Department of Justice Canada
Ministère de la Justice Canada

BACKGROUND PAPER

FEDERATION OF LAW SOCIETIES OF CANADA CONSULTATION ON CHILD SUPPORT GUIDELINES AND CUSTODY AND ACCESS

2001-FCY-10E

Canada

Federation of Law Societies of Canada
Consultation on Child Support Guidelines and Custody and Access

Prepared by:
Federation of Law Societies of Canada
and
Canadian Research Institute for Law and the Family

Joanne J. Paetsch, B.A.,
Lorne D. Bertrand, Ph.D., and
Joseph P. Hornick, Ph.D.

Canadian Research Institute for Law and the Family

Presented to:
Family, Children and Youth Section
Department of Justice Canada

Aussi disponible en français

For more information on this report, please call the Department of Justice Canada at 1-888-373-2222.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

This project was conducted with the assistance and support of many individuals and organizations. First, we would like to acknowledge the financial support of the Department of Justice Canada. The Federation of Law Societies of Canada supported the project by arranging for the consultation to take place in conjunction with the National Family Law Program in St. John's, Newfoundland.

We thank the members of the Project Advisory Committee for their guidance: Marilyn Bongard, Family, Children and Youth Section, Department of Justice Canada; Carolina Giliberti, [former] Team Leader, Child Support Team, Department of Justice Canada; Dorothy Hepworth, Research Coordinator, Child Support Team, Department of Justice Canada; George Kiefl, Research Officer, Child Support Team, Department of Justice Canada; and The Honourable Justice R. James Williams, Member, Federal Child Support Guidelines Advisory Committee and Board Member, Canadian Research Institute for Law and the Family.

We appreciate the willingness of members of the Federal Child Support Guidelines Advisory Committee for serving as workshop facilitators. We thank Heather Walker for her administrative assistance and Linda Bland for data input.

Thanks, of course, are due to all who attended the conference workshops and completed the survey. Without their participation, there would have been no project.

The Canadian Research Institute for Law and the Family is supported by a grant from the Alberta Law Foundation.

1.0 INTRODUCTION

1.1 Purpose of the Project

The purpose of this project was to get feedback from lawyers and judges about their experiences and perceptions regarding the Federal Child Support Guidelines and the issues of custody and access. The project was undertaken by the Federation of Law Societies of Canada (FLSC) on behalf of the Department of Justice Canada. The Federation worked in partnership with the Canadian Research Institute for Law and the Family (CRILF).

The project was held in conjunction with the Federation's National Family Law Program in St. John's, Newfoundland, July 10-13, 2000. Participants were asked to comment on issues and policy options, based on their knowledge and experience.

1.2 Methodology

The consultation consisted of two components: a survey completed by conference participants and a series of workshops with small groups of conference participants, including a brief questionnaire and a discussion period. A Project Advisory Committee was established at the beginning of the project to identify issues to be addressed in the survey and workshops, review the draft survey, and decide on the format and content of the workshops in St. John's (see Appendix A for a list of the Project Advisory Committee members).

The survey on custody and access issues was distributed to participants at the conference in St. John's (with the conference materials during registration) (see Appendix B for a copy of the survey). Participants were asked to return completed surveys to the Registration Desk anytime during the conference, along with an entry form for a draw. The draw, held during the dinner function on Wednesday, July 12, was provided as an incentive to participate in the project. There were three $500 cash prizes.

The workshops were intended to gain more in-depth information from a small group of judges and lawyers concerning specific issues and policy options regarding the Federal Child Support Guidelines and custody and access. Workshops on child support guidelines issues included Support of Children Over the Age of Majority; Spouse in Place of a Parent; and Shared Custody. One workshop was held on an issue related to custody and access, specifically Clarifying Terminology and Parental Responsibility.

The workshops on the Federal Child Support Guidelines were held simultaneously on Monday, July 10, 2000, for approximately one hour at the end of the day. Conference participants were asked to attend the workshop that most interested them. The workshop on custody and access was held for approximately one hour at the end of the day on Tuesday, July 11.

The workshops were facilitated by representatives of the Department of Justice Canada and members of the Advisory Committee for the Implementation of the Child Support Guidelines. As participants arrived at each workshop, they were given a brief background sheet outlining the issue to be discussed, as well as a brief questionnaire regarding policy options. (Participants were asked to answer the questions, and return their responses at the end of the workshop.) Each

workshop then began with a brief introduction about the project, followed by a general introduction to the issue by the facilitator. The balance of the workshop was spent discussing possible solutions to the issues. Notes were taken during each workshop by observers working on behalf of CRILF and the Federation of Law Societies of Canada.

1.3 Limitations

Certain limitations of the data presented in this report may affect generalizations about the findings with regard to the legal community as a whole. Specifically, one should keep in mind that the project participants in the project do not represent a random sample of individuals in the Canadian legal community. Delegates to the Federation of Law Societies of Canada's National Family Law Program likely consist of lawyers and judges most knowledgeable about family law in general and particularly about issues regarding the Federal Child Support Guidelines and custody and access.

In addition, the sample is not geographically representative of lawyers and judges across Canada. For example, there was a higher proportion of respondents from Nova Scotia, no doubt due to the location of the conference in St. John's, Newfoundland.

2.0 SURVEY ON CUSTODY AND ACCESS ISSUES

2.1 Demographics of Survey Respondents

A total of 105 surveys were completed and returned to the CRILF. Of these, 79 percent (n=83) were completed by lawyers, 16 percent (n=17) by judges, and 5 percent (n=5) by others (e.g. professor, mediator, court officer). The majority of respondents were from Ontario (23 percent), Nova Scotia (22 percent) and Alberta (18 percent) (see Figure 2.1).

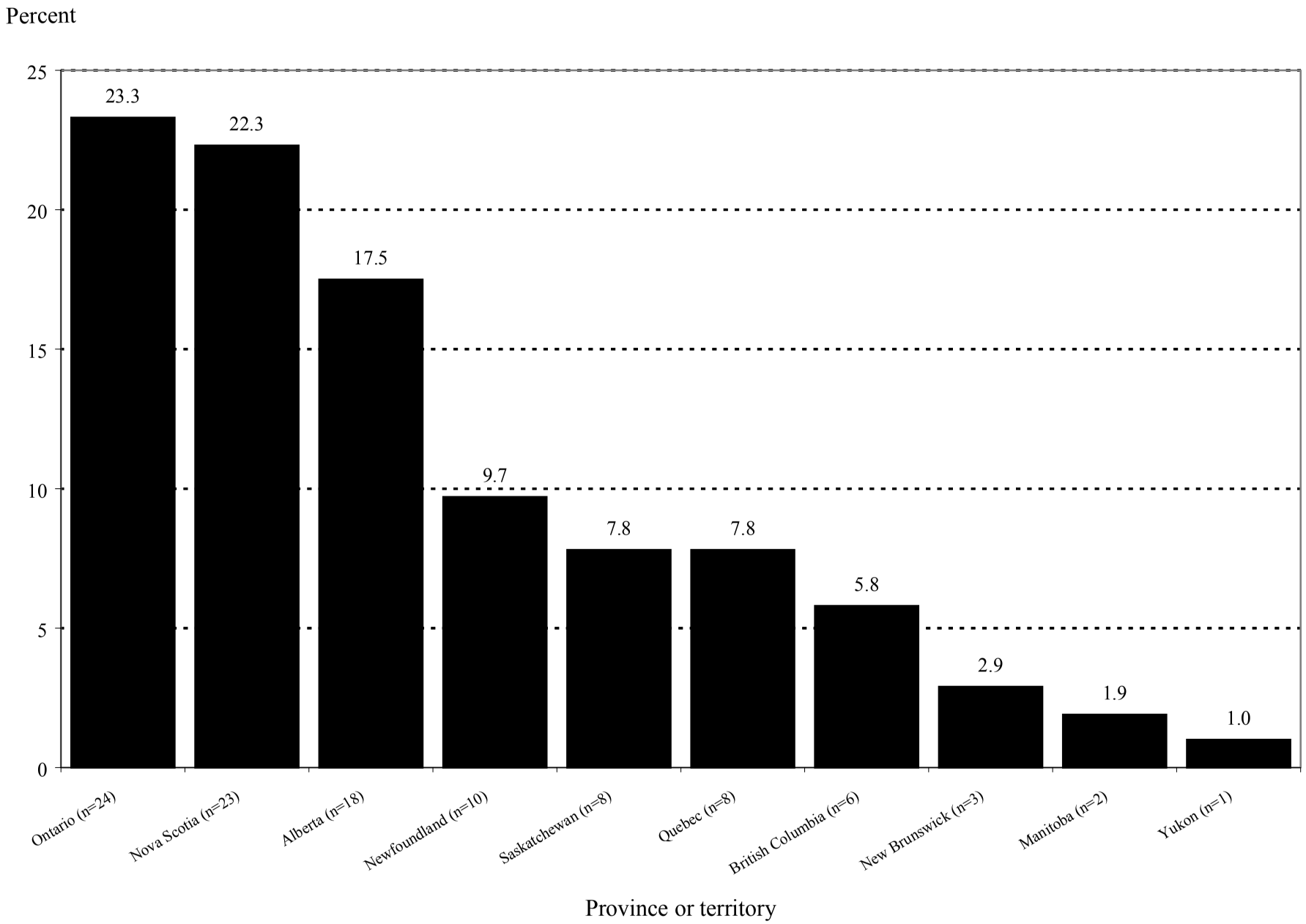
When asked approximately how many custody and access cases they had handled in the past year, respondents reported a wide range (0 to 400), with an average of 50. Of the lawyers who reported whether their cases were funded by Legal Aid, two thirds (64 percent) said that none of their cases were, while 12 percent said all of their cases were. Nearly three-quarters of the lawyers (74 percent) said their clients consisted of more or less equal proportions of custodial and non-custodial parents, and 23 percent said their clients were mostly custodial parents. When asked how often they refer their clients to mediation, one half of them (49 percent) said frequently, one third (33 percent) said occasionally, 16 percent said always and 1 percent said never. The majority of lawyers (81 percent) said their cases proceed to litigation occasionally, and 15 percent said they frequently proceed to litigation.

2.2 Best Interests of the Child

All but one respondent (99 percent) agreed that the *Divorce Act* should continue to include the "best interests of the child" test, and a majority (71 percent) thought that the Act should include more specific criteria with respect to the best interests of the child. Respondents were then asked to rate specific criteria as either high, medium or low in importance or not relevant in terms of the best interests of the child. As indicated in Table 2.1, the criteria that respondents felt were of highest importance were those dealing with maintaining a strong and stable relationship with both parents, protecting the child from harm caused by violence, and providing for the basic needs of the child (e.g. the child's health and education).

Respondents were also given an opportunity to suggest other criteria that should be specified in the *Divorce Act* with respect to the best interests of the child. Of the 16 responses received, the most common was the length of time that the child had lived in a stable secure environment (see Appendix C, Table C-1).

Figure 2.1: Percentage of respondents from each province or territory



Total n = 105. Missing cases = 2.

Table 2.1: Respondents' ratings of the importance of "Best Interests of the Child" criteria

Best interest criteria	Level of importance							
	High		Medium		Low		Not relevant	
	N	%	N	%	N	%	N	%
Opportunity for the child to maintain a strong and stable relationship with both parents	79	92.9	4	4.7	0	0.0	2	2.4
Need to protect the child from physical or psychological harm caused by violence or exposure to violence	77	90.6	5	5.9	3	3.5	0	0.0
Arrangements that encourage the child's emotional growth, health, stability and physical care at every stage of the child's development	65	79.3	16	19.5	0	0.0	1	1.2
Ability of parent(s) to provide guidance, education, basic needs and other special needs of the child	66	77.6	17	20.0	1	1.2	1	1.2
Willingness of each parent to encourage a close relationship between the child and the other parent	56	66.7	22	26.2	3	3.6	3	3.6
Protecting the child from continued exposure to conflict between parents	49	59.0	29	34.9	3	3.6	2	2.4
Personality, character and emotional needs of the child	49	57.6	30	35.3	5	5.9	1	1.2
Quality of the relationship that the child has with the parent(s)	47	55.3	36	42.4	2	2.4	0	0.0
Ability of the parents to cooperate and communicate with each other on important issues concerning the child	39	45.9	27	31.8	9	10.6	10	11.8
Ensuring that no preference is given to either parent on the basis of gender	33	38.8	21	24.7	13	15.3	18	21.2
Ability of the child to adjust to the new parenting arrangement	30	35.7	39	46.4	10	11.9	5	6.0
Caregiving role assumed by each parent before the break-up	28	33.3	36	42.9	16	19.0	4	4.8
Opportunity for the child to maintain a strong and stable relationship with other members of his or her family	28	32.6	54	62.8	3	3.5	1	1.2
Opinions and wishes expressed by the child	21	25.6	42	51.2	19	23.2	0	0.0
Child's cultural, ethnic and religious background	8	9.8	51	62.2	17	20.7	6	7.3

While nearly all respondents thought the "best interests" test should continue to be included in the *Divorce Act*, some felt the list of options provided in the survey needed to be qualified: "[The] list should not be exhaustive … and all criteria should not have to be applied to every case" and "Your criteria are all positive: often the challenge is to eliminate the negative factors." One respondent cautioned against including the options in the *Divorce Act*: "The suggested criteria reflect the latest 'bandwagon' thinking. If they are entrenched in the *Divorce Act*, it will become very inflexible."

