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**FINAL FEDERAL-PROVINCIAL-TERRITORIAL  
REPORT ON  
CUSTODY AND ACCESS AND CHILD SUPPORT**

**PUTTING CHILDREN FIRST**

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**November 2002**





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Custody and Access and Child Support**

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*Aussi disponible en français*

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# **Final Federal-Provincial-Territorial Report on Custody and Access and Child Support**

## **Putting Children First**

This report represents the results of the Custody and Access Project of the Federal-Provincial-Territorial Family Law Committee, which was initiated at the request of Deputy Ministers Responsible for Justice. The federal, provincial and territorial governments participated in this work. The deputy ministers also asked the committee to review the child support guidelines.

The report is the result of extensive research and consultations with family law professionals, parents, advocacy groups and interested Canadians, as well as lengthy federal-provincial-territorial discussions to develop recommendations for future action.

The views expressed in this report are those of the Family Law Committee members and do not necessarily reflect the views of the departments or governments they represent.





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## EXECUTIVE SUMMARY

It is not enough that we in the justice system be *reactive*. To do our jobs properly, we must also be *proactive*. While our task is to solve people's problems, we can only really solve those problems in a thorough way if we take proactive steps to ensure that family law and procedure are modified to keep pace with changes in society. Proactive means progressive, innovative thinking and action that strives to meet the actual problems in the lives of the men, women and children the law serves. Family law is perhaps closer to the basic norms and values of our society than any other area of the law. And if the law is to be effective, it must reflect these values.<sup>1</sup>

The following report is presented to Ministers Responsible for Justice in the hope that it will stimulate continued dialogue on family law issues, support continued development of needed family law services and promote thoughtful family law reform.

This paper reviews many of the challenges facing children and families before, during, and after family separation. It reviews research, surveys, previous studies and the experiences of other jurisdictions. It builds on public consultations and research undertaken for this project. The report contains suggestions regarding custody and access legislation and family law services and processes that might assist in resolving family disputes and reducing trauma to children and their families. This involves individual, professional, judicial and government action.

Children today live in a diversity of family forms. Social change has resulted in an increase in single-parent families and blended families and the potential for children to face multiple family restructurings. An increasing number of children face family separation at an earlier age. An increasing number of children are born to parents who are not married, and children born to common-law couples face a greater risk of experiencing parental separation than do children whose parents are married.

When family breakdown occurs, adjustments must be made to parenting arrangements. Adjustments may also be needed from time to time until the children are no longer dependent. Conflicts that precipitated the family breakdown may make this process very difficult for many families. Divorce or separation may aggravate pre-existing problems such as poverty or ineffective parenting. New issues that may affect the parenting arrangement, such as a parent moving or having other children, may arise after the separation.

The family legal system in relation to custody, access and child support consists of the laws and the legal processes in place to resolve disputes when parents cannot agree. In Canada, government responsibility for the family legal system is divided between the federal and provincial and territorial governments as a result of the distribution of legislative powers under the *Constitution Act, 1867*.

The federal *Divorce Act* applies to custody, access and child support issues in divorce proceedings. These issues are determined by provincial and territorial legislation for separating

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<sup>1</sup> Remarks of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada, to the Family Law Dinner, Ontario Bar Association, Toronto, Ontario, January 24, 2002.

married parents who are proceeding under provincial legislation for orders of separation and other relief, and for divorcing parents who choose to have them determined under provincial legislation during their divorce proceedings. They are also determined under provincial legislation for unmarried parents. Provincial and territorial law governs all other aspects of family law in relation to parents and children, including establishment of parentage, adoption, child protection, guardianship of the estate of the child and consent to medical treatment. The federal government is responsible for the appointment of judges of the superior courts, but the provinces are responsible for the administration of all the courts that deal with family matters.

Given the shared jurisdiction, as well as our increasingly mobile population, it is important that jurisdictions work collaboratively in the pursuit of family law reform. In recognition of the need for a comprehensive and co-operative inter-jurisdictional review of this area of the law, the Family Law Committee was asked to look at legislation and services in relation to custody and access, and to review the recommendations made by the Special Joint Committee on Child Custody and Access.

The Ministers Responsible for Justice approved a set of guiding principles and objectives for family law reform in 1999, and the Family Law Committee proposes that these principles continue to guide the development of a longer term, collaborative, inter-jurisdictional response to family law reform and family law service enhancement.<sup>2</sup> **The Family Law Committee recommends that the principles and objectives of family law reform be as follows.**

### *Principles*<sup>3</sup>

**Ensure that the needs and well-being of children come first.**

**Promote an approach that recognizes that no one way of parenting after separation and divorce will be ideal for all children, and that takes into account how children and youth face separation and divorce at different stages of development.**

**Support measures that protect children from violence, conflict, abuse and economic hardship.**

**Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so.**

**Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with their grandparents and other extended-family members, when it is safe and positive to do so.**

**Recognize the positive contributions of culture and religion in children's lives.**

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<sup>2</sup> As a result of a restructuring of policy committees at the direction of Deputy Ministers Responsible for Justice, the Family Law Committee will cease to exist with the completion of this report. Its work will be carried on under a new Federal-Provincial-Territorial Committee to be called the Co-ordinating Committee of Senior Officials–Family Justice. This new committee will bring family law policy and family law services discussions together in one forum, replacing both the Family Law Committee and the Child Support Guidelines Task Force.

<sup>3</sup> Appendix E contains a complete list of the recommendations made in this report.

**Promote non-adversarial dispute-resolution mechanisms and retain court hearings as mechanisms of last resort.**

**Provide legislative clarity to the legal responsibilities of caring for children.**

**Recognize the overlapping jurisdictions in custody and access matters in Canada, and make efforts to provide co-ordinated and complementary legislation and services.**

### *Objectives*

**To focus parents, professionals and services to better serve children's needs and interests.**

**To reduce the negative impact of conflict on children and to promote healthy models of dispute resolution.**

**To support positive parental, extended family and cultural interactions with the child.**

**To provide clearer, more predictable and understood responses to family justice issues.**

It is important to recognize that there are two interrelated components to family law reform: legislation and services. It is clear from public consultations, the report of the Special Joint Committee on Child Custody and Access and the submissions of organizations like the Canadian Bar Association, that many Canadians do not view legislative change as the sole or even primary focus for family law reform. Legislative change without service improvements may have limited or no impact on the way families and children cope with family breakdown. This report addresses both legislation and services, including dispute resolution processes.

Both the federal government and the provincial and territorial governments have important roles in supporting services in the family law legal system. A commitment by governments for funding for services in the provinces and territories is needed to support a long-term integrated multi-sectoral approach to the provision of complementary and co-ordinated family justice services.

## **CUSTODY AND ACCESS REFORM**

### **Legislation**

In addition to the *Divorce Act*, there are at least thirteen different provincial and territorial statutes governing custody and access in Canada. None of the legislative provisions is exactly the same, although there are important common elements. For example, all provide that the fundamental principle is the best interests of the child, and all use the term *custody*. However, not all statutes use the term *custody* in the same way, and substantive provisions as well as terminology vary. Relative consistency in federal, provincial and territorial legislation would help make the law clearer to Canadians, and also help to ensure consistent treatment of children.

**The Family Law Committee recommends that jurisdictions work to ensure that children are treated similarly and provided similar protection in Canada by providing relative consistency in laws affecting custody, access and child support.**

In the 2001 public consultations, *Putting Children's Interests First: Custody, Access and Child Support in Canada*, the Family Law Committee identified several key legislative issues for reform. They are defining “best interests,” terminology, family violence, high-conflict relationships, addressing children’s perspectives and meeting custody and access responsibilities.

**Defining *Best Interests*:** Some, but not all, provincial and territorial laws list specific factors that parents are to consider when determining the best interests of the child. The *Divorce Act* does not contain such a list. **The Family Law Committee recommends that custody legislation contain an explanatory non-exhaustive list of criteria for parents, judges and others involved in the decision-making process to consider when determining the custody arrangement that is in the best interests of the child or children. The factors to be listed include:**

- **factors related to the children themselves, such as the children’s health and special needs;**
- **the children’s relationships with others;**
- **factors related to parenting of the children in the past; and**
- **factors related to the future of the children, including the potential for conflict or violence affecting the children.**

**The Family Law Committee also recommends that any list of best interests criteria be child-centred to ensure that the child’s best interests remain the foremost consideration in custody and access decision making.**

**Terminology:** The current terminology of custody and access has been criticized by some, including the Special Joint Committee on Child Custody and Access, which recommended that the terms no longer be used in the *Divorce Act* and be replaced by a new term, *shared parenting*. The critics argue that the current language promotes conflict and focuses on parents’ rights rather than on the child. Others argue that the current terminology is neutral, flexible, well understood and that change could engender litigation, at least in the short term. The Family Law Committee considered the five options articulated for public discussion in the public consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada First*. The five options are:

**Option 1—Keep Current Legislative Terminology**

The terms custody and access would be retained. Awareness and use of the wide range of parenting arrangements that are now available would be promoted through new and enhanced public and professional education and training programs.

**Option 2—Clarify the Current Legislative Terminology: Define Custody Broadly**

The terms custody and access would be retained, but clarified by being defined to include a non-exhaustive list of areas that make up custody in clear and understandable language. The legislation would provide a framework for parents and judges to assign the various parenting responsibilities to one parent alone or to both parents jointly. The legislation would require the

courts to clearly allocate parenting responsibilities but not require the parties or the courts to use the terms custody or access.

**Option 3—Clarify the Current Legislative Terminology: Define Custody Narrowly and Introduce the New Term and Concept of Parental Responsibility**

The term custody would be retained but it would be redefined narrowly to mean residence only. It would be but one component of a new concept, *parental responsibility*, which would refer to all the rights and responsibilities of parents for their children. Each parent would be responsible for the day-to-day care and decisions about the children when they are with that parent. Responsibilities could be assigned to one parent only or to both parents jointly.

**Option 4—Replace the Current Legislative Terminology: Introduce the New Term and Concept of Parental Responsibility**

The terms custody and access would be replaced with a new concept, *parental responsibility*. Court orders of *parental responsibility* would allocate specific aspects of parental responsibilities between the parents. A specific function could be allocated to one parent alone, to the parents proportionately or to both parents jointly.

**Option 5—Replace the Current Legislative Terminology: Introduce the New Term and Concept of Shared Parenting**

The terms custody and access would be replaced with a new concept, *shared parenting*. This shared parenting approach would not mean that children must live an equal amount of time with each parent. The starting point for any parenting arrangement, however, would be that children would have extensive and regular interaction with both parents, and that parental rights and responsibilities, including all aspects of decision making, but not including residence, would be shared equally or nearly equally.

The Family Law Committee does not recommend Option 5 (shared parenting) for several reasons. Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. There should be no presumptions in law that one parenting arrangement is better than another. It is also a term that seems to focus on parents' rights, rather than on the child. Its meaning and application is ambiguous and this itself may promote litigation. **The Family Law Committee recommends that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child.**

Fundamentally, the Family Law Committee recognizes that any reform should be aimed at clarifying parenting responsibilities and helping parents focus on the needs of the children. Any terminology needs to be sufficiently flexible to respond to the range of needs and circumstances of children and their parents. It is the workability of the arrangements rather than the terminology that matters most.

In general, the Committee believes that options 2, 3 or 4 could meet these principles for reform, depending on the specific statutory language and the supports available to promote implementation and understanding of the concepts. All of these options could clarify the

decision-making responsibilities of parents and unbundle the decision-making requirements to make it clear that parental responsibilities can be shared by, or divided between, the parents in a way that meets their children's best interests. It is recognized that there may be difficulties if the current terminology is discarded, particularly with respect to international enforcement of Canadian orders, and the potential for increased litigation with the introduction of new terminology. **The Family Law Committee recommends that, where jurisdictions determine that their legislative terminology should be changed or clarified, any amendments to legislation should be child-centred, focus on parents' responsibilities to understand and meet their children's needs, and promote the positive and safe involvement of both parents. It is agreed that Options 2, 3 and 4 could meet these criteria and that Option 5 does not.**

**Family Violence:** The *Divorce Act* should explicitly address family violence issues and the current emphasis in the *Divorce Act* on maximizing contact must be appropriately balanced against the need to protect children from family violence. Making one criterion more important than another seems contrary to a child-centred approach. **The Family Law Committee recommends that, with a view to ensuring that no court orders are made which may result in prejudice to the safety of children and place them at risk,**

- (a) **there be no legislative presumptions regarding the degree of contact a child has with his or her parents; and**
- (b) **legislative criteria defining best interests include, as factors to be considered,**
  - **any history of family violence and the potential for family violence; and**
  - **facilitating contact with both parents when it is safe and positive to do so.**

**The Family Law Committee also recommends that governments work to strengthen supports to families exposed to family violence, including crisis counselling programs and counselling programs for children exposed to family violence.**

**High-Conflict Relationships:** It is difficult to adequately define high-conflict cases, other than those involving family violence, in a way that lends itself to a legislative response or criteria. The best approach to high-conflict cases involves finding better ways to identify them in order to intervene earlier and more effectively, and services which help parents focus on their children's needs and improve their communication and conflict resolution skills. **The Family Law Committee recommends that high-conflict cases be addressed through a mixture of services and procedural supports to minimize the negative impact of conflict on children and families.**

**Addressing Children's Perspectives:** In order to determine the best interests of the child, decision makers need to hear the children's perspectives on the way their parents propose to care for them. The desirability of giving the child a voice in the decision-making process must be balanced against the need to shield the child from parental conflict and prevent the child from becoming embroiled in it. **The Family Law Committee recommends that each jurisdiction review its legislation, procedures and services to ensure that:**



- the parents and the courts have access to information on the child’s perspectives; and
- **the information is obtained from the child and is communicated to the parents and the court where necessary in a way that is appropriate to the child’s best interests, age and maturity, and in a way that the child does not feel responsible for the custody decision.**

**Meeting Custody and Access Responsibilities:** Although a considerable amount of attention is paid to the issue of wrongful denial of access, there are also problems of failure to exercise access and difficulties respecting enforcement of a right of custody. Access enforcement is not an easy problem to resolve given the wide range of circumstances in which it is an issue, and given that decisions must be made in the best interests of the child. Moreover, the actual level and nature of access problems are not clear. Rather than focus on punitive responses, strategies may need to focus on preventing conflict situations or misunderstandings that lead to access denial or non-exercise of access.

Although the Family Law Committee has identified a number of areas where improvements could be made to child custody and access enforcement legislation, and to legislation implementing *The Hague Convention on the Civil Aspects of International Child Abduction*, more work is needed to explore these options, to analyze work currently underway internationally, including a recently released British report, and to provide Deputy Ministers with refined recommendations. **The Family Law Committee recommends that, recognizing the breadth and complexity of the issues involved in child custody and access enforcement and parental child abduction cases, further detailed work be undertaken.**

The current provisions in the *Divorce Act* governing jurisdiction in custody issues have resulted in the custody of children habitually resident in one province being determined in the courts of another province with which they have a more tenuous and/or recent connection. Some, but not all, provincial and territorial legislation clearly sets forth jurisdictional rules for the determination of custody and access cases based on the habitual residence of the child, with certain consent and safety-based exceptions. **The Family Law Committee recommends that the *Divorce Act* and provincial and territorial legislation provide that the courts of the province or territory of the child’s habitual residence have jurisdiction to determine custody and access, subject to exceptions based on consent or safety considerations, and taking into consideration, as applicable:**

- **the jurisdictional provisions in some provincial custody and access legislation;**
- **the provisions of child custody enforcement legislation; and**
- ***The Hague Convention on the Civil Aspects of International Child Abduction.***

## Service Options and Responses

**Public and Professional Information and Education:** Public and professional information and education programs and services help families cope with the emotional trauma of separation, enable parents to make informed choices about parenting and assist parents to co-parent as effectively as possible. This is done by providing information to families, and to professionals working with them, on legal issues, child development, dispute resolution options, methods of communication and resources, and by teaching parents skills and techniques to improve their co-parenting abilities.

The federal, provincial and territorial governments have all been active in recent years in developing and implementing various parent information services and programs. Examples include toll-free telephone lines, booklets, pamphlets, Web sites and videos. **The Family Law Committee recommends that information on existing and new laws and services be disseminated to the public as widely as resources permit, and through a variety of communication modes, to be accessible to all families with children.**

Parent education and information programs help parents understand the demands and challenges of parenting after separation and divorce, teach them new ways to communicate and resolve day-to-day disputes, and explain appropriate alternatives to the formal court process to settle any issues they may have. The programs reduce conflict, frustration, confusion and costs to parents and to the legal system. **The Family Law Committee recommends that governments support parent education—mandatory or voluntary—which is broadly accessible and meets linguistic, cultural, geographic, and general parenting, legal and process information needs.**

Lawyers, social workers and other professionals involved with families and family separation issues, including advocates, mediators and counsellors, are key sources of information for parents. Professionals helping families deal with family breakdown and parenting issues need to have a solid understanding of the issues—emotional and legal—that families experience. Professional organizations should consider requiring members to keep abreast of the key issues, the wider social dynamics that affect families, and the resources and services available to assist separating and divorcing families, and providing training to facilitate this. **The Family Law Committee recommends that support be given to professionals working with families during and after separation and divorce, such as lawyers, social workers, and psychologists, to engage in continuing education and training in child custody and support law, family violence issues, the dynamics of family separation and divorce and the effects on children. Professional organizations should be encouraged and supported to facilitate professional development in this area, and to consider certification approaches incorporating professional development in this area. Jurisdictions should work with law societies and the bar associations:**

- **to explore options for legal professional development and training in appropriate ways to interact with children of separated parents in the litigation process; and**

- **to review practice codes with a view to ensuring that they set out counsel’s role and obligations in a way that adequately safeguards children’s best interests, and to ensuring that counsel have an obligation to explore appropriate alternative dispute resolution options with their family law clients.**

The provinces and territories have developed an inventory of the many custody and access services they currently provide, *An Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions*. This inventory should be maintained and updated periodically. **The Family Law Committee recommends that the *Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions* should be maintained and updated periodically.**

**Dispute Resolution:** Access to appropriate and timely dispute resolution options, either as part of the court process or independent of it, can allow parties to narrow the issues in dispute, resolve issues more quickly, and minimize parental conflict, emotional hurt and financial costs. **The Family Law Committee recommends that governments and the professions work together to support the development of a broad spectrum of dispute resolution services, including mediation, arbitration and collaborative law, and other supports to parents to help identify and narrow the issues in dispute, such as custody and access assessments and parent education.**

While mediation should be encouraged in appropriate cases, it is not recommended that mediation be mandatory. Such an approach is inconsistent with the basic premise of mediation as voluntary, consensus-based decision making. It is also not consistent with a focus on child-centred decision making. It could put the child or a parent at risk and, where both parents are not comfortable with the mediation process, it may itself generate, rather than reduce, conflict. **The Family Law Committee recommends that:**

- **mediation not be made mandatory; and**
- **mediation be available for informed participants of relatively equal bargaining power where participation of both parties is voluntary and where appropriate screening exists to ensure that family violence cases are identified and generally screened out.**

Traditionally, lawyers assist parties in resolving disputes through negotiation, and where this fails, advocate their clients’ cases in court. Recently, lawyers have developed a different approach to family dispute resolution: collaborative family law, in which lawyers are retained for the sole purpose of helping the parties to reach an agreement and cannot represent the parties in any court proceedings. **The Family Law Committee recommends that jurisdictions encourage the development of collaborative family law practice as a further option for parties to consider as a method of dispute resolution.**

The *Divorce Act* requires lawyers to advise clients of counselling and mediation facilities, and to discuss the advisability of negotiating custody and support issues. Given the range of dispute resolution mechanisms that has been developed, from arbitration to collaborative law, the current requirements in the legislation, and any similar provisions in provincial and territorial legislation,

may be too narrow. **The Family Law Committee recommends that family law legislation require lawyers to advise clients of the full range of available dispute resolution options.**

Currently, under the *Divorce Act*, a judge can adjourn the divorce proceeding to allow the parents to attempt reconciliation. It may be that the *Divorce Act* should also expressly state that a judge may adjourn the proceedings so that the parties can attempt to resolve their issues outside of court through mediation or other non-judicial dispute resolution mechanisms.

Courts across Canada have been attempting to promote early resolution of cases through a variety of mechanisms. **The Family Law Committee recommends that courts make appropriate use of judicial and non-judicial settlement approaches to avoid the hardening of positions and to promote early settlement and narrowing of issues in dispute.**

Case management systems support early settlement of disputes and reduce unnecessary delay and expense by having judges and others actively manage a case by conferences and the imposition of timelines. Experienced court personnel or judges focus the parties and their lawyers on the issues that are truly in dispute, encourage agreement, and attempt to ensure that unresolved issues are heard as efficiently as possible. In family law matters, case management systems need to be sensitive to the particular issues families face. In particular, they have to ensure that in urgent matters, such as those involving violence or wrongful removal of a child, case management procedures do not impede families having their case heard by a judge without delay. **The Family Law Committee recommends that case management systems provide for expedited access to judicial decision making where it is in the best interests of the child to have the matter dealt with on an urgent basis.**

Court orders should be in clear, unequivocal language, setting out each parent's responsibilities to the children. This is important both for enforcement purposes and also to provide rules and guidance to the parents to help them resolve issues as they arise. **The Family Law Committee recommends that orders be worded clearly and consistently to ensure that the parties understand their obligations and that the orders can be enforced.**

Parenting arrangements set out in a court order may have to be changed many times over the course of a child's life. Even where parents agree on the change, they cannot change the order without a further order. In many cases, however, there is no need for a court hearing, and if there is one, it may itself trigger discord. **The Family Law Committee recommends that procedures for variation of orders provide that, where there is consent, custody, access and child support orders can be varied expeditiously and without a court hearing.**

**Enforcement:** As noted above, enforcement of access denial and failure to exercise access is a problematic policy area. The magnitude of either problem is difficult to assess; the problems arise in varied circumstances; and it is difficult to fashion remedies which may not have unintended adverse effects on the child. Certainly, proactive approaches such as parent education programs may help to prevent the problem. **The Family Law Committee recommends that problems of access denial and failure to exercise access be monitored through research to identify best practices and the most effective ways of dealing with these problems, and that further research be undertaken to develop and assess innovative remedial approaches.**

**Family Legal Aid:** Legal aid for family law matters is available in all jurisdictions but the availability of legal aid is limited and the range of family law matters that are covered varies considerably from one jurisdiction to the next. In a few jurisdictions, family legal aid is available only in cases where domestic violence is present. There is a serious concern that lack of access to family legal aid can result in very negative consequences for children and their parents. In addition, large numbers of self-represented litigants (and the number appears to be increasing) strain the court system. The Family Law Committee recognizes that issues relating to legal aid family law services are currently being reviewed at the national level, and that there are other options that should be considered for assisting families in dealing with parenting legal issues, such as law help lines and manuals to help self-represented parties. **The Family Law Committee recommends that governments continue to work at improving components of the legal system that are critical to families' access to the legal system to resolve family breakdown issues, such as family legal aid.**

**Completion of Family Court Models:** By combining a streamlined court structure and a specialized judiciary with services such as mediation and assessments, unified family courts provide an effective mechanism for resolving family disputes. **The Family Law Committee recommends that the federal government work with jurisdictions to establish unified family courts, where there is a jurisdictional request. Further, it is recommended that persons appointed to, and serving in, specialized family courts have expertise in family law issues.**

### **Research and Further Work**

This report draws upon a considerable body of research conducted in Canada and elsewhere, including work undertaken through the Family Law Committee's custody and access project. The Family Law Committee believes that further research is required to continue to develop and enhance our understanding of families, family transitions and family-law related problems and issues. **The Family Law Committee recommends that there be a continued national emphasis on research and evaluation to monitor trends and the impact of reforms in law and services.**

In the course of its review of the family justice system in Canada, the Family Law Committee identified several particular issues that require further work or research. For example as noted above, further detailed work is needed in the area of custody and access enforcement and parental child abduction. Another area is provincial and territorial legislation governing custody and access rights and responsibilities upon the birth of a child to unmarried parents, and legislation respecting the establishment and recognition of parental status. The legislation varies from province to province. Considering the increasing number of children who are born to parents who were never married, **the Family Law Committee recommends that the provinces and the territories review their legislation respecting establishment and recognition of parental status, and entitlement to custody and access on the birth of a child, with a view to identifying any issues that require a legislative or service response, and making recommendations in the future.**

Finally, the Family Law Committee recognizes that its review has not yet sufficiently addressed diversity and Aboriginal issues with respect to family law and family law services. More work is required to meet this expectation. The Family Law Committee suggests that more dialogue

about the needs of specific communities is necessary. **The Family Law Committee recommends that continued dialogue, research and development be undertaken to address diversity and Aboriginal issues with respect to family law.**

## **CHILD SUPPORT**

As well as reviewing custody and access issues, the Family Law Committee, as part of its ongoing work, identified and consulted on specific issues related to child support guidelines.

The *Federal Child Support Guidelines* came into effect on May 1, 1997. Since that time, all of the provinces and territories have enacted child support guidelines legislation. The Family Law Committee believes that, in general, the Guidelines have succeeded in meeting their objectives. However, some fine-tuning is required to provide greater clarity while maintaining flexibility.

Taking into account the results of the 2001 consultation as well as previous consultations on other issues, research results and case law analysis, the Family Law Committee makes the following recommendations.

### **Shared Custody**

#### ***The 40 Percent Rule***

When a parent exercises access to, or has physical custody of, a child for forty percent or more during the year, the court has broad discretion to order a support amount different from the amount prescribed in the Guidelines. While the 40 percent time threshold has been criticized because it links child contact and support, no alternative has been found that demonstrably improves the test. **The Family Law Committee recommends that no change be made to the 40 percent threshold rule. However, further guidance should be provided in the child support guidelines on how to determine or analyze the elements that contribute to the determination that the 40 percent rule has been met.**

#### ***Presumptive Formula***

Broad discretion to determine the amount of support in shared custody situations has led to inconsistent results. To improve certainty and predictability while maintaining flexibility, **the Family Law Committee recommends that the current factors used to determine the amount of support in shared custody situations be replaced by the use of a presumptive formula. The formula amount would be the difference between the table values for each parent given the total number of children in the shared custody arrangement, unless that amount is deemed inappropriate based on, for example, how the parents share the child's expenses.**

### **Special or Extraordinary Expenses**

#### ***Definition of "Extraordinary"***

Section 7 of the Guidelines provides for a proportional sharing for six categories of special child-related expenses. Included in those categories are *extraordinary expenses* for education and extracurricular activities. The term *extraordinary* has been interpreted differently across the country, leading to some confusion and inconsistency. In order to increase predictability and

certainty, **the Family Law Committee recommends that the term *extraordinary* be defined in the Guidelines.**

### **Support for Children at or Over the Age of Majority**

#### ***Disclosure***

For children at or over the age of majority, the guidelines do not require disclosure of information relevant to the child's ongoing entitlement to support. To ensure transparency and accountability, it is proposed that the Guidelines be amended to require such disclosure. To insulate the child from direct involvement in the litigation, the amendment will require the recipient parent, not the child, to provide the information. **The Family Law Committee recommends that no change be made to the provisions regarding the eligibility for support of a child at or over the age of majority. It is recommended that the Guidelines be amended to require recipients of support for children at or over the age of majority to disclose information respecting the child's ongoing eligibility for support.**

#### **Undue Hardship Test**

If payment of the Guidelines amount would cause either parent or a child to suffer undue hardship, judges may order a different amount of support. Courts are currently applying the section as intended. In many cases where the paying parent resides far from the child, courts are making provision for high transportation costs incurred by the parent exercising access by way of a separate order. **The Family Law Committee recommends that no changes to deal specifically with high access costs be made to the Guidelines. These situations should be dealt with on a case-by-case basis and any accommodation appropriate to a particular case should be addressed as part of a custody and access order.**

#### **Obligations of Those Who Stand in the Place of a Parent**

A person who "stands in the place of a parent" to a child may have child support obligations similar to a natural parent. Broad judicial discretion to determine the amount of child support for these "step-parents" has led to inconsistencies. However, the question of how to allocate child support among natural parents and step-parents is complex and largely driven by the facts of each case. A rigid formula could create unfair results. **The Family Law Committee recommends that no changes be made to the provisions in the child support guidelines respecting the obligations of those who stand in the place of a parent.**

#### **Child Support Tables**

When the Guidelines were adopted, the intent was for changes to be made to the tables when changes to the tax rates significantly affected the table amounts. **The Family Law Committee recommends that the child support tables be updated every five years, or more often, if there are changes to federal, provincial or territorial taxes that would have a major impact on the table amounts.**

## **REFERENCES AND SUMMARY OF RECOMMENDATIONS**

Full citations of research papers and other documents referred to in the footnotes can be found in the References section at the end of the report. Appendix D contains a list of research reports produced under the custody and access project. Appendix E contains a list of all the recommendations made in this report.



## **PART 1: CUSTODY AND ACCESS**

### **A. FAMILIES TODAY**

Over the course of a child's lifetime, his or her family may form, break up and re-form. The initial family unit may consist of one or both parents and one or more children. Often, grandparents, aunts, uncles or other relatives form an extended family to care for the child. Laws and services directed at the care and upbringing of children seek to recognize and accommodate the diversity of family forms in which children live.

