

**Promoting Resiliency in Children and Families:**  
**Identifying Priorities**

**Purpose:**

In 1998 the “Promoting Resiliency in Children and Families” discussion paper and workshops brainstormed and reached agreement on the key issues children and families face during separation and divorce. In discussion of these issues, some solutions were identified but it was clear that participants needed more information about various approaches or responses before consensus could be reached on preferred directions.

This paper responds to the need for information and presents a range of possible services and programs. Recognizing the limited resources of families, communities and government, the reader is encouraged to consider the **priority** they would attach to the various approaches described.

The reader is asked to address the following questions.

**Prevention** - What can be done to support parents and children to build resilient families that can overcome the challenges of separation and divorce or overcome the factors that lead to separation and divorce?

**Assessment and Addressing Conflict** - If a marriage or partnership is experiencing breakdown or deconstruction, what can be done to assess the level of support needed to help the parents and children cope?

**Dispute Resolution** - Where conflict occurs, what can be done to resolve disputes in a practical way that will further resiliency?

**Enforcement** - Once an agreement or court resolution has been reached, what can be done to maintain the arrangement while respecting the child's best interests, parent's or other's obligations as well as promoting public respect for the law?

**I. Introduction**

Child advocacy and child development authorities are increasingly using the term *resiliency* to describe a desired state for healthy children. Resiliency is the capacity of individuals to cope successfully with challenges. “Promoting Resiliency” was selected as the title for the province's approach to discuss coping strategies for new parenting and family arrangements.

Custody and access issues are emotional and often complex. These issues are easier to resolve when parents are willing to cooperate in establishing new family relationships. Where cooperation is impossible, the law and the court system may be needed to provide direction to

the parents and safeguard the interests of the children. Underlying the process for resolution, the best interests of the children must be served and the interests of both parents must be secondary to those of their children.

In 1996 the government conducted consultations on child support guidelines. During these consultations custody and access was recognized as a priority area for future review. On March 31, 1998 a provincial process “Promoting Resiliency in Children and Families” was announced to bring together professionals, advocacy organizations and community organizations to consider the needs of children and families who experience custody and access problems during separation and divorce.

Phase I of the consultation process involved the distribution of discussion and summary papers titled “Promoting Resiliency in Children and Families”. Five multidisciplinary workshops to discuss the paper were held throughout the province in May 1998 with a total of 104 participants representing 75 organizations. The workshops opened lines of communication about the challenges of custody and access and obtained perspectives from a cross-section of representatives. Questions for the workshops focused participants on the role to be played by individuals, communities/organizations and government.<sup>1</sup>

An overview of comments from the workshops was distributed in the fall of 1998. Some of the key issues arising from the workshops included:

- Policies and services have to address the needs of all children who experience separation and divorce. Additional education, information and counseling services are required for children.
- The needs of children are paramount, including a “voice” for children. Children should not have to compete with adult agendas.
- Parents need to communicate with each other and with their children to learn their new roles in their children’s lives. Parenting arrangements must revolve around the needs of the children.
- Parents and children need a consistent support network to provide access to centralized services, avoid duplication and confusion and deal in a less fragmented way with the needs of the children and family.
- Communities and schools need more information to ensure children are not stereotyped or stigmatized.
- Situations that put parents and children at risk of ongoing violence or abuse must be better understood, addressed and stabilized.
- Legal resources need to be more accessible.

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<sup>1</sup> The following two general questions were asked at the workshops. 1) In your view, what are the important issues to remember when supporting children and families who are facing custody and access issues? 2) To address these issues, what steps could be taken by (a) individuals, (b) your organizations (c) the community (d) the government.

- Terminology should avoid gender assumptions and adversarial notions.
- Early intervention is important. Services need to help parents find ways to minimize conflict and to become better post separation parents. Support and access to services should be available at times of crisis to help parents make wise decisions.
- Any services or programs must be accessible to parents and children. People should be encouraged to access a range of support programs.

The consultation and workshop process led to a broad-based consensus and agreement on a child-centred approach.

A child-centred approach has been described as "securing a process that constrains the egos of ourselves and our notion of childhood in favour of the child's". A child-centred approach is about promoting an equal sense of self-worth for children and treating children with equal concern, equal respect and equal consideration.<sup>2</sup>

Participants also identified the need for information, education and greater awareness of parenting after divorce and separation for parents, children, professionals and the community. There was also a recognition that the provincial and federal Ministers of Justice to work together to promote consistent changes to the *Divorce Act* and to provincial legislation.

Throughout the document, boxed comments from the participants of the five workshops have been included to show this response has been prepared to address the issues raised in 1998.

When considering possible responses, the reader should remember each family faces a unique set of circumstances. Broad program or policy responses need to balance unique needs with the benefits of predictability / standardization.

A chart from the "Promoting Resiliency " document noting the progressive types of interventions possible for families experiencing low, medium and high conflict is attached on the following page. This approach to analysis is continued throughout this document recognizing that, while it is difficult to predict the level of conflict families will experience, research shows that the majority of families require medium to low levels of support. A small percentage of cases involve high levels of conflict.

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2. "The Long Term Impact of Divorce on Children A First Report from a 25 year Study". Judith Wallerstein and Julia Lewis. Family and Conciliation Courts Review Vol 36. No. 3. July 1998.

Some programs and services may support families during all phases of family deconstruction and reconstruction. For example, education can help prevent family breakdowns, reduce the level of harmful incidences during and after separation, help parents to better understand and meet the needs of the children and help parents adjust to and maintain positive family arrangements.

"How can we ensure that services are accessible financially and geographically" (*Yorkton, May 1, 1998*)

"How can cultural and linguistic diversity be accommodated" (*Prince Albert, May 14, 1998*)

"Bring back teachings of elders" (*Regina, May 22, 1998*).

"More qualified people in remote areas" (*Meadow Lake, May 27, 1998*).

"Decision makers need to understand first hand the geographic constraints and cultural issues of north" (*Meadow Lake, May 27, 1998*).

The approaches discussed in this document may not be applicable in all areas of the province or to all communities. As approaches are discussed throughout the document, readers should be sensitive to the geography, culture and diversity of Saskatchewan.

#### **A. Vision and Principles**

A Saskatchewan vision of custody and access was presented and endorsed during the Phase I workshops held in May 1998.

**The Saskatchewan vision is a future  
where custody and access is determined in  
a nurturing, child-centred way through  
appropriate dispute resolution processes that  
promote child and family resiliency.**

The following principles were agreed upon as being important to a child-centred perspective:

- decision-making should focus on the needs and rights of the child;
- the “best interests of the child” test is fundamental, but uniqueness of the family needs to be reflected;
- children should learn from their parents and community how to develop and maintain healthy relationships and effectively resolve conflicts; and
- there is a primary need for protection of physical and emotional well-being of children and parents.

Phase I focused on brainstorming the issues children and families face during separation and divorce. Suggestions from the Phase I workshops emphasized the need for a continuum of services for children and families during the different periods of separation and divorce as described above, including: prevention, assessment and addressing conflict, dispute resolution and enforcement.

### **B. National Perspective**

Custody and access issues are also being discussed nationally. In 1998 a Joint Parliament / Senate Committee on Custody and Access conducted nationwide discussions. They released their report and recommendations in December 1998. The Federal Minister of Justice responded to the Joint Committee report on May 10, 1999.<sup>3</sup> She acknowledged the recommendations for legislative reforms but also recognized, as did the Joint Committee, that many difficulties cannot be resolved simply by changing the law. Rather, education, support and other services are essential to help children and their parents cope with their emotions.

### **C. Current Saskatchewan Services**

The Saskatchewan government is committed to the well being, protection and development of our most vulnerable citizens - children. This commitment has been exhibited through Saskatchewan’s Action Plan for Children. The Action Plan promotes and sustains an important emphasis on issues affecting children, youth and families, and contributes to awareness of these issues and actions across all sectors.

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<sup>3</sup> The federal Minister of Justice proposed a strategy for reform of custody and access with four principles:

- Child’s Perspective - Commitment to promoting child centred reforms.
- Governments - Governments must work together to pursue coordinated multi-jurisdictional efforts.
- Holistic approach - Statutory amendments alone cannot address many of the problems. Cooperative parenting needs improved education and support services to encourage healthy relationships.
- One size does not fit all - Conflict levels of parents vary, as do children’s individual needs over time. One model will not be ideal for all children. Supports should be flexible enough to meet the best interests of the children.

A comprehensive list of services provided by Saskatchewan Justice, Saskatchewan Health, Saskatchewan Social Services and the Children's Advocate Office can be found in the "Promoting Resiliency in Children and Families" discussion paper

Some of the services children and families benefit from include the Family Law Division of the Court of Queen's Bench and the Family Law Support Services office. Family Law Support Services provides custody and access assessments, divorce and separation education for parents and a supervised access and exchange program.

As well, Saskatchewan produced a facilitator's manual for children's education on divorce and separation along with videos for three age categories of children. The program has been made available to District Health Boards, school divisions and various helping agencies in communities. Interested community agencies may utilize this program as they feel appropriate in addressing the educational needs of children about separation and divorce.

Other Saskatchewan Justice family law services include the implementation of child support guidelines and the Maintenance Enforcement Office.

Saskatchewan Justice and Saskatchewan Social Services cooperate to provide the Saskatoon Child Centre and the Regina Children's Justice Centre. The centres utilize a joint investigation approach to assessing children in need of protection.

The role of Saskatchewan Social Services is to focus on safety issues for the child. In situations where there are child protection concerns, but the child can safely remain in the home, Social Services may provide family support services, such as counseling or in-home family support services.

Health Districts provide mental health counseling for children experiencing distress when their parents separate or divorce. Community counseling agencies have a lead role in supplying services to the general population experiencing separation and divorce.

The Children's Advocate Office engages in public education regarding children's rights, works to resolve disputes, conducts independent investigations and recommends improvements of programs for children to the government and/or the Legislative Assembly.

### **D. Research and Statistical Information**

- (a) Family structure continues to change

In Canada fewer couples were married in 1996 and far fewer ended their marriages. A total of 156,692 couples were married (down 2.2% from 1995) and 71,528 couples were divorced (down 7.9% from 1995). The number of divorces in 1996 was the lowest since 1985.<sup>4</sup>

There were 260,390 families in Saskatchewan in 1996. Of those 34,930 were one-parent households. Of these one-parent households, a female parent headed 29,290 and a male parent headed 5,640.<sup>5</sup>

(b) How changes in family structure affect children

The National Longitudinal Survey of Children and Youth (NLSCY) involves a sample of 22,000 children who were aged 0 to 11 years in 1994. Data will be collected every two years until they reach age 25. The survey is designed to explore factors that affect children's development.

