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CHILD CUSTODY AND ACCESS

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TABLE OF CONTENTS

Page

INTRODUCTION 1

CUSTODY AND ACCESS LAW 1

A. Legislative Framework 1
B. *Divorce Act* – Custody and Access Applications 2
C. "Best Interests" and Other Tests for Custody and Access 4
D. Joint Versus Sole Custody 6
E. Access Arrangements and the Rights of Access Parents 8
F. Enforcement of Custody and Access Orders 10

NEW POLICY DIRECTIONS 11

A. A Joint Parliamentary Committee on Custody and Access Issues 12
B. Outstanding Custody and Access Issues 13

CONCLUSION 14

BIBLIOGRAPHY 15

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CHILD CUSTODY AND ACCESS

INTRODUCTION

The 1968 passage of the first federal *Divorce Act* enabled many more Canadian couples to divorce,[1] resulting in more and more disputes over the custody of children and parents' right to access to them. In Canada, almost 40% of marriages now end in divorce, affecting the lives of thousands of children. Their parents' struggles, both during and following a separation, have a lasting impact on these children, as mental health experts are able to demonstrate. Custody and access determinations can be readily made by some parents, with little or no acrimony; however, in other cases there are long-term conflicts that resist resolution. This paper looks at the law governing the custody of and access to children in Canada, with particular attention to federal law, as well as at some related legal issues such as child abduction and enforcement. It also discusses a number of new policy and legislative options for Canada.

CUSTODY AND ACCESS LAW

A. Legislative Framework

Family law is an area of divided legislative responsibility in Canada. While the *Constitution Act, 1867* reserves the area of divorce to the federal Parliament, it grants jurisdiction with respect to property and civil rights to the provincial legislatures. Parliament has exclusive jurisdiction to legislate in the area of substantive divorce law, which includes corollary matters such as support and custody. Provincial legislation in the family law area covers all matters

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(1) There were over 77,000 divorces per year in Canada between 1991 and 1994. Statistics Canada, "Divorces, Canada, the provinces and territories" [Online].
Available: http://www.statcan.ca/english/Pgdb/People/Families/famil02.htm [24 July 1997].

related to the separation of unmarried couples; it also applies to matters such as property division, enforcement of support and other obligations, as well as support and custody in cases involving unmarried couples or married couples where no divorce is sought. Provincial law also governs adoption, child protection, change of name, and matters related to the administration of the courts. Because of the overlapping nature of family law jurisdiction, most reform initiatives are developed through coordinated federal-provincial-territorial efforts. Nonetheless, there are significant differences amongst the provincial family law statutes that are in place.

Custody and access disputes in Canada may be resolved under the federal *Divorce Act*[(2)] if the action is brought within the context of an application for divorce, or under provincial or territorial family law legislation in other cases. The application of these laws to custody and access matters does not mean that the decisions are always made by judges, however. Indeed, most custody and access matters are settled between parents, with or without the assistance of lawyers, mediators or social workers. Very rarely are the courts called upon to make final custody determinations.

Custody of children is a broad concept encompassing all of the rights and obligations related to a child or the children of a marriage. During the marriage, these rights are vested equally in both parents. In cases of separation or divorce, custodial rights and obligations are usually divided, most often so that one parent has custody and provides the main residence for the child, while the other parent is granted access, or visitation and information rights. This area of family law is perhaps the most difficult, given the emotional issues involved and the serious consequences of a determination that may be seen as "taking the child away" from a parent who loses custody to a former spouse. It is when parents are unable to resolve their conflict with each other, or at least to prevent their children from being drawn into it, that the harmful consequences of divorce are likely to be most severe.

B. *Divorce Act* - Custody and Access Applications

Custody of and access to children are two of the forms of corollary relief that may be granted by a court under sections 15 to 19 of the *Divorce Act, 1985*. Corollary relief may be sought by a petitioner in his or her application for a divorce, or by the responding spouse in a

(2) *Divorce Act*, R.S.C. 1985, c.3, (2nd Supp.), as amended.

counter-petition. Along with the granting of a divorce, a court may make orders for child or spousal support, or custody of or access to a child or children of the marriage, or an order varying a custody or support order.