2.3 Voice of the Child

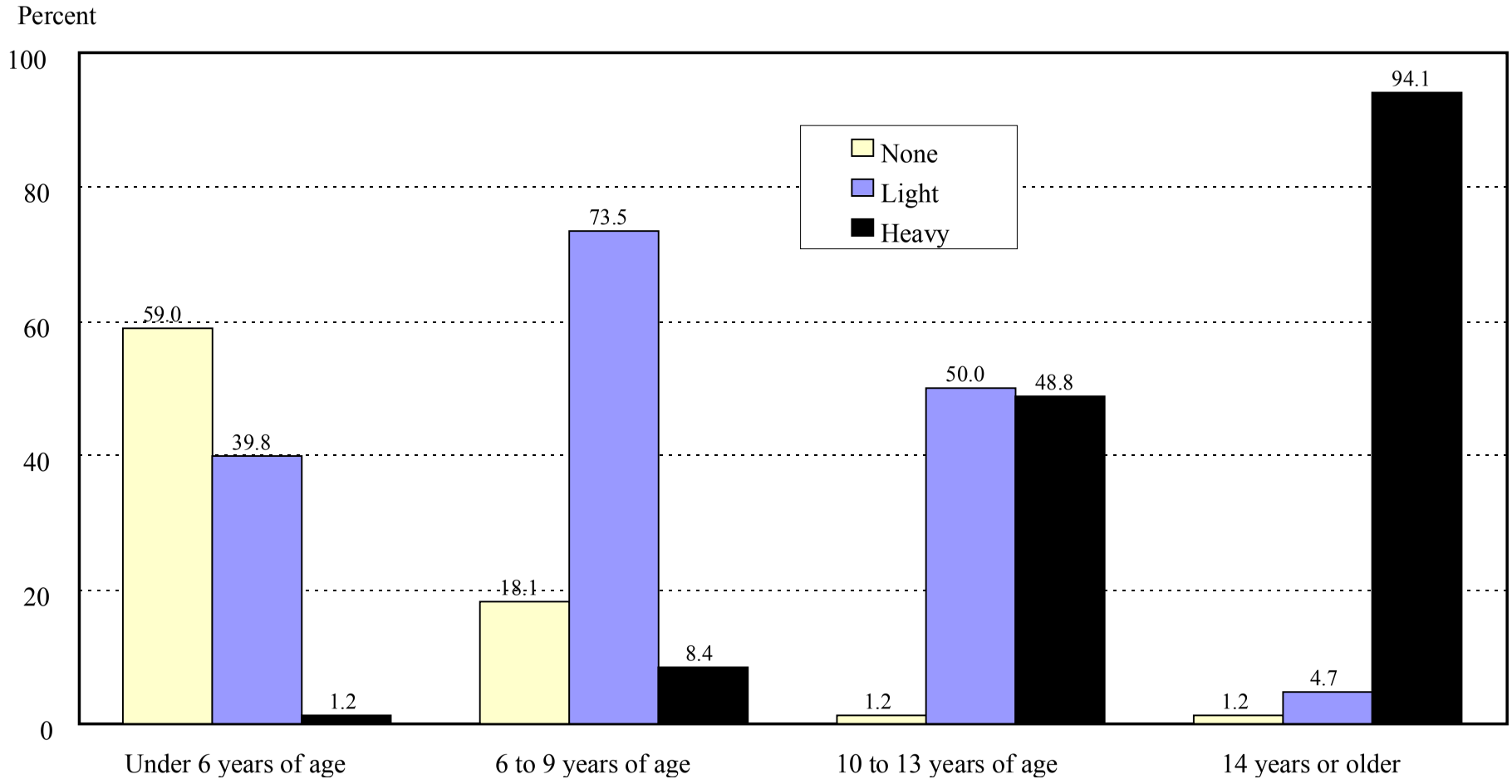
The United Nations Convention on the Rights of the Child asserts the right of a child to participate in decisions that affect his or her life. Respondents were asked if they thought legislative reforms or service improvements were necessary to better enable children to voice their views when parenting decisions affecting them were made. The majority (78 percent) said yes. Respondents were then asked their opinion about specific measures. Two thirds (66 percent) agreed with assessment reports and more than half (56 percent) agreed with legal representation for the child. Only one quarter of respondents agreed with non-legal representation for the child (25 percent) and judicial interview with child (24 percent). Respondents were least likely to agree with testimony by the child (15 percent) and to having a legislative provision stating that parents should respectfully consult their children when making parenting arrangements upon separation (8 percent). With regard to consulting with children, one respondent commented that "I like the concept but am not convinced that it could work, and there is a danger in encouraging parents to consult in that they are likely to try to sway the opinion of the child."

Respondents were asked whether they thought other legislative reforms or service improvements were needed to enable children to voice their views. The most common suggestions of the 19 given were: government-sponsored assessments; the use of an *amicus curiae*; and the use of discretion depending on circumstances (see Appendix C, Table C-2).

When respondents were asked what factors should be considered when deciding the degree of importance to be given to a child's views, most were very supportive of all factors listed. Specifically, these factors were: age of the child (80 percent); indication of parental coaching (78 percent); the child's reasons for views (76 percent); the child's emotional state (69 percent); ability of the child to understand the situation (68 percent); and ability of the child to communicate (66 percent). Respondents made 10 other suggestions for factors to be considered (see Appendix C, Table C-3).

Respondents were fairly consistent when asked how much weight should be given to the preferences of a child regarding custody decisions at specified ages. Predictably, respondents thought that the older the child, the more weight should be given to her or his preferences (see Figure 2.2). While 59 percent thought no weight should be given to the preferences of children under age 6, 74 percent thought the preferences of 6- to 9-year-olds should be weighed lightly,

Figure 2.2: Respondents' views on how much weight should be given to the preference of children at specified age ranges



Total n = 105. Missing cases = 22.

and 94 percent thought the preferences of children 14 or over should be weighed heavily. For ages 10 to 13, 50 percent of respondents thought their preferences should be weighed lightly, and 48 percent thought they should be weighed heavily.

Some respondents also offered cautionary comments in this area. For example, one respondent stated that "children don't always know what is best for them or even what they want, and there will be *many* cases when it is not even appropriate to ask them… must be very careful that they are not being asked to choose between parents."

2.4 Family Violence

The Government of Canada strongly believes that it is important to send a message that all aspects of the family law system must take into account incidents of family violence involving the child or a member of the child's family. Survey respondents were asked how legislation should recognize family violence as a factor in decision making with respect to children after separation and divorce. As shown in Table 2.2, the options that received the most support from respondents were that history of family violence should be a factor considered in evaluating the "best interests of the child" test, and that legislation should recognize domestic violence as a factor that negatively affects children and that should be considered in determining parenting arrangements. Only one quarter of respondents agreed that legislation should preclude mandatory mediation when there is evidence of family violence, and only one third thought that legislation should provide a statutory definition of family violence.

Table 2.2: Respondents' views on how legislation should recognize family violence in decision making about children

Factors	N	%
History of family violence should be a factor considered in evaluating the "best interests of the child" test	88	83.8
Legislation should provide that domestic violence is a factor that negatively affects children and should be considered in determining parenting arrangements	86	81.9
Legislation should provide that supervised access should be ordered where necessary to protect the child	69	65.7
Legislation should clarify that shared parenting should not be ordered when it could cause abuse, serious harm or injury	58	55.2
Legislation should create an offence for false allegations of abuse or violence	50	47.6
Legislation should provide a statutory definition of family violence	37	35.2
Legislation should preclude mandatory mediation when there is evidence of family violence	29	27.6
Other	12	11.4

There were 13 "other" suggestions made by 12 respondents for how legislation should recognize family violence as a factor in decision making (see Appendix C, Table C-4). Two people cautioned that while all the suggestions given were factors, they should not be specifically legislated because the result might be increased false allegations. One participant noted that "all too often, the allegations are false or exaggerated greatly. We must consider whether we have one isolated incident or a pattern of violence over time."

Respondents were also asked what other reforms or service improvements would be useful. Each of the following options was supported by a majority of respondents: better access supervision services (78 percent); more education for parents on the effects of family violence on children (72 percent); independent assessment services (70 percent); better counseling services (66 percent); legal representation for children (61 percent); better access to Legal Aid (61 percent); and more education for professionals on the effects of family violence on children (51 percent). Thirty-two "other" suggestions were made by respondents (see Appendix C, Table C-5). The most common were judicial education on the effects of violence on children, education for parents on how to communicate with the other spouse after separation, and counselling services for children.

2.5 Managing High Conflict Situations

Experts agree that exposure to unresolved, high conflict situations increases risks to children. Respondents were asked if legislation should define high conflict spousal relationships, and 40 percent said it should. When asked what factors should be included in a legislative definition of high conflict spousal relationships, the responses were long-term disputes involving high degrees of anger and distrust (37 percent); chronic disagreements over parenting issues (32 percent); history of misuse of the legal system (31 percent); and unsubstantiated allegations of poor parenting (25 percent). The most common "other" response was a history of abuse or violence (see Appendix C, Table C-6). With regard to a history of abuse of the legal system, one respondent commented: "This is crucial! [We] must look at chronic litigators dominating parent/spouse and impose sanctions."

Roughly two thirds of respondents (68 percent) thought there should be specialized legislative provisions or other procedures to deal with high conflict disputes. When asked what type of legislative provisions or other procedures would be workable and useful, more than half of respondents agreed with the following measures: special provisions for case management (58 percent); specialized education for parents on high conflict cases (58 percent); special assessment services (55 percent); special counselling services (52 percent); and legal representation for children (51 percent). One quarter to two thirds of the sample agreed with the following measures: special mediation services (37 percent); special provisions for access to the courts (36 percent); and legislation clarifying that shared parenting should not be ordered when there are long-term, emotional, high conflict disputes (26 percent). Other suggestions given by respondents are listed in Appendix C, Table C-7.

2.6 Promoting Non-adversarial Dispute Resolution

Subsection 9(b) of the *Divorce Act* imposes an obligation on lawyers to inform and discuss with their clients the availability of mediation facilities. Respondents were asked if subsection 9(b) should be strengthened, and one third (34 percent) said yes. Respondents were then asked to

suggest ways that subsection 9(b) could be strengthened, and 42 comments were received (see Appendix C, Table C-8). The most common suggestions were having a standard form for clients to sign that would acknowledge that they have received and understand the information, and making mediation and/or counselling a necessary step prior to litigation. However, one respondent cautioned: "I do not believe that mediation is a panacea; [it is] often ineffective [when] a spouse is too dominated by the other. But clients should know that if litigation is pursued, mediation and/or counselling will be a necessary step before litigation."

Respondents were asked to indicate what mechanisms or services they thought would be useful to help parents resolve disputes about their children, and also whether such a service should be voluntary or mandatory. Table 2.3 shows that a great majority of respondents favoured each mechanism or service listed. For example, 92 percent supported mediation services, 90 percent supported parenting education programs, 88 percent supported marriage/family counselling, and 84 percent supported parenting plans. Respondents differed, however, on whether the mechanism or service should be voluntary or mandatory. The majority of respondents thought that marriage/family counselling, mediation services, parenting plans, and access supervision services should be voluntary. Roughly two thirds (63 percent) thought that parenting education programs should be mandatory. One instructor of the Parenting After Separation Seminars in Alberta commented: "Most parents' initial reaction to mandatory services is negative. They must feel they are 'participating' or 'agreeing to go for the sake of the kids'… If they are told to go, they have little enthusiasm for the service and are not likely to put much effort into it."

Table 2.3: Mechanisms respondents thought would be useful in helping parents resolve disputes about their children, and whether they should be voluntary or mandatory

Mechanisms	Voluntary		Mandatory	
	N	%	N	%
Marriage/family counselling	75	71.4	17	16.2
Mediation services	72	68.6	5	23.8
Parenting plans	54	51.4	34	32.4
Access supervision services	51	48.6	29	27.6
Parenting education programs	27	25.7	66	62.9

Thirteen "other" comments were received regarding support for parents in resolving disputes about their children (see Appendix C, Table C-9). The most common response was assessment services.

Respondents overwhelmingly agreed with the following suggestions for how parents can be better informed of mechanisms or services to help them resolve disputes about their children: ensure information is available early in the process (91 percent); obtaining printed materials (e.g. brochures, booklets) from law offices (80 percent); obtaining printed materials from the court (79 percent); and multimedia advertising (e.g. television, newspapers, Internet) (70 percent). When asked for "other" suggestions, 36 comments were received (see Appendix C,

Table C-10). The most common were: court personnel; mandatory attendance at programs; information from lawyers; printed materials in medical offices (e.g. doctor, dentist, hospital); and availability of videos.

2.7 Access and Compliance

More than two thirds of respondents (69 percent) agreed that stronger legislative measures than s. 16(10) (the "friendly parent clause") or other measures were required to promote the extensive and regular interaction of children with both of their parents. When asked what legislative or other measures were needed, respondents were most supportive of educating parents about the benefits to children of contact with both parents (see Table 2.4). As for requiring lawyers and judges to explain to each party the obligations created by a parenting order and the consequences of non-compliance with orders, one respondent commented: "This is very important. I do not think parents are aware that they have an obligation to encourage [a] relationship with other parent, whether the other parent is [the] access or custodial parent. The message needs to come from the bench." Other suggestions are presented in Appendix C, Table C-11. The most common response was to reserve the right to seek increased child support for the custodial parent when access by the non-custodial parent is not exercised. With respect to sanctions for breaches of access orders, one respondent stated: "I am not in favour of sanctions against a parent who breaches an access order (often the only 'weapon' available for a parent not receiving support) until the enforcement branch for support actually works efficiently. I do not think children should be pawns in this game, but some parents have no other choice."

Most respondents (88 percent) thought that parents should be encouraged to formalize, by written agreement or court order, their custody and access arrangements. One expert disagreed, saying: "Respect the freedom of parents and presume that they act responsibly." Another commented: "Why do we care if they formalize their arrangements?" The majority of respondents agreed with the following mechanisms or services: parenting education programs (73 percent); mediation services (67 percent); better access to information (66 percent); parenting plans (66 percent); better access to Legal Aid (53 percent); and counselling services (52 percent). Ten "other" suggestions were made (see Appendix C, Table C-12).

Respondents were asked how costs should be dealt with when extensive and regular access arrangements involved financial costs. About two thirds of respondents (64 percent) said the issue of costs should be specifically included in the access order, and half (51 percent) felt that the Federal Child Support Guidelines should reflect an adjustment for these costs. Respondents did not favour the other options given. Fewer than one third (31 percent) agreed that costs should be shared in proportion to income, 27 percent agreed that the "extensive and regular interaction" should be specifically defined (e.g. a threshold amount of time), and only 13 percent agreed that all costs should be borne by the access parent (i.e. the present model).

Table 2.4: Respondents' views on which legislative or other measures for promoting children's interaction with both parents

Measures	N	%
Education for parents about the benefits to children of contact with both parents	64	61.0
Punishing and sanctioning the parent who breaches an access order	52	49.5
Mediation services	52	49.5
Supervised access services	50	47.6
Counselling services	50	47.6
Court-connected office to enforce access orders	48	45.7
Requiring lawyers and judges to explain to each party the obligations created by a parenting order and the consequences of non-compliance with orders	44	41.9
Stronger legislative measures dealing with the non-exercise of access	40	38.1
Presumption of shared parenting	25	23.8
Other	18	17.1

Respondents made 29 "other" comments (see Appendix C, Table C-13). The most common were that courts should have discretion to address cases on an individual basis, and that special provisions may be appropriate for exceptional or extraordinary costs. One respondent commented: "All costs should be borne by [the] access parent, except in cases [when] the custodial parent makes a decision to move, the net effect of which is to inordinately increase the costs of the access parent, and [when] the move was unforeseen by the access parent at the time of the original access order." Another respondent noted: "Seldom, especially with [the] Guidelines, do child support awards come anywhere near to representing actual needs of children. The suggestion to saddle a custodial parent, usually a woman, who statistically earns less than the non-custodial spouse, with the burden of funding access is ridiculous!"

