LAW & JUSTICE

AN ENTERTAINING AND EDUCATIONAL DIGEST OF LEGAL SOLUTIONS

Medical complaints and medical negligence

By Gerald B. Heinrichs,
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From time to time, people are unhappy with their doctor's care or conduct. A person may dislike the doctor's bedside manner or disagree with his or her diagnosis and treatment. What should you do if your concern about your physician is more than trifling? Should you file a formal complaint or are there grounds for a lawsuit? The answer to that question depends upon whether the nature of your complaint is ethical or professional.

The Canadian Medical Association publishes a Code of Ethics for physicians. This Code sets standards on how doctors must deliver professional care to their patients. Among other things, the code lists responsibilities of physicians including the following:

- Consider first the well-being of the patient.
- Treat all patients with respect, do not exploit them for personal advantage.
- Provide for appropriate care for your patient, including physical comfort and spiritual and psychosocial support, even when cure is no longer possible.
- Practice the art and science of medicine competently and without impairment.
- Engage in lifelong learning to maintain and improve your professional knowledge, skills and attitudes.
- Recognize your limitations and the competence of others and when indicated, recommend that additional opinions and services be sought.

In each province, physicians are regulated through licensing bodies. In most provinces that body is called the College of Physicians and Surgeons. Consequently, if you believe that a doctor has breached the Code of Ethics, a complaint can be made to this professional body. Many jurisdictions require complaints in writing so a mere phone call will not get results.

Each province has legislation that outlines the procedure for handling ethical complaints; typically, a College member would investigate the complaint and then make a recommendation on whether formal disciplinary proceedings were warranted. The investigator may also conclude that the complaint is without foundation. In 1995, no fewer than 2,420 complaints were made to the College of Physicians and Surgeons in Ontario. Only 67 of those complaints were referred to disciplinary proceedings.

Sometimes a patient's complaint about a physician involves more than an ethical breach. What if an operation had terrible consequences? What if a serious medical ailment was not detected or was misdiagnosed? In those types of cases the patient's health may be damaged. Can the doctor be held responsible?

The courts require doctors to deliver reasonably competent care. The Supreme Court of Canada described the legal duty as follows:

Every medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. He is bound to exercise that degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing, and if he holds himself out as a specialist, a higher degree of skill is required of him than of one who does not profess to be so qualified by special training and ability.

Physicians have a lot of training and people rely on their skills. If a doctor provides medical services that are below the reasonable standard and someone's health is harmed, then that doctor is negligent.

Physicians may also be negligent if they do not fully advise their patients of the risks of a particular medical procedure. Courts have ruled as follows:

Canadian doctors are obligated to disclose to their patients the nature of a proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation.

Consequently, if a risk is not disclosed to a patient and that risk materializes after the operation, a doctor may be negligent. In such a case the patient must also prove that he would have declined the medical procedure if he knew all the risks beforehand.

In either instance of negligence, if a doctor's improper care damages the health of a patient, the courts may order the physician to pay compensation for the loss. That compensation may include money damages for "pain and suffering", lost wages, out of pocket expenses, potential future losses and court costs.

If you have a serious grievance with your doctor, the professional college and the courts are available to remedy the circumstance. Fortunately, most grievances with physicians are of a minor nature. If a talk with your physician does not cure the problem, you are always free to change doctors.

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REGINA LEADER POST MARCH 16, 2000

Getting Back – Lawsuits for Sexual Assault

by Gerald Heinrichs

Sexual abuse is alarmingly common, yet hidden. The U.S. Bureau of Justice reports that two out of 1,000 people in the United States will be victims of sexual assault in any given year. Further, it suggests that only 32% of all sexual assaults are reported to police.

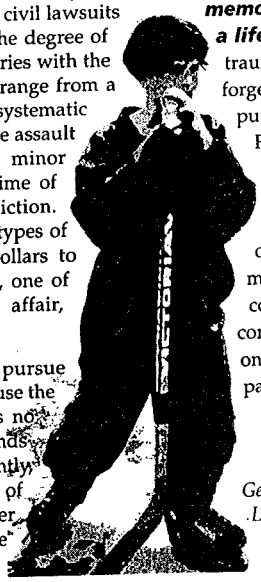
In recent years, there has been a growing awareness of child sexual abuse in Canada. Almost every month the public hears new cases of adults retelling incidents of abuse from their childhood. Often these events were concealed or latent for years as was the case with the recent conviction in Calgary of hockey coach Graham James. Perhaps because of a new era of openness towards sex and abuse, these stories have been brought to the public courts. More often, however, victims do not have the courage or stamina to pursue their assailant in the courts because these types of lawsuits can take years to resolve.

The allegations from the Mount Cashel Orphanage in Newfoundland are perhaps the most notorious in Canada. In that case, 45 men recalled years of terrible abuse suffered during the 1970s at the hands of members of the Christian Brothers Order. Nine church members were sentenced to jail terms following criminal proceedings. Aside from the criminal investigation, however, civil lawsuits were also brought against the Christian Brothers Order. The victims sought monetary compensation for the abuse.

This Newfoundland case is only one in a long line of civil lawsuits for sexual abuse that are before the courts across Canada. Dozens of lawsuits are commenced each year. There are now precedents for suing parents, step-parents, foster-parents, guardians, and provincial guardians. In fact, the lawsuits are so numerous that some lawyers call this a growth area of litigation. Most of the cases contain graphic and disturbing tales of violence and abuse of trust.

Although some child abuse victims may sue the offender for moral reasons, civil lawsuits deal primarily with money. The degree of monetary compensation in lawsuits varies with the degree of assault. Sexual assault can range from a single inappropriate touch to years of systematic rape. At the same time, the effect of the assault on the victim can range from minor embarrassment to disease and a lifetime of depression and drug addiction. Consequently, compensation in these types of cases ranges from a few hundred dollars to hundreds of thousands. Shane Earle, one of the victims of the Mount Cashel affair, obtained a court award of $400,000.00.

Many victims of abuse do not pursue compensation through the courts because the offender is poor. If the assailant has no money it is senseless to spend thousands of dollars on a lawsuit. Consequently, lawyers look for defendants with lots of money or "deep pockets." Former residents of a Nova Scotia girls' home recently won a large award against the government in that province. In that case, senior government officials failed to take any action when they knew an employee was molesting young girls in the 1970s. The officials were just as blameworthy as the sex offender. Undoubtedly, the offender was penniless but the government had resources to pay and that was one reason why the government was sued.



Victims of sexual abuse often state that memories of the abuse haunt them for a lifetime. Different people adapt to the trauma in different ways. Some try to forget. For others, though, there is a need to put things right — a need for a resolution. For those people, a civil lawsuit may be a solution. In these types of court cases the victim is able to tell his or her story and judgement is passed on the offender. In addition, however, a monetary amount is assessed as compensation. Money may not be complete compensation, but it may be the only substantive way to reimburse the pain and loss that a victim suffers.