The survey has revealed three main trends. First, while most children are born into two-parent families, an increasing number of parents are not married. Second, an increasing number of children are experiencing life in a single-parent family and doing so at an earlier age than previously. Finally, children born to common law couples face a greater risk of experiencing parental separation than children whose parents are married.<sup>6</sup>

Over the last three decades children are experiencing their parents separation at an increasingly younger age. One in five children born between 1971 and 1973 have seen their parents separate by the time they reached 11 years of age. By the time they were just over six years old, one in five children born in 1983 and 1984 had separated parents. The same proportion of children born in 1987 and 1988 were just under five years old when their parents union dissolved.<sup>7</sup>

Custody was decided without a court appearance in over half of the cases of children of separated couples (53%). The remaining 47% either had a court order or were awaiting a court decision. Among children whose parents had been separated for a year or less, decisions were made out of court in 73% of cases. Out of court decisions were made for only 47% of children whose parents had been separated for more than a year.<sup>8</sup>

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<sup>4</sup> "Marriages and Divorces" The Daily. Statistics Canada. January 29, 1998.

<sup>5</sup> "Census families in private households by family structure, 1991 and 1996 Censuses". Statistics Canada. 1996.

<sup>6</sup> "National Longitudinal Survey of Children and Youth: Changes in the Family Environment" The Daily. Statistics Canada. June 2, 1998.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

Mothers had custody in 68% of the cases and fathers had custody in 11% of cases. 21% of the cases had joint custody, a significant increase from 1986 when only 1% of cases were joint custody. The definition of joint custody for this study was both physical custody and joint decision-making.<sup>9</sup>

(c) Effects of parenting on children's well-being

Measures of parent/child interaction indicate that poor parenting practices, regardless of family structure, are strongly associated with relationship and behavioral problems in children. The NLSCY found that children at risk (e.g. lower income, low parental education, family dysfunction, prenatal problems and single parent) have fewer behavioral problems when raised with positive and consistent parenting. Parenting style, particularly a hostile parenting style, has a more negative effect on behavioral problems than other factors such as income and family structure.<sup>10</sup>

This data emphasizes the importance of effective parenting skills, regardless of the parenting arrangements. Parental divorce and separation have long-term impacts on children. Young adults whose parents go through separation or divorce appear to have higher rates of family instability and more likelihood to be lone parents. For example, the likelihood of living common law before age 25 is 70% higher among young adults whose parents were separated or divorced.<sup>11</sup>

At the same time, the likelihood of marriage for young adults whose parents are separated or divorced is significantly lower than for children whose parents were still married. As well,

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<sup>9</sup> *Canadian Fact book. Selected Statistics on Canadian Families and Family Law.* Child Support Research Unit of Department of Justice Canada. November 1997.

<sup>10</sup> The NLSCY measures four dimensions of parent child interaction: Hostile / ineffective interaction (how often parents tell children they are bad or not as good as others, get angry when they punish children, etc); Punitive / aversive interaction (how often parents raise their voice or yell at children, use physical punishment with children etc); Consistent interaction (the proportion of time parents make sure the child follows a command or order, enforces a punishment after warning the child etc); and Positive interaction (how often parents laugh with children, play sports, hobbies and or games together etc). Each parenting style was assessed through a series of questions concerning interaction with the individual style (parenting style may vary with each of the parents' children). Responses were combined into a scale for each child and for each parenting style. A child's parents were considered to exhibit a negative parenting style if they scored in the worst 10%. *"National Longitudinal Survey of Children and Youth"* The Daily. Statistics Canada. October 28, 1998.

<sup>11</sup> *"Analytic Insights and Products Studies on Canada's Children"* SCAN. Winter 1999 at page 19.



women from families of separation or divorce are almost twice as likely to give birth before age 20 or to be single mothers.<sup>12</sup>

Children are also impacted by the change in family income. Entering or exiting low income is just as frequently determined by changes in family status as by gaining or losing a job. When a change in family status occurs, it has a much greater impact on income than a labour-market change.<sup>13</sup>

### (d) Family Violence in Canada

Studies indicate that children who witness violence between their parents are at an increased risk of behavioural and developmental problems and are at a greater risk of becoming victims and perpetrators of violence themselves.<sup>14</sup> Further, children who witness violence by one parent against the other often suffer emotional trauma, difficulties in their interactions with others, increased aggression, an absence of close emotional ties to their parents and disrupted parenting. The negative impact on children witnessing violence in the home has led some provinces, including Saskatchewan, to enact legislation that extends the definition of a child in need of protection to include children who are exposed to domestic violence.<sup>15</sup>

Witnessing violence can encompass a wide range of experiences including visually witnessing violence between parents, hearing violence from another part of the house or seeing the physical or emotional consequences of the battering of a parent.<sup>16</sup>

## II Framework for Discussion

This part of the document reviews services and programs for children and families during different phases of the separation and divorce proceedings. Discussion occurs around prevention, assessment/early intervention and addressing conflict, dispute resolution and enforcement. For each of these discussions, the section is followed by a table outlining points to consider. The table is organized in a matrix so that discussion on programs and services can include mild, medium and high conflict families. The tables also acknowledge the roles that individuals, communities and governments have in helping parents and children build resiliency during separation and divorce.

### A. Prevention

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> "Family Violence in Canada: A Statistical Profile 1998". Statistics Canada. May 28, 1998.

<sup>15</sup> Ibid.

<sup>16</sup> "Assaults against Children and Youth in the family, 1996". Canadian Centre for Justice Statistics. Statistics Canada Catalogue no. 85-002-XPE Vol 17 no. 11.

*What can be done to support parents and children to build resilient families that can overcome the challenges of separation and divorce or overcome the factors that lead to separation and divorce?*

Families experiencing difficulties or on the brink of separation may still withstand separation with appropriate support. As well, children who are taught communication, conflict resolution and relationship skills at an early age will be able to use these skills in their own personal relationships as they grow, thereby reducing the number of negative consequences of separation and divorce in the future.

*(a) Individual*

"Use someone else as a sounding board to check out how you are parenting" (Regina, May 22, 1998).<sup>17</sup>

People who have experience with family breakdown could provide insight and information to address parenting concerns after separation or divorce and may even act as role models. Individuals may wish to access self-help information or reflect on their parenting and relationship skills with an impartial party.

Education can promote good family relationships and prevent family breakdown or the negative consequences of breakdown. Examples of such education include pre-marital classes and pre-natal classes or community-sponsored parent education classes.

*(b) Community*

"Use mentoring leaders in the community to resource help for families" (Regina, May 22, 1998).

"Share your stories and strengths with others through parent support groups" (Prince Albert, May 14, 1998).

"Responsibility on businesses and organizations to create family friendly workplaces" (Saskatoon, May 21, 1998).

"Educate children about relationships, communication and conflict resolution skills" (Yorkton, May 1, 1998).

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<sup>17</sup> Throughout the paper quotes from the Phase I workshop are included to provide a focus for the discussion.

The Canadian Institute of Child Health has developed a Parent Kit, a home study course on parenting skills. Information is presented on effective parenting practices and how children develop. The Parent Kit includes tips, techniques and strategies that have a wide range of applications.<sup>18</sup> Community organizations may want to consider developing similar parenting kits for separated or divorced parents. Learning positive parenting skills may help parents communicate and help parents maintain a positive parent/child relationship. As well, education can be offered to children through family life programs in the schools or community-based programs.

Increasing public knowledge about the impact of separation and divorce provides individuals the opportunity to consider the experiences of marriage, exiting relationships or the negative aspects of breakdown.

Reconciliation or counseling programs could provide support to help families endure difficult times and stay together. If they cannot remain together, counseling could prevent acrimonious separations.

### *(c) Government*

Each year since 1994-95 the Saskatchewan government has announced significant funding targeted to community prevention and support projects that:

- Improve the health and well-being of children, youth and families, supporting the principles and goals of the Saskatchewan Action Plan for Children;
- Emphasize prevention and /or support for vulnerable families;
- Address community-identified needs and support community involvement, partnership and ownership;
- Demonstrate cultural sensitivity, reflecting the background and input of the community;
- Avoid unnecessary duplication of existing programs and parallel administrative structures; and
- Encourage and assist participating individuals, families and communities to become more self-sufficient in meeting their needs.

Please see the table on the following page for a summary of options for prevention.

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<sup>18</sup>

The Parent Kit Brochure. Canadian Institute of Child Health. March 1999.

**B. Assessment and Addressing Conflict**

*If a marriage or partnership is experiencing breakdown or deconstruction, what can be done to assess the level of support needed to help the parents and children cope?*

"More ways at early stages to get third party professionals involved in helping parents make decisions regarding the children" (*Saskatoon, May 21, 1998*).

"Techniques such as thorough assessment, interviewing and investigation should be utilized in order to determine the best interests of the child" (*Regina, May 22, 1998*).

"How do we make basic information available to those who need it in ways they will access and understand" (*Yorkton, May 1, 1998*).

Families experience different levels of conflict during separation and divorce. An assessment of a family's conflict level and particular needs may assist in determining what services are needed.

*(a) Individual*

"Responsibility to self-educate" (*Saskatoon, May 21, 1998*).

Parents may benefit by assessing what they are doing positively or negatively and how that affects their level of cooperation. Where needed, they may also seek out assistance from written information, support groups or mentors to develop communication and conflict resolution skills. They may assess their personal anger / sadness resulting from family deconstruction and determine if they need to seek mental health services. Parents can also reflect on their parenting arrangements and relationships to determine if they are child-focused.

*(b) Community / Organizations*

(i) Training

“Provide child education to the support people in the system”  
*(Yorkton, May 1, 1998).*

"Building on idea of screening program, community groups and professionals in community need to be educated and know when to refer people at the earliest stage" *(Prince Albert, May 14, 1998).*

To provide the best information for parents, professionals need training in various areas such as marriage counseling, divorce and separation preparation, conflict assessment and the impact of divorce on the parents and children. They need training to determine the level of conflict, recognize mental health needs and understand the impact of danger, violence and high conflict on children.

(ii) Support

During the divorce or separation process, community support groups may benefit both parents and children. They may also help with ongoing support as families work to maintain cooperation. Please see the appendix for discussion of various support group models. For example, Circle of Friends in British Columbia is a mutual support program for young people who are experiencing some type of loss, including children whose parents are divorced or separated. "Parents Together" is a self-help program for parents concerned with their teen's behavior.

(iii) Education

There are a variety of ways for community organizations to develop and deliver education programs for families that address issues specific to their community. For example, education programs could be offered to help extended family members focus on the best interests of the child and act as intermediaries in the parents' disputes.

(iv) Crisis Intervention

For situations of high conflict or violence, communities may consider the need for mobile crisis intervention, hot lines or other crisis services for parents and children.

(c) *Government*

(i) Training

"Develop a more holistic view. Consistency in service delivery and consolidate services" (*Yorkton, May 1, 1998*).