Applications for custody of or access to a child are made under section 16 of the *Divorce Act*, and may be made by either or both spouses, or by any other person with leave of the court.(3) These orders may also be made on an interim basis pending a final resolution; in some cases an order for joint custody may be made rather than custody being granted to only one spouse. Section 16(5) provides that a spouse who is granted access to a child is entitled to make enquiries of the custodial parent and be given information about the health, education and welfare of the child. The factors to be considered in making a custody and access determination, as provided in subsections 16(8) and (9), include the best interests of the child of the marriage as determined by reference to his or her condition, means, needs and other circumstances; the past conduct of any person must not be taken into consideration unless that conduct is relevant to the ability of that person to parent the child.

Section 16(10) requires the court, in making a custody and access order, to give effect to the principle that a child of the marriage should have as much contact with each parent as is consistent with that child's best interests, and that therefore the court must consider each parent's willingness to facilitate the exercise of access by the other. This provision is often referred to as the "friendly parent" rule. It is based on the premise that maintaining close contact with both parents is in the child's best interests, and that any conduct by a parent that interferes with the other parent's relationship with the child is to be discouraged.

Section 17 of the Act sets out the requirements to be met in an application to vary a support or custody order. The maximum contact or "friendly parent" rule is reiterated for consideration in the context of applications to vary custody orders in section 17(9). The test to be applied, as set out in subsections 17(4) and (5), is that there must have been a change in the condition, means, needs or other circumstances of the spouse or the child since the making of the original order. Judges generally require this material change of circumstances to be demonstrated in order to justify altering the status quo.

Section 16(9) of the *Divorce Act* specifically precludes the court from considering the past conduct of a parent in making a custody or access order, unless that conduct is relevant

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(3) *Ibid*., section 16(3).

to the person's ability to act as a parent to the child. This provision was intended to prevent evidence about marital misconduct from entering into the court's consideration of custody and access matters; however, its impact has become more controversial now that many divorces proceed on a no-fault basis. The provision has had the effect of excluding consideration of certain types of information about the family's history in the custody and access context. For example, until very recently the courts had generally held that violence by one spouse against the other did not necessarily indicate anything inappropriate or negative about the former's parenting; only violence directed toward the child would be considered relevant to the custody determination. This counter-intuitive reasoning prevailed until the 1989 *Young* v. *Young* case, in which the judge's finding of abuse during the marriage was held to relate directly to the father's "ability to parent the children on a full-time basis."(4)

Since 1989, it has been argued (and demonstrated) more frequently that witnessing any family violence or other form of abuse does have an impact on a child's well-being, and should be considered relevant to an evaluation of the abuser's parenting abilities.(5) Though most American states have legislation that specifically mentions domestic violence as a factor relevant to determinations in child-related cases,(6) in Canada, only Newfoundland's family law statute makes specific reference to violence as relevant in this context.(7)

C. "Best Interests" and Other Tests for Custody and Access

Where the parents are not able to settle the custody and access issues themselves, the determination will be made by a court. Family law lawyers often advise their clients that leaving it to a stranger to decide where their child will live should be a remedy of last possible resort, and that they would be wise to attempt to settle the question by agreement with their former spouse. Indeed, such matters are often resolved outside of litigation. When resort to the courts is necessary, however, case law provides several tests to guide the decision-making judge.

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(4) *Young* v. *Young* (1989), 19 R.F.L. (3d) 227, at 235 (Ont. S.C.), cited in Nicholas Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach," (1996) 13, *Canadian Journal of Family Law*, 215, at p. 253.

(5) Peter G. Jaffe, David Wolfe, Susan Kaye Wilson, *Children of Battered Women*, Sage Publications, Newbury Park, California, 1990, Chapter 2, cited in Department of Justice, *Custody and Access: Public Discussion Paper*, Ottawa, March 1993, at p. 12.

(6) Bala (1996), p.252.