Respondents were also asked how to handle the situation when a custodial parent wishes to move to a location that would affect the current access arrangements. As shown in Table 2.5, respondents agreed that: decisions should be based on the best interests of the child; there should be a statutory notice period (e.g. 90 days) to allow time for altering access schedules, negotiation or litigation if necessary; and financial arrangements should be adjusted to allow regular visits by the non-custodial parent. More respondents felt that there should *not* be a presumption favouring the custodial parent (48 percent) than that there should be (14 percent). Of the 13 "other" comments received from 12 respondents, the most common was that the onus should be on the custodial parent to show that the benefits of a relocation outweigh the prejudicial effects (see Appendix C, Table C-14).

Table 2.5: Respondents' views on ways to deal with situations in which a custodial parent wishes to relocate

Options	N	%
Decisions should be based on the best interests of the child	90	85.7
There should be a statutory notice period (e.g. 90 days) to allow time for altering access schedules, negotiation or litigation if necessary	76	72.4
Financial arrangements should be adjusted to allow regular visits by the non-custodial parent	76	72.4
The custodial parent should have to show that the reason for the move is something other than to frustrate access by the non-custodial parent	69	65.7
There should not be a presumption in favour of the custodial parent	50	47.6
There should be a presumption in favour of the custodial parent	15	14.3
Other	12	11.4

The opinions of respondents on legal approaches or program supports to address the problem of enforcing access orders are presented in Table 2.6. Options receiving the support of the majority of respondents were: special education for parents about the problem; provincial legislation or court rules to facilitate quick reaction by courts; use of counselling; and legislation authorizing courts to order compensatory access and compensation for expenses incurred as a result of access denial. Respondents were least supportive of agency enforcement to address the enforcement of access orders. Thirteen "other" comments were received from 11 respondents (see Appendix C, Table C-15).

Table 2.6: Respondents' views on legal approaches or program supports to address the enforcement of access orders

Options	N	%
Special education for parents about the problem	69	65.7
Provincial legislation or court rules to facilitate quick reaction by courts	62	59.0
Use of counselling	55	52.4
Legislation authorizing courts to order compensatory access and compensation for expenses incurred as a result of access denial	53	50.5
More access supervision services	51	48.6
Use of mediation	50	47.6
Legislation providing a statutory definition of wrongful access denial and providing remedies for access denial only if it is wrongful	43	41.0
Create offences for wrongful denial of access	36	34.3
Agency enforcement	23	21.9
Other	11	10.5

One third of respondents (32 percent) thought that stronger legislative or other measures were needed to promote the extensive and regular interaction of children with their grandparents. When asked what legislative or other measures were required, 28 percent of respondents agreed there should be more specific statutory references to the importance of grandparents in "best interests of the child" criteria, and 24 percent agreed with including provisions for access by grandparents in parenting plans. Approximately one fifth of respondents agreed with better counselling and support for parties in this situation (21 percent), special education on the problem (20 percent), and specifying grandparents in legislation (18 percent). In commenting on whether stronger measures are necessary to promote access by grandparents, one respondent stated: "No more so than other extended family; I am more concerned about the relationship with step-siblings as families re-configure." Another indicated that "this should be done only if the main problem between the parties is resolved and the extension of access to grandparents does not unduly prolong the conflict."

2.8 Clarifying Terminology and Parental Responsibilities

To address one of the most important issues regarding custody and access—the issue of clarifying terminology and parental responsibilities—questions were included in the survey instrument and a workshop was held with interested participants. The survey distributed to respondents included an outline of four options that the Department of Justice Canada is considering for legislative changes to terminology in the *Divorce Act*. Workshop participants received an outline of the four options, as well as some additional background information (see Appendix D). The four options as presented by the Department of Justice Canada are: Option 1, Status quo; Option 2, Clarify the meaning of "custody"; Option 3, Allocating parental responsibility; and Option 4, Shared parenting (the recommendation of the Special Joint Committee).[1]

2.8.1 Results from the Survey on Clarifying Terminology and Parental Responsibilities

Respondents were asked which option they would like to see implemented. The most favoured was Option 3, Allocating parental responsibility (39 percent), followed closely by Option 2, Clarify the meaning of "custody" (35 percent). Only 12 percent supported Option 1, Status quo, and only 11 percent favoured Option 4, Shared parenting. Five percent of the respondents chose "None of the above." One expert commented: "'Custody' is the term most of my files wind up [having] difficulty over. 'Primary residence' or 'day-to-day care and control' are far less contentious."

---

[1] One participant disagreed that Option 4 reflects the recommendation of the Special Joint Committee on Child Custody and Access. It was stated in the Department of Justice Canada response document, "Strategy for Reform", that "it is unclear whether the Joint Committee's recommendation requires 50/50 residential arrangements…." In fact, according to *For the Sake of the Children*, "the Committee is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of children." See: Pearson, Landon., & Roger Gallaway (Co-Chairs), *For the Sake of the Children—Report of the Special Joint Committee on Child Custody and Access*. Ottawa: Parliament of Canada, Special Joint Committee on Child Support and Access (1998); Government of Canada, *Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access: Strategy for Reform*. Ottawa: Department of Justice, Communications & Executive Services Branch (1999).

Very similar results were obtained when respondents were asked which option best promotes child-centred decision making. Option 3, Allocating parental responsibility, was favoured by 44 percent of the respondents, and 30 percent chose Option 2, Clarify the meaning of "custody." Only 13 percent chose Option 4, Shared parenting, and 11 percent felt that Option 1, Status quo, best promotes child-centred decision making. From the 9 percent of respondents who chose "None of the above," the most common comment was that changing terminology alone would have little effect on child-centred decision making. In commenting on Option 4, one participant stated: "The recommendation [of the Special Joint Committee] defuses violence, stress and positioning, and encourages a consideration of responsibilities instead of rights, but a 50-50 residence is impractical."

Most respondents (85 percent) agreed that emphasizing parental responsibilities rather than parental rights was an appropriate reform objective. When asked which option best emphasizes parental responsibilities rather than parental rights, respondents once again favoured Option 3, Allocating parental responsibility (45 percent), and Option 2, Clarify the meaning of "custody" (22 percent), over Option 4, Shared parenting (12 percent) and Option 1, Status quo (5 percent).

Respondents were asked a general question on other ways that legislation could provide guidance in determining parents' responsibility for their children during separation and divorce. These suggestions are contained in Appendix C, Table C-16. The most common responses of the 52 received were: no other legislative solutions are needed, what is needed is funding for services and education; parenting education programs should be mandatory; and legislation should have a language of responsibilities rather than rights. Specific comments by participants included the following:

> Many or most courts in Nova Scotia accept that the provincial *Family Maintenance Act* articulates a presumption of joint custody. It is useful as a construct as is, say 16(10) of the *Divorce Act*. A language of responsibilities rather than rights would be a useful addition.
>
> The legislation, in my experience, cannot provide guidance to the parents—they rarely read it. The courts currently have a significant amount of freedom to treat children as individuals. There needs to be a greater appreciation among lawyers, judges and other professionals who give advice to these people [of] how destructive some actions can be in relation to children. Lawyers have to remain 'above the fray' and not add fuel to the fire, but emphasize that they are hired to solve problems, not create new ones.
>
> Legislation providing for/requiring attendance at educational programs is, in my view, the best way to impact parenting conflicts. No one family is the same, so legislatively imposing 'rules' as guidance will only create more litigation.
>
> *Do not* link money to time. The allocation of time kids spend with each parent *rarely* reflects the willingness of the respective parents to pay for the children's needs. The 40 percent rule is being broadly misused to avoid child support, while the 60 percent parent continues to pay virtually all expenses and costs. Make child support independent of the time-sharing arrangements.

There is too much negative baggage attached to custody and access; the focus is on win/lose. Parents' responsibility requires parents to focus on what they do for the child; it is forward looking rather than arguing about the past. If we get rid of old language, focus on best interests factors and who (parental responsibility) can best do it; that is all that is needed. This is an art, not a science!

2.8.2 Results of the Workshop on Clarifying Terminology and Parental Responsibilities

Approximately 34 participants attended the workshop on clarifying terminology and parental responsibilities, which was facilitated by two representatives from the Department of Justice Canada. The facilitator explained that the Department of Justice Canada is not yet at the stage of proposing legislative changes regarding custody and access, but is looking at one particular aspect of custody and access reform, i.e. language. The purpose of the consultation was to give participants an opportunity to convey their views on this topic to the Department of Justice Canada.

The point was made that changing the terms "custody" and "access" alone won't change the substance, particularly if people do not understand what the terms mean. When Australia changed its terms, an interim evaluation report suggested that the change in terminology raised expectations and increased litigation. Litigation goes with any legislative reform, but in this case it was mainly fathers who thought they could get a better deal. The change provoked litigation, and also changed the nature of interim orders, whereby judges were ordering more shared physical arrangements. By the final orders, that was being reversed. The Australian legislation said contact was the right of the child, and that caused people to think there was a presumption of shared parenting.

It was stated that in addition to changing the terminology, a package of reform is needed. The kinds of things mentioned that need to go along with a change in terminology were:

- parenting education;
- mediation and better access to it;
- ways to deal with high conflict cases, such as having someone else impose a solution on the parents at an early stage;
- support for counselling services, including ongoing support since custody and access is not a static process;
- assessment services;
- access supervision services;
- more Legal Aid so people can get the advice they need; and
- better enforcement of orders, e.g. consistency in language between provinces to make enforcement of orders easier.

Participants in the workshop were very supportive of mandatory parenting education. It was thought that parents needed help on how to parent after separation, and how to communicate more effectively. Concern was raised, however, regarding mandatory mediation services. The lack of standards and training mean that anyone can be a mediator. Regarding abusive relationships, concern was raised about the power imbalance between the parties. Women may be accepting less in negotiation, particularly if they are unrepresented.

Not everybody agreed that it was necessary to change the term "custody." It was suggested that the term continue to be used, with a difference between legal and physical. It was stated that very few parents disagree with the concept of joint *legal* custody, when it is explained to them. More at dispute is the specification of *when* the children will spend time ("physical care and control") in the orders.

In terms of legislative amendments, participants disagreed on whether there should be presumptions in the legislation. One view was that there should be no presumptions, and that analysis of a case should be child-centred and based on facts, not stereotypes. In many cases today mothers and fathers are equivalent primary caregivers, and no one should presume there is only one. The opposing view was that a primary care presumption regarding physical custody sends the right signals, that it is not sexually biased but consistent with current social science literature.

Another view was that there should not be a presumption of shared parenting. Contact between both parents and children should be encouraged, but children should not have their residence split in half.

In closing, a caution was raised about reshaping the reality of family law from the perspective of the high conflict case. The comment was made that if joint custody will not work, neither will shared parenting.

3.0 WORKSHOPS AND QUESTIONNAIRES ON CHILD SUPPORT GUIDELINES ISSUES

3.1 Support of Children Over the Age of Majority

Background information was produced by the Department of Justice Canada and distributed to workshop participants as they arrived, along with a brief questionnaire regarding policy options (see Appendix E).

3.1.1 Workshop Results

The workshop on support of children over the age of majority was attended by 14 participants. The facilitator introduced herself and the co-facilitator, and explained the purpose of the consultation. The first issue was whether child support should be paid directly to a child who is at the age of majority or over. Some people have expressed the view that such a child should receive the support money directly, rather than the payment going to the receiving parent. Other people are concerned that recipient parents continue to incur costs relating to the child, such as maintaining the home, even if the child is attending school and living away from home for part of the year. They say parents would not be compensated for these costs if payments were made directly to the child.

In addition, there are concerns that the child would become responsible for enforcing the order, should that need arise, and for applying to change the order if circumstances change. As well, some are concerned that responsibility for managing the money would rest solely with the child, who might not have experience in managing large amounts of money.

There was some discussion about the "age of majority" and when child support payments should change, the point being that the "age of majority" is not necessarily when a change in support is needed. It happens upon graduation from high school, which for some individuals can be at age 17. But the age of majority in some provinces is 19.

Participants disagreed on who child support should be paid to if the child is at the age of majority or older. One view was that there should be a rebuttable presumption that child support for children at or over the age of majority should be paid directly to the child in every situation. Supporters of this position liked the underlying philosophy of such a view. It allows the child to grow up, and many payors prefer to make the payment directly to the child than to their ex-spouses. When the child is home from school, some suggested, the child should pay room and board to the custodial parent.

The concern was raised that children may not be mature enough to handle their own finances, and trying to do so may be forcing children to grow up too fast. Also, if the payor defaults, a child is not in a position to fight for the money. There is also a potential timeframe problem. If regular child support and an add-on amount for post-secondary education is being paid on a monthly basis, it cannot be given to the child every month for payment of tuition in September. In this regard, it was suggested that perhaps the support should not be paid directly to the child, but to the institution, so that if the child is not mature, the paying parent can feel certain that the institution will receive the money.

There were also various comments about whether the legislation should include something specific about making payments directly to the child. One view was that no legislative change is necessary, since judges can already order payment directly to the child or the institution. The comment was made that many judges do not do this, however, and that many parents do not know these options are available. The suggestion was made that legislation could include a list of options, rather than a presumption. Another view was that all cases cannot be decided in the same way, and that judges should have discretion as to whether payments should be made directly to a child.

The second issue discussed at this workshop was disclosure. Should the Federal Child Support Guidelines be changed to require that the recipient of support payments (either the child or the parent) made for a child at or over the age of majority must provide the paying parent with information about the status of the child, and not just when special expenses have been ordered but in all cases? (For example, proof that the child is still enrolled in a post-secondary institution.) Who should provide such information? The consensus was that both parents have a right to all that information, and that "he who receives the money should give the information."