To ensure that families are referred to appropriate services for their unique circumstances, front line government workers, such as mental health workers and social workers, could be better trained to assess conflict levels and enhance awareness of services for families.

(ii) Intake process for assessment

Early intervention could be enhanced through processes such as pre-court services that assess service needs early in the divorce and separation process. An intake coordinator could conciliate between the parents and make referrals to other services seen as helpful to that particular family.

Family Law Support Services of Saskatchewan Justice currently performs custody and access assessments on court order at no cost. Prior to a trial, the parties and their lawyers must meet with a judge in a pre-trial settlement conference. At this pre-trial conference the judge may order a custody / access assessment. An order for assessment may be made prior to the pre-trial conference if both parents request it. The purpose of the assessment is to help parents reach an agreement on parenting arrangements or to help the judge decide what parenting arrangements are in the best interests of the child.

Other models and approaches are discussed in detail in the Appendix.

(iii) Education

"Mandatory education sessions for separating parents and children" (*Prince Albert, May 14, 1998*).

Education programs can help parents focus on cooperation and the best interests of the child. Saskatchewan offers a six-hour voluntary parent education program facilitated by mediators and social workers from Saskatchewan Justice. The program is available to any divorcing or separating parents who wish to register for the session in their area. The sessions cover a range of topics including options for resolving disputes, stages of separation and divorce, child support

guidelines, children's reactions to separation and divorce and parenting after separation and divorce. Sessions are offered in 14 centres throughout the province.

Some jurisdictions have made parent education a mandatory component of the court process, unless the parents are exempted by the court from attending.

As well as mainstream education programs, consideration could be given to an additional program for high conflict families. The parent education for high conflict families would explain to parents the need to reduce the conflict because children do best when both parents can be involved in a healthy relationship with the children. The realities associated with high to very high conflict relationships and the realities of abusive relationships could be acknowledged and alternative interaction models could be offered.<sup>19</sup>

Other education programs are discussed in detail in the Appendix.

#### (iv) Crisis Intervention

Families in moderate to high conflict may need crisis intervention programs, including police intervention, coordination of police/justice responses to family violence, child abduction and child protection.

Please see the table on the following page for a summary of the discussion on assessment options.

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<sup>19</sup> "Parent Education Programs in the Court System" Orysia Z. Kostiuk Program Coordinator for For the Sake of the Children. Manitoba Justice.

### C. Dispute Resolution

*Where conflict occurs, what can be done to resolve disputes in a practical way that will further resiliency?*

The basic decisions parents must make on separation and divorce involve determining parental responsibilities in the best interests of the children.

"Move process out of formal court arena" (*Yorkton, May 1, 1998*).

"Parents need to be able to let go of adversarial approach and biases and understand best interests of the child (*Prince Albert, May 14, 1998*).

"Institute mandatory counseling/mediation/education with a focus on looking at the best interests of the child (*Prince Albert, May 14, 1998*).

As each family experiences varying levels of conflict, a continuum of dispute resolution techniques can help families find the best way for them to resolve their custody and access issues.

Conflict has a significant impact on children. The goal is for each family to find a method, or combination of methods, to resolve their disputes in the least acrimonious ways. In the "Promoting Resiliency" workshops, participants thought there needed to be more affordable and less adversarial processes for dispute resolution and that it is important for the child to have a voice in the dispute resolution process. This paper considers options to improve the expediency and affordability of the court process as well as other ways to resolve custody and access disputes.

#### *(a) Individual*

"Have parents consider non-legal options when the family is in conflict" (*Saskatoon, May 21, 1998*).

"Discourage inappropriate responses that escalate conflict" (*Meadow Lake, May 26, 1998*).



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Parents could use materials and information available to resolve their disputes. For example, if a parenting workbook were available, parents could obtain a copy and work on solving their disputes and developing a parenting plan.

The experience gained from the impact of divorce and separation on families prompted Australian authorities to employ, in addition to the traditional methods of intervention, new instruments for self-initiated conflict management. The Australian model activates the personal potential for action of those involved and enables them to participate in a controlled process of conflict resolution on the basis of self-responsibility.<sup>20</sup>

### *(b) Community Organizations*

"More ways at early stages to get third party professionals involved in helping parents make decisions regarding the children" (*Saskatoon, May 21, 1998*).

#### (i) Workbook

A parenting skills workbook on separation and divorce issues for families might help parents develop positive parenting, communication and conflict resolution skills. Community organizations could develop and distribute parenting workbooks to help families in their community and possibly to address issues particular to their community.

#### (ii) Resources

"For those coming from remote communities, women and children need to be encouraged to stay where there is access to support services" (*Prince Albert, May 14, 1998*).

"Increased awareness that reporting child abuse is a legal obligation" (*Regina, May 22, 1998*).

"Provide a warm safe supportive environment (churches, employers)" (*Regina, May 22, 1998*).

"Provide healthy relationships workshops" (*Regina, May 22, 1998*).

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<sup>20</sup> Family Counseling in Court Mediation Child Guidance in Separation or Divorce. Australian Federal Ministry of Youth and the Family and the Australian Federal Ministry of Justice. 1997 at page 14.

Communities provide a significant number of resources to families. Communities may be able to expand the programs available to parents and children on communication, parenting and conflict resolution. Examples of tasks communities might undertake include developing a parenting workbook and establishing child friendly places, such as recreation centres, for parents to spend time with their children. Communities may want to organize family education days. More details on this program have been included in the Appendix.

### (iii) Counseling

Communities can offer programs to assist children and families through the difficulties of separation and divorce.

The Family Centre of Winnipeg is currently operating a pilot project called “Giving Children Hope”. It is a group treatment program for separated families in which conflict is chronic. Areas addressed include disputes around the child’s time with each parent, differences in parenting styles, schooling and extracurricular activities of the children and the children’s emotional and behavioural development. The program operates free of charge and is available to families who have high rates of litigation or high degrees of anger, tension, distress, verbal abuse and aggression.

### (c) Government

#### (i) Workbooks and Parenting Plans

Although this section appears under the role of government, no determination has been made to develop workbooks and parenting plans. We recognize the role community organizations and professional organizations can play by producing workbooks and parenting plans with similar considerations and components as discussed below.

Parents who can keep conflict to a minimum can focus on the needs of the children.

To support these families, a model workbook could be produced to help parents work out a new family arrangement or parenting plans. A majority of parents solve matters by agreement. To help parents have thorough discussions, a workbook could be produced to help parents understand the needs of their children and working out the best possible arrangements. Discussion of the workbook could be part of a parent education program.

Rather than focusing on parenting skills, the workbook could include:

- discussion of dispute resolution processes such as mediation and court processes
- considerations and options for a parenting plan

- forms to be completed for a parenting plan
- listing of available services to help families.

"Put a proactive formula/guideline in place to deal with residency, financial, education and medical issues" (*Regina, May 22, 1998*).

"Where parents can't make a decision regarding a child, a group or panel of people with sociology/psychology who also have a specific interest in the child should be involved in a best interests decision for the child" (*Regina, May 22, 1998*).

Parents may want an agreement that recognizes joint responsibility and commitment to care for their children. A standard form of parenting plan could be developed to address decision making around religion, education, health and social activities as well as how and when access is to be exercised and how disputes are to be resolved<sup>21</sup>

There are many different options to develop a parenting plan. Parents could obtain a form for the parenting plans and on their own or through the assistance of friends, counselor or a lawyer complete the form. Parenting plans may form part of a parenting workbook.<sup>22</sup>

Parenting plans and workbooks may not be appropriate for high conflict families. In situations of high conflict, forcing parents to carry out a cooperative approach such as a parenting plan may be harmful to a child and/or parents. However, with counseling and education programs, the level of conflict may be sufficiently reduced to allow for consideration of parenting plans.

If a parenting plan was developed for high conflict families it would need to go beyond traditional elements of an order or agreement to deal with issues such as:

- communication between parents
- schedule changes
- sharing possessions - there is less dissension if children move between households with as little baggage as possible
- introducing new parenting figures to children
- handling children's refusal to visit
- emergency procedures for interparental flare-ups.<sup>23</sup>

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<sup>21</sup> *MLA Review of the Maintenance Enforcement Program and Child Access*. Alberta Justice. June 1998 at page 36.

<sup>22</sup> *Ibid.*

The goal when designing a parenting plan is the reduction of interparental conflict. Although many programs help to reduce conflict at the time of divorce, there may be a need for programs that help facilitate long-term co-parenting.

High conflict cases, in particular, may need support like a professional parenting coordinator. When developing and implementing a parenting plan, the responsibilities of a parenting coordinator could include:

- ensure the residence and access arrangements specified in the orders are followed
- teach parents communication skills, principles of child development and children's issues in divorce
- act as an arbitrator on any issue over which the parents reach an impasse.<sup>24</sup>

The level of conflict determines the level of detail and intervention required. Parents who engage in moderate conflict will require a structured co-parenting plan and more intervention by the coordinator than parents who engage in mild conflict. Parents with moderate conflict will benefit from learning to parent at a distance while being guided toward disengagement through arbitration, education and access strategies to reduce contact.<sup>25</sup>

Parents with severe conflict present the most challenging circumstances. In these cases, parenting coordinators would need to ensure the safety of the children during access, recognize situations that endanger the children and take action to secure supervised access.<sup>26</sup>

### (ii) Case Management

Several provinces, including Saskatchewan, have implemented pre-trial meetings for case management. For many years, Saskatchewan has had a mandatory process where parents, their counsel and the judge meet prior to the trial. These pre-trials are intended to encourage parents to come to an agreement prior to trial.

While case management could be mandatory at the outset of a case, there could be an opportunity to opt out. Criteria would be needed to identify cases that are not suitable for case management and criteria for opting out of case management.<sup>27</sup>

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<sup>23</sup> "Caught in the Middle" Mitchell A. Barris and Carla Garrity. MacMillan Publishing Inc. 1994.

<sup>24</sup> Caught in the Middle. Mitchell Barris and Carla Garrity. Macmillan Publishing Inc. 1994 at page 121.

<sup>25</sup> Ibid at page 129.

<sup>26</sup> Ibid at page 130.

<sup>27</sup> *Case Management Pilot Project Data Evaluation Report*. E. Frank Cormier Research and Consulting Winnipeg, Manitoba. March 30, 1998 at page 2-3.

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A case management meeting can operate in several ways to help parents solve or narrow disputes. The case management process is also an opportunity to provide referrals to professional services such as mediation and counseling.

Case management for high conflict families needs a screening mechanism for emergency situations or situations of domestic violence. Referrals for those cases need special consideration to ensure the family members and children are safe. As well, training for the front line workers (mediators, mental health workers, teachers, etc.) on accurate assessment of conflict and available services can also ensure high conflict families have proper referrals to specialized services. In these cases, the role of the case manager may expand from service referrals to continue throughout dispute resolution and beyond to continue support for ongoing parental cooperation.

