



Custody, Access and Child Support in Canada

REPORT ON FEDERAL-PROVINCIAL-TERRITORIAL CONSULTATIONS

Executive Summary

Presented to the
Federal-Provincial-Territorial Family Law Committee

Prepared by
IER Planning, Research and Management Services

*The views expressed in this report are those of the authors
and do not necessarily represent the views of
the Federal-Provincial-Territorial Family Law Committee.*



The federal, provincial and territorial governments held nation-wide consultations on custody, access and child support issues from early April to the end of June 2001. Canadians with an interest in these issues contributed their views through some 2,300 feedback booklets, 71 written submissions and 45 workshops, all of which are summarized in this report. The results of the consultations, as presented in this report, will be used to inform the Federal-Provincial-Territorial Family Law Committee's work on its Custody and Access Project as well as the discussions of federal, provincial and territorial Ministers Responsible for Justice. They will also provide valuable qualitative information on recurring issues and themes for a report to Parliament on custody, access and child support to be tabled by the federal Minister of Justice before May 2002.

The following topics were addressed during the consultations:

- best interests of the children;
- roles and responsibilities of parents after separation or divorce;
- family violence;
- high conflict relationships;
- children's perspectives;
- meeting access responsibilities; and
- child support.

The key points raised by participants on each of these topics are described in the following pages.

Best Interests of Children

Respondents were asked to identify what children need when their parents separate or divorce. They suggested the following needs:

- physical safety and emotional, psychological and financial security;
- as great a level of stability and consistency as possible during and after the process of separation;
- their voices to be heard and their integrity to be respected;
- to not feel burdened with responsibility for the separation or for parents' behaviour;



- to not participate in their parents' dispute or in legal or court processes; and
- to feel that their particular cultural and developmental needs are being considered.

Some respondents thought that children need to maintain contact with both parents at all times. Other respondents were of the opinion that, in cases of high conflict between parents or family violence, children's needs are best met by limiting contact with the aggressive or violent parent.

Those in favour of including in the *Divorce Act* a list of factors for determining children's best interests thought that it could provide useful guidance for judges and parents to help ensure that they consider relevant concerns when making decisions on custody and access. Those arguing against including a list of factors said that such a list would exacerbate conflict and competition between parents. They also feared that the use of a list would exclude the consideration of unlisted factors and discourage assessment of the particular circumstances of each family situation. Finally, others thought that establishing a list would neither make court decisions more predictable nor reduce disputes.

With regard to support services, respondents often indicated that existing services should be better publicized and made more accessible to all, regardless of gender or location. According to these respondents, improvements to such services would include the following characteristics:

- Better coordination between community and government services would improve accessibility of services for children.
- A conciliatory approach would be preferable to resorting to the legal system.
- Information, education and counselling and other support services must be readily available to help parents focus on their children's needs.
- More community-based services and mediation services are required, and the number of children's advocates must be increased.

Roles and Responsibilities of Parents After Separation or Divorce

In response to a question about what factors enable "good parenting," respondents identified a wide variety of issues relating to the parents themselves and their relationship, the support offered to both parents by the legal system, and the various support services in place.

Respondents stressed the need for improved educational services (for parents as well as for the legal profession), support services (such as supervised access centres



or “parenting coordinators”) and legal aid services. To improve the effectiveness of services, respondents suggested that services be offered in a more coordinated, timely and accessible manner.

Participants were asked whether the terms *custody* and *access*, which are currently used in the *Divorce Act*, should be changed. The main argument in favour of changing the terminology is that the terms *custody* and *access* have negative connotations of ownership and promote the concept of a “winner” and a “loser”, which leads to an adversarial process and perpetuates a perceived anti-male bias in the current system. Those opposed to changing the terminology maintained that it is well understood by Canadians and within the legal system, that it is useful in situations in which sole custody is in the best interests of the children (for example, in situations of violence), and that resources would be required to define the new terms.

Some respondents thought that narrowing the definition of *custody* and introducing the term *parental responsibility* would be more appropriate. They felt that a more neutral terminology would encourage parents to divide their responsibilities themselves (without assuming a 50-50 split of responsibilities). Some respondents voiced the following arguments against this proposal: the proposed terminology is too vague and, therefore, may lead to greater conflict and litigation; and children need to have only one primary caregiver, which the term *parental responsibility* may preclude.

Those in favour of replacing current terminology with the term *parental responsibility* highlighted the fact that the term emphasizes parents’ responsibilities towards their children as opposed to parents’ rights. Some respondents suggested that individual responsibilities must be detailed in the law; while others said such a list of responsibilities would be counter-productive.

Those who preferred the option of replacing the current terminology with the term *shared parenting* said that the presumption of shared parenting gives both parents equal responsibility for parenting, promotes a low-conflict framework for allocating parental responsibilities, and ensures that children have access to both parents and extended family. Respondents who disagreed with this option took the position that the shared parenting model is not always realistic, may have negative effects on children (for example, when family violence is an issue), and does not acknowledge situations in which a parent may not be fit nor willing to care for the children.



Family Violence

Several respondents indicated that family law legislation should contain three points about family violence:

- a statement that the best interests of children are the first priority;
- a clear definition of *violence* (in particular, the scope of the definition); and
- an allocation of burden of proof (in particular, whether this should rest with the alleged victim or with the alleged perpetrator, and what should be done in the meantime to protect children).

