could move away from that language in child protection by replacing it with other language. Not all provinces and territories use the language of custody when regulating child protection. For example, the Manitoba *Child and Family Services Act* R.S.M. 1987, does not use the language of custody but, rather, refers to "care while under apprehension," "parental rights and obligations," "temporary guardian" and "permanent guardian."[384] Child-protection legislation could be amended to use similar language, but careful consideration would need to be given to the interaction of this language with other provincial and territorial legislation regulating children.[385]

Adoption

A number of provincial and territorial adoption laws also rely on the concept of custody. For example, under the Ontario *Child and Family Services Act*, consent for adoption is required from

[383] The language of parental responsibility could be used. Parental responsibility could be defined in separation and divorce legislation as all the rights, duties, obligations and responsibilities over children, and could then operate as the full package of rights and responsibilities over children. While parental responsibility is increasingly seen to be an appropriate way to describe post-separation parenting, it is not as clear that it would be appropriate language in the context of children in the state's custody.

[384] It does, however, as noted, use the language of access.

[385] In some provincial and territorial legislation, guardianship is used to deal only with authority over a child's property. In other cases, it deals with authority over both the property and person of the child. Further, in some provincial legislation, guardianship is used to describe the rights and responsibilities of parents over their children. In other laws, it is used to describe someone who is not a child's parent, but who has been appointed a guardian. Using the language of guardianship, then, would depend on the ways in which this term is currently used in other provincial legislation.

a child's parent, and includes in the definition of parent "an individual who, under a written agreement or court order… has custody of the child or has a right of access to the child."[386] Section 137(5) provides that when a child is placed for adoption by an agency, and all required consents have been given, "the rights and responsibilities of the child's parents with respect to the child's custody, care and control are transferred to the society" until such time as the consent is withdrawn or an order is made for the child's adoption.

The Manitoba *Adoption Act*, S.M. 1997, c.47, does not use the language of custody, but the phrase "care and control of a child" appears in the Act. For example, in the context of *de facto* adoptions, an application for an order for adoption can be made by an individual or couple who have had "care and control of the child" for at least two consecutive years.[387] Similarly, before ordering any adoption, the court must be satisfied that the child has resided with the applicant and "the applicant has had care and control of the child."[388] Care and control is not defined in the *Adoption Act*; however; in the *Family Maintenance Act*, custody is defined as "care and control of the child."

The British Columbia *Adoption Act* RSBC 1996, Chapter 5, also uses the language of custody and access. It refers to children "in the continuing custody" of child-welfare authorities, as well as to persons with "care and custody of a child." It deals with the transfer of care and custody of the child to the child-welfare agency, as well as from that agency to the prospective parents. The Act defines care and custody as including the ability of a person to consent to a child's health care, and a child's participation in school, social and recreational activities. It also relies on the language of access in the context of persons who are entitled to receive a notice of an application for adoption. Any person who has a right of access to a child by court order or agreement must receive notice of an application for adoption.

As with child-protection legislation, provincial adoption legislation must be able to take into account the way in which parental responsibility may be allocated after separation. If the language of custody is no longer used to describe the allocation of decision-making authority over a child after separation, it will be more difficult for adoption legislation to use the language of lawful custody to identify a child's parent. Given that adoption is all about the transfer of full parental status from the biological parents to the adoptive parents, it may be that adoption legislation could adopt the language of parental responsibility, if parental responsibility was defined as the all the rights, duties, obligations and responsibilities over children. A parent then could be defined as any person with parental responsibility. More narrowly, it could be defined as any person with decision-making authority over the child. The question that would need to be revisited in adoption legislation, then, would be which aspect of parental responsibility was relevant in designating a person a parent.

Alternatively, the post-separation parenting legislation could include a deeming provision, as discussed above. Although there are certain disadvantages to deeming provisions, it is an approach that would be considerably easier than undertaking a comprehensive review and reform of the adoption legislation.

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[386] Section 137(1)(e), Ontario Child and Family Services Act.
[387] Section 73, Manitoba Adoption Act.
[388] Section 83, Manitoba Adoption Act.

Other Legislation Relying on the Language of Custody

There are many other provincial and territorial statutes that rely on the concept of custody of a child, that would require consideration if the language of custody and access was abandoned in the *Divorce Act*, in provincial or territorial custody law or in both or all three. Many provincial and territorial laws provide rights and obligations to "a person having lawful custody" of a child. Some laws define a parent as "a person having lawful custody." Some laws also use the language of guardianship, which is uniformly defined, but deals with a person who has some legal rights and responsibilities for a child. Still other laws use the phrases *custody and control* or *care and control* of a child.

The following discussion highlights some of the many ways in which the concepts of custody and guardianship confer rights and responsibilities in a range of provincial legislation.

Person Having Lawful Custody

In Ontario, a number of statutes confer rights and responsibilities to a "person having lawful custody" of a child. For example, the *Change of Name Act* R.S.O.1990, c.C.7, requires written consent of every person who has lawful custody of the child in order to change the name of a child. The *Vital Statistics Act* S.O., C.s.26, similarly provides that a person with lawful custody of a child under the age of 12 whose birth was registered in Ontario may elect to change the child's forename or surname. If two persons have lawful custody of a child, the election may only be made by both persons. The *Health Protection and Promotion Act*, R.S.O. 1990, c.H.7, requires that consent to release medical information must be provided by a parent or other person having lawful custody of the child.[389] The *Freedom of Information and Protection Act* similarly provides that any right or power under the Act can be exercised, if the person is younger than 16, by a person having lawful custody.