An issue identified during the Promoting Resiliency workshops in 1998 is the lack of continuity in judicial review. Case management may be a solution. Issues do not arise in isolation and often are linked to what happened in the past. It may be very difficult to sort out a complicated history based on different versions of events in the limited time of a chambers appearance. It is argued that the institutional memory of the file may not be the best substitute for the personal experience of the judge sorting out sometimes hostile accusations.<sup>28</sup>

A judicial case management program could ensure that the same case management judge has the file through to completion of the case. A case management judge could meet with the parties and go through the issues and establish tasks and time tables for the proceedings.

In cases of severe conflict, judicial case management may be beneficial. A judge could conduct the preliminary screening and refer the parties to appropriate dispute resolution processes or accompanying services. For particularly complicated cases, the judge could preside over the case each time it came before court to ensure consistency in decision making.

For more detailed information on the various case management programs, please see the Appendix.

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<sup>28</sup>

*MLA Review of the Maintenance Enforcement Program and Child Access.* Alberta Justice. June 1998 at page 49.

(iii) Mediation

"Mandatory mediation training for all lawyers practicing family law" (*Saskatoon, May 21, 1998*).

"Mandatory mediation" (*Saskatoon, May 21, 1998*).

Parties, as their relationship deteriorates, may establish a pattern of adversarial conduct and negative communication. Mediation is a process in which an impartial third party helps parties discuss their issues and work towards a solution. The mediator does not take sides or make decisions for the parties but helps parties understand their issues, develop alternatives, make informed decisions and work towards a practical outcome. While mediation does not always eliminate the conflict in the relationship, it can reduce it to a manageable level by developing a new model for communication based on respect and a common focus on the best interests of the child.

Parents can meet with a mediator who will help them understand the areas of conflict and help them negotiate the design of their own parenting arrangements. The mediator does not offer an opinion about the arrangements but may make some suggestions. Generally, the parents are interviewed jointly unless there are safety concerns. Mediation may not be advisable if there is intimidation or threats of violence that impair the ability of parents to represent their interests in negotiations.<sup>29</sup>

There are several models of mediation to consider. As well different models apply for families with different levels of conflict.

Poor mediation outcomes are generally predicted for parents who have rigid, highly divergent perceptions of their children's needs, which they tend to confuse with their own needs, and harbor a pervasive distrust of each other's capacity to provide a secure environment. They fail to make use of mediation because it relies upon a rational decision-making process.<sup>30</sup>

For high conflict families, mediation is not necessarily an option as it may lead to unbalanced power struggles or the parties may be unable to be in the same room with one another. One option to consider is impasse directed mediation or therapeutic mediation. By understanding

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<sup>29</sup> *London Custody and Access Project London Family Court Clinic*. London Ontario.

<sup>30</sup> *In the Name of the Child*. Janet Johnson and Vivien Rosenby. 1997 at page 278.

why parents are locked in chronic dispute, therapists can focus on resolving the deeper impasses so parents can make decisions more rationally based upon the needs of the child.

This model may be particularly helpful for bitterly litigating families. It brings therapy and mediation together. There are four phases: assessment, pre-negotiation counseling, negotiation of a plan and implementation. The diagnostic and counseling component is not provided in a separate setting, apart from negotiations, because an understanding of the dynamics gleaned during the counseling phase is invaluable in helping to choose negotiation strategies and build psychologically sound agreements.

Impasse directed mediation educates and counsels these parents about their children's needs. They undertake direct therapy with their children to help them cope with and manage their family situations. The goal is to develop a psychologically sound parenting plan and to build a structure to support parents and children's continued growth and development.<sup>31</sup>

Another dispute resolution option is a mediation / arbitration model. This process is helpful for parties who cannot afford to go to court but are unable to resolve the issues themselves. The parties sign a binding agreement to mediate all issues they can and for those issues on which they cannot agree the arbitrator will decide. The structure of the agreement varies depending upon the needs of the parties and the complexity of the case. The solutions are limited only by the creativity of the participants and the skill of the mediator /arbitrator. More discussion of particular dispute resolution models is included in the Appendix.

"How do we effectively respond to allegations of abuse or safety of the children" (*Yorkton, May 1, 1998*).

"How can we assist children who witness family violence" (*Saskatoon, May 21, 1998*).

"What level of violence is tolerated before access is restricted" (*Regina, May 22, 1998*).

"How can we effectively deal with false allegations of child abuse" (*Regina, May 22, 1998*).

"Training for police emergency response teams based on needs of families in crisis and abuse issues" (*Prince Albert, May 14, 1998*).

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<sup>31</sup>

In the Name of the Child. Janet Johnson and Vivien Rosenby. 1997 at page 280.

(iv) Special services for families with violence

Children who witness abuse in their families, even if they are not the targets, suffer a great deal. They may grow up believing that abuse is part of a normal relationship and may become abusers or abuse victims themselves. Children from high conflict homes exhibit some of the following characteristics: constant fear for their lives, increasing deceptiveness, lying, cheating, poor definition of personal boundaries, little or no understanding of dynamics of violence, blame themselves for violence, continuation of abuse patterns later in life, poor problem solving skills, being at higher risk as a victim or witness and heightened suicide risks and attempts.<sup>32</sup>

If there is abuse, both the criminal law and civil law offer assistance. Criminal law is intended to stop crimes from being committed and punish offenders. When someone is arrested and charged the court can impose conditions that may include no contact or communication with the victim or restraint on use of alcohol.

Civil law such as *Victims of Domestic Violence Act*, is used to settle disputes between individuals. As well, *The Child and Family Services Act* in Saskatchewan requires police and social services officials to take action to protect children whose life, health or emotional well being is endangered, including removal of the child from the parent's home. Abuse is a ground for protection under *The Child and Family Services Act* and people who are aware of abuse have a legal responsibility to report it to authorities.

Please see the table on the following page for a summary of the discussion on dispute resolution options.

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<sup>32</sup> Condensed from Behavioural Characteristics of Domestic Violence by Vickin D. Boyd and Karil S. Klingbell referred to in Module 13 High Conflict Families For the Sake of the Children. Manitoba Justice.



#### **D. Enforcement**

*Once an agreement or court resolution has been reached, what can be done to maintain the arrangement while respecting the child's best interests, parent's or other's obligations as well as promoting public respect for the law.*

"What can be done to increase compliance or enforcement of agreements and court orders" (*Regina, May 22, 1998*)

"Government enforce court orders" (*Meadow Lake, May 27, 1998*).

Once an agreement or an order arranging custody and access is in place, it is the parents' responsibility to uphold that arrangement. However, families may still require support, education and counseling to work through the difficulties of a new family relationship. As well, participants at the Phase I workshops raised concerns that post-separation arrangements be upheld by the justice system along with a review process to ensure all is working well or determine if the family needs a new arrangement.

Problems of access are usually worked out by parents talking to each other or through friends, a counselor or a mediator and least often by going to court, as it is expensive and uncertain. An Alberta study found only 19% of custodial parents felt their experiences were very difficult and strained compared to 45% of non-custodial parents. In addition, 70% of custodial parents and 64% of non-custodial parents reported that denial of access seldom occurred.<sup>33</sup> However, the fact that the majority of parents are able to find solutions without the need to go to court does not diminish the problems faced by the minority for whom the courts may be the only option.

##### *(a) Individual*

Maintaining parental arrangements and cooperation is an ongoing task, even when the initial conflict is resolved. Cooperation and low levels of conflict help maintain the best interests of the child. Some parents may want protocols in place for communication and conflict resolution. In more serious cases, parents may need to seek out third party help for example, anger management.

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<sup>33</sup>

*MLA Review of the Maintenance Enforcement Program and Child Access.* Alberta Justice. June 1998 at page 32.

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For those parents with access, time spent with their children is very valuable. There are a variety of options of activities for parents to do with their children. However, geography, timing or information on activities and centres where they can spend time with their child may create barriers to quality time for parents.

### *(b) Community / Organizations*

#### (i) Roles of community centres

Communities may need to be more sensitive to the needs of children whose parents are divorced or separated. Are there options for using recreation centers differently with different times and activities? Community and recreation centres could consider focusing recreational family activities throughout the weekend and evenings when most parents are exercising access.

Communities could offer safe, supervised environments for children to spend time with their parent or be transferred from one parent to the other. Supervised access and exchange services help children who could not otherwise have contact with their parents due to high levels of conflict or concerns about safety.

#### (ii) Support

To maintain parenting coordination, families benefit from peer support. Communities could establish support groups for parents and children and maintain these groups throughout the divorce and separation process, as well as the following several years, to encourage positive parenting as time goes on. Support groups could provide good parenting role models and have skill development classes.

#### (iii) Training on remedies

If an agreement or order is not being followed, legislative remedies are available under *The Children's Law Act*. Counsel should be trained on the remedies available, as well as conflict resolution skills, to avoid the expense of numerous court applications.

### *(c) Government*

#### (i) Remedies

"People don't have money to enforce interim or other orders" <i>(Yorkton, May 1, 1998).</i>
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Saskatchewan currently has some of the most extensive custody and access enforcement legislation in Canada. *The Children's Law Act* includes a range of remedies where there has been non-compliance with an order or agreement for custody or access. However, these remedies do require that the parties return to court.

One of the remedies suggested for breach of an access order is incarceration. The ultimate sanction for contempt of court by violating the court order is already incarceration. However, incarceration of a parent carries serious potential to harm the children and harm the child's relationship with the parents.<sup>34</sup>

Non-custodial parents also have obligations to exercise access. In 1992 the Canadian Research Institute for Law and Family found that over one third of custodial and non-custodial parents felt that the non-custodial parent was not spending as much time with the children as either of them would have liked.<sup>35</sup> Access is the right of the child, and *The Children's Law Act* contains a range of consequences for failing to properly exercise access, just as there are for failing to provide access.

There are some jurisdictions with more of a role for public officials after an order or agreement is reached. In California, a pilot project established the office of "Special Master". A Special Master might be considered when other avenues of conflict resolution have not resulted in parents being able to settle issues such as schedules, overnight visitation and choice of schools, etc. A Special Master's goals are to make legally sound decisions in the best interest of the child. But, they also help families learn effective problem solving strategies to learn how to communicate well with each other and sometimes to learn more about child development and understand their feelings about the other parent. The major goal is to help families develop their skills so that they do not need a Special Master and the power to make decisions about their children can be put back in their hands.<sup>36</sup> Please see the appendix for more information on Special Masters.

