

**DIVORCE LAW IN CANADA**

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DIVORCE LAW IN CANADA\*

ISSUE DEFINITION

In recent decades, family law in Canada has been the subject of frequent and important reform. Amendments to provincial and federal family law legislation, as well as other legal changes made by the courts, have mirrored and in some cases anticipated dramatic social changes, such as more couples separating or living together outside of marriage, more women working outside the home as well as in it, and large numbers of children living with single parents or step-parents. Divorce law is one of the key components of family law in Canada. This paper reviews the current state of Canada's divorce law, and also touches upon future potential areas of law reform action within federal jurisdiction.

As more people every year experience divorce or separation, whether their own or that of someone close to them, family law continues to have a tremendous impact on growing numbers of Canadians. In Canada, almost 40% of marriages now end in divorce. The social science literature is full of evidence of the negative impact that divorce can have on the emotional well-being of children and other members of the family, while the financial damage caused by divorce and separation is well known. Since 1968, when the first federal *Divorce Act* was passed, society has become more tolerant of separation and remarriage, which have been made easier through major reforms to the divorce law effected by the *Divorce Act, 1985*.

BACKGROUND AND ANALYSIS

A. History of Divorce Law in Canada

Prior to 1968 there was no federal divorce law in Canada. In Newfoundland and Quebec, where there was no provincial divorce legislation either, persons had to seek the passage of a private Act of Parliament in order to end their marriages. In most other jurisdictions in

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\* The original version of this Current Issue Review was published in October 1996; the paper has been regularly updated since that time.

Canada, provincial law incorporated by reference the English *Matrimonial Causes Act* of 1857; this permitted a husband to obtain a divorce on the grounds of his wife's adultery, and a wife to do so provided she could establish that her husband had committed incestuous adultery, rape, sodomy, bestiality, bigamy, or adultery coupled with cruelty or desertion. Wives proven to have committed adultery were not entitled to spousal support, and husbands had no right to apply for support in any circumstances. Some provinces enacted legislation allowing either spouse to seek a divorce on the basis of adultery. The provincial divorce acts continued in effect until 1968, when Parliament enacted the *Divorce Act*.

The *Divorce Act* of 1968 introduced the concept of permanent marriage breakdown as a ground for divorce, while also retaining fault-based grounds for divorce, the most important of which were adultery, cruelty and desertion. The move away from purely fault-based grounds for divorce was controversial, and the compromise whereby fault and no-fault grounds were combined was continued in the *Divorce Act, 1985*. The change recognized that marriages often end without a matrimonial offence being the cause of the breakdown and that the reliance on fault allegations in divorce proceedings can exacerbate and prolong what is already an unpleasant, expensive, and potentially harmful process. Grounds for divorce were broadened to include one no-fault ground, in order to spare at least some couples this often painful process.

The grounds for divorce set out in the 1968 *Divorce Act* were equally available to husbands and wives, thus removing the double standard that had existed under the U.K. *Matrimonial Causes Act*. Sections 3 and 4 listed the various grounds under which divorce could be sought. The grounds set out in section 3 of the Act included adultery, rape or another sexual offence such as a homosexual act, bigamy, or physical or mental cruelty. Additional grounds set out in section 4 of the Act applied if the parties had been living separate and apart and there was a permanent breakdown of the marriage based on specified factors, such as the respondent spouse's having been imprisoned for more than two years, being addicted to alcohol or drugs, having disappeared or deserted the petitioner, or having failed to consummate the marriage.

Decrees of divorce under the 1968 legislation could not be granted unless a trial was held before a judge who was satisfied on all of the following: that there were grounds other than that the parties consented to a divorce; that the parties had not colluded with each other (i.e., conspired to mislead the court); that there had been no condonation or forgiveness and

approval of the offence subsequently complained of by the petitioner; that there had been no connivance at the offence by the petitioner (i.e., no goading of the spouse into a marital offence); that there was no reasonable prospect of reconciliation; and that proper arrangements for the care of the children or the maintenance of a dependent spouse had been made, which would not be jeopardized by the granting of a divorce. Divorce judgements were made in two stages: the first was a decree *nisi*; unless the period was shortened by a judge, the petitioner could apply for the decree to be made absolute three months after the decree *nisi* had been granted. The parties were not free to remarry until the decree absolute was granted.

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 matters related to the separation of married or unmarried couples, including support and custody in cases where no divorce is sought, property division, enforcement of support and other obligations, 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, provincial family law statutes across the country differ significantly.

In 1976 the Law Reform Commission of Canada, in its influential *Report on Family Law*, recommended that, in order to reduce the hostility of the traditional adversarial approach to divorce and to promote more constructive resolutions of family disputes on separation, the only ground for divorce in Canada should be breakdown of the marriage. It also recommended the establishment across the country of Unified Family Courts, to whom exclusive jurisdiction over family law issues would be granted. The latter recommendation has been only partially followed, with the creation of Unified Family Courts for some cities in Canada. Also, the 1985 *Divorce Act* only partially removed the fault component from divorce actions, creating a single ground for divorce called marriage breakdown, which could be established by proving either separation for at least one year, or one of three fault-based criteria: adultery, physical cruelty, or mental cruelty.