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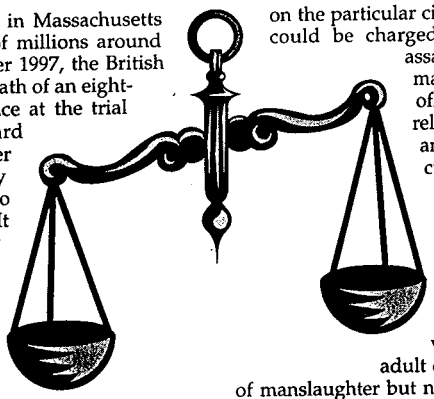
Shaken-Baby Syndrome and the Criminal Law

by Gerald Heinrichs

Louise Woodward's trial in Massachusetts grabbed the attention of millions around the world. In November 1997, the British *au pair* was convicted in the death of an eight-month-old child. The evidence at the trial revealed how Ms. Woodward shook the baby to death. Never before had shaken-baby syndrome (SBS) received so many newspaper headlines. It brought a great deal of new attention to a very old problem.



As many people may know, SBS involves a person aggressively shaking, dropping, or hitting an infant often in response to the child's crying. It is commonly the result of anger or frustration in a care-giver. It can cause brain damage or blindness in the child. In the Woodward case and many others, it results in the infant's death.

In the not-so-distant past, SBS was known as Whiplash Shaken Infant Syndrome. Regardless of its name though, the medical community has identified a number of common symptoms in children related to SBS. These injuries include swelling of the brain, internal bleeding in the head and internal bleeding of the eyes (retinal hemorrhages). The majority of SBS cases involve children under six months of age. Many medical professionals claim that it is almost physically impossible for an adult to cause severe injury by shaking only; some form of external striking or impact is necessary to cause the greatest SBS injuries.

In Canada there is no special mention of SBS in the *Criminal Code*. The Code lists a series of crimes entitled "Offenses Against the Person." Depending on the particular circumstances, an SBS offender could be charged with common assault, or assault causing bodily harm, or manslaughter, or murder. The offenses grow more serious in relation to the degree of violence and harm in any particular circumstance.

When an incident of SBS results in death, it is rare that the aggressor intended to kill the child. More often it is a case of the adult recklessly but intentionally causing harm. If the violence results in death, the adult could be convicted in Canada of manslaughter but not murder unless there was a proven intent to kill. Some U.S. states, though, do not draw such distinctions in their law. In the state of Iowa the criminal definition of murder includes "child endangerment" which is far broader than Canada's definition which requires an intent to kill. As a result of the definition of murder in Iowa, perpetrators of two separate SBS incidents were sentenced to 50 years in jail for murder in 1997.

Under the *Criminal Code*, violence against an infant or an adult is an offense regardless of labels like SBS. SBS is not a special or new form of criminal activity. If one person willfully injures another there is little need for distinctions or labels. From a social point of view, however, perhaps that is the right attitude. Some parents would say that SBS is part of the larger social evil of violence against children. Beyond that, it may also be a symptom of many homes that are unprepared for the anxiety and tribulations of family life.

Criminal laws are society's recipe for treating offenders after the crime. Consequently, they offer very little help in explaining why crimes happen or how to prevent them in the future. The courts will sentence SBS offenders but it will be social and health workers who try to educate and prevent the violence from occurring.

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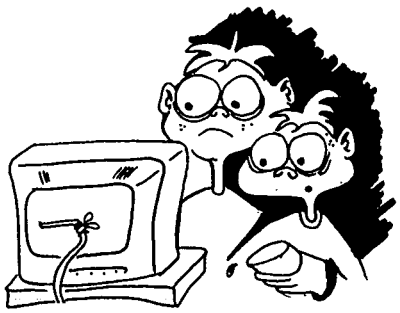
Are there any Rules on Television Violence?

By Gerald Heinrichs



Decades ago, North American society decided it was wrong for television programs to show sex or swearing. At the same time though, we decided it was inoffensive to show fist fights, stabbings, bombings, and wild brandishing of guns. This strange acceptance of violence has met with a lot of scrutiny in the last 15 years.

It is difficult to proclaim that all violent programming is undesirable for television. Shakespeare plays, war documentaries, and Agatha Christie dramas all contain elements of violence. Perhaps equally important though, most adults do not want their television viewing censored even if their favourite program has little objective quality. Adults want the freedom to choose their entertainment. This demand for freedom of choice however, clashes with a parent's desire to censor television viewing in the home. A significant amount of psychological research concludes that exposure to depictions of violence can lead to aggressive behaviour and an acceptance of violent conduct. Consequently, parents are concerned about violent TV's effect on their children.

Most people now agree that graphic and gratuitous violence must be handled carefully on public media like television. As a sign of this change, in 1987 the Canadian Association of Broadcasters developed its first code regarding TV violence. Broadcasters concluded that ignoring violence in all circumstances was not responsible. The programming code includes the following rules:

> • Canadian broadcasters shall not air programming which contains gratuitous violence in any form [or] sanctions, promotes or glamourizes violence.
>
> • The portrayal of violence within drama programming shall be relevant to the development of character, or to the advancement of the theme or plot.
>
> • The depiction of violence within children's programming shall not be so realistic as to threaten young children, to invite imitation, or to trivialize the effects of violent acts.

Thus for the first time, the television industry in Canada drew formal limits on television violence. The code has been revised since 1987 and today Canada's programming code is a model for the world.

Parents now have a right to demand that broadcasters do not violate the code with their news, entertainment, or commercials. Each year over 200 complaints are filed with the Canadian Broadcast Standards Council. This body investigates violations. The children's program *Mighty Morphin Power Rangers* was the subject of an investigation in 1994. The Council found that the program violated many elements of the broadcast code. In their ruling they stated, "the Council viewed the violent element as the essential and dominant message of each episode . . . none of the episodes so much as offered an alternative to the conflict resolution central to each plot other than the application of one fighting technique or another."

The latest chapter in the battle against television violence began with CRTC hearings in 1996. Both our country and the U.S. (under The Children's Media Protection Act) want to implement a rating system for all television programs. This system will allow parents to electronically delete violence or other offensive television content using a V-chip. The rating code was completed in May 1997. The V-chip will soon be the parent's ally for blocking out television signals which contain undesirable violence levels. Parents can then supervise a child's TV viewing even when the parent is not home. This technology may be available to parents across Canada as early as September 1997.

In the last 15 years, there has been a taming of television violence in Canada. A code on television violence has been adopted by most broadcasters and the V-chip will give parents more control over what their children see. These changes were possible because families got angry at broadcasters who once thought TV violence was harmless.

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Grandparent access

by Gerald Heinrichs

Society has many different family arrangements. Consequently, grandparents can play many different roles. In some families, grandparents are the primary caregivers for grandchildren; in other families, the grandparents are prominent visitors.

To most grandparents, there is nothing more pleasant than sharing time with grandchildren, but visitation is not necessarily guaranteed by law. What can a grandparent do when visitation or access to a grandchild is frustrated or terminated? Consider the following scenarios:

(A son and his wife become angry with the grandparents and cut off all contact between the grandparents and grandchildren.

(A daughter is killed in a car accident. Her boyfriend obtains custody of her surviving children and moves to a new city, far away from the grandparents.

(A son divorces his wife. The son gets a court order for specified access to the children but there is no additional access time for the grandparents.

(A girl is raised by her grandparents for 5 years. Her mother reclaims custody and is only willing to give the grandparents access at Christmas and Easter.

In each of these cases a grandparent may want more access to the grandchildren; but at the same time, may feel powerless to secure better arrangements. Can a grandparent go to court to get more, or better, access?