In British Columbia, a number of statutes also confer rights and responsibilities to a "person who has lawful custody." For example, the *Infants Act*, R.S.B.C. 1996 ch.223, provides that when a child usually resides with a person who is not a parent, but that person has lawful custody, then the child's domicile is with that person. The *Family Relations Act* allows a person with lawful custody of a child to apply for an order restraining harassment. The *Name Act*, R.S.B.C. 1996 Chapter 328, provides that if an applicant has minor children of the marriage of which he or she has lawful custody, he or she may apply to change the name of the children, but a court must acquire written consent of the other parent.

These provisions all appear to be directed to the persons with legal decision-making authority over the child. If the language of custody and access was abandoned, these statutory provisions would need to be amended to make this explicit—that it is intended to deal with legal decision-making authority, and not, for example, the residential parent.

Care and Control of a Child

Some provincial and territorial statutes confer rights and responsibilities on persons "with care and control of a child." The Manitoba *Parental Responsibility Act*, S.M., 1996, c.61, for

[389] Similar but slightly different language is found in the Municipal Act, S.O. Chapter M.45, which speaks of 'the person responsible for the custody of the minor."

example, defines a parent as "a biological parent or a person declared to be the parent of a child… [who] is responsible for the care and control of the child." Under this Act, parents are held accountable for the activities of their children in relation to the property of other people. The Act does not specifically use the language of custody, but of care and control (though other Manitoba statutes define custody as "the care and control of a child"[390]).

It is not immediately clear how the idea of care and control could be translated into the new parenting language. Care and control seems to be intended to represent the full package of rights and responsibilities that are associated with custody—both physical care and legal control. As such, the concept would not be captured by the phrase *residential parent*, since it includes more than physical care. However, it is also not clear that it would be captured by *decision-making authority*, since in its current form, it also appears to include the ability to supervise and control a child, which is related to a child's residential parent or physical caregiver.

Care and Custody of a Child

Yet another variation found in provincial statutes is "care and custody of a child." For example, the Ontario *Child and Family Services Act*, as discussed above in relation to child protection and adoption, uses the language of "care and custody of a child." This phrase is used to describe the making of temporary orders for children during adjournments of child-protection hearings,[391] to describe the powers associated with a society and crown wardship,[392] as well as to describe interim orders in relation to adoption.[393] The British Columbia *Adoption Act*, as also discussed above, also uses the language of care and custody to describe the package of parental rights and responsibilities that are to be transferred through the process of adoption. In both of these acts, the language of care and custody of the child appears to be intended to describe both physical care and legal control over the child.

Guardianship

A number of provincial and territorial laws use the term *guardianship* although there is no consistency in its definition. Sometimes, it is defined as a "person who has lawful custody of a child other than a parent" (for example, the Ontario *Education Act*). In other contexts, it is defined as a person other than a parent who has been appointed guardian of the person of the child by a court of competent jurisdiction (for example, the Manitoba *Change of Name Act*). To the extent that the definitions of guardian and guardianship are in some way dependent on the language of custody, these definitions would also need to be revisited.

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[390] See, for example, the Change of Name Act, S.M., 1987, c.13-C.50, and the Family Maintenance Act, R.S.M. 1987, c.F20.

[391] Section 51 of the Child and Family Services Act provides that the court can make a order for the "care and custody of the child," returning the child to the "care and custody" of the person who had charge of the child before the intervention, or keeping the child in the "care and custody" of the society.

[392] Sections 57 and 63 of the Child and Family Services Act provide that the society has "care and custody of the child."

[393] See, for example, section 154 of the Child and Family Services Act, placing a child in an applicant's "care and custody" for a specified period of time.

Summary

These examples begin to highlight the different ways in which the language of custody is relied upon by provincial and territorial legislation to confer rights and responsibilities for a child. Because custody under existing law confers a package of rights dealing with both physical care and legal control, these provincial and territorial laws do not distinguish between these two aspects of parental responsibility. If the laws dealing with post-separation parenting were reformed to abandon the language of custody, and to instead specifically allocate these different dimensions of parental responsibility, these laws would need to be revisited to consider which dimension of parental responsibility was at issue. Is it residence that is important (as in child support, for example), or is it decision-making authority (as in a change of name)? Or is it both? Because the law has relied on the concept of custody in which these two dimensions of parental responsibility are united, there has been no need to address this question. However, a move away from the language of custody will necessitate this inquiry.

Assuming that the provinces and territories agree in principle to reform their laws according to the new language of post-separation parenting, each province and territory would have to undertake a statutory audit to examine the way in which the language of custody and access appears in their legislation, and if and how that language could be changed. Amending the laws that rely on the language of custody would be much more complex than simply finding all the laws that use the language of custody and replacing it with the new parenting language. Rather, the particular purpose of each statutory provision would need to be examined, in order to determine which aspect of parental responsibility was at issue, and how the legislation could be changed to include this aspect of parental responsibility in a post-separation context.

Other Legislation

While the examples discussed above all rely on the language of custody, there are at least some laws that do not expressly rely on this language, but that nevertheless effectively require the designation of a custodial parent or a primary caregiver. Any move away from a custodial regime in which a custodial parent or primary care giver could be identified could create problems for these legislative regimes.