B. *Divorce Act, 1985*

The 1985 *Divorce Act* changed the rules by which a court could assume jurisdiction to deal with a petition for divorce. Sections 3 to 6 of the Act define the circumstances in which the court of a province will have jurisdiction to hear a petition for divorce. In general, the court will have jurisdiction if one or both spouses are ordinarily resident in the province where the proceedings are commenced. Any subsequent variation applications are not necessarily heard by the same court that granted an original divorce judgement, but may be made to a court of a province in which one or both spouses is ordinarily resident, or where the spouses accept the court's jurisdiction.

As mentioned above, the 1985 Act brought significant changes to the available grounds for divorce. Section 8 of the Act provides that a divorce may be granted on the ground that there is a breakdown of the marriage; this is established by showing that the spouses have lived separate and apart for at least one year, or that the respondent spouse has committed adultery, or physical or mental cruelty of such a kind as to render continued cohabitation impossible. Where the ground is marriage breakdown based on one year of separation, the time is calculated from the date the spouses began living separate and apart. Application for the divorce can be made within the one-year period, but it will not be granted until the year has run out. In their attempts to reconcile, couples often resume cohabitation; a period of cohabitation of more than 90 days interrupts the period of separation, so that the calculation of the one-year period will have to be re-commenced following the latest date of separation.

Section 11 of the Act sets out the bars to divorce, which are similar to some that existed under the 1968 legislation: no divorce will be granted if the parties have colluded with each other; divorce will not be granted until reasonable arrangements have been made for the support of any children of the marriage; a divorce sought on the basis of cruelty will not be granted if there has been condonation or connivance on the part of the petitioner.

One of the innovations introduced in 1985 was the provision in section 8 that allows parties to file for divorce jointly. Such a joint petition, based on the breakdown of the marriage and where the parties have been living separate and apart for at least one year, may include claims for support, and custody of or access to children. Although the substantive law of divorce falls within federal jurisdiction, court practices and procedures are governed by the provinces. The provision of section 8 clearly contemplating joint applications has made possible

the use of Joint Petition for Divorce forms, which can be filed by the spouses together. More often, if the parties have resolved all outstanding issues between them, or if no relief other than a divorce is sought, they will agree that if one files for divorce the other will not respond to it, thereby allowing it to proceed as an uncontested divorce. An appearance in court is generally not required in uncontested or settled cases.

Section 9 of the Act imposes a duty on lawyers to discuss with their clients the possibilities of reconciliation, as well as the options of negotiating or mediating the corollary issues in the divorce proceeding, such as support or custody. Section 9(1) restates the duty that was imposed on lawyers by section 7 of the 1968 *Divorce Act* to discuss the possibility of reconciliation, and subsection (2) adds the requirement for discussion of negotiation and mediation. This subsection promotes negotiated settlements and mediation, which is a process by which parties resolve the issues outstanding between them with the assistance of a neutral third party. Section 10 requires judges to satisfy themselves that there is no realistic possibility of reconciliation of the parties, and to adjourn proceedings and encourage the parties to see a counsellor should it become appropriate.

It is not clear whether the section 9 duties of lawyers have any significant impact on the likelihood that parties will either reconcile, negotiate or mediate. Certainly, many couples manage to reach negotiated outcomes, given that, according to Professor Julien Payne, 86% of divorces are uncontested from the start, and only 4% of divorces go to trial. Often family law disputes are settled by negotiation between the parties, both represented by lawyers, before a Petition for Divorce is issued. Although various different types of relief may be covered in the terms of the settlement, these divorces are considered uncontested in terms of the litigation aspect of their resolution.

Another mechanism for the resolution of family disputes without resort to litigation, or as a part of the litigation process, is mediation. Mediation is sometimes court-affiliated, but more often it is private. Parties involved in mediation are often represented by private counsel throughout the process. The professional qualifications of mediators vary widely, although efforts are being made to organize an accreditation system, so that certain minimum requirements will have been met by all those holding themselves out as mediators. Mediation advocates claim that it allows people to settle their matrimonial affairs more quickly than does litigation, and that individuals who have decided for themselves how their dispute will



be resolved will be more committed to the terms of the resulting agreement, and will therefore find it easier to deal with each other in an amicable way as time goes on. The impact of mediation has not yet been clearly demonstrated, but there is growing interest in it as a desirable alternative to the court process.

As this field grows, more and more family lawyers are engaging in family mediation, and their participation has been endorsed by lawyers' governing bodies in most provinces. Mediation of custody and access disputes is thought to be the area most appropriately undertaken by mediators from other disciplines, such as social work and psychology. Once a settlement has been reached, matters that have been settled either by negotiation with the help of lawyers, or with a mediator, will often be expressed in writing in a separation agreement, or in the settlement documents in a divorce action. The terms of the Minutes of Settlement or agreement may then be incorporated into a divorce judgement, in order to make them more readily enforceable.

A divorce judgement granted pursuant to the *Divorce Act, 1985*, becomes effective 31 days after it is granted, as is set out in section 12. This change removed the two-stage procedure (decrees *nisi* and absolute) required under the 1968 Act. The court may abridge the 31-day period in special circumstances, if the parties agree and undertake not to appeal the judgement. Certificates of divorce proving that a judgement has taken effect, such as must be shown in order to remarry, are generally not made available until the 31-day period has expired.