(7) *Children's Law Act*, R.S.N. 1990, section 31(3).

The most commonly applied test in custody and access matters, whether under the *Divorce Act* or provincial law, is the "best interests" test.(8)

Section 16(8) of the *Divorce Act* requires the court to take into account the best interests of the child of the marriage in making the custody and access order. The "best interests" test has been criticized as being too ambiguous, but it is also supported on the grounds that it provides the only criterion flexible enough to enable the courts to reach the right result for each child in his or her particular circumstances. In applying it, the court will generally consider any evidence about the child's welfare, whether provided by the parents, other interested relatives or friends, or mental health professionals retained as expert witnesses by a parent.

The test requires that any consideration relevant to the child's interests be taken into account; some of the most important considerations have been held to include the child's relationship with each parent; the child's moral and emotional welfare; the wishes of the child, if he or she is old enough to express them; the desire to avoid separating siblings; and the willingness of each parent to facilitate the other parent's access to the child. The preservation of the status quo, so as to disrupt the child's living arrangements as little as possible, is often a factor of overriding influence, particularly in interim custody and access determinations. In some jurisdictions, legislators have spelled out in family law statutes a list of criteria to be considered by the courts in determining the child's best interests. Where this mechanism has been employed, it has been seen as an effective method of incorporating and giving formal support for some of the previously unregulated aspects of custody and access law, such as the desirability of maintaining contact between children and their grandparents.

One useful criterion for determining which arrangement will be in a child's best interests, the "primary caregiver" rule, has been relied upon by many judges and by lawyers who are assisting their clients in custody negotiations. This rule is based on the premise that it will be in the child's best interests to continue to be in the care and custody of the parent who has been his or her primary caregiver throughout the marriage.(9) In most families, one parent (often the mother) has provided most of the child care throughout the lives of the children. Indeed,

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(8) All Canadian jurisdictions apply the "best interests" test as the primary factor in custody and access matters, except the Northwest Territories, where the *Domestic Relations Act* requires consideration of the welfare of the child and the conduct and wishes of the parents.

(9) Karen M. Munro, "The Inapplicability of Rights Analysis in Post-Divorce Child Custody Decision-Making," (1992) Vol. XXX, No. 3, *Alberta Law Review*, p.852 at 895.

although our family law statutes put parents on an equal footing with regard to applications for custody and access, it should be noted that, although there are exceptions, parents rarely share parenting responsibilities equally during a marriage. Clearly there is a basis for maintaining the primary caregiver's role in order to limit the upheaval experienced by children, especially young children, after a separation. Regardless of the final custody and access arrangement, it has been observed that the termination of an unhappy marriage, and the resulting opportunity for each spouse to parent independently of the other, may offer a previously less-involved parent the chance to become a better parent, to the ultimate advantage of the child.

D. Joint Versus Sole Custody

Although they are commonly used, the terms "custody" and "access" are frequently misunderstood. Custody of a child includes the responsibility and power to make decisions with respect to the child, in areas such as schooling, medical care, religious upbringing, and other important aspects of the child's life. Traditionally, the decision-making power always went along with the day-to-day care and control of the child and the provision of the child's home. The non-custodial parent is generally granted access, which comprises both visitation privileges and a right to be given certain information about the decisions being made by the custodial parent.

Under pressure from advocates for joint custody and other new approaches to post-divorce parenting, some of which have altered the traditional pattern of severing custody and access rights, a wide range of options have been tried and modelled, so that families, particularly those best able to resolve their disputes amicably, can choose the division of custody and access rights and obligations that best suits them. Custody and access arrangements can now be found at various points along a spectrum between the traditional arrangement of custody to one parent (usually the mother), with access to the other (generally the father) on Wednesday evenings and every other weekend; and the type of joint custody arrangement where the child spends alternative weeks or months in each parent's home, with decision-making power being shared equally by both parents.