As discussed above, the *Ontario Works Act* is an example of legislation that effectively requires the designation of a custodial parent. The Act, which regulates social assistance, provides assistance only to the parent with whom the child resides. Both parents cannot obtain assistance for the same child, regardless of their custodial arrangement. Further, the Act arbitrarily defines the custodial parent, or primary caregiver, as the person who received the Federal Child Tax Benefit. If the parent with whom the child is living is not receiving the benefit, then that parent would not be eligible for social assistance. The Ontario government's directives further provide that if Canada Customs and Revenue Agency determines that each parent is an equal primary caregiver, the benefit may be split between them, with each parent receiving the benefit for six months. The parent would be eligible for social assistance in any month in which he or she received the benefit.

The problem is that joint custody or shared parenting arrangements rarely, if ever, allocate the child a month at a time. Joint custody arrangements, wherein a custodial or primary caregiver parent is not identifiable, are already causing problems for parents who are seeking benefits

under this Act. If a parenting regime was adopted in which the language of custody and access was abandoned altogether in favour of either parental responsibility or shared parenting, these problems would only be intensified for parents requiring social assistance.

A parental responsibility or shared parenting scheme could make it more difficult to identify a custodial or primary caregiver and thereby present further obstacles for parents seeking social assistance benefits. However, in both regimes, it would likely still be possible to identify a residential parent. The term *residential parent* could replace *custodial parent* or *primary caregiver* without seriously compromising the integrity of the schemes. The serious difficulty would arise in situations of joint physical custody, when it was not possible to identify a residential parent.

The *Ontario Works Act* is also indicative of the fact that the implications of changing the language of post-separation parenting may not be easily identifiable through a search of the terms *custody*, *custodial parent* or *lawful custody*. This Act does not actually rely on this language, and yet the eligibility of parents for benefits under the Act may be seriously affected by a move towards a shared parenting regime.

CONCLUSION

Under the existing law, the term custody represents the full package of rights and responsibilities over children. It involves both physical care and legal control over the child. When statutes rely on the language of custody, it is not necessary to specify which aspects of parental responsibility are involved, since custody embodies both the child's residence and all decision-making authority over the child.

The reform of custody and access law according to either a parental responsibility model or a shared parenting model involves a move away from the allocation of such a full package of rights and responsibilities to one parent after separation and divorce. Rather, both options for reform involve, to differing degrees, a disarticulation of the various aspects of parental responsibility. In a parental responsibility model, residence, contact and decision-making authority would each be allocated according to the best interests of the child. In a shared parenting model, residence and contact would be allocated according to the best interests of the child, and decision-making authority would be shared between parents unless it was not in the best interests of child to do so. In both of these options for reform, physical care and legal control no longer go automatically hand-in-hand.

As a result of this disarticulation of care and control under either of these two options for reform, each statute that currently relies on the language of custody would have be revisited to consider how, if at all, it can be amended to be brought in line with the changes. Sometimes, the use of the term *custody* is intended to indicate the parent with physical care of the child. More often, however, the use of the term *custody* appears to be intended to indicate the parent with legal control over the child. In the case of the former, it would be possible to amend the statutory language to include a reference to the residential parent. In the latter case, it would be possible

to amend the statutory language to include a reference to the parent(s) with decision-making authority over the child.[394]

The examples reviewed in this section are intended to highlight the implications for a broad range of federal and provincial and territorial legislation that relies on this language of moving away from the language of custody and access in post-separation parenting. It is not intended as a comprehensive review of all the affected statutes. Rather, the federal, provincial and territorial governments would have to undertake a comprehensive statutory audit of all of their laws that rely on the language of custody and access, and determine if and how these laws could or should, be reformed to reflect the change in post-separation parenting language. The examples reviewed here demonstrate that this cannot be done by simply replacing the language of custody and access with the new language of post-separation parenting. The task at hand would be far more complicated, involving an examination of the context and purpose of the use of the language of custody in each of these statutes, in order to determine which element of parental responsibility is relevant.

Moreover, at least some statutes do not lend themselves to such change. The particular way in which the language of custody is used in the context of child-welfare law, for example, presents a particularly difficult challenge. It is not clear that the legal regulation of children in the care of child-welfare authorities would be best captured by language intended to promote post-separation parenting. At the same time, however, it would be important that such child-welfare legislation be able to take into account the way in which parental responsibility is allocated between parents after separation and divorce.

The implications of moving away from the language of custody and access in post-separation parenting are far-reaching. The easiest approach, as adopted in a number of other jurisdictions, would be to include a general deeming provision for the purposes of other federal, provincial and territorial laws. In so doing, the new language would be restricted to the specific context of post-divorce parenting, and would not attempt to revise the legal regulation of children as a whole. However, it would still be necessary to amend the laws that specifically deal with post-divorce parenting. The laws of child support, custody enforcement and child abduction are all specifically directed to the reality of post-separation parenting. It would be necessary to make these laws consistent with the new language of post-divorce parenting in the *Divorce Act* and its provincial and territorial equivalents.

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[394] However, even this latter change would be complicated by the fact that, under a parenting plan regime, parents would be free to allocate specific aspects of decision-making authority. One parent might have decision-making authority over religious decisions, while the other might have authority over extracurricular activities. Decision-making authority need not be entirely shared. A parenting plan that allocated decision-making authority in such a manner might be required to designate which parent(s) had decision-making authority for the purposes of other provincial and federal laws.