3.1.2 Questionnaire Results

At the end of the workshop, participants were asked to complete a brief questionnaire that asked their opinions on two issues (see Appendix E). Given the low level of response (n=17), the results of this questionnaire must be interpreted with caution.[2] Approximately one third of respondents thought there should be a rebuttable presumption that support for children at or over the age of majority be paid directly to the child in every situation. One respondent said "the presumption leads to 'growing up,' which is very valuable." Approximately one quarter of respondents agreed that direct payment to a child should be permitted only when the child is living away from home for most of the year, and provided that the receiving parent and the child consent to this arrangement. Another quarter responded that direct payment to the child should be permitted only when the child is living away from home for most of the year and if the child consents, but regardless of whether the receiving parent consents. Only two of 17 respondents agreed that direct payment to the child should be permitted in every situation, provided that the receiving parent and the child consent to the arrangement. Only two respondents said direct payment to the child should never be permitted. One participant suggested that the "receiving parent and child should make their own arrangements."

The second question asked whether the Federal Child Support Guidelines should be changed to require the recipient of support payments (either the child or the parent) for a child at or over the age of majority to provide the paying parent with information about the status of the child, and not only when special expenses have been ordered but in all cases. The results of this question were much more definitive; 15 of 17 respondents said "Yes, the recipient should be required to provide this information to the paying parent." Not one respondent said "No," and two respondents offered other comments. One said, "the bottom line is the child is entitled to support

---

[2] Additional copies of the questionnaires were left at the registration office, allowing participants who did not attend the workshops to respond to the questionnaires. This is why the number of questionnaires received may exceed the number of participants in a particular workshop.

merely by virtue of their status as a child, not as a result of performance of obligations," and the other said, "the child should be directed to provide [the information]."

3.2 Spouse in Place of a Parent

Background information was produced by the Department of Justice Canada and distributed to workshop participants as they arrived (see Appendix E).

3.2.1 Workshop Results

The workshop on spouses in place of parent was a very small group (only five non-government participants) and four of them came from British Columbia.

The *Divorce Act* defines a "child of the marriage" as a child of two spouses or former spouses, and includes "any child of whom one is the parent and for whom the other stands in the place of a parent." According to the Federal Child Support Guidelines, when a spouse stands in place of a parent for a child, the amount of the child support order is such amount as the court considers appropriate, having regard to the amounts prescribed in the tables and any other parent's legal duty to support the child. The issue discussed in this workshop was how the Federal Child Support Guidelines should address the amount of child support payable by a step-parent.

Discussion began with the assumption that some clarification of section 5 of the Federal Child Support Guidelines is needed to clarify step-parent liability for child support obligations. It was suggested that a formula approach should be considered, and that the formula should be premised on some basic assumptions such as:

- The natural parent's obligation is fixed, but *Chartier* [3]case establishes the liability of step-parents for support as well.

- Not all natural parents can afford the Guidelines amount and sometimes default on their payments.

- Sometimes the step-parent's income is higher than the natural parent's.

Given this, it seems logical for a formula to base step-parent obligation on the idea of indemnifying the custodial parent for what cannot be collected from the natural parent.

It was noted that an indemnification approach would result in generally negating an overall stepfather obligation and that some judges are reluctant to go that far, usually because a child-focussed approach would seem to demand recognition of a child's economic needs as well as the impact that a breakdown of the stepfamily relationship might have on the child. If a child is used to living at an income level that included support from the natural father as well as from the stepfather, an attempt should be made to maintain that level after the step relationship breaks down.

---

[3] *Chartier* v. *Chartier*, [1999] 1 S.C.R. 242.

Also, under the *Divorce Act*, the test is whether the parent stands in the place of a parent. Under the *Chartier* ruling, if there is an involved biological parent, the step-parent may never meet the threshold test that would impose any obligations.

Supporters of the formula approach thought it would be useful in simple, straightforward cases. They liked the fact that it was based on the premise that the first obligation should be on the biological parent. Opponents thought that while a formula approach sounds good in theory, judicial discretion remains critical. There are many different scenarios, and it may be that a wider range of factors come into play in stepfamily situations than can be accounted for by a formula. Factors identified include the amount of contact between the child and the biological parent, the length of the step-parent relationship, and the nature of the step-parent relationship.

Some workshop participants criticized the current Federal Child Support Guidelines as being far too rigid and taking away critical judicial discretion. In this view, the role of judges is to assess the facts and then apply discretion, not just to follow a formula.

Participants were asked whether they favoured time-limited support orders. Responses were unclear and indicated, for example, the complications involved in determining the duration of the step-parent/child relationship, who repudiated the relationship and why, and when the support obligation should begin and end.

Another issue raised was whether the table amount is relevant in determining the amount of support when a child has multiple parents. Should the table amount be all that the child gets? An alternative view is that any existing step-parent obligation should end when a new step-parent relationship begins, based on the principle that the child is only entitled to one step-parent.

3.2.3 Questionnaire Results

Workshop participants were asked to complete a brief questionnaire at the end of the session (see Appendix E). Given the low level of response (n=8), the results of this questionnaire must be interpreted with caution.[4] The question posed to participants was: How should the Federal Child Support Guidelines address the amount of child support payable by a step-parent? There was support for three of the four options given. The majority of respondents said the Guidelines should stipulate that a step-parent has a secondary obligation to provide reasonably for the support of his or her step-child to the extent that the child's natural parents fail to do so. Respondents also favoured that the court should consider the following criteria:

- the step-parent's ability to pay;
- the natural parents' ability to provide financially for the child;
- the nature of the relationship between the child and the step-parent, such as the latter's involvement in the child's education or discipline;

---

[4] Additional copies of the questionnaires were left at the registration office, allowing participants who did not attend the workshops to respond to the questionnaires. This is why the number of questionnaires received may exceed the number of participants in a particular workshop.

- the step-parent's financial contribution to the well-being of the child;
- the duration of the relationship between the step-parent and the child (i.e. three years); and
- acknowledgement, on behalf of the child and society, that the step-parent is responsible as a parent to the child.

Lastly, respondents also agreed that the Guidelines should provide a procedure for calculating the amount of child support payable by a step-parent as the child support table amount minus the amount received from any other paying parent. Only one respondent said the Guidelines amount should apply to each payor. Also, only one respondent agreed with the option that there should be no change to the Guidelines in dealing with this issue.

3.3 Shared Custody

Background information from the Department of Justice Canada was distributed to participants at the beginning of the workshop (see Appendix E).

3.3.1 Workshop Results

Approximately 47 people attended the workshop on the contentious issue of shared custody. A review of shared custody as it relates to the Guidelines is being done in light of the custody and access amendments the Department of Justice Canada is also considering.

Two major issues are involved with shared custody: defining shared custody and, once shared custody is established how the child support amount is to be determined. With regard to the latter, it is necessary to make sure the support amount is predictable. This is especially important for unrepresented parties, who have a good idea of what the amount will be without relying solely on judicial discretion.

One possible option in addressing the issue of definition is to move from the current 40 percent rule to "substantially equal." However, this option would raise a problem in defining substantially equal, a term that encompasses more than just money. It also must take into account who is spending the money, i.e., the spending patterns of both parents on behalf of the child or children. Thus, substantially equal is not easy to define because it involves a more qualitative assessment than the definition of shared custody, which is based primarily on a period of time.

A second problem is how costs would be divided, given that joint physical custody invariably costs more for both parents than sole custody. Possible options for determining the child support amount would be to leave it to judges to decide, adopt a formula approach, or balance a formula approach with judicial discretion. The reality is that judicial discretion will always be needed in some cases, even if a formula is adopted.

One consideration would be to adopt a formula approach similar to that used in some American states. A multiplier would be used, e.g. 1.5, whereby the split amount that would currently be paid by the high-income parent in a shared custody situation would be multiplied by the multiplier, and this would become the amount that the paying parent would pay to the recipient parent. This would result in higher child support payments than the simple offset currently used

in shared custody situations, but lower payments than are ordered in sole custody cases. The effect of the multiplier would be to transfer more income from the high-income parent to the low-income parent, in acknowledgement of the fact that shared parenting is costly.

The question was asked whether the Department of Justice Canada had ever considered having each parent pay 50 percent of costs, based on receipts, in shared custody arrangements. Workshop participants generally felt that this would open the door to having to show receipts in all types of custody arrangements. If receipts are required in shared custody situations, it would be difficult not to have the same requirement in sole custody cases.

The issue was raised that some equalization between the two homes is needed, and to do this requires looking at standard of living. Even in cases when parents are truly sharing expenses, the standard of living in the two households still must be considered.

The suggestion was also made that clients should be empowered to work out their individual situations, but if high conflict prevails, they should be required to bring in receipts.

3.3.2 Questionnaire Results

At the end of the workshop, participants were asked to complete a brief questionnaire about two issues (see Appendix E).

The first question asked 35 respondents to indicate which *one* of three statements best reflected their opinion of how shared custody should be defined. Only three out of 35 respondents agreed with the first statement: "The 40 percent rule presently in the Guidelines should continue to apply." Of the remaining 32 respondents, roughly half agreed with the second statement, which was: "The 40 percent rule presently in the Guidelines should be changed. Only parents who share their children on a 'substantially equal' basis have a shared custody arrangement. *A separate provision should be created to deal with parents who have greater than average but not 'substantially equal' custody or access*."

Many respondents added additional comments to this question. The most common was that "substantially equal" includes the sharing of expenses and responsibilities in addition to time. For example, one respondent said, "substantially equal must be driven by the sharing of actual costs of child care. Only on proof of same should consideration be given to reducing child support." Another respondent, however, said that "time is irrelevant; true shared parenting begins with shared expenses and child raising responsibilities." One respondent who argued for changing the 40 percent rule said, "I have not had a case with a bona fide 40 percent, but many cases where clients strive to get 40 percent only to attempt to get support relief. This is a bullshit provision that is prone to abuse."

The second question asked respondents to indicate which *one* of several statements best reflected their opinion about how to determine child support in shared custody arrangements. Nearly half of respondents (14 of 35) agreed that "The Guidelines should include a set formula or tables developed for the calculation of child support in all shared custody arrangements. The court should have little discretion to set the amount of child support." One third of respondents (11 of 35) agreed that "Parents and the court should rely on budgets prepared by the parents to calculate child support in shared custody arrangements. The court should have discretion to set the

amount of child support." Statements that received support from only one respondent were "The current shared custody section in the Guidelines should continue to apply. The court should have discretion to set the amount of child support:" and "No child support should be payable by either parent in shared custody arrangements."

Respondents again wrote in many additional comments. One said, "Encourage parents to deal with their unique family situations outside of court processes, e.g. using collaborative techniques (settlement meetings), mediation, etc." Another respondent said that "it is not just about equalizing incomes… absolutely must recognize standards of living in the two homes; [this is] critically important when the child lives in both homes…." Another said that none of the options were right:

> I think any solution has to be a combination of an objective formula which parents would only have access to if they actually establish some discretion with the courts to apply income situations where the facts just don't fit the formula and the application of the formula would result in an injustice.

One respondent cautioned, "Keep away from a return to budgets. Our clients cannot afford this kind of fighting."

4.0 SUMMARY AND CONCLUSIONS

This chapter presents the overall findings from the survey on custody and access issues and the questionnaires on child support guidelines issues. In addition, respondents provided their opinions on what legislative reforms or other reforms, services or mechanisms were needed to address a variety of custody and access issues. Suggestions that by at least one half of the respondents supported are presented according to whether they are legislative reforms, or other types of reforms or mechanisms.

4.1 Custody and Access Issues

4.1.1 Overall Findings

- All but one respondent agreed (99 percent) that the *Divorce Act* should continue to include the "best interests of the child" test.

- The majority of respondents (71 percent) thought that the *Divorce Act* should include more specific criteria about the best interests of the child.

- Most respondents (78 percent) agreed that legislative reforms or service improvements were necessary to better enable children to voice their views when parenting decisions affecting them were being made. Respondents stated that more weight should be given to the preferences of older children regarding custody decisions than to those of younger children.

- Only 40 percent of respondents thought that legislation should define high conflict spousal relationships.

- Two thirds of respondents (68 percent) thought that there should be specialized legislative provisions or other procedures to deal with high conflict disputes.

- Only 34 percent of respondents thought that subsection 9(b) of the *Divorce Act*, which imposes a duty on lawyers to inform and discuss with their clients the availability of mediation, facilities should be strengthened.

- Respondents were very supportive of the following mechanisms or services to help parents resolve disputes about their children: mediation (92 percent), parenting education programs (90 percent), marriage and family counselling (88 percent), and parenting plans (84 percent).

- The majority of respondents thought that marriage and family counselling, mediation, parenting plans and access supervision services should be voluntary. Nearly two thirds of respondents (63 percent) thought that parenting education programs should be mandatory.

- More than two thirds of respondents (69 percent) agreed that stronger legislative measures than section 16(10) (the "friendly parent clause") or other measures were required to promote children's extensive and regular interaction with both their parents.

- Most respondents (88 percent) thought that parents should be encouraged to formalize in a written agreement or court order their custody and access arrangements.

- Two thirds of respondents (64 percent) thought that costs should be specifically referred to in access orders when extensive and regular access arrangements involve financial costs.

- One half of respondents (51 percent) thought that the child support guidelines should reflect an adjustment for access costs.

- Only one third of respondents (32 percent) thought that stronger legislative or other measures were required to promote children's extensive and regular interaction with their grandparents.

- Respondents were asked which of four legislative options they would like to see implemented to clarify terminology and parental responsibilities. The majority of respondents favoured option 3 (allocating parental responsibility), followed closely by option 2 (clarify the meaning of *Custody*).

4.1.2 Suggested Legislative Reforms

- Specific "best interests of the child" criteria that respondents thought were of high importance and should be included in the *Divorce Act* were the following:

    - opportunity for the child to maintain a strong and stable relationship with both parents (93 percent);

    - need to protect the child from physical or psychological harm caused by violence or exposure to violence (91 percent);

    - arrangements that encourage the child's emotional growth, health, stability and physical care at every stage of his or her development (79 percent);

    - ability of parent(s) to provide guidance and education for the child, and meet his or her basic and special needs (78 percent);

    - willingness of each parent to encourage a close relationship between the child and the other parent (67 percent);

    - need to protect the child from continued exposure to conflict between parents (59 percent); personality, character and emotional needs of the child (58 percent); and

    - quality of the relationship that the child has with his or her parent(s) (55 percent).

- Most respondents (82 percent) thought legislation should include domestic violence as a factor that negatively affects children and that should be considered when determining parenting arrangements.

- One half of respondents thought that a stronger legislative measure was needed to punish and sanction the parent who breaches an access order.

- One half of respondents thought that the child support guidelines should reflect an adjustment for access costs when extensive and regular access arrangements involve financial costs.