### 1. Corollary Relief Applications

The powers of a court hearing a divorce action to grant corollary relief are governed by sections 15 to 19 of the *Divorce Act*. Corollary relief may be sought by the petitioner in the application for a divorce, or by the responding spouse in a counter-petition. Corollary relief claims may be joined with claims for a division of property or other relief under provincial family law legislation. Orders may be made on an interim or final basis, and even orders for "interim interim" custody and support are made in some jurisdictions in order to provide for the needs of the dependent members of the family while interim corollary relief applications are being resolved. It is also possible, in jurisdictions where it is permitted by the provincial rules governing court procedures, to sever the divorce from the corollary relief sought,

in order that a summary judgement of divorce may be granted to the parties even before corollary matters have been dealt with by the court.

A court that, pursuant to sections 3 to 7 of the *Divorce Act* has jurisdiction to hear a divorce application, may make orders for child or spousal support, or custody of or access to a child or children of the marriage, or to vary a custody or support order. Sections 15 to 15.3 of the Act provide that the court may order a spouse to secure or pay (or secure and pay) lump sum or periodic payments of support for the other spouse or the children of the marriage, or both. Interim orders for support may be made as well, to maintain the dependent members of the family until a final disposition can be made, or to pay the cost of retaining experts to value property that is subject to division under provincial matrimonial property law.

Section 15.2(5) specifically excludes spousal misconduct or fault from the considerations to be included in determining a spousal support application. Subsection (4) sets out the factors on such an application, including the condition, means, needs and other circumstances of each spouse and any child of the marriage; the length of time the spouses lived together; the spouses' roles or functions during their cohabitation; and any order, agreement or arrangement relating to the support of the spouse or child.

Section 15.2(6) sets out a list of objectives for spousal support orders. Spousal support orders should recognize any economic advantages or disadvantages to the spouses from the marriage or its breakdown, apportion the financial consequences of caring for a child, relieve economic hardship, and as far as possible, promote the economic self-sufficiency of each spouse within a reasonable period of time. Since 1997, applications for child support have been made under section 15.1 of the *Divorce Act*, which refers to the applicable child support guidelines, including the federal *Child Support Guidelines* set out in the Regulations under the Act. Until 1997, child support levels were set according to the results of a legislative test aimed at sharing the responsibility for maintaining children between their parents in proportion to the latter's relative abilities to pay. Since the passage of Bill C-41, which came into force on 1 May 1997, the quantum of child support has been governed by the "applicable guidelines," defined in the Act to mean either a provincial set of guidelines where they have been designated as applicable by the federal Cabinet, or the Federal Child Support Guidelines in all other cases. Child support orders must be made in accordance with the applicable child support guidelines, or in a different

amount as permitted under section 15.1(5), where the application of the guidelines would have an inequitable result.

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 (section 16(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 granting custody to only one spouse. Subsection (5) provides that a spouse who is granted access to a child is entitled to make inquiries 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 (8) and (9), include the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child, and must not include the past conduct of any person 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 each parent's willingness to facilitate the exercise of access by the other must be considered. 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 on the part of a parent that interferes with the other'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 same objectives for such orders as for original spousal or child support orders are set out in subsections (7) and (8) of section 17. The maximum contact or "friendly parent" rule is also reiterated in section 17(9) for consideration in the context of applications to vary custody orders. The test to be applied on a variation application, as set out in subsections (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 order that is to be varied. In the context of a support order that was to last for a definite period, where support was to be terminated at a certain date or when a certain event took place, variations may not be made after the time has expired, unless the court is satisfied that the variation is needed to relieve economic hardship arising from a change in circumstances that is related to the marriage, and

that the original order would have been different had the change of circumstances been known at the time it was made.

a. Child Support Orders

The *Divorce Act* provides that support may be sought for any or all “children of the marriage,” defined to include one or more children of the two parties to a divorce who is either under the age of majority, or 16 or older and unable to withdraw from the charge of one or both parents, or to meet his or her own needs, because of illness, disability or other cause. Child support is not generally terminated when a child reaches 16 or even 18, however; the stage at which it is terminated depends on the child’s own means of support and other circumstances. Attendance at a post-secondary educational institution will often justify the granting of support to a child past the age of majority, depending on the parents’ means and the likelihood that they would have supported such an endeavour if they had not separated.

In order to be entitled to child support, a child does not have to be the biological offspring of either or both parents. The Act provides in section 2(2) that the definition of “child of the marriage” includes a child for whom one or both of the parties stand in place of a parent. The test for determining whether someone does so includes such considerations as the degree to which that person has contributed to the child’s financial support; the intention of the person to perform the role of a parent to that child in an emotional, practical and legal sense; and the length of time the person has performed this role with respect to the child. In some cases (but not all), the relative obligations of a biological parent and a step-parent or “settled intention” parent are weighed with respect to the same child, and depending on all the factors, the support obligation of the natural parent may be held to be more important.

Until 1997, the factors to be considered by the court in making a child support order were set out in section 15(5) of the *Divorce Act* and the objectives for such an order were listed in section 15(8). Similar criteria were set out in section 17 to be considered in the context of an application to vary a child support order. The objectives, which included the recognition and apportionment of the joint financial obligation of the parties, reflected the ruling in the leading Ontario Court of Appeal case of *Paras v. Paras*, which established a formula for the calculation of child support based on the apportionment of the child’s costs between the parents, according to their ability to pay. In setting the quantum of support to be paid, the courts

attempted to ensure that all the reasonable costs of raising the child are borne proportionally by the parents, and the child's standard of living is affected as little as possible by the parents' separation and divorce.