VI IMPACT OF REFORM ON EXISTING ORDERS AND AGREEMENTS

Any reform to the existing regime of custody and access must consider the impact of this reform on existing orders and agreements. It would be important to stipulate that the reform does not have any retroactive effect, and that the legislative reform itself does not constitute a significant change in circumstances that could justify a variation of an existing order or agreement. Otherwise, the reform initiative would undermine one of its most basic objectives; of reducing parental conflict and litigation. If the legislative reform constituted a ground for a variation order, all existing custody and access orders and agreements could be subject to review, which would likely result in a dramatic increase in court applications for variation, in situations in which there had been no other change in circumstances. This would not be in the best interests of the children involved, and would not be in keeping with the objectives of reform of promoting the best interests of children, encouraging parental cooperation and reducing conflict.

VIII CONCLUSION

The three options for reform have their relative advantages and disadvantages. Each option can promote some of the objectives for reform, but each also has its limitations. The following discussion attempts to highlight the *differences* between the models, and the policy choices that need to be made in light of these differences.

TERMINOLOGY

The differences among the three options for reform are first and foremost differences of terminology. Custody and access, parental responsibility and shared parenting represent three very different ways of framing and conceptualizing post-separation and divorce parenting.

The language of custody and access of Option One has the advantage of stability but the disadvantage of being emotionally loaded with what has come to be perceived as an all-or-nothing, winner-take-all mentality.

As discussed above, this winner-take-all approach somewhat misrepresents the trends in the law. Over the last decade, the courts have been extending the rights of non-custodial parents, and have been promoting the continuous involvement of both parents in the lives of their children. Non-custodial parents are no longer completely excluded from participation in their children's lives. However, notwithstanding this change, there is a social perception that non-custodial parents are relegated to a second-class parental status.

It is not clear that any amount of reform within the model of custody and access could address this social perception. The problem has come to be framed as one of language. As such, nothing short of abandoning the language of custody and access would be seen to be seriously addressing the problem. The momentum for this change only continues to build as more and more jurisdictions abandon the language of custody and access in favour of more appropriate terminology.

Both the parental responsibility and shared parenting models, therefore, have the advantage of abandoning the emotionally fraught terminology of custody and access. They both share, however, the disadvantage of the uncertainty and ambiguity created by legal change, as well as the broad ranging implications for other federal and provincial laws.

The language of shared parenting in Option Three has the additional disadvantage of the negative connotations already associated with the term itself: it too closely approximates the idea of joint custody and is to closely associated with fathers' rights groups. It also has the disadvantage of creating profound confusion—that is, there is no clear and consistent way in which the term is used. For some, it means joint legal custody. For others it means joint physical custody. For yet others it simply means that parents continue to be parents. It is highly controversial language, and any effort to define the term more precisely would encounter a host of resistance from a range of constituencies. It is also not clear that the language is the most child-centred of the options insofar as it continues to focus on parental entitlement rather than parental responsibility.

Parental responsibility is the most neutral language of the three options for reform. It has neither the negative connotation of custody and access, nor the negative connotations of shared parenting. It is language intended to capture the idea that parenting survives separation and divorce, but it does not dictate the terms of that parenting. It is language that best captures the new child-centred approach to post-divorce parenting, that both emphasizes the continuing responsibilities of both parents and allows for maximum flexibility in designing parenting arrangements tailored to the unique needs of individual families.

BALANCING BEST INTERESTS AND PARENTAL RESPONSIBILITY

The existing regime of custody and access can be reformed to better promote the best interests of the child, by providing a more elaborate definition of those interests, by including references to parenting plans and divorce-related services, and by specifically addressing the relevance of violence, high conflict and inadequate parenting. While this option for reform could attempt to promote the idea of parental responsibility (by including a list of parental responsibilities), there is tension between this idea and a regime that continues to rely on the language of custody and access. The language of custody and access continues to allow for the all-or-nothing mentality that the idea of parental responsibility attempts to displace.

A neutral regime of parental responsibility would be designed to require that parental responsibilities be allocated between the parents on the basis of the best interests of the child. There would be no assumptions about how parental responsibility should be allocated, no general preset understanding that particular parenting arrangements would be in the best interests of children. Rather, in each case, parental responsibility could be allocated according to the best interests of the child. The criteria for best interests could be general or specific. A regime could simply include a general list of factors to take into account when determining the best interest of the child. Or, the regime could specify the particular factors to be taken into account when allocating particular aspects of parental responsibility according to the best interests of the child. Either scheme would require that parental responsibility be examined and allocated in each individual case, either by parental agreement or court order, according to a determination of the best interests of the child.

A regime of shared parenting would be designed on the basis of the assumption that a particular parenting arrangement is generally in the best interests of the child. It would assume in advance that the sharing of particular aspects of parental responsibility is in the best interests of the child. This is a regime that begins with an assumption that parental responsibility should be shared, and any deviation from this sharing would have to be demonstrated to be in the best interests of the child. It could either include a general list of factors to take into account when determining any deviation from the principle of sharing, or specify the particular circumstances in which shared parenting would not be appropriate.

Options Two and Three, then, can be seen to be characterized by a very different balance between the best interests principle and the parental responsibility principle. In Option Two, the best interests test is used to allocate parental responsibility in each case, and retains the best interests test as the cornerstone of all determinations of parenting arrangements. In Option Three, a particular allocation of parenting responsibility (shared) is predetermined to be in the best interests of children, and the best-interests test is then used in individual cases to

justify a deviation from it. Option Three elevates the principle of parenting responsibility by deciding in advance that a particular parenting arrangement is in a child's best interests. While not entirely displacing the best interests principle, Option Three relies on the best-interests test to justify deviations from the general principle of shared parenting.