The plight of some grandparents has attracted the attention of politicians. Grandparent access rights have been debated both in the Alberta Legislature and the federal Parliament.

On October 1, 1997, the Alberta Provincial Court Act was amended. The amendments give courts the power to award access to grandparents. The relevant sections state as follows:

"If a grandparent at any time is refused access to a child, the Court may on application make an order as it sees fit regarding the grandparent's right of access to the child.

In making an order under this section, the Court shall take into consideration only the best interests of the child as determined by reference to the needs and other circumstances of the child including

(a) the nature and extent of the child's past association with the grandparent,

and

(b) the child's views and wishes, if they can be reasonably ascertained."

This new legislation allows the courts to assist grandparents who face problems like those described in the scenarios presented earlier. Now the courts may order a custodian to give the grandparent access at specific times. To a certain extent, courts have always had the power to award access to grandparents in divorce proceedings. Section 16 of the Divorce Act of Canada states:

"A court . . . may, on application by either or both spouses or by any other person, make an order respecting the ... access to, any or all children of the marriage." (emphasis added)

In March, 1997, a Reform Party Member of Parliament introduced a private member's bill. The bill's objective was to substantially increase the access rights of grandparents in divorce proceedings. The bill only reached second reading when Parliament was dissolved for the June 1997 election. Consequently, the federal laws have not been changed.

There is however, a trend in Canadian law to strengthen the right to access by grandparents. One must remember though, that each claim stands or falls on its own particular facts. Clearly, a grandparent who has a close and long-term relationship with a grandchild cannot, in law, be easily deprived of access. Moreover, some psychologists may assert that strong bonds with grandparents are of fundamental benefit to children in almost all cases. If this opinion was accepted by the courts, it could give grandparents an almost absolute right to access to grandchildren.

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Read All About It

by Annette Saks

Back by popular demand is the wonderful, gentle story, ***Brenda and Edward,*** by Maryann Kovalski (Kids Can Press, 1997). Now in its seventh printing with 50,000 copies printed to date, the tale of two dogs' adventures in New York City has a new look.

Brenda and Edward is the story of two happy dogs who live in a cozy cardboard box behind a French restaurant. One day, Edward, a night watchdog at a garage across town, forgets to take his dinner to work. When Brenda tries to go after him, she gets lost in the busy city streets. Edward returns home to find Brenda gone and is heartbroken. After many years of searching for her, Edward comes upon a car with a familiar scent, one that could only belong to one dog — Brenda. Edward jumps into the car and refuses to leave. After a long drive in the country, he finds Brenda waiting for him on the porch of the house.

This "happy-ever-after" book will lift parents' spirits as they read it to their children, who in turn will love Kovalski's beautiful illustrations of New York in the 1940s. And who wouldn't love the happiest of all endings — Brenda and Edward's reunion.

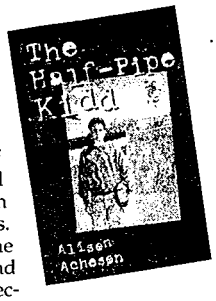
Spider Dan, by Norman Foote (Whitecap Books, 1997), is a great book to teach the importance of equality and friendship. Children's entertainer, Norman Foote, tells the tale in rhyming verse, of a sensitive spider that has a hard time catching dinner in his sticky web.

Spider Dan is told by his mother that he must catch bugs to survive, but the thought of doing that makes him sick. When he meets beautiful Beatrice Butterfly, sickly Marv Mosquito and Henry Cockroach, who has 32 kids and a wife, Dan just can't have them as his meal. Dan's kindness is soon repaid, when a giant frog gobbles him up. After some cajoling, he lets Dan go. With an encouraging "We could be friends, it's not too late. Let's go get something good to eat," Spider Dan and the frog decide to dine on melon rinds and breadcrumbs.

The bold, bright illustrations by Charlie Mitchell will capture the young child's imagination, especially in seeing the human clothes and accessories that the characters get to wear.

The Half-Pipe Kidd, by Alison Acheson (Coteau Books, 1997), is the perfect novel for teenage boys interested in freestyle biking and reading about the difficulties friends have in staying friends, yet keeping their own individuality.

Ogilvie Kidd rides freestyle bike on his backyard half-pipe (a wooden platform with ramps, constructed with plywood on two-by-fours) with his best friends. Roland is a straight-A genius and Couch (Chester) loves sports, but is failing English. Everything is fine until "Og" enters a poetry contest on a dare and wins. Roland is thrilled for Og, Couch hates poetry ("poetry is boring stuff written by dead guys, isn't it?") and Og gets all sorts of attention from adults and teens when the poem is printed in the local newspaper. Life gets more complicated when a well-known freestyle biker plans to visit their town. Og is afraid to meet him for fear he'll find out that Og is a biker and a poet, two interests that don't seem to go together.



Teens will enjoy the author's knowledge of biking and the lingo, and will relate to the anticipation of meeting someone famous. This novel captures the essence of being a teen and trying to deal with the expectations that friends place on one another.

Annette Saks is a freelance journalist who has had bylines in various newspapers and magazines. Her love of books and children (she has three) has led her to run a library program for a Calgary private school, which she really enjoys.

A Family's Freedom to Worship

by Gerald Heinrichs

Next year, many religious and human rights groups will mark the 50th anniversary of the *Universal Declaration of Human Rights.* This Declaration by the United Nations on December 12, 1948 was largely prompted by the horror of the Second World War. The Declaration addresses many human rights but within it, article 18 provides for freedom of religion. It states:

> "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship and observance."

The freedom to worship is also recognized in Canada's *Charter of Rights and Freedoms* . Section 2 of the Charter declares "freedom of conscience and religion . . . freedom of thought, belief, opinion . . . freedom of peaceful assembly; and freedom of association." Additionally, the Alberta *Individual's Rights Protection Act* prohibits many specific forms of discrimination based on religion. For example, employment or tenancy cannot be denied because of the applicant's "religious beliefs."

All of these laws proclaim the high value we place upon freedom of religion. But how easily does our society accept the cost? Will we accept that a person has a right to practise his or her religion in every way?

Few people will deny support for freedom of religion. It is perhaps easiest though to judge serious violations of religious freedom when they occur in foreign countries. Consider the case of Mai Duc Chuong, a Roman Catholic priest in Vietnam. He and five other church members have been imprisoned since 1987. Their crime was teaching religious classes and distributing religious material without a government permit. Further, consider the case of Martin Bednar in the Slovak Republic. He was sentenced to one year in prison in February 1997. He refused military service because his religion forbade carrying weapons.

It is perhaps more difficult to judge infringements of religious freedom when they occur in our own country. How easily will we support freedom of religion when it conflicts with our own sense of privacy? There have been several cases in Canada involving Sikh individuals and the wearing of a kirpan — a religious dagger. Contrary to vigorous arguments to the contrary, Human Rights Commissions have concluded that school or hospital regulations prohibiting the kirpan are violations of religious freedom. In another vein, the Quebec town of Blainville attracted national attention in November 1997. The Blainville town council passed a by-law prohibiting Jehovah's Witnesses from soliciting door to door without a permit. To date, five church members have each been fined $250.00 and could face imprisonment if they continue to defy the by-law.

