15 CFLQ 1
Canadian Family Law Quarterly
1997

Uncertainty: Custody, Support, Mobility — The Plight of Family Law

E.F. Anthony Merchant, Evatt F.A. Merchant*

1. — Goals for Examination

(a) — Hypothesis

Uncertainty is a known anomaly of family law. In other areas of the law uncertainty would be broadly criticized as inconsistency; appeals would succeed. Individual lack of fairness is tolerated generally in the law to achieve order and consistency. Conversely, in family law, individual justice is the determined aim.

The cases cited will provide practitioners with often contradictory authorities. The proposition embodied in this discussion will assist with the jurisprudential thinking that justifies frequently contradictory views, contributing to the bane of family law: inconsistency.

For example, in child custody the sole consideration is the welfare of the child. Secondary considerations, such as preserving the administration of justice, consistency and fairness to litigants, are all factors that the court may not consider. With respect to property dispositions, decisions as to support, and factors accepted as relevant by judges, the view that these issues are largely discretionary is a part of every flavour of family law. Individual justice is the Holy Grail. Contracts between couples have only partial enforceability and none regarding children and child support. Property rights give way to notions of fairness over houses, inheritance, and pre-marital exemptions. Even the rules of evidence over disclosure, negotiations, and hearsay of children and others, and statements between spouses are different and more relaxed. Is family law rife with inconsistencies, or should that same individual decision-making be described as necessary in order to achieve fairness and individual equity?

(b) — The Application of Custody Laws

Each year thousands of Canadian families are guided by custody laws in arranging for the care and upbringing of their children following spousal separation. Of the 78,152 divorce decrees granted by the courts in 1990, 48,525 included custody provisions.[1] Children were affected by divorce in 62 percent of the cases dealt with in that year.

The vast majority of divorce actions are uncontested, where the courts are not called upon to review parenting arrangements reached by the parties. However, the principles enunciated in cases that are litigated are of significance because they are applied as guidelines by family law practitioners in the negotiation of settlements. Thus, while statistically the number of contested custody actions is estimated to be as low as 3 percent, the broad application of custody law principles is extensive.[2] Research indicates that disputes regarding custody exist in 64 percent of cases, which are then resolved with the aid of professionals and, according to existing precedents, through negotiation, mediation, custodial assessments, and other alternative methods.[3] Accordingly, due to widespread application of these precedents and the notions they foster, the need to nurture and maintain innovative legal policies within this domain should not be taken for granted.

(c) — Analysis

During the past 30 years society has witnessed widespread criticism of the impact of the legal process upon family conflict resolution. Experts in the behavioural and social sciences have condemned the adversarial nature of the justice system as an ineffective means of promoting the constructive resolution of family disputes.[4] The current criticism within the public and the legal community is that the existing legal system, being based on the winner-loser approach lying at the heart of litigation, fails to properly resolve the conflicts and hardships that arise out of family law disputes. Moreover, litigation is confrontational, exacerbating the already frayed emotions of divorcing spouses.

At the centre of many of these disputes lie problems relating to child custody and access that can often be the most emotional

and difficult aspects of family litigation the legal system is called upon to resolve. Personal conflicts and subjective viewpoints between spouses often create this dissension. The courts, faced with these obstacles, are then called upon to serve as referee and adjudicate between the parties.

> Most judges maintain that, perhaps next to a death penalty case, custody battles are the most unpleasant, difficult and unrewarding aspects of the judicial function. Few winners ever emerge. If there is a loser, it is usually the children; and more often than not, both litigants are bitterly disappointed with the result. Since the days of Solomon, there has never been any joy in attempting to "divide the baby".[5]

Without question, custody arrangements have a profound effect on divorced families. New families suffering from the effects of ongoing hostilities between separated spouses, poverty, the erosion of parent-child relationships, and other hardships created by single parent families may all be symptoms of problems inherently related to custody and access. Such examples are representative of problems which currently exist within the economic and social realities faced by custodial and non-custodial parents. Accordingly, the examination of custody laws, and identifying improvements that could be made to these laws, is a task of significant societal benefit.