It has been suggested an Access Enforcement Office and registry should be established. There are no Canadian provinces with an access enforcement office. However, there are various models to consider, such as an office like the Maintenance Enforcement Office, where the custody and access order would be registered. Officers could then attempt, through various remedies, to enforce a custody and access order. However, a registry of custody orders presents difficulties. First, would it be voluntary or mandatory registration? Would only orders

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<sup>34</sup> *MLA Review of the Maintenance Enforcement Program and Child Access*. Alberta Justice. June 1998 at page 48.

<sup>35</sup> *MLA Review of the Maintenance Enforcement Program and Child Access*. Alberta Justice. June 1998 at page 46.

<sup>36</sup> *Special Masters in Child Custody Cases*. S. Margaret Lee, Ph.D. Published in Association of Family and Conciliation Courts NEWSLETTER, Volume 14, Number 2, Spring 1995.

be registered or could agreements be registered and enforced? Custody and access enforcement differs from maintenance enforcement in that often parents and children must retain flexibility to changing child needs. Orders and agreements may often be informally rearranged to adjust to changes; therefore, it may be almost impossible to keep a registry system up to date.

The most aggressive access enforcement program appears to be in Michigan. The government runs an agency known as the "Friend of the Court" established through legislation. Access enforcement is dealt with in ways similar to support enforcement. Any party may complain to this organization that he or she has been denied access. Upon receiving a complaint, the agency is required to investigate.<sup>37</sup> Please see the appendix for further discussion of the "Friend of the Court".

For cases of severe conflict and/or potential abductions, consideration could be given to a registry of custody and access orders as well as related orders such as restraining orders. This type of registry could be related to Canadian Police Information Centre ("CPIC"). Where police officers are called to homes with domestic disputes or disputes over a custody and access order, they would have immediate access in their vehicles to the court order and would be able to determine which parent's right should be enforced. However, as with an Access Enforcement office, there may be difficulties in maintaining this registry. Would the registry contain orders and agreements? If not agreements, then what about situations where an order was in place but the parents varied the order by an agreement? Also, custody and access orders and agreements vary on a fairly frequent basis and the registry would require ongoing, accurate updating.

(ii) Review process

"Review orders in court periodically to see if they are working for individuals" (*Yorkton, May 1, 1998*).

A judge or court officer could review a parenting arrangement with parents on a regular basis to determine if it is working or if there need to be any changes. The review process could operate on an annual basis or less regularly. However, this approach could lead to increased costs and conflict for families.

(iii) Supervised Access

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<sup>37</sup> *Model Friend of the Court Handbook*. State Court Administrative Office, Friend of the Court Bureau. August 1998.

"Supervised access programs could be an effective vehicle for education on parenting skills, anger management and coping skills" (*Saskatoon, May 21, 1998*).

In situations of severe conflict, it may be necessary to have a supervised access program. There are two types of supervised access to help families with varying levels of conflict. The first is a supervised transfer facility so that a child can be transferred into the care of the other parent without contact between the parents. The second occurs when there is concern for the safety or well-being of the child to the extent that access must be supervised.

Many of the supervised access programs that currently exist are somewhat non-interventionist, as they do not provide therapy or counseling. They consist of a small staff team supplemented by volunteers or in association with larger organizations such as a child protection service or mental health agency.

In Saskatchewan, for example, trained volunteers and staff social workers provide the supervision of access to children by the non-custodial parent and other family members in a safe, child-focussed environment. When there is an order for supervised access it is immediately forwarded to Family Law Support Services. A volunteer and social worker are assigned to the case. An initial interview takes place between the social worker and each parent prior to the first visit. Supervision of exchanges of children during an unsupervised access period is provided upon request.

Often the difficulty around supervised access is the availability of a program, particularly in more remote or rural areas. Currently, in Saskatchewan, supervised access and exchange programs operate in Regina, Saskatoon and Prince Albert. If parents outside of those cities require supervised access or exchange services, arrangements must be made to attend one of the cities.

Recently, there has been an innovative expansion of supervised access to include therapeutic, education programs and counseling as part of supervised access. Australia piloted and evaluated a project to facilitate children's contact with non-residential parents. The pilot was done in partnership with the court and community organizations. The primary emphasis is on prevention of parental conflict through information sessions and early and constructive intervention to resolve disputes through mediation and counseling through court. The pilot, although targeted at parents convicted of breaches, provides more educative rather than punitive penalties.

According to the Australian report, increased attention needs to be paid to the ways in which parents can move towards self-management. Collaborative agreements with counseling or mediation services may help with an overall self-management model. As well, "off-site"

supervision or low vigilance supervision is offered in Australia as part of its service. For example, supervision may only be for exchanges or supervision may occur outside of the government facility. The aim is to promote healthy relationships and improve the parents' ability to independently manage contact arrangements. It is for low vigilance cases but is effective in reassuring parents that effective contact can take place away from high vigilance supervision. Other suggestions include development of simple communication processes that allow parents to communicate about their child such as a diary that highlights child activities, achievements and illnesses. Please see the Appendix for more information on the Australian program.

### (iv) Abduction

When a child is wrongfully taken by his or her parent, there are both criminal and civil remedies to support the return of the child.

If the child is abducted outside of Canada, a parent may be assisted by the Central Authority under the Hague *Convention against International Child Abduction*. The Convention applies throughout Canada and in 42 other countries. The objectives of the Hague Convention are:

- to secure the prompt return of a child wrongfully removed to or retained in any contracting State, to the environment from which the child was removed; and
- to ensure that rights of custody and of access under the law of one contracting State are effectively respected in other contracting States.<sup>38</sup>

If the abduction is within Canada, the parties can use existing custody and access enforcement remedies.

In addition to civil remedies, there are criminal charges for abducting a child, either within or outside of Canada. Charges under section 282 of the *Criminal Code* could be laid where:

- a child under the age of 14 is involved;
- there is a court order establishing “custody rights” granted in Canada which is not being complied with;
- the alleged abductor is a parent, guardian or other person having the lawful right to care for the child;
- the alleged abductor takes, entices away, conceals, detains, receives or harbours the child;
- the alleged abductor is in contravention of the custody provisions of a Canadian custody order;
- the taking was done by the abductor with the intent to deprive a parent, guardian or person with care of the child, of possession of the child contrary to a court order;

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<sup>38</sup>

*International Child Abductions A Manual for Parents*. Department of Foreign Affairs and International Trade December 1998 at page 7.

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- a parent, guardian or other person with care or charge of the child, did not consent to the taking of the child; and
- there is no reason to believe the alleged abductor did not know of the existence or terms of the custody order.

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Charges may be laid under section 283 of the *Criminal Code* where:

- a Canadian custody order exists but the alleged abductor did not believe or know there was a valid order;
- no Canadian custody order exists, but parental rights of custody under statute or common law exist;
- no Canadian custody order exists but custody rights under a separation agreement or foreign order have been violated;
- the alleged abductor is a parent, guardian or other person having the lawful right to care for or lawful charge of the child; and
- the taking, enticing etc. was done by the alleged abductor with the intent to deprive the parent, guardian or other person with care or charge of the child, of the possession of the child.

It is not a defence that the young person consented or suggested the conduct of the accused. It is a defence if the alleged abductor establishes the taking was done with consent of the other parent. It is a defence if the child was taken to protect the child from danger or imminent harm or the alleged abductor was fleeing from imminent harm and taking the child as well.

In 1998 federal/provincial/territorial Minister of Justice approved use of national charging guidelines for use by police and Crown in these cases.

Please see the table on the following page for a summary of options on enforcement.



### III General Discussion

The above discussion has related to programs and services to help families come to terms with the new family arrangement after separation or divorce. Although there are issues regarding current legislation, discussion of these issues needs to be coordinated with consultation on possible amendments to the federal *Divorce Act*. Such consultations are anticipated to occur within the next year.

However, in the previous workshops, some general issues to discuss included the best interests of the child test, the terminology and the voice of the child.

#### A. Best Interests of the Child Test

"Who determines the best interest and what are the criteria of the best interest" (*Yorkton, May 1, 1998*).

"How can we help parents know what is in the best interests of the child" (*Yorkton, May 1, 1998*).

"In determining 'best interests' of the child how do we overcome gender stereotypes regarding parents and really focus on the children" (*Prince Albert, May 14, 1998*).

"There should be some criteria in deciding what is in the best interest of the children that witnessing violence is detrimental to the children" (*Prince Albert, May 14, 1998*).

A significant amount has been written about the meaning of the best interests of the child test. The *Divorce Act* acknowledges the best interests of the child test although it has been criticized for not articulating what should be considered in determining the best interests of the child. On the other hand, *The Children's Law Act* clearly articulates considerations to determine best interests.

In *The Children's Law Act*, the test encompasses the physical, emotional, intellectual and moral well being of the child. The court must look not only at the child's day-to-day needs but also to the child's longer-term growth and development. The test needs to remain fluid and flexible to respond to the unique circumstances of each child without sacrificing predictability of outcome.

**B. Terminology**

"Shared parenting should be a mandatory starting point"  
(Regina, May 22, 1998).

"Government should not legislate mandatory shared parenting"  
(Regina, May 22, 1998).

"What words can we use to describe parents/custody/ access  
which doesn't set up assumptions and adversarial notions"  
(Meadow Lake, May 27, 1998).

There are numerous terms to describe various parenting arrangements including sole custody, joint custody, parental responsibility and shared parenting. Terminology is an important issue; however, further discussion will occur during federal consultations expected in the near future.

**C. Hearing the Children's Voice**

How can we open up these lines of communication between  
parents and children" (Meadow Lake, May 27, 1998).

"What skills do child advocates need" (Meadow Lake, May  
27, 1998).

"How can we ensure that the best interests of the children are  
taken into consideration apart from the adults" (Prince Albert  
May 14, 1998).

"Using a "friend of the court" (lawyers?) who would be a link  
between child and court and represent child's best interests.  
Avoid becoming another legal adversary. Possible expansion of  
child advocacy program." (Prince Albert, May 14, 1998).

"How can children have a voice without being caught in the  
middle"(Regina, May 22, 1998).

The United Nations Convention on the Rights of the Child was completed in 1989 and has been ratified by over 200 countries. Canada was a signatory in 1989. Article 12 of the Convention asserts the right of the child to participate in decisions that affect his or her life:

Article 12

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Children testified at the Joint Parliament/Senate Committee on Custody and Access that they felt left out of their parent's divorce and separation proceedings that were determining arrangements for their daily lives. Several children testified they should have someone - a lawyer, advocate or extended family member - to represent them in legal proceedings.<sup>39</sup>

The Joint Committee concluded all children in these cases should have an opportunity to express their views to a skilled professional whose duty is to communicate those views to the judge. They felt it imperative for children in high conflict cases to have legal representation, particularly when the child's interests were not being advanced by counsel for either parent.