- When asked how to handle a custodial parent's wishes to move to a location that would affect the current access arrangements, 72 percent of respondents said that there should be a statutory notice period (e.g. 90 days) to allow time for altering access schedules, negotiation or litigation when necessary. Almost three quarters of respondents (72 percent) thought that financial arrangements should be adjusted to allow regular visits by the non-custodial parent, and two thirds (66 percent) thought that the custodial parent should have to show that the reason for the move is something other than to frustrate access by the non-custodial parent.

- Respondents were asked what legal approaches could address the problem of enforcing access orders, and 59 percent suggested that provincial legislation or court rules to allow courts to respond quickly. One half of respondents (51 percent) thought that legislation was needed authorizing courts to order compensatory access and compensation for expenses incurred as a result of access denial.

4.1.3 Other Suggested Reforms, Services and Mechanisms

Parenting Education Programs

Respondents were favoured of parenting education programs to address a variety of issues. The vast majority of respondents (90 percent) thought parenting education programs would help parents resolve disputes about their children. Three quarters of respondents (73 percent) thought parenting education programs would encourage parents to formalize their custody and access arrangements. Most respondents (72 percent) also thought education for parents on the effects of family violence on children would be useful, and 58 percent thought specialized education could help parents deal with high conflict disputes. Respondents thought that education for parents on the benefits for children of contact with both parents would promote children's interaction with both parents (61 percent), and 66 percent thought that parental education could address the problem of enforcing access orders.

Counselling Services

Respondents were also in favour of counselling services to address custody and access issues. Most respondents (88 percent) thought that marriage and family counselling would help parents resolve disputes about their children. Two thirds of respondents (66 percent) thought that better counselling services would be useful to address family violence issues, and 52 percent thought that special counselling services would help parents in high conflict disputes. One half of respondents (52 percent) thought that counselling services would encourage parents to formalize their custody and access arrangements, and one half (52 percent) thought that counselling could address the problem of enforcing access orders.

Mediation

Almost all respondents (92 percent) thought mediation would help parents resolve disputes about their children. Two thirds (67 percent) thought mediation would encourage parents to formalize their custody and access arrangements, and 50 percent thought mediation could address the problem of enforcing access orders.

Legal Representation for the Child

Nearly two thirds (61 percent) of respondents thought legal representation for the child would be useful in situations with family violence. Slightly more than half of respondents (56 percent) thought that legal representation would enable children to voice their views when parenting decisions affecting them are being made, and 51 percent thought legal representation for the child would be useful when dealing with high conflict disputes.

Assessment Services

An independent assessment service was mentioned by 70 percent of respondents as a useful improvement for dealing with situations involving family violence. Two thirds of respondents (66 percent) thought that an assessment report would enable children to voice their views when parenting decisions affecting them are being made. Half of respondents (55 percent) thought that special assessment services would be useful when dealing with high conflict disputes.

Legal Aid

Respondents (61 percent) thought better access to Legal Aid was necessary for cases involving family violence. Slightly more than half of respondents (53 percent) thought parents would be encouraged to formalize their custody and access arrangements if they had better access to Legal Aid.

Parenting Plans

Most respondents (84 percent) thought the use of parenting plans would help parents resolve disputes about their children, and two thirds (66 percent) thought parenting plans would help parents to formalize their custody and access arrangements.

Better Access Supervision Services

More than three quarters of respondents (78 percent) thought that better access supervision services were necessary in cases involving family violence, and 76 percent thought that access supervision would help parents resolve disputes about their children.

Education for Professionals

One half of respondents (51 percent) thought that more education for professionals on the effects of family violence on children was necessary.

Special Provisions for Case Management

More than half (58 percent) of respondents thought there should be special provisions for case management for high conflict disputes.

Availability of Information

Two thirds of respondents thought that parents would be encouraged to formalize their custody and access arrangements if they had better access to information. Respondents thought parents would be better informed of mechanisms or services to help them resolve disputes about their children if information was made available to them early in the process (91 percent), if printed materials (e.g. brochures and booklets) were available in law offices (80 percent) or through the

courts (79 percent), and if multimedia advertising (e.g. on television, in newspapers and on the Internet) were used (70 percent).

4.2 Child Support Guidelines Issues

4.2.1 Overall Findings

The overall findings on child support guidelines issues should be interpreted with caution, given the small number of respondents who completed the questionnaire.

Children Over the Age of Majority

- Overall, almost all of the respondents agreed that child support for children at or over the age of majority should be paid directly to the children in some situations.

- Approximately one third of respondents thought there should be a rebuttable presumption that child support for children at or over the age of majority be paid directly to the children in every situation.

- Approximately one quarter of respondents agreed that direct payment to children should be permitted only when they are living away from home for most of the year, provided that the receiving parent and the children consent to this arrangement.

- Another quarter of respondents said that direct payment to children should be permitted only when the children are living away from home for most of the year, if the children consent but regardless of whether the receiving parent consents.

- When asked whether the child support guidelines should be changed to require that whomever receives the child support payments (either the children or the parent) for children at or over the age of majority, provides the paying parent with information about the status of the children, not just increases with special expenses but in all cases; 15 of 17 respondents said, "yes, the recipient should be required to provide this information to the paying parent."

Spouse in Place of Parent

- The majority of respondents answered that the child support guidelines should state that a step-parent has a secondary obligation to provide reasonably for the support of his or her step-child to the extent that the child's natural parents fail to provide reasonably for his or her support.

- Respondents also said that the court should consider the following criteria when determining child support:

    - the step-parent's ability to pay;

    - the natural parents' ability to provide financially for the child;

    - the nature of the relationship between the step-parent and the child, such as involvement in vital activities such as the child's education or discipline;

- the step-parent contributed financially to the child's well-being; and
- the duration of the relationship between the step-parent and the child (i.e. three years); and
- the representation to the child and society that the step-parent is responsible as a parent to the child.

- Respondents also agreed with the option that the child support guidelines should provide procedures for calculating the amount of child support payable by a step-parent as follows: child support table amount minus the amount received from any other paying parent.

Shared Custody

- Almost all respondents agreed that the 40 percent rule currently in child support guidelines should be changed.
- Approximately half of the 35 respondents said that only parents who share their children on a "substantially equal" basis should be considered to have a shared custody arrangement.
- Approximately half of the respondents also agreed with the following statement: "The 40 percent rule presently in the Guidelines should be changed. Only parents who share their children on a 'substantially equal' basis have a shared custody arrangement. *A separate provision should be created to deal with parents who have greater than average but not 'substantially equal' custody or access.*"
- When asked which one of several statements best reflects their opinion on how to determine child support in shared custody arrangements, all but one respondent (34 of 35) thought that the current shared custody section in the guidelines should be changed.
- Almost half of the respondents (14 of 35) agreed that "the Guidelines should include a set formula or tables developed for the calculation of child support in all shared custody arrangements. The court should have little discretion to set the amount of child support."
- Only one third of respondents (11 of 35) agreed that "parents and the court should rely on budgets prepared by the parents to calculate child support in shared custody arrangements. The court should have discretion to set the amount of child support."

APPENDIX A: ADVISORY COMMITTEE MEMBERSHIP

Ms. Marilyn Bongard
Family, Children and Youth Section
Department of Justice Canada

Ms, Carolina Giliberti
Team Leader
Child Support Team
Department of Justice Canada

Ms. Dorothy Hepworth
Coordinator, Research
Child Support Team
Department of Justice Canada

Dr. Joseph P. Hornick (ex-officio)
Executive Director
Canadian Research Institute for Law and the Family

Mr. George Kiefl
Research Officer
Child Support Team
Department of Justice Canada

The Honourable Justice R. James Williams
Member, Federal Child Support Guidelines Advisory Committee
and Board Member, Canadian Research Institute for Law and the Family

APPENDIX B: SURVEY ON CUSTODY AND ACCESS ISSUES

SURVEY ON
CUSTODY AND ACCESS ISSUES

The Federation of Law Societies of Canada and the Canadian Research Institute for Law and the Family are conducting this project to obtain feedback from lawyers and judges concerning their experiences with custody and access issues, and to solicit expert opinion concerning possible reforms in the area of custody and access. The project is funded in part by the Department of Justice Canada.

We would appreciate your assistance in completing this survey. Feel free to add additional pages for comments if desired. Please be assured that your anonymity will be maintained and that responses will not be attributed to individuals.

As an incentive for participating in this project, if you complete the survey, your name will be entered in a draw for three prizes of $500 each. To enter this draw, please complete the entry form attached to this page, remove it from the survey, and drop both the entry form and the completed survey off at the Conference Registration Desk before 5:30 p.m. on Wednesday, July 12, 2000. The draw will be made on Wednesday evening.

Thank you for your cooperation in completing this survey.

CONSULTATIONS

In conjunction with this survey on custody and access issues, there will be consultations held during the conference on specific topics. The consultations are intended to gain more in-depth information from a smaller group of conference participants, as well as to obtain anecdotal information concerning their experiences and suggestions for change.

On Monday, July 10th, 4:15 to 5:15 p.m., participants may choose to attend one of three consultations on suggested reforms regarding the Child Support Guidelines. On Tuesday, July 11th, 4:15 to 5:15 p.m., a consultation on custody and access will be held to discuss terminology and parental responsibilities; three sessions of this consultation will be held simultaneously to allow greater participation. Consultation topics are listed below.

CONSULTATIONS ON CHILD SUPPORT GUIDELINES

Consultation #1, Monday, July 10th, 4:15 - 5:15 p.m.

Topic: Support of Children Over the Age of Majority

Consultation #2, Monday, July 10th, 4:15 - 5:15 p.m.

Topic: Spouse in Place of a Parent

Consultation #3, Monday, July 10th, 4:15 - 5:15 p.m.

Topic: Shared Custody (s. 9 of the Child Support Guidelines)

CONSULTATIONS ON CUSTODY AND ACCESS

Consultation #4, Tuesday, July 11th, 4:15 - 5:15 p.m. (3 sessions)

Topic: Clarifying Terminology and Parental Responsibilities

SURVEY ON CUSTODY AND ACCESS ISSUES

1.0 Best Interests of the Child

Currently, subsection 16(8) of the *Divorce Act* provides that in making a custody order, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs, and other circumstances of the child.

1.1 Should the *Divorce Act* continue to include the "best interests of the child" test?

☐ Yes (If yes, please go to Question 1.2)
☐ No (If no, what should replace the "best interests of the child" test?)

_____

_____

_____

(If you do not think the *Divorce Act* should include the "best interests of the child" test, please go to Section 2.0)

1.2 Should the *Divorce Act* include more specific criteria respecting the best interests of the child?

☐ Yes
☐ No (If no, please go to Section 2.0)

1.3 Please rate the following criteria as high, medium, or low importance in terms of the best interests of the child. If you do not think the criterion is relevant, please check the "Not Relevant" box.

High	Medium	Low	Not Relevant	
☐	☐	☐	☐	Opportunity for the child to maintain a strong and stable relationship with both parents
☐	☐	☐	☐	Opportunity for the child to maintain a strong and stable relationship with other members of his or her family
☐	☐	☐	☐	Opinions and wishes expressed by the child
☐	☐	☐	☐	Ability of parent(s) to provide guidance, education, basic needs, and other special needs of the child
☐	☐	☐	☐	Child's cultural, ethnic, and religious background

High	Medium	Low	Not Relevant	
☐	☐	☐	☐	Ability of the parents to cooperate and communicate with each other on important issues concerning the child
☐	☐	☐	☐	Ability of the child to adjust to the new parenting arrangement
☐	☐	☐	☐	Willingness of each parent to encourage a close relationship between the child and the other parent
☐	☐	☐	☐	Need to protect the child from physical or psychological harm caused by violence or exposure to violence
☐	☐	☐	☐	Ensuring there is no preference in favour of either parent on the basis of that parent's gender
☐	☐	☐	☐	Quality of the relationship that the child has with the parent(s)
☐	☐	☐	☐	Arrangements that encourage the child's emotional growth, health, stability, and physical care at every stage of the child's development
☐	☐	☐	☐	Protecting the child from continued exposure to conflict between parents
☐	☐	☐	☐	Personality, character, and emotional needs of the child
☐	☐	☐	☐	Caregiving role assumed by each parent before the breakup
☐	☐	☐	☐	Other (Please specify) _____

_____

_____

_____

2.0 Voice of the Child

The United Nations *Convention on the Rights of the Child* asserts the right of the child to participate in decisions that affect his or her life.

2.1 Do you think that legislative reforms or service improvements are necessary to better enable children to voice their views when parenting decisions affecting them are being made?

☐ Yes

☐ No (If no, please go to Section 3.0)

2.2 What legislative reforms or service improvements do you think are necessary to enable children to voice their views? (Please check all that apply)

- ☐ Judicial interview with child
- ☐ Testimony by child
- ☐ Assessment report
- ☐ Legal representation for child
- ☐ Non-legal representation for child
- ☐ Legislative provision that parents should consult their children respectfully when making parenting arrangements upon separation
- ☐ Other (Please specify) _____

_____

_____

2.3 What factors do you think should be considered when deciding what weight should be given to the child's views? (Please check all that apply)

- ☐ Age of child
- ☐ Ability of child to communicate
- ☐ Ability of child to understand the situation
- ☐ Child's emotional state
- ☐ Child's reasons for views
- ☐ Indication of parental coaching
- ☐ Other (Please specify) _____

_____

_____

2.4 How much weight should be given to the preferences of a child regarding custody decisions at the following ages?

None	Lightly	Heavy	
☐	☐	☐	Under 6 years of age
☐	☐	☐	6 to 9 years of age
☐	☐	☐	10 to 13 years of age
☐	☐	☐	14 years or older

3.0 Family Violence

The Government of Canada strongly believes that it is important to send a message that all aspects of the family law system must take into account incidents of family violence involving the child or a member of the child's family.

3.1 How should legislation recognize family violence as a factor in decision-making respecting children post separation and divorce? (Please check all that apply)

- ☐ Legislation should provide that domestic violence is a factor that negatively affects children and should be considered in determining parenting arrangements
- ☐ Legislation should provide a statutory definition of family violence
- ☐ Legislation should preclude mandatory mediation where there is evidence of family violence
- ☐ Legislation should clarify that shared parenting should not be ordered where this could cause abuse, serious harm, or injury
- ☐ History of family violence should be a factor considered in evaluating the "best interests of the child" test
- ☐ Legislation should provide that supervised access should be ordered where necessary to protect the child
- ☐ Legislation should create an offence for false allegations of abuse or violence
- ☐ Other (Please specify) _____

_____

_____

3.2 What other reforms or service improvements would be useful? (Please check all that apply)

- ☐ Independent assessment services
- ☐ Legal representation for children
- ☐ Better accessibility to Legal Aid
- ☐ Better access supervision services
- ☐ Better counselling services
- ☐ More education for parents on the effects of family violence on children
- ☐ More education for professionals on the effects of family violence on children
- ☐ Other (Please specify) _____

_____

_____

4.0 Managing High Conflict Situations

Experts agree that exposure to unresolved, high-conflict situations increases risk factors in children.