Children are society's future. Their health and well-being should be a primary concern. Policy-makers need to consider how to respond to research and experience that demonstrates children's well-being can be harmed by separation and divorce, and the restructuring of the family.<sup>4</sup> Problems faced by children during family restructuring seem to be increasing. Social change has resulted in an increase in single-parent families and blended families and the potential for children to face multiple family restructurings.<sup>5</sup>

Recent surveys of family life have revealed four main trends. First, most children are born into two-parent families, but an increasing number of these parents are not married. Second, children are increasingly experiencing life in a single-parent family and doing so at an earlier age than previously. For example, an analysis of data from the National Longitudinal Survey of Children and Youth (NLSCY) shows that one in four children born in the early 1970s saw their parents separate by age fifteen. Just over ten years later, one out of four children born in the early 1980s had experienced their parents' separation by age ten. By the late 1980s, almost one in four children born in 1987 to 1988 saw their parents separate by age six.<sup>6</sup> Third, children born to common-law couples face a greater risk of experiencing parental separation than do children whose parents are married.<sup>7</sup> Fourth, more children are subject to multiple family structures. This is so because children are younger at the time of the first family separation and their parents are more likely to re-couple (perhaps more than once) with other adults, some of whom will also have children from another relationship.

An increasing number of Canadian children live with only one parent, while the other parent lives in another family structure. Many children have parents who are not married. A recent

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<sup>4</sup> See Williams (2001), where research using the 1995 General Social Survey shows that adults who experienced their parents' separation or divorce as children were less happy and less close to their parents as children compared with adults who did not experience their parents separation or divorce. See also Stewart (2001), where he reports that children of separation and divorce are at greater risk of negative outcomes than are children in intact families. Possible negative outcomes include poor academic achievement, poor social relationships, conduct difficulties, emotional difficulties, substance abuse, and poor adult relationships.

<sup>5</sup> For demographic and social data and trends, see Child Support Team (2000). Another good source for general family data and demographic trends is Vanier Institute of the Family (2000).

<sup>6</sup> See Marcil-Gratton and Le Bourdais (1999), where analysis of data from the first cycle of the NLSCY shows that social and familial trends are changing. For example, more couples are opting to live in common-law relationships and are not getting married; more adults are going through separation and divorce; and more children are experiencing the separation or divorce of their parents and at younger and younger ages. See also Statistics Canada (1998a).

<sup>7</sup> Marcil-Gratton and Le Bourdais (1999). See also Statistics Canada (1998a).

analysis of NLSCY data shows that in the early 1960s over ninety percent of all births were to two married parents who had never cohabited before marriage. In contrast, by 1993–94, less than forty percent of all births were to married parents who had never cohabited before marriage, and twenty percent of children were born to unmarried parents. This trend is strongest in Quebec, where only twenty-three percent of births were to parents who married without first living together, and forty-three percent of births were to common-law couples.<sup>8</sup>

Children, regardless of their family structure, need stable and nurturing environments, protection from negative influences such as conflict, poverty and violence, and positive relationships with at least one adult.<sup>9</sup> Problems faced by a family prior to separation, such as poverty or ineffective parenting, may often be aggravated by divorce or separation. Parents who are emotionally or financially challenged by the separation or divorce may feel bewildered, angry, victimized or diminished by the changes in the family structure. Children may feel that they are responsible for the family breakdown, isolated from previous support systems and emotionally depressed.

The NLSCY shows that children at risk (e.g., low socio-economic status, low parental education, family dysfunction, prenatal problems, and children of single parents) have fewer behavioural problems when raised with positive and consistent parenting. Parenting style, particularly a hostile parenting style, has a more negative effect on children's behaviour than other factors such as income or family structure.<sup>10</sup>

## **B. THE FAMILY LAW COMMITTEE PROJECT**

The Deputy Ministers Responsible for Justice directed the Family Law Committee to make custody and access issues a priority, both as a matter of family law reform and as an integrated justice services project. The project was given the following mandate:

Identify and make recommendations respecting custody and access issues that arise before, during and after family disputes. This will involve developing a strategy to deal with legislative and service delivery issues requiring immediate priority for action, and

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<sup>8</sup> Marcil-Gratton and Le Bourdais (1999). See also Statistics Canada (1998a).

<sup>9</sup> See Stewart (2001), where his review of the literature identifies a number of risks for children of separation and divorce, and a number of factors that contribute to the positive adjustment of children, including the sensitivity and commitment of the parents to their children, and on-going relationships between both parents and child. See also Bernardini and Jenkins (2002), where the researchers review the risk and protective factors for children of separation and divorce. They identify four main risk factors—non-residential parental absence, troubled parent-child relationships, economic disadvantage, and parental conflict—and conclude that the primary risk factor is exposure to inter-parental conflict. Concerning factors that help protect or insulate children from the negative outcomes associated with separation and divorce, they conclude that some children do not show negative adjustment problems because of pre-existing factors—warmth in the parent-child relationship, positive emotionality—that help them cope with the stress of separation and divorce.

<sup>10</sup> Statistics Canada (1998b). The NLSCY measured four dimensions of parent-child interaction: hostile/ineffective interaction (e.g., how often parents tell children they are bad or not as good as others); punitive/aversive interaction (e.g., how often parents raise their voice or yell at children, and use physical punishment with children); consistent interaction (e.g., the proportion of time parents make sure the child follows a command or order, and enforces a punishment after warning the child); and positive interaction (e.g., how often parents laugh with children, play sports, hobbies and or games together). See also Stewart (2001), and Bernardini and Jenkins (2002).

also identifying an integrated, multi-sectoral process to respond to the longer term legal, environmental and service needs of children and families, for the purposes of:

- responding nationally to the public concerns which continue to be raised concerning current practice, law and services, available in the custody and access area;
- promoting the development of a public consensus or dialogue on appropriate types and levels of response; and
- developing integrated and diversity sensitive approaches to services that better serve the client and the public interest.

In December 1999, the then Ministers Responsible for Justice reviewed and approved the work plan for the project, the plans to hold public consultations and a set of principles to guide family law reform. As well, the federal Minister, with the concurrence of her provincial and territorial colleagues, also agreed to refer the recommendations of the Special Joint Committee on Child Custody and Access<sup>11</sup> to the Family Law Committee to include in its review.

In March 2001, a consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*,<sup>12</sup> was released and the public was invited to respond both in writing and through workshops that were held from April to June 2001 in every province and territory. The issues identified and discussed in *Putting Children's Interests First* reflected concerns that had been raised nationally on custody, access and child support. The consultations provided a wide range of comments on these issues. A review of the report from the consultations<sup>13</sup> reveals a general consensus on certain broad themes, including:

- the need to maintain a child-centred focus, including retention of best interests of the child as the key question to be addressed in determining family responsibilities;
- the need to enhance the family law system and support services to more adequately ensure that the best interests of children are indeed served when dealing with family breakdown;
- a recognition of the importance of children's need for physical safety, and emotional, psychological and financial security;
- the importance of encouraging and supporting good parenting practices during and after separation and divorce; and
- the need for continued flexibility in approaches to ensure that the unique needs of children and families during and after separation and divorce, including extended family, cultural and social needs, can be identified and addressed on an ongoing basis.

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<sup>11</sup> Canada. Special Joint Committee on Child Custody and Access (1998).

<sup>12</sup> Department of Justice (2001).

<sup>13</sup> See IER (2001). There is also an *Executive Summary* available under the same author. Both the report and the executive summary are available through the Family, Children and Youth Section of the Department of Justice Canada.

While a diversity of views was expressed on most issues, the workshop format encouraged participants to listen to and learn from the perspectives of different people concerned about children and families experiencing divorce and separation. Workshop participants, in total about 750 people, represented social service, education, enforcement, legal community, child welfare, health, women's interest groups, men's interest groups, grandparents' groups, non-custodial parents' groups, and Aboriginal organizations. As well, there were youth workshops.

The Family Law Committee also reviewed the recommendations of the Special Joint Committee on Child Custody and Access. In its report, *For the Sake of the Children*, the Committee made forty-eight recommendations on custody, access and child support, including legal and service issues.<sup>14</sup> The Committee's recommendations concerning the issues addressed in this report are discussed in the relevant sections of this report.

The Family Law Committee's work on the custody and access project was informed by research on various topics conducted before and during the life of the project by the federal government, and through other consultations, research and reviews conducted at the provincial and territorial level.

For example, Saskatchewan began a review of service and legislative issues with the March 1998 release of *Promoting Resiliency in Children and Families: A Discussion Paper on the Effects of Separation and Divorce*.<sup>15</sup> The paper was available for public response and was discussed in five multi-sectoral workshops. The results led to development of another paper, *Promoting Resiliency in Children and Families: Identifying Priorities*,<sup>16</sup> released in fall 2000 for public discussion and a further round of multi-sectoral workshops. Participants in both workshop sessions have provided feedback that helped direct provincial approaches to participating in the national *Putting Children's Interests First: Custody, Access and Child Support in Canada* consultations.<sup>17</sup>

In Alberta, the Unified Family Court Task Force submitted a report recommending a single court to deal with family matters.<sup>18</sup> The Government of Alberta has also initiated the Alberta Family Law Reform Project. Public consultations on family law reform began in February and March 2002.

On April 29, 2002, *Children Come First: A Report to Parliament on the Provisions and Operation of the Federal Child Support Guidelines* was tabled in the House of Commons by the federal Minister of Justice.<sup>19</sup> The Report to Parliament contains the recommendations for amendments to the *Federal Child Support Guidelines* found in Part 2 of this report entitled *Child Support*. The federal, provincial and territorial governments worked together through the Family Law Committee to develop these recommendations. The Report to Parliament also provides information on how governments worked together to implement the guidelines across Canada

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<sup>14</sup> The Special Joint Committee's recommendations are reproduced in Appendix A.

<sup>15</sup> Government of Saskatchewan (1998).

<sup>16</sup> Government of Saskatchewan (2000).

<sup>17</sup> *Putting Children's Interests First* was the paper-based component of the national consultations held in the spring of 2001 (See Department of Justice Canada, 2001).

<sup>18</sup> Alberta (2000).

<sup>19</sup> Department of Justice Canada (2002).

through the delivery of family justice services, carrying out research projects, conducting public awareness and information campaigns for parents, lawyers and judges and improving the enforcement of support orders.

The Report to Parliament also outlines the steps that governments have taken to work together to improve the enforcement of support obligations. For the family law justice system to work, family support obligations must be enforceable. In Canada, the provinces and territories are responsible for the enforcement of family support orders. However, over the past six years, the Government of Canada has taken a more active role in enforcement.

The federal government has concentrated its enforcement efforts in the areas of co-ordination and enhanced federal enforcement tools. It has established a federal enforcement policy unit, increased project-based funding, and launched a comprehensive program of research on enforcement and compliance issues. The results of some of the research are expected this year, and they will be extremely valuable in assessing ongoing efforts and, therefore, in planning for the future.

The scope of the custody and access and child support project did not include assessment of support enforcement policy or program issues. For more information about federal/provincial/territorial work on enforcement of support, the reader is referred to the Report to Parliament.

The Deputy Ministers Responsible for Justice have asked that all policy work include discussion of diversity issues. The Family Law Committee recognizes that its review has not yet sufficiently addressed diversity and Aboriginal issues with respect to family law and family law services. More work is required to meet this expectation. Although Aboriginal workshops were held in Ottawa in June 2001,<sup>20</sup> and research was conducted in Nunavut,<sup>21</sup> the Family Law Committee suggests that more dialogue about the needs of specific communities is necessary.

### **Recommendation 1**

**It is recommended that continued dialogue, research and development be undertaken to address diversity and Aboriginal issues with respect to family law.**

It is the hope of the Family Law Committee that distribution of the report from the national consultations, availability of research conducted for this project, and this report itself will continue to foster dialogue, discussion and the development of consensus on the important issues addressed in this report.

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<sup>20</sup> See IER (2001) Appendix B for results from the Aboriginal consultations.

<sup>21</sup> See Gallagher-Mackay (2002).

## C. PRINCIPLES AND OBJECTIVES

As mentioned above, Ministers Responsible for Justice approved a set of guiding principles for family law reform in December 1999. These principles were included in the text of the consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*,<sup>22</sup> and during the consultations there appeared to be agreement with these principles. The Family Law Committee proposes that these principles continue to guide the development of a longer term, collaborative, inter-jurisdictional response to family law reform and family law service enhancement.

### **Recommendation 2**

**It is recommended that the principles and objectives of family law reform be as follows:**

#### *Principles*

*Ensure that the needs and well-being of children come first.*

**Promote an approach that recognizes that no one way of parenting after separation and divorce will be ideal for all children, and that takes into account how children and youth face separation and divorce at different stages of development.**

**Support measures that protect children from violence, conflict, abuse and economic hardship.**

**Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so.**

**Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with their grandparents and other extended-family members, when it is safe and positive to do so.**

**Recognize the positive contributions of culture and religion in children's lives.**

**Promote non-adversarial dispute-resolution mechanisms and retain court hearings as mechanisms of last resort.**

**Provide legislative clarity to the legal responsibilities of caring for children.**

**Recognize the overlapping jurisdictions in custody and access matters in Canada, and make efforts to provide co-ordinated and complementary legislation and services.**

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<sup>22</sup> Department of Justice Canada (2001). For results from the consultations, see IER (2001).

### *Objectives*

**To focus parents, professionals and services to better serve children’s needs and interests.**

**To reduce the negative impact of conflict on children and to promote healthy models of dispute resolution.**

**To support positive parental, extended family, and cultural interactions with the child.**

**To provide clearer, more predictable and understood responses to family justice issues.**

## **D. THE ROLE OF FEDERAL, PROVINCIAL AND TERRITORIAL LAWS**

Custody, access and child support are areas of shared constitutional jurisdiction because of Parliament’s responsibility for marriage and divorce and the provinces’ responsibility for property and civil rights. The *Divorce Act* applies to custody, access and child support when these issues are determined under that legislation during divorce proceedings. These issues are determined by provincial and territorial legislation for separating married parents who are proceeding under provincial legislation for orders of separation and other relief, and when divorcing parents choose to proceed under provincial legislation during divorce proceedings. They are also determined under provincial legislation for unmarried parents. Provincial and territorial law governs all other aspects of family law in relation to parents and children, for example, establishment of parentage, adoption, change of name, child protection, guardianship of the estate of the child and consent to medical treatment.

Thus there are at least fourteen different statutes and fourteen different statutory provisions governing custody and access in Canada. Some provinces and territories have more than one statute that affects custody and access. Appendix C outlines the statutory provisions in all Canadian jurisdictions. None of the provisions is exactly the same, although there are important common elements. All provide that the governing and fundamental principle is the best interests of the child.<sup>23</sup> All use the term custody, although it is not always the primary term used to define parental rights and responsibilities. For example, in British Columbia and Alberta, guardianship is the primary term employed in the legislation.

The specific definition or use of the term custody varies from statute to statute, but, except in the Quebec legislation, the term usually refers to all the rights and obligations related to the care and control of a child, including *legal custody*, the responsibility to make all important decisions about a child’s care and upbringing, and *physical custody*, the responsibility for the everyday physical care and control of the child. This bundle of rights and responsibilities is sometimes called “guardianship of the person” of the child. It generally does not include responsibilities

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<sup>23</sup> Most statutes use the phrase “best interests of the child” to express this principle. Some use terms such as the “welfare of the child.”

related to the children's property or estate, which is often referred to as "guardianship of the estate" of the child.<sup>24</sup>

For example, in Saskatchewan, *The Children's Law Act, 1997* defines *custody* to mean "personal guardianship of a child and includes care, upbringing and any other incident of custody having regard to the child's age and maturity."<sup>25</sup> Under Quebec law, in contrast, *custody* has a narrower meaning. It refers only to physical custody. The Quebec concept of *parental authority* is closer to the concept of *custody* as it is used in other Canadian jurisdictions. The common denominator across Canada is that, at the least, the term *custody* implies the actual physical care and control of the child and the practical day-to-day decision making required to fulfil that responsibility.

*Access*, as it is used in the legislation, refers to the non-custodial parent's contact with the child, through visits or otherwise. Some of the statutes contemplate a somewhat broader definition of access than do others. For example, some legislation specifies that access includes the right to be provided with important information about the child. Others specify that this is a right to information only, and not a right to be consulted or participate in decision making.

*Joint custody*, while not defined *per se* in any statute, is a term usually used to refer to a situation where both parents have legal custody of the child, although one parent may have physical custody, or *primary physical care and control*. Its usage is akin to the Quebec concept of *joint parental authority*.

*Shared custody* is not a term currently used in Canadian custody legislation. It generally refers to a situation where parents share physical custody, as well as legal custody.<sup>26</sup>

Canadian legislation generally allows the court wide discretion to fashion the kind of order it considers appropriate in the circumstances. The courts can and do order a wide variety of parenting arrangements, both under the *Divorce Act* and under provincial and territorial legislation. Some examples are:

- orders that do not use the terms custody or access at all;
- sole custody to one parent with access to the other;
- joint custody with primary residence, or primary physical care and control, to one parent, and physical care and control to the other parent at specified times or times to be agreed;
- joint custody, but with one parent to have ultimate decision-making authority;
- shared custody;

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<sup>24</sup> In some provinces (e.g., BC and Alberta) "guardianship" includes both guardianship of the person and guardianship of the estate.

<sup>25</sup> Saskatchewan, *The Children's Law Act, 1997*, s. 2(1).

<sup>26</sup> *Shared custody* is defined for the purposes of child support in s. 9 of the *Federal Child Support Guidelines* to be "where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year."



- joint parental exercise of authority; and
- joint guardianship.

The legislation also does not preclude the parents from entering into, by agreement, whatever parenting arrangement in their view best suits their divided family. Parents are not bound to use the statutory terminology in their own agreements, although precision in a custody order is essential to enforcement should disputes arise.

## **E. OVERVIEW OF RESEARCH AND CONSULTATIONS**

In recent years, a number of countries have made significant changes to their laws governing child custody and access. The Family Law Committee studied changes in the State of Washington, the United Kingdom, and Australia in some detail.<sup>27</sup> These jurisdictions were chosen for several reasons. Each has made significant changes to the terminology of custody and access. The new legislation has been in effect in these jurisdictions for a number of years and, as a result, some evaluation material concerning the impact of the legislation is available. Although none of the evaluations are conclusive in terms of the effects of the legislation, the available research does indicate that the legislation has not yet had positive benefits in terms of reducing litigation and conflict between parents. The Family Law Committee also looked at custody and access reforms in civil law countries, particularly in France.<sup>28</sup>

This report also draws upon research conducted here in Canada. Much of this recent research has been undertaken in co-ordination with the Family Law Committee. Most of it is fairly recent, having been undertaken in the last four years following the release of the Special Joint Committee on Child Custody and Access report and its suggestion that further Canadian research was needed and should be undertaken.<sup>29</sup> Different types of research projects have been undertaken, including legal research, empirical research and consultative research.

Examples of the kinds of legal research undertaken include analyses of options for reforming access enforcement or addressing high-conflict cases.<sup>30</sup> The empirical research includes projects that have looked at available statistical data from existing surveys such as the National Longitudinal Survey of Children and Youth and the General Social Survey,<sup>31</sup> as well as related sociological reviews of available literature on topics of concern such as false allegations of abuse and high conflict.<sup>32</sup> The consultative research includes consultations with the general public<sup>33</sup> as well as consultations with professionals who work with families in transition.<sup>34</sup>

This report draws on this Canadian research. Throughout the report, where appropriate, research results are offered and references to the research are provided for the interested reader. Taken as

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<sup>27</sup> See Ministry of Attorney General of British Columbia (1999).

<sup>28</sup> See Appendix B for an overview and summary of the research carried out in these jurisdictions.

<sup>29</sup> The Special Joint Committee (1998) argues for the need for further research in many areas.

<sup>30</sup> See, e.g., Bailey (2001), and Gilmour (2002).

<sup>31</sup> See, e.g., Marcil-Gratton and Le Bourdais (1999), and Le Bourdais, Juby and Marcil-Gratton (2001).

<sup>32</sup> See, e.g., Bala et al. (2001), and Stewart (2001).

<sup>33</sup> See, e.g., IER (2001), and S.A.G.E. (2000).

<sup>34</sup> See, e.g., Paetsch et al. (2001a) and (2001b).

a whole, the research is another example of the fruits of federal-provincial-territorial co-operation and the benefits of informed policy development. The body of research is fairly large, but it is the view of the Family Law Committee that further research is required to continue to develop and enhance our understanding of families, family transitions, and family-law related problems and issues.<sup>35</sup>

### **Recommendation 3**

**It is recommended that there be a continued national emphasis on research and evaluation to monitor trends and the impact of reforms in law and services.**

## **F. KEY LEGISLATIVE ISSUES**

While a number of concerns have been raised about current custody and access legislation, it is clear from the public consultations, from the report of the Special Joint Committee on Child Custody and Access, and from responses from organizations such as the Canadian Bar Association, that many Canadians do not view legislative change as the sole or even primary focus for family law reform. It is generally recognized that legislative change without service enhancement or reform may have limited or no impact on the way families and children deal with family breakdown and reconstruction.<sup>36</sup> The need for services and family-sensitive dispute resolution mechanisms to support families in dealing with separation issues in the best way for the children has been a dominant theme of the custody reform discussion. The options for reform in services and dispute resolution processes are discussed in more detail in Section G of this report entitled “Service Options and Responses.”

This section of the report addresses concerns about the current legislative framework for custody and access. There are some key issues and these were put forward for discussion in the 2001 *Putting Children’s Interests First: Custody, Access and Child Support in Canada First* consultation document. They are defining “best interests”; terminology; family violence; high-conflict relationships, addressing children’s perspectives; and meeting custody and access responsibilities.

### **Defining “Best Interests”**

Custody and access law and services in Canada are guided by the basic principle that all decisions must be made in the best interests of the child. This is also the standard adopted in the United Nations *Convention on the Rights of the Child*.<sup>37</sup>

All Canadian statutes governing custody and access incorporate this overriding principle and direct the courts to consider the child’s best interests in making custody and access decisions.<sup>38</sup>

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<sup>35</sup> Appendix D provides a bibliographic list of the research reports prepared under the custody and access project.

<sup>36</sup> For results from consultations, see Paetsch et al. (2001a), Paetsch et al. (2001b), IER (2001), and S.A.G.E. (2000). See also Cossman (2001), where the author discusses options for reform and cautions against putting too much faith in legislative reform.

<sup>37</sup> United Nations General Assembly (1989).

<sup>38</sup> Most statutes use the phrase “best interests of the child” to express this principle. Some use terms such as the “welfare of the child.”

Some, but not all, provincial and territorial laws list specific factors that parents are to consider when determining the best interests of the child. The *Divorce Act* does not contain such a list. The Special Joint Committee on Child Custody and Access recommended a list of criteria to consider in determining the best interests of the child.<sup>39</sup>

The consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*, contained a broad list of factors that could be included in a definition of best interests.<sup>40</sup> The possible factors were characterized as falling within several broad themes:

- factors related to the children themselves (e.g. health, maturity, views and preferences);
- factors related to the children's relationships with others (e.g. family members, teachers, friends);
- factors related to parenting of the children in the past (e.g. pre-separation division of parenting responsibilities); and
- factors related to the future of the children (e.g. potential for future conflict or violence, ability to meet the child's developmental needs).

Stakeholders were asked whether best interests criteria should be inserted in the *Divorce Act* and, if so, which criteria should be included. While many supported a change to help ensure that best interests would be better understood, many participants questioned the overall impact such a change might have. For them, a greater focus on public education and family services might achieve more concrete results in better educating parents, families and professionals on the meaning of best interests. Although there was no consensus for adopting a defined list of criteria, there was some appreciation that a non-exclusive list did not have any perceived negative impact in those jurisdictions that had adopted criteria.<sup>41</sup>

The Family Law Committee has some concerns that an exhaustive list of criteria may create new areas of litigation based on the enumerated items. However, a balanced, non-exhaustive list of criteria could provide guidance to parents, professionals and the courts on the kinds of factors to consider and should not in itself encourage new litigation.

#### **Recommendation 4**

**It is recommended that custody legislation contain an explanatory non-exhaustive list of criteria for parents, judges and others involved in the decision-making process to consider when determining the custody arrangement that is in the best interests of the child or children. The factors to be listed include:**

- **factors related to the children themselves, such as the children's health and special needs;**

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<sup>39</sup> The Special Joint Committee's recommendations are reproduced in Appendix A, see recommendation 16.

<sup>40</sup> See Department of Justice (2001) for the full list of factors.

<sup>41</sup> IER (2001).

- **the children’s relationships with others;**
- **factors related to parenting of the children in the past; and**
- **factors related to the future of the children, including the potential for conflict or violence affecting the children.**

### **Recommendation 5**

**It is recommended that any list of best interests criteria be child-centred to ensure that the child’s best interests remain the foremost consideration in custody and access decision making.**

### **Terminology**

Use of the terms *custody* and *access* has been criticized. It is argued that the terms are inappropriate to describe a parent-child relationship because they have connotations of the old concept of the child as the property of the parents, and because they encourage parents to focus on their rights rather than on their responsibilities. From the critics’ perspective, the terms are “emotionally loaded” and promote a culture of litigation that leaves one parent the “winner” and the other a “loser,” irrespective of their parenting abilities.

Advocates of abandoning the current terminology also often link their concerns about custody language to a concern that parenting responsibilities are not allocated appropriately under the current legal approach. They feel that it results in one parent having most of the authority and responsibilities in relation to the child, to the virtual exclusion of the other parent from a meaningful parenting role. Some link the current language and approach to an allegation that the current system is gender-biased. These critics feel that what is required is not only new language but also a new concept of allocating parenting responsibilities after separation and divorce.

Because of similar concerns, some other common-law countries and American states have discarded the traditional custody and access language and adopted new terminology and often new substantive legal concepts. For example, in Australia and the United Kingdom, the terms *custody* and *access* were replaced by the terms *parental responsibility*, *residence* and *contact*. Washington State replaced custody and access with a regime based on parenting plans in which parenting functions, including decision-making authority, are allocated to each parent.<sup>42</sup>

Some civil law jurisdictions have also been reviewing the language they use to describe parenting arrangements. In the 1970s, family law went through significant changes in European civil law countries, particularly in France. The Council of Europe in 1984 recommended the use of the term *parental responsibilities*. Although France continues to use the term *parental*

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<sup>42</sup> See Appendix B for a summary of the research from these international jurisdictions, as well as for references to the research reviewed.

*authority*, France has proposed a new approach for courts and others to assist parents in organizing the terms and conditions of their parental authority.<sup>43</sup>

The Special Joint Committee on Child Custody and Access recommended that the terms custody and access be replaced in our legislation with a new regime and terminology that the committee called *shared parenting*, where “in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles.”<sup>44</sup>

On the other hand, supporters of retaining the current terminology maintain that the existing terminology is not necessarily negative. Parents can define their roles appropriately by agreement and the courts have wide discretion to mould the parenting arrangement to suit each family by allocating the incidents of custody in a positive way.

The proponents of retaining the current custody language point out that it is important to be realistic about how much changing legislation can accomplish.<sup>45</sup> Changing legal terminology cannot alter attitudes or force parties to abandon confrontation. Indeed, the Australian experience demonstrates that attempts to clarify terminology may increase the potential for litigation and misunderstanding. While there are those who argue for some form of presumption of joint parental responsibility or shared parenting,<sup>46</sup> the Australian experience suggests that jurisdictions be cautious in inserting new terminology given its potential to be misunderstood or to lead to negative results in terms of balancing the interests of children and their parents.

In 1987, Washington State changed to a *parenting plan* model to try to refocus parents on the needs of the child, but to date the change has had little impact on the reality of post-separation parenting. The changes in the United Kingdom were intended to encourage parents to focus on co-operative arrangements, but the available research indicates that these changes have not succeeded in reducing litigation concerning custody and access. On the contrary, there has been “a dramatic increase in litigation over contact orders.”<sup>47</sup>

Some advocates of changing terminology have also argued that the current language lacks clarity in Canada because, they allege, it has different meanings in different jurisdictions. They believe that there is a need to clarify the language so that it is understood and employed in the same way throughout Canada. Those opposing changing the current terminology maintain it is clear and well understood by Canadians and the legal system and any confusion that may exist can be resolved through means other than changing the terminology.

The consultation paper, *Putting Children’s Interests First: Custody, Access and Child Support in Canada*, articulated five options for public discussion:

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<sup>43</sup> The new bill was introduced in June 2001 in the French National Assembly. See Appendix B for a summary of the research from these international jurisdictions, as well as for references to the research.

<sup>44</sup> The Special Joint Committee (1998: 27). The Committee’s recommendations are reproduced in Appendix A; see especially recommendation 5.

<sup>45</sup> See e.g., consultation results in Paetsch et al. (2001a), and Paetsch et al. (2001b). See also Cossman (2001).

<sup>46</sup> See, e.g., the Special Joint Committee recommendations 3, 5, 6, and 25. The recommendations are reproduced in Appendix A of this report.

<sup>47</sup> Cossman (2001: 35).