Recognizing the need to ensure children participate in a meaningful way in decisions that affect their lives, should lawyers for children be available only in exceptional circumstances or should all children whose parents are making custody and access decisions have access to legal representation? Does the lawyer advocate the child's wishes, put forward the child's best interests or merely assist the court in collecting relevant evidence? What about the capacity of the child to vocalize a position and instruct counsel? What about very young children and babies?

Do lawyers need special training to represent children? The American Bar Association has standards of practice for lawyers who represent children in abuse and neglect cases. There are specific roles and responsibilities for a lawyer appointed to represent a child. There are also a set of standards for trial judges to assure high quality legal representation.

Some would argue that the pressure to choose between parents and fear of hurting one of them could be damaging to children. Others argue a child's participation ensures the decision-making process is child-centred. It gives children the opportunity to convey their physical, emotional

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<sup>39</sup> "For the Sake of the Children" Joint Parliament Senate Committee on Custody and Access. December 11, 1999 at page 20.

and social needs to a judge so the decision that has life long ramifications on the child is not focused on parent's views and preferences.<sup>40</sup>

There are a variety of options to consider to hear children's voices. Children can be heard through judicial interviews, custody and access assessments or through non-lawyer representatives. There are also models for legal representation. Models that relate to representation of children are discussed in the Appendix.

When asking for a child's input, at what age should that input be sought" (*Regina, May 22, 1998*)

Child-friendly processes for children who appear as witnesses, whether they do or do not have a representative, are contained in *The Saskatchewan Evidence Act*:

- (i) Screens in the courtroom to prevent the child from seeing the parties and reducing anxiety of the child so the child can give accurate comprehensive testimony (section 42.1 of *The Saskatchewan Evidence Act*).
- (ii) Closed circuit television where the child testifies in a separate room while it is being televised in the courtroom.
- (iii) Video taped testimony where the child can express his or her own wishes in an informal setting. It is probably beneficial for young children who would be frightened by testifying in a courtroom. Videotaped interviews could be tendered as evidence. Saskatchewan law permits them to be admitted in civil proceedings (section 42.2 of *The Saskatchewan Evidence Act*).
- (iv) Although the law is unsettled in the civil context, it is generally inadmissible because of the hearsay rule, to transmit a child's views to the court through a third party. Some argue the rules should be more liberal to spare the child testifying in court.

A judicial interview may allow a child to express his or her views in a free and relaxed manner. Others argue the environment may be intimidating for a child and the interview may not have enough depth to assess the child's wishes. There is also the issue of training judges to interview children.<sup>41</sup>

If a child is going to testify, it may be beneficial for the child to have a support person who can explain the proceedings and be present while the child is waiting.

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<sup>40</sup> "The Voice of the Child in Divorce, Custody and Access Proceedings" Ronda Bessner 1999 for the FPT Family Law Committee at page 45.

<sup>41</sup> Ibid at page 60.

## Identifying Priorities

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How are children's voices to be heard when parents are negotiating their own agreement or are proceeding through mediation?

There are circumstances when it may be necessary and appropriate to include the children in the negotiation process such as:

- the children have expressed a strong interest in and opinion about the living arrangements;
- the parents are confused about the children's views and are anxious about not putting them in the middle; or
- the circumstances are especially difficult, the children are older or there are allegations of child abuse.

The decision to involve children in the mediation process rests with the parents. Factors include the age, maturity and circumstances of the children. There are numerous reasons why children should be involved, as the decision directly affects their lives and they can feel part of the process. It may even give them some relief to be listened to. It also helps parents focus on the child's needs and wants. There are also reasons why children should not participate in divorce mediation, such as concern about the psychological burden this places on children who may feel guilty regarding any choices made. As well, parents may discount the child's views, or worse, it may jeopardize future relationships with one or both parents.<sup>42</sup>

### **D. Accessibility to the Legal System**

"How can we ensure that people are receiving accurate legal information? (*Regina, May 22, 1998*)

"Open to interdisciplinary practice i.e. mediator, lawyer, counselor for consistent services are provided to the same family to whom they are all working with" (*Prince Albert, May 14, 1998*).

"How can we support-encourage the legal profession and legal systems to work in a less adversarial way" (*Saskatoon, May 21, 1998*).

"Make legal services more accessible to people who fall in the gap of income that is too high for Legal Aid, too low to afford a private lawyer" (*Prince Albert, May 14, 1998*).

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<sup>42</sup>

"The Role of Children in Mediation". Mimi Lyster, P.M. AFJ, Pat Dixon, M.S., P.M.AFM and Robert D. Benjamin, M.S.W., J.D., P.M. AFM presented at the Second World Congress on Family Law and the Riches of Children and Youth in San Francisco, California June 6, 1997.

Access to legal services can have several meanings, access in the sense of geography or access to legal advice and the court process due to the cost of legal representation. There are a variety of options to improve accessibility to the legal system. Education information and tools such as self-help kits developed by community organizations or government may encourage parents to cooperate and develop custody and access agreements on their own rather than proceeding through the court system.

Other considerations to improve accessibility to legal advice could include legal insurance, duty counsel, pro bono work or expansion of legal aid, restructuring of fees or restructuring of services.

**Thank you for taking the time to review these very important issues. Please forward your comments on the “Identifying Priorities” document to:**

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## Appendix

The following is a more detailed discussion of programs and services with specific references to jurisdictions that have implemented and sometimes evaluated their programs.

### **Assessment / Early Intervention to Address Conflict**

#### Community

Circle of Friends was a project piloted in Ottawa. The originators of the self-help program encouraged Boys and Girls Clubs of British Columbia to address a range of issues related to grief counseling. It is a support program for young people dealing with loss, including family deconstruction. Coping with loss is difficult and young people need the opportunity to express their feelings, have mutual support and learn how to take a difficult situation and turn it into one of growth and maturity. A support group facilitates an opportunity for children to discover their own strength and creates a safe and comfortable environment where children can participate.<sup>43</sup>

Young people meet in groups of 8 to 20 and participate in 8 weekly sessions conducted in schools or selected community agencies. All potential participants would be invited to a one-hour orientation at which time a trained facilitator would offer them a chance to share concerns and hear about an opportunity for them to voluntarily participate in professionally-led weekly meetings. Confidentiality would be taught and stressed. Schools, agencies and parents may be asked to join the project in offering children an opportunity to identify, in confidence, personal/family concerns that negatively affect their lives.<sup>44</sup>

Parents Together is a province-wide network of professionally-monitored self-help groups located in 26 communities throughout British Columbia with approximately 500 parents meeting weekly to support one another and seek positive resolutions to parent/teen conflicts. Trained volunteers teach new skills to solve problems and offer support and encouragement to follow through on plans for change. The groups meet weekly in many communities throughout British Columbia. The groups share success stories and offer support. Workshops on parenting issues are held.<sup>45</sup>

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<sup>43</sup> Circle of Friends. A proposal by the Boys and Girls Clubs of British Columbia. June 11, 1997.

<sup>44</sup> Ibid.

<sup>45</sup> Parents Together brochure. A program administered by Boys and Girls Clubs of British Columbia.

The Volunteer Grandparents Society of British Columbia is a non profit organization that matches people of grandparenting age with families who lack accessible grandparents. <sup>46</sup>

### Government

- Assessments

London, Ontario has a custody and access project housed within their London Family Court Clinic. The project covers three services: assessment, mediation and arbitration.

The assessment identifies and provides an understanding of the child's needs and the parents willingness and ability to meet those needs. The recommendations from the assessor may help parties reach a settlement. However, if the parties go to court, the assessment report can be used to assist the judge.

During the assessment, the parents are interviewed about their issues and the children's adjustment. Parents are observed in separate playroom sessions with the children. They are sometimes asked to attempt to discuss some of their concerns with each other near the end of the assessment so their ability to plan together can be evaluated. These sessions occur only with each parent's consent. Sometimes, children who are old enough are also interviewed during the assessment. Sessions may be arranged with other family members, new spouses, agencies or lawyers.<sup>47</sup>

The length of time for an assessment varies but each parent can expect to attend from three to six session. Parents are expected to have retained a lawyer for this process.<sup>48</sup>

If the parents are able to reach an agreement on the issues during the assessment, a brief report setting out the agreement can be provided. However, should a plan break down, a full assessment will be written on request. If no settlement is reached, the full report is prepared.<sup>49</sup>

In Nova Scotia a judge in an ongoing court matter must order an assessment that may cost as much as \$2,000 to \$3,000 to prepare. The amount paid is based on the parent's income. Assessors are social workers or psychologists with expertise in the area of children and custody

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<sup>46</sup> Volunteer Grandparents Society of B.C. brochure. Volunteer Grandparents Society of B.C. Vancouver B.C.

<sup>47</sup> *London Custody and Access Project London Family Court Clinic.* London Ontario.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.



## Identifying Priorities

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and access matters. Disagreement with the assessor's recommendations can be addressed in court.<sup>50</sup>

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- Parent education

### British Columbia:

British Columbia had a mandatory parent education pilot project from June 1998 until March 31, 1999. The educational sessions were three hours long and information was presented through lectures, video handouts and interaction with participants. The objective was to enable participants to make choices about resolving conflict. It was designed to address the situations of varying levels of conflict. For example, some dispute resolution options such as mediation, are not appropriate for all cases.<sup>51</sup>

Both the applicant and the respondent must attend the education session whenever there is an original order or a variation of child custody/access or support. They must attend the session before the first appearance date will be set. A Certificate of Attendance is provided to ensure attendance. However, there are circumstances when the parties do not have to attend before the first appearance including: a consent order has been reached; the application is urgent and based on a real or perceived risk of harm; or a person has already attended a session. There is a Program Administrator who will review other requests for not attending, such as a person is not fluent in the language in which the program is offered or does not reside where the program is being offered. As there are concerns about parents attending workshops together, parents must attend separate workshops to avoid conflict. The timing and early intervention of this course may prevent parties from becoming too entrenched in their position.

### Newfoundland:

Newfoundland has a parent education program titled “Parents are Forever”. Sessions include lectures and group discussion as well as hands-on practice of skills. The Newfoundland program is not mandatory. Both parents are encouraged to attend and are registered in separate sessions.<sup>52</sup>

Professionals who have expertise in separation/divorce facilitate the program. The program lasts approximately 10 hours and includes topics such as:

- the separation experience - parent and child perspectives;
- children’s needs;
- understanding conflict its sources and how children get caught in the middle;
- communication skills - listening, speaking and body language;
- do it yourself mediation, a four step model; and

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<sup>51</sup> “Mandatory Parenting After Separation Pilot Project” British Columbia Bulletin. September 1998.

<sup>52</sup> “Parents are Forever” informational pamphlet. Newfoundland.

## Identifying Priorities

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- the legal process - legal definitions, parenting plans, child support guidelines and alternatives to court.