The choice between Options Two and Three depends then on whether or not a particular parenting arrangement, in which some aspects of parental responsibility are shared, can be said to generally be in the best interests of children.

This choice presupposes a number of other policy choices.

First, should the legislative framework make any assumptions that particular parenting arrangements are generally in the best interests of the child, or should the legislative framework refrain from making any such assumptions? If the legislative framework rejects legislative presumptions and recognizes that no one model of post-separation parenting would be ideal for all children, then Option Two would be preferred. If the legislative framework allows for recognition that one model of certain aspects of post-separation parenting would generally be in the best interests of all children, what would, in effect, be a legislative presumption, then Option Three would be preferred.

Secondly, the choice requires a clear understanding of the particular aspects of parenting responsibility that are to be shared within Option Three. Before deciding whether a particular arrangement can be said to be generally in children's best interests, it is essential that there be a clear and accepted understanding of that arrangement. Does it involve shared decision-making? Major or minor decision-making? Shared residence? These must be clearly and precisely defined.

DECISION-MAKING AUTHORITY

The existing regime of custody and access under the *Divorce Act* allows for either sole and joint custody orders. In sole custody, decision-making authority is vested in the custodial parent. The access parent has the right to make inquiries and be given information regarding the health, education and welfare of the child. In joint custody orders, the decision-making authority is shared between the parents. The possible reforms within the existing regime would not substantially affect the way in which decision-making authority could, or should, be allocated between parents. Parents would be free to agree to joint-custody arrangements in which decision-making was shared. However, in contested cases, the courts would still be called upon to resolve the dispute and, given their reluctance to order joint custody in contested cases, the resolution would likely come in the form of sole custody and access orders.

Two reforms within the existing regime of custody and access might influence the allocation of decision-making. First, the incorporation of optional parenting plans might encourage parents to enter into parenting arrangements that avoid the language of custody and access and allow more flexibility in the allocation of decision-making authority. Second, the incorporation of divorce-related services that encourage cooperative dispute resolution might encourage more parents to enter into such parenting plans. Both reforms would, in effect, encourage parents to consider parenting arrangements deviated from a strict model of custody and access, and that would, at

least, allow for a more flexible allocation of decision-making authority. However, both reforms would be entirely optional and would depend on mutual agreement. In contested cases, the courts would still resolve the dispute within the language of custody and access.

A regime of parental responsibility would be designed to require that decision-making authority be allocated between the parents on the basis of the best interests of the child. There would be no assumptions in advance that a particular allocation of decision-making authority is always or generally in the best interests of the child. Decision-making authority could be shared, divided or granted to one parent. Parents and courts would make this determination on the basis of the best interests of the children in each case. As with parenting responsibility generally, the criteria for allocating decision-making authority could be general or specific. It could be governed by a general statutory list of factors to take into account when determining the best interests of the child. Or, it could be governed by a more specific list of factors specifically directed at the allocation decision-making authority.

A regime of shared parenting would be designed on the understanding that decision-making authority should generally be shared between parents. Decision-making authority is most likely the dimension of parenting responsibility that this model would single out and insist be shared between the parents. It would assume in advance that a child's best interests are generally served if decision-making authority is shared between the parents. Any deviation from shared decision-making authority would have to be justified on the basis of the best interests of the child on a case-by-case basis. A regime of shared parenting might include a specific list of circumstances that could justify a deviation from this shared decision-making.

Again, Options Two and Three can be seen to be characterized by a different role for the best interests principle. In Option Two, all decision-making authority is allocated on the basis of the best interests principle on a case-by-case basis. In Option Three, the best-interests principle is said to predetermine shared decision-making, and any deviation from shared parenting must then be justified according to the best interests of the child on a case-by-case basis.

As noted in the discussion of parental responsibility generally, the choice between Option Two and Option Three is, then, a choice about whether or not shared decision-making authority can generally be said to be in the best interests of children. The choice depends first and foremost on whether or not the *Divorce Act* should include what is, in effect, a legislative presumption in favour of one particular allocation of decision-making authority. Second, this choice would require a clear and accepted definition of precisely how decision-making authority would be shared under Option Three. Would only major decisions be shared (major medical, education and religion decisions)? Would decision-making be joint or independent? How would day-to-day decision-making be allocated and exercised?

RESIDENCE AND CONTACT

Reforms to the existing regime of custody and access would not significantly change the way in which residence and contact were allocated. Residence would continue to be allocated to the custodial parent, and contact to the access parent. The reforms could further elaborate on the best interests of the child test according to which these decisions of residence and contact are made. Incorporating a reference to parenting plans might encourage some parents to enter into

agreements that allocate the child's residential time without reference to the language of custody and access. However, in contested cases, residence and contact would continue to be allocated to the custodial and access parents respectively.

In a parenting responsibility scheme, residence and contact would be decided and allocated between parents on the basis of the best interests of the child. Again, the criteria could be general or specific.

In a shared parenting scheme, residence and contact would also have to be decided and allocated on the basis of the best interests of the child. There are few advocates for a shared parenting scheme that requires shared residence or equal residential time with both parents.[395] Rather, a shared parenting scheme would likely be a regime in which decision-making authority was shared between the parents, but in which the child's residential time would still need to be allocated between the parents.

In this respect, then, Options Two and Three are very similar. Both would require that criteria be established to allocate the child's residential schedule and contact with the non-residential parent.