Canadians proudly celebrate their cultural diversities. Additionally, we are proud of our laws protecting our basic freedoms. Nonetheless, one person's religion may conflict with another person's sensitivities. Will we tolerate the conflict or will we support laws that restrict someone's genuine religious practice? Our conviction to religious freedom is measured based on how we judge ourselves.

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Robert Latimer's Case

Good Law or Bad Law?

by Gerald Heinrichs

Most western Canadians are familiar with the criminal charges laid against Robert Latimer. In December 1997, the Saskatchewan farmer went on trial for a second time after taking the life of his disabled daughter. He was convicted of second-degree murder. In an irregular turn of events though, the trial judge exempted Mr. Latimer form the mandatory sentence of life imprisonment with no parole for ten years. Instead the convicted Latimer was sentenced to one year imprisonment plus one year of "house arrest."

Opinions of Mr. Latimer, and what he has come to stand for, could not be more opposite. Debaters passionately attack him or defend him.

In Mr. Latimer's first appeal, Saskatchewan Chief Justice Edward Bayda referred to the farmer as "the salt of the earth." More than a few editorials claimed he was motivated by compassion when he ended his daughter's life in the garage at his farm. In court, his lawyer said he did it "out of love."

Individuals and groups like the Council for Canadians with Disabilities disagree strongly with Latimer's defenders. Spokesman Mel Graham stated, "We're sliding toward a two-tiered justice system for different categories of victims. Look at the public reaction when that Smith woman in South Carolina murdered her 'two perfect little boys.' Horror. But when ... Latimer murdered [his child], all anyone talks about is how hard [he] had it." Ron Gray, leader of the Christian Heritage Party stated that the Latimer verdict was "a declaration of open season on disabled people."

Several recent cases have made Canadians think long and hard about the morality of homicide in nonmalicious circumstances. Robert Latimer is only one of those cases. Halifax doctor Nancy Morrison was charged with murder after the death of one of her terminally-ill patients in November 1996. In July 1997, Quebec mother Danielle Blais was convicted of the killing of her six-year-old autistic son. Like Latimer though, she received a lenient sentence. In each of these cases the public lines up on either side of the mercy-killing debate.

The *Criminal Code of Canada* defines the intentional taking of a life as first-degree murder or second-degree murder. Self-defence can be a lawful excuse to taking a life, but the *Criminal Code* does not recognize mercy killing as a defence. In law, Robert Latimer is a murderer — though that is hardly the end of the debate.

There are many calls for a change in the *Criminal Code*. University of Toronto law professor Bernard Dickens proposes there could be a new offense of "mercy" in homicide cases. On the other hand, many believe there should be no change at all to the current law.

The Latimer Case will probably make its way to the Supreme Court of Canada for a second time. That is unlikely, however, to diminish the public debate. Regardless of the highest court's future decision, few will consider it the last word.

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Workplace Laws and the Family

by Gerald Heinrichs

Jim Miller is a business writer and lecturer in Texas. Every year he announces a contest to find the worst boss in North America. The contest receives hundreds of entries; unfortunate employees compete by retelling their stories of rude and discourteous treatment from nasty employers.

Some parents would agree that the worst employers are those who show little concern for a worker's commitments to family. If your child was injured at school, only a heartless boss would not allow time off to go to the hospital. What can be done if an employer does not accommodate a worker's important family obligations? Does the law guarantee that family always comes first?

Both job and family are demanding. Obligations at home often conflict with those at work. For good or bad, though, only a handful of family-related benefits are guarded by government-made laws. These mandatory benefits include maternity leave, bereavement leave, and holidays. The law imposes minimum standards on employers and the benefits differ between provincial and federal laws. The Provincial Labour Code applies to most employees while the Federal Labour Code applies to certain industries such as railways, pipelines, telecommunications, and the federal civil service.

Perhaps the greatest conflict between family and job arises when a new child comes into the home. How is it practical for a mother to work at a full-time job given the medical and domestic demands after a new baby? Traditionally, maternity leave guaranteed that a woman could take time off from work to give birth; further, it guaranteed she would not lose her job or seniority due to the absence. Similar benefits are now extended to a person who adopts a child. In Alberta, the Labour Code guarantees a minimum maternity leave of 18 weeks or eight weeks for adoption leave. The Federal Labour Code legislates 17 weeks maternity leave plus an additional 24 weeks parental leave which is available to either parent. Neither of the Labour Codes order an employer to pay wages during maternity or parental leave. Workers who have contributed to Employment Insurance, however, may qualify for payments from that program.

Bereavement leave entitles an employee to be absent from work for a period of time following the death of a family member. Under the Federal Labour Code, employees are entitled to three days of bereavement leave. Further, the definition of family member includes a common-law spouse and his or her parents. Bereavement leave is not part of the Alberta Labour Code.

Annual vacations with pay were not required by law until 1944. Prior to that date, employees lost their salary for the time they took off for a family holiday. Today, however, people take paid holidays for granted. In addition to the nine statutory holidays in Alberta, employees are entitled to two weeks of annual paid holidays or three weeks after gaining five years of seniority. Similar benefits are mandated under the Federal Labour Code.

Provincial and federal laws prescribe minimum benefits that assist parents in balancing their family and job commitments. Additionally, union or employment contracts may ensure additional rights such as a longer maternity leave.

Back in Texas, Jim Miller also runs a contest to find the best boss. Some workers believe the best boss is friendly and offers a lavish Christmas party. Parents, however, would claim the best boss is one who appreciates a worker's family duties.

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FIXED-TERM SPOUSAL SUPPORT – THE PENDULUM SWINGS BACK?

Gerald Heinrichs • Merchant Law Group • Regina

For the third time in less than two years, the Saskatchewan Court of Appeal has sustained a judgment for fixed-term spousal support following a long-term marriage where one spouse earned significantly more income than the other. The decision from January 16, 2007 in *McIntyre v. McIntyre* (2007 SKCA 5) adds notable weight to previous similar enunciations from the Court of Appeal in *Dobson v. Dobson* (2005 SKCA 53) and *Bradley v. Bradley* (2005 SKCA 53). Together the three cases could be called the "fixed-term trilogy." Moreover these three cases plot, one might argue, a significantly different path from what was expected following the precedent spousal support decisions from the Supreme Court of Canada.

"At the very least, the Saskatchewan trilogy adds fiber to the spousal support debate. Taken together, the three cases appear to make fixed-term spousal support an option in perhaps the vast majority of long-term marriage breakdowns."

In *McIntyre*, the spouses were together for 18 years. A year after separation they signed a contract stating that the husband would pay two years of spousal support and then the support was "reviewable by the parties." After the two years, the wife brought an application to extend the spousal support. The wife's income had risen over the two years but the husband's income still exceeded hers by a substantial measure: $87,585.00 versus $35,397.00. In chambers, Mr. Justice Barclay stated that fixed-term spousal support was not an option after such a long-term marriage and, moreover, where there was a significant gap in income. His Lordship stated:

> "In *Messer v. Messer* (1996), 141 Sask R. 163, the Saskatchewan Court of Appeal held that it is not appropriate to make an order for time-limited support in a situation where the husband earns substantially more than the wife and where it has been a long-term marriage."

The Court of Queen's Bench then ordered the husband to continue paying spousal support of $900.00 per month indefinitely.