4.1 Should legislation define high conflict spousal relationships?

- ☐ Yes
- ☐ No (If no, please go to Question 4.3)

4.2 What factors should be included in a legislative definition of high conflict spousal relationships?

- ☐ Long-term disputes involving high degrees of anger and distrust
- ☐ Chronic disagreements over parenting issues
- ☐ Unsubstantiated allegations of poor parenting
- ☐ History of misuse of the legal system
- ☐ Other (Please specify) _____

4.3 Should there be specialized legislative provisions or other procedures to deal with high conflict disputes?

- ☐ Yes
- ☐ No (If no, please go to Section 5.0)

4.4 What types of legislative provisions or other procedures would be workable and useful? (Please check all that apply)

- ☐ Legal representation for children
- ☐ Legislation clarifying that shared parenting should not be ordered where there are long-term, emotional, high conflict disputes
- ☐ Special provisions for access to the courts
- ☐ Special provisions for case management
- ☐ Special assessment services
- ☐ Special mediation services
- ☐ Special counselling services
- ☐ Specialized education for parents on high conflict cases
- ☐ Other (Please specify) _____

_____

5.0 Promoting Non-adversarial Dispute Mechanisms

5.1 Should the current subsection 9(b) of the *Divorce Act* (the provision that imposes a duty on lawyers to inform and discuss with their clients the availability of mediation facilities) be strengthened?

☐ Yes
☐ No (If no, please go to Question 5.3)

5.2 How should subsection 9(b) be strengthened?

_____

_____

_____

_____

_____

_____

5.3 What mechanisms or services would be useful to support parents in resolving disputes about their children? (Please check all that apply and indicate whether the mechanism or service should be voluntary or mandatory)

Voluntary	Mandatory	
☐	☐	Marriage/Family Counselling
☐	☐	Mediation Services
☐	☐	Parenting Plans
☐	☐	Parenting Education Programs
☐	☐	Access Supervision Services
☐	☐	Other (Please specify) _____

_____

_____

_____

5.4 How can parents be better informed of mechanisms or services to support them in resolving disputes about their children? (Please check all that apply)

- ☐ Printed materials (e.g., brochures, booklets) available at law offices
- ☐ Printed materials (e.g., brochures, booklets) available through the courts
- ☐ Multimedia advertising (e.g., television, newspapers, Internet)
- ☐ Ensure information is available early in the process
- ☐ Other (Please specify) _____

_____

_____

6.0 Access and Compliance

6.1 Are stronger legislative measures than s. 16(10) (the "friendly parent clause") or other measures required to promote children's extensive and regular interaction with both their parents?

- ☐ Yes
- ☐ No (If no, please go to Question 6.3)

6.2 What legislative or other measures do you think are required to promote children's interaction with both their parents? (Please check all that apply)

- ☐ Presumption of shared parenting
- ☐ Punishing and sanctioning the parent who breaches an access order
- ☐ Stronger legislative measures dealing with the non-exercise of access
- ☐ Education for parents on the benefits for children of contact with both parents
- ☐ Requiring lawyers and judges to explain to each party the obligations created by a parenting order and the consequences of non-compliance with orders
- ☐ Court-connected office to enforce access orders
- ☐ Supervised access services
- ☐ Mediation services
- ☐ Counselling services
- ☐ Other (Please specify) _____

_____

_____

6.3 Do you think parents should be encouraged to formalize in a written agreement or court order their custody and access arrangements?

☐ Yes
☐ No (Please go to Question 6.5)

6.4 What mechanisms or services would encourage parents to formalize their custody and access arrangements? (Please check all that apply)

☐ Better access to Legal Aid
☐ Better access to information
☐ Mediation services
☐ Counselling services
☐ Parenting education programs
☐ Parenting plans
☐ Other (Please specify) _____

_____

_____

_____

6.5 When extensive and regular access arrangements involve financial costs, how should these costs be dealt with? (Please check all that apply)

☐ The issue of costs should be specifically included as part of the access order
☐ Child Support Guidelines should reflect an adjustment for these costs
☐ Costs should be shared in proportion to income
☐ All costs should be borne by access parent (i.e., the present model)
☐ "Extensive and regular interaction" should be specifically defined (e.g., a threshold amount of time)
☐ Other (Please specify) _____

_____

_____

_____

6.6 When a custodial parent wishes to move to a location that would affect the current access arrangements, how should this be dealt with? (Please check all that apply)

- ☐ There should be a presumption in favour of the custodial parent
- ☐ There should <u>not</u> be a presumption in favour of the custodial parent
- ☐ Decisions should be based on the best interests of the child
- ☐ There should be a statutory notice period (e.g., 90 days) to allow time for altering access schedules, negotiation, or litigation if necessary
- ☐ The custodial parent should have to show that the reason for the move is something other than to frustrate access by the non-custodial parent
- ☐ Financial arrangements should be adjusted to allow regular visits by the non-custodial parent
- ☐ Other (Please specify) _____

_____

_____

6.7 What legal approaches or program supports could address the problem of enforcing access orders? (Please check all that apply)

- ☐ Create offences for wrongful denial of access
- ☐ Legislation should provide a statutory definition of wrongful access denial and provide remedies for access denial only if it is wrongful
- ☐ Legislation should authorize courts to order compensatory access and compensation for expenses incurred as a result of access denial
- ☐ Use of mediation
- ☐ Use of counselling
- ☐ More access supervision services
- ☐ Agency enforcement
- ☐ Special education for parents on the problem
- ☐ Provincial legislation or court rules to facilitate quick reaction by courts
- ☐ Other (Please specify) _____

_____

_____

_____

6.8 Are stronger legislative or other measures required to promote children's extensive and regular interaction with their grandparents?

☐ Yes
☐ No (If no, please go to Section 7.0)

6.9 What legislative or other measures do you think are required to promote children's interaction with their grandparents? (Please check all that apply)

☐ More specific statutory references to the importance of grandparents in "best interests of the child" criteria
☐ Specifying grandparents in legislation
☐ Better counselling/support for parties in this situation
☐ Special education on the problem
☐ Including provisions in parenting plans for access by grandparents
☐ Other (Please specify) _____

_____

_____

_____

7.0 Clarifying Terminology and Parental Responsibilities

Listed below are four options that the Department of Justice Canada is considering for legislative changes to terminology in the *Divorce Act*.

Option 1: Status Quo

- Maintain existing terminology in legislation. Leave the current "custody" and "access" terms and their meanings alone.

- Focus on services, rather than a change in terminology to better serve the interests of children and reduce conflict between parents.

Option 2: Clarify the Meaning of "Custody"

- Maintain terminology of custody, but introduce the terminology of "parental responsibility."

- The meaning of the current term "custody" would be re-defined and clarified. Parental responsibility would be the wider term relating to all of the duties, responsibilities and authority which a parent of a child has in relation to his or her child. "Custody" would refer

- more specifically to the residential caregiving duties and the authority that goes along with that.

- A general definition of "parental responsibility" would be adopted such as, "all the duties, powers, responsibilities and authority that a parent of a child has in relation to the child. In keeping with the Quebec "parental authority" approach, while both parents would maintain "parental responsibility," the practical exercise of this responsibility would need to be described. An agreement or court order would therefore set out how custody (residence), access, and decision-making authority would be exercised between the parents.

Option 3: Allocating Parental Responsibility

- This option involves eliminating the terms "custody" and "access" from family law legislation respecting private parenting disputes. The new concept and terminology of "parental responsibility" would be introduced and would emphasize the allocation of specific aspects of parental responsibility between the parents based on the best interests of the child.

- As noted in Option 2, a general definition of "parental responsibility" could be adopted such as, "all the duties, powers, responsibilities and authority that a parent of a child has in relation to the child."

- The legislation would indicate that both parents would have "parental responsibility" and would also include an additional statutory provision that would more specifically identify the specific responsibilities and duties of parents in relation to their children such as:
  - maintaining a loving, nuturing and supportive relationship with the child;
  - seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare, and supervision;
  - decision-making concerning the child's welfare, health care, education and religion;
  - providing emotional support for the child; and
  - providing financial support for the child.

Option 4: Shared Parenting (the Recommendation of the Special Joint Committee)

- Eliminate the terms "custody" and "access" from both the *Divorce Act* and provincial family law legislation and replace them with the term "shared parenting."

- The Special Joint Committee's report *For the Sake of the Children* recommended that the term "shared parenting" be adopted so that all the meanings, rights, obligations and common law and statutory interpretations previously embodied in the terms custody and access would be exercised jointly by both parents.

- It is unclear whether the Joint Committee's recommendation requires 50/50 residential arrangements, but the key feature would be a presumptive starting point that the rights and responsibilities of child rearing be shared in an equal or near equal division, and that children would have extensive and regular interaction with both parents.

7.1 Which option would you like to see implemented?

- ☐ Option 1: Status Quo
- ☐ Option 2: Clarify the Meaning of "Custody"
- ☐ Option 3: Allocating Parental Responsibility
- ☐ Option 4: Shared Parenting (the Recommendation of the Special Joint Committee)
- ☐ None of the Above (Please explain) _____

_____

_____

7.2 Which option best promotes child-centered decision making?

- ☐ Option 1: Status Quo
- ☐ Option 2: Clarify the Meaning of "Custody"
- ☐ Option 3: Allocating Parental Responsibility
- ☐ Option 4: Shared Parenting (the Recommendation of the Special Joint Committee)
- ☐ None of the Above (Please explain) _____

_____

_____

7.3 Is emphasizing parental responsibilities rather than parental rights an appropriate reform objective?

- ☐ Yes
- ☐ No (If no, please go to Question 7.5)

7.4 Which option best emphasizes parental responsibilities rather than parental rights?

- ☐ Option 1: Status Quo
- ☐ Option 2: Clarify the Meaning of "Custody"
- ☐ Option 3: Allocating Parental Responsibility
- ☐ Option 4: Shared Parenting (the Recommendation of the Special Joint Committee)
- ☐ None of the Above (Please explain) _____

_____

7.5 How else can legislation provide guidance in determining parents' responsibility for their children on separation and divorce?

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

8.0 Professional Information

8.1 In what province(s)/territory do you work? _____

8.2 What is your profession?

☐ Lawyer
☐ Judge (Please go to Question 8.8)
☐ Other (Please specify) _____ (Please go to Question 8.8)

8.3 Approximately how many custody and access cases have you handled in the past year?

_____

8.4 What proportion of your cases are funded by legal aid? _____%

8.5 How would you classify the majority of your clients?

☐ Primarily custodial parents
☐ Primarily non-custodial parents
☐ Approximately equal proportions of custodial and non-custodial parents

8.6 How often do you refer your clients to mediation?

☐ Never ☐ Occasionally ☐ Frequently ☐ Always

8.7 How often do your cases proceed to litigation?

☐ Never ☐ Occasionally ☐ Frequently ☐ Always

8.8 Have you attended the consultation on "Clarifying Terminology and Parental Responsibilities," held on July 11th?

☐ Yes
☐ No
☐ I have completed this survey prior to the consultation being held.

Thank you for completing this survey.

APPENDIX C: SUPPORTING TABLES

Table C-1: Respondents' suggestions for other criteria that should be considered in best interests of the child

Options	N
How long child has lived in a stable environment	3
Ensuring child has benefit of differing parental roles of mother and father	1
Likelihood that custodial parent will maintain in same area or community	1
Sibling relationships	1
Ability to address child's disabilities and/or medical and emotional needs	1
Parents' financial situations should NOT be relevant	1
History of violence to other parent or children	1
Time available to each parent to be with child	1
Long-term parental plans (e.g. to move, repartner)	1
Absence of manipulation	1
Presumption of joint custody initially	1
Extent of parental alienation	1
Relationship of child to new partners of both parents	1
Lists in provincial legislation should be reviewed	1

Table C-2: Respondents' suggestions on other legislative reforms or service improvements necessary to enable children to voice their views

Options	N
Government-sponsored assessments for parents without financial means	3
Should be discretionary (e.g. age of child, issues, parents' attitude)	2
Amicus curiae	2
True views of child will be very difficult to ascertain	1
Children's Lawyer Social Work Report (as available in Ontario)	1
Home assessments and counselling should be available in all custody and access cases	1
Having both parents attend sessions with a child therapist to discuss child's needs	1
Availability of mediation/counselling services	1
Training and certification for lawyers who wish to represent children	1
Child's wishes conveyed by short-form assessment if necessary	1
Testimony by child only as they wish	1
Improved funding for children's lawyer or similar programs	1
Interview by senior court counsellor or designate	1
Interview by professionals, perhaps in presence of judge	1
All suggested reforms could put extreme pressure on child and should not be used in average cases	1

Table C-3: Respondents' suggestions of other factors that should be considered when deciding what weight to give to a child's views

Options	N
Length of time from family break-up	1
Has child's mind been poisoned?	1
Parents' circumstances, strengths and weaknesses	1
Length of time child has held view	1
Sibling influence	1
Reliability of court's source of information for the child's views	1
Maturity of child	1
Child's ability to understand court process	1
Difficulty that being pressured to express a view will create for child	1
Protocol followed in investigating child's preference where evidence is given by an expert	1

Table C-4: Respondents' suggestions for other legislation that should be considered to recognize family violence as a factor in decision making about children after separation and divorce

Options	N
All options are factors, but don't need to be specifically legislated; this could result in more false allegations	2
All options are covered in child protection legislation	1
Possibility of parental abduction	1
Require both parents to attend parenting sessions regarding the effects of their behaviour on child	1
Provide option of parallel parenting	1
Order ongoing family supervision	1
Definition of family violence is essential to avoid hysterical reactions	1
Family violence should include grave false allegations	1
Mediation should not be mandatory	1
Some sanction or impact on custody entitlement should be provided	1
Legislation should be clear because abuse is hard to prove	1
Difficult to define; mandate the court to address using judicial discretion	1

Table C-5: Respondents' suggestions for other reforms or service improvements that would be useful in dealing with family violence