There are, however, some differences between the options in their approach to contact.
A guiding principle for reform is that children should have the opportunity to have meaningful relationships with both their parents after separation and divorce. All three options for reform, then, must allow and encourage such contact. However, in Options One and Two, decisions regarding contact are to be made on the basis of the best interests of the child. That best interests test might include a general statement about the positive value of parent-child contact. However, it would be one factor to balance against a range of others. In Option Three, the emphasis on shared parenting suggests an even stronger bias or presumption in favour of contact. The very idea that shared parenting endorses is that both parents should have ongoing and meaningful relationships with their children. It assumes that this model of post-separation parenting is generally in a child's best interests. Even without including a legislative presumption in favour of contact within the statutory framework, this is a model for reform that would include a very strong bias in favour of contact. Under a shared parenting regime, any deviation from this bias in favour of contact would have to be established to be in the best interests of the child. It is, again, a concrete example of the balancing of best interests and parental responsibility. In Options One and Two, parental responsibility, including contact, is allocated according to the best interests of the child. In Option Three, a particular allocation of parental responsibility is assumed to be in the best interests of the child, and any deviation from this allocation must then be proven to be in the best interests of the child on a case-by-case basis.

VIOLENCE, HIGH CONFLICT AND INADEQUATE PARENTING

Each of the options could significantly advance the objective of protecting children from harm, if appropriate provisions are included in the statutory framework.

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[395] As noted above, the Special Joint Committee, supra note 1, did not recommend shared residence.

The custody and access regime could be improved by incorporating a reference to violence, high conflict and inadequate parenting. A parenting responsibility regime could take these factors into account in the allocation of parental responsibility in parenting orders and parenting plans. A shared parenting regime could also take these factors into account as limiting the presumption in favour of shared parenting. In particular, violence, high conflict and inadequate parenting could be identified as factors that would, or could, limit the presumption in favour of shared decision-making.

The extent to which the models would be able to protect children from these harms would depend less on the model chosen and more on the extent to which the statutory framework specifies how these factors should be taken into account. All three of the options could specify how these factors should be taken into account in the allocation of parental responsibility in parenting orders and parenting plans.

Although it is important that these factors be incorporated into all three options for reform, it is particularly crucial that these factors be identified as limiting a presumption in favour of shared parenting in Option Three. Sharing parenting is not in the best interests of children who have experienced violence, high conflict or inadequate parenting, and the statutory framework must ensure that children from these families do not inadvertently fall into a shared parenting stream.

PARENTING PLANS

All three models could incorporate parenting plans into the statutory regimes, particularly optional parenting plans, in which parents are encouraged to reach their own agreements on post-divorce parenting. As discussed, all three options could adopt very similar approaches to the issues of content, criteria for review, restrictions and modification of these optional plans. As discussed, there are very few negative aspects of including parenting plans on an optional basis, with the exception that these plans could be ignored.

The three options are not, however, equally positioned in relation to mandatory parenting plans. A mandatory scheme in which all separating and divorcing parents are required to file parenting plans would be most consistent with a neutral parenting responsibility regime. The idea behind a parenting plan is that it provides a flexible instrument that allows parents to individualize their parenting arrangements according to the particular needs of their children. It makes no assumption in advance of how parenting responsibility ought to be allocated, but allows parents (and, if they do not agree, courts) to make that determination according to their assessment of the best interests of the children.

By contrast, a mandatory scheme would be least consistent with the current regime of custody and access. The objective of a mandatory parenting plan scheme is to encourage parents to think beyond the restrictive categories of custody and access when allocating their parenting responsibility. There would be little incentive for parents in contested cases to even try to do so if, at the end of the day, the courts were going to decide the case on the basis of custody and access. An optional scheme, however, might encourage and allow fewer conflicted parents to allocate their parenting responsibility in more creative ways than custody and access appears to allow.

A shared parenting regime could incorporate a mandatory scheme, although it is not entirely consistent with the idea of encouraging parents to negotiate their own unique parenting arrangements, according to the unique needs of their children. A shared parenting regime begins from the assumption that at least some kind of parenting responsibility, most frequently decision-making, ought to be shared. A mandatory scheme within a shared parenting regime would, therefore, likely begin from an assumption that major decision-making authority is generally shared between parents, and then allow parents to negotiate all the other details of their parenting arrangements.

DIVORCE-RELATED SERVICES

Each of the models can advance the objective of promoting non-adversarial dispute resolution, by incorporating some reference to divorce-related services. Jurisdictional and funding restraints operate as an obstacle to mandatory divorce-related services in all three models. But all three models could include provisions encouraging the use of these divorce-related services. Each model could incorporate parenting education on an optional or court-ordered basis. Each model could incorporate a reference to the availability of mediation services, as well as allow the court to appoint a mediator on a consensus basis.

A mandatory parenting plan approach might be designed with a particular view to encouraging separating and divorcing parents to use mediation, counselling or some other primary dispute-resolution mechanism to assist in the negotiation of their parenting plans. But, even in a mandatory parenting plan approach, the use of primary dispute resolution processes should remain optional or court-ordered.

There are, however, no significant differences between the three options in terms of these divorce-related services.

REASONABLE EXPECTATIONS OF LEGAL CHANGE

It is perhaps nothing short of crystal ball gazing to attempt to assess the differences among what each option for reform is likely to accomplish. As discussed above, no option for reform would be able to realize all of the desired objectives. This concluding section attempts to provide an assessment of the extent to which each model might advance the reform objectives and guiding principles. It concludes with some comments about the general limits of law reform.

Custody and Access

A regime that continues to be based on custody and access will advance some, but not all, of the objectives for reform.