The Court of Appeal, however, set aside that ruling. The court relied upon the contractual terms between the parties but also the spousal support factors listed in section 15.2 of the *Divorce Act*. The appellate court instead awarded the wife an additional but fixed term of support - merely 24 months. More particularly, however, they adjudged that indefinite support was not justified in the case even though there was a long-term marriage and a significant income gap. Although they did not mention *Messer v. Messer*, the appeal panel did add further important guidance to that ruling stating:

> ". . . it must be remembered that there is no absolute right to self-sufficiency, but only an obligation, so far as is practicable, to promote the economic self-sufficiency of the spouses."

The *McIntyre* decision on fixed-term spousal support adds muster to *Dobson* and *Bradley* from 2005. In *Dobson v. Dobson* the Court of Appeal upheld a fixed-term spousal support order made at trial. In that case the spouses were married for 23 years. The trial judge awarded the wife fixed-term support of 24 months. The wife appealed but in vain. Writing for the appellate panel, Smith, J. A. stated:

> "The appellant argued that the trial judge focused excessively on her ability to become self-supporting and neglected to give adequate consideration to the principle of compensation for the economic disadvantage to the appellant resulting from the marriage. It is our view that this is not a case in which the compensatory factor should override other considerations taken into account by the trial judge. Both parties had worked throughout the marriage in accumulating considerable assets, with the assistance of the respondent's parents. Neither acquired any further education or professional qualifications. The assets were equally divided at trial and, in each case, would be the primary source for on-going income. It is our conclusion that the trial judge made no error in principle in determining the amount and duration of spousal support payable to the appellant."

Although property division was relevant to spousal support in *Dobson*, it was not the only element.

The FAMILY Corner

In the first case of the trilogy, *Bradley v. Bradley*, the appellate court was more tightlipped. In that case the spouses were married for 36 years and, at time of trial, the husband was earning $71,000.00 per annum compared to the wife's annual income of approximately $15,500.00. The trial judge awarded the wife fixed-term support of 12 months and the wife appealed. The appeal court succinctly dismissed the appeal (Jackson, J. A. dissenting) stating:

> "...the appellant has failed to satisfy us that Justice Zarzeczny erred in principle as alleged by the appellant in limiting the duration of the order to twelve months."

One might argue that in *Dobson* and *Bradley* the appellate court, despite perhaps disagreeing, was showing deference to the court below as was directed by the Supreme Court in *Hickey v. Hickey* [1999] 2 S. C. R. 518. The fact, therefore, that the appellates court intervened to impose fixed-term support in *McIntyre* is of significant note.

Prior to 2005 there were various Queen's Bench decisions that awarded fixed-term spousal support after long-term marriages where there was income discrepancy between the parties. Those cases included *D.B. v. J.A.B.* (2002), 226 Sask.R. 161 (FD) and *Goodwin v. Goodwin* (2002), 215 Sask.R. 250 (FD). But prior to the trilogy, there was an absence of appellate decisions endorsing or confirming such a disposition. Moreover, the Supreme Court's enunciated principles on spousal support in *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 ,tended to slant away from a clean break disposition where there was a long-term marriage and one spouse had greater earning ability than the other. Additionally, the proposed Federal Spousal Support Guidelines focus substantially on duration of marriage and discrepancy in income upon separation. Indeed those are among the primary factors used in the proposed guideline formulas.

At the very least, the Saskatchewan trilogy adds fiber to the spousal support debate. Taken together, the three cases appear to make fixed-term spousal support an option in perhaps the vast majority of long-term marriage breakdowns.

There is a well-known disparity of opinion among judges on the subject of spousal support. Indeed the background paper to the proposed Federal Spousal Support Guidelines states: "There are growing concerns among lawyers and judges that the current Canadian law of spousal support is excessively discretionary, creating an unacceptable degree of uncertainty and unpredictability." Uncertainty was always a problem with spousal support. If there was a previous tendency to believe that liberal or open-ended spousal support was the norm prior to the trilogy, however, then these three recent appeal cases may mark a swinging back of that pendulum. ⚖

The Trouble with Toys

by Gerald Heinrichs

Consumers have a choice of hundreds of children's products in Canadian department stores. Toys, cribs, clothes, and car seats are among the first goods that come to mind. In each case a manufacturer has produced the item and the parent-purchaser who sees it in the store relies on its apparent quality. We expect that research and careful manufacturing have created a safe product for our home. How can parents be certain of a product's safety and what legal recourse is available if the product is unsafe?

In Canada, the Product Safety Bureau (Health Canada) regulates the sale of many children's products. For example, all pacifiers and strollers must comply with federal safety regulations or they are prohibited. This prohibition is very strict and applies to the sale of used merchandise at a store or even at a garage sale.

If a manufacturer believes one of its products poses a safety risk, the manufacturer may issue its own recall notice. The Infant and Toddler Safety Association (Kitchener, Ontario) publishes a newsletter that lists many of these recalls. Some people may find surprising the number of recalls that are issued annually. For example, the Spring 1997 edition of the association's newsletter lists twelve separate manufacturer recalls of products such as playpens, car seats, dolls, high chairs, and toy cars.

Private interest groups and the media play a role in monitoring the safety of children's merchandise. American organizations like the Public Interest Research Group (PIRG) often challenge manufacturers' claims that their toys are completely safe. Each Christmas season, the group releases a list of what it believes to be dangerous toys. In 1996, the list contained over twenty items including products marketed by Mattel and Lego. Choking and strangulation of small children were commonly cited hazards.

Government departments, manufacturers, and the media all try to protect the public from unsafe products and thereby prevent injuries to children and adults. If a product causes injury, however, the courts are the place for citizens to seek recourse and compensation.

The courts recognize a system of tort law known as product liability. This area of law decides who is at fault when injury results from a malfunctioning manufactured good. Sometimes blame lies with the manufacturer or retailer; sometimes the loss must be borne by the unfortunate consumer. Additionally, most provinces provide further protection to consumers over and above the court remedy of products liability. These provinces have a Sale of Goods Act or a Consumer Products Warranty Act that sets certain quality standards on all marketed goods.

How can parents be certain of a product's safety and what legal recourse is available if the product is unsafe?

Each year many lawsuits are commenced in Canada by injured users of manufactured goods. One notable case was a 1993 Ontario lawsuit alleging negligent design of an infant car seat (Stevens v.s. Fourney). A child was seriously injured in an auto collision and the court found the seat manufacturer at fault. In most of these types of cases, however, special scientists and experts argue at length over whether the manufacturer negligently designed or produced the item. These cases can take years to resolve. One of the larger lawsuits involved a 1987 settlement with Fisher Price for $2.25 million; the case related to a child's choking injury that occurred in 1971.

In the modern global marketplace, parents and other consumers can readily purchase goods manufactured anywhere in the world. Parents should make note of manufacturer recalls, as well as product warnings from government agencies and private consumer watchdogs. It is impossible to understand all the technicalities and potential hazards of manufactured goods; therefore it makes sense to rely on people who offer their expert advice, especially when that advice is free. If a product causes injury, there is slim practicality in a lawsuit against a manufacturer in Honduras or Malaysia.

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Rental Cars and Child Seats

by Gerald Heinrich

Every year in Canada, over 4,000 children are injured in automobile accidents and about 70 are killed. Consequently, informed parents are very concerned about restraining their children properly in motor vehicles.