The courts rarely impose joint custody orders in the absence of the consent of the parties. It is thought that unless the parents can work together amicably and constructively enough to set up their own custody and access arrangement, joint custody would not be in the

child's best interests. Joint custody implies sustained and frequent contact between the parents as they resolve together all of the parenting issues that arise in relation to the child over time. These parents need to be able to communicate frequently and share authority to decide schooling, religious, medical and other contentious questions as they come up. The courts have generally held that such an arrangement should not be imposed on unwilling parents. Joint custody also has important repercussions for the future mobility of the parents, and has been a factor in a number of cases where a joint custodial parent has been denied approval for a proposed move outside the jurisdiction in which both parents have been residing after separation or divorce.

A joint custody order means that the parents will have equal decision-making authority with respect to the child. It does not always mean that the child spends an equal amount of time with each parent, although this is often the objective of a parent who is seeking joint custody. Under a joint custody arrangement, the details of where the child will reside are spelled out. The order may look like a traditional custody and access order, with the child having a regular residence with one parent, and spending alternate weekends with the other. Many families find that the children are more comfortable staying with one parent most of the time, especially during the school year, and visiting the other frequently. At certain stages of a child's development, it may be unduly disruptive to be moving back and forth regularly between parents. Where they are able to do so, some parents can make these moves easier by providing homes in the same neighbourhood, so that children will at all time be close to the same friends and school.

The movement toward joint custodial, divided-residence arrangements reflects the desire of many parents to maintain close, involved and meaningful relationships between both parents and their children following divorce. Equally important, from a mental health perspective, is to protect children from being drawn into post-separation conflict between their parents; in some cases, the shared decision-making required for joint custody would exacerbate parental conflict. Courts need to exercise caution where the non-custodial spouse (or the one who has been less involved in parenting before separation) advances as an argument for joint custody that the child's time should be divided equally between the parents on grounds of fairness. Such arguments, which give undue weight to the interests of the parents, could readily obscure the chief objective of the custody-access determination, the child's best interests. Attention must be on whether the child's best interests can be met by an arrangement that

involves frequent moves between his or her parents' residences. When such an arrangement is attempted, there may be a long period of tinkering before a schedule is finalized within which all the parties are comfortable.

E. Access Arrangements and the Rights of Access Parents

Whenever one parent is awarded custody of a child, the other is generally awarded access. Again the test applied is the best interests of the child. The access provisions usually spell out the schedule of visits year-round, specifying how holidays such as birthdays and summer vacations will be divided. In cases where there is a high degree of parental cooperation, there may be a very flexible award of "generous" or "reasonable" access. This type of order is more difficult to enforce, however, should a dispute arise between the parents; a specific access schedule becomes necessary where cooperation is not maintained. Even where a specific schedule has been set out in a court order, parents may have to become more flexible in order to accommodate the wishes and extra-curricular activities of children as they get older. Restrictions on access, such as preventing a parent from removing the child from the jurisdiction, requiring that access privileges be exercised under the supervision of a third party, or specifying that the access parent refrain from consuming alcohol or drugs, may be ordered where appropriate.

Two Supreme Court of Canada decisions on the rights of access parents were released in 1994: *Young* v. *Young,* and its companion case from Quebec, *Droit de la famille-1150 D.P.* v. *C.S.*[(10)] These decision dealt with the rights of access parents, both fathers, to involve their children in religious activities and discussions. Although the results in the two cases differed, some common threads ran through the decisions. Access determinations are made on the basis of the best interests test, which the judges all agreed is a fact-based, child-focused test. The interests or desires of the custodial parent are not relevant unless they coincide with the child's best interests.