### **Option 1—Keep Current Legislative Terminology**

The terms custody and access would be retained. Awareness and use of the wide range of parenting arrangements that are now available would be promoted through new and enhanced public and professional education and training programs.

### **Option 2—Clarify the Current Legislative Terminology: Define Custody Broadly**

The terms custody and access would be retained but clarified by being defined to include a non-exhaustive list of areas that make up custody in clear and understandable language. The legislation would provide a framework for parents and judges to assign the various parenting responsibilities to one parent alone or to both parents jointly. The legislation would require the courts to clearly allocate parenting responsibilities but not require the parties or the courts to use the terms custody or access.

### **Option 3—Clarify the Current Legislative Terminology: Define Custody Narrowly and Introduce the New Term and Concept of Parental Responsibility**

The term custody would be retained but it would be redefined narrowly to mean residence only. It would be but one component of a new concept, *parental responsibility*, which would refer to all the rights and responsibilities of parents for their children. Each parent would be responsible for the day-to-day care and decisions about the children when they are with that parent. Responsibilities could be assigned to one parent only or to both parents jointly.

### **Option 4—Replace the Current Legislative Terminology: Introduce the New Term and Concept of Parental Responsibility**

The terms custody and access would be replaced with a new concept *parental responsibility*. Court orders of *parental responsibility* would allocate specific aspects of parental responsibilities between the parents. A specific function could be allocated to one parent alone, to the parents proportionately or to both parents jointly.

### **Option 5—Replace the Current Legislative Terminology: Introduce the New Term and Concept of Shared Parenting**

The terms custody and access would be replaced with a new concept *shared parenting*. This shared parenting approach would not mean that children must live an equal amount of time with each parent. The starting point for any parenting arrangement, however, would be that children would have extensive and regular interaction with both parents, and that parental rights and responsibilities, including all aspects of decision making, but not including residence, would be shared equally or nearly equally.

Respondents in the consultations voiced many of the arguments summarized above about the merits of changing the current terminology and concepts. There was no public consensus on which of the options would be best. Indeed, there were strong opposing views expressed on Option 1 (Keeping current terminology) and Option 5 (shared parenting). There appeared to be support for some form of terminological change, or at least a public expectation that the legal

system should encourage parents to focus their attention on the needs of the children and their responsibilities as parents rather than upon their rights as parents.<sup>48</sup>

The Family Law Committee was also unable to reach a consensus in favour of any one of the options. The Committee agreed that it would not recommend Option 5 (shared parenting) for several reasons. Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. There should be no presumptions in law that one parenting arrangement is better than another. The Special Joint Committee on Child Custody and Access also concluded that the legislation should not contain presumptions. Its report, under the section entitled “No Presumptions,” relates some of the debate on the issue and makes the following comment:

Presumptions in favour of joint custody or the primary caregiver have been adopted in a number of jurisdictions, but in some cases legislatures have subsequently withdrawn them after finding that they were not having the intended desirable effect. Presumptions that any one form of parenting arrangement is going to be in the best interests of all children could obscure the significant differences between families.<sup>49</sup>

Shared parenting has come to imply a presumptive starting point of equal or near equal parental rights and responsibilities, including decision making. Imposing a regime of shared decision making on parents who are not able to deal with each other without conflict can engender more conflict to the detriment of the children. Moreover, while it is recognized that both parents can play a positive role after separation in the child’s development, the parental role should not be emphasized at the expense of a clear determination of what is in the child’s best interests. It is also a term that seems to engender significant debate regarding its meaning and how it should apply. The ambiguity of the term itself may promote conflict.

The Family Law Committee considered and weighed various factors in its assessment of the other four options.

The Family Law Committee’s review of legislation across the country indicates that the argument for legislative change based on a need for clarity is not compelling. Although the statutes vary, as discussed earlier in this report, all statutes use custody to mean, at the least, the everyday care and control of the child or, to put it another way, residence and the day-to-day decision making that goes along with it as a practical matter. The language is workable for enforcement purposes and the legislative concept is flexible enough to permit any kind of parenting arrangement that suits a particular family.

However, a term like “parental responsibility” might not have the negative baggage that some ascribe to the current terminology. Requiring or permitting the use of this seemingly more neutral language might encourage parents to take a more consensual approach. Research conducted during this project suggested that terminology change might help to promote a less adversarial approach.<sup>50</sup> Building into the legislation a menu of alternative parenting arrangements or parenting functions may provide guidance to parents, lawyers, other

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<sup>48</sup> See IER (2000).

<sup>49</sup> Canada. Special Joint Committee (1998: 42).

<sup>50</sup> See Cossman (2001).

professionals, and the courts to help them develop parenting arrangements that are more sensitive to the child's needs with regards to each of the child's parents.

On the other hand, many people do not believe that the terms custody or access have negative implications or, if they do, legislative change is not necessarily required to change the language actually used to describe parenting arrangements where the parents do not want to use that language. For some years now, parents, lawyers and judges across the country have been moving away from the language of custody and access in agreements and court orders, and they have been able to do so because the current legislative language and scheme permits this flexibility.<sup>51</sup> For example, in Manitoba, the typical custody order does not take the form of sole custody with access. More often, the order states that the parents have joint custody (meaning decision making about important matters is shared), and one parent has "primary physical care and control" and the other parent has "physical care and control as the parties may agree."<sup>52</sup> Furthermore, to the extent that there may be any ambiguity in the existing terminology, parents, lawyers and judges are free to fashion agreements and orders that suit the particular family.

The Family Law Committee's review of the current federal, provincial and territorial legislation has not revealed any gender bias in the legislation. It is recognized that, while the law may be gender neutral, in a majority of cases the mother is a sole custodian or, in a joint custody arrangement, she is the primary caregiver with the father having the role of an access parent.<sup>53</sup> There is no reason to believe that this gender differentiation is a result of systemic bias in the Canadian courts. It is more likely that in the vast majority of cases the parties have themselves agreed on this arrangement. The social realities or parents' perceptions regarding parenting roles may be responsible.

Fundamentally, the Family Law Committee recognizes that any reform should be aimed at clarifying parenting responsibilities and helping parents to focus on the needs of the children. Any terminology needs to be sufficiently flexible to respond to the range of needs and circumstances of children and their parents. It is the workability of the arrangements rather than the terminology that matters most.<sup>54</sup>

In general, the Committee believes that options 2, 3 or 4 could meet these principles for reform, depending on the specific statutory language and the supports available to promote implementation and understanding of the concepts. There was a range of support for each of

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<sup>51</sup> See, e.g., Goubau (2000).

<sup>52</sup> Under its Automated Court Order project, the Court of Queen's Bench of Manitoba (Family Division) requires a set of standard clauses be used in most orders. The quoted orders are standard clauses for those kinds of parenting arrangements.

<sup>53</sup> National statistics on custody orders and custody arrangements are not available in Canada. However, research estimates show that the most common custody arrangement is by far sole mother custody. See, e.g., Marcil-Gratton and Le Bourdais (1999), where the research indicates the following approximate breakdown of custody types: 81 percent sole mother; 7 percent sole father; 13 percent shared custody. Other research shows similar results. For example, research over the last three years from the Survey of Child Support Awards provides the following similar approximate breakdown of custody types: 81 percent sole mother; 8 percent sole father; 5 percent shared; 5 percent split, and 1 percent other (See Hornick, et al., 1999, Bertrand et al., 2000, and Bertrand et al., 2001).

<sup>54</sup> See, e.g., Moyer (2002).



these models.<sup>55</sup> All of these options could clarify the decision-making responsibilities of parents and unbundle the decision-making requirements to make it clear that parental responsibilities can be shared by, or divided between, the parents in the way that meets their children's best interests.

However, any change has the potential for negative and positive effects. The potential impact should be analyzed further, including the time required to implement these changes, so as not to disrupt family relationships unnecessarily. If the terms custody and access are replaced in family law legislation, they may still be used in other legislation dealing with child protection or guardianship. The impact of such a change on provincial and territorial legislation needs to be considered in this context as well. In addition, even if the terms custody and access are replaced in relation to parents' rights and responsibilities, the term access may need to be retained to deal with third party claims, such as those of grandparents or other extended family.

Any change in the current terminology would also have to accommodate the definition of custody in *The Hague Convention on the Civil Aspects of International Child Abduction* so that in cases falling under the Convention, one could ascertain whether an incident of custody within the meaning of the Convention had been breached. This would be necessary to ensure that requests for the return of abducted Canadian children are not jeopardized.

Indeed, the Family Law Committee's concerns regarding the impact of any terminology change include the need to consider what services will be required to help families adjust to any new regime and what information will need to be provided to families, legal professionals and others involved in the family justice system about any legislative change. Changes to legislation, particularly to terminology, require time to adjust to a new way of thinking. Parents need information about their obligations and everyone in the family justice system needs to understand the intention and effect of any legislative change. As well, the concepts of custody and access are well established in society beyond the family justice sphere. For example, police officers, day care workers, school officials, and health care workers refer to the concepts. Many different groups would require information on how new terminology would apply to their work.

Experience in other jurisdictions confirms that an ongoing program of education and information is required to properly implement any legislative reform in the area of family law.<sup>56</sup> Interest groups and professionals interpret changes in family laws in different ways. The challenge is how to address the fact that there are many different messages being heard from the same words used in legislation. There are subtleties in language and slight changes can mean differences in the message.

The Family Law Pathways Advisory Group was established by the Australian Attorney-General and Minister for Family and Community Services to find ways to improve the pathways for families through the family law system. That group recommended an ongoing information strategy be developed to reach people at the time they need to hear the message. Such a strategy would be aimed at helping people understand their obligations upon marriage breakdown and their continuing responsibilities to parent their children.

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<sup>55</sup> See IER (2001).

<sup>56</sup> See Appendix B for an overview of international research.

Consultations with parents and professionals indicate that problems in the family justice system have more to do with the lack of resources for families than with legislation.<sup>57</sup> In fact, increased availability of family justice services and education programs would likely have a greater and more positive impact in changing the circumstances families experience on separation and divorce than any legislative change.<sup>58</sup>

If there is legislative change, it will require time and funding to implement the legislation and to assist with the appropriate service changes.

### **Recommendation 6**

**It is recommended that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child.**

### **Recommendation 7**

**It is recommended that, where jurisdictions determine that their legislative terminology should be changed or clarified, any amendments to legislation should be child-centred, focus on parents' responsibilities to understand and meet their children's needs, and promote the positive and safe involvement of both parents. It is agreed that Options 2, 3 and 4 could meet these criteria and that Option 5 does not.**

## **Family Violence**

Another major issue of concern for the public and the Family Law Committee is whether the current family law system ensures that family violence issues are appropriately addressed in making determinations on what is in the best interests of the child. Provincial and territorial legislation varies in the degree to which it deals with this issue. The *Divorce Act* has been criticized for lack of clarity on how the courts are to treat allegations or findings of family violence, and for how it balances these issues with rules relating to maximum contact. The current regime has been criticized as placing over-emphasis on contact, sometimes at the risk of the child. A child's needs must be considered in the overall context of that child's life and circumstances. Making one criterion more important than another seems contrary to a child-centred approach.<sup>59</sup>

The consultation paper, *Putting Children's Interests First: Custody, Access and Child Support in Canada*, raised these issues. Although there were a variety of responses, it would seem that a significant number of respondents recognize that family violence can have serious consequences for children, as well as for their caregivers, and that legislation may require greater clarity to

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<sup>57</sup> See, e.g., IER (2001), S.A.G.E. (2000).

<sup>58</sup> See, e.g., O'Connor (2002b), where the researcher argues that services to families and children would likely have a greater impact than legal reform. See also Cossman (2001).

<sup>59</sup> See, e.g., results from consultations with professionals in Paetsch et al. (2001a) and (2001b). See also S.A.G.E. (2000) for results from focus group testing on directions for reform.

ensure that the safety of children is not compromised. It is also clear that participants in the consultation recognized the need for a strong network of services to support legislative measures.<sup>60</sup>

The options for reform range from including a general statement of principle in the legislation to indicate that children deserve to develop in a healthy environment free from emotional, physical and psychological harm, to including specific presumptions against contact where family violence has been shown to be a factor. Many are concerned, however, that any change in legislative standards can have negative results in terms of either deterring parties from raising family violence concerns or in creating incentives to raise family violence when the circumstances do not warrant it.

A related issue is the concern that has been expressed that some parents make false allegations of child abuse against the other parent in order to gain an advantage in custody litigation. Research has shown that there are differing perceptions regarding this issue and that the actual level of false allegations seems to be relatively low.<sup>61</sup> However, the lack of trust and lack of adequate communication between parties may lead to misunderstandings or misinterpretations leading to increased conflict and more distrust. Again, the difficulty lies in achieving the right balance to ensure that the child's safety is not compromised and that the child's contact with both parents is not limited without sufficient reason.

The Family Law Committee acknowledges the serious negative impact that family violence can have on children's sense of security, self-esteem, and future orientation to relationships. This negative effect exists whether the children are the direct or indirect victims of the violence. However, each case must still be considered based on the past, current and future potential for violence or negative implications of violence on relationships. We recognize that violence can occur in isolated instances or may be part of an ongoing pattern of conduct. The implications of the particular risks or negative implications of family violence need to be carefully considered in each case where this factor is raised. The pre-eminent purpose of keeping children safe and supporting their well-being needs to be recognized throughout decision making. This means that parents and courts should ensure that their decisions do not create situations that place the child at risk.

### **Recommendation 8**

**It is recommended that, with a view to ensuring that no court orders are made which may result in prejudice to the safety of children and place them at risk,**

- (a) there be no legislative presumptions regarding the degree of contact a child has with his or her parents; and**
- (b) legislative criteria defining best interests include, as factors to be considered,**
  - any history of family violence and the potential for family violence; and**
  - facilitating contact with both parents when it is safe and positive to do so.**

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<sup>60</sup> See IER (2001) for results from the national consultations.

<sup>61</sup> See Bala et al. (2001).

## Recommendation 9

**It is recommended that governments work to strengthen supports to families exposed to family violence, including crisis counselling programs and counselling programs for children exposed to family violence.**

### High-Conflict Relationships

At present, neither the *Divorce Act* nor provincial and territorial legislation contain provisions specifically addressing high-conflict relationships. It has been suggested that legislative measures are needed to deal specifically with those cases where a parent or child alleges they are at risk as a result of high conflict. There are differing views on the “streaming” of violent or high-conflict cases.<sup>62</sup> One view holds that the fact that the case is before the court means that it warrants judicial attention, because there may be undisclosed issues of power imbalance in the family. Another view holds that to force all high-conflict cases, such as those involving family violence, into the court stream, and away from other dispute resolution techniques is paternalistic and denies the autonomy of the victim.<sup>63</sup>

The research seems to show that only about ten to fifteen percent of all couples exhibit a high level of legal and interpersonal conflict.<sup>64</sup> Families may cycle in and out of conflict depending on factors such as financial stress, new relationships, and problems with childcare and development. Research shows that the level and intensity of parental conflict is a very important factor in children’s adjustment after separation or divorce. Parents caught in the cycle of conflict may not recognize the harm being generated. Parents who co-operate after they separate increase the chances that their children will have close relationships with both of them and will cope successfully with the separation or divorce. Parental conflict and lack of co-operation have a negative effect on children’s adjustment after separation and divorce. When parents’ interpersonal struggles take centre stage, children’s needs are not given adequate attention. High-conflict parents may have difficulty seeing their children’s needs as separate from their own and this interferes with their ability to learn how to effectively co-parent or communicate.<sup>65</sup>

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<sup>62</sup> The Special Joint Committee on Child Custody and Access recommended that high conflict cases be identified early and streamed into a different, undefined, process than the normal or average couple going through divorce. See Appendix B where the Committee’s recommendations are reproduced, especially recommendation 32. Stewart (2001) argues that the social science research does not lend support to the idea that we could effectively identify, stream and treat high-conflict cases at this time.

<sup>63</sup> See Stewart (2001), or Gilmour (2002) for a general discussion of problems with early identification and streaming of these cases.

<sup>64</sup> The Special Joint Committee’s report, drawing on expert witness testimony, estimates that between 10 to 20 percent of divorces are high-conflict (see Canada; Special Joint Committee 1998). Research (see Stewart, 2001) similarly estimates that 10 to 15 percent of separations and divorces are high-conflict. It should be noted that these are estimates of the number of cases that experience high conflict in the process of separation and divorce. These cases are usually identified as being high conflict because they use more court time and court resources, often returning to litigate again and again. In the research literature, high-conflict cases may, but do not necessarily, involve violence. High-conflict cases therefore should not be equated with family violence cases.

<sup>65</sup> See Stewart (2001) for an overview of the effects of high-conflict divorce on children. See Bernardini and Jenkins (2002) for an assessment and relative importance of risk and protective factors for children of divorce.

The research suggests that “there is no generally accepted definition of what constitutes a high-conflict divorce, although there is acknowledgement that these situations differ from the normal amount of upset associated with marital separation and divorce.”<sup>66</sup> Most separating couples go through a period of transition that includes emotional upset regarding the end of their relationship. However, the reason some separating and separated couples become “locked into long, bitter and expensive battles over custody, access and support, while the majority of separating and divorcing families are able to avoid such protracted disputes, remains unclear.”<sup>67</sup>

Research indicates that high-conflict situations may cause serious problems for children and parents. Children experience fear, sadness, powerlessness, guilt and a sense of divided loyalty. Parents experience similar emotions and report that a range of problems occur in high-conflict situations, including physical threats and assaults, access denial, restrictions of access to extended family members, withholding of support payments, and refusing access to information for the other parent. Mental health workers and lawyers also describe high-conflict situations as being problematic, involving anger and powerlessness, domestic violence and physical, emotional and verbal abuse. Lawyers and judges often describe high-conflict cases in terms of increased court time and repeated litigation.<sup>68</sup>

Separation and divorce cases marked by high conflict seem to share some characteristics. These include the emotional difficulties experienced by the parents and children in dealing with the high levels of conflict; related problems that arise out of the parents’ conflict such as the use of false allegations of abuse or access denial; and the simple reality that high-conflict parents often litigate more than do other less conflicted couples, resulting in their using more court time and resources as well as their own time and resources on settling their dispute. In these kinds of situations, it is difficult to believe that the best interests of the children are being served.<sup>69</sup>

While the public consultations raised this issue and invited comments on an appropriate legislative or service response, it appears clear that—family violence aside—it would be difficult to sufficiently define high-conflict cases in a way that would lend itself to a legislative response or criteria. The solution to high-conflict cases lies in supporting parents to focus on their children’s needs, improving their communication and conflict resolution skills, and support services or approaches to better stream and screen high-conflict cases in order to intervene earlier and more effectively.<sup>70</sup> For example, Manitoba’s parent education program, *For the Sake of the Children*, runs separate seminars for parents experiencing higher conflict. These seminars focus on safe, low-to-no-contact ways to parent after separation. These issues will be addressed further in Section G of this report, “Service Options and Responses.”

## **Recommendation 10**

**It is recommended that high-conflict cases be addressed through a mixture of services and procedural supports to minimize the negative impact of conflict on children and families.**

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<sup>66</sup> Stewart (2001: 2).

<sup>67</sup> Stewart (2001: 2).

<sup>68</sup> Stewart (2001: 14).

<sup>69</sup> See Stewart (2001), and Gilmour (2002).

<sup>70</sup> See Stewart (2001), and Gilmour (2002).

## Addressing Children's Perspectives

To determine the best interests of the children, decision makers need to hear the children's perspectives on the way their parents propose to care for them. Canada is party to the United Nations *Convention on the Rights of the Child*. That Convention says:

State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

There are varying opinions about when and how to best hear children's views.<sup>71</sup> The desirability of giving the child a voice in the decision-making process must be balanced against the need to shield the child from parental conflict and prevent the child from becoming embroiled in it. Children should not be put in the position of having to choose one parent over another.

While the *Divorce Act* has no provisions expressly mandating the court to consider the children's wishes, most provincial and territorial legislation directs the court to consider the views and preferences of the child, usually as part of a best interests test.<sup>72</sup> The law in Canada generally recognizes that the weight to be given to the children's wishes increases with the age and maturity of the child.

In some situations, courts have appointed a representative for the child during a proceeding that will determine the child's custody or access. In Ontario, the Office of the Children's Lawyer represents the child if the case meets the criteria defined by that office. In Manitoba, until recently, Legal Aid funded appointments of counsel by the court to act as *amicus curiae*. The role of the *amicus* was to advise the court as to the child's best interests; the *amicus* would relay the child's expressed wishes, but would not take instructions from the child. Currently, Manitoba's Family Conciliation Office is operating a pilot project, called the *Brief Consultation Service*, whereby the child's voice may be heard. A counsellor is available to the court to meet with parents and see the child within a short time. The counsellor then provides a brief verbal or written report to the court, which may include information respecting the wishes or concerns of the child.

Expert reports, such as those provided by the Manitoba service, are the most common way the child's views are expressed to the court. The expert, such as a social worker, interviews the child

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<sup>71</sup> See Bessner (2002) for an overview of the legal literature on "voice of the child" in the context of separation and divorce proceedings.

<sup>72</sup> See, e.g., s. 31(2) of *The Child and Family Services Act and Family Relations Act* of New Brunswick, where the statute lists as a best interests factor "the views and preferences of the child, where the views and preferences can reasonably be obtained."

and communicates to the court, often as part of a custody and access assessment report, the views the child has expressed. In rare circumstances, the judge may interview children.<sup>73</sup>

Research conducted during the Family Law Committee project indicates that currently children generally have little opportunity to participate in custody and access proceedings that affect them. The research looks at a range of possible responses from a more direct role with counsel or advocates to development of service supports for children.<sup>74</sup>

Youth participating in the consultations *Putting Children's Interests First* were enthusiastic about being asked their views. There were six consistent themes brought out during the workshops: parental conflict; parental abandonment or lack of interest in the child; voice of the child; availability, responsiveness and accountability of professionals; child support; and concern about the future. The vast majority of youth wanted services and divorce legislation to provide a way for their voice to be heard when decisions were made, but there was clear concern that they not be placed in the middle of the dispute.<sup>75</sup>

The Special Joint Committee on Child Custody and Access specifically recognized the need for children to be heard when parenting decisions affecting them are being made, through a professional or other representative, including legal counsel where required.<sup>76</sup>

As the premise for the work of the Family Law Committee is to take a child-centred approach to custody and access reform, addressing the needs of children to have their perspectives heard in formal or informal forums and by appropriate processes is recognized as a matter of priority.

### **Recommendation 11**

**It is recommended that each jurisdiction review its legislation, procedures and services to ensure:**

- **the parents and the courts have access to information on the child's perspectives; and**
- **the information is obtained from the child and is communicated to the parents and the court where necessary in a way that is appropriate to the child's best interests, age and maturity, and in a way that the child does not feel responsible for the custody decision.**

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<sup>73</sup> See Bessner (2002), where the various methods are discussed.

<sup>74</sup> See Bessner (2002).

<sup>75</sup> See IER (2001), especially Appendix A where results from the youth consultation are presented.

<sup>76</sup> The Special Joint Committee's recommendations are reproduced in Appendix A; see recommendation 3.

## Meeting Custody and Access Responsibilities

### *Introduction*

Parents may have rights of custody or access by operation of law, or pursuant to a written agreement or a court order. Third parties, such as grandparents and others, may also have rights of custody or access pursuant to an order or agreement. When a right of custody or access is denied, there is a wide range of legal remedies and options available to enforce the right in question.<sup>77</sup> Some options are only available if a court order exists; others only apply to children of certain ages or in inter-jurisdictional cases. Options range from informal negotiations between the parties and/or their legal counsel, to mediation, to invoking the civil justice system and, in some cases, the laying of criminal charges. The test applied by courts across Canada in determining parenting arrangements for children and access arrangements respecting children is the best interests of the child. Depending on the mechanism used to enforce a custody or access right, the test applied by the court may be very different or involve the best interests of children in the general, rather than the specific, sense (e.g., as is the case in proceedings pursuant to *The Hague Convention on the Civil Aspects of International Child Abduction*).

Although a considerable amount of attention is paid to situations where one parent alleges that the other parent is wrongfully denying access as ordered by a court, there are also situations where parents fail to exercise access as provided in orders. Difficulties may also arise respecting enforcement of a right of custody, whether or not the situation amounts to a parental child abduction.<sup>78</sup>

Access enforcement is not an easy problem to resolve as allegations range from serious denial and abduction, to frustration with denial of contact or non-exercise of access at expected times. The actual level and nature of access problems are not clear. Identifying effective solutions is also difficult, given the wide range of circumstances in each case, and given that decisions must be made in the best interests of the child. Rather than focussing on punitive responses, strategies may need to focus on preventing conflict or misunderstandings that lead to access denial or non-exercise of access.<sup>79</sup>

Although the Family Law Committee has identified a number of areas where improvements could be made to child custody and access enforcement legislation, and to legislation implementing *The Hague Convention on the Civil Aspects of International Child Abduction*, more work is needed to explore further options to address these difficult cases, to analyze work currently underway internationally, including a recently released British report,<sup>80</sup> and to provide Deputy Ministers with refined recommendations.

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<sup>77</sup> See Bailey (2001) for an overview of access enforcement options.

<sup>78</sup> Research (Bailey, 2001, and O'Connor, 2002a) suggests that, while neither access denial nor non-exercise of access are widespread, non-exercise of access by the non-custodial parent seems to be more of a problem.

<sup>79</sup> See Bailey (2001), and O'Connor (2002a).

<sup>80</sup> Advisory Board on Family Law: Children Act Sub-Committee (2002).



## **Recommendation 12**

**It is recommended that, recognizing the breadth and complexity of the issues involved in child custody and access enforcement and parental child abduction cases, further detailed work be undertaken.**

Recognizing work on specific issues and services is still needed, the following is an explanation of the current remedies.<sup>81</sup>

### ***Non-Judicial Remedies***

In less complex or entrenched cases, parents may benefit from trying to mediate or negotiate resolutions to access difficulties. For example, a dispute over the timing of access, or rescheduling of access visits, may be appropriately dealt with through mediation or negotiation through the parties' counsel. Parent information programs offered early in the process (ideally prior to any court orders or mediated agreements being reached) may be of assistance to many families in forestalling future custody and access enforcement issues. These programs can greatly assist parents in understanding the emotional needs of their children at various stages of development and how those needs change over time and may require increased flexibility with regard to access and parenting arrangements.

### ***Civil Contempt***

Where a right of custody or access is contained in an order of the court, the option of civil contempt may be available (inferior courts do not have inherent jurisdiction to find an individual in contempt of an order unless contempt occurs in court proper.) The rules of court may provide penalties for individuals found in contempt. Civil child custody and access enforcement legislation may also contain a range of enforcement provisions.

In contempt applications, a number of principles are of critical importance:

- The responding party must be aware of the provisions of the order. Proof of personal service may be necessary.
- Particulars of the alleged contempt must be set forth in the motion.
- The motion must be personally served.
- There must be wilful failure to comply with the court order.

Courts have held that a contempt proceeding should be a last resort where there are other means to ensure compliance. Once an individual has been found in contempt of an access order, among the orders that have been pronounced are periods of incarceration, suspended sentences, fines, stays of ongoing litigation, compensatory access, supervised access and suspension of maintenance or other payments pending resumption of access.

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<sup>81</sup> See Bailey (2001) for an overview of available remedies. See also O'Connor (2002a).

For contempt to be a viable option, the access order must be clear on its face. This generally means that the order must be one for specified periods of access, with prescribed days and times. An order providing for “reasonable access” is not generally one that could be used to seek a finding of civil contempt. The party denied access would be more likely to ask that the court specify periods of access.

### ***Civil Custody and Access Enforcement Legislation***

Some provincial and territorial jurisdictions across Canada have child custody enforcement legislation providing a variety of means to ensure compliance with custody or access orders. This legislation can be invoked where an order is being breached in the province in question (e.g. if a child is being abducted to or within, or is in the process of being abducted from the province in question or access is denied in that province).

Child custody and access enforcement legislation applies to court orders of custody or access granted by courts of the province in question, as well as the courts or tribunals outside the province or territory with jurisdiction to grant custody orders. Generally speaking, these acts do not enable persons with custody or access rights pursuant to written agreements, or by operation of law, to invoke their provisions. In most jurisdictions, child custody enforcement legislation can be invoked without the existence of formal reciprocal arrangements with the other jurisdiction, unlike reciprocal enforcement of maintenance orders legislation.

These acts limit the court’s ability to substitute its own custody and access order to situations where a child does not have a significant connection to the jurisdiction in which the original order was granted, providing the child does have such a connection to the province in question, all of the parties are now habitually resident in the province or the child would suffer serious harm if returned to the custodial parent named in the order (or if the access parent was allowed contact).

Enforcement orders under these acts are binding in the province in which they are granted, which means that in a situation where a child is abducted from one province to another, and then to a third, proceedings may need to be taken in more than one jurisdiction.

These acts contain a wide range of remedies that can be used to enforce an access or custody order being breached within the province in question. Remedies may include non-molestation orders, the posting of a bond or the signing of a recognizance, authorization for a person to apprehend and deliver a child to another person, transfer of property or maintenance payments to a trustee and denial of passports or other documents. Some remedies may only apply if the order contains a non-removal clause.