Most parents own a car seat for their young child. Proper installation of a car seat, however, is just as important as having any car seat at all. But installation of the seat can be confusing to some parents. Depending on the type of seat or car, parents may encounter such things as locking clips, abdominal shields, or a five-point harness. A recent government safety blitz in Regina found improper installation with 100% of the inspected car seats. A little education, however, is all that is needed to solve this type of problem.

All modern toddler car seats (for children 9 to 18 kilograms) require securing with both a seat belt plus a tether strap on top. Infant seats are rear facing and do not require a tether strap. Proper installation of all seats, though, is required by law. Section 65(2) of the Alberta Highway Traffic Act specifically states:

"No person shall ... operate a motor vehicle ... in which a child is a passenger unless

(a) the motor vehicle is equipped with the prescribed child seating assembly,

(b) the child seating assembly is properly installed, and

(c) the child is occupying and is properly secured in the child seating assembly."

The legislation places a very high onus on parents. They must both install the car seat correctly and then use it.

Although Alberta's laws place a duty on parents to transport children safely, the laws put no such burden on certain businesses that earn a profit from motor vehicles. For example, the Highway Traffic Act regulations exempt taxicabs and "motor vehicles that are rented or leased for periods of 14 days or less." These businesses have no legal duty to provide proper child restraints. Parents may ask, therefore, why businesses like car rental companies are exempted. Did the government believe this was in the best interest of children?

Many car rental companies take child safety very seriously regardless of the laws. Some car agencies will properly install child seats for their customers. Others will not install the seats (perhaps for insurance reasons) but will provide parents with all the necessary equipment. These services are not, however, imposed by law in Alberta.

My wife and I recently rented a minivan from a national company at an airport. We were surprised that the toddler seat we requested was not installed. It sat loosely on the back seat. Moreover, the vehicle was not equipped with a tether bolt to secure the seat properly. An hour of arguing revealed that the technicians did not know how to install the seat and, further, we could only get a tether bolt if we drove the van and the unsecured seat to a downtown garage for installation. We were not pleased, and these people are no longer on our Christmas card list. I later learned that we were not the first victims of this type of surprise. We talked to some parents who travel with their own child car seat and assembly equipment. Regrettably, some car rental agencies are ignorant of child safety.

All of this shows that parents must be cautious and diligent when renting a car. Moreover, perhaps it is time for all provincial governments to impose child seat safety rules on car rental companies. Perhaps these rental companies will object because they want to avoid the inconvenience associated with child seats. That is, however, no excuse. Children deserve no less protection in rental cars than other motor vehicles.

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The Changing Face of Adoption

by Gerald Heinrichs

Over the last 25 years, there has been tremendous change in the contexture of adoption in Canada. A couple seeking to adopt a healthy baby today will encounter a more painful wait and struggle than a couple in 1970 did. At the same time, the barrier of secrecy and isolation which historically existed between adopted children and their birth parents is slowly eroding. What are the reasons for these changes and what are society's new laws?

Each year it becomes more difficult for Canadian couples to find children for adoption. Between 1981 and 1990 the number of children placed in adoptive homes across Canada declined from 5,376 per year to 2,836 — a decline of almost 50%. Social commentators and statisticians are quick to suggest three factors responsible for this trend: a declining birth rate; increased availability of abortion; and an increase in single mothers keeping their babies.

In 1997, many couples anxious to find adoptable children are looking overseas. China, with its one child per couple policy, is a common source for children. So too are India, Romania and the former Yugoslavia. There has been a substantial rise in foreign adoptions. In 1970, Immigration Canada recorded fewer than ten international adoptions; since 1991 there have been more than 2,000 annually. Private adoption agencies often arrange these adoptions. Some agencies charge Canadian couples up to $15,000 per adoption and many couples pay gratuities to the foreign orphanage as well. Not without foundation, some observers see international adoptions as a widening enterprise vulnerable to misuse. Developing countries fear that their children may become commodities purchased from their mothers and exported from their homelands. Consequently, in February 1997, Canada ratified an international convention which attempts to prevent the "abduction, sale and trafficking in children." Provincial governments are gradually establishing departments that monitor the propriety of all foreign adoptions within their borders.

Another legal change in adoption relates to the secrecy between adopted children and their biological parents. In most Canadian provinces, a sacred privacy is established when a baby is given for adoption. The child receives a new birth certificate that does not identify the biological parents. The provincial adoption agency controls the adoption records and only discloses the information in later years to the child or biological parent if both parties approach the government for this information. Diverse interest groups support this type of privacy arrangement even today. For example, many adoptive parents want to preserve the family bond that adoption creates; they fear that revealing biological parents to adopted children threatens this bond. Additionally, some anti-abortion groups believe more women will choose abortion if the mother's identity is not protected. Finally, government bureaucrats see mountains of work arise if they must declassify and organize decade-old adoption records.

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Each year it becomes more difficult for Canadian couples to find children for adoption. Between 1981 and 1990 the number of children placed in adoptive homes across Canada declined from 5,376 per year to 2,836 — a decline of almost 50%.

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British Columbia recently passed legislation which radically liberalizes the rules of disclosure between adopted children and their biological parents. The government in that province believes that it is at the forefront; in November 1996, the province's minister for children, Penny Priddy, stated that B. C. had the "best adoption legislation in North America" and that it was "on a par with New Zealand and New South Wales in Australia." As of 1997, all B.C. adoption records are open to parents and children unless one of them files a veto preventing disclosure. This form of disclosure by default is a significant departure from the wall of secrecy which existed in the past. Many support this change in attitude; they propound an adopted child's fundamental right to know. As well, adopted children have legitimate medical reasons for wanting to know their parents' identity and medical history.

Foreign adoptions and parent-child disclosure are two modern changes to adoption in Canada. These changes have a reason: most couples cannot find Canadian children available for adoption; and the public is demanding an end to secrecy between adopted children and their biological parents. In response, politicians have made laws to regulate these changes. Many adoption issues are, however, still unresolved; these include Indian bands' claims of a special interest in children from their communities and maternity/paternity leave for adopting parents. Undoubtedly, the next 25 years will see further changes to adoption in Canada.

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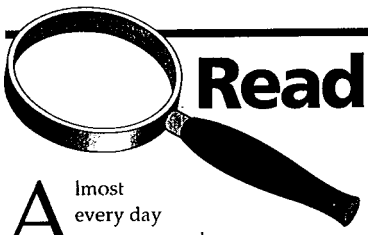

Reading the Fine Print

by Gerald B. Heinrichs

Almost every day common people encounter complex contracts. For example, it could take you hours to read and understand a car rental agreement; nonetheless, when you sign the contract, the car rental company imposes its standard terms upon you. If you go skiing or attend a concert, the back of your ticket will contain a long list of disclaimers; the ski hill or concert hall is trying to protect itself from lawsuits if you are injured. Does anybody read those terms and are they always binding?

Most people do not read these contracts and mentally dismiss the legal jargon as loopholes and fine print. Frequently, these terms are innocent and list only the conditions you expected such as a description of your purchase and the price. More often, however, the terms extend a special privilege to the business that you may not have expected.