Facilitating the exercise of access is an important priority in family law, as is indicated by the *Divorce Act* "friendly parent" rule. Maintaining close ties with both parents can be a very important means of reducing the negative impact of divorce on children, and access is rarely denied altogether. This presumption is borne out in the social science literature, where it has been shown that continued contact with both parents, without friction or conflict being felt

(10) (1994), 49 R.F.L. (3d) 117; (1994), 49 R.F.L. (3d) 317.

by the child, can enable the child to recover more quickly from the parents' divorce and to avoid negative repercussions for his or her own development.(11) However, it has been pointed out that, although the role of access parents is being strengthened, so as to encourage the maintenance of meaningful relationships between a child and both parents, the most important factor in the welfare of a child following separation is the child's relationship with the custodial parent.(12) Therefore, judges who are considering enhancing the role of an access parent must exercise caution, in order to avoid exacerbating conflict between the parents or undermining the custodial parent's relationship with the child, thereby adding to that parent's stress.(13)

In extreme cases, access to the child by the non-custodial parent may present a risk that outweighs any potential benefit to the child from this continued relationship. A court may order that a non-custodial parent's access be supervised where the circumstances, such as physical or sexual abuse of the child, dictate. In cases involving violence by the non-custodial parent against the custodial parent, the exchange of the child might be ordered to take place in a public place, such as a shopping centre or the lobby of a police station, or the court order may require that a specified individual supervise the exchange. In the worst cases, where a court finds that continuing the access relationship is no longer in the best interests of the child, access may be terminated altogether. A complete denial of access is a very rare outcome, and is unlikely to happen except in protracted cases of repeatedly harmful or destructive conduct by the non-custodial parent.

Applications for custody or access may be made by persons other than the parents of a child, if they are granted leave of the court.(14) Such leave will usually be granted unless the third party application is being made for frivolous or vexatious reasons. Even if a leave application is successful, custody or access will be granted to a third party only in accordance with the child's best interests. Usually this type of order will be made in situations where there is a close family member, such as a grandparent, who has played a particularly important role in a

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(11) See for example Susan Maidment, *Child Custody and Divorce*, Croom, Helm, London, 1984, cited in Department of Justice, *Custody and Access: Public Discussion Paper*, at p. 9.

(12) Judge Weisman, "On Access After Parental Separation," (1992) 36 R.F.L. (3d) 35, cited in Berend Hovius, "The Changing Role of the Access Parent," (1993) *Canadian Family Law Quarterly*, Vol.10, p.123.

(13) Hovius (1993), p.185.

(14) Leave is required under the *Divorce Act*, but many provincial family law statutes permit applications for custody or access by "any person."

child's life and whose regular and close contact might be interrupted to the child's detriment by the parents' divorce.

F. Enforcement of Custody and Access Orders

While the area of enforcement falls primarily within provincial legislative competence under the provinces' authority with respect to "property and civil rights in the province," several federal statutes form important components of the system for enforcing family law orders and agreements. Traditionally, the enforcement of a support or custody order, as of any other obligation in a civil court order, fell to the individual support creditor, usually the custodial parent. Creditors could privately enforce family law orders and agreements in a number of ways, such as summoning the parent not in compliance, usually the payor,(15) to a judgment-debtor examination, garnisheeing wages or other money due to the payor, seizing property, registering writs against the debtor's name or real estate, or committal for contempt. This last remedy applied most readily to contraventions of custody or access orders or agreements.

Since the mid-1980s most Canadian provinces have established state-run agencies that are responsible for the enforcement of spousal and child support obligations at no cost to the creditor.(16) Unacceptably high levels of non-compliance with support orders and agreements had been demonstrated for many years, with dire economic consequences for both the children who were the intended beneficiaries of these orders and agreements, and their custodial parents (usually mothers). Many of these custodial parents turned to public assistance for financial relief, to the extent that eventually the enforcement of support obligations could no longer be treated as a private matter.

Custody rights under court order, or stemming from an agreement or implied agreement, are enforceable under the *Criminal Code of Canada*. The applicable *Criminal Code* provisions were enacted to protect the rights of children to security and stability by preventing a child's abduction by a parent following a divorce. Children are protected from being abducted

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(15) Support payers are referred to as "payors" in family law.

(16) For more information about the enforcement systems in place in the provinces, and other issues in child support law, see "Child Support: Quantum, Enforcement and Taxation," BP-345E, Parliamentary Research Branch, Library of Parliament, February 1996.

out of their province of residence, or internationally, by provincial reciprocal enforcement legislation and by the *Hague Convention on the Civil Aspects of International Child Abduction*.