In some jurisdictions child custody enforcement legislation has been used to implement *The Hague Convention on the Civil Aspects of International Child Abduction*.

### ***The Hague Convention on the Civil Aspects of International Child Abduction***

*The Hague Convention on the Civil Aspects of International Child Abduction* was concluded in October of 1980. Canada was one of the original four signatory states. The Convention has been implemented in all Canadian provinces and territories. Each province and territory has a

Central Authority charged with certain obligations pursuant to the terms of the Convention. There is also a federal Central Authority.

The Hague Convention governs international child abduction situations, not those of an inter-provincial/territorial nature. The Convention deals with issues of jurisdiction and provides, with limited exceptions, that the appropriate courts to deal with issues relating to custody are those of the child's habitual residence before his or her removal. Like provincial child custody and access enforcement legislation, the Hague Convention sets forth a framework for determining the most appropriate forum to resolve custody disputes and in that sense is concerned with the best interests of children. The Convention is based on the principle that the best interests of children are met by protecting them from abduction and by securing respect for custody rights. It does not deal with the merits of competing claims and the best interests of children in the context of resolving those claims.

The Hague Convention applies to children under the age of 16 years. It is applicable to situations where a right of custody by operation of law or pursuant to a court order has been breached. The Supreme Court of Canada has considered the Hague Convention in two cases.<sup>82</sup> The Court indicated that removal of a child in contravention of a non-removal clause in an interim order constituted "wrongful removal" within the meaning of the Convention, but also indicated that this would not necessarily be so in the case of a final custody order.

Although Article 21 of the Hague Convention allows an application to be made to a Central Authority for assistance in establishing or enforcing a right of access, the Convention is not clear as to the nature of the international obligation in this regard. Accordingly, many countries, including most Canadian Central Authorities, take the view that they will not become actively involved in access establishment and enforcement cases, although Legal Aid assistance may be available for these purposes in some jurisdictions. The Fourth Special Commission revisiting the operation of the Convention in 2001 in The Hague noted that access issues were of critical importance. It has been suggested that a special meeting be held in The Hague to further discuss this important area.

### ***Criminal Sanctions***

In January 1983, specific provisions in the *Criminal Code of Canada* came into effect making parental child abduction a criminal offence. Sections 282 and 283 of the *Criminal Code* prohibit parental child abductions in situations where there is a custody order made by a Canadian court and there is no such custody order, respectively. Section 283 therefore applies to situations where parents continue to have joint custody of their child by operation of law, where there is a written agreement, where there is a foreign custody order, or where the abducting parent did not believe or know there was a valid custody order. Ministers Responsible for Justice first approved Parental Child Abduction Charging Guidelines in 1989. Updated Revised Parental Child Abduction Guidelines were approved by Ministers at their October 1998 meeting. At the time that the charging guidelines were first developed, the Family Law Committee recommended that police officers should have direct access to designated counsel with experience in the area of

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<sup>82</sup> *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290; and *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481, [*Droit de la famille-1763*, 19 R.F.L. (4th) 341].

family law within their jurisdiction and, in particular, telephone access to these counsel outside of regular working hours.

Not every case in which a custody or access order is breached amounts to parental child abduction. Depending on the legislation or statute pursuant to which the custody order or access order was granted, there may be other charges that can be considered.

### ***Non-exercise of Access***

Non-exercise of access can be as damaging to a child as denial of access. Several provinces have legislation under which a custodial parent may seek financial compensation in the event that the other parent fails to exercise access as contemplated in the original order.<sup>83</sup>

### ***Jurisdictional Provisions in Custody and Access Legislation***

Some but not all provincial or territorial legislation clearly sets forth jurisdictional rules for the determination of custody and access cases based on the habitual residence of the child, with certain consent and safety-based exceptions. An example of a consent exception would be where the parents agree on a court of competent jurisdiction, even if it is not in the province where the child habitually resides. An example of a safety-based exception would be where the court has concerns that failing to exercise jurisdiction would place the child at risk. Other provinces and territories do not have such provisions, but do have custody enforcement legislation that contains similar tests respecting recognition of an *ex juris* order (and that court's ability to assume jurisdiction and substitute its own custody or access order).

*The Hague Convention on the Civil Aspects of International Child Abduction* also deals with issues of jurisdiction and provides, with limited exceptions, that the appropriate courts to deal with issues relating to custody are those of the child's habitual residence before his or her removal.

The *Divorce Act* provides that the courts of a province or territory where either spouse or former spouse is ordinarily resident have jurisdiction to deal with custody issues. The court may transfer a custody action to a court in another jurisdiction where "the child...in respect of whom the order is sought is most substantially connected with another province,"<sup>84</sup> but it is not required to do so. This jurisdictional approach differs significantly from provincial custody and custody enforcement legislation and from Canada's international obligations under the Hague Convention. It has also resulted in the custody of children habitually resident in one province being determined in the courts of another province with which they have a more tenuous or recent connection.

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<sup>83</sup> See Bailey (2001) and O'Connor (2002a) for a discussion of non-exercise of access and legislation concerning access.

<sup>84</sup> *Divorce Act*, s. 6.

### Recommendation 13

**It is recommended that the *Divorce Act* and provincial and territorial legislation provide that the courts of the province or territory of the child’s habitual residence have jurisdiction to determine custody and access, subject to exceptions based on consent or safety considerations, and taking into consideration, as applicable:**

- **the jurisdictional provisions in some provincial custody and access legislation;**
- **the provisions of child custody enforcement legislation; and**
- ***The Hague Convention on the Civil Aspects of International Child Abduction.***

### G. SERVICE OPTIONS AND RESPONSES

The Family Law Committee has been asked to consider both legislative and service responses to the problems facing children when their parents separate. The provincial and territorial experience has been that services are critical to support the policy and legislative intent to help families deal with the difficulties of separation in the healthiest way for the parents and their children. A focus on legislative issues in isolation from service and practice needs would fall short of addressing the complex needs of families.

The program of research in custody and access supports this position. Practically every research report produced recommends programs and services for parents and children.<sup>85</sup> The public demand for a wide range of service supports to families was clear in the responses to the *Putting Children’s Interests First* consultations.<sup>86</sup> As the report on the consultations stated:

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 the legal profession), support services (such as supervised access centres or “parenting co-ordinators”) and legal aid services. To improve the effectiveness of services, respondents suggested that services be offered in a more co-ordinated, timely and accessible manner.<sup>87</sup>

Moreover, it is clear from experiences in other jurisdictions that legislative change creates an increased demand for services, and those rates of litigation may increase concomitantly with the increasing demand for services. Change in the law may uncover an untapped dissatisfaction with

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<sup>85</sup> See, e.g., Cossman (2001), where the author points out the limitations of legislative reform and argues that any reform should be accompanied by programs and services for families. See also, e.g., O’Connor (2002b), where, in the context of providing children with an opportunity to view their preferences and the needs of children experiencing separation and divorce, the author argues in favour of providing services and program, supports for parents and children.

<sup>86</sup> See Department of Justice Canada (2001), for a copy of the consultation document.

<sup>87</sup> IER (2001: ii – iii).

the family law system and thereby place increased demand on all components of the system at once. This increased demand may be sustained over the medium term (five to ten years).

For example, the creation and expansion of supervised access facilities accompanied legislative changes in Australia. These services have proven to be a necessary part of the new system which promotes a child's "right of contact" with both parents. There is now increased pressure to expand the supervised access services to more locations within the country. Court applications for residence and contact more than doubled in the year following changes in the legislation, and remained relatively constant at that increased rate over the four years following the change. Eighty new magistrates were appointed to deal with the increased demand for court adjudication.<sup>88</sup>

Recognizing the shared jurisdiction in family law and shared concern with the welfare of Canadian children and families experiencing divorce and separation, the Family Law Committee believes that there is a role for provinces, territories and the federal government to support service delivery.

Five major themes for service development were presented to Ministers when they met in September 2001. They are public and professional information and education, dispute resolution, enforcement, family legal aid, and completion of family court models. These service responses require action not just by government, but also by individuals, communities, and professionals within an integrated framework. These sectors working together can provide an integrated response to the evolving needs of children and families going through family transition.

### **Public and Professional Information and Education**

The goals of public and professional information and education programs and services are to help families cope with the emotional trauma of separation, to enable parents to make informed choices about parenting and to help parents co-parent effectively. This is done by providing information to families, and to professionals working with them, on legal issues, child development, dispute resolution options, methods of communication and resources, and by teaching parents skills and techniques to improve their co-parenting abilities. Separating and divorcing parents need information and may need help to understand the types of arrangements they can make for the care of their children, to understand what the impact of the arrangements will be on their children, and to understand what they and their children are experiencing.

Information can help parents and children understand the implications of divorce and separation, their options, and ways to develop positive relationships that sustain new family relationships. Information is needed at a time of crisis so that parents can focus on immediate decisions and avoid generating unnecessary conflict. During the divorce process information is important to help ensure that all options are considered and conflict is minimized. After separation, information can help sustain arrangements and foster co-operation and positive interactions between parents and between parents and children. Indeed, families on the brink of separation may still withstand separation with appropriate information and support.

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<sup>88</sup> See Bourke (2001).

## ***Parent Information***

A major response of participants in the national consultations, *Putting Children's Interests First*, was to call for increased access to timely information in a variety of forms. Separated and separating parents need information about:

- parenting arrangements (for example, residence, time with each parent; day-to-day decision making, child's perspectives and developmental needs, major decision making, mobility);
- custody and access law;
- dispute resolution options (for example, mediation, conciliation, arbitration, parenting plans, negotiation, court proceedings); and
- resources and services that are available in their community.<sup>89</sup>

In search of this information, parents may speak with friends, family members, counsellors, doctors, religious leaders, teachers, childcare workers or other community members. Often, friends, relatives or community services lack the information they need, or give incorrect information, and parents may receive different and at times conflicting advice from these community sources. Many parents turn to lawyers for this information. Lawyers in private practice must charge clients for their time spent in giving this information. Since legal expertise is not required to provide basic information, this is not always the most efficient way to use a lawyer. In addition, some lawyers may not have all the necessary information. Much of the needed information is provided in a variety of forms by government and community agencies.<sup>90</sup>

The federal, provincial and territorial governments have all been active in recent years in developing and implementing various services and programs in this area. The following are examples of some of the ways family law information can be made more accessible to the public, resources permitting:

- *Print materials* Publications that explain in plain language the vital information (parenting arrangements, the law, dispute resolution options, available services) should be broadly available. Ideally, the print materials should be available in different languages where this is necessary to reach all members of the community. For example, in Manitoba, *Family Law in Manitoba*, a booklet containing comprehensive, basic information on all these issues as well as on family law generally, is widely distributed to a variety of service providers for dissemination to parents throughout the province.
- *Telephone lines* Many jurisdictions operate toll-free telephone lines where inquiries from the public are answered by knowledgeable staff who will refer callers to appropriate resources for

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<sup>89</sup> See IER (2001).

<sup>90</sup> See Canadian Facts (2001), where the research included questions on parent's use of services. Parents use a range of service providers including lawyers and mediators, and different types of services ranging from supervised access services, to parenting plans, to parent education courses. Overall, 75 percent of parents with an arrangement reported using some sort of help or service in the process of separation. The most often used service was that of a lawyer (53 percent). In terms of helpfulness, however, lawyers received the lowest rating.

more detailed information, assistance and legal advice. British Columbia currently operates a toll-free family justice telephone enquiry line that provides taped information on a variety of topics.

- *Electronic information* Many families now have computers, and can access information in this form. For example, Manitoba is currently expanding its Parent Education Program to enable delivery of information in CD-ROM format so those living in remote communities, those who are house bound or those who are simply interested in the topic can have access to information.
- *Internet sites and email* As increasing numbers of people gain access to the Internet, this is becoming a more important method of disseminating information. Much family law information, such as legislation, is now readily accessible on the Internet. It can also be used to provide information in language intended for the layperson and targeted at families experiencing custody and access issues. Many governments, as well as providers of public legal information, are already making increasing use of government websites and the Internet to improve access to informational materials and to maintain up-to-date information products. For example, Manitoba's family law booklet, mentioned above, is available on the Manitoba Justice website. British Columbia recently began operation of a Family Justice website. The site provides short, clear explanations and answers to over a hundred questions about the basics of family law, options for dispute resolution and services available to help parents.
- *Videos* These may be able to convey information in a way that is more easily understandable for many families, especially for families who have literacy limitations.

Some jurisdictions provide information to the public through information centres where the public can attend and speak with an individual and obtain print information. For example, Ontario's Family Law Information Centres, which are located in the court building in most court districts, including all Unified Family Court sites, provide information and referral, and other assistance. Court personnel provide information about court procedure, including court forms, and a lawyer provides summary legal advice. Some information centres in other provinces offer other services as well. These are discussed in more detail below.

#### **Recommendation 14**

**It is recommended that information on existing and new laws and services be disseminated to the public as widely as resources permit, and through a variety of communication modes, to be accessible to all families with children.**

#### ***Parent Information and Education Programs***

Parent education and information programs teach parents how to promote their children's best interests through co-operation and consultation when it is safe to do so. The aim of these programs is to help parents understand the demands and challenges of parenting after separation and divorce, to suggest new ways to communicate and resolve day-to-day disputes and to suggest appropriate alternatives to the formal court process to settle any issues they may have. If parents learn basic conflict resolution skills, these skills can help them to lessen conflict or dissension and use positive conflict resolution approaches with their children. The programs



provide parents with a basis for decision making and reduce conflict, frustration, confusion and costs to parents and to the legal system.

Parent education and information programs can play a key role in building awareness and skills for people experiencing relationship breakdown. These programs, whether voluntary or mandatory, should target people before they begin litigation, and should contain clear guidelines to ensure the streaming of victims of abuse to the court system. Parent education programs should contain a component about the increased vulnerability of victims of domestic violence and abuse at the time of separation, and should offer an expedited process for accessing the court in these situations.

Currently in Canada, most government-funded parent education programs are connected to a court site, either through intake or delivery. For example, in Newfoundland and Labrador, the Unified Family Court in St. John's offers a parent education program called *Parents Are Forever* for parents experiencing separation and divorce. It is a twelve-hour skills-building course that provides information on the effects of separation and divorce on children and teaches communication and negotiation techniques aimed at reducing parental conflict.

The Alberta *Parenting After Separation Seminars* provide separating or divorcing parents with information about the divorce process, its effect on their children, techniques for improving communication, legal issues, and encourages the use of mediation and parenting plans. It is mandatory for parents who wish to access the courts, with exceptions for family violence situations. An evaluation of the program reported that a significant majority of attendees indicated that they thought the information would help them deal with their children and that the information would help them deal with the other parent in the future. There was also evidence that the program helped to reduce the level of conflict between the parents.<sup>91</sup>

The evaluation of Manitoba's parent education program, *For the Sake of the Children*, showed that the program had a positive effect on parents' abilities to cope with separation. The evaluation report stated:

(I)t is significant that most parents felt they were dealing more effectively with their children, the other parent and their own feelings and reactions at follow-up. Moreover, most attributed the program as having positively influenced these changes.<sup>92</sup>

The Special Joint Committee on Child Custody and Access recommended that all parents seeking child care orders be required to participate in an education program, and that certification of such attendance would be required before parents would be able to proceed with their application for a parenting order.<sup>93</sup> Some jurisdictions, such as Saskatchewan and Alberta,

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<sup>91</sup> See Sieppert et al. (2000), where the evaluators report that 86.8 percent of parents thought the information provided in Alberta's *Parenting After Separation Seminars* would help them deal more effectively with their children, and 79.6 percent thought the information would help them deal more effectively with the co-parent. The percentage of parents who reported at least a moderate level of conflict dropped from 64.5 percent to 40.8 percent after having completed the program.

<sup>92</sup> McKenzie and Guberman (2000: 146).

<sup>93</sup> The Special Joint Committee's recommendations are reproduced in Appendix A; see recommendation 10.

already have such a requirement in legislation or court rules.<sup>94</sup> British Columbia operated a mandatory *Parenting After Separation (PAS)* program on a pilot basis at two provincial court locations. The evaluation results indicated that parents who attended were highly satisfied with the information they received, and that they made less use of the court process than did parents in control sites where the program did not operate.<sup>95</sup> British Columbia now requires attendance at a PAS session in ten court locations.

Some jurisdictions have also invested in programs specifically targeted to helping children understand the dynamics of divorce and separation. In Saskatchewan, programs for three different age groups of children were developed and are being delivered by community-based organizations to help children understand that the divorce or separation is not their fault, learn how to distance themselves from the conflict between the parents, and learn how to communicate better with their parents on what they are feeling or experiencing. Such programs are seen as very beneficial in reducing risk factors for children.<sup>96</sup>

Examples of other education and information programs include education for families in transition to help newly created or blended families adjust to new family dynamics, and self-help or targeted materials to help parents understand and make decisions on parenting issues through parenting plans or agreement booklets.<sup>97</sup>

### **Recommendation 15**

**It is recommended that governments support parent education—mandatory or voluntary—which is broadly accessible and meets linguistic, cultural, geographic, and general parenting, legal, and process information needs.**

#### ***Professional Information and Education***

Lawyers, social workers and other professionals involved with the family and its separation issues as advocates, mediators or counsellors are key sources of information for parents. Professionals helping families deal with family breakdown and parenting issues need to have a solid understanding of the emotional and legal issues that families experience.

Professionals who are better equipped with information and understanding of the issues can help parents make better decisions and reduce the overall level of conflict, confusion and cost. Professional organizations should consider requiring members to keep abreast of the key issues, the wider social dynamics that affect families, and the resources and services available to assist

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<sup>94</sup> See, e.g., *Queen's Bench Act*, s. 44.1, Statutes of Saskatchewan. Other jurisdictions with such requirements include British Columbia, Ontario, and Nova Scotia.

<sup>95</sup> See Ministry of Attorney General of British Columbia (2000).

<sup>96</sup> See, e.g., Bernardini and Jenkins (2002), and O'Connor (2002b), where the authors behind the research argue in favour of programs aimed at children and children's needs.

<sup>97</sup> See, e.g., the Canadian Institute of Child Health's "Parent Kit," a home study course on parenting skills, effective practices and how children develop and cope (available at <http://www.cich.ca> on the "links" page). Other community or professional organizations or governments may be interested in building on this idea.

separating and divorcing families, and providing training to facilitate this.<sup>98</sup> Research supports the view that people working with separating and divorcing couples, and the families they serve, would benefit from more training and education.<sup>99</sup> Similarly, consultations with the public support increased training and the expansion of services to assist families in transition.<sup>100</sup>

In addition, there are professionals in a wide variety of front-line government and community agencies, whose primary function may be other programs, for example, crisis shelters, who are in regular contact with separating and separated families. They can help parents by providing basic information and by making referrals for appropriate assistance. It is important that these agencies have access to information that they can then share with their clients, and that the workers have training opportunities so that they can better assist their clients. Governments can provide basic information that can be reformatted or included in publications of these agencies. Standard workbooks or manuals and training materials could also be developed for use by these agencies.

Some parents have indicated that they feel that the lawyers rather than the parties are directing the dispute or they lack confidence in their ability to instruct counsel. A family law case involving children is unlike most other areas of advocacy in that all parties to the matter are to make decisions based on the best interests of the child. This may conflict with the lawyer's traditional adversarial role to advocate the client's position. Lawyers, as officers of the court that is required to render decisions on the basis of the best interests of the child, need to take this into consideration in their practice.

#### **Recommendation 16**

**It is recommended that support be given to professionals working with families during and after separation and divorce, such as lawyers, social workers, and psychologists, to engage in continuing education and training in child custody and support law, family violence issues, the dynamics of family separation and divorce and the effects on children. Professional organizations should be encouraged and supported to facilitate professional development in this area, and to consider certification approaches incorporating professional development in this area.**

#### **Recommendation 17**

**It is recommended that jurisdictions work with law societies and the bar associations:**

- **to explore options for legal professional development and training in appropriate ways to interact with children of separated parents in the litigation process; and**
- **to review practice codes with a view to ensuring that they set out counsel's role and obligations in a way that adequately safeguards children's best interests, and**

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<sup>98</sup> See, e.g., the Special Joint Committee's recommendation 31 (reproduced in Appendix A), where the Committee recommends that "the provinces and the territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments."

<sup>99</sup> See, e.g., O'Connor (2002b).

<sup>100</sup> See I.E.R. (2001), and S.A.G.E. (2000).

**to ensuring that counsel have an obligation to explore appropriate alternative dispute resolution options with their family law clients.**

### ***Providing Information to the Public on Government Initiatives***

Canadian jurisdictions have developed different approaches and levels of support to provide education and information. Jurisdictions could benefit from building a more common material base, relying on “best practices,” and reducing development costs by sharing experiences. The provinces and territories have an array of services. They have developed an inventory of services, *An Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions*, which is available on the Department of Justice Canada website.<sup>101</sup> This inventory should be maintained and updated periodically.

### **Recommendation 18**

**It is recommended that the *Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions* should be maintained and updated periodically.**

As well, it would be beneficial if governments could reach a common understanding on how to better disseminate information, and who could and should do so. This would assist in reducing the confusion for the public between the provisions of the various federal, provincial and territorial laws and services.

### **Dispute Resolution**

Resolving separation and divorce disputes, particularly regarding children, can be distressing to the parents and the children. Each family experiences different and varying levels of conflict depending on their circumstances. Situations that were relatively stable can become volatile or conflictual due to a parent forming a new relationship, lingering relationship issues, changing needs of children, or a parent wanting to move for employment or education reasons.

The court process can be very lengthy, leave important issues unresolved for too long and cause more conflict between the parents. The trial process is not always sensitive to the complex issues that affect children. Consensual agreements are more likely to endure than decisions made by a judge after a contested court hearing. Alternate dispute resolution processes can be used to support and facilitate positive conflict resolution approaches. Access to appropriate and timely dispute resolution options, either as part of the court process or independent of it, can allow parties to narrow the issues in dispute, resolve issues more quickly, and minimize parental conflict, emotional hurt and financial costs.

Parents may become frustrated by the lack of access to legal services and their inability to resolve initial or outstanding problems relating to parenting responsibilities. This frustration may lead to parents attempting to represent themselves in court proceedings at an emotional and financial cost to themselves, their families and the administration of justice. Alternatively, parents may decide to act unilaterally and aggravate an already deeply stressful situation by engaging in child abduction or failing to pay maintenance to attempt to force what they believe

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<sup>101</sup> See Federal-Provincial-Territorial Family Law Committee (2000).

to be a more “equitable” arrangement. Again, this leads to increased enforcement costs for the state and emotional and financial costs for the family.

Sadly, some parents may simply decide to try to leave the frustration behind and either fall into a pattern of disrespecting the terms of the order or agreement they feel is unsatisfactory, or walk away from the child’s life. Parents who have become disengaged from their children present complex reasons for their loss of contact with their children including discouragement because of access denial, practical difficulties of distance or work schedule, or an early pattern of no contact.<sup>102</sup> As well, parents often absent themselves due to concern that ongoing conflict will be harmful to the children. Obviously, this distancing and dissatisfaction can have a negative impact on parent-child relationships and also fails to provide an opportunity to demonstrate or learn ways to deal with conflict effectively.

A variety of mechanisms exist to help families resolve disputes outside court. Lawyers play a major role in resolving disputes through traditional legal negotiation. In many cases however, the settlement comes only after contested interim court proceedings and other steps in the litigation process, too late in the process to avoid the conflict and emotional and financial costs of the adversarial system. More recently, some lawyers have been engaging in collaborative family law, in which lawyers for both parties are retained exclusively to help the parties reach an agreement and cannot represent the parties in any court proceedings.

Mediation, where a neutral third party helps parents reach an agreement, can be a very effective tool for two parents of relatively equal bargaining strength. The mediator, who can be a lawyer, social worker or other professional trained in mediation, facilitates discussion and helps them work out their plans for parenting their children after separation. Parents who participate in mediation still need the help and advice of a lawyer acting in the lawyer’s traditional role as an advocate. Mediation is available in all the provinces and territories and there is an increasing emphasis on it throughout Canada.<sup>103</sup>

A critical aspect of mediation is to ensure that power imbalances are recognized and mitigated and that the safety of the participants is maintained as a primary consideration.<sup>104</sup> Certainly, these concerns arise in situations where there is a history of family violence, but there may be other circumstances where power imbalances do not allow the parties to meet on an equal basis. In many cases, those involved in regulating or promoting mediation have established processes to screen out cases where mediation would not be appropriate. Certainly, the Special Joint Committee on Child Custody and Access, while supporting mediation generally, recognized that screening individuals for family violence issues and assuring the safety of all parties are key to the timing and use of mediation.<sup>105</sup>

Perhaps the strongest and most comprehensive efforts to encourage mediation are being made in Quebec, where parents must attend a mediation-information session before their hearing on

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<sup>102</sup> See Depner (1993).

<sup>103</sup> See, e.g., the Family Mediation Canada website ([www.fmc.ca](http://www.fmc.ca)), where they provide a list of mediators by province and territory.

<sup>104</sup> Concerns about possible power imbalances have been raised in many of the research projects undertaken through the custody and access project (see, e.g., Stewart, 2001).

<sup>105</sup> The Special Joint Committee’s recommendations are reproduced in Appendix A, see recommendation 14.

custody, access or child support. Mediation may be voluntary or ordered by the court, which may direct parties to mediation at any point in the proceedings. The service is free for up to six sessions, each of which lasts about one hour and fifteen minutes.<sup>106</sup>

Manitoba offers a *Comprehensive Co-mediation Service* where two mediators, one of whom is a lawyer and the other is a family relations specialist, assist parents in coming to an agreement on all issues in dispute. In the evaluation of the pilot project that preceded the implementation of the current program, eighty-one percent of the respondents said that the most important benefit was that mediation addressed all issues (both child related and financial) requiring a resolution. Over the course of the pilot project, agreement on all issues was reached in 52 percent of cases, and agreement on some or most issues was reached in a further 31.5 percent of cases.<sup>107</sup> The pilot project also had an internship component to facilitate the accreditation of professionals (lawyers and family relations specialists) from the private sector.

While mediation should be encouraged in appropriate cases, it is not recommended that mediation be mandatory. Such an approach is inconsistent with the basic premise of mediation as voluntary, consensus-based decision making. It is also not consistent with a focus on child-centred decision making, could put the child or a parent at risk, and, where both parents are not comfortable with the mediation process, it may itself generate, rather than reduce, conflict.

### **Recommendation 19**

#### **It is recommended that:**

- **mediation not be made mandatory; and**
- **mediation be available for informed participants of relatively equal bargaining power where participation of both parties is voluntary and where appropriate screening exists to ensure that family violence cases are identified and generally screened out.**

Court proceedings to resolve disputes over parenting arrangements are still necessary in many cases, for example, where there is family violence and mediation is inappropriate, or where mediation or other alternate dispute resolution methods have been tried and failed. However, modifications can be made to the traditional litigation model to encourage settlement of some or all issues early in the court process, and to manage cases more efficiently to reduce costs, conflict and delays.

Case management programs support early settlement of disputes by reducing unnecessary delay and expense by having judges and others actively manage the court process. Experienced court personnel or judges focus the parents and their lawyers on the issues that are truly in dispute, and encourage parents to come to an agreement on other issues. This may involve pre-trial conferences with the judge or mini-trials, where a judge offers parents his or her assessment of the likely outcome of a trial. Another aim of case management is to ensure that those cases that do go to full trial proceed as efficiently as possible.

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<sup>106</sup> See the Quebec *Code of Civil Procedure*, Articles 814.3 and following.

<sup>107</sup> McKenzie and Pedersen (2001).

For example, in Manitoba's case management system, case conferences may be set in a number of ways. Parents may request a case conference date or the court may schedule one on the occurrence of certain triggering events, such as a request for a contested motion date. Parents must attend all case conferences unless excused by the case conference judge. The case conference judge assigned to preside at the first case conference will remain available to assist parents and their lawyers in managing the case until it is finished.

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

Some provinces and territories have early settlement programs or procedures, such as allowing judges to direct parents to case management events and to adjourn a case to allow parents to try another method of dispute resolution. British Columbia has a pilot project in several provincial court registries that requires parties involved in custody, access guardianship or support proceedings to meet separately with a family justice counsellor to go over their options prior to their first court appearance. Urgent cases can be heard immediately by a judge.

In some situations, where there is consent or the order is unopposed, the court will grant custody, access and support orders without the need for a court hearing. In Quebec, the Special Registrar can approve any agreement between parties that provides a full settlement on custody and support issues. The Registrar can hear the parties, separately if necessary, and in the presence of counsel, to determine if the agreement protects the best interests of the children and consent was not given under duress. If not, the Registrar may refer the matter to a judge. The intent of this system is "to simplify the procedure and accelerate the processing of cases involving child custody and support."<sup>108</sup>

Independent custody and access assessments are also useful in resolving disputes. They can help parents focus on the needs of the child and reduce the level of conflict. They may also induce settlement because many parents are prepared to accept the recommendations of a neutral third party and because parents may feel further litigation would be unproductive as the courts tend to give such reports a great deal of weight. Research indicates that these services help parents reach settlement in the majority of cases.<sup>109</sup> The investigations of the Children's Lawyer of Ontario have similar beneficial effects.<sup>110</sup>

In Manitoba, two pilot projects are underway to assist the court and parents to address child-related issues in a timely fashion. One is the *Brief Consultation Service* whereby a counsellor is available to the court to meet with parents and see the child within a short time. The counsellor then provides a brief written or verbal report to the court that may include information respecting the wishes or concerns of the child. The other pilot project involves the preparation of timely

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<sup>108</sup> Federal-Provincial-Territorial Family Law Committee (2000).