One aspect of the calculation of quantum of child support was the establishment of the ability of the paying parent ("payor") to pay. This was a factual determination based on the financial information that this parent provides to the court; however, the court could impute income to a party who had artificially lowered his or her income, for example by quitting a job or refusing available overtime work. Another aspect of the calculation was the determination of the costs of raising each child. This was done on the basis of the custodial parent's evidence about the actual and projected costs associated with each child, such as day care expenses, food, clothing, shelter, extra-curricular activities such as lessons, medical or dental expenses, and even camps and sports equipment.

Bill C-41, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, was passed in the spring of 1997 and came into force on 1 May 1997. This bill removed the previous test for quantum of child support, as outlined above, which had been widely criticized as leading to inadequate, inconsistent and arbitrary awards. The principle behind the test, that of joint apportionment of child-rearing costs, remains in the Act, having been reinserted as section 26.1(2) by the Senate Social Affairs Committee during their study of the bill. Courts are, however, now required to award child support in accordance with tables set out in the Federal Child Support Guidelines, which are promulgated as Regulations made under section 26.1 of the Act, unless the spouses reside in a province whose guidelines have been designated as applicable.

The guidelines include not only the tables establishing the amounts of child support to be paid for each child (based on the income of the payor spouse), but also set out a series of provisions governing other aspects of the determination, such as the calculation of the payor's income, the circumstances where amounts may be varied up or down from the table amounts, and the test to be applied following a divorce in cases where parenting is shared (meaning the payor spouse has physical custody of the child at least 40% of the time).

Most provinces **and territories** – including Saskatchewan, Ontario, Prince Edward Island, Newfoundland, British Columbia, New Brunswick, Manitoba, **Nova Scotia**,

**the Northwest Territories and Yukon** – have adopted or slightly modified the Federal Child Support Guidelines for application in provincial family law matters. Quebec adopted its own guidelines in May 1997. Manitoba, Prince Edward Island and New Brunswick, as well as Quebec, have had their guidelines designated by the federal government so that they will apply in cases decided under the *Divorce Act* as well as those under provincial jurisdiction. Alberta has not yet adopted guidelines, having decided to consider its options after a period of monitoring the effects of the Federal Guidelines. Enabling legislation has been passed but it has not been proclaimed in force in **Alberta**. **The Alberta Justice Department provides information to the public about the federal Child Support Guidelines through public information offices located in the courthouses in Edmonton and Calgary.**

In most cases where a province has adopted guidelines that depart from the federal model, the changes are minor, and are intended to bring the guidelines into harmony with provincial legislation and procedures. For example, in Ontario the *Family Law Act* has been amended to adopt guidelines that use the term “parent” instead of “spouse,” because that Act applies to the children of unmarried and married parents. More significant innovations have been adopted in provinces such as Newfoundland, where both parents are required to file financial information, and Nova Scotia, where there is no reference to a provincial child support service, as none exists in that province. More extensive changes have been made in the provinces where designations have been received, including Manitoba, Prince Edward Island and New Brunswick.

#### b. Spousal Support Orders

One of the most complex and rapidly changing aspects of divorce law is the area of spousal support. The 1985 *Divorce Act* severed the relationship that had previously existed between the parties’ conduct and a spouse’s entitlement to support. Section 15.2(6) sets out the objectives of an order for spousal support: the order should recognize economic advantages or disadvantages; apportion economic consequences; relieve economic hardship; and promote self-sufficiency. These objectives have been the subject of much judicial consideration since the 1985 Act was passed.

Of several key developments in the evolution of the law of spousal support under the *Divorce Act*, one of the most important was the release of the Supreme Court of Canada’s

1987 trilogy of spousal support cases: *Pelech*, *Caron* and *Richardson*. These cases involved impecunious former wives who were seeking spousal support in spite of the existence of separation agreements barring or terminating their entitlements to support. The trilogy was widely regarded as having established both a “clean break” theory of spousal support and a causal connection test. The former emphasized the desirability of having spouses being able make a clean break from each other by settling their own affairs in a permanent way; the latter required that a causal connection between the spouse’s economic dependence and the marriage be shown in order to be successful in an application to overturn a separation agreement.

The application of the trilogy reasoning, particularly in originating spousal support applications, resulted in some very harsh decisions. The over-emphasis on the self-sufficiency component of the section 15.2(6) objectives for a spousal support order had been based on an unrealistic view of the position of women in Canadian society. The legislation was based on the premise that men and women should be equally able to provide for themselves financially, but the reality was (and is) that women’s wages were lower than men’s, and that women, by removing themselves from the work force to raise children, compounded their financial disadvantages.

The self-sufficiency test was gradually weakened by courts across Canada, and finally abolished by the Supreme Court of Canada in *Moge v. Moge*. The Court rejected the self-sufficiency model for spousal support, and developed a series of policy considerations, based on an equitable sharing of economic consequences, to be applied by the courts in future cases. The objectives set out in section 15.2(6) represent a legislative intention to recognize the economic value of the contributions made both by a wage-earning spouse and a spouse who assumes child-care and household management responsibilities. In the *Moge* decision, Madam Justice L’Heureux-Dubé cited statistics drawn from the Department of Justice *Evaluation of the Divorce Act: Phase II* to support her finding that the disproportionately high number of women in poverty in Canada is partially due to divorce and its economic effects.