Options	N
Judicial education on effects of violence on children	4
Education for parents on how to communicate with the other parent after separation	3
Counselling for children	3
Mandatory training for divorce lawyers	2
Loosening of financial eligibility criteria for Legal Aid and more funding for Legal Aid	2
More mediation	2
Better investigative/assessment services to determine nature of violence	2
Better training for counsellors and mediators to recognize situations of potential violence	1
Funding for services	1
Mandatory education regarding family violence	1
Use of intervention model	1
Video information	1
Follow-up should be available for judges so they can assess the results	1
More education on whether episodic violence associated with relationship breakdown is any different vis-à-vis parenting	1
Better police response/training	1
Education for lawyers and judges on effects of deprivation of fathers or mothers	1
Better prosecution policies towards support services	1
Education before marriage (e.g. at school)	1
Restore mental health resources to communities	1
More ADR options and accessibility to them	1
General advertising campaign across Canada regarding zero tolerance for family violence	1

Table C-6: Respondents' suggestions of other factors that should be included in a legislative definition of high conflict spousal relationships

Options	N
History of abuse/violence	5
Denigration of other parent in eyes of children	1
Threats of violence	1
Frequent contact with legal system for domestic violence/abuse	1
Evidence of parent coaching a child to make false allegations	1
Presence of destructive "cheer leaders"	1
Misuse of community resources (e.g., police, Children's Aid)	1
More than two separate applications for custody and access by either or both parents within a 12-month period	1

Table C-7: Respondents' suggestions for other types of legislative provisions or other procedures that would be useful in managing high conflict situations

Options	N
Court-appointed person for ongoing monitoring of situation	2
Use team approach so all professionals have same background information	1
Intervention model	1
Parallel parenting	1
Administrative mechanisms to flag these cases and direct them into case management	1
Links to police and criminal courts as well as probation and corrections, child welfare, and mental health records	1
Legislative orders that costs be awarded against spouse creating conflict	1
Other ADR options	1

Table C-8: Respondents' suggestions for how subsection 9(b) should be strengthened

Options	N
Standard form information sheets with clients' signature to indicate that they have reviewed and understood	6
Mediation and/or counselling should be a mandatory step before litigation unless a case of domestic violence	5
Increase funding	3
Summary sanctions against counsel who persistently discourage clients from using mediation	3
Should be more specific (e.g. who may offer service, estimated cost, importance vis-à-vis court process)	3
Steps taken should be identified	2
Presumptive utilization of mediation/conciliation application approved by the court to bypass this step	2
Clients should be required to attend introductory session with mediator to discuss their situation	2
Reasons for one or both parents declining should be given to judge	2
Should include reference to voluntariness	2
Funded mediation prior to filing/better access to it	2
Should include attempts to resolve issue with opposing counsel	1
Interim motions should not be brought except in emergency situations (which would require leave) until steps taken	1
Focus should not be on reconciliation, but use of non-adversarial methods of dispute resolution	1
Impose parenting course and conflict resolution course	1
Mandatory in all cases, even those with violence	1
Onus should be on parties, not their lawyers	1
Section already clear, need better case management	1
Other ADR options	1
Obligation of serious consideration	1
Act should stipulate that parents be provided with information on mediation by someone other than their lawyer	1

Table C-9: Respondents' suggestions for other mechanisms or services that would be useful to support parents in resolving disputes about their children

Options	N
Assessments, when determined by court to be appropriate	3
Parents in high conflict situations need a "referee" available on an ongoing basis to mediate/arbitrate issues regarding children	2
Services available to parents regardless of ability to pay; sliding scale with government subsidies	1
Withholding relief pending recourse to service	1
Settlement conferences (except in cases of domestic violence)	1
Intervention model for high conflict cases	1
Legal Aid	1
Funding for services outside urban centres	1
Access to family law lawyers	1
Hand-out material	1

Table C-10: Respondents' suggestions of other ways that parents can be better informed of mechanisms or services to help them resolve disputes about their children

Options	N
Court personnel/court houses/Family Law Information Centre in court locations	5
Mandatory attendance at programs	5
Lawyers are the contact with the system; dissemination of information to lawyers and judges is key	4
Doctors/dentists' offices/hospital waiting rooms	4
Videos	4
Community centres	3
Printed materials available in schools	2
Need services to back up information in materials/seminars	2
Filing a petition should trigger a response in terms of all services available	1
Libraries	1
Transition houses/support groups	1
Hot lines	1
Court readiness programs	1
Materials through social service agencies	1
Designate someone to assist parents in identifying appropriate route	1

Table C-11: Respondents' suggestions for legislative or other measures needed to promote children's interaction with both parents

Options	N
Reserve the right to seek greater child support if access is not exercised	3
Increased funding for Legal Aid	2
Psychological assessment services for children	2
Access assessments	1
Try to get parents to work out their own arrangements so they will accept the process	1
Special intervention for chronic cases (2-3% of divorces filed)	1
If you sanction non-exercise of access, who is going to pay for children?	1
Similar provisions to s. 16(10) in provincial legislation	1
Some legislated guidelines on mobility	1
Education on obligations and rights should occur well before divorce (via pre-marital counselling, schools, information at time of marriage)	1
Other ADR	1
Stronger indication that custody will be transferred to non-custodial parent if persistent and unjustified denial of access	1
Education for lawyers on effects of divorce on children and how to help parents make child-centred decisions	1
Mandatory parent education early in the process	1
Positive statutory duty to become a friendly parent (except in abuse cases)	1

Table C-12: Respondents' suggestions for other mechanisms or services to encourage parents to formalize their custody and access arrangements

Options	N
More closely monitored procedures in high risk and high conflict situations	1
Funding	1
Requirement in legislation/rules of court	1
Less focus on legal rights and more help to create flexible, workable plan	1
No divorce until parenting agreement or custody/access order in place	1
Government funded support services	1
Other ADR options in court process	1
Access to enforcement agency	1
Access to family law lawyers	1
Child assessments regarding parenting	1

Table C-13: Respondents' suggestions of ways to deal with access arrangements with financial costs

Options	N
Courts should have discretion to address cases on individual basis	10
For exceptional costs of long distance access, special provisions may be appropriate	5
Also consider costs of non-exercise of access	3
Court should be required to take costs of access into account when appropriate	1
Order should be capable of specificity for enforcement purposes	1
Custody/access/parenting should no longer be considered as distinct or separate from child support	1
Discuss issue in mediation with fallback to the Federal Child Support Guidelines	1
Presumption that parent who moves away pays	1
Depends on which party is causing need for financial cost	1
Costs should be shared unless they result from abusive conduct of one party	1
Depends on incentives required for particular case	1
All costs by access parent if they voluntarily move or move in own best interest	1
Child Support Guidelines should take access costs into account	1
Should always involve a determination of which parent is primary spender of essential costs	1

Table C-14: Respondents' suggestions of other options in cases when custodial parent wishes to move to a location that would affect access

Options	N
Onus should be on custodial parent to show that benefits outweigh prejudicial effects	3
No unilateral decisions should be allowed	2
Presumption of no mobility	1
Need to re-examine existing arrangements if access parent wishes to move	1
Legislative presumption that the custody order is tied to maintaining residence close to non-custodial parent	1
Court should consider extended family contact, educational, medical, emotional implications	1
Move of children should be prohibited until all post-move issues are fully resolved	1
Some financial adjustment should be made depending on available cash flow	1
Access to mediation/counselling for family to discuss change to parenting plan	1
Non-custodial parent must establish that the primary purpose of the move is to frustrate access	1

Table C-15: Respondents' suggestions for other legal approaches or program supports that could address the problem of enforcing access orders

Options	N
Law is fine; problems more likely to be assisted by process reforms aimed at high conflict families	2
Enforce access by access parents	2
Obligation for access parent to exercise his or her access regularly or lose privilege of access	1
Fix access problem; do not transform it into a financial problem	1
Provide more education early in the process rather than offences	1
Try to keep out of court unless absolutely necessary	1
Intervention model	1
Custody change if long-term and persistent access denial	1
Legislate justifications for denial (e.g. documented illness, family wedding, danger to physical or emotional welfare of child)	1
Enforcement of access legislation would be huge step backwards for true shared parenting	1
Supervision of access exchanges	1

Table C-16: Respondents' suggestions of how legislation can provide guidance in determining parental responsibility for their children

Options	N
No other legislative solutions; need funding for services and education	7
Parenting education should be mandatory	6
Language of responsibilities rather than rights would be useful	4
It is positive that many parents are developing parenting plans; need resources to assist this trend	3
Presumptions not necessary, but possibly would provide guidance	2
General rule should be shared parental responsibility	2
Make legislation child-focussed	2
Educate people before they become parents	2
Minimize "win-lose" culture in custody cases	2
Make sure that Family Court support services do not create a perception of bias against fathers	1
Legislation should not be too restrictive	1
Be careful about setting up standards that may be too high	1
Where parties are unable to resolve dispute themselves, status quo provides most clear framework for decision making	1
If custody and access terms are changed, still need to specify residential arrangements for police to be able to enforce access arrangements	1
Perhaps a mandatory meeting with both parents, resulting in an assessment of the degree of cooperation that exists	1
Legislation should specify right to attend activities designed for parents	1
Legislation should specify that the court may order joint decision making	1
Cost consequences for failure to abide by separation agreements	1
Forming terms of elements as part of the order	1
Provide framework with general principles	1
Do not make it too complicated	1
Get rid of child support guidelines	1
Mandatory courses for judges and lawyers on same issues as parents' courses	1
Greater appreciation among lawyers, judges and other professionals of how destructive some actions can be to children	1
Include presumption of primary caregiver	1
Make child support independent of time-sharing arrangements	1
Guidance on responsibility of parent to foster relationship with other parent	1
Penalize parents who engage in tactics of parental alienation	1
Cost awards to party who proposes a reasonable parenting plan that is rejected by other party	1
List of mechanisms for resolution of disagreements including mediation	1
Provision for division of specific and regular costs for children	1

APPENDIX D:
OPTIONS FOR LEGISLATIVE CHANGES TO TERMINOLOGY

OPTIONS FOR LEGISLATIVE CHANGES TO TERMINOLOGY

OPTION 1: STATUS QUO

- Maintain existing terminology in legislation. Leave the current "custody" and "access" terms and their meanings alone.

- Focus on services, rather than a change in terminology to better serve the interests of children and reduce conflict between parents.

Description

- Subsection 2(1) of the *Divorce Act* defines custody as including care, upbringing and any other incident of custody. Subsection 16(5) provides that an access parent has the right to make inquiries and be given information on the child's health, education and welfare. Based on these sections of the *Divorce Act*, the prevailing view is that, in the absence of directions to the contrary, an order granting sole custody to one parent means that the custodial parent has the authority to make decisions regarding the physical care, control and upbringing of the child, without the involvement of the non-custodial parent.

- Currently neither the *Divorce Act* nor provincial family law legislation contain any presumptions about whether joint or sole custody should be ordered. However, sole custody is the most common order and joint custody is not normally ordered unless the court finds that there is sufficient cooperation between the parties to make such an order workable.

- For the purposes of discussion, it should be assumed that both the existing terms and their meaning would not change under Option 1. While it is recognized that one way to lessen the disadvantages associated with this option might be to modify and more clearly define the definitions of the terms custody and access, this is a feature of Option 2 below.

Considerations

- The existing terms are widely used by family law professionals and this option would preserve the existing body of caselaw that can be utilized as precedents to provide some certainty and predictability.

- The public's use and understanding of the terms custody, access and guardianship would be maintained, thereby avoiding possible confusion and uncertainty that could arise with new terms.

- Maintaining existing terminology would avoid Australia's experience with new terminology which raised the public's expectations of additional parental rights and appears to have resulted in increased litigation.

- There are negative connotations associated with the words "custody and access." It is argued that these terms promote conflict by encouraging some separating parents to view their children as property to be fought over.

- There are particular concerns about sole custody being the most common type of order because it results in "access" parents (usually fathers) having a lesser parental status than custodial parents.

OPTION 2: CLARIFY THE MEANING OF "CUSTODY"

- Maintain terminology of custody but introduce the terminology of "parental responsibility."

- The meaning of the current term "custody" would be re-defined and clarified. Parental responsibility would be the wider term relating to all of the duties, responsibilities and authority which a parent of a child has in relation to his or her child. "Custody" would refer more specifically to the residential caregiving duties and the authority that goes along with that.

- A general definition of "parental responsibility" would be adopted such as, "all the duties, powers, responsibilities and authority that a parent of a child has in relation to the child." In keeping with the Quebec "parental authority" approach, while both parents would maintain "parental responsibility," the practical exercise of this responsibility would need to be described. An agreement or court order would therefore set out how custody (residence), access, and decision-making authority would be exercised between the parents.

Description

- This option narrows the meaning of "custody" so that the custodial parent is not perceived to have all the rights and responsibilities. The objective is to increase the options for parents and courts to develop more flexible parenting arrangements.

Considerations

- The term "custody" is maintained but there is a new emphasis on parental responsibility that takes the focus off of "rights" and encourages parents to instead look at how they can work together to meet their children's needs.

- The win-lose dichotomy of custody disputes would be minimized by the introduction of the new term "parental responsibility" and a clarified meaning for the term "custody." These changes would provide a greater range of choices and court orders respecting post-separation parenting arrangements.

- It could be a serious challenge to preserve but re-define and clarify the term "custody" given that there are currently strong public perceptions and connotations associated with the term.

OPTION THREE: ALLOCATING PARENTAL RESPONSIBILITY

- This option involves eliminating the terms "custody" and "access" from family law legislation respecting private parenting disputes. The new concept and terminology of "parental responsibility" would be introduced and would emphasize the allocation of specific aspects of parental responsibility between the parents based on the best interests of the child.

- As noted in Option 2, a general definition of "parental responsibility" could be adopted such as, "all the duties, powers, responsibilities and authority that a parent of a child has in relation to the child."

- The legislation would indicate that both parents would have "parental responsibility" and would also include an additional statutory provision that would more specifically identify the specific responsibilities and duties of parents in relation to their children such as:

  - maintaining a loving, nurturing and supportive relationship with the child;

  - seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare and supervision;

  - decision-making concerning the child's welfare, health care, education and religion;

  - providing emotional support for the child; and

  - providing financial support for the child.

Description

- The objective is to shift the focus away from parenting labels to working out arrangements for the child. The new concept of "parental responsibility" will involve identifying and allocating specific aspects of parental responsibility between the parents, based on the best interests of the child.