The regime of custody and access could be reformed to better promote the use of non-adversarial dispute resolution. Divorce-related support services could be incorporated into the *Divorce Act*. In addition to a general statement encouraging parents to consider non-adversarial dispute resolution, parenting education could be incorporated on a court-ordered basis where available. Mediation and other primary dispute-resolution mechanisms could be incorporated on an optional basis. Parenting plans could also be incorporated into the *Divorce Act* on an optional

basis, which could encourage parents to agree on their parenting arrangements. These reforms would help advance the reform objectives of encouraging parents to resolve their disputes in as non-adversarial a manner as possible. While these reforms in some respects only reflect existing practice, their incorporation into the *Divorce Act* could advance the educational and exhortative objectives of reform—that is, of establishing general standards and principles to guide separating and divorcing parents in the process of dispute resolution.

The regime of custody and access could be reformed to advance the objectives of protecting children from harm, particularly from the harm of violence, conflict and abuse. The *Divorce Act* could be reformed to specifically incorporate a reference to violence, high conflict and inadequate parenting when considering the best interests of the child and when making custody and access orders and parenting plans.

The regime of custody and access is one in which the best interests of the child remain paramount. The regime could be reformed to elaborate on the content of the best interests of the child. Although there may be some educational value in providing more guidance to parents, professionals and courts about the specific factors that should be taken into account, this reform will not make the outcome of parenting disputes any more predictable, and is not likely to significantly affect the degree of conflict.

Similarly, a list of parenting responsibilities could be added to this regime, which could have some educational and exhortative value, by encouraging parents to turn their attention to the very specific needs of their children. However, as discussed, this list of parenting responsibilities sits awkwardly with a regime that is ultimately based on custody and access. It is not clear how far this regime of custody and access can go in recognizing that parental responsibility continues beyond separation and divorce, and that both parents should continue to be involved in the lives of their children. Although the principle could be affirmed in the best interests of the child test, the prevailing understanding of the language of custody and access would seem to undermine the ability of this regime to advance these objectives.

Parental Responsibility

A regime of parental responsibility could advance many of the reform objectives. First and foremost, it is a regime that moves away from the contested language of custody and access. It is a regime that might be able to take some of the emotional sting out of parenting disputes by avoiding labels that suggest first- and second-class parental status. It is a regime that could advance the reform objective of affirming the parental status of both parents.

It is a regime that focusses on the idea of parental responsibility rather than on parental rights, and emphasizes that this responsibility continues after separation and divorce. It not only affirms the continuing parental involvement in the lives of children, but also focusses attention on the particular dimensions of parental responsibilities. It is a child-centred approach, that attempts to focus attention on children's needs.

As with custody and access, a regime of parental responsibility could incorporate and encourage the use of divorce-related support services and parenting plans. In this way, the reform could advance the reform objectives of promoting non-adversarial dispute resolution, and encouraging

parents to resolve their disputes with as little conflict as possible and without resorting to the courts.

In addition, a regime of parental responsibility could promote the reform objective of protecting children from the harm of violence, conflict and abuse. The regime could carefully specify the relevance of these factors in the allocation of parenting responsibility in parenting orders and parenting plans.

A regime of parental responsibility could also advance the reform objective of recognizing that no one model of post-separation parenting would be ideal for all children. A neutral model of parental responsibility makes no assumptions in advance about how parenting responsibility should be allocated but, rather, allows that responsibility to be allocated according to the best interests of the child in parenting orders and parenting plans. It is a model that embraces flexibility and diversity. It is also a model in which the best interests of the child remains paramount: all allocations of parental responsibility are to be guided by the best-interests principle.

Shared Parenting

A regime of shared parenting could advance some of the reform objectives. It is a regime that moves beyond the contested language of custody and access, towards a language that affirms the continuing parental status of both parents. It is a regime that can promote the reform objective of recognizing that children benefit from developing and maintaining meaningful relationships with both parents. The very premise of the model is that parenting not only continues after separation and divorce, but that this parenting should be shared.

A regime of shared parenting can also incorporate and encourage the use of divorce related support services and parenting plans. In this way, it is a model that can advance the reform objectives of promoting non-adversarial dispute resolution, and encouraging parents to resolve their disputes with as little conflict as possible and without resorting to the courts.

A regime of shared parenting can advance the reform objective of protecting children from harm, if it carefully specifies the circumstances that would justify a deviation from the principle of sharing. If the legislation did not do so, children who had experienced violence, high conflict and inadequate parenting might become subject to shared parenting arrangements that could be extremely damaging.

A regime of shared parenting does not, however, appear to be able to advance the reform objective of recognizing that no one model of post-separation parenting will be ideal for all children. Rather, it is premised on the idea that a particular mode of parenting in which decision-making is shared is generally in a child’s best interests.

As such, it is not as clear that it is a model in which the best interests of the child are always paramount. Rather, the model is one that presupposes that a particular allocation of parenting responsibility is generally in a child’s best interests, and then requires that deviations from this allocation be justified. Certainly, it is a model that continues to be governed by the idea of the best interests of the child, but does not examine the particular interests of particular children on a case-by-case basis. Rather, it assumes that best interests are generally served by shared decision-

making. It is then a slightly, and perhaps subtly, different understanding of what it means for the best interests of the child test to be paramount. At the same time, it is important to emphasize that in the allocation of other aspects of parental responsibility, specifically residence, it is a model that continues to be based on a determination of the best interests of the child on a case-by-case basis.