The ability of the legal system to promote arrangements under which a child may enjoy a strong relationship with both divorced parents has broad public consequences, due to the prevalence of divorce within our society. Research indicates that preserving parent-child relationships subsequent to divorce is beneficial to both child and parents. Striving to improve custody laws assists divorced spouses in reshaping their lives according to new priorities and circumstances while attempting to preserve the virtues of a child's relationship with both parents. The critical issue is how to resolve family disputes and create a viable separated familial structure while preserving the relationships between parents and their children.[6] In "Co-operative Parenting after Divorce: A Canadian Perspective," Professor Julien Payne and Brenda Edwards comment:

> The rearing of children, whether during the subsistence of a marriage or on its breakdown, encompasses a wide variety of cooperative relationships. Divorce is intended to sever the marital bond — not child/parent bonds.[7]

(d) — The Custody Battle

Children raised in a two-parent family structure instinctively desire the continued support, love, and attention of both parents. Indeed, children need greater emotional support from both parents during and after marriage breakdown than they do when they have the stability of a two-parent family with the status quo of home, schools, and an apparently stable household. The damage that can be done to the social development of children through the ordeal of their parents becoming divorced can be devastating and have an exponential effect.[8]

Protecting children throughout the ordeal of divorce is the paramount concern of the courts when adjudicating parental arrangements.[9] As stated by Mr. Justice Hinkson of the British Columbia Court of Appeal:

> Hopefully, that situation and the relationship between the [separated] husband and wife will continue and improve because, from the court's point of view, it is the welfare of the children which is the primary concern.[10]

Unfortunately, the positive spirit needed to resolve custodial problems is often not present at times of marital breakdown. Many divorcing spouses grow to resent, hate and lose respect for one another, especially those involved in contested litigation. It is against this backdrop that divorcing parents must endeavour to control their animosity and consider the desires and interests of their children.

In essence, custody and access problems cannot simply be dealt with as legal issues; they are family issues. They touch the lives of many average Canadians in an individual sense. These are laws of an intrusive nature, which essentially seek to govern the interpersonal relationships of citizens, and accordingly require a higher level of public acceptance if they are to be effective. They will only truly succeed if former spouses are prepared to set aside the personal irritation and frustration they feel towards each other and act rationally with a view to negotiating arrangements consistent with the best interests of their children.

2. — The Impact of Uncertainty

(a) — Conceptual and Terminological Uncertainty

Custody laws seek to deal with each child in an individual way. Jurists agree that each case must be decided upon its unique facts and circumstances.[11] Laws are broadly framed in an attempt to grant courts the degree of flexibility necessary to accommodate the various circumstances of each family. A judge's mandate under the *Divorce Act*[12] is to resolve disputes

according to the sole criterion of what is in *the best interests of the child*. However, the best interests of the child criterion is considered a "legal standard" rather than a "legal rule" since it does not provide clear direction for the resolution of disputes but provides only a general direction to judges to make a qualitative and probable assessment of the situation.[13]

A consequence of ambiguously designed laws is that they manifest uncertainty, which breeds inconsistent application of the law. The indeterminacy surrounding custody law is not consistent with the judicial process.

Legal systems are most effective when consistently applied. For example, in contract law people govern their affairs based on legal certainty; hence, lack of fairness to an individual litigant may be sacrificed in order to preserve legal consistency. This fosters confidence in the legal system, encouraging citizens to conduct themselves in accordance with the law. Contrast that situation with the inherent uncertainty of the law relating to custody and access under the *Divorce Act*. As the best interests of the child are the sole issue, then presumably each case, by mandate of Parliament, is to be judged individually. This has a profound effect. The quality of advocacy may, as a result, have an undue impact on decision-making. The personal proclivities of fact-finders also have considerable impact: for example, the conduct of the spouses relevant only insofar as it relates to parenting ability, will be assessed according to the values of the judges. Judges are provided with little guidance on what standards to apply.[14] In reviewing lower court decisions in *MacGyver v. Richards*, Abella J.A. succinctly commented:

> Both judges in this case relied on "the best interests of the child" in coming to diametrically opposite conclusions about how to achieve that result. Both acknowledged the factors they were required by statute to consider, including the child's relationship and ties to each parent, each parent's plan for the child's care, the likely stability of the proposed family units, the child's views, and expert psychological assessment. Having acknowledged the relevance of each of these factors, and having applied them to the same, undisputed facts, the two judges disagreed about the potential impact of those factors and facts on the child.[15]

No meaningful legislative mandate exists as to whether one parent or another ought to get custody, joint custody, access, or as to the rights, role, responsibilities, or involvement of the custodial parents.