<sup>109</sup> See Birnbaum and McTavish (2001).

<sup>110</sup> See Birnbaum et al., 2001; and Birnbaum and Radovanovic, 1999.

“focussed assessments” which replace traditional comprehensive family assessments in situations involving resolution of a single issue.

Another way jurisdictions have attempted to support and assist separating and separated parents in resolving parenting issues, either prior to court proceedings or after they have begun, is by providing multiple services through one agency or facility. Parents have better access to information and dispute resolution services when these services are located in one place. Family Law Information Centres in Edmonton and Calgary provide legal information, help parents deal with the justice system and refer them to other organizations that can help them with court proceedings. The goal of these centres is to help parents resolve disputes before they go to court.<sup>111</sup>

In British Columbia, Family Justice Centres are located in many communities across the province, but are not attached to courts. Family Justice Counsellors provide dispute resolution services such as conciliation and mediation, help parents with court applications and help parents negotiate and prepare consent orders and written agreements.

Ontario has Family Law Information Centres (FLIC) in most family court districts, where people can obtain more information about the court process, about alternatives to litigation including mediation, and also obtain summary legal advice from a lawyer. Information and Referral Coordinators are available in Unified Family Court FLICs to provide referrals to community resources, such as counselling or support groups. In addition, clients can register for voluntary parent information sessions provided at each Unified Family Court. These sessions stress the importance of keeping children out of the middle of disputes between the parents.

In Newfoundland and Labrador, Family Justice Services Western (FJSW), a pilot project operating out of Corner Brook, gives separating parents an alternative to the court system. FJSW is a multi-disciplinary team of professionals who provide on-site education, mediation and counselling services to adults and children involved in divorce, custody, access, or child or spousal support proceedings. All applications to court are referred directly to FJSW before a court date is issued. Both parties are expected to attend the initial three-hour education session.

Parents should be able to assess the appropriateness of, and have access to, a variety of dispute resolution processes. However, these services may not be available or accessible to all parents due to cost, location or awareness of the service. In many cases, the court should be the arena of last resort in a family law dispute, but inability to access other dispute resolution processes may require parties to follow a traditional litigation route.

Concerns have been expressed that an increasing number of people are appearing in family court proceedings who are not legally represented, either because they cannot afford a lawyer and legal aid is not available, or they prefer to represent themselves. Where they are unable to represent themselves effectively, this can have negative consequences for the parents and the children. Without legal advice and representation, some parents engage in destructive behaviour such as child abduction and refusing to pay support. Moreover, they can drain the legal system through unnecessary and protracted litigation. While improvements in access to legal aid are one way of

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<sup>111</sup> See Praxis (2000).



dealing with this problem, another approach is to provide self-represented litigants with supports to help them through the court process. For example, information packages or kits can include information on how to apply for child support, how to apply for custody or access, how to vary an existing order, and how to oppose an application. The kits can include copies of court forms and instructions on how to complete and file documents. The services offered by agencies such as BC's Family Justice Centres, and the Ontario and Alberta Family Law Information Centres are another example.

## **Recommendation 20**

**It is recommended that governments and the professions work together to support the development of a broad spectrum of dispute resolution services, including mediation, arbitration and collaborative law, and other supports to parents to help identify and narrow the issues in dispute, such as custody and access assessments and parent education.**

## **Enforcement of Custody and Access**

The goals of enforcement services are to ensure that parents fulfil their obligations and responsibilities toward their children, to limit the level of conflict and distress experienced by parents and children due to non-compliance with court orders and agreements, and to increase respect for the administration of justice through compliance with orders and agreements.

Problems arise when parents fail to abide by the terms of their agreement or order and deny access or fail to exercise access rights. Reasons for doing so can include a misunderstanding about what parents are required to do. Consequences can range from minor incidents to high-conflict disputes. Research shows that serious problems with access are much more likely to occur when there is a history of abuse or high conflict between the parents.<sup>112</sup>

For example, the roles of the state and of the parents may become linked when there are allegations of neglect or abuse by a parent that raise a child welfare concern. In such cases, parental willingness to comply with the terms of orders or agreements relating to the child may decrease and there may also be a decrease in trust between the parties. Child welfare authorities may face specific pressures when dealing with this type of case as the allegations have implications for family court proceedings. As well, front line professionals dealing with custody and access matters may become aware of situations of harassment or abuse that call for a remedy beyond the remedies available for custody and access enforcement. For example, a parent may need to obtain a restraining order against the other parent.

The Special Joint Committee on Child Custody and Access recommended that:

... the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention,

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<sup>112</sup> See Bailey (2001) and O'Connor (2002a) for legal and social overviews of the research on access, access denial, non-exercise of access and access enforcement. The research suggests that access problems, such as access denial or non-exercise of access, are usually not isolated problems.

parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders.<sup>113</sup>

Most of the legal remedies and services recommended by the Special Joint Committee already exist. The legal issues and remedies are outlined under *Key Legislative Issues* in this report and the services are described above in this part of the report. The legislation could possibly be made more specific to provide a greater range of remedies in some jurisdictions, but legal tools are only a partial solution given the limitations in accessing legal remedies, the negative impact this can have on already troubled relationships, the cost and the inability of the remedies to resolve the underlying problem.<sup>114</sup> While court orders and agreements should be respected by all involved, emotional demands and frustrations may lead parties to disrespect agreements or orders they do not see as fair or sufficiently flexible or sufficiently clear.

Custody and access enforcement issues involve a complex web of physical, psychological and emotional needs for children and parents. Parents need to be supported and encouraged to understand that the children's needs come first and that as parents they have responsibilities to ensure the children's emotional, psychological and financial well-being, to the extent possible.

The Family Law Committee has looked at legislative and service approaches to enforcement both within Canadian jurisdictions and in other countries. The research in this area consistently underscores the difficulty of developing effective and cost-effective approaches that do not have unintended deleterious consequences for the family.<sup>115</sup>

For example, Manitoba operated an access assistance project from 1989 to 1993. The two main components of the project were voluntary conciliation aimed at resolving the root problems of the access difficulty, and a legal component whereby court action could be taken at no cost to the parent seeking to ensure compliance with the access order. Demand for the service was relatively low. It was found that the families who accessed the service had multiple issues demanding significant time and resources. The program was not cost-effective and it was discontinued for fiscal reasons.

This is an area where more work is required to identify and develop more effective ways of dealing with the problems some parents experience. Service responses can help parents to better understand the terms of their agreement or order and provide support to help them work through conflict and focus on the child. Supervised access services can help parents meet their access obligations in situations where high levels of conflict exist between parents, or where it would be in the best interests of the child for access with the non-custodial parent to be supervised.

Service elements—identified in this report under *Public and Professional Information and Education* and *Dispute Resolution*—are also important in helping parents make informed decisions in the area of enforcement. This includes, for example, parent education, mediation or

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<sup>113</sup> The Special Joint Committee's recommendations are reproduced in Appendix A, see recommendation 19.

<sup>114</sup> See Bailey (2001) for a discussion of the limits of using legal remedies and suggested approaches to access enforcement.

<sup>115</sup> See Bailey (2001) and O'Connor (2002a) for legal and social research overviews of child access.

collaborative law. Some issues that are particularly relevant to enforcement and require further consideration are outlined below.

- Protocols may be needed to clearly establish an understanding of the role of child protection authorities in custody and access cases involving enforcement issues.
- Those involved in providing services to families need to understand the dynamics of family violence and the available criminal and civil remedies.
- All jurisdictions may need to review the remedies that are currently available under their legislation or services and determine whether there is a need to enhance them.

### **Recommendation 21**

**It is recommended that problems of access denial and failure to exercise access be monitored through research to identify best practices and the most effective ways of dealing with these problems, and that further research be undertaken to develop and assess innovative remedial approaches.**

### **Family Legal Aid**

The Special Joint Committee on Child Custody and Access recommended that the federal government provide adequate resources for legal aid “to ensure that parties to contested parenting applications are not prejudiced by the lack or adequacy of legal representation.”<sup>116</sup> In the *Putting Children’s Interests First* consultations, respondents highlighted the need for access to legal aid in family law cases.<sup>117</sup>

Legal aid for family law matters is available in all jurisdictions. Generally speaking, financial eligibility guidelines for legal aid are below the Statistics Canada low-income cut-off. Thus, the availability of legal aid is limited to the very poor. The range of family law matters covered varies considerably from one jurisdiction to the next. Most legal aid plans provide services in a range of family law matters (for example, divorce, custody, access, maintenance, property division, child protection and restraining orders). In certain jurisdictions, priority is given to cases in which there are issues related to safety of the spouse or children. In all jurisdictions, priority is given to child protection cases following the case of *New Brunswick v. G.(J.)*.<sup>118</sup> In a few jurisdictions, family legal aid is available only in cases where domestic violence is present.

The Family Law Committee recognizes a strong body of opinion in Canada that there is a high level of unmet need for family legal aid. There is a serious concern that lack of access to family legal aid can result in very negative consequences for children and their parents.

Family legal aid issues are not a major part of the current national legal aid research initiative. However, at present, limited research is under way using existing data sources to determine the

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<sup>116</sup> The Special Joint Committee’s recommendations are reproduced in Appendix A, see recommendation 22.2.

<sup>117</sup> See IER (2001).

<sup>118</sup> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46.

number of unrepresented litigants in family courts. The Committee looks forward to the results of this inquiry.

There is only preliminary empirical evidence at this time relating to unrepresented litigants in family court. Depending on the jurisdiction and the level of court, preliminary data show that between about forty and eighty percent of litigants in family law matters are not represented at the time of first filing.

However, more access to legal aid is not the only solution. There are other options that should also be considered for meeting the needs of families who require assistance in dealing with parenting legal issues. Providing access to justice for families may involve a multidisciplinary approach using both legal and non-legal strategies to address problems arising from family breakdown. These include services such as law help lines, non-litigation strategies such as mediation and family case counselling, unbundled services in which legal aid lawyers provide limited advice dealing with only certain aspects of legal matters and assistance designed to enable clients to handle other matters themselves, and *pro bono* services provided by the private bar. These efforts might also include public legal information materials combined with some hands-on assistance aimed at helping parties with completing and filing court documents at least in uncontentionous proceedings. These are areas in which the legal profession can partner with the major funders of legal aid services to develop innovative solutions for low and middle-income families.

### **Recommendation 22**

**It is recommended that governments continue to work at improving components of the legal system that are critical to families' access to the legal system to resolve family breakdown issues, such as family legal aid.**

### **Completion of Family Court Models**

In 1974 the Law Reform Commission of Canada prepared an extensive paper on family courts and recommended that courts be created with exclusive jurisdiction to deal with all matters related to family law.<sup>119</sup> At that time, sometimes two or three courts exercised family law jurisdiction in a province or territory. Since that time, many jurisdictions have created dedicated unified family courts or structured models that allow family law jurisdiction to be exercised by one court or one division of a superior court. More recently, the Special Joint Committee on Child Custody and Access also recommended the expansion of unified family courts.<sup>120</sup>

A key element of a family court model is a specialized judiciary, knowledgeable about or genuinely interested in family law issues and sensitive and knowledgeable about the complex social and legal issues raised in these cases. This specialized knowledge, it is argued, makes these courts more effective and efficient and, as a result, leads to better and less costly results for the clients.

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<sup>119</sup> Payne (1974).

<sup>120</sup> The Special Joint Committee's recommendations are reproduced in Appendix A, see recommendation 22.1.

Family court models need to be supported by a range of services and programs to be truly effective. The Special Joint Committee on Child Custody and Access also recognized the need for unified family courts to provide comprehensive services in addition to their adjudicative function. By combining the streamlined court structure and specialized judiciary with a selection of the services and dispute resolution models described above, these courts provide an effective mechanism for resolving family disputes.

#### **Recommendation 23**

**It is recommended that the federal government work with jurisdictions to establish unified family courts, where there is a jurisdictional request.**

#### **Recommendation 24**

**It is recommended that persons appointed to, and serving in, specialized family courts have expertise in family law issues.**

### **H. DEALING WITH PARENTING ISSUES UNDER THE FAMILY LAW SYSTEM**

#### **Introduction**

The Family Law Committee's mandate for this project required it to "identify and make recommendations respecting custody and access issues that arise before, during and after family disputes." The previous two sections of this paper deal with the key legislative and service issues. This section of the paper examines how the family justice system deals with other custody and access issues arising in separated or separating families, from the time of the birth of a child, through all stages of family breakdown. As a result of this analysis, the Committee identified a number of areas for legislative action, service improvement, research or further work.

When parents separate, they need to consider several main legal issues in deciding their post-separation parenting arrangement.

- Which laws—provincial, the federal *Divorce Act* or both—apply to the situation?
- What are the main features of these laws? What are the differences?
- How to ensure their children's perspectives are heard and understood?
- What are the options in determining their parenting arrangement?
- What are the particular concerns or unique circumstances that affect the decision making?
- What default provisions will apply if they decide not to make a formal arrangement?

Following an information-gathering stage, the parents may decide on an arrangement with the assistance of skilled professionals, such as lawyers and family counsellors. If no agreement can be reached, the parents may proceed to court. Different dispute resolution processes apply to a

court matter, some of which may be ordered by a judge but are external to the court process (for example, assessments and mediation), and others that are part of the court process (for example, case conferences, pre-trial conferences and opportunities for disclosure of information). Following the establishment of a parenting arrangement, there may be a need to enforce or change the arrangement, and this may trigger the whole decision-making cascade again.

Many families have particular issues that complicate the usual process. Of particular importance are situations where the behaviour of one or both parents makes it unsafe for the other parent or the child to participate in direct negotiation of the custody and access issues. These situations include domestic violence and child abduction. In some situations addiction or mental illness may result in a parent being incapable of caring for a child.

In many separations, one parent makes the decision to separate against the wishes of the other parent. The other parent in these situations may negotiate children's issues as a means of maintaining contact with the former partner, or in the hope of reconciliation, and may not be fully cognizant of the ramifications of agreements they make about their parenting arrangements. On the other hand, a parent who has been left may be resentful and, in retaliation, may take unreasonable positions on parenting arrangements. There is a risk that either parent may knowingly or unknowingly use the children as pawns to meet his or her own needs.

In addition, many parents never live together with their biological children. Such situations must be accommodated in any discussion of custody and access.

## **The Stages of Family Breakdown**

### ***When Parents Never Reside Together***

The parental responsibilities of parents who never marry or reside together are governed completely by the law of the province or territory in which they live. While all provincial and territorial legislation establishes that a child's rights are the same whether born within or outside marriage, the provinces and territories have different starting positions concerning the custody and access of a child born to parents who have never lived together.

The Saskatchewan legislation provides that "where the parents of a child have never cohabited after the birth of a child, the parent with whom the child resides is the sole legal custodian of the child." *Custody* under the Saskatchewan legislation "means personal guardianship of the child and includes care, upbringing and any other incident of custody having regard to the child's age and maturity."<sup>121</sup> In other words, the person with whom the child lives has both physical custody and decision-making authority. Under the British Columbia legislation, the mother is the *sole guardian*, which is defined to include both guardianship of the estate and guardianship of the person of the child, unless a court orders otherwise.<sup>122</sup>

Some statutes draw no express distinction between the situation where parents cohabit after the birth of the child and where they do not. Several take the same approach as the Ontario legislation which provides that "where the parents of a child live separate and apart, and the child lives with one of them with the consent, implied consent or acquiescence of the other of them,

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<sup>121</sup> *The Children's Law Act, 1997*, S.S. C-8.2, ss. 2(1) and 3(2).

<sup>122</sup> *Family Relations Act*, R.S.B.C. 1979, c.121, ss. 1(1), 25(1), and 27(5).

the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.”<sup>123</sup>

Sometimes the fact of parentage is at issue. This most often arises in the context of child support, and usually it is paternity that is at issue. All the jurisdictions have legislation that sets out how the courts are to determine this question. The statutory provisions all differ, but there are some important common elements. Almost all the statutes contain provisions establishing a presumption of paternity in certain circumstances, and providing that, in these circumstances, a person is presumed to be the father unless the contrary is proven on a balance of probabilities. The circumstances giving rise to a presumption typically include:

- The man was married to the mother at the time of the child’s birth.
- The man was married to the mother and the marriage was terminated by death or dissolution of marriage within 300 days of the child’s birth.
- The man and the mother have acknowledged in writing that the man is the father of the child.
- The man was cohabiting with the mother in a relationship of some permanence at the time of the child’s birth or the child was born within 300 days after the cohabitation ceased.
- The man has been recognized by a court to be the father of the child.<sup>124</sup>

Where a child is born to parents who are not cohabiting, the first important legal step in terms of establishment of parentage is the birth registration. The jurisdictions have varying requirements under their legislation relating to birth registration and the effects of it on the establishment of paternity.

In view of the fact that an increasing number of Canadian children are born to unmarried parents, the Family Law Committee believes that there is a need to do further work to consider whether changes to legislation are required to ensure a level of consistency between jurisdictions. Such a review might be timely given the proposed federal legislation dealing with reproductive technology.

## **Recommendation 25**

**It is recommended that the provinces and the territories review their legislation respecting establishment and recognition of parental status, and entitlement to custody and access on the birth of a child, with a view to identifying any issues that**

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<sup>123</sup> *Children’s Law Reform Act*, R.S.O. 1990, c. C 12, s. 20 (4).

<sup>124</sup> These provisions, in varying language and specifics, are found in the legislation of British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nunavut, Northwest Territories, Prince Edward Island, Saskatchewan, and the Yukon. Alberta’s legislation is somewhat different. Quebec’s presumption (Article 525 of the *Civil Code*) is limited to birth during marriage or within 300 days after dissolution of marriage. Nova Scotia does not have similar legislative provisions expressly setting out a presumption of paternity.

**require a legislative or service response, and making recommendations in the future.**

### ***When Cohabiting Parents Separate***

When parents cohabit, there are three main models in Canada of custody and access upon separation. These models apply from the time of separation until there is a formal, legally recognized agreement between the parents or a court order. In some jurisdictions, the parent with whom the child lives has physical custody and decision-making authority and the other parent may have access. In others, the parent with whom the child lives has physical custody, the other parent has access, and they share decision-making authority. A third model provides that the parents continue to have joint custody until a court orders otherwise. In Quebec, the children remain under the parental authority of both their parents.

These models provide very different starting points for parents who separate. Many parents may not understand the subtle differences between these models. These parents will work out their own arrangement about the care of their children, using terms like custody, access, guardianship, parental authority, residence, care and control or visitation, without relating these terms to the law of their province.

In terms of the child's best interests, there are two main policy considerations that require balancing. On the one hand, the child's living arrangement should be secure so the parent with whom the child resides can effectively manage the child's care, and so the child is not subject to abrupt removal by the other parent, violence or inadequate parenting. On the other hand, the statutory model should not jeopardize the relationship that the child had with both parents prior to separation. Each jurisdiction has struck its own balance, based on assessments and perceptions of societal norms.

Where abuse, violence, mental illness, or child welfare matters have forced a parent to separate, that parent must seek the protection of the court to change the default statutory provisions for custody and access. Additional caution may be needed in seeking the input of children in these situations, as the stress can be detrimental to their mental health and development. They may identify with the abusive parent, view themselves as the saviour of the mentally ill or addicted parent, or blame themselves for disclosing abuse.<sup>125</sup>

The point of separation offers many opportunities for government and the community to support parents and children. Assistance to parents who are separating should come in the form of parent information and education services; training for persons who are likely first points of contact, including lawyers, counsellors, child welfare workers, doctors and religious advisors; and emotional support for those parents who require time to accept the reality of separation. Further details of the service recommendations of the Family Law Committee are found in this report under the section entitled *Service Options and Responses*.

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<sup>125</sup> See, e.g., Bessner (2002) and O'Connor (2002b) for a good review of issues on providing children with the opportunity to voice their views.



### ***When Parents Cannot Agree on a Parenting Arrangement***

Whether parents have never resided together or they have cohabited, many will not have a formal arrangement about the care of their children. They may not have a formal arrangement for many reasons. For example where one parent, usually the father, has little or no contact with his children, neither parent may see any advantage to entering into a formal arrangement. Other examples include situations where the parents manage co-operatively without dispute, or the parents lack the resources to enter into a formal arrangement. About a third of separated parents will have no formal arrangement for the care of their children.<sup>126</sup>

Other parents will arrive at some written, legally sanctioned arrangement about the care of their children. Most commonly this arrangement is set out in a separation agreement. Only a minority will obtain a court order. Most separation agreements are prepared with the assistance of one or more lawyers. Some will contain very limited information about parenting arrangements, while others will incorporate a detailed parenting plan.

Parenting plans usually consist of a detailed schedule of the child's living arrangements; a list distributing decision-making responsibility about different facets of the child's life (for example, one parent might be responsible for religious education, while the other could decide if the child would participate in select sports teams); restrictions on changing the child's or either parent's residence, provisions for holiday periods with the child; and a dispute resolution mechanism. Parenting plans have the benefit of anticipating many of the conflicts that arise in "usual" separations, but for the parent who is highly controlling or who simply wants to maintain contact with the former spouse, they can lead to seemingly endless rounds of negotiation over details. In the hands of an abusive former spouse, a parenting plan can be a very effective tool of control, because they do not change the underlying assumption of most law that the parents share decision-making authority. Usually, the plan is only enforceable between the parents, and parents have few real options if their former spouses simply choose to ignore the rules set out in the plan.<sup>127</sup>

Lawyers usually draft separation agreements and consent court orders. Lawyers may simply reduce to writing the terms the parties have agreed to themselves with or without assistance from other persons such as mediators. Where the parties are unable to reach an agreement, lawyers assist the parties through negotiations. Lawyers frequently encourage clients to consider mediation, a parenting plan or a conciliatory solution during the preparation of a separation agreement. If the area of disagreement is small, direct negotiation between lawyers will remove the need to have another professional involved with the family. In many cases, settlement of

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<sup>126</sup> National statistics on custody orders and custody arrangements are not available in Canada. However, research estimates suggest that almost one-third of separated parents do not have a formal arrangement for the care of the children. See, e.g., Canadian Facts (2001) where the findings, based on a small telephone sample of separated or divorce parents, show that at the time of separation 26 percent of parents reported having no arrangement, 30 percent reported having an oral arrangement, 32 percent reported having a court order specifying the arrangement, and 12 percent reported having some other type of written arrangement. See also Marcil-Gratton and Le Bourdais (1999), where their analysis of the NLSCY data shows that, even five years after separation, over 50 percent of children are not under a court ordered agreement.

<sup>127</sup> A review of parenting plans, including a compendium of parenting plans, has been undertaken as part of the research support for the custody and access project. The report is still in draft form. When complete, it will be made public through the Department of Justice Canada, Family, Children and Youth Section.

child custody and access issues through a separation agreement may provide a more flexible and comprehensive remedy for the parties than a court order or at least provide as durable an arrangement as a court order.

In a few areas in the United States and Canada, lawyers are developing a new approach to resolving family disputes—collaborative family law. Lawyers trained in interest-based negotiation work with their clients and other counsel to negotiate a settlement in a face-to-face process. The lawyers and clients agree before negotiations begin to forego litigation or, if the negotiation fails, the parties must hire new counsel. Thus the focus is clearly on settlement.

The *Divorce Act* requires lawyers to advise clients of counselling and mediation facilities, and to discuss the advisability of negotiating custody and support issues. Given the range of dispute resolution mechanisms that has been developed, from arbitration to collaborative law, the current requirements in the legislation, and any similar provisions in provincial and territorial legislation, may be too narrow.

#### **Recommendation 26**

**It is recommended that jurisdictions encourage the development of collaborative family law practice as a further option for parties to consider as a method of dispute resolution.**

#### **Recommendation 27**

**It is recommended that family law legislation require lawyers to advise clients of the full range of available dispute resolution options.**

#### ***When Married Parents Decide to Divorce***

Like marriage, divorce is a legal event. It can only be accomplished by a court order. Only persons who are married need to get a divorce, but not all married parents who separate will divorce since there is generally no legal need to do so unless one of the former spouses wishes to remarry.<sup>128</sup>

When parents do divorce, they have the option of making parenting arrangements under the *Divorce Act*. Because of the structure of the Canadian constitution, if one parent decides to proceed under the *Divorce Act* to determine parenting arrangements, proceedings under provincial law to determine the custody or access of the children are stayed or terminated. The paramountcy of the federal statute is significant, because if there is a substantial difference between the two statutes, the parent who perceives the federal statute to be more advantageous to his or her rights will likely proceed with a divorce.

Currently, under the *Divorce Act*, a judge can adjourn the divorce proceeding to allow the parents to attempt reconciliation. It may be that the *Divorce Act* should also allow a judge to

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<sup>128</sup> In Nova Scotia, another reason spouses may require a divorce is to enter into a “domestic partnership” under the *Law Reform (2000) Act* of Nova Scotia.

adjourn the proceedings so that the parties can attempt to resolve their issues outside of court through mediation or other non-judicial dispute resolution mechanisms.

While the Family Law Committee endorses the use of alternatives to court action to resolve parenting disputes, there is a lack of consensus about providing legislative authority in the *Divorce Act* for a judge to order parents to attend mediation, an assessment or other provincially funded services. Since most jurisdictions provide for the use of alternate approaches to dispute resolution through court rules or legislation, further work is required to determine whether there are legal or practical limits to the ability to access these services in *Divorce Act* cases.

As well, Canadians are increasingly mobile and it is common for one or both parents to move, for better employment opportunities or other reasons, and leave the jurisdiction where the family resided after the marriage or relationship breakdown. Relative consistency of federal, provincial and territorial laws has the benefit of reducing the confusion about the law that applies to family relationships across the country and the manner in which child-centred decision making occurs.

### **Recommendation 28**

**It is recommended that jurisdictions work to ensure that children are treated similarly and provided similar protection in Canada by providing relative consistency in laws affecting custody, access and child support.**

#### ***When Parents Seek the Assistance of the Court***

It will not be safe or reasonable for some families to establish their own parenting arrangements because of problems such as conflict, emotional distress, competing values, family violence, serious mental illness, or addiction, which place one of the parents or the children at risk. Other families will attempt to make their own parenting arrangements and not succeed. Still others will find themselves before a court, because a court order is a necessary prerequisite to the resolution of the parenting arrangements (for example, they require an order finding them a parent before they can claim access), or for some other entitlement (for example, income security benefits.)

Court activity is governed by two components: the applicable law and the court procedure (which is usually set out in court rules). Under the constitution, each province controls its court procedures. As explained above, provincial law governs all parents who are not married. Even married parents can choose to start a court action under the law of their province, rather than the *Divorce Act*. In some provinces there are two levels of court that can decide family law issues. Where there are two levels of court only the higher court can grant a divorce. Typically, legal fees and court costs are higher in the higher court and procedures are more complex, and so some parents prefer to resolve their parenting issues in the lower court. In other provinces, and in parts of some provinces, the two levels of court are “unified” so that one court has the capacity to make all family law decisions.

Court processes across Canada are adversarial, meaning that each person is responsible for bringing forward the facts and law to convince the judge of the merits of their case. Since parenting is an ongoing relationship, resolving parenting issues through an adversarial model can be counterproductive. Parents who come to view the court case as a battle, where one will be the winner and one the loser, are ill equipped to continue a co-operative relationship. In response to

this perceived flaw, many provinces have added additional supports and steps to the court process when custody is at issue to help ensure that the focus on the best interests of the child is not lost.

### **Recommendation 29**

**It is recommended that courts make appropriate use of judicial and non-judicial settlement approaches to avoid the hardening of positions and to promote early settlement and narrowing of issues in dispute.**

#### *Steps in the Court Process*

Court procedures vary from province to province and between levels of court within those jurisdictions which still have two levels of court. A jurisdiction's civil law procedures usually govern its family proceedings, although some jurisdictions have specialized family procedures. Sometimes attempts have been made to use plain language in the codes of procedure for family law to allow the lay litigant to better understand the process.

Civil courts, particularly federally appointed superior courts, tend to have extensive codes of procedure. These allow for complex litigation over a whole range of civil issues, including commercial disputes. The language and process of the court is most often foreign to the parents, who can feel that their parenting decision has been "handed over" to a decision-making process over which they have little control. For example, in a research report into the effectiveness of mediation, a Manitoba study shows that only a small number of participants felt they had some control over the court process.<sup>129</sup>

Usually, there is an early opportunity for a parent to get an interim or temporary order, which will last until the final determination of the issue through settlement or trial. Most court systems have at least one conference, directed by a judicial officer, to discuss the prospect of settlement of some or all of the issues between the parties. In specialized court procedures there can be many conferences with a judge before a trial.

In Canada, most family court processes are case-managed, meaning that the judge or court staff attempt to keep the parties on a scheduled timeline, to ensure that the matter proceeds expeditiously. This case management process can add additional steps to the process, as parents must report to the court about why their case is not progressing. Case management systems need to be sensitive to the particular issues involved in family proceedings. In particular, they have to ensure that, in urgent matters, such as those involving violence or wrongful removal of a child, case management procedures do not impede families having their case heard by a judge without delay.