On the other hand, others thought that the current legislation should not be changed. Participants raised the following arguments, among others:

- Strong legislative and procedural processes are already in place to address concerns of family violence. Violence is a factor that is currently carefully considered in court through the “best interests” test;
- Highlighting family violence could lead to increased false allegations of violence. This could lead to inadequate consideration of other factors of significance to the best interest of children;
- Government involvement in resolving issues of family violence should be minimal;
- It is more important to ensure affordable services (such as counselling or supervised access) than focussing on making legislative changes.

Furthermore, some respondents mentioned the difficulty of attempting to define *violence* correctly in legislation and that governments should develop awareness programs and provide training on the realities of family violence to service providers and the legal community (for example, judges).

With regard to the legislative options presented in the consultation document, respondents differed about what is in the best interests of children. Some thought that children’s safety should be the priority, while others insisted that the priority was the children’s access to both parents. Those who gave priority to the safety of the children supported limiting contact between the children and the violent parent as well as the decision making of this parent unless he or she could prove that such a limit was not in the children’s best interests. Those who felt access to both parents should be the priority supported a presumption of “maximum contact,” except when there was proof that the parent had been violent towards the children.



Some respondents suggested that the overall approach to services addressing the needs of children in situations of family violence should be based on the following principles: best interests of the children; prevention of violence; sensitivity to cultural differences; ensuring safety; and gender sensitivity. Many people were of the opinion that structural and organizational changes are needed to improve the current provision of services, including the following:

- more community-based services;
- sufficient funding;
- improved coordination of services; and
- greater accessibility to services.

High Conflict Relationships

Some respondents said that high conflict situations were, in fact, another form of family violence. They felt that distinguishing between situations of high conflict and those involving family violence implies that a certain level of violence is acceptable. Other respondents thought that high conflict situations are a natural by-product of the divorce process. They said that although parents may be in a high conflict relationship it does not mean that they are not able to care for their children.

Those respondents who agreed that the law should deal with the problem of high conflict relationships generally supported a combination of options 2 and 3 or of options 2 and 4 (from those presented in the consultation document). Both combinations would result in a very detailed agreement about parenting arrangements, which supporters felt would reduce the likelihood of further litigation and conflict between the parents. The two combinations differ on whether that agreement would be achieved through a mandatory dispute resolution process (which some respondents felt would be ineffective in a high conflict situation) or through the courts.

Children's Perspectives

Young people were asked to discuss their views on whether children's perspectives should be considered during discussions on custody and access, and, if so, how this should be done. Both the young people and other respondents indicated that children's perspectives are currently considered to varying degrees, depending on a number of factors.

Some respondents thought that children should not be consulted because their views would not be considered anyway, and that the emotional consequences would be too great. Others added that very often children would not understand the



situation well enough to make a decision. According to some respondents, children's opinions, if they are considered, should not be the sole basis for decisions that affect children.

Many young people thought that children should be better informed about their parents' difficult relationship but should remain outside their parents' dispute and should be consulted at the time of separation. Some women's rights organizations and some Aboriginal respondents echoed this position.

Some young people spoke in favour of the possibility of expressing their views to a neutral third party (for example, a mediator). These participants also identified factors that should determine children's level of involvement: age; professional support; ability to provide information; relationship with parents; and emotional well-being. Special needs, the presence of family violence or high conflict relationships, and cultural values should also be considered.

Several respondents emphasized the need to safeguard children's well-being throughout their participation in the decision-making process. This would involve the following:

- adequate representation by a children's advocate;
- protection from any repercussions from the parents; and
- information about the reasons for the decisions being made.

Meeting Access Responsibilities

Respondents said there are two main issues to be addressed with regard to meeting access responsibilities: denial of access by the custodial parent; and non-exercise of access. Respondents felt that both of these situations were equally detrimental to children's welfare, and proposed that tools such as parenting plans, parental education and counselling be considered as ways to encourage parents to meet their access responsibilities.

Respondents recognized that it would be very difficult to resolve the problem of non-exercise of access through the law. They thought that forcing an uninterested parent to have contact with his or her children would not be in the children's best interests and might even be dangerous.

Respondents did, however, feel that there were some areas in which legislation could be useful in addressing the problem of denial of access: specifically, by means of enforcement orders, alternatives to court-based solutions, and supervised access centres.



Child Support

Respondents provided input on several questions concerning child support.

With regard to calculating child support amounts in shared custody situations, some respondents raised concerns about time or cost being the sole determining factors. Respondents supported transparent guidelines or a formula-based approach for determining the amount of child support to be paid in shared custody situations.

With regard to unusually high and unusually low access costs, respondents thought that both situations should be addressed in child support guidelines and legislation.

With regard to the payment of child support once children are at or over the age of majority, some respondents favoured paying some or all of the child support directly to the children, which would reassure the parent paying the support that the money is being spent on the children. Other respondents were not in favour of direct payment, pointing out that the custodial parent continues to have expenses related to maintaining a home for the children, regardless of the children's age.

Participants' Perspectives

The consultations uncovered a wide range of views among Canadians based on individual experience, professional opinion and the perspectives embraced by the organizations participants represented. From these opinions, three recurring themes emerged:

- many men's organizations (and other non-custodial parent support groups) supported implementing the recommendations of the Special Joint Committee on Child Custody and Access;
- many women's organizations argued that the consultation process and options did not recognize gender issues and, therefore, that a gender analysis should take place before proceeding;
- many professionals (e.g. lawyers and service providers) said that the term *parental responsibility* had merit as a flexible option that could address many of the concerns raised by other respondents, with or without changing existing terminology in the area of custody and access.