Self-sufficiency is no longer the objective that is most often discussed by judges for spousal support awards, as it was before the *Moge* case. Since the *Moge* decision, Professor Carol Rogerson has noted that there has been more recognition of the concept of compensatory support, and spousal support has been revived as a serious legal obligation. Currently, time-limited spousal support is seldom awarded by the courts; particularly for medium- and long-term

marriages, support is almost always open-ended and reviewable. Given the range of considerations encompassed by the objectives set out in the Act, however, and the infinite numbers of factual scenarios presented by divorcing couples in Canada, it is not surprising that there is very little predictability and consistency in spousal support awards. One of the most difficult areas for a family lawyer is how to advise clients on what to offer or accept as an appropriate level of spousal support.

Late in 1999, in the *Bracklow* decision, the Supreme Court of Canada confirmed that *Moge* continues to be the governing authority in the area of spousal support. Courts must follow the method set out in *Moge*, considering the factors in section 15.2(4) against the objectives set out in section 15.2(6), and weighing the various considerations raised in a particular case in a manner that “equitably alleviates the adverse consequences of marriage breakdown.” The decision confirms the existence of three distinct conceptual grounds for spousal support: compensatory, contractual, and non-compensatory. Depending on the nature of the marital relationship of the parties, a spouse may be entitled to support on one or more of these bases. Once entitlement has been established, the quantum of spousal support is set on the basis of a discretionary weighing of a number of factors, such as the length of cohabitation, need, and ability to pay.

**Since the Supreme Court of Canada’s *Moge* and *Hickey* decisions in 1997, legal experts have observed that both the quantum and time limits of spousal support awards continue to be difficult to predict. These orders are made at the discretion of the judges, based on a variety of factors. The only general rule seems to be that any spouse who is unable to maintain their accustomed standard of living on marriage breakdown will be found to be entitled to spousal support in some quantum, for some length of time.<sup>(1)</sup>**

c. Custody and Access Orders

Custody of children is a broad concept encompassing the rights and obligations related to a child or the children of a marriage. In cases of divorce, custodial rights and obligations, which during the marriage have been equally vested in both parents, are usually divided; thus, one parent has custody, and provides the main residence for the child, while the

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(1) J.G. McLeod and A.A. Mamo, *Annual Review of Family Law 1999*, Carswell, Toronto, 1999, p. 201.



other parent is granted access, or visitation and information rights, to the child. This area of divorce law is perhaps the most difficult, given the emotional issues involved, and the seriousness of the consequences of a determination that may be seen as “taking the child away” from a parent who loses custody to a former spouse. On the other hand, litigation of custody and access issues is relatively rare. Most couples are able to decide for themselves how they will share their custodial obligations toward their children.

Where the parents are not able to settle the custody and access issues themselves, the determination will be made by the court. The *Divorce Act*, section 16(8) requires the court to take into account the best interests of the child of the marriage. The “best interests” test is the one that generally applies to these determinations across Canada, whether under provincial family law legislation or the *Divorce Act*. The test has been criticized as being too ambiguous, but it is also defended on the basis that it provides the only criteria flexible enough to enable the courts to reach the right result for each child’s particular circumstances.

The best interests 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 that the child’s living arrangements are disrupted as little as possible, is often a factor with 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; this has been seen as an effective method of incorporating and giving formal support for some 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 the arrangement that will be in a child’s best interests, the “primary caregiver or caretaker” rule, has been relied upon by many judges and by lawyers assisting their clients in custody negotiations. The primary caregiver 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. In many families, one parent (generally the mother) has provided most of the child care throughout the lives of the children. Clearly there is a basis for maintaining that parent’s role of primary caregiver in order

to limit the upheaval experienced by the children, particularly young children, after their parents' separation.

Section 16(9) of the *Divorce Act* specifically precludes the consideration of the past conduct of a parent in making a custody or access order, unless that conduct is relevant 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. Its impact has become more controversial, however, now that many divorces proceed on a no-fault basis; it has had the effect of excluding certain types of information about the family's history from being considered in the custody and access context. For example, it was often claimed that one spouse's violence against the other did not indicate anything inappropriate or negative about the former's parenting, and that only violence directed toward the child was relevant. It is being argued (and demonstrated) more and more, however, that any family violence or other form of abuse witnessed by a child does have an impact on his or her well-being, and should be considered relevant to parenting abilities.

Although they are commonly used, the terms custody and access are frequently misunderstood. Custody of a child includes the 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 to the child, which comprises both visitation privileges and a right to certain information about the decisions being made by the custodial parent. Custodial and access rights and obligations 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 by both parents.

Rarely are joint custody orders imposed by the courts 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 all of the parenting issues that arise in relation to the child over time.

They need to be able to communicate frequently and share authority to decide schooling, religious, medical and other 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; in a number of cases a joint custodial parent has been denied approval for a move outside the jurisdiction in which both parents were residing after separation or divorce.

Joint custody does not always mean that the child spends an equal amount of time with each parent, although this is often the objective that motivates a parent who seeks joint custody. When a court orders joint custody, the parents will have equal decision-making authority with respect to the child, and the details of where the child will reside are also spelled out. These, however, 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 can be disruptive to be moving back and forth between parents on a regular basis. Parents can make these moves easier by providing homes in the same neighbourhood, so that children will at all times be close to friends and school.