- The use of parenting plans would be promoted as a tool to describe the allocations. Parenting plans would be described as very flexible documents that can set out a wide variety of individualized parent-child arrangements. The only prerequisite would be that the arrangements promote the children's best interests and well-being. While extensive and regular interaction with both parents would be promoted, there would be no presumptions or requirements that the parenting arrangements be divided equally or even necessarily exercised cooperatively. Some aspects of parental responsibility could be exercised jointly by both parents—some aspects exercised alone by either one of the parents, where that would be in the child's best interest.

- If parents cannot agree to appropriate arrangements, a court order would set out how specific parenting responsibilities would be allocated and how disagreements and disputes should be settled.

- Another feature of this option would be some specific statutory best interest provisions to provide guidance to parents in reaching agreements and to assist the court in making its determination concerning the allocation of parenting responsibilities when the parties can't agree. Specific considerations relevant to the different aspects of parental responsibility could be identified; for example, some specialized criteria that should be considered in determining residential responsibilities and potentially different criteria with respect to major decision-making authority.

Considerations

- Replacing the terms "custody" and "access" with the new term and concept of "parental responsibility" shifts the focus away from parental custodial rights and control and emphasizes the practical aspects of providing and caring for children post-separation. It encourages parents to focus on their children's needs.

- Encouraging parents to develop parenting plans that allocate parental responsibilities based on children's best interests will promote child-focused discussions and perhaps lead to more agreements.

- However, the experience of other jurisdictions suggests that for some parents the new language of "parental responsibility" and reforms that increase the range of post-separation parenting options leads to increased conflict and litigation. In Australia, for example, the reforms have resulted in an increase in applications for parenting orders as well as an increase in applications alleging breaches of parenting orders.

- There is concern that the "parental responsibility" framework as opposed to the current orientation of sole custody and access, requires parents to interact more frequently and may result in an increase in harassment and control by one parent over the other.

- Individualized parenting plans will vary in their language and content and may not offer sufficient guidance to third parties such as school authorities, daycare providers, immigration officials, etc. who may need to know and understand the legal implications of the agreement or order. They may also be difficult to enforce.

OPTION 4: SHARED PARENTING (THE RECOMMENDATION OF THE SPECIAL JOINT COMMITTEE)

- Eliminate the terms "custody" and "access" from both the *Divorce Act* and provincial family law legislation and replace them with the term "shared parenting."

- The Special Joint Committee's Report For the Sake of the Children recommended that the term "shared parenting" be adopted so that all the meanings, rights, obligations and common law and statutory interpretations previously embodied in the terms custody and access would be exercised jointly by both parents.

- It is unclear whether the Joint Committee's recommendation requires 50/50 residential arrangements, but the key feature would be a presumptive starting point that the rights and responsibilities of child rearing be shared in an equal or near equal division, and that children would have extensive and regular interaction with both parents.

Description

- While this option creates a presumptive starting point of shared parenting, the best interests of the child would remain the paramount consideration. The onus would be on the parent wanting a different arrangement to prove that it would be contrary to the child's best interest.

Considerations

- This option acknowledges the importance of the active involvement of both parents in their children's lives. It provides both parents with the opportunity to guide and nurture their children.

- Adopting an interpretation of the term "shared parenting" that would provide that parental rights, duties and responsibilities be exercised jointly by both parents would provide the family law system with the certainty and predictability that many people believe is needed.

- Concerns have been raised that creating a shared parenting presumption would be imposing a simplistic "one size fits all" solution to a very complicated problem.

- Shared parenting requires divorcing parents to cooperate and communicate regarding all issues concerning their children. This would be unworkable for many separating/divorcing parents and may even serve to increase some children's exposure to on-going conflict or violence.

- Replacing "custody" and "access" with "shared parenting" would have a significant impact on other legislation that currently uses or incorporates the terms "custody" and "access" in relation to children. For some statutes, the impact would be minimal, while for others, a change in terminology could have a significant impact.

APPENDIX E:
BACKGROUND INFORMATION FOR WORKSHOPS AND QUESTIONNAIRES

NATIONAL FAMILY LAW PROGRAM—CONSULTATION
CHILD SUPPORT FOR CHILDREN AT THE AGE OF MAJORITY OR OVER

BACKGROUND

For over 30 years, the divorce laws of Canada have allowed parents and courts to determine child support for older children who are unable to provide for themselves because of illness, disability or other causes. Since that time, courts have interpreted the term "other cause" as including studies at the secondary or post-secondary level.

Child support for children studying at college or university has therefore been part of Canadian society for a long time. Changes to the *Divorce Act* and the introduction of the Federal Child Support Guidelines in 1997 did not change this situation. The laws introduced in 1997 only changed the age at which support for an older child might no longer be appropriate, from age 16 to the age of majority of each province or territory (18 or 19 in all provinces and territories).

Almost all the provinces and territories have laws in place that allow parents and courts to determine child support for children at or over the age of majority. In fact, in some provinces and territories, these laws apply to intact families. In other words, parents who are not separated or divorced may have a legal obligation to support their child who is at or over the age of majority.

Research reveals that children of divorce are disadvantaged on many fronts but particularly when it comes to post-secondary education. While intact families can usually agree on whether parents will pay for their children's post-secondary education, divorced parents are often not able to make such joint decisions. To minimize the impact of divorce on children, the laws provide the court with the discretion it needs to make the appropriate decision given the means of the parents and the child.

For all of these reasons, rather than challenging the long-standing right to child support of older children who are still dependant on their parents, this consultation will focus on two aspects that have been raised to make child support for older children fairer for everyone in the family.

WHAT WE HAVE HEARD

Child support paid directly to the child who is at the age of majority or over

People have expressed the view that the child who is the age of majority or over, should receive the child support money directly, rather than having the payment go to the receiving parent.

Other people are concerned that recipient parents continue to incur costs relating to the child, such as maintaining the home, while the child is attending school and living away from home for part of the year. They are concerned that parents would not be compensated for these costs if payments were made directly to the child.

In addition, there are concerns that the child would become responsible for enforcing the order should the need arise and/or applying to change the order if there is a change in circumstances. As well, some are concerned that the responsibility for managing the money would rest solely with the child, who might not have experience in managing large amounts of money.

Disclosure of information relating to the status of the child

Many times we have heard people suggest that there is a particular need for accountability in situations of child support for children at or over the age of majority. In all cases of child support for children at or over the age of majority (not just cases where special expenses have been ordered), they want the recipient parent or the recipient child, to disclose relevant information, such as school records or apartment or university residence leases, that confirm the child's status and, therefore, the support payer's continuing obligation to pay child support.

We have also heard from others that requiring such disclosure relating to financial information may be difficult and impractical in certain situations, for example, where the child is living with the recipient parent and their finances are intertwined.

ISSUES FOR CONSULTATION

1. Child support paid directly to the child who is at the age of majority or over

Please indicate which one of the following statements best reflects your opinion on direct child support payments to a child who is at the age of majority or over:

- ❑ There should be a rebuttable presumption that child support for children at or over the age of majority be paid directly to the child in every situation.
- ❑ Direct payment to the child should be permitted in every situation, provided that the receiving parent and the child consent to this arrangement.
- ❑ Direct payment to the child should be permitted only when the child is living away from home for most of the year, provided that the receiving parent and the child consent to this arrangement.
- ❑ Direct payment to the child should be permitted only when the child is living away from home for most of the year, if the child consents but *whether the receiving parent consents or not.*
- ❑ Direct payment to the child should never be permitted.
- ❑ Other comments:_____

2. Disclosure of information relating to the status of the child

Do you think that the child support guidelines should be changed to require that the recipient of child support payments (either the child or the parent) made for a child at or over the age of majority, provide the paying parent with information about the status of the child, not just where

special expenses have been ordered but in all cases? (For example, proof that the child is still enrolled in a post-secondary institution?)

- ❑ No, the recipient should not have to provide this information to the paying parent.

- ❑ Yes, the recipient should be required to provide this information to the paying parent.

Other comments:_____

NATIONAL FAMILY LAW PROGRAM—CONSULTATION
CHILD SUPPORT OBLIGATIONS OF A SPOUSE WHO STANDS IN THE PLACE OF A PARENT

BACKGROUND

Serial spousal and family relationships of varying permanence have become relatively common in Canadian society. A person who parents the child of his or her spouse may have a legal obligation to support the child after the relationship with the spouse has ended.

Presently, the federal *Divorce Act* defines a "child of the marriage" as a child of two spouses or former spouses and includes "any child of whom one is the parent and for whom the other stands in the place of a parent."

Most provinces and territories have adopted a similar definition in their own legislation or have defined "child" as "a child whom a person has demonstrated a settled intention to treat as a child of his or her family".

The Federal Child Support Guidelines provide that where a spouse stands in the place of a parent for a child, the amount of the child support order is such amount as the court considers appropriate, having regard to the amounts prescribed in the tables and any other parent's legal duty to support the child.

SUPREME COURT OF CANADA

Recently, the Supreme Court of Canada decided that it is not in a step-child's best interest for a person to unilaterally withdraw from a relationship in which he or she has assumed the role of a parent in order to avoid a child support obligation.

The Court stated that in order to determine whether a person stands in the place of a parent to a child, the court must look to the nature of the relationship by taking into account a number of factors such as whether the person provides financially for the child, disciplines the child as a parent, represents explicitly or implicitly to the child and the community that he or she is responsible as a parent to the child, and the nature or existence of the child's relationship with the absent biological parent.

Once a step-parent relationship has been established, the obligations of the step-parent towards the child are the same as those of the natural parents. The step-parent also acquires certain rights, such as the right to apply for custody or access of the child.

The concern that a child might collect support from both the biological parent and the step-parent was not a valid one for the Court. It stated that the contribution to be paid by the biological parent should be assessed independently of the obligations of the step-parent. The Court also said that the support obligations for a child are all joint and several between parents responsible for supporting a child. If a parent seeks contribution from another parent, he or she must, in the meantime, pay support for the child regardless of the obligations of the other parent.

WHAT WE HAVE HEARD

Some people believe that a step-parent should not have a financial obligation for his or her step-child because he or she is not the biological parent. Others believe that a step-parent should remain financially responsible for his or her step-child even after the breakdown of the relationship with that step-child's natural parent.

We have heard that it is often difficult to determine whether a spouse "stood in the place of a parent" to a child. In addition, when step-parents must be taken into account or when children from a series of relationships must be provided for, it becomes increasingly difficult to determine the amount to be paid by each step-parent for the support of the child or children.

ISSUES FOR CONSULTATION

How should the Federal Child Support Guidelines ("Guidelines") address the amount of child support payable by a step-parent?

(Indicate by inserting numbers in order of priority the options that you consider viable)

Possible options:

- ❑ There should be no change to the Guidelines to deal with this issue.
- ❑ The Guidelines should provide that a step-parent has a secondary obligation to provide reasonably for the support of his or her step-child to the extent that the child's natural parents fail to provide reasonably for that child's support.
- ❑ The Court should consider the following criteria: (Check as many boxes as you wish)
  - ❑ The step-parent's ability to pay.
  - ❑ The natural parents' ability to provide financially for the child.
  - ❑ The nature of the relationship between the step-parent and the child, such as involvement in vital activities such as the child's education or discipline.
  - ❑ The step-parent contributed financially to the wellbeing of the child.
  - ❑ The duration of the relationship between the step-parent and the child (i.e. 3 years).
  - ❑ The representation to the child and society that the step-parent is responsible as a parent to the child.
  - ❑ The nature or existence of the child's relationship with the absent natural parent.
  - ❑ Other: (specify)_____
- ❑ The Guidelines should provide procedures for calculating the amount of child support payable by a step-parent as follows: (Check one box)
  - ❑ Guidelines amount <u>less</u> the amount received from any other paying parent.
  - ❑ Apply the Guidelines amount for each payor.
  - ❑ Other comments:
    _____

NATIONAL FAMILY LAW PROGRAM—CONSULTATION
CHILD SUPPORT IN SHARED CUSTODY SITUATIONS

BACKGROUND

The principle that a child should have as much contact with each parent, as is consistent with the best interests of the child, is of primary importance. However, shared parenting arrangements can be costly for both parents. Experts agree that when parents share physical custody of a child, it is more expensive than a sole custody arrangement because both parents incur costs for housing, food, transportation and even clothing.

There are two elements to the question of shared custody. First, what is the fairest way to determine if the family situation is a shared custody arrangement? Second, once shared custody has been established, how do you calculate child support?

Presently, the Guidelines state that shared custody exists if a parent exercises access to, or has custody of, a child for not less than 40 percent of the time over the course of a year. The Guidelines then set out three factors that a court must look at when determining child support. The factors the court will consider are:

- the amounts set out in the tables for each of the parents;
- the increased costs of the shared custody arrangement; and
- the means and needs of the parents and the child.

WHAT WE HAVE HEARD

A common question regarding shared custody is defining exactly what constitutes a shared custody arrangement. Does it exist only when children spend exactly half their time with each parent as some people believe or is it more flexible than that, as others say?

With regard to how to calculate child support in shared custody arrangements, many people believe that if parents share custody of their child, no child support should be paid by either parent. Others believe that the standard of living of the mother's household and the father's household should be similar in order to ensure an equitable situation for the child.

We have heard clearly that calculating child support in shared custody situations is difficult.

ISSUES FOR CONSULTATION

1. Defining shared custody

Please indicate which one of the following statements best reflects your opinion of how shared custody should be defined:

❑ The 40 percent rule presently in the Guidelines should continue to apply.

- ❑ The 40 percent rule presently in the Guidelines should be changed. Only parents who share their children on a "substantially equal" basis have a shared custody arrangement.

- ❑ The 40 percent rule presently in the Guidelines should be changed. Only parents who share their children on a "substantially equal" basis have a shared custody arrangement. *A separate provision should be created to deal with parents who have greater than average but not "substantially equal" custody or access.*

- ❑ Other comments:_____

2. Determining child support in shared custody arrangements

Please indicate which one of the following statements best reflects your opinion on how to determine child support in shared custody arrangements.

- ❑ The current shared custody section in the Guidelines should continue to apply. The court should have discretion to set the amount of child support.

- ❑ Parents and the court should rely on budgets prepared by the parents to calculate child support in shared custody arrangements. The court should have discretion to set the amount of child support.

- ❑ The Guidelines should include a set formula or tables developed for the calculation of child support in all shared custody arrangements. The court should have little discretion to set the amount of child support.

- ❑ The standard of living in each parent's household should be equalized. A test, such as the Comparison of Household Standards of Living Test in Schedule II of the Guidelines, should be used to determine the appropriate amount of child support. The court should have little discretion to set the amount of child support.

- ❑ No child support should be payable by either parent in shared custody arrangements.

Other comments:_____