Limits of Law Reform

The general objectives of reform are to reduce parental conflict, encourage parental cooperation and promote meaningful relationships between children and their parents while protecting children from harm. The objectives aim to improve the process of dispute resolution by encouraging parents to reach agreements through non-adversarial means. The objectives also aim to improve post-separation and divorce parenting, encouraging ongoing involvement of both parents and cooperative parenting.

Other jurisdictions have pursued similar objectives, and their experience with a myriad of reforms to the law of custody and access suggests that realizing such profound change is a tall order.

Law reform may hold out the most promise in terms of improving the process of dispute resolution. A legal regime can be more or less adversarial, and there does appear to be considerable merit in attempting to reform the *Divorce Act* to promote a more non-adversarial, court-driven procedure for the resolution of parenting disputes. As discussed, all three options for reform can incorporate a reference to divorce-related support services that encourages the use of primary dispute resolution. It is not clear that such a reference will result in a significant transformation of the current practice of resolving parenting disputes, which already relies very heavily on education, mediation and counselling to help parents work out their parenting arrangements without resorting to court proceedings. It may be the multiple procedural reforms and innovative divorce-related services that the provincial, territorial and federal governments have initiated in recent years that offer the most promise for continuing down the road to more cooperative dispute resolution. However, there is still merit in reforming the *Divorce Act* to better reflect and, thereby, symbolically endorse this approach.

In terms of the terminology of parenting disputes, it may be that a move away from the language of custody and access might also be of assistance when promoting a less adversarial legal regime. Shared parenting is also a controversial and conflicted term. The presumption around shared decision-making is intended to reduce conflict and promote the continued involvement of both parents in the lives of their children. However, it might also inadvertently lead to a situation in which more parents feel compelled to litigate in order to rebut the presumption. The language of parenting responsibility, as the most neutral language, may be the least adversarial of the three options. Terminological change is not likely, in its own right, to eliminate conflict. However, it may form one small part of a more general set of reforms designed to promote a less adversarial approach to the resolution of parenting disputes.

Further, it is crucial to recognize that no amount of law reform can eliminate all the conflict for separating and divorcing parents. Encouraging non-adversarial dispute resolution would not affect the parenting disputes of high conflict families. In addition, any parenting regime would continue to have to address the needs of separating and divorcing parents who cannot resolve

their disputes through non-adversarial means. Any parenting regime would continue to need to rely on the intervention of courts in disputes that would not otherwise go away.

While law reform holds out some promise for improving the process of dispute resolution, it appears to hold out less promise for affecting the allocation of parental responsibility after divorce. The emerging research suggests that law reform does not seem to have a significant impact on the actual allocation of parental responsibility after divorce, which continues to a large extent to reflect pre-divorce patterns. As discussed above, there is a serious question about the extent to which any law reform can promote cooperative co-parenting relationships. A legal regime might encourage parents to consider co-parenting. It might be designed so as to remove any obstacles to co-parenting. But it is ill-equipped to impose or enforce it.[396] A legal regime can also encourage ongoing relationships with both parents, but it cannot enforce these relationships if the parents themselves do not want them.

Law reform may be able to affirm the continuing parental responsibilities of mothers and fathers after divorce. All three approaches could incorporate a reference to parental responsibilities and include some statement of principle affirming the parental status of both parents after divorce. However, as discussed, a custody and access regime would have the most difficulty in doing so. A shared parenting regime would be premised on this very idea, but may compromise other countervailing interests. A neutral parenting-responsibility regime is best positioned to both affirm the continuing parental status of both parents, while not sacrificing objectives such as flexibility, protecting children from harm and ensuring that the best interests test remains the cornerstone of all decisions regarding children. However, both a parenting responsibility regime and shared parenting regime would be able to symbolically affirm the importance of continuing parental involvement in the lives of children. Law reform could provide at least some of the affirmation that access parents so strongly desire.

This affirmation may come at a cost. At least some jurisdictions that have moved towards a shared parenting regime have experienced the frustrated expectations of these former access parents, who had expected more from the reform than it was able, or even committed, to deliver. Changing the law can not only not eliminate conflict, but it also always runs the risk of creating more conflict. Unrealistic expectations about what law reform can accomplish may only fuel the fires of discontent, rather than douse them.

Finally, the educational and exhortative objectives of reform, of changing attitudes about parenting upon separation and divorce, will depend on a broad range of social factors, difficult to predict and harder to measure. As discussed, the extent to which any reform can bring about the desired result will depend as much, if not more so, on the attitudes of the divorce professionals—the lawyers, judges, mediators, counsellors and educators involved in the separation process. Parents' attitudes towards their children at the same time of separation and divorce will be shaped in part by what they are told by these professionals. If these divorce professionals promote non-adversarial dispute resolution and continuing parental involvement (as many already do), parents may behave accordingly.

[396] Maccoby and Mnookin, supra note 77.

Parents' understanding of the law and approach to their children, however, depends on a myriad of other factors, ranging from their own beliefs about child rearing to the representation of divorce in the media. A much bigger question (unfortunately without an answer) looms: to what extent can law reform be said to bring about change in attitudes or does it simply reflect changes that have already taken place? Many of the reforms under consideration in the above discussion are based on changes that have already taken place—changes in how divorce professionals practice (such as using non-adversarial approaches), and changes in how parents expect to parent following separation and divorce (such as continued involvement). Other reforms would be trying to bring about new changes (such as cooperative parenting). It is here that law reform is most at risk of making promises that it cannot deliver, and of creating expectations that will only be frustrated by the continuing reality of parenting practices and divorce.