It is this kind of uncertainty that triggers the confusion manifested by *Young v. Young*[16] and *D. (P.) v. S. (C.)*[17] respecting religious education and the conflict between *Carter v. Brooks*[18] and *MacGyver v. Richards*[19] respecting mobility rights.

(b) — Uncertainty in Terminology

Current terminology used within custody law is indeterminate, confusing, and, combined with the win-lose of litigation, engenders ill-will. The nomenclature merits consideration. Arguably, words such as "custody" and "access" are inappropriate. They fail to recognize that parental responsibility may continue following termination of a marriage. Recent judicial opinion has remarked that terms such as "shared parenting" would more accurately reflect how divorced spouses wish to divide parental duties.[20] Sachs L.J. of the English Court of Appeal acknowledged the indeterminate language within the family law domain in the case of *Hewer v. Bryant* by stating:

> In their efforts to assist the court counsel referred to the series of words and phrases appearing in that cascade of legislation which during the past half century has touched upon the welfare and protection of children from many angles. In those statutes one finds scattered, sometimes with and sometimes without definitions, words and phrases such as "care, control, custody, actual custody, legal custody, guardianship, legal guardian and possession." In the end, so far as comprehensibility on these matters is concerned, one finds that this voluminous and well intentioned legislation has created a bureaucrat's paradise and a citizen's nightmare. Each statute was passed with its eyes focused on its own particular set of objects, and for my part I have found but little assistance from their detailed terminology. ... It follows that this court must simply do its best to ascertain the particular meaning of the word "custody" ... remembering that it has different meanings in other contexts.[21]

The uncertainty created by the sloppiness of language in the family law area is significant. For example, judges will order joint custody out of kindness to an access parent or parents will agree upon joint custody when each has quite a different view of what those words mean. The same nomenclature will signify a certain bundle of rights and obligations to one judge who uses a particular word and mean something different to a subsequent judge.[22]

3. — Statutory Regulation of Custody

(a) — Jurisdiction over Divorce

The federal *Divorce Act, 1986*,[23] which supersedes the *Divorce Act* of 1968,[24] is the only statute in Canada under which

divorce may be granted. Under section 8 of the *Divorce Act*, spouses may be granted a divorce upon the sole ground of a "breakdown of their marriage" established by proof of (1) adultery, (2) cruelty, or (3) separation for a minimum of one year preceding the divorce judgment. Statistics indicate that 82.3 percent of all spouses file on the basis of separation.[25]

(b) — Definition of "Court"

Under section 2(1) of the Act, a decree of divorce may only be granted by "a court of competent jurisdiction." These comprise the Supreme, Superior (Quebec), Queen's Bench, General Division (Ontario), or Unified Family Courts in each of the provinces or territories. Only federally appointed justices are vested with the authority to deal with divorce.[26]

(c) — Sections 16 and 17 of Divorce Act

The court's authority to resolve questions respecting arrangements for the upbringing of the child in a divorce is articulated in sections 16 and 17 of the *Divorce Act*. Section 16 of the Act defines the court's authority to grant interim or permanent orders respecting the custody and access of children of a marriage. As set out by section 16(8), a court in making an order respecting custody or access shall "take into consideration only the *best interests of the child* of the marriage as determined by reference to the *condition, needs and other circumstances* of the child"[emphasis added]. Section 17 defines corresponding criteria with respect to the court's jurisdiction to vary, rescind or suspend a "custody order or any provision thereof."