Consider the following:

- A daycare agreement states "Staff will not be responsible for lost articles including toys."
- A concert ticket that states "Ticket holder assumes all risks and danger incidental to any event whether occurring prior to, during or subsequent to the actual event."
- An airline ticket that states "The liability of the carrier for loss or damage to any personal property including baggage shall not exceed $100.00."

In each case the business is attempting to change your normal expectation; they are limiting their duty and your rights. For example, if you shipped your child's wardrobe in a suitcase and the airline destroyed it in transit, you would expect compensation for its real value rather than a mere $100.00; but your claim was limited by the airline's contract and that is all you get. Lawyers call these types of terms "exculpatory clauses" and whether you read them or not, they form part of the agreement. Consequently, you should be conscious of the terms without the expectation that the business will negotiate any of them.

A business cannot rely on these fine-print clauses in all cases. Courts have held that the fine-print terms are void when they are blurry and illegible or so small that they are unreadable. It is a relief that there is a limit on the "smallness" of fine print; if you need a magnifying glass to read them, the terms are probably void.

Additionally, fine-print terms may not apply if they are not directly attached to any written agreement. Sometimes businesses will try to rely on terms located on a separate unsigned document or a poster on a back wall. These efforts to include fine print in a contract are not legitimate.

As long as people form business agreements, fine print will be a reality. Be cautious and note how you are prejudiced by these clauses. If a business tries to explain its bad service based on fine-print terms, however, do not let it pass. If you did not clearly accept the terms at the start, the business cannot rely on them later.

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What Happens to Learning Disabled Children When Parents Separate?

by Gerald Heinrichs

When parents of young children separate, two legal issues need to be resolved.

Firstly, what role will each parent play in the child's life when there are two homes? In most cases, one parent has custody while the other has access or a visitation schedule. In more and more cases though, some form of joint care or decision-making is arranged between the parents.

The second issue is child support. Specifically, the parents must sort out how they will share the cost of raising the child or children. The recent introduction of the Federal Child Support Guidelines has solved much of the debate on that issue. Child maintenance is now linked directly to the income of the non-custodial parent. The more they earn, the more they pay.

These same two issues, custody and support, need to be dealt with where the child involved is learning disabled. There are, however, some differences for non-disabled children.

If a child is learning disabled, there may be extraordinary costs for the child's day to day care. Special schooling or instruction may place an additional financial burden on the custodial parent. In other cases, medication costs can be significant. Tutor fees or regular prescription costs have been considered by the courts. The Child Support Guidelines specify that "extraordinary expenses" related to schooling or health must be divided between parents in proportion to their incomes. Thus, the non-custodial parent must pay for 50 per cent of these expenses if both parents have the same income level. The non-custodial parent would pay more than 50 per cent if his or her income was higher than the other parent's. Moreover, this financial contribution is in addition to any regular monthly child support.

If parents are fighting over custody of a learning disabled child, the parent who is best able to deliver any special care has a strong claim for custody. Clearly, if one parent was the primary caregiver prior to separation, that parent has a strong claim for custody after separation.

The courts determine custody and access arrangements based upon the "condition, means, need, and other circumstances" of the child. If parents are fighting over custody of a learning disabled child, the parent who is best able to deliver any special care has a strong claim for custody. Clearly, if one parent was the primary caregiver prior to separation, that parent has a strong claim for custody after separation.

No two children are alike. Thus, the accommodation for a learning disabled child of separated parents must address the child's special care and financial needs. If the parents cannot sort things out for themselves, the courts must then try and divide up their obligations and rights.

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THE FAMILY HOME IN A TOPSY TURVY MARKET

Gerald Heinrichs • Merchant Law Group • Regina

Unless you recently arrived from afar, you have noticed the dramatic rise in Saskatchewan real estate prices these last three years. In January 2010, the Regina *Leader Post* reported, "two or three years ago, Regina was among the most affordable cities in the world." Today, Regina is on par with the average Canadian city as being "moderately unaffordable" while Saskatoon was reported as "seriously unaffordable." For many families, the home now represents a surprise treasure in their net worth; and net worth, of course, is the fuel in family property litigation.

If a family property case is destined for trial, it is common that the trial is held two or more years after the date the court proceedings were commenced (the petition date). In several recent trial cases, there was a three-year lag (*Busse v. Gadd*, 2009 SKQB 99, *Riley v. Riley*, 2009 SKQB 98). Consequently, a dramatic change in the value of the family home between those two dates is common. Moreover, section 2 of *The Family Property Act*, the genesis of the legal valuation debate, empowers the court to choose either of the two dates, "whichever the court thinks fit". Such words are music to any creative legal mind.

> ***"For many families, the home now represents a surprise treasure in their net worth; and net worth, of course, is the fuel in family property litigation."***

In the last three years, a trend has emerged where Saskatchewan courts have valued the family home as at trial date and not at the earlier petition date. This was noted by Mr. Justice R.S. Smith in *Williams v. Williams*, 2008 SKQB 390 writing, "Generally, in this jurisdiction, when dealing with real estate, the Court has been inclined to use the date of adjudication for valuation as realty can, and in the last three or four years has, increased substantially by reason of market forces." Mr. Justice Smith cites a useful list of cases including: *Ouellet v. Ouellet*, 2007 SKQB 298; *Dobson v. Dobson*, 2005 SKCA 136; *Ioanidis v. Ioanidis*, 2007 SKQB 233; and *Zawada v. Zawada*, 2007 SKQB 35.

In *Zawada v. Zawada, supra* (Wright, M-E, J.) the court explained the rationale for trial-date home valuation stating, "There is no compelling reason that should preclude the respondent from sharing in the increase in the value of the family home between the time of application and the time of trial." Many cases refer to the increase in the real estate value as a "windfall" to be shared equally between the spouses. This is arguably more appropriate regarding the family home, as opposed to other assets, because the family home is to be divided equally except in extraordinary circumstances. As Mr. Justice MacLeod once stated, perhaps with tongue in cheek, "[the legislation] directs that family property will be divided equally except for the family home which will be divided more equally."

Some may now contend that there is a general rule for valuing the family home at trial date with little latitude to avoid such a verdict, but as Mr. Justice Smith in *William v. Williams, supra*, smartly noted, "General rules are referred to as general because they are not absolute." A few cases, therefore, have bucked this trial-date trend.

In *Staudt v. Staudt*, 2009 SKQB 7 (Zarzeczny J.) various factors persuaded the court to choose the petition date as the house valuation date notwithstanding expert evidence about the growth in value leading up to trial. The court noted the wife's need of the house for the child, her inability to buy out the equity, and also noted that the husband had purchased a house after petition date which had similarly risen in value; the husband "benefitted by the 49% increase in the value of his Regina home," the court observed.

Williams v. Williams, supra, was another case that went against the tide of opinion for trial-date valuation. In that case the court valued the house at the earlier petition day and awarded one spouse the entire benefit of the market growth to trial. In that case, the court described the influential trial facts stating, "In this case, I am satisfied that it would be inequitable for Mr.

Williams to share in the increase in value in the family home. He has contributed nothing to the family finances since 1998 and but for the petitioner there would be no family home."