Whenever one parent is awarded custody of a child, the other will generally be awarded access to the child. 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. However, this type of order is more difficult to enforce should a dispute arise between the parents, so that a specific access schedule is necessary where cooperation is not maintained. Even where a specific schedule has been set out in a court order, as children get older parents may have to be more flexible to accommodate children's wishes and extra-curricular activities. Restrictions on access, such as one preventing a parent from removing the child from the jurisdiction, or one requiring that access privileges be exercised under the supervision of a third party or 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.* These decisions dealt with the rights of access parents, in these cases both fathers, to involve their children in religious activities and discussions. Although the results in the two cases differed, many common threads ran through the decisions. Access determinations are made on the basis of the best interests test, which the judges all agreed is fact-based and child-focused. 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 suggested by the *Divorce Act* "friendly parent" rule. Maintaining close ties with both parents is taken to be a very important means of reducing the negative impact of divorce on children, and access is rarely denied altogether. The social science literature has shown that continued contact with both parents, in which the child feels no friction or conflict, can enable the child to recover more quickly from the parents' divorce and to avoid negative repercussions for his or her own development.

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. 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 the type of situation where there is a close family member who has played a particularly important role in a child's life, such as a grandparent, whose regular and close contact with a child might be interrupted to the child's detriment by the parents' divorce.

## 2. Enforcement of Support, Custody and Access Orders

Although 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 an important component of the system whereby support and custody orders are enforced. Traditionally the enforcement of a support obligation, like any other obligation in a civil court order, fell to the individual support creditor. Creditors could enforce family law orders and agreements in a number of ways, such as summoning the payor 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.

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. Unacceptably high levels of non-compliance with support orders and agreements had been demonstrated for many years, with terrible 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.

Under the provincial enforcement schemes, court orders were automatically filed with a central agency, which would receive support payments and forward them to support creditors. The systems varied widely from province to province and levels of effectiveness have not been clearly documented. Ontario, which had been one of the most aggressive provinces in support enforcement, is currently reducing the administrative support for its enforcement legislation and has closed all its Family Support Plan offices except in Toronto. Support recipients have expressed their concern that less effective enforcement is the result; serious delays in the forwarding of support payments to them have already been reported, bringing the effectiveness of Ontario's enforcement system into question.

Federal enforcement legislation has been designed to support and facilitate the efforts of the new provincial enforcement agencies. The *Family Orders and Agreements Enforcement Assistance Act* (R.S.C. 1985 (2nd Suppl.) c. 4) gives provincial enforcement agencies access to federal information sources, including Revenue Canada data banks, to help locate spouses in breach of support, custody or access orders or agreements. It also allows the garnishment of "garnishable moneys," which since 1988 have been defined in the Regulations under the Act as including income tax refunds, unemployment insurance benefits, old age security payments and training allowances, GST credits and Canada Pension Plan payments, in order to satisfy support orders or agreements that are in default. A new Licence Denial Scheme was added by Bill C-41, permitting the denial of certain federal licence applications in cases of persistent support default. The definition of "licence" would include a passport, as well as a

number of professional licences listed in a schedule to the bill, such as shipping, pilot and air traffic controller certificates and licences.

The *Garnishment, Attachment and Pension Diversion Act* (R.S.C. 1985, c. G-2) permits the garnishment of federal employees' salaries and federal pension benefits to satisfy support obligations.

## PARLIAMENTARY ACTION

Since 1968, Parliament has considered a number of proposed amendments to the *Divorce Act*, aside from the two versions of the Act passed in 1968 and 1985 and various amendments made from time to time. According to Professor Julien Payne, to whom the drafting of the 1985 Act is commonly attributed, the primary objectives of a sound divorce law are:

- (i) to facilitate the legal termination of marriages that have irretrievably broken down with a minimum of hurt, humiliation and hardship;
- (ii) to promote an equitable disposition of the economic consequences of the marriage breakdown; and
- (iii) to ensure that reasonable arrangements are made for the upbringing of the children of divorcing parents.

In recent years, both legislators and policy-makers across Canada have paid significant attention to the financial repercussions of divorce and separation on children. The Federal/Provincial/Territorial Family Law Committee has done a great deal of work on the question of how to improve the financial lot of these children. Responses to this work have included the provinces' efforts in creating new and expensive enforcement mechanisms, and the adoption of child support guidelines. Other observers have focused on the tax treatment of child support as a potential area for reform, resulting in a reversal of the inclusion/deduction system of taxing child support payments as of 1 May 1997. For some years, advocacy had taken place on behalf of support recipients who objected to the tax treatment of child support payments on the basis that it unfairly reduced the amount of money custodial parents had available to spend on their children. Members of Parliament such as Dawn Black and Beryl Gaffney made a series of

motions in the House of Commons on the issue, culminating in the passage on 30 May 1994 of Ms. Gaffney's motion for the elimination of the requirement that child support be included in the income of the recipient for tax purposes. Several provisions of the *Income Tax Act* that required that such payments be included in the recipient's income were tested and upheld by the Supreme Court of Canada in the 1995 decision in *Thibaudeau v. R.* These provisions were repealed, however, by amendments to the *Income Tax Act* that took effect on 1 May 1997. Child support payments under separation agreements or court orders made or varied on or after that date are "tax neutral"; the recipient does not report moneys received as income, and the payor does not get a tax deduction.

Attention has also been focused on custody and access issues, which became the most visible controversy arising from the study of Bill C-41 by Committees of the House of Commons and the Senate. In March 1993, the federal Department of Justice released a Discussion Paper on these, calling for comments in a number of areas for potential reform. In 1994 and 1995, the House of Commons Standing Committee on Justice and Legal Affairs considered and heard evidence about a Private Member's bill (C-232) introduced by Reform M.P. Daphne Jennings on the issue of grandparents' standing to make applications for custody and access under the Act. The bill was twice rejected by the Committee, but drew a great deal of interest from both parliamentarians and advocates for grandparents' rights. Following the Senate Social Affairs Committee's study of Bill C-41, the Minister of Justice and the Leader of the Government in the Senate agreed to the formation of a joint parliamentary committee to deal with the issues of custody of and access to children.