### **Recommendation 30**

**It is recommended that case management systems provide for expedited access to judicial decision making where it is in the best interests of the child to have the matter dealt with on an urgent basis.**

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<sup>129</sup> McKenzie and Pedersen (2001).

At any point during the court process, parents can reach an agreement about their parenting arrangement. Because they have an application before the court, this agreement is often incorporated into a consent order of the court. If no agreement is reached, the court case will proceed through all of the steps and culminate in a trial, at which evidence is heard. At the conclusion of the trial, the judge will order a parenting arrangement for the children.

Court adjudication and trial have a role to play in the protection of parents and children who may be at risk of harm or manipulation. However, because most family law, apart from child protection legislation, is private law and parents must handle their own litigation, the court process tends to favour the parent who has the most financial resources. Legal aid funding for court activity is unevenly distributed across the country, and between the civil and criminal legal aid systems.

### ***When the Court Makes an Order***

A court may only make an order about an issue raised by one of the parents. Either parent must ask the court to assist with the parenting arrangement before the court has the power to make an order. Court orders can be interim (pending a final order) or final. The title *final* on court orders dealing with parenting arrangements is somewhat misleading since the law allows a parenting order to be changed if it is in the child's best interest to do so, and if there has been a material change since the making of the order.

For married parents to be divorced, the court must make a divorce order. Often, parenting arrangements that have been agreed to in a separation agreement are included in the divorce judgment.

Court orders in Canada tend to be drafted by the lawyers who represented the parents, or by court staff. These orders may be very different in the level of detail that they provide about the parenting arrangement. Some courts will incorporate a detailed parenting plan, while others will simply state that the parents have joint custody of the children. Courts in Canada may order a full spectrum of parenting arrangements. Case law confirms that the court can attach any conditions to an order for custody or access that it thinks are necessary to give effect to the order.

If the parents have been to court, the court order is the primary definition of their future parenting relationship. Parents can benefit from clear, unequivocal language in the court order setting out each parent's responsibilities to the children. Because they have had to turn to the court to resolve their parenting dispute, it is more likely that they need more guidance or rules to resolve parenting disputes in the future. It is important that the order be clear for enforcement purposes as well. Manitoba has been proactive in addressing the issue of clarity in court orders by developing a template of clauses that judges and lawyers can include in court orders through an "auto-orders" pilot project.<sup>130</sup>

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<sup>130</sup> See Manitoba's "Automated Court Orders in Family Cases" project, which can be found at the Manitoba Courts Internet site at <http://www.manitobacourts.mb.ca>.

### **Recommendation 31**

**It is recommended that orders be worded clearly and consistently to ensure that the parties understand their obligations and that the orders can be enforced.**

#### ***When a Person Needs to Change a Parenting Arrangement***

Children grow and families change. Parenting arrangements or decisions about the child's upbringing may have to be changed many times over the course of a child's life. Even where "final" decisions have been reached between a child's parents, changes such as new parental relationships, one or both parents' desire to move, a child becoming an adolescent and changes in financial circumstances can trigger a re-evaluation of the parenting arrangement. How the change is made is determined, to a great extent, by the form of the original arrangement.

Usually a written agreement about the care of a child can be changed by a further written agreement that is signed by both parties and witnessed. Many separation agreements contain dispute resolution mechanisms, including mediation and arbitration, to assist parents to decide on the terms of the variation.

A court order can only be changed by a further court order. Therefore, even when parents agree, if the parenting arrangement is set out in a divorce judgment or a custody and access order, they will have to return to court to have the order changed. Some parents need the assistance and protection of the court even where they have reached an agreement. For example, judicial review of parenting changes can guard against coercion by one parent. However, where the parents initially obtained a court order, not because they had a dispute, but for other reasons discussed above, such as income security requirements, court action to change their parenting arrangement may itself trigger discord. In other words, a court hearing with its attendant emotional and financial costs may not be necessary or desirable in some cases.

### **Recommendation 32**

**It is recommended that procedures for variation of orders provide that, where there is consent, custody, access and child support orders can be varied expeditiously and without a court hearing.**

## PART 2: CHILD SUPPORT

### A. INTRODUCTION

Child support guidelines are the rules and tables that the courts must follow in determining the amount of a child support order. Amendments to the *Divorce Act* establishing the framework for the guidelines and the *Federal Child Support Guidelines* Regulation came into effect May 1, 1997. All the provinces and territories also have enacted child support guidelines legislation. With the exception of Quebec, the provinces and territories adopted the federal guidelines or enacted a modification of them. Quebec has its own child support guidelines.

Part of the legislation adopting the *Divorce Act* child support guidelines required that the federal Minister of Justice report back to Parliament by May 1, 2002. In 1999, the federal Department of Justice consulted on technical issues related to the child support guidelines through distribution of a paper for public response.<sup>131</sup> An interim report on child support guidelines was provided by the Standing Senate Committee on Social Affairs, Science and Technology.<sup>132</sup> The 2001 public consultations, *Putting Children's Interests First*,<sup>133</sup> invited responses on four issues:

- child support in shared custody situations;
- the impact of access costs on child support amounts;
- child support for children at or over the age of majority; and
- the child support obligations of a spouse who stands in the place of a parent.

The Family Law Committee believes that, in general, the guidelines have succeeded in providing a reasonable basis upon which parties can determine their level of responsibility for child support, in encouraging parties to accept and pay child support and in raising the general level of child support available to children.<sup>134</sup>

While the guidelines have been largely successful, parents, lawyers, judges and others have identified issues that require further work to improve the guidelines. These issues will not require major changes to the guidelines, merely fine-tuning. The intent is to provide greater clarity while maintaining flexibility. It is noted that any change to terminology in the *Divorce Act* would, of course, require changes in the child support guidelines provisions in the federal, provincial and territorial legislation.

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<sup>131</sup> See Department of Justice (1999) for a copy of the technical consultation document and response booklet.

<sup>132</sup> See Canada, Standing Senate Committee (1998).

<sup>133</sup> See Department of Justice (2001) for a copy of the national consultation document, and IER (2001) for the reported results.

<sup>134</sup> See Department of Justice (2002) for the federal government's report on the workings and operations of the Federal Child Support Guidelines, which suggests that the guidelines have met their objectives and have been successful.

Taking into account the results of the 2001 consultation as well as previous consultations on other issues, research results and case law analysis, the Family Law Committee makes the following recommendations.

## **B. LEGAL PROCESS/LEGISLATIVE ISSUES**

### **Shared Custody**

When a parent exercises access to, or has physical custody of, a child for forty percent or more of the year, the court may order a support amount different from the amount prescribed in the guidelines. In making such a decision, the judge considers the table value for each parent, the extra costs of shared custody and the condition, means, needs and other circumstances of each parent and any child for whom support is sought.

#### ***The 40 Percent Rule***

Although the use of a threshold based on time has been criticized because of the direct link between child contact and support, no alternative has been found that can demonstrably improve the test. Although many other proposals have merit, none simplifies the court process and each represents a radical departure from the status quo. Departure from time as the basis for the threshold test would result in significant uncertainty and increased litigation, contrary to the objectives of the Guidelines.

Selecting a higher time threshold such as *substantially equal* has some advantages. However, they are somewhat outweighed by other factors. These factors include the potential for increased litigation over the meaning of the term; unfairness to parents with high access time; and uncertainty as to whether this would actually reduce the link between child contact time and child support, leading to a decrease in litigation.

There is an established body of case law interpreting the section and parents and legal professionals are familiar with it. However, the case law will continue to be monitored.

### **Recommendation 33**

**It is recommended that no change be made to the 40 percent threshold rule. However, further guidance should be provided in the child support guidelines on how to determine or analyze the elements that contribute to the determination that the 40 percent rule has been met.**

#### ***Presumptive Formula***

It is proposed that the current factors used to determine the amount of support in shared custody situations be replaced by the use of a presumptive formula. A judge will determine the support amount by applying the prescribed formula, unless that amount is inappropriate. The proposed formula amount is the difference between the table values for each parent (set-off formula). The introduction of a presumptive formula is intended to increase predictability and certainty while maintaining overriding judicial discretion to order another amount in the appropriate circumstances.



The set-off formula will be determined having regard to the table values for the total number of children for whom the parents maintain a residence. In determining the appropriateness of the formula amount, the court may consider any relevant factor, including how the spouses share the children's expenses.

The set-off method accounts for the increased costs of maintaining a residence because each parent's contribution will be based on the total number of children for whom the parents maintain a residence. This is different from split custody situations where the table values only account for the number of children in each parent's care. The set-off method is consistent with the guideline approach that requires each parent to contribute to the maintenance of the children in accordance with what he or she would contribute if the family were intact.

Use of a presumptive formula simplifies the determination of support and provides certainty and predictability. It gives parents and courts more direction in determining the amount of support in shared residence situations while maintaining flexibility. Overriding judicial discretion to depart from the formula in appropriate cases means that unfair amounts should not be ordered. Many courts are already applying this test in appropriate cases.

#### **Recommendation 34**

**It is recommended that the current factors used to determine the amount of support in shared custody situations be replaced by the use of a presumptive formula. The formula amount would be the difference between the table values for each parent given the total number of children in the shared custody arrangement, unless that amount is deemed inappropriate based on, for example, how the parents share the child's expenses.**

#### **Definition of Extraordinary Expenses**

Section 7 of the Guidelines provides that six categories of special child-related expenses can be included in the child support amount if they are reasonable and necessary in light of the needs of the child, the means of the parents and the child and any family spending pattern established prior to separation. Included in those categories are *extraordinary expenses* for education and extracurricular activities.

The term *extraordinary* has been interpreted differently across the country. This has created some confusion and inconsistency in application resulting in calls for an explanation of the term. It is therefore proposed that section 7 be amended to add a definition of the term *extraordinary*. Parents and courts will be directed to examine whether the expense is extraordinary in relation to the income of the parent requesting and paying for the expense. If an examination of the income is insufficient to determine whether the expense is extraordinary, parents and the court will be directed to consider other factors in addition to income. This reform would model the changes that Manitoba has made to its legislation. These other factors will include:

- the number and nature of the programs and activities;
- the overall cost of the programs and activities;

- any special needs and talents of the child; and
- any other similar factor the court considers relevant.

The proposed approach is consistent with the original intent of the section and with the interpretation adopted by several appeal courts.

### **Recommendation 35**

**It is recommended that the term *extraordinary* be defined in the Guidelines.**

### **Support for Children at or Over the Age of Majority**

Many people have argued that older children receiving support should be accountable and provide financial and other information to demonstrate continued entitlement to support. Others say this is an unnecessary breach of the older child's privacy that also has the effect of involving the child in the parent's litigation.

It is proposed that the Guidelines be amended to require disclosure of information relevant to the child's entitlement to support. This would ensure transparency and accountability. The amendment will require the recipient parent, not the child, to provide the information upon the written request of the paying parent, thus insulating the child from direct involvement in the litigation. This requirement would apply in all cases where support is to be paid for children at or over the age of majority, not just in those that include special expenses.

Special expenses, such as tuition for post-secondary education, are those beyond what is covered by the child support table amount. Under the Guidelines, there is already a section that requires parents to produce information regarding the status of any special expenses. However, this provision does not extend to producing information about ongoing eligibility and other expenses that may be paid with the table amount or another amount paid for older children.

### **Recommendation 36**

**It is recommended that no change be made to the provisions regarding the eligibility for support of a child over the age of majority.**

### **Recommendation 37**

**It is recommended that the Guidelines be amended to require recipients of support for children over the age of majority to disclose information respecting the child's ongoing eligibility for support.**

### **Undue Hardship Test**

The undue hardship provision recognizes that, in some circumstances, payment of the table amount, or the table amount plus special expenses, can cause a parent or a child to suffer undue hardship. This section permits courts and parents to decide upon a different amount, in appropriate cases, in order to relieve this hardship. The undue hardship provision is intended to

balance the Guidelines objectives of consistency and a fair standard of support, taking into account the particular circumstances of any given family.

The undue hardship provision has been criticized because it has been restrictively applied for parents who seek to decrease the support amount, notably when access costs are high for paying parents who reside far from the child. Courts are presently reviewing these situations on a case-by-case basis and, for the most part, are applying the section as intended. In many mobility cases (paying parent residing far from the child), courts are making provisions for high transportation costs incurred by the parent exercising access by way of a separate order.

### **Recommendation 38**

**It is recommended that no changes to deal specifically with high access costs be made to the guidelines. These situations should be dealt with on a case-by-case basis and any accommodation appropriate to a particular case should be addressed as part of a custody and access order.**

### **Obligations of Those Who Stand in the Place of a Parent**

Spousal and family relationships of varying permanence, and blended families, have become more common in Canadian society.<sup>135</sup> A person who acts as a parent to a child may have a legal obligation to support that child after the relationship with the other parent ends.

Currently, the *Divorce Act* defines a child of the marriage (a child eligible to receive child support) as a child of two spouses or former spouses, including “any child of whom one is the parent and for whom the other stands in the place of a parent.”<sup>136</sup> Most provinces and territories have adopted a similar definition in their own legislation or have defined a child as “a child in relation to whom a person has demonstrated a settled intention to treat as a child of his or her family.”

Once it has been established that a step-parent stands in the place of a parent, the step-parent’s obligations are similar to those of the natural parent. The child support guidelines allow courts to set a child support amount they consider appropriate in these cases. When making this decision, courts must take into account the amount set out in the guidelines and the legal duty of any parent other than the step-parent to support the child.

Courts have adopted a variety of approaches to this issue and, in light of the resulting inconsistencies, some people have argued that the regulations should give judges explicit direction about how the amount of support for stepchildren should be determined. However, the question of how child support should be allocated among natural parents and step-parents is quite complex and is largely driven by the facts of each case. A rigid formula could create unfair results. Most respondents expressed this concern during the consultation process.<sup>137</sup> For all these reasons, it is recommended that this section not be amended.

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<sup>135</sup> See Marcil-Gratton and Le Bourdais (1999).

<sup>136</sup> *Divorce Act*, s. 2(2).

<sup>137</sup> See IER (2001).

### **Recommendation 39**

**It is recommended that no changes be made to the provisions in the child support guidelines respecting the obligations of those who stand in the place of a parent.**

### **Child Support Tables**

The federal child support tables set out the amount of monthly child support payments for each province and territory on the basis of the annual income of the parent ordered to pay support and the number of children for whom a table amount is payable. The amounts vary from one jurisdiction to another because of differences in provincial income tax rates and certain credits. When the *Federal Child Support Guidelines* were adopted, the intent was for changes to be made to the tables when changes to the tax rates significantly affect the table amounts.

### **Recommendation 40**

**It is recommended that the child support tables be updated every five years, or more often, if there are changes to federal, provincial or territorial taxes that would have a major impact on the table amounts.**

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## **APPENDIX A: RECOMMENDATIONS OF THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS**

Reproduced verbatim from the report at the Department of Justice website, at:  
<http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm>.

1. This Committee recommends that the Divorce Act be amended to include a Preamble alluding to the relevant principles of the United Nations Convention on the Rights of the Child. (page 23)<sup>138</sup>
2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the Divorce Act be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another. (page 23)
3. This Committee recommends that it is in the best interests of children that
  - 3.1 they have the opportunity to be heard when parenting decisions affecting them are being made;
  - 3.2 those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;
  - 3.3 a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;
  - 3.4 the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the Divorce Act or provincial legislation; and
  - 3.5 we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction. (page 23)
4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child. (page 23)

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<sup>138</sup> The page numbers refer to the page numbers in the Committee's report where the recommendation is made.

5. This Committee recommends that the terms “custody and access” no longer be used in the Divorce Act and instead that the meaning of both terms be incorporated and received in the new term “shared parenting”, which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms “custody and access”. (page 27)
6. This Committee recommends that the Divorce Act be amended to repeal the definition of “custody” and to add a definition of “shared parenting” that reflects the meaning ascribed to that term by this Committee. (page 28)
7. This Committee recommends that the federal government work with the provinces and territories toward a corresponding change in the terminology in provincial/territorial family law. (page 28)
8. This Committee recommends that the common law “tender years doctrine” be rejected as a guide to decision making about parenting. (page 28)
9. This Committee recommends that both parents of a child receive information and records in respect of the child’s development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should extend to schools, doctors, hospitals and others generating such information or records, as well as to both parents, unless ordered otherwise by a court. (page 28)
10. This Committee recommends that all parents seeking parenting orders, unless there is agreement between them on the terms of such an order, be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children’s developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order. Parents should not be required to attend sessions together (page 30).
11. This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent’s responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child’s development and social activities. All parenting orders should be in the form of parenting plans. (page 32)
12. This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans. (page 32)

13. This Committee recommends that the Minister of Justice seek to amend the Divorce Act to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court. (page 32)
14. This Committee recommends that divorcing parents be encouraged to attend at least one mediation session to help them develop a parenting plan for their children. Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision making should be structured to screen for and identify family violence. Where there is a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution should be used to develop parenting plans only when the safety of the person who has been the victim of violence is assured and where the risk of violence has passed. The resulting parenting plan must focus on parental responsibilities for the children and contain measures to ensure safety and security for parents and children. (page 33)
15. This Committee recommends that the Divorce Act be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the “best interests of the child”. (page 44)
16. The Committee recommends that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child, and that list shall include
  - 16.1 The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
  - 16.2 The relative strength, nature and stability of the relationship between the child and other members of the child’s family who reside with the child, and persons involved in the care and upbringing of the child;
  - 16.3 The views of the child, where such views can reasonably be ascertained;
  - 16.4 The ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;
  - 16.5 The child’s cultural ties and religious affiliation;
  - 16.6 The importance and benefit to the child of shared parenting, ensuring both parents’ active involvement in his or her life after separation;
  - 16.7 The importance of relationships between the child and the child’s siblings, grandparents and other extended family members;
  - 16.8 The parenting plans proposed by the parents;
  - 16.9 The ability of the child to adjust to the proposed parenting plans;

- 16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
  - 16.11 Any proven history of family violence perpetrated by any party applying for a parenting order;
  - 16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;
  - 16.13 The willingness shown by each parent to attend the required education session; and
  - 16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute. (page 45)
17. This Committee recommends that the Divorce Act be amended to ensure that parties to proceedings under the Divorce Act can choose to have such proceedings conducted in either of Canada's official languages. (page 46)
  18. Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:
    - 18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed by this Committee;
    - 18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;
    - 18.3 The desirability of considering both parents' income, or financial capacity, in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is "shared parenting";
    - 18.4 Recognition of the expenses incurred by support payors while caring for their children;
    - 18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;
    - 18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;
    - 18.7 The ability of parties to contract out of the Federal Child Support Guidelines; and

- 18.8 The impact of the Guidelines on the income of parties receiving public assistance. (page 51)
19. This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders. (page 55)
20. This Committee recommends that the federal government establish a national computerized registry of shared parenting orders. (page 55)
21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child. (page 57)
22. This Committee recommends that the federal government provide leadership by ensuring that adequate resources are secured for the following initiatives identified by this Committee as critical to the effort to develop a more child-centred approach to family law policies and practices:
- 22.1 Expansion of unified family courts across Canada, including the dedication of ample resources to interventions and programs aimed at ensuring compliance with parenting orders, such as early intervention programs, parenting education, make-up time policies, family and child counselling, and mediation;
  - 22.2 Civil legal aid to ensure that parties to contested parenting applications are not prejudiced by the lack or inadequacy of legal representation;
  - 22.3 A Children's Commissioner, an officer of Parliament reporting to Parliament, who would superintend and promote the welfare and best interests of children under the Divorce Act and in other areas of federal responsibility;
  - 22.4 The provision of legal representation for children when appointed by a judge;
  - 22.5 Parenting education programs;
  - 22.6 Supervised access programs; and

- 22.7 Enhanced opportunities for professional development for judges, focused on the concept of shared parenting formulated by this Committee, the impact of divorce on children, and the importance of maintaining relationships between children and their parents and extended family members. (page 59)
23. This Committee recommends that the federal government continue to work with the provinces and territories to accelerate the establishment of unified family courts, or courts of a similar nature, in all judicial districts across Canada. (page 63)
24. This Committee recommends that unified family courts, in addition to their adjudicative function, include a broad range of non-litigation support services, which might include
- 24.1 family and child counselling,
  - 24.2 public legal education,
  - 24.3 parenting assessment and mediation services,
  - 24.4 an office responsible for hearing and supporting children who are experiencing difficulties stemming from parental separation or divorce, and
  - 24.5 case management services, including monitoring the implementation and enforcement of shared parenting orders. (page 64)
25. This Committee recommends that, as much as possible, provincial and territorial governments, law societies and court administrators work toward establishing a priority for shared parenting applications, above other family law matters in dispute. (page 64)
26. This Committee recommends that in matters relating to parenting under the Divorce Act, the importance of the presence of both parties at any proceeding be recognized and emphasized, and that reliance on ex parte proceedings be restricted as much as possible. (page 64)
27. This Committee recommends that court orders respecting shared parenting be more detailed, readable and intelligible to police officers called upon to enforce them. (page 67)
28. This Committee recommends that provincial and territorial governments explore a variety of vehicles for increasing public awareness about the impact of divorce on children and, in particular, the aspects of parental conduct upon marriage breakdown that are most harmful to children, and implement such education programs as fully as possible. To the extent practicable, the Committee recommends that the federal government contribute to such efforts within its own jurisdiction, including the provision of funding. (page 68)
29. This Committee recommends that the federal government extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship. (page 68)



30. This Committee recommends that the Divorce Act be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time. (page 70)
31. This Committee recommends that provinces and territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments. (page 72)
32. This Committee recommends that federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children. (page 74)
33. This Committee recommends that professionals who meet with children experiencing parental separation recognize that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention. (page 74)
34. This Committee recommends that the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada. (page 76)
35. This Committee recommends that the Divorce Act be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a parent and a child in situations of transition, or where there is clear evidence that the child requires protection. (page 76)
36. This Committee recommends that the provincial and territorial governments require child protection agencies to provide disclosure of records of investigations to court-appointed assessors examining families who have been the subject of such investigations. (page 77)
37. This Committee recommends that the attorneys general of Canada and the provinces, along with police forces and police organizations, ensure that all warrants in child abduction matters provide expressly that their application and enforcement are national. (page 84)
38. This Committee recommends that the Attorney General of Canada work to develop a coordinated national response to the problem of child abduction within Canada. (page 84)
39. This Committee recommends that the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent be recognized as contrary to the best interests of the child, except in an emergency. (page 84)

40. This Committee recommends that a parent who has unilaterally removed a child not be permitted to rely on the resulting period of sole care and control of the child, of whatever duration, as the basis for a sole parenting order. (page 84)
41. This Committee recommends that the federal government implement the recommendations of the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled *International Child Abduction: Issues for Reform*. (page 84)
42. This Committee recommends that the Minister of Foreign Affairs and the Passport Office continue to examine ways to improve the identification of minor children in travel documents and consider further the advisability of requiring that all children be issued individual passports. (page 84)
43. This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the Criminal Code in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury. (page 90)
44. This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem. (page 93)
45. This Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way. (page 97)
46. This Committee recommends that the federal government include as the basis for such consultations the family law-related recommendations of the Royal Commission on Aboriginal Peoples and work toward their implementation as appropriate. (page 98)
47. This Committee recommends that sexual orientation not be considered a negative factor in the disposition of shared parenting decisions. (page 99)
48. This Committee recommends that the Minister of Foreign Affairs work toward the signing and ratification as soon as possible of the 1996 *Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. (page 101)

## APPENDIX B: SUMMARY OF INTERNATIONAL EVALUATIONS

### WASHINGTON STATE

In 1987, Washington State made significant changes to its divorce and child custody law in the form of the *Washington State Parenting Act*. In this legislation, the primary tool used to structure post-separation parenting is the parenting plan. Even where parents are unable to agree on a parenting plan and court proceedings are necessary, the court order (called a “parenting order”) is made in the form of a parenting plan. The objectives of the parenting plan include providing for the child’s physical care, setting out the authority and responsibilities of each parent with respect to the child, minimizing parental conflict, and encouraging parents to resolve their disputes under the parenting plan instead of through the court system.<sup>139</sup> The parenting plan is the vehicle by which “parenting functions” are allocated between the parents. These parenting functions include maintaining a loving, stable, consistent and nurturing relationship with the child, attending to the daily needs of the child, attending to the child’s education, and providing financial support for the child.<sup>140</sup>

Since the passage of the *Washington State Parenting Act* in 1987, research has been conducted in an effort to determine the impact of the new act on divorcing families.<sup>141</sup> The studies indicate that, while there appears to be strong policy support for the goals of the act, particularly among professionals involved in the family law system, it does not appear that the act has had a significant impact on the reality of post-separation parenting. For the most part, children continue to live with one parent following divorce and it is that parent who exercises control over significant decisions concerning the child. In general, non-residential parents continue to play a limited role in children’s lives, with the “every other weekend” schedule predominating. Nor do the research results indicate that the act has reduced conflict between divorcing parents. In fact, in some circumstances the new act may have increased conflict between parents since the mutual decision-making provisions contained in most parenting plans provide a fresh source of conflict for some parents.

### UNITED KINGDOM

The *Children Act 1989* came into effect in 1991.<sup>142</sup>

The United Kingdom legislation has replaced the terms “custody” and “access” with the terms “parental responsibility,” “residence” and “contact.” The changes in terminology were intended to encourage parents to focus on co-operative arrangements for caring for their children and to provide more flexibility in childcare arrangements.

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<sup>139</sup> See *Washington Rev. Code*, s. 26.09.184.

<sup>140</sup> See *Washington Rev. Code*, s. 26.09.004.

<sup>141</sup> See Lye (1999).

<sup>142</sup> *The Children Act 1989* Chapter 41.

The central feature of the United Kingdom model of post-separation parenting is the notion of parental responsibility. The act replaces the old custody and access order with four types of orders:

1. residence orders;
2. contact orders;
3. specific issues orders; and
4. prohibited steps orders.

A residence order defines the person or persons with whom the child is to live. A contact order requires the person with whom the child lives, or is to live, to allow the child to have contact with another person. A specific issues order deals with a dispute over a particular aspect of parental responsibility. A prohibited steps order requires that a particular step not be taken without the approval of the court.

Research indicates that the act has not succeeded in reducing litigation concerning custody and access. For example, the number of contact orders increased by 117 percent between 1992 and 1996.<sup>143</sup> Recent statistics obtained from the United Kingdom government suggest that litigation concerning access and contact is not decreasing in the longer term.<sup>144</sup> For some parents, the reforms appear to have assisted them in arriving at a co-operative parenting arrangement, while for others the act's emphasis on parental responsibility seems to have expanded the range of issues to fight about.

## AUSTRALIA

Australia made significant changes to its *Family Law Act* in 1995 with the passage of the *Family Law Reform Act*. The legislative changes were largely modelled on the family law reforms carried out in the United Kingdom in 1989. The new act was intended to change attitudes by encouraging separating and divorcing parents to focus on their children's interests instead of their own, to remain involved with their children following separation, to share parenting responsibilities, and to resolve custody issues through agreement instead of through litigation.<sup>145</sup>

The Australian act uses terminology similar to that used in the United Kingdom *Children Act 1989*. Residence and parental responsibility take the place of custody, and contact replaces access. The court makes a *parenting order* in which responsibilities are allocated to the parents according to the best interests of the child.

Two evaluations are available concerning the impact of the changes to the Australian *Family Law Act*.<sup>146</sup> Several patterns are suggested by the two Australian studies. First, the principle of the child's right to contact appears to be given more weight than any other principle under the act including the provisions concerning family violence. This was not an articulated purpose of the

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<sup>143</sup> See Davis and Pearce (1998).

<sup>144</sup> Statistics obtained from UK Court Services, December 6, 1999.

<sup>145</sup> See Rhoades et al. (1999).

<sup>146</sup> See Rhoades et al. (1999), and Dewar et al. (1999). An updated version of the interim report by Rhoades and colleagues is also available, see Rhoades et al. (2000).

legislation and is clearly an unintended result. Second, many fathers appear to believe that they have more “rights” under the new legislation and many mothers think they have to agree to more generous contact arrangements and that they cannot relocate (again, neither of these were intended results). Also, the act has not yet met its objective of decreasing litigation and conflict in family matters. Although for some parents the new provisions seem to promote settlement by increasing the range of parenting options available, for others involved in high conflict disputes, the new provisions seem to allow for more opportunities to litigate.

The Family Law Committee was particularly interested in the Australian reforms and therefore asked the senior Australian official responsible for the new legislation to meet with the Committee and discuss his experience. He advised that any change to the legislative framework in family law runs the risk that interest groups and professionals will interpret it in different ways. In Australia, the words used by the legislature have been given quite opposite meanings by men’s groups and women’s groups and on many occasions bore little resemblance to the intention of the legislature. Further interpretations by professionals and judicial officers add to the confusion for those trying to find their way through the family law system. He indicated that in order for legislative changes to be successful, it is vital to ensure one clear message is articulated and that message must be transmitted appropriately to interested stakeholders over time. Legal and other professionals are key players in transmitting that message. It was also pointed out that legislative change will not resolve the problems of high-conflict families and attitudinal changes regarding post-separation parenting will occur only over the long term with appropriate support in the form of services.