In that same vein, Judges have opined that where one party undertakes significant renovations after petition date, or pays all the house-related costs, those factors too could lead to an earlier valuation date for the benefit of one spouse (*Ioanidis v. Ioanidis, supra, Zawada v. Zawada, supra*). Similarly, the discretionary factors under section 21 (3) of *The Family Property Act* provide ammunition for other debates for an earlier valuation date. Those factors include length of time that the spouses cohabited, duration that the spouses have lived apart, and date when the property was acquired. It rests on the trial lawyer to find the facts and issues to persuade a trial judge one way or the other on valuation date and there is potential return for such an effort. As Chicoine, J. stated, ". . . the appellate level decisions vest in a trial judge considerable discretionary power in selecting a date of valuation . . ." (*Riley v. Riley, supra.*

The rising price in real estate has also changed the ability of one spouse to buy out the other. Prior to 2006, Saskatchewan residents were accustomed to inexpensive housing which almost any working person could afford. In previous years, one spouse would commonly buy out the other and only rarely were both spouses unable to afford paying out half the equity. But rising prices have caused a quantum shift in the buy-out option. For example in *Mang v. Hyshka,* 2009 SKQB 164 (Dovell J.), the court ordered a sale of the house where neither spouse could afford to purchase the equity-rich home. This will be, it seems, a more common disposition in these high-price times. Pennies are tight when spouses split and their incomes are then stretched to support two households. At such a time, they are least able to muster more financing for a buyout of $100,000 or more.

The rise in home prices in Saskatchewan is being echoed in many parts of Canada. In February 2010, *MacLean's* magazine reported, "After barely pausing to acknowledge the financial crisis, Canada's residential real estate market has roared back to life, reaching record highs in recent months." That same article, however, quotes economists warning of a dire future with one American economist stating, "Canada is in for a housing bust worse than ours." Such speculation begs the question: If we have a real estate bust in Saskatchewan, what will be the legal fallout over the family home?

One need only look to the U.S. to find jurisdictions that have experienced the sad inverse of Saskatchewan's real estate boom. In December 2009 the *Wall Street Journal* discussed the U.S. housing crash in relation to divorce. In the U.S., the fall in housing prices means that, currently, 31.8% of persons with a first mortgage have negative equity – or the house is worth less than the mortgage owing. The article reports, "It used to be that couples fought over the house...Now everyone wants to run from it." The *Wall Street Journal* lists a menu of unattractive options for the negative-equity home upon divorce including selling it at a loss or renting it out. Oddly, perhaps, the article reports falling divorce rates in the U.S. because couples are staying together longer waiting "until the market rebounds."

Back in Saskatchewan, and for the time being, the U.S. family home dilemma seems far away. Few business people want to talk about the word that comes after boom. In the coming years, however, Saskatchewan lawyers may be reviving cases like *Medernach v. Medernach* (1985), 40 Sask. R. 269 which discusses valuation of family real estate in a declining market.

TAKING CARE OF JUNIOR - ADULT CHILD SUPPORT

by Gerald Heinrichs of Merchant Law Group Regina

Mr. Pearce did not get very far in court. The Vancouver father was opposed to paying any child support for his university-age children who resided with their mother. "I fully paid for my way through university and I now expect my children to do their best possible in doing the same." he stated to the judge. The court, however, saw things differently. Relying on Parliament's legislation, the court ruled that because the adult children were in university they were unable to withdraw from their mother's "charge or to obtain the necessaries of life." Consequently, the father had to pay child support.

Mr. Pearce's case is not unusual. Parents like him are ordered to pay maintenance for adult children every day in almost every family court in the country. Moreover, what is sometimes called basic child support is often inflated with extras like tuition and books. Both Parliament and the courts, therefore, have placed a heavy financial duty on departed fathers and mothers. The custodian can legally force the other parent to pay child support for, in some cases, four or more full years of university education.

Many of these support orders are for somewhat elderly children. An Alberta father was ordered to pay support for his 23-year-old daughter who was, at that age, commencing a two-year college course. A Manitoba judge ordered a father to assist paying for his son's Master's degree. Furthermore, the New Brunswick Court of Appeal went so far to say that support could be ordered for a child of any age "while seriously pursuing his or her education". All these precedents indicate there is no fixed age when the financial apron strings are cut between a child and a separated parent.

Of course circumstances are very different for cohabiting parents. They have no legal obligation to pay for their child's university or technical school - although many parents help out. The mandatory duty to financially support a child, however, ends at a young age. Cohabiting parents must only provide the necessaries of life for the child until the age of sixteen. After high school graduation, cohabiting parents can tell their son or daughter: "You're on your own! Get out. I'm not giving you money." Most certainly, they are not legally obliged or required to pay for tuition, books, or residence expenses. Therefore, cohabiting parents do not face the same heavy-handed assessments levied by the courts upon Mr. Pearce and thousands of other separated parents in Canada.

As a result of the Child Support Guidelines, our Parliament and courts have created a double standard for relationships between parents and their adult children. There is one set of legal duties for separated parents and another for parents who stay together. For the latter, any and all financial support is voluntary. The parent determines the terms of what, if anything, is paid. For separated parents though, the courts regularly impose a long-term agenda or sentence of monthly payments.

The irony of this double standard is further illustrated with low-income families. Many poor couples cannot afford to send their children to university. Nonetheless, the courts rarely accept low income of a separated parent as an excuse from paying adult-child maintenance. For example, a Newfoundland court ordered a father who earned only $26,000 per year to pay $257 per month for his 20-year-old nursing-student daughter. A similar amount was ordered against a Prince Edward Island father who earned only $29,000 per year and who was also paying support for two younger children. A Saskatchewan farmer who earned $33,000 per year was ordered to pay $585 per month for two children in university. Individuals earning these types of low incomes live with few luxuries. They may not be able to afford a vehicle or a house. Vacation trips and retirement savings are likely beyond their grasp. Yet the laws and courts force them to buy a college education and scrounge that money from their already meagre resources.

The financial burden created by these court decrees can be crippling. Take the case of Mr. Chu. He borrowed $40,000 from his parents to put his first two children through university. Mr. Chu then protested paying university support for the third child and being pushed further into debt. "I can't afford it." he said. The Saskatchewan court, however, followed Parliament's laws and directed Mr. Chu to pay even more. This heavy burden fell upon Mr. Chu in middle age when he, and thousands of parents like him, are trying desperately to save for retirement. Few parents begrudge making a financial sacrifice when their children are young. At some point, however, many and perhaps most older parents want to save and invest their money for themselves instead.

If these child support orders are a financial drain on separated parents today, then the mere drain may become a sinkhole in the future. In 2001 the average undergraduate university year with residence cost $12,251. That expense, though, is estimated to rise 5.7% annually. It may be worse. In December 2001, Queen's University petitioned the Ontario government to allow special undergraduate tuition increases. Currently, those increases are limited to 2 percent per year but Queen's University wants tuitions to increase 10% annually. At that same time, tuition at medical and law schools at the University of Toronto were set to rise massively. As a consequence, future adult-child support orders will undoubtedly climb far above their current levels.

In 1997, the Federal Government introduced the Child Support Guidelines. The laws were designed to deliver even and income-based maintenance to children after separation and divorce. Back then, however, many were unaware how far these rules would be extended to cover adult children. Beyond a doubt, the financial duty of separated parents now extends past high school and into college. Most troubling however, these laws create two standards of care. They treat separated parents in a harsh and domineering way compared to parents who are smart or lucky enough to stay together.