The enforcement of access orders and agreements remains a private obligation, usually carried out by way of contempt of court proceedings, where the penalty may be a fine or even imprisonment of the custodial parent. Provincial legislation, such as Ontario's *Children's Law Reform Act*, may permit the court to order the police or sheriff to apprehend and deliver the child to the access parent. Advocates for non-custodial parents have argued that the no-fee enforcement assistance with support enforcement provided by the provinces in the last decade, while not improving access enforcement mechanisms, has unfairly benefited custodial parents, usually mothers, without responding to the often-expressed concerns of non-custodial parents, usually fathers. While some jurisdictions have considered new access enforcement methods, to date no proposals have gone ahead.

Any form of automatic access enforcement is particularly controversial; custodial parents often argue that they may not make the child available as required because of concerns for the child's well-being. When resort to the courts is necessary in order to enforce an access obligation, a judge is given the opportunity to assess the evidence of potential risk to the child before altering an access schedule or levying a penalty against the custodial parent. In 1989, Ontario passed new access enforcement legislation (the *Children's Law Reform Amendment Act, 1988,* Bill 124), to allow for speedier access to the courts and empower the courts to award compensatory access; however, the Act was never proclaimed. The proposed law was opposed primarily by women's groups, who claimed that it would make it too easy for non-custodial parents to draw custodial parents into costly and time-consuming litigation.

NEW POLICY DIRECTIONS

Family law issues have featured on the federal legislative agenda relatively frequently in recent years. The issue of the right of grandparents to apply under the *Divorce Act* for access to their grandchildren was raised by way of a Private Member's bill that was studied by a House of Commons committee, and defeated in the spring of 1996. In the same year, the federal government introduced Bill C-41, which amended the *Divorce Act* and two other federal statutes to create the Federal Child Support Guidelines and strengthen federal legislative measures dealing with the enforcement of child support obligations. Bill C-41 came into force

on 1 May 1997, at the same time as new *Income Tax Act* provisions changed the tax treatment of child support payments, so that they would no longer form part of the taxable income of the recipient, usually the custodial parent of the child.

Both child support and custody issues had been on the policy agenda for a decade. As more and more Canadian families deal with separation and divorce, questions are increasingly raised about the effectiveness of the family law system as the forum for resolving disputes and enabling families to recover and move on. In the course of hearings on Bill C-41, both the House of Commons Standing Committee on Justice and Legal Affairs and the Standing Senate Committee on Social Affairs, Science and Technology heard a number of witnesses express pronounced dissatisfaction with the government's order of priorities, according to which child support guidelines had been developed before an attempt had been made to develop legislative reforms in the areas of access to and custody of children. Members of the Senate Committee were unhappy with the speed with which Bill C-41 was studied and passed, and felt that the important custody and access issues raised by witnesses had not been adequately examined. To facilitate the passage of the bill by the Senate Committee, the Minister of Justice and the Leader of the Government in the Senate agreed that a joint Parliamentary Committee would be established to deal with the issues of access to and custody of children.

A. A Joint Parliamentary Committee on Custody and Access Issues

The decision to establish a Joint Committee on custody and access issues reflects the feelings of Senators who studied Bill C-41 that significant areas of custody and access law raised by witnesses had not been addressed in the bill, or in any of the amendments to it. The Senators had also expressed concerns that the Guidelines, as regulations under the *Divorce Act*, would not be subject to the same form of parliamentary review as is applied to new legislation. In response to this concern, it was agreed that the Senate Committee would have an ongoing role in scrutiny of future amendments to the Guidelines.

Many of the access and custody issues raised by witnesses before the Senate Committee had been outlined in the Department of Justice report *Custody and Access: Public Discussion Paper*, released in March 1993. This paper resulted from the federal government's participation in the review of the legal regime governing child custody and access undertaken by the Federal/Provincial/Territorial Family Law Committee (the "Family Law Committee"), and

was intended to encourage public participation in the review process. To date, no follow-up or summary document has been published on the results of this consultation effort. Departmental officials told the Senate Committee that priority had been given to child support and enforcement issues by both the Family Law Committee and the federal Justice Department; the government's view was that adequate custody/access and access enforcement remedies already exist under the *Divorce Act* or provincial laws.