(d) — Corollary Relief Jurisdiction

The *Divorce Act*, under section 16(1), deals with custody of children within the context of divorce proceedings. Custody is an ancillary and derivative claim arising out of the substantive cause of the action, that being divorce itself.[27] While custody alone may also be resolved under provincial welfare legislation, the federal statute holds a concurrent and paramount jurisdiction over custody when it arises as an ancillary issue to the dissolution of a marriage.[28] The authority to deal with child custody, child support, and spousal support arises under the Act as "corollary relief" incorporated into divorce with an aim to resolve all issues relating to the dissolution of the marriage within the same forum.[29] Corollary relief provisions are within the competency of the Parliament's exclusive jurisdiction over "marriage and divorce" under section 91(26) of the *Constitution Act, 1867*.[30] Mr. Justice Laskin, then of the Ontario Court of Appeal, confirmed:

> On the view I have taken of the restricted nature of the custody jurisdiction under the Canadian *Divorce Act*, I hold that its provisions as to custody are valid enactments under the federal power in relation to marriage and divorce. To me, they are bound up with the direct consequences of marriage and its dissolution as much as is alimony and maintenance; and, much more importantly than those it is so bound up by the reason of the physical and human relationships of parents and their children. ... The very concept of divorce where there are dependent children of the marriage makes the question of their custody a complementary one to divorce itself.[31]

(e) — Interim Custody

Child custody may be granted under the *Divorce Act* on an interim basis by virtue of section 16(2), which may be invoked once either spouse has filed for divorce. Although an application for divorce may not be given effect on evidence of "separation" until a minimum of one year has elapsed, either spouse is free to launch an action for divorce on the basis of a one-year separation immediately following the couple's separation or on the other grounds allowed, and by doing so establish the right to seek corollary relief under the Act — for example, for interim custody and access, or spousal and child support.

(f) — Practical Significance of Initial Parenting Arrangements

Regardless of whether interim custody is regulated by a provincial court order, superior court order, or separation agreement, the practical effect of a child's initial custodial arrangements is significant. The inclination of the courts in divorce proceedings is not to disturb the status quo when a child is already established in a stable and comfortable environment.[32] It is thus profoundly important to establish custody or access rights to one's child from the outset of separation.

(g) — Appellate Jurisdictions

Reliance upon factual evidence within custodial dispositions has the effect of limiting the scope of appellate review. As a trial court's decision involves an assessment of the depth and character of the relationships which exist between the parents and the child, appellate courts are hesitant to upset the evidentiary determination of the trial division on the basis of the transcript. As stated in the English case of *Re B. (T.A.) (An Infant)*, "... so much may turn, consciously or unconsciously, on estimates of

character which cannot be made by those who have not seen or heard the parties ..."[33] An appeal is not intended to be a rehearing of the merits of a case. A judge's decision is entitled to deference and should not be set aside unless the appellant can show the judge erred in reaching his or her decision.[34] As a result, appeal courts are unlikely to interfere with the decision of a trial judge in a custody dispute unless it can be shown that the lower court exercised its discretion improperly or took into account an inappropriate factor. The Supreme Court of Canada has stated that a case on appeal does not turn on fact or credibility; the appropriate test is whether the proper legal principles have been applied.[35] Since a trial judge normally bases a decision on widely enunciated principles, it is difficult to know whether he or she has acted upon some inappropriate principle or factor.[36]

The effect of this reluctance to intervene on the part of appellate courts is to perpetuate the inconsistent standards used by lower courts, leaving custody laws as indeterminate as ever.

(h) — Judicial Discretion over Custody and Access

The Supreme Court of Canada decision of *Moge v. Moge*[37] enunciates a fundamental principle regarding the interpretation of statutory provisions within the field of divorce law that is likely to have a profound effect on the social philosophy central to the Canadian justice system.[38] *Moge* acknowledges that, subject to the overriding constitutional doctrines, the sovereignty of Parliament is paramount and that judges may explain but cannot override statute law.[39]

This statement of principle reiterates the view previously put forward in *Multiform Manufacturing Co. c. R.*[40] by Lamer C.J., who observed that "when the courts are called upon to interpret a statute, their task is to discover the intention of Parliament."

The *Moge* decision stands as a reminder to the judiciary that while they may interpret and explain statutorily enacted laws, they may not redefine what has been enacted by the legislature in an attempt to resolve legal or social imperfections. This remains a responsibility of Parliament. However, in the context of interpreting custody laws, concepts such as the best interest of the child, as set out in section 16(8) of the *Divorce Act*, are so broad as to confer a virtually unfettered discretion on the trial judge. *Moge* leaves judges walking a fine line between the inherent vagueness of custody law and the directive that courts are not to deviate from the intention of Parliament.