### Nova Scotia:

In Nova Scotia, parent education sessions increase parents' awareness of the impact of parental conflict on children, improve communication between parents about their children's needs and provide new ways to avoid placing children in the middle of issues between their parents. The sessions are mandatory if a court officer has referred a parent. Failure to attend is noted in the court file and may affect a parent's ability to have a court date set.<sup>53</sup>

### Manitoba:

In addition to a mainstream education program, consideration was given to a special program for high conflict families, "For the Sake of the Children". The education for high conflict families contains messages such as "try to reduce the conflict between you and the other parent" and "children do best when both parents can be involved in a healthy relationship to the children". The realities associated with high to very high conflict relationships and the realities of abusive relationships are acknowledged and alternative interaction models are offered.<sup>54</sup>

Materials presented to people, who can, for the most part, communicate without acrimony, would not be appropriate for parents with high levels of conflict. The primary message of many parent education programs is "let go of the past", "communicate with the other parent for the children's sake" and "be a good parent to your children by staying in contact with the other parent". These are positive post-separation messages, if they do not place the listener or his/her children at risk.

During the education sessions parents are advised that there is a range of conflict, within the high conflict identification. Some individuals are engaged in high conflict interaction in the early stages of separation while experiencing the more extreme levels of anger associated with that phase. For others, this stage may last longer, particularly if they were not expecting the separation and there is a sense of betrayal. People can move (and are encouraged) to move to a lower conflict relationship, with more direct communication. However, when people are encouraged to engage in a direct contact mode of communication before they are ready, they will experience failure and conflict will increase. By encouraging parents to use a low contact mode of communication during phases of anger/high conflict, normalizing anger and not instilling guilt for a person's inability to be the "friendly parent", the program lays the groundwork for coping during high conflict phases and for movement toward low conflict relationships.

There are a range of strategies presented to the parents for communication in period of high conflict, including letter writing, e-mail and answering machines. Strategies for parenting

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<sup>53</sup> Overview The Family Division of the Supreme Court. Nova Scotia Justice.

<sup>54</sup> "Parent Education Programs in the Court System" Orysia Z. Kostiuk Program Coordinator for For the Sake of the Children.

relationships include supervised exchange or access programs. Medium conflict periods should be a time for low contact parenting plans and a more direct approach on certain issues. Counseling to address anxiety abandonment and sadness may be helpful. Strategies for communication include itemizing points of discussion prior to making direct phone calls, adhering to the topic at hand without going off on emotional tangents, choosing conversation times carefully and prearrange meetings in public places. Low conflict periods can be time for direct contact. Strategies for communication and parenting include direct contact and phone calls to check with each other about parenting plans and issues.<sup>55</sup>

### California:

The Pre-Contempt/Contemner's Group Diversion Counseling Program in Los Angeles County is an educational program designed for parents who have high levels of conflict, are chronically in violation of custody and visitation orders and seek frequent court intervention. The goals of the program are to provide parents with information about pertinent issues - the effects of divorce and parents' conflictual behaviour on children, custody and visitation laws, the range of child-sharing plans available, the consequences of noncompliance with court orders, and to improve parenting skills in communicating and resolving conflicts.

Both parents are required to attend by court order. The program consists of one two-hour session per week for six consecutive weeks. Three facilitators participate in the session and use lectures, videotapes, group discussions and role-play exercises.<sup>56</sup>

## **Dispute Resolution and Parenting Arrangements**

### Community

- Counseling

#### Family Centre of Winnipeg

Each parent attends 5 sessions separately and 5 sessions with their former partner. The separate sessions focus on psycho-educational and therapeutic issues to help parents understand children's needs. Emphasis is on parents taking responsibility for their role in continuing dispute and on building skills to reduce conflict. In the joint session, the parents will try to negotiate a parenting plan and resolve issues.

Children between the ages of 6 and 10 will attend a separate 10 week group to focus on issues that relate to witnessing conflict and violence and issues of being caught in the middle. It will address their sadness anxiety and withdrawal.

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<sup>55</sup>

Module 13 High Conflict Families For the Sake of the Children. Manitoba Justice.

<sup>56</sup>

In the Name of the Child. Johnson, Janet. And Vivien Rosenby. Free Press 1997. Pages

274 to 276.

This program is NOT an assessment program. Rather, it is a therapeutic treatment program. Parent involvement is voluntary and confidential.<sup>57</sup>

Counseling must contain precise legal information and relate to the entire social and psychological situation. Joint counseling by lawyers and family counselors offers a considerably wider range of areas in which the persons concerns can be considered.

Especially where children are affected by the failure of the parental relationship, the parents must be required to maintain a minimum standard of communication and cooperation. The aim of the mediation part of the project is to reach a joint responsible arrangement for the future ways of life of their children. Parents are able to find a way to exercise their respective parental roles in a manner acceptable to themselves as well as to their children. In doing so, the children concerned are to be included in the mediation process integrating them as directly as possible so as to give them an opportunity to articulate and introduce their interests themselves. A pair of mediators consists of a registered psychologist and a lawyer.

Very young children are usually not able to express their situation with words and they need more child-oriented models of expression. Working with a group of children to create room and protection for the child and to offer opportunities of expression and problem management removes the lack of expression.

- Case Management

### Saskatchewan:

Prior to proceeding to trial in Saskatchewan, the parties and their lawyers must meet with a judge in a pre-trial conference. The process is relatively informal and in most centres can take place within eight weeks from when the parties have the necessary information prepared. The focus of the conference is on settlement. A judge is there to advise lawyers and parties on legal issues. A settlement can be quickly converted into a judgement. A majority of files commenced are settled during this pre-trial process.

### Manitoba:

Manitoba Justice launched the Case Management Pilot Project in November 1995. The project objectives were to reduce costs to the litigants, reduce number of contested hearings, reduce delay and increase litigant lawyer judge satisfaction with the court process.<sup>58</sup>

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<sup>57</sup> "Group Treatment for High Conflict Families of Divorce Seeking Referrals". The Family Centre of Winnipeg.

<sup>58</sup> *Case Management Pilot Project Data Evaluation Report*. E. Frank Cormier Research and Consulting. Winnipeg, Manitoba. March 30, 1998 at page 1.

## Identifying Priorities

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An initial case conference is scheduled when one of the parties requests the conference, a court date is set for the hearing of a contested motion, an answer is filed by the respondent or 90 days have passed since the petition was filed and no answer has been filed. Parties must attend all case conferences unless excused by the case conference judge.

The case conference judge will be assigned to preside at the first case conference and will remain available to assist parties and their lawyers in managing the case until it is finished.

An evaluation of the program has determined clients were more likely to be satisfied with the amount of their legal fees than clients that were non-case managed. Data also showed that cases are resolved more quickly and with fewer contested motions under the Case Management system. In fact, contested hearings were clearly reduced through the program. The program was also effective in reducing delay in the processing of cases. The average duration of cases in the non-case management sample was 56 days longer than in the Case Management sample. As would be expected, the data showed the program increased satisfaction with the court system.<sup>59</sup>

### Nova Scotia:

The first step for parties to go through is an extensive pre-court intake process, assisted by court officers. The court officers attempt to conciliate the case where it is possible and appropriate. The staff has the authority to make orders that would assist in the disclosure process. They provide referrals to professional services, such as mediation and counseling. This process encourages the identification of issues, proper disclosure by the parties and helps the parties to reach a satisfactory and fair resolution.<sup>60</sup>

### British Columbia:

In January 1996 the British Columbia Supreme Court introduced early intervention meetings for *Divorce Act* and *The Family Relations Act* matters. These meetings should reduce the number of interim applications or the time required for such applications, reduce the number of actions for trial and minimize the length of trials. They should help reduce delay and costs in litigation.

After the Answer to an application is filed, an early intervention meeting will be held. No contested cases will be heard without the early intervention meeting having first taken place, unless it is an emergency application.

British Columbia changed their family court rules on December 1, 1998 to include a requirement to inform parents about the range of options for resolving custody, access or support issues and

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<sup>59</sup> *Case Management Pilot Project Data Evaluation Report*. E. Frank Cormier Research and Consulting. Winnipeg, Manitoba. March 30, 1998 at page 2-3.

<sup>60</sup> *Family Division Update*. Supreme Court (Family Division). Issue Number One, December 1998, Nova Scotia.

their right to choose the best option for themselves and their children. When matters are urgent, such as those involving family violence, parents will be assisted to attend court and be referred to emergency services. When they are not urgent, the parents meet separately with a family justice counselor to discuss options that may include attending court, referrals to a lawyer, a child support clerk, a parenting after separation program or mediation with the other parent. The early intervention meeting lasts about 30 to 45 minutes to identify legitimate issues and eliminate or reduce frivolous and unnecessary issues. The family justice counselors do not provide legal advice. When parents file applications for custody access or support they are included in the program.<sup>61</sup>

### Ontario:

In 1995 the Ontario Court (General Division) introduced a program of Dispute Resolution Officers (DRO's) to vet applications to vary existing orders.

DRO's are senior members of the family law bar. Their function is to hear family law applications, to conduct case conferences and from time to time, and on consent only, to sort out contested motions referred by a judge. The DRO's practice "an active listening" approach as in mediation. They look for areas of potential agreement or common concerns to build on. Identifying the issues and trying to approach them in order of difficulty helps. Although resolution of all the issues may not be possible, it may be possible to reach an agreement on the process. Affording the parties the opportunity to meet and discuss settlement is often all that is necessary to divert the parties from a court process they see as expensive, time-consuming and intimidating. The DRO's are members in good standing of the Law Society of Upper Canada and have practiced primarily in the field of family law for a minimum of ten years. They need neutrality, an understanding of the legal issues, interpersonal skills and ability to develop innovative solutions and knowledge of the process if no agreement is reached. The program was evaluated in 1997 and statistics showed 70% of cases did not proceed beyond the DRO stage.<sup>62</sup>

### Arizona:

In Arizona, differentiated case flow management is available very early in the process. The case flow manager screens cases, meets with the parties and their lawyers and will set time lines for the process. He or she can facilitate settlement, set the case for a short trial, refer the matter to mediation or make an immediate referral to a judge if necessary.

Ontario has had a judicial case management program since 1994. The key to their system is the same case management judge has the file through to completion of the case. The first case conference is about 15 minutes and the parties go through the issues and set timetable and tasks. However, it may take an hour if the judge senses that one particular issue is a stumbling

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<sup>61</sup> Family Justice Registry Project. British Columbia Ministry of the Attorney General.