B. Outstanding Custody and Access Issues

Some of the very contentious issues raised by witnesses before the Senate Committee and likely to be considered by a Joint Committee studying custody and access issues include: the adequacy of current access enforcement mechanisms; the rights of second or subsequent families; the desirability of mandatory mediation of divorce disputes; the rights of grandparents or other third-parties to apply for access or custody; mobility rights of parents after divorce; the information and other rights of non-custodial parents; and the psychological and developmental effects of divorce on children. The Senators were also very interested in testimony about the impact of the current "language of divorce" on divorcing parents, and their children. Witnesses argued that the expressions "custody" and "non-custodial parent" have an undesirable alienating and diminishing impact on families, and particularly on the parent who does not provide the child's primary residence after divorce, most often the father.

A Joint Committee might also study examples of new measures in place in other Canadian jurisdictions, or in the United States or Europe. For example, some witnesses on Bill C-41 spoke favourably of the "parenting plan" approach to custody and access, adopted in a number of American jurisdictions, whereby a legislative presumption in favour of joint custody or shared parenting has been created; joint custody is presumed to be the optimal solution for every divorcing couple, and sole custody will only be granted if the contrary can be proven. However, this mechanism is very strongly opposed by some, and a significant number of those jurisdictions that had implemented a presumption in favour of joint custody have since retreated from it. Other witnesses referred to divorce education, a model that has been implemented in several Canadian cities as well as some in the United States, whereby parents who are divorcing are given courses on the possible impact of their post-separation behaviour on their children. The aim of these programs, which have had differing levels of success so far, is to prevent

parents from engaging in some of the types of conduct, such as involving the children in their own ongoing conflict, that have been shown to be most likely to inflict psychological damage on their children.

CONCLUSION

As others have noted, the solutions to the difficulties inherent in meeting children's needs following divorce and securing the best possible outcome for their development and mental health, may not come from legislative change. More and more families are now undergoing divorce and working through the long-term challenge of parenting in two households; their experiences will offer lessons to other parents about how to do what is in their children's best interests. The majority of divorcing couples in Canada make their post-separation arrangements for their children with very little guidance from legislation or courts. Positive or negative outcomes for children seem to be more dependent on the level of conflict between their parents, and the ability of those parents to shield them from it, than on the types of legislative provisions that apply to the divorce litigation.

For those parents who are unable to settle their differences, the family law system can sometimes be an effective tool for terminating conflict. Litigation provides a formalized, objective forum in which conflicting versions of events can be weighed, decisions made, and mental health professionals involved when this is appropriate. One of the most crucial roles of the legal system is to ensure that in the most extreme high-conflict divorces, children are protected from violence, other abuse, or abduction. However, the family law system is expensive, time-consuming, and adversarial; the outcome of litigation is usually unpredictable and almost always disappointing to at least one of the participants. Much more work will have to be done in order to ensure an optimal outcome for all children whose parents divorce. One step is already being taken, as academics, policy-makers and legislators critically analyze family law and consider the experiences of those who have been affected by it.

The 1986 changes to the *Divorce* Act, altered the grounds for divorce in an effort to reflect the needs of spouses who wished to end unhappy marriages without the rancour that might arise from a claim based on evidence of marital misconduct. Since that time, the attention of many involved in or observing the family law system has been transferred to the children, who are so profoundly affected by parental decisions made at the time of a divorce. Although the

needs and welfare of these children are inextricably tied up with those of their parents, any policy or legislative change must be made in the context of a concerted effort to distinguish and separate the desires of their parents from the consideration of the children's interests. This approach reflects the shift away from looking at marriage (and divorce) as merely a set of legal rights and obligations between adults, to a recognition of its importance as the context for the development and nurturing of healthy, happy and secure children.

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