## **FRANCE—A COUNTRY WITH A CIVIL LAW TRADITION**

### **Terminology: A word about the concepts *parental authority* and *parental responsibility***

The 1970s saw profound upheavals in family law in European countries with a civil law tradition, including France. The reforms affected all areas of family law, including marriage, divorce and the legal status of children.

With respect to children, the principle of gender equality—enshrined in virtually all statutes—and the growing importance placed on protecting the interests of the child were contributing factors in changing the legal relationship between parents and children. Fathers and mothers were charged with a veritable trust in relation to their children, as the changes in legal terminology show. In France in particular, the concept of *paternal power* was replaced with that of *parental authority* (Law of July 4, 1970), parental authority being conceived of as a function comprising both rights and duties whose ultimate aim was the interests of the child.

A few years later, in 1984, the Committee of Ministers of the Council of Europe found that in some states, the concept of *parental authority* no longer reflected social and legal reality, while

in others, it ran counter to the predictable development of the law. The Committee therefore adopted a Recommendation concerning *parental responsibilities*.<sup>147</sup> The explanatory document for this Recommendation mentioned that the drafters preferred the phrase *parental responsibilities* (rather than *parental authority*) because it more accurately expressed the modern concept according to which parents, on equal footing with each other and their children, were entrusted with a mission of education, legal representation, maintenance, etc. It was thought that parents exercised powers not under some authority conferred upon them in their own interests, but in order to fulfil duties in the interests of their children.

The sixth principle of the Recommendation reads as follows:

In the case of a dissolution of a marriage or a separation of the parents, the competent authority requested to intervene should rule on the exercise of parental responsibilities. It should accordingly take any appropriate measures, for example by dividing the exercise of the responsibilities between the two parents or, where the parents consent, by providing that the responsibilities should be exercised jointly. In taking its decision, the authority should take account of any agreement concluded between the parents provided it is not contrary to the interests of the children.<sup>148</sup>

Despite the fact that the Council of Europe adopted this Recommendation, France did not see fit to modify its legal terminology. Parental authority remained, and remains today, the phrase used in the French *Civil Code*. For its part, Quebec introduced the concept of parental authority into the *Civil Code of Quebec* in 1977.

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<sup>147</sup> The phrase *parental responsibility*, which is taken from the *Convention on the Rights of the Child* (article 18), is also found verbatim in the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* of October 19, 1996.

As one can see from the Explanatory Report of this Convention, the phrase “covers responsibility concerning the person of the child, responsibility concerning the child’s property, and generally the legal representation of the child, regardless of the name given to the institution (parental responsibility, parental authority, paternal power, and also guardianship, wardship, legal administration, custody). The rights and obligations referred to are those of the father and the mother under the law, with a view to raising their children and ensuring their development, where the custody, education, establishment of residence or supervision of the person of the child (in particular with regard to the child’s relationships) is concerned. The term *powers* refers more specifically to the representation of the child. This responsibility is usually exercised by the parents, but it may also be exercised in whole or in part by third parties, under conditions set by national legislations, in the event of death, incapacity, inability or unworthiness of the parents, or abandonment of a child by its parents.” Actes et documents de la Dix-huitième session (1996) [Proceedings and documents of the eighteenth session (1996)], Volume II, Protection des enfants [Protection of children] (printed separately as the report of Mr. Paul Lagarde) p. 40.

<sup>148</sup> Council of Europe, Committee of Ministers, Recommendation No. R (84) 4 on parental responsibilities, adopted on February 28, 1984, and explanatory memorandum. Strasbourg: Council of Europe Publishing, 1984.

## The New Right of Parental Authority in French Law Since the Reform of March 2002

In recent years, France has undertaken a significant reform of its family law. The general orientations of this reform were made public in April 2002 by the French minister of Justice and the minister responsible for the family, children and persons with disabilities. Parental authority and divorce are the two components of this reform.

The objective pursued by the French government in this reform was stated as follows at a conference on the family held on June 11, 2001:

While seeking to consider more effectively the diversity of family situations, the various components of this reform are conceived as parts of a coherent whole. The aim is to implement the principles of freedom in the life choices of couples and parents, of equality among children regardless of their parents' circumstances, and of parity between men and women, and of searching for and attaching value to agreements between spouses and parents.<sup>149</sup>

Regarding divorce more particularly, the proposed orientations aim to “humanize and pacify divorce proceedings, in order to provide parents with better support and to create conditions for an organization responsible for the consequences of the parents' separation for the children.”<sup>150</sup>

*Law No. 2002-305 of March 4, 2002 concerning parental authority* has been adopted by the French National Assembly and published in the *Journal officiel* [Official gazette] [J.O. No. 54 of March 5, 2002, p. 4161]. This law, which was amended during the legislative process, is of immediate application and is therefore now in force in France.

The text of the law is available on the Web site of the *Journal officiel* at the following address: <http://www.legifrance.gouv.fr>.

It should be noted that this legislation concerns only the right of parental authority, including the organization of that authority in case of separation or divorce, and certain aspects of child protection (particularly juvenile prostitution and the international abduction of children). However, the reform of divorce law as such (proceedings, grounds for divorce), is still in the works before the French legislative bodies. This much awaited reform of divorce law in France should include the abandonment of divorce on the grounds of fault, and the introduction of rules designed to simplify proceedings, with particular emphasis on the importance of family mediation and negotiated agreements.

Readers may consult the major points of this draft reform of divorce law in France on the Web site of the French ministry of Justice, at the following address: <http://www.justice.gouv.fr/presse/conf091001.htm>

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<sup>149</sup> Speech of the ministers responsible, *Projet du Gouvernement relatif à la réforme du droit de la famille* [Government bill on family law reform], presented by the Prime Minister on June 11, 2001, and the press document concerning the reform of divorce, *Une réforme pour reconnaître le droit au divorce, pour pacifier le divorce, pour construire un « après »* [A reform to recognize the right to divorce, to pacify divorce, and to construct an “after”] (October 11, 2001). See the Web site of the French Ministry of Justice at <http://www.justice.gouv.fr/presse/conf091001a.htm>.

<sup>150</sup> *Ibid.*

## The Exercise of Parental Authority

The new law was adopted following the work of two government commissions that, in recent years, have examined family law reform in general.<sup>151</sup> The new law is in line with the two most recent reforms (1987 and 1993) that France has introduced in this field. The laws of 1987 and 1993 had introduced the model of joint exercise of parental authority (as it has existed in Quebec law since 1977). We can say that the French law of 2002 translates into law all the consequences of the principle of *joint parenthood*, whether in the united couple or in the separated family. The new law is based on two major principles, identified by the Dekeuwer-Défossez Commission:

- *Making the rules concerning parental authority uniform.* Whatever the parents' marital status (married or unmarried, united, separated or divorced), a common law of parental authority now applies. In this regard, French law is thus abandoning the legal concept of distinguishing "legitimate" from "illegitimate" children. The new legislation no longer distinguishes between separation and divorce in respect of the consequences of marriage breakdown on the exercise of parental authority. A common law of separation is thus introduced.
- *Making the joint exercise of parental authority widespread,* so that the principle of joint parenthood becomes the norm. The new legislation quite clearly seeks to promote the active participation of fathers in the work of educating their children, even (and perhaps especially) where couples break up.

One remarkable fact is that the new law maintains the concept of *parental authority*, thus refusing to follow the direction of the European rules that nevertheless advocate the disappearance of the terms "power" and "authority" in favour of the phrase *parental responsibility*. The Théry and Dekeuwer-Défossez reports justify maintaining the term *authority*, emphasizing that it more accurately reflects the inseparable nature of the rights and duties that belong to parents: "Parents have more than just responsibilities; they also have a 'duty of requirement' in regard to their children, to enable the children to become socialized. Devaluing this duty would be to weaken the meaning of the parental relationship."<sup>152</sup> Moreover, "To empower the father and mother, it is not enough to emphasize their responsibility; it is also appropriate to insist on the powers they have to carry out their mission successfully. There is responsibility because there is authority. It has been said how important it seemed today to reaffirm that authority, less perhaps in regard to the children or to third parties, than in regard to the parents themselves."<sup>153</sup>

Another innovation is that for the first time, the French Civil Code gives a definition of the concept of parental authority, while up to this point it had merely enumerated the main

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<sup>151</sup> The commission chaired by Ms. Théry (I. Théry, *Couple, filiation et parenté aujourd'hui : le droit face aux mutations de la famille et de la vie privée* [The couple, parentage and parenthood today: the law in the face of changes in the family and in private life], Éditions Odile Jacob and La Documentation française, 1998), and the commission chaired by Ms. Dekeuwer-Défossez (F. Dekeuwer-Défossez, *Rénover le droit de la famille : propositions pour un droit adapté aux réalités et aux aspirations de notre temps* [Renewing family law: propositions for law adapted to the realities and aspirations of our time], La Documentation française, 1999).

<sup>152</sup> Report of the Théry Commission, p. 190.

<sup>153</sup> Report of the Dekeuwer-Défossez Commission, p. 74.



components of that authority (as the *Civil Code of Quebec* does). This definition is based on the ultimate purpose of the authority. The new article 371-1 of the Code states the following rule:

Parental authority is a set of rights and duties whose aim is the interests of the child.

Until the child reaches the age of majority or becomes independent, it is up to the father and mother to protect the child's safety, health and morality, to ensure the child's education and to allow his or her development, with the respect due to the person of the child.

In sum, we may say that French law confirms that parents, whatever their marital status, jointly exercise the parental authority that is an effect of parentage. There is only one exception to this principle. Article 372 of the Civil Code provides that where parentage is established in respect of one of the parents more than one year after the birth or where parentage is judicially declared in respect of the second parent, only the parent whose parentage was already established (usually the mother) shall exercise the authority. Nevertheless, the parents might agree to joint exercise of the authority, and the court might also impose such a solution in the best interests of the child.

The principle of the joint exercise of parental authority also applies in case of separation or divorce. Article 373-2 of the French Civil Code provides:

The separation of the parents has no impact on the rules for conferring the exercise of parental authority.

It is only in cases where the interests of the child require it that a judge may order the exclusive exercise of the authority by one parent only (article 373-2-1 C.C.). The Code then employs the phrase "unilateral exercise of parental authority" (art. 389-2, 2<sup>o</sup>). In such cases, the other parent may exercise a "right of visit and accommodation", and this right cannot be refused except for serious reasons. In other words, French law presumes that it is in the interests of the child that both the child's parents exercise parental authority, whether they are separated or not.

It is interesting to note that the phrase "right of custody" has been removed from the French legislative vocabulary. It has been replaced with the phrase "exercise of parental authority", rounded out by reference to organization of the "child's mode of residence" (article 373-2-9 C.C.).

### **Determination of the Child's Mode of Residence (Physical Custody)**

Regarding the attribution of what we in Canada call the "right of physical custody" and what French law, as we have seen, describes as the "child's mode of residence", the Civil Code expressly provides (and this is a novelty) for the possibility that the parents may agree on an "alternating residence" solution and on the power for the court to impose such a solution.

Combined with the principle of the joint exercise of parental authority, the mode of alternating residence, where the residence time at the home of each parent is more or less the same, is equivalent to joint custody in Canada. Regarding the organization of the child's mode of residence (and hence of the custody right in the conventional sense), French law does not contain any legal presumption. Nonetheless, the new law formally recognizes the possibility of

alternating residence for the child in the case of separation or divorce. By insisting on the importance of parental agreements<sup>154</sup> and mentioning alternating residence in the first place, the new law now seems to favour this mode of post-separation family organization.

However, even if the alternating residence solution is in fact the first that the law cites among the various possibilities of which the judge disposes (art. 373-2-9 C.C.), we cannot conclude from this that any kind of *presumption* exists. When the court is called upon to make a decision concerning either the physical presence of the child or the organization of other aspects of the exercise of parental authority, it must take into account a certain number of criteria that allow it to identify more clearly the interests of the child (art. 373-2-11 C.C.). In this regard, we should point out that the first criterion stated by the Code is “the practice that the parents previously followed.” The other criteria are agreements, the feelings expressed by the child, parental aptitude (including the aptitude for recognizing the rights of the other parent), and the findings of any expert assessments or social inquiries. The new enactment, which is in tune with the *International Convention on the Rights of the Child* of 1989, insists on the importance of the child’s place in any discussions concerning him or her. For example, the new article 371-1, paragraph 3 expressly provides: “Parents shall involve the child in any decisions concerning the child, in accordance with his or her age and degree of maturity.”

### **The Place of the Non-Custodial-Parent**

We use the term *non-custodial* because it refers to a situation that is well-known in Canadian law. Let us recall, however, that the concept of *custody* (and hence of *custodial parent* or *non-custodial*) has been eliminated from the French Civil Code.

We have seen that in the case of separation or divorce, the general rule is that parental authority is exercised jointly, and that the child may reside with both parents, on an alternating basis. This scenario covers not only what we in Canada describe as *shared custody* but also other cases, namely situations where the child resides primarily with one parent but goes from time to time (but on a regular basis) to the home of the other parent. In other words, the conventional situation of sole custody, with access rights, is settled in French law by the joint exercise of parental authority and determination of the child’s residence, without reference to the concepts of custody or access.

On the other hand, as we have seen above, a court may decide, in the best interests of the child, to award *unilateral* exercise of parental authority to one parent (art. 373-2-1 C.C.). The other parent then obtains a “right of visit and accommodation,” and this right may only be refused for serious reasons. This “right” is also described as a veritable duty for the parent. The new article 373-2, para. 2 in fact provides: “Both the father and the mother *must* maintain personal relations with the child (...). According to the report of the Dekeuwer-Défossez Commission, this affirmation reflects the idea that the parental function is a set of indissolubly linked duties, and

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<sup>154</sup> In this regard, we note that the new provisions very clearly favour the family mediation route. For example, article 373-2-10, para. 2 introduces an incentive measure by providing that, “In order to facilitate the parents’ search for an exercise of parental authority based on consensus, the judge may propose mediation measure, and after obtaining their consent, may appoint a family mediator to proceed with the measure.” Moreover, article 373-2-10, para. 3 provides that the judge may “order” the parents to “meet a family mediator who will give them information about the purpose and process of this measure.”

that the visitation and accommodation rights granted to parents also reflect the desire of the child to preserve relations with both parents.”<sup>155</sup>.

Along the same lines, the supervisory right of the parent who, in exceptional cases, does not exercise parental authority is also considered a *duty*, as article 373-2-1, para. 3 C.C. stipulates. This provision also states that this parent must be informed of any important choices concerning the life of the child. The right to information appears as the guarantee of the effective performance of the duty of supervision.

A judge who rules on the terms and conditions for exercising parental authority in the event of separation of the parents must take into consideration “the aptitude of each of the parents to assume their duties and *to respect the rights of the other*” (article 373-2-11 C.C.).<sup>156</sup> Furthermore, article 373-2-6, para. 2 provides that “the judge may take any measures to guarantee the continuity and effectiveness of the child’s ties with each of the child’s parents.”<sup>157</sup>

We can therefore say that the concept of joint parenthood is the principle underlying the reorganization of parental roles, even in cases where parental authority is exercised unilaterally. This emerges clearly from the report of the Dekeuwer-Défossez Commission, which states that the new legislation thus tends to avoid having the rights of one parent be opposed to those of the other: “Taking the child rather than the parents as the starting point, the text establishes the child’s right to be raised by both parents and to preserve personal relations with each of them.”<sup>157</sup>

The new law contains a remarkable application of this principle of joint parenthood in regard to the child’s moving. For example, paragraph 3 of the new article 373-2 stipulates:

Any change of residence by one of the parents, when it changes the terms and conditions for exercising parental authority, must first be indicated to the other parent in a timely manner. In the event of any disagreement, the more diligent parent shall bring the matter before the family affairs judge, who shall make a ruling based on what the best interests of the child require. The judge shall allocate travel costs and adjust accordingly the amount of the contribution to the maintenance and education of the child.

Out of a concern to prevent international abduction, the new article 373-2-6 of the Civil Code now confers upon judges the power to order that a prohibition against taking a child out of French territory without the authorization of both parents be entered in the parents’ passport. Out of the same concern to combat non-compliance with orders pertaining to parental authority and the child’s mode of residence, criminal sanctions have been strengthened in regard to non-representation<sup>158</sup> and removal of a child.<sup>159</sup>

Finally, we should mention that the new provisions aim to foster contacts between the child and third parties. In the old legislation, a third party had to invoke “exceptional circumstance” to

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<sup>155</sup> Report of the Dekeuwer-Défossez Commission, p. 85.

<sup>156</sup> This rule conforms with the principle of the “friendly parent,” well-known to Canadian law and established by the *Divorce Act* (s. 16(10)).

<sup>157</sup> Report of the Dekeuwer-Défossez Commission, p. 85.

<sup>158</sup> Article 227-5 of the French Criminal Code.

<sup>159</sup> Article 227-7 of the French Criminal Code.

obtain the right to maintain personal relations with a child (for example, visitation rights). Henceforth, all a third party needs to do is prove that these contacts are in the interests of the child. The burden of third parties is thus lightened. In cases of separation, this innovation should be particularly helpful to spouses who have acted *in loco parentis* in a blended family (article 371-4, paragraph 2 C.C.).

## APPENDIX C: CANADIAN CUSTODY AND ACCESS LEGISLATION

### CANADA

#### Governing Legislation

##### *Divorce Act*

#### Statutory Terminology

The *Divorce Act* uses the terms *custody* and *access* in reference to parental rights and responsibilities. *Custody* includes “care, upbringing and any other incident of custody.”<sup>160</sup> *Access* is not specifically defined. Section 16(5) of the *Divorce Act* provides that “unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.” No other terms are used in the Act in reference to parental rights and responsibilities.

#### Applications for Custody and Access Orders

Either or both spouses, or any other person, may apply for custody of, or access to, a child under the *Divorce Act*. Section 16(1) of the Act provides that, “(a) court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.” Third parties must obtain the leave of the court to pursue an application for custody or access.<sup>161</sup>

#### Court Orders

The *Divorce Act* permits the court to make interim and final (sole or joint) custody and access orders and enables it to impose terms, conditions and restrictions in connection with those orders.<sup>162</sup>

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<sup>160</sup> *Divorce Act*, s. 2(1).

<sup>161</sup> *Divorce Act*, s. 16(3).

<sup>162</sup> *Divorce Act*, s. 16(1), (3), (4) and (6). Section 16(1) provides that a court of competent jurisdiction may make an order respecting the custody of and/or access to any or all children of the marriage. Section 16(3) provides that where an application is made under subsection (1), the court may make an interim order regarding the matters listed in subsection (1). Pursuant to section 16(4), a court may make an order granting custody of, or access to, any or all children of the marriage to any one or more persons. Section 16(6) enables the court to make an order for a definite or indefinite period or until the “happening” of a specified event and may impose such terms, conditions or restrictions in connection therewith, as it thinks fit and just.

## ALBERTA

### Governing Legislation

*Domestic Relations Act, Provincial Court Act*

### Statutory Terminology

Alberta legislation does not define custody or access. The terms are used in the *Domestic Relations Act* and the *Provincial Court Act*.

The primary term used to define parental rights and responsibilities in Alberta law is guardianship. The *Domestic Relations Act* is the main family law statute in Alberta. It deals with custody and access in Part 7. Part 3 of the *Provincial Court Act* allows the Provincial Court to make custody and access orders.

Guardianship is dealt with in Part 7 of the *Domestic Relations Act*, and in part 5 of the *Child Welfare Act*. Part 5 of the *Child Welfare Act* gives the Provincial Court a jurisdiction over guardianship that is not restricted to child protection proceedings.

Section 49 of the *Domestic Relations Act* provides that, unless guardianship is limited by court order, each guardian

- (a) may act for and on behalf of a minor;
- (b) may appear in court and prosecute or defend an action or proceedings in the name of the minor;
- (c) has the care and management of the estate of the minor, whether real or personal...;
- (d) has the custody of the person of the minor and the care of the minor's education.

Guardianship has been interpreted as including all parental obligations related to the raising of children, and all of the powers required to meet those obligations.

The Alberta Court of Appeal has recently clarified the relationship between guardianship under the *Domestic Relations Act* and custody under the *Divorce Act*.<sup>163</sup> Unless a court expressly removes powers of guardianship, the non-custodial parent, whether or not that parent is an access parent, retains all of the powers of guardianship, except those that are required by the custodial parent for purposes of day-to-day living.

### Statutory Custody and Access Arrangements After Birth of a Child

Section 50 of the *Domestic Relations Act* provides that the mother is always a guardian of a child. Guardianship of the father is not necessarily based upon cohabitation with the mother after the birth of the child, but on the nature and extent of the father's relationship with the mother. If the father is a guardian, the mother and father are joint guardians, each able to exercise full powers of guardians, unless their authority is limited by court order.

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<sup>163</sup> *V.L. v. D. L.* (2001), 206 D.L.R. (4<sup>th</sup>) 325.

A father is presumed to be a guardian of a child if:

- (i) the father was married to the mother at the time of the birth of the child;
- (ii) the father was married to the mother of the child and the marriage was terminated by ... a decree of nullity...or...a judgment of divorce granted not more than 300 days before the birth of the child; or
- (iii) the father cohabited with the mother of the child for at least one year immediately before the birth of the child;
- (iv) the father married the mother of the child after the birth of the child and has acknowledged that he is the father of the child.

If a father is not a guardian by virtue of meeting the criteria set out in the presumptions, he may apply to the Court to be appointed a guardian. Unless the court qualifies the guardianship, the father will enjoy all of the rights of guardianship.

The Court of Queen's Bench may also make orders for custody and access pursuant to sections 58 and 59 of the *Domestic Relations Act*. The Provincial Court may make custody and access orders pursuant to section 18 of the *Provincial Court Act*.

### **Applications for Custody and Access Orders**

Applications for custody and access can be made by parents and children<sup>164</sup> and by grandparents or grandchildren.<sup>165</sup>

### **Court Orders**

The legislation does not specify the particulars of orders. It simply states that the court can make orders of guardianship, custody orders and access orders. The content of orders can vary from the general to the very specific. In divorce cases, orders for corollary relief are generally made under the *Divorce Act* rather than under provincial legislation.

## **BRITISH COLUMBIA**

### **Governing Legislation**

The *Family Relations Act*

### **Statutory Terminology**

The *Family Relations Act* uses the terms *custody* and *access*. Neither is defined. The FRA also refers to *guardianship*, which is defined by referring to old English statutes. Guardianship refers to all the rights, duties and powers a person may have over a child. Custody is a more limited concept and generally refers to the day-to-day care of a child.

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<sup>164</sup> *Domestic Relations Act*, s. 59 and *Provincial Court Act*, s. 18.

<sup>165</sup> *Provincial Court Act*, s. 19.

## **Statutory Custody and Access Arrangements After Birth of a Child**

Generally, a child's guardian will be one or both of his or her parents. Section 27 of the Act deals with parental guardianship rights. It provides that where a mother and father are living together, whether married or not, they are joint guardians of the child unless a court orders otherwise. Where the mother and father separate following a common-law relationship or marriage, section 27(2) provides that they are joint guardians of the estate of the child and the parent who usually has care and control of the child is the sole guardian of the person of the child. Where the parents have never lived together or shared joint guardianship, the mother is the sole guardian of the child. The same statutory regime also applies to custody.

Section 34 provides that while living together (whether married or not) the parents are joint custodians. However, upon separation, or if the parties have never lived together, the person who has care and control of the child is the sole custodian until a court orders otherwise. Third parties may also be appointed as a child's guardian either by the parents (e.g. appointment under a will) or by the court. If a child has no guardian, the Director under the *Child, Family and Community Service Act* is guardian of the person of the child and the Public Trustee is guardian of the estate of the child.

## **Applications for Custody and Access Orders**

Section 35 provides that any person, including grandparents, may apply for a custody or access order.

## **Court Orders**

It is common for courts to award sole custody to one parent and joint guardianship, where the guardianship rights are defined. Courts also have the ability to award joint custody and joint guardianship. Parents may also reach their own agreements about custody and guardianship. These agreements may be registered with the court and enforced as if they were a court order. In *Divorce Act* proceedings, courts make custody orders under that Act. Under the *Family Relations Act*, a custody order made under the *Divorce Act* gives the custodial parent guardianship of the child as well, unless the court orders otherwise. However, frequently a *Family Relations Act* claim for guardianship is joined with the *Divorce Act* proceeding so that the court can make a guardianship order at the same time as it makes a custody order.

## **MANITOBA**

### **Governing Legislation**

*The Family Maintenance Act*

### **Statutory Terminology**

*The Family Maintenance Act* uses the terms *custody* and *access* with reference to parents' legal rights and responsibilities for their children vis-à-vis each other.



*Custody* is defined in the act as “the care and control of a child by a parent of that child.”<sup>166</sup> *Access* is not specifically defined. The act states that the court can make an access order, “for the purpose of visiting the child and fostering a healthy relationship between parent and child.” The act provides that unless a court orders otherwise, the non-custodial parent “retains the same right as the parent granted custody to receive school, medical, psychological, dental and other reports affecting the child.”<sup>167</sup> It further clarifies that this is “a right to be provided with information only and is not, unless a court orders otherwise, a right to be consulted about or to participate in the making of decisions by the parent granted custody.”<sup>168</sup>

*The Child and Family Services Act* uses the terms *guardianship* and *access* in relation to third parties. *Guardianship* is not defined *per se*, but *guardian* is defined as a “person other than a parent of a child who has been appointed guardian of the person of the child by a court of competent jurisdiction or to whom guardianship has been surrendered...”<sup>169</sup>

Guardianship of the estate of the child is governed by *The Infants’ Estate Act*. Section 9 of that act sets out the authority of a guardian, which includes control of real property, management of personal property, representing the child in any litigation affecting the child’s estate and expending money for the child’s benefit.

### **Statutory Custody and Access Arrangement after Birth of a Child**

Where the parents cohabit after the birth of their child, the act provides that the “rights of parents in the custody and control of their children are joint,” i.e. they have joint custody, until a court orders otherwise.<sup>170</sup>

Where the parents do not cohabit after the birth of their child, the act provides that “the parent with whom the child resides has sole custody and control of the child”. The other parent does not have any right to access, until a court orders otherwise.<sup>171</sup>

### **Applications for Custody and Access Orders**

Either parent may apply for custody of, or access to, a child.

Third parties, including grandparents and step-parents, cannot apply for custody or access under *The Family Maintenance Act*. If a third party wants to assume responsibility for the upbringing of a child, the party would either apply for an order of guardianship (which would leave the parent-child relationship intact) or apply to adopt the child (which would sever the former parent-child relationship and make the party the new parent of the child.) Guardianship applications are made under *The Child and Family Services Act*.

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<sup>166</sup> *The Family Maintenance Act*, s. 1.

<sup>167</sup> *The Family Maintenance Act*, s. 39(4).

<sup>168</sup> *The Family Maintenance Act*, s. 39(5).

<sup>169</sup> *The Child and Family Services Act*, s. 1.

<sup>170</sup> *The Family Maintenance Act*, s. 39(1).

<sup>171</sup> *The Family Maintenance Act*, s. 39(1).

A third party who is a member of the child’s family (including grandparents) may apply for access under *The Child and Family Services Act*. That statute also allows a non-family third party to apply for access “in exceptional circumstances.”<sup>172</sup>

## **NEW BRUNSWICK**

### **Governing Legislation**

The *Family Services Act*

### **Statutory Terminology**

The *Family Services Act* (FSA) uses the terms *custody* and *access*, but neither term is defined.

### **Statutory Custody and Access Arrangements After Birth of a Child**

Section 129(1) of FSA provides that unless otherwise agreed in writing or ordered by the court, where the child has more than one parent, both parents jointly have custody of their child.

*Parent* is defined to mean a mother or father and includes a guardian and a person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his or her family. However, it does not include a foster parent, a natural or adopting parent whose rights with respect to the child have been terminated, or a natural father who is not married to the mother, unless:

- he has signed the birth registration form (s. 9 *Vital Statistics Act*), or
- he has filed with the Registrar General of Vital Statistics a statutory declaration along with the mother (s. 105 FSA), or
- he has been named the father in a declaratory order (Part VI FSA), or
- he is person with whom the child ordinarily resides who has demonstrated a settled intention to treat the child as a child of his family.

### **Applications for Custody and Access Orders**

Section 129(2) provides that on application the court may order that either or both parents, or any person, either alone or jointly with another, shall have custody of a child, on the basis of the best interests of the child. In addition, s. 129(3) provides that on application the court may order that either parent or any person shall have access to a child, whether or not an order of custody has been made.

### **Court Orders**

In the FSA, *custody order* is defined to mean any order of any court with respect to the custody, care or control of a child. The orders may be subject to such terms and conditions as the court determines, such order to be made on the basis of the best interests of the child. The end result is

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<sup>172</sup> *The Child and Family Services Act*, s. 78(2).

a broad discretion for the judge to define custody as the judge sees fit. It can include residence, day-to-day decision making, and decision making regarding health, education and religion and cultural heritage. In *Divorce Act* proceedings, the courts will also make custody orders.