(i) — Access Considerations by Impact on Custodial Parent

Even under the rubric of access, where consistency predominates, judges are flirting with a concept that says, in effect, that if the custodial parent is sufficiently unnerved by access, then access might end. The theory is that if the custodial parent is profoundly upset and impacted by access, that must impact unfavourably upon the child.

In *Mitchell v. Price*,[41] Baynton J. held that there is a rebuttable presumption that it is in the child's best interests to have access to the non-custodial parent. The mother experienced great anxiety about the father. Regardless of whether the anxiety was rational, it was submitted that it affected the mother's relationship with the child. Evidence showing fault with the father lacked weight. The parents had had a casual relationship and never married. The case goes some distance in focusing on the relationship between the parents and its impact upon the children, rather than on the relationship between the child and the parent. The father got restricted and supervised access on a few occasions each year.

> [T]here are instances in which parental contact is not in the best interest of the child. But this is the exception not the norm. The court will cut off parental contact only when the legal presumption of its benefit has been rebutted.
>
> As stated previously, it is not up to the parents to prove their worth. That is presumed until the contrary is established. Accordingly, if "onus of proof" is a concept that applies to the determination of the best. ...[42]

In *M. (B.P.)*,[43] the father, who appeared to be obsessed with access, pursued the mother, who was the custodial parent, when she moved to new jobs and attended university. There was evidence of years of harassment, insensitivity, and disruptions, as well as evidence that the father was violent, including evidence of violent behaviour in front of the child. The father made his ex-wife's life miserable. The court held that the child was in a painful situation and suffering from stress. The trial Judge found there was no benefit to the child in continuing access with the father.

In *Abdo*[44] the Ontario Court of Appeal dealt with a husband who was "domineering, selfish, argumentative, and at times, a cruel spouse and father." He was found to be unpredictable and uncontrollable. One issue on appeal was whether the trial

Judge gave undue consideration to the custodial parent's wish that access be cut off. The Court of Appeal cited *Lavery v. Lavery*[45] from Nova Scotia and did not overturn the trial disposition.

Mitchell, Lavery, Abdo, and *M. (B.P.)* are about the wishes of the custodial parent being a relevant factor in determining the best wishes of the child.

4. — Terminology

(a) — "Child of the Marriage"

Section 2 of the *Divorce Act* reads:

> (1) In this Act,
>
> . . . . .
>
> "child of the marriage" means a child of the two spouses or former spouses who, at the material time,
>
> (a) is under the age of sixteen years, or
>
> (b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;
>
> . . . . .
>
> (2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
>
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

In practice, while possible within the confines of the *Divorce Act*, custody of a child over 16 years of age will not normally be granted by a court, because a child that mature will be left to determine with whom to reside. The wishes of younger children concerning custodial preferences are also considered by the courts, being accorded weight depending on the age of the child, but only as one of the factors to be taken into account in determining the best interests of the child.

As defined by section 2(2) of the Act, "child of the marriage" is not confined to offspring of the spouses.[46] Biological parents and persons deemed to be standing in the place of parents may seek custody of a child on or after divorce. The undertaking of the child-rearing responsibilities on the part of a spouse as a stepfather or stepmother establishes the right to seek custody or access, as well as the possibility of future liability for child support.[47]

(b) — Uncertainty Surrounding "Child of the Marriage"

Hoilett J. of the Ontario Court (General Division) recently observed that "[i]t is probably trite to state that the concept of a 'child of marriage' is a fluid one, not arbitrarily defined by age," but a conclusion implicit in the definition provided in section 2(1).[48] Unfortunately, no detailed test is provided under the Act for determining whether a child is a child of the marriage. This ambiguity has inflicted the court system with inconsistent results in divorce judgments.

The standard applied to determine the dependency of a child appears to vary from case to case and jurisdiction to jurisdiction. In *Smith v. Smith*[49] the Supreme Court of British Columbia came to the determination that the parties' 20-year-old daughter, who was in good health, not in school, and capable of entering the workforce, would continue to be a "child of the marriage" due to her financial dependence on her mother. The following year, the same Court in *Baker v. Baker*[50] found that a daughter could not, in the eyes of the law, be termed a "child of the marriage" since her disability[51] would not prevent her from the potential of marrying or working in her own way.