In November 1997, the Senate Standing Committee on Social Affairs, Science and Technology received an Order of Reference from the Senate to undertake a study monitoring the implementation and application of Bill C-41 and the Federal Child Support Guidelines. That Committee issued an interim report in June 1998, making a series of recommendations dealing with consultation and modification of the guidelines, "special or extraordinary expenses" (known as "add-ons"), support for adult children in post-secondary education, shared parenting, undue hardship, enforcement, and the access expenses of parents living at a distance from their children.

The Special Joint Committee on Child Custody and Access was formed in November 1997, and commenced hearings early in 1998 in its study of parenting arrangements after divorce. The Committee's Terms of Reference comprise the following objectives:

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.

The Special Joint Committee's report, *For the Sake of the Children*, was tabled in December 1998. The Report, which reflected a one-year series of 39 public meetings spread over all the provinces, contained 48 recommendations covering many aspects of the contentious area of custody and access law and practice. Having heard from more than 500 witnesses, members of the Committee were convinced that the problems they had raised called for legal and other changes.

The Committee's recommendations addressed legal issues at the international, federal and provincial levels, as well as other questions, such as funding, social policy and education. With respect to the *Divorce Act*, the Committee recommended that the terminology of "custody" and "access" be replaced with a new concept of "shared parenting." This concept, the Report makes clear, was not intended to create a presumption in favour of joint custody, but rather to enhance the roles of both parents in their children's lives, regardless of the residential arrangements that might be made. The Committee also recommended that decisions about post-separation parenting arrangements should be made on the basis of the "best interests of the child," and that the *Divorce Act* should be amended to include a list of statutory criteria to be used in determining a particular child's best interests.

Through this Report, the Committee also informed the government of concerns about the Child Support Guidelines that had been raised in the course of their hearings. Although the Committee had not been charged with the study of these questions, nor had it actively solicited submissions on them, members concluded that the messages of so many witnesses should be brought to the Minister's attention.



The government's response to *For the Sake of the Children*, entitled *Strategy for Reform*, was released in May 1999. That document referred to the statutory obligation of the Department of Justice to provide Parliament by 1 May 2002 with the results of a comprehensive review of the provisions and operations of the Child Support Guidelines and the determination of child support. The Department's strategy is to incorporate the development of reforms to custody and access issues into that review process. Further research is also to be carried out jointly with the provinces and will include public consultations on specific reform proposals in 2001.

Given the contentious and polarized nature of custody and access, it is not surprising that reaction to the government's *Strategy for Reform* has been mixed. Those groups who advocated joint custody have applauded the document's endorsement of the principle that both parents should have equal statutory responsibilities for guiding, nurturing and financially supporting each of their children. Others have emphasized that both the Committee and the Justice Department refused to endorse any presumption in favour of a particular type of custodial arrangement. Many commentators have objected to the length of time for consultations that the government paper suggests will be necessary before any legislative reform can take place.

#### A. Recent Legislative Developments

The government's most recent proposals to amend the *Divorce Act* were those announced in the March 1996 federal budget. They resulted in the 1997 amendments to the *Divorce Act* as well as the *Income Tax Act* and several pieces of federal enforcement legislation, as discussed below.

Bill C-41, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, received First Reading on 30 May 1996. It received Royal Assent 19 February 1997, and came into force 1 May 1997. The bill implemented part of the new child support package announced in the March 1996 federal budget. It made a number of changes to federal legislation dealing with child support and related issues, including the *Divorce Act*, in order to improve the adequacy and enforceability of child support payments under federal law. The other two of the four prongs of the new strategy were carried out through budget

implementation legislation amending the *Income Tax Act*, and also in force since 1 May 1997. These latter amendments accomplished both the reversal of the current tax treatment of child support payments and the doubling of the maximum level of the Working Income Supplement of the Child Tax Benefit.

With the passage of Bill C-41, the *Divorce Act* was amended to establish a framework for using guidelines in the determination of quantum of child support. The guidelines, which will replace judicial discretion, have been established through the regulatory process. The second component of the March 1996 child support package, a variety of enforcement measures, was also accomplished through this bill. Amendments were made to the *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA) to add Revenue Canada (now Canada Customs and Revenue Agency) to the list of federal departments whose data banks can be searched in order to locate those defaulting on child or spousal support, and to establish a new federal scheme whereby licences would be denied to those who persistently breached their child support obligations. In order to satisfy support arrears, the bill also expanded access to federal public service employee pension benefits and the wages of persons working at sea.

The objective underlying the adoption of child support guidelines is to achieve fairer and more consistent levels of child support. This mechanism has been implemented across the United States, with mixed results so far. It is also hoped that the removal of child support negotiations at the time of separation will make divorce less traumatic for families and reduce legal costs, both for individuals and for the state, through savings in legal aid and court administration costs. In Canada, since the March 1996 budget announcements, lawyers, advocates for support recipients and payers of support have expressed varying views about the model that has now been adopted here. Family lawyers differ on the appropriateness of the amounts set out in the guidelines, with most concluding that their application will produce unfair results at the low and high income extremes. Over the past decade or so, the education of the judiciary about the costs of raising children had begun a trend toward increasing awards in many cases; some fear that, by eliminating judicial discretion, this benefit may be lost.