## **NEWFOUNDLAND AND LABRADOR**

### **Governing Legislation**

*Children's Law Act*

### **Statutory Terminology**

The *Children's Law Act* (CLA) uses the terms custody and access. Neither term is defined.

Subsection 26(1) states that the father and the mother are equally entitled to custody of the child. Subsection 26(2) states that a person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child and shall exercise those rights and responsibilities in the best interests of the child.

Subsection 26(6) states that the entitlement to access to a child includes the right to visit and be visited by the child and the same right as a parent to make inquiries and be given information as to the health, education and welfare of the child.

Part IV of the CLA uses guardianship to describe the person who is a guardian of the property of a child. Subsection 57(1) states that the parents of a child are equally entitled to be appointed as guardians of the child's property.

### **Statutory Custody and Access Arrangements After Birth of a Child**

The CLA draws no distinction between parents who cohabit after the birth of their child, and those who do not. Subsection 3(1) states that a person is the child of his or her natural parents, and his or her status as their child is independent of whether he or she is born inside or outside marriage.

Subsection 26(4) states that where the parents of a child live separate and apart, and the child lives with one of them with the express or implied consent of the other, the right of the other to exercise the entitlement of custody and the incidents of custody, but not the entitlement to access is suspended, until a separation agreement or order otherwise provides. Therefore, by default the parent with *de facto* custody of the child has custody, and the other parent has access, unless there is no consent or acquiescence.

### **Applications for Custody and Access Orders**

Section 27 of the CLA states that a parent of a child or other party, as specified in paragraphs 69(4)(b) to (d), may apply to a court for an order respecting custody of or access to the child or determining an aspect of the incidents of custody of the child.

Subsection 69(4) refers to a grandparent of the child, a person who has demonstrated a settled intention to treat the child as a child of his or her family, a person who had the actual care and

upbringing of the child immediately before the application and another person whose presence as a party is necessary to determine the application.

The merits of any application for custody or access are to be determined on the basis of the best interests of the child.

### **Court Orders**

Section 33 of the CLA states that the court to which an application is made under s. 27

- (1) by order may grant the custody of or access to the child to one or more persons,
- (2) by order may determine any aspect of the incidents of the right of custody or access, and
- (3) may make an additional order that the court considers necessary and proper in the circumstances.

Section 40 allows a court to give directions for the supervision of custody or access.

Section 42 permits a court to make an order restraining harassment.

The courts usually grant custody to one parent and access to the other. In some instances, the parents are granted joint custody with the principal residence of the child being with a designated parent. The parent who is granted custody has the right to make the day-to-day decisions including those dealing with health, education and religion.

In *Divorce Act* proceedings, the courts will make custody orders under that legislation.

## **NORTHWEST TERRITORIES**

### **Governing Legislation**

*Children's Law Act*

### **Statutory Terminology**

Neither custody nor access is specifically defined in the *Children's Law Act* but they are described. Section 18(2) provides that a person entitled to custody has "the rights and responsibilities of a parent in respect of the person of the child." Section 18(6) provides that the entitlement to access to a child "includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child."

The term "guardian of a child" is also used in this legislation and is defined to mean "a guardian of the estate of a child."

### **Statutory Custody and Access Arrangements**

The act provides that a father and mother of a child are equally entitled to custody. However it further provides that the right of a parent to exercise the entitlement and incidents of custody are suspended until an agreement or order provides otherwise when the parents are living separate and apart and the child lives with the other parent or the parent has consented (expressly or by

implication) or acquiesced in the other parent having sole custody of the child. This would apply whether or not the parents lived together after the child's birth. The entitlement to access is not suspended in these circumstances.

### **Applications for Custody and Access Orders**

A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspects of the incidents of custody of the child. The Act does not specify who the "other person" might be which appears to leave it open to grandparents or any other person to bring an application.

### **Court Orders**

The court can grant custody or access to one or more persons, can determine any of the aspects of the incidents of custody or the rights to access and make additional orders it considers necessary and proper in the circumstances. There are provisions for specifying dates and times of access if necessary.

In practice the courts make orders that use the language *sole custody* or *joint custody*. In the latter case the court usually specifies that primary care and control be assigned to one parent unless there is a case of shared parenting.

## **NOVA SCOTIA**

### **Governing Legislation**

*Maintenance and Custody Act* (formerly called the *Family Maintenance Act*)

### **Statutory Terminology**

The *Maintenance and Custody Act* (MCA) uses the terms *custody* and *access*. Neither term is defined. Subsection 18(4) of the act states that the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise provided by the *Guardianship Act* or ordered by a court of competent jurisdiction.

Subsection 18(5) of the act provides that in any proceeding concerning care and custody or access and visiting privileges in relation to a child, the court has to apply the principle that the welfare of the child is the paramount consideration.

Section 2 of the MCA defines *guardian* as a head of a family and any other person who has in law or in fact the custody or care of a child and *parent*, in the case of a child of unmarried parents, as a person who has been ordered by a court of any law district to pay maintenance for the child.

### **Statutory Custody and Access Arrangements After Birth of a Child**

The MCA draws no distinction between parents who cohabit after the birth of their child as opposed to those who do not. As stated previously, both parents are equally entitled to care and custody of the child. However, practically speaking, where there is no court order, the parent

with whom the child resides has *de facto* custody of the child and has the right to make all day-to-day decisions with respect to the child.

### **Applications for Custody and Access Orders**

Subsection 18(2) of the MCA states that a parent or guardian or other person with leave of the court may make an application for custody of, or access to, a child. This means that third parties, including grandparents and step-parents, can apply for custody or access provided they obtain leave of the court first.

### **Court Orders**

Subsection 18(2) of the MCA provides that the court may make an order that a child be placed in the care and custody of a parent or guardian or authorized person or respecting access and visiting privileges of a parent or guardian or authorized person. The Act does not use terms such as *joint custody* or *sole custody*. The court is free to fashion an order in any form provided that it applies the principle that the welfare of the child is the paramount consideration.

Nova Scotia courts usually grant sole custody to one parent and access to the other. In some instances, the parents are granted joint custody (which means joint decision making and the right of the access parent to obtain information relating to the child) with the principle residence of the child being with one parent or the other. The parent who is granted sole custody has the right to make the day-to-day decisions relating to the child.

In *Divorce Act* proceedings, the court will make custody and access orders under the federal legislation. However, typically, parents will initially obtain custody and access orders under provincial legislation prior to commencing divorce proceedings.

Under the MCA parties have the ability to enter into an agreement with respect to custody and access arrangements relating to their child. That agreement, when registered with the court, has the effect of a court order. This is provided for in s. 52 of the act.

## **NUNAVUT**

### **Governing Legislation**

The *Children's Law Act (Nunavut)*

### **Statutory Terminology**

The *Children's Law Act* uses the terms *custody* and *access*, neither of which are defined. A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child. Entitlement to access includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child. The term "guardian for a child" is defined as "a guardian of the estate of a child."

## **Statutory Custody and Access Arrangements After Birth of a Child**

The father and the mother of a child are equally entitled to custody. The right of a parent to exercise the entitlement to custody of a child and the incidents of custody, but not the entitlement to access to the child, is suspended until a parental or separation agreement or a court order otherwise provides where: (a) the parents of the child live separate and apart and the child lives with the other parent; and (b) the parent has consented, either expressly or by implication, or acquiesced to the other parent having sole custody of the child.

### **Applications for Custody and Access Orders**

Pursuant to s. 20, a parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or for determining any aspect of the incidents of custody of the child. An application, if made by a person other than a parent, may not be made without leave of the court.

The act specifically states that applications will be determined in accordance with the best interests of the children, with a recognition that differing cultural values and practices must be respected in that determination.

Any person, including a child, may apply to the court for an order respecting guardianship for the child. A guardian has charge of and is responsible for the care and management of the child's estate and, as guardian, shall act in the best interests of the child.

### **Court Orders**

The court, on application pursuant to s. 20, may grant custody of or access to the child to one or more persons, and may determine any aspect of the incidents of custody or the right to access and may make such order in respect of the determination as the court considers appropriate.

## **ONTARIO**

### **Governing Legislation**

*Children's Law Reform Act (CLRA).*

### **Statutory Terminology**

The CLRA does not contain an explicit definition of custody, but it does state that a father and mother are equally entitled to custody<sup>173</sup> and that "a person entitled to custody has all the rights and responsibilities of a parent in respect of the person of the child and must exercise those rights and responsibilities in the best interests of the child."<sup>174</sup>

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<sup>173</sup> *Children's Law Reform Act*, s. 20(1).

<sup>174</sup> *Children's Law Reform Act*, s. 20(2).

The CLRA does not explicitly define access but does state “the entitlement to access to a child includes the right to visit and be visited by the child and the same right as a parent to make inquiries and be given information about the health, education and welfare of the child”<sup>175</sup>

The CLRA uses guardianship to describe the person who is a guardian of the property of a child.<sup>176</sup> Parents are equally entitled to be appointed guardian of the child’s property.

### **Statutory Custody and Access Arrangements After Birth of a Child**

The CLRA draws no distinction between parents who cohabit after the birth of their child, and those who do not. However, s. 20 (4) says “where the parents of a child live separate and apart, and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or order otherwise provides.” Therefore, by default the parent with *de facto* custody of the child has custody, and the other parent has access, unless there is no consent or acquiescence.

### **Applications for Custody and Access Orders**

Under s. 21 of the CLRA, “a parent or any other person may apply to a court for an order respecting the custody of or access to the child or determining any aspect of the incidents of custody of the child.” There is no limitation on who can apply, except the best interests of the child.

### **Court Orders**

The court orders that are available are defined under s. 28. It provides:

- The court to which an application is made under s. 21,
- (a) by order may grant custody of or access to the child to one or more persons,
  - (b) by order may determine any aspect of the incidents of the right of custody or access, and
  - (c) may make such additional order as the court considers necessary and proper in the circumstances.

In addition, there are specific provisions for the supervision of access (s. 34), and restraining harassment (s. 35).

In practice, the courts make many kinds of orders, including orders that do not use the terms custody and access. Lawyers working for non-custodial parents prefer the use of joint custody terminology, because the default position in the legislation is one custodial, one access parent. There is no standardization of the terms used by the courts. Most commonly the order is expressed as custody and access or joint custody with defined periods of *residence* or *care and control*. In divorce proceedings it is not readily apparent from many orders which legislation forms the basis of the order, since the terms custody and access are used in both the *Divorce Act*

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<sup>175</sup> *Children’s Law Reform Act*, s. 20(5).

<sup>176</sup> *Children’s Law Reform Act*, s. 47.



and the CLRA. If a *Divorce Act* matter proceeded to trial, the court would likely apply the *Divorce Act* tests and terminology.

## **PRINCE EDWARD ISLAND**

### **Governing Legislation**

*Custody Jurisdiction and Enforcement Act*

### **Statutory Terminology**

The act defines *custody* to mean:

- ...the rights and responsibilities of a parent in respect of the person of the child, including
- (a) the right to care and control of the child;
  - (b) the right to direct the education and moral and religious training of the child, in the best interests of the child.

The act does not specifically define *access* but provides that “(t)he entitlement to access to a child includes the right to make reasonable inquiries and to be given information as to the health, education and welfare of the child.”<sup>177</sup>

### **Statutory Custody and Access Arrangement after Birth of a Child**

The act provides that except “as otherwise ordered by a court, the father and the mother of a child are joint guardians of a child and are equally entitled to custody of the child.”<sup>178</sup> The act does not specifically set out the custodial arrangement where the parents do not cohabit after the birth of the child, but it appears that the custodial rights of the parent with whom the child does not reside are suspended until an agreement or court order provides otherwise. Section 3(4) provides that:

Where the parents of a child live separate and apart and the child lives with one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is suspended until a separation agreement or court order otherwise provides.

### **Applications for Custody and Access Orders**

A parent of a child or any other person may apply to a court for an order respecting custody of, or access to, the child or determining any aspect of the incidents of custody of the child.

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<sup>177</sup> *Custody Jurisdiction and Enforcement Act*, s. 3(5).

<sup>178</sup> *Custody Jurisdiction and Enforcement Act*, s. 3(1).

## **Court Orders**

The court may grant custody or access to one or more persons and may by order “determine any aspect of the incidents of the right to custody or access...”<sup>179</sup>

## **QUEBEC**

### **Governing Legislation**

*Civil Code of Québec*

### **Statutory Terminology**

The *Civil Code* uses the terms *parental authority* and *custody*. Neither is specifically defined. *Parental authority* is a broader concept than *custody*. It includes the rights and duties set out in Article 599 of the *Civil Code*, “the rights and duties of custody, supervision and education” and the duty to “maintain” the children, and other responsibilities pursuant to other articles of the *Civil Code* and other Quebec legislation. Article 600 provides that “The father and the mother exercise parental authority together.”

*Custody* is a physical concept and relates to residence and day-to-day decision making. The custodial parent has the right to determine the residence of the child and make the day-to-day decisions, but the non-custodial parent “retains the right to participate in major decisions about the child’s upbringing as a consequence of the exercise of parental authority.”<sup>180</sup> Article 605 provides that “Whether custody is entrusted to one of the parents or to a third person, and whatever the reasons may be, the father and the mother retain the right to supervise the maintenance and education of the children, and are bound to contribute thereto in proportion to their means.” As Goubau comments, “the distinction between ‘custody’ and ‘authority’ is not completely foreign to the law of some Canadian provinces in which some legislation (in Ontario, for example) already makes a distinction between ‘custody’ and ‘guardianship’. The latter in some ways is more akin to the civil law notion of parental authority.”<sup>181</sup> The *Civil Code* does not use the term *access*.

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<sup>179</sup> *Custody Jurisdiction and Enforcement Act*, s. 4(1).

<sup>180</sup> Goubau (2000: vi).

<sup>181</sup> Goubau (2000: 20).

## **Statutory Custody and Access Arrangement after Birth of a Child**

The *Civil Code* provides that parents jointly exercise parental authority. The *Civil Code* makes no distinction between situations where the parents cohabit after the birth of the child and where they do not.

### **Applications for Custody and Access Orders**

Custody may be awarded to either parent or to a third party.<sup>182</sup>

With respect to grandparents, Article 611 states:

In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court.

### **Court Orders**

The *Civil Code* provides that when the court makes a decision relating to separation, it disposes namely of the custody arrangements in the children's "interest and in respect of their rights, taking into account the agreement made between the spouses, where such is the case."<sup>183</sup> Every decision concerning children shall be taken in their interest and in respect of their rights. The *Civil Code* provides the criteria to be considered when making these decisions: the moral, intellectual, emotional and physical needs of the child, as well as the child's age, health, personality and family environment, and the other circumstances (Article 33). Article 521 provides that divorce has the same effects in respect of children as separation from bed and board. When awarding custody to one parent, the court generally awards access rights to the other. The court may also award parents shared custody, in which children alternate between both parents' households. The most common solution is to award custody to one parent and access to the other according to terms set out by the court regarding frequency and length of visits.<sup>184</sup>

## **SASKATCHEWAN**

### **Governing Legislation**

*The Children's Law Act, 1997*

### **Statutory Terminology**

*The Children's Law Act, 1997* uses the terms *custody* and *access* for determination of parental rights and responsibilities. Section 2(1) of the act defines *custody* to mean personal guardianship of a child and includes care, upbringing and any other incident of custody having regard to the child's age and maturity.

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<sup>182</sup> *Quebec Civil Code*, Article 605.

<sup>183</sup> *Quebec Civil Code*, Article 514.

<sup>184</sup> Mireille D.-Castelli and Dominique Goubau, *Précis de droit de la famille*, Presses de l'Université Laval (2000), p. 225-226.

*Access* is not defined by the act. Section 9 of the act provides that, in making, varying or rescinding an order for access the court shall have regard only for the best interests of the child. Also, there is no consideration of past conduct of any person unless it is relevant to the ability of that person to care for the child.

The authority to make major decisions regarding health, education and religion rests with the custodial parent. Section 9(2) of the act provides that “unless otherwise ordered by the court, a parent who is granted access to a child has the same right as the custodial parent to make inquiries and be given information concerning the health, education and welfare of the child.” This right to information, unless the court orders otherwise, is not a decision-making power or a right to be consulted about or to participate in the making of decisions by the custodial parent.

In reference to parental responsibility the act also uses the term “guardian of the property of a child.” Section 30 of the act provides the parents of a child are joint guardians of the property of the child with equal rights, powers and duties, unless otherwise ordered.

### **Statutory Custody and Access Arrangements After Birth of a Child**

Section 3(1) of the act states that unless otherwise ordered by the court and subject to subsection (2) and an agreement pursuant to subsection (3), the parents of a child are joint legal custodians of the child with equal rights, powers and duties.

Section 3(2) states that where the parents of a child have never cohabited after the birth of the child, the parent with whom the child resides is sole legal custodian of the child.

Section 3(3) recognizes that parents may enter an agreement to vary their status as joint legal custodians of a child and specify each parent’s rights, powers and duties. Hence, the act creates a legal presumption that parents are joint legal custodians of a child unless one parent has never resided with the child and other parent. The presumptions of the act may be inapplicable if the court orders otherwise or if the parents reach a different agreement.

### **Applications for Custody and Access Orders**

Section 6(1) of the act provides that, notwithstanding subsections (3) to (5), a parent, or other person having in the opinion of the court, a sufficient interest, may apply for an order granting custody of, or access to, a child. Although they would be included, the act does not limit applications to grandparents but addresses applications from other third parties provided they can establish a sufficient interest in the child.

### **Court Orders**

The act provides that when making an order of custody or access, the court, in the manner and on the conditions that the court considers appropriate, may provide for the division and sharing of parental responsibilities. Sections 8 and 9 provide that when making, varying or rescinding an order for custody or access of a child the court shall have regard only for the best interests of the child. The sections include lists of considerations in determining the best interests.

In practice, court orders or agreements generally provide for custody, joint custody or joint custody with primary residency. The latter, “joint custody with primary residency” refers to joint

decision making on the major issues but not on the day-to-day decisions. It clarifies the child's primary residence. *Joint custody* refers to joint physical custody with the child having no one primary residence and provides for joint decision making. *Custody* refers to residence and all decision making including major decisions and day-to-day decisions.

## YUKON

### Governing Legislation

*Children's Act*

#### Statutory Terminology

Custody is defined in s. 28(1) of the *Children's Act* as including “the right to care and nurturance of the child, the right to consent to medical treatment for the child, the right to consent to the adoption or the marriage of the child, and the responsibilities concomitant with those rights, including the duty of supporting the child and of ensuring that the child is appropriately clothed, fed, educated and disciplined, and supplied with the other necessities of life and a good upbringing.” *Care* is defined to mean “the physical care and control of a child.”

Access is not defined, but described as including “The right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.” The act also specifies that “the parent not having care of a child shall have (a) the right to consent to the adoption or marriage of his minor child, and (b) the right to give consent to urgent medical treatment for his or her child where the consent of the parent entitled to the care and custody of the child cannot expeditiously be obtained.”<sup>185</sup>

Part 2—Division 4 of the *Children's Act* deals with guardianship. Section 60 sets out the rights and responsibilities of a *guardian*. A guardian “has charge of and is responsible for the care and management of the property of the child and shall act in the best interests of the child.”<sup>186</sup> If there is more than one guardian, the guardians are jointly responsible for the care and management of the property of the child.<sup>187</sup> (s. 60(2))

#### Statutory Custody and Access Arrangement after Birth of a Child

Section 31(1) provides that, except as otherwise provided in that part of the legislation, “the father and the mother of a child are equally entitled to custody of the child.” Section 30(4) states that “In any proceedings in respect of custody of a child between the mother and the father of that child, there shall be a rebuttable presumption that the court ought to award the care of the child to one parent or the other and that all other parental rights associated with custody of that child ought to be shared by the mother and the father jointly.”

Where the child's parents “live separate and apart and the child lives in the care of one of them with the consent, implied consent or acquiescence of the other of them, the right of the other to

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<sup>185</sup> *Children's Act*, s. 31(6).

<sup>186</sup> *Children's Act*, s. 60(1).

<sup>187</sup> *Children's Act*, s. 60(2).

exercise the entitlement to custody and the incidents of custody, but not the entitlement to access, is vested in the parent with care of the child until an agreement between the parents or an order otherwise provides.”<sup>188</sup>

Under s. 61(1), while cohabiting, the father and the mother of the child are equally entitled to guardianship and are the guardians of the child. Where the mother and father do not cohabit, the parent who has the lawful care and custody of the child is also the sole guardian of the child unless the parents agree otherwise, the guardian appoints someone else to exercise those rights, or the court appoints someone else.<sup>189</sup>

### **Applications for Custody and Access Orders**

Either parent or “any other person” may apply to the court for a custody or access order.<sup>190</sup>

### **Court Orders**

The court may grant custody or access to one or more persons. The courts generally make orders for joint custody in the sense of joint decision making unless there is good evidence that it is not in the best interests of the child to do so. There are increasing numbers of orders that provide for shared “care” of the child as well. If one parent is awarded sole custody there will often be an order for joint guardianship.

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<sup>188</sup> *Children’s Act*, s. 31(4).

<sup>189</sup> *Children’s Act*, s. 61(2).

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S.A.G.E. Research Group

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## **APPENDIX E: SUMMARY OF FAMILY LAW COMMITTEE RECOMMENDATIONS**

1. It is recommended that continued dialogue, research and development be undertaken to address diversity and Aboriginal issues with respect to family law.
2. It is recommended that the principles and objectives of family law reform be as follows:

### ***Principles***

Ensure that the needs and well-being of children come first.

Promote an approach that recognizes that no one way of parenting after separation and divorce will be ideal for all children, and that takes into account how children and youth face separation and divorce at different stages of development.

Support measures that protect children from violence, conflict, abuse and economic hardship.

Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so.

Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with their grandparents and other extended-family members, when it is safe and positive to do so.

Recognize the positive contributions of culture and religion in children's lives.

Promote non-adversarial dispute-resolution mechanisms and retain court hearings as mechanisms of last resort.

Provide legislative clarity to the legal responsibilities of caring for children.

Recognize the overlapping jurisdictions in custody and access matters in Canada, and make efforts to provide co-ordinated and complementary legislation and services.

### ***Objectives***

To focus parents, professionals and services to better serve children's needs and interests.

To reduce negative impact of conflict on children and to promote healthy models of dispute resolution.

To support positive parental, extended family, and cultural interactions with the child.

To provide clearer, more predictable and understood responses to family justice issues.

3. It is recommended that there be a continued national emphasis on research and evaluation to monitor trends and the impact of reforms in law and services.
4. It is recommended that custody legislation contain an explanatory non-exhaustive list of criteria for parents, judges and others involved in the decision-making process to consider when determining the custody arrangement that is in the best interests of the child or children. The factors to be listed include:
  - factors related to the children themselves, such as the children’s health and special needs;
  - the children’s relationships with others;
  - factors related to parenting of the children in the past; and
  - factors related to the future of the children, including the potential for conflict or violence affecting the children.
5. It is recommended that any list of best interests criteria be child-centred to ensure that the child’s best interests remain the foremost consideration in custody and access decision making.
6. It is recommended that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child.
7. It is recommended that, where jurisdictions determine that their legislative terminology should be changed or clarified, any amendments to legislation should be child-centred, focus on parents’ responsibilities to understand and meet their children’s needs, and promote the positive and safe involvement of both parents. It is agreed that Options 2, 3 and 4 could meet these criteria and that Option 5 does not.
8. It is recommended that, with a view to ensuring that no court orders are made which may result in prejudice to the safety of children and place them at risk,
  - (a) there be no legislative presumptions regarding the degree of contact a child has with his or her parents, and
  - (b) legislative criteria defining best interests include, as factors to be considered:
    - any history of family violence and the potential for family violence in the future, and
    - facilitating contact with both parents when it is safe and positive to do so.
9. It is recommended that governments work to strengthen supports to families exposed to family violence, including crisis counselling programs and counselling programs for children exposed to family violence.

10. It is recommended that high-conflict cases be addressed through a mixture of services and procedural supports to minimize the negative impact of conflict on children and families.
11. It is recommended that each jurisdiction review its legislation, procedures and services to ensure that:
  - the parents and the courts have access to information on the child’s perspectives; and
  - the information is obtained from the child and is communicated to the parents and the court where necessary in a way that is appropriate to the child’s best interests, age and maturity, and in a way that the child does not feel responsible for the custody decision.
12. It is recommended that, recognizing the breadth and complexity of the issues involved in child custody and access enforcement and parental child abduction cases, further detailed work be undertaken.
13. It is recommended that the *Divorce Act* and provincial and territorial legislation provide that the courts of the province or territory of the child’s habitual residence have jurisdiction to determine custody and access, subject to exceptions based on consent or safety considerations, and taking into consideration, as applicable:
  - the jurisdictional provisions in some provincial custody and access legislation,
  - the provisions of child custody enforcement legislation, and
  - *The Hague Convention on the Civil Aspects of International Child Abduction*.
14. It is recommended that information on existing and new laws and services be disseminated to the public as widely as resources permit, and through a variety of communication modes to be accessible to all families with children.
15. It is recommended that governments support parent education—mandatory or voluntary—which is broadly accessible and meets linguistic, cultural, geographic, and general parenting, legal and process information needs.
16. It is recommended that support be given to professionals working with families during and after separation and divorce, such as lawyers, social workers, and psychologists, to engage in continuing education and training in child custody and support law, family violence issues, the dynamics of family separation and divorce and the effects on children. Professional organizations should be encouraged and supported to facilitate professional development in this area, and to consider certification approaches incorporating professional development in this area.
17. It is recommended that jurisdictions work with law societies and the bar associations:
  - to explore options for legal professional development and training in appropriate ways to interact with children of separated parents in the litigation process; and

- to review practice codes with a view to ensuring that they set out counsel's role and obligations in a way that adequately safeguards children's best interests, and to ensuring that counsel have an obligation to explore appropriate alternative dispute resolution options with their family law clients.
18. It is recommended that the *Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions* should be maintained and updated periodically.
  19. It is recommended that:
    - mediation not be made mandatory, and
    - mediation be available for informed participants of relatively equal bargaining power where participation of both parties is voluntary and where appropriate screening exists to ensure that family violence cases are identified and generally screened out.
  20. It is recommended that governments and the professions work together to support the development of a broad spectrum of dispute resolution services, including mediation, arbitration and collaborative law, and other supports to parents to help identify and narrow the issues in dispute, such as custody and access assessments and parent education.
  21. It is recommended that problems of access denial and failure to exercise access be monitored through research to identify best practices and the most effective ways of dealing with these problems, and that further research be undertaken to develop and assess innovative remedial approaches.
  22. It is recommended that governments continue to work at improving components of the legal system that are critical to families' access to the legal system to resolve family breakdown issues, such as family legal aid.
  23. It is recommended that the federal government work with jurisdictions to establish unified family courts, where there is a jurisdictional request.
  24. It is recommended that persons appointed to, and serving in, specialized family courts have expertise in family law issues.
  25. It is recommended that the provinces and the territories review their legislation respecting establishment and recognition of parental status, and entitlement to custody and access on the birth of a child, with a view to identifying any issues that require a legislative or service response, and making recommendations in the future.
  26. It is recommended that jurisdictions encourage the development of collaborative family law practice as a further option for parties to consider as a method of dispute resolution.

27. It is recommended that family law legislation require lawyers to advise clients of the full range of available dispute resolution options.
28. It is recommended that jurisdictions work to ensure that children are treated similarly and provided similar protection in Canada by providing relative consistency in laws affecting custody, access and child support.
29. It is recommended that courts make appropriate use of judicial and non-judicial settlement approaches to avoid the hardening of positions and to promote early settlement and narrowing of issues in dispute.
30. It is recommended that case management systems provide for expedited access to judicial decision making where it is in the best interests of the child to have the matter dealt with on an urgent basis.
31. It is recommended that orders be worded clearly and consistently to ensure that the parties understand their obligations and that the orders can be enforced.
32. It is recommended that procedures for variation of orders provide that, where there is consent, custody, access and child support orders can be varied expeditiously and without a court hearing.
33. It is recommended that no change be made to the 40 percent threshold rule. However, further guidance should be provided in the child support guidelines on how to determine or analyze the elements that contribute to the determination that the 40 percent rule has been met.
34. It is recommended that the current factors used to determine the amount of support in shared custody situations be replaced by the use of a presumptive formula. The formula amount would be the difference between the table values for each parent given the total number of children in the shared custody arrangement, unless that amount is deemed inappropriate based on, for example, how the parents share the child's expenses.
35. It is recommended that the term *extraordinary* be defined in the Guidelines.
36. It is recommended that no change be made to the provisions regarding the eligibility for support of a child over the age of majority.
37. It is recommended that the Guidelines be amended to require recipients of support for children over the age of majority to disclose information respecting the child's ongoing eligibility for support.
38. It is recommended that no changes to deal specifically with high access costs be made to the Guidelines. These situations should be dealt with on a case by case basis and any accommodation appropriate to a particular case should be addressed as part of a custody and access order.

39. It is recommended that no changes be made to the provisions in the child support guidelines respecting the obligations of those who stand in the place of a parent.
40. It is recommended that the child support tables be updated every five years, or more often, if there are changes to federal, provincial or territorial taxes that would have a major impact on the table amounts.