<sup>62</sup> Manual for Dispute Resolution Officers in the Ontario Court General Division. November 1997. Ontario Court (General Division) Toronto Family Law.

block and resolution of that issue can settle the case. Mediation services keeps two hours a day open for quick referral from a case management judge for mediation. If parties have entrenched positions and a trial is inevitable then the case conference time sets out steps for trial. The success of the system relies on the intuition and experience of judges.<sup>63</sup>

- Mediation

London, Ontario:

Parents have a choice of open or closed mediation. Closed mediation provides confidentiality. In open mediation the mediator may prepare a report or actually appear in court.<sup>64</sup>

Parents participating in mediation are advised to retain a lawyer. They can, however, waive a lawyer. Once the mediation document is drafted, parents are strongly urged to consult their lawyers before they sign.

When parents have specific issues, such as Christmas vacation, but have difficulty choosing among several plans for the children, they may want to pursue arbitration. Parents want a clear direction from a professional to resolve their dispute. The arbitrator evaluates the plans in the context of the parents needs. Arbitration can be binding on the parents or advisory where the parents agree that they will carefully consider the recommendation of the arbitrator but not be bound by it. At the conclusion of the arbitration the arbitrator provides a letter to counsel and, if necessary, to court, setting out the conclusions and the basis for conclusions.<sup>65</sup>

Nova Scotia:

In Nova Scotia, a conciliation service begins after one parent starts an action in court. The parents, either separately or together, meet with a court officer to help them focus on their situation and consider options. It is different than mediation, as there is no negotiation of the issues. Rather, the court officer/conciliator helps the parents' sort out the steps for the process. Conciliation identifies the issues, ensures proper disclosure, reduces conflict, considers options to resolve issues and can recommend other steps. A conciliation record is prepared and submitted to a judge to advise what issues have been identified. If the parties are able to reach an agreement, the conciliator assists the parties in drafting an order that outlines the agreement. The parents then consult a lawyer about the agreement, and, if satisfied, the order is forwarded to a judge to sign. The conciliation process in Nova Scotia is mandatory.<sup>66</sup>

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*Case Management in the Family Division Pilot Project Discussion paper*. Manitoba Justice February 1998 (for discussion purposes only).

<sup>64</sup> *London Custody and Access Project London Family Court Clinic*. London Ontario

<sup>65</sup> Ibid.

<sup>66</sup> Overview The Family Division of the Supreme Court. Nova Scotia Justice.



- Develop special services to deal with family violence and abuse allegations

The Spousal Abuse, Child Custody and Access Research Team in New Brunswick includes lawyers, psychologists, sociologists, social workers, mediators, government and academic interests. They offer research, data and guidance to the legal community on how best to make safe, effective custody and access decisions about children in the face of allegations that one or the other parent abuses or has abused the other.

### **Enforcement**

#### Government

- Remedies

The Uniform Child Custody Jurisdiction and Enforcement Act has been adopted in the United States in all fifty states, the District of Columbia and the Virgin Islands. As well, the federal government enacted the Parental Kidnapping Prevention Act to address interstate custody jurisdictional problems. The PKPA mandates that state authorities give full faith and credit to other state's custody determinations.<sup>67</sup>

- Special Masters

The concept of Special Master in child custody cases expands the original concept to include both an on-going relationship between the Special Master and the parents and adding mediative, educational and therapeutic elements to the process. Thus, a Special Master is most often a psychologist but can be any mental health professional, mediator or family law lawyer who specializes in helping high conflict, post-divorce families resolve disputes through such processes as mediation, developmental education and quasi-therapeutic intervention. When these efforts fail, the Special Master, as Judicial Officer, makes a decision in the manner a judge would and is subject to an appeals process.<sup>68</sup>

The parents pay the fees for services of a Special Master. Most Special Masters request a retainer when they begin their work with a family. Hiring a Special Master is a serious matter. Once you decided to have a Special Master and have named that person in a court order, you may be "stuck" with that person for the whole term that is defined in the order.

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<sup>67</sup> Uniform Child-Custody Jurisdiction and Enforcement Act national Conference of Commissioners on Uniform State Laws. September 1997.

<sup>68</sup> *The Special Master in Child Custody Cases*. S. Margaret Lee, Ph.D. Published in Association of Family and Conciliation Courts NEWSLETTER, Volume 14, Number 2. Spring 1995.

- Friend of the Court

Any party may complain to the Michigan "Friend of the Court" that he or she has been denied access and the agency then investigates. It makes a determination as to whether an order has been breached and tries to mediate the issue. If mediation is unsuccessful, the matter is referred to a referee. This referee, who is a mediator, may hold hearings and then recommend an order. The parties may appeal the recommendations to a court.

If the matter is not successfully resolved, then the agency may:

- provide compensatory contact i.e. without going to court the non-custodial parent can receive additional access time. An access arrears account is monitored by the agency;
- bring a contempt action in court; or
- petition the court for a change in the contact order.<sup>69</sup>

- Supervised Access and Exchange

An extensive evaluation of the Australian program was completed and is available on the Internet. The following themes arose. The majority of mothers expressed a sense of relief at having accessed the service, particularly reporting a typical pattern prior to the service as extremely stressful and threatening. Responses were more varied for fathers. There were many men who, at the outset, expressed anger and resentment at having to use the service, especially if it was court ordered.

- Parenting Coordinator

A co-parenting coordinator helps parents make ongoing decisions about their children over the long term. It has been in place in a few jurisdictions: special master (California), wise person (New Mexico), custody commissioner (Hawaii) and co-parenting counselor or mediation / arbitration (Colorado). Generally, there are two models in practice. First, the co-parenting arbitrator is called upon to arbitrate only when the parents cannot settle a specific dispute. There is no counseling function. Second, the coordinator acts as the counselor, mediator or therapist and exercises the right to arbitrate where parents fail to agree. To institute either model, a written contract with the parties and their lawyers is signed by both parties.<sup>70</sup>

- Children's Voice

- (i) Amicus Curiae:

- An Amicus Curiae or "friend of the court" is a lawyer appointed to assist the court in an impartial exposition of the facts, the law and interests of non participants in court

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<sup>69</sup> *Model Friend of the Court*. State Court Administrative Office, Friend of the Court Bureau.

<sup>70</sup> *In the Name of the Child*. Janet Johnson and Vivien Rosenby. 1997 at pages 293 to 295.

proceedings. They assist the court in determining the best interests of the child. Amicus curiae are a neutral position, not an advocate for the child. They have no obligation to ascertain or present the child's wishes.<sup>71</sup>

(ii) Litigation Guardian:

Litigation guardians must take the necessary measures to ascertain the best interests of the child and present them to the court. They can submit reports, solicit expert testimony, examine and cross-examine witnesses. A litigation guardian may disregard a child's instructions if, in his or her opinion, these instructions are not in accordance with the child's best interests.<sup>72</sup>

(iii) Advocate:

The advocate represents the legal rights and interests of his or her client whether it is an adult or a child. They can suggest a child re-evaluate his or her position. However, they are under an obligation to put forth the child's preferences and wishes regardless if they are in the best interests of the child.<sup>73</sup>

### Ontario: Office of the Children's Lawyer in Toronto

Ontario has a Children's Lawyer who is an advocate of the child's wishes. The children's lawyer advocates for a child client so that the child's interests are understood and communicated to the parents. The children's lawyer asks the child about his or her wishes and preferences. The lawyer represents the child's wishes rather than the best interests of the child. Counsel is not an amicus curiae or a litigation guardian.

Counsel will gather information from court documents and by speaking to significant persons in the child's life. Counsel meets with the child to obtain his or her preferences if any. Counsel may attend settlement meetings and pre-trials. Counsel will keep the child informed about the status of proceedings. Counsel will ensure all relevant evidence of the child's views is heard in a contested matter.<sup>74</sup>

The Office of the Children's Lawyer in Toronto is an independent crown law officer appointed to represent children in the administration of justice. For custody and access cases, the facts must meet the guidelines and criteria to be assigned to child's counsel.

If a model of legal representation is considered, lawyers need to have appropriate skills to represent children. They need to be able to communicate with young people and comprehend child psychology. They must understand the stages of development, be able to comprehend

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<sup>71</sup> "The Voice of the Child in Divorce, Custody and Access Proceedings" Ronda Bessner 1999 for the FPT Family Law Committee at page 23.

<sup>72</sup> Ibid at page 24.

<sup>73</sup> Ibid at page 25.

<sup>74</sup> "The Role of the Children's Lawyer" Wilson A. McTavish, Q.C. Office of the Children's Lawyer. Toronto. January 1996 at appendix D.

information conveyed by the child and possess ability to communicate information in simple language so they can appropriately interview children.<sup>75</sup>

Alaska has a Guardian Ad Litem (litigation guardian) program operating. Guardians ad Litem are appointed by the court to represent the best interests of the children in court. They perform investigations of the facts involving the children. However, they are present in court to speak on behalf of the children. This does not mean the Guardian must always ask a judge to do what a child wants done. Rather, the Guardian listens to child and then must decide whether what the child wants is best for the child.<sup>76</sup>

In 1980, the State Court of Florida began implementing a court volunteer program designed to assist abused and neglected children. The role of the Guardian Ad Litem Program is to represent the best interests of abused and neglected children in the judicial system. Today, the appointment of a Guardian Ad Litem is mandated in all juvenile dependency and divorce custody cases involving allegations of child abuse or neglect. A guardian is a specially trained volunteer appointed as an officer of the court and is legally obligated to do everything possible to ensure the judgment rendered in the case is in the child's best interest.<sup>77</sup>

The Guardian is an investigator and interviews people involved with the child. The Guardian is a reporter and compiles the information from the investigation. The Guardian protects the child from insensitive questioning and harmful effects of being embroiled in the adversarial court process. The Guardian is a spokesperson to assure that the best interests of the child are presented. The Guardian serves as a monitor of the agencies and persons who provide services to the child.<sup>78</sup>

The Hong Kong Law Reform Commission recommended that the wishes of the child be one consideration for the best interests of the child. In Saskatchewan, the best interests of the child test in *The Children's Law Act* already includes the child's wishes.

The Hong Kong Commission goes on to suggest that the views of the child can be determined by a judge interviewing the child or through a social welfare officer or psychologist. The judge decides whether a child is mature enough to express his or her views. They also recommend that a separate representative for the child be appointed to ensure all information relevant to determining the best interests is brought to the attention of the court. Criteria for the

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<sup>75</sup> "The Voice of the Child in Divorce, Custody and Access Proceedings" Ronda Bessner. 1999 for the FPT Family Law Committee at page 32.

<sup>76</sup> "Investigators vs. Guardians ad Litem". Pradell and Associates Attorneys at Law.

<sup>77</sup> Leon County, Florida, USA Guardian Ad Litem Program. Second Judicial Circuit Tallahassee Florida.

<sup>78</sup> Ibid.

appointment of a separate representative and guidelines as to how a person should act were also recommended.<sup>79</sup>

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*Consultation Paper on Guardianship and Custody.* The Law Reform Commission of Hong Kong. December 1998 at page 6.