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 from a number of witnesses who expressed dissatisfaction with the government's order of priorities. They felt that child support should not have been dealt with before an attempt had been made to consider legislative reforms in the important areas of access

to and custody of children. Members of the Senate Committee, in particular, were unhappy with the speed with which the bill was being studied and passed, and felt that they had not had an adequate opportunity to examine the custody and access issues raised by witnesses. 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 words “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.

The Senate Committee members sought an ongoing examination of the issues they saw as having been overlooked in the development of Bill C-41, and wanted a governmental commitment to a continued consideration of the issues that had been raised by the witnesses. One component of the arrangement that led to the passage of the bill by the Senate Committee was the agreement between the Minister of Justice and the Leader of the Government in the Senate for the formation of a joint parliamentary committee to deal with the issues of access to and custody of children. 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 the development of legislation. In response to this concern, it was agreed that the Senate Committee would have an ongoing role in scrutiny of the Guidelines in the future. Both of these Committees are discussed above in the section entitled “Parliamentary Action.”

#### B. Other Potential Areas for Reform

A number of aspects of divorce law have attracted the attention of commentators and family law practitioners as needing improvement. For example, across North America there has been vigorous debate for the past decade or more about the desirability of legislating a presumption that joint custody would be in children’s best interests, or a requirement that all divorcing couples attend at least one meeting with a mediator before being allowed to litigate their dispute. Both of these options have been exercised in a number of U.S. jurisdictions, but continue to attract serious criticism. Mandatory mediation is now in place for all family law matters in Quebec. Other issues have come before Canadian courts that extend the application of existing family law legislation, and raise the question of whether they should be specifically provided for in divorce law or provincial family law legislation. Examples include same-sex support and custody/access rights and obligations, the mobility rights of divorced or separated

spouses, how to prevent or respond more effectively to child abduction, and the relative financial obligations of spouses and the state in cases of illness or disability.

Two U.S. innovations that have been implemented to varying degrees in Canada are designed to improve the ability of the family law process to serve the needs of children whose parents divorce. The first, divorce education, seeks to inform parents about the effects of divorce on children, and provide parents with tools whereby they protect their children from these effects. Divorce education programs are affiliated with the courts in a number of U.S. states and more than one Canadian province, where they form a mandatory part of the divorce process. Their content and form vary widely, and their success has been mixed, but research shows that they can help parents in the post-separation period avoid some of the most harmful behaviours. Another mechanism is the parenting plan, developed by the parents through negotiation or mediation, which is now a necessary component of the resolution of cases in some jurisdictions.

A number of these possibilities, including mediation, divorce education, and parenting plans, were studied by the Special Joint Committee on Child Custody and Access, and are canvassed in its report. Some developments on issues such as mobility rights of divorcing parents and child abduction are also mentioned in this report. **Since 1997, the \$63.6 million Child Support Implementation and Enforcement Fund has enabled the provinces and territories to test and implement a variety of measures designed to improve the effectiveness of the family law system, including information programs, parenting education, new court rules and mediation.**

**In Alberta, one of the first Canadian jurisdictions to implement parenting education, a Parenting After Separation Program is delivered in all judicial districts. The objective of the program is to provide information about children's reactions to their parents' separation; the legal, emotional and financial implications of separation; and the use of mediation to resolve disputes. The program also covers options for custody and access, the development of parenting plans, and methods of improving parent-child relationships after separation.**

## CHRONOLOGY

- 1968 - First federal *Divorce Act* passed, introducing the concept of permanent breakdown of marriage as a ground for divorce.

- 1976 - Law Reform Commission Report on Family Law recommended that marriage breakdown be made the sole ground for divorce.
- 1985 - *Divorce Act, 1985* passed, reducing the required period of separation to one year to meet the “marriage breakdown” ground for divorce.
- 1990 - Justice Department published *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation*, concluding that the no-fault ground for divorce introduced in 1985 has contributed to reducing the adversarial nature of divorce proceedings.
- 1993 - *Custody and Access: Public Discussion Paper* released by the Department of Justice.
- 1994 - The Supreme Court of Canada handed down the *Young v. Young* decision on the rights of access parents.
- 1994 - Liberal M.P. Beryl Gaffney’s Private Member’s motion supporting the elimination of the requirement that child support be included in the recipient’s income was passed by the House of Commons.
- 1995 - Federal/Provincial/Territorial Family Law Committee’s Report and Recommendations on Child Support released; child support guidelines were recommended.
- 1995 - Bill C-232, a Private Member’s bill introduced by Reform M.P. Daphne Jennings, which would have amended the *Divorce Act* to facilitate custody and access applications by grandparents, was studied and defeated by the House of Commons Standing Committee on Justice and Legal Affairs.
- 1996 - Federal budget announcement of new Child Support Package, including Federal Child Support Guidelines, elimination of the inclusion/deduction mechanism for child support, new enforcement measures and enhancement of the Working Income Supplement of the Child Tax Benefit.
- 1997 - Bill C-41, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act, received Royal Assent on 19 February 1997, and came into force on 1 May 1997.
- 1998 - *For the Sake of the Children*, the Report of the Special Joint Committee on Child Custody and Access, was tabled in December.
- 1999 - *Strategy for Reform*, the government response to the Report of the Special Joint Committee on Child Custody and Access, was released in May.

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