Inconsistencies also exist regarding the status of children who are enrolled in post secondary education. Easton J. in the Newfoundland decision of *Snook v. Snook* stated that

> a person of 19 years of age attending university should take advantage of all opportunities for employment, student

> loans, bursaries, etc., and, if as a matter of conscience the parents can contribute so much the better. I have difficulty in placing the legal obligation on the parent [to find that the child is a "child of the marriage" as set out in section 2 of the *Divorce Act*, S.C. 1986, c. D-4].[52]

Conversely, Hrabinsky J. concluded in the Saskatchewan decision of *Saunders v. Saunders*, which was confirmed in the Court of Appeal:

> Jane is a child of the marriage within the meaning of the [*Divorce Act*], notwithstanding the fact that she will soon be 21 years of age by reason of the fact that she is capable of benefit from further education which will fit her for an occupation in life.[53]

In *Duncan v. Duncan*, Halvorson J. went even further, acknowledging previous decisions opposed to his position and decided to the contrary in any event:

> As well, numerous decisions were cited to illustrate the cogency of the mother's position that support for the son must remain. Among these were: *Jackson v. Jackson*, [1973] S.C.R. 205 ...; *Jones v. Jones*, [1971] 2 R.F.L. 393 ...; *Tapson v. Tapson*, [1970] 1 O.R. 521 ...; *Crump v. Crump*, [1971] 2 R.F.L. 388 ...; *Janzen v. Janzen* (1981), 21 R.F.L. (2d) 316 ...; *Strachan v. Strachan* (1986), 2 R.F.L. (3d) 316 ...; and *Saunders v. Saunders* (1987), 10 R.F.L. (3d) 437, ... affirmed [(1988),] 14 R.F.L. (3d) 225.
>
> . . . . .
>
> I am not satisfied from the material filed that the son continues to be a "child of the marriage" as contemplated by s. 2(1)(b) in the sense that he is under the charge of one of these parents but unable to withdraw from that charge or to obtain the necessaries of life.[54]

These cases are only a sample of the many contradictory decisions which exist in reference to this section of the *Divorce Act*.[55] The effect of the subjective application of the Act is to undermine its authority within the minds of the public. Moreover, due to such uncertainty, costly litigation is more likely to be required in the resolution of disputes, notwithstanding the judiciary's desire to reduce the amount of contested disputes. Further, many practitioners negotiate settlements based upon the uncertainty in the case law and the lack of clarity under the *Divorce Act*.

(c) — The Term "Custody"

Under the provisions of section 2(1) of the *Divorce Act*, "custody" includes care, upbringing and any other incident of custody. No further definition characterizing the meaning of custody is provided under the Act. As a result, the meaning of custody remains uncertain, having been given a variety of presumed definitions through judicial interpretation. As has been observed by Gow L.J.S.C.:

> Custody is a word of chameleon qualities. it takes its meaning from surrounding circumstances. ... Its meaning can range from immediate effective possession and control of the person ... to control by a parent of a child in the widest possible sense, that is, not only physical but also intellectual, educational, spiritual, moral and financial.[56]

The term "custody," as canvassed by Sachs L.J. in the English decision of *Hewar v. Bryant*,[57] is essentially noted to have two common meanings when used in relation to children. In its widest sense the word is used almost as an equivalent of guardianship, while in its narrow sense it refers to the power to physically control a child's movements. As addressed by Professor Bissett-Johnson and David Day:

> The term "custody" can be used in at least two senses. First, it may refer to which parent has physical care and control of a child. Second, it may be used to indicate which parent has the bundle of legal rights associated with custody; for example, to determine the child's religious or secular upbringing, to approve of medical procedures, or to consent to the adoption, change of name, or marriage of the child.[58]

The decision of the Manitoba Court of Appeal in *Lapointe v. Lapointe*[59] also provides guidance as to which parent has "custody".

> Although the parents in this case agreed on "joint custody", their terminology was inaccurate. In determining who has custody of a child, the incidents of custody must be looked at rather than the language used: see *Abbott v. Taylor* (1986), 2 R.F.L. (3d) 163 [[1986] 4 W.W.R. 751] (Man. C.A.), *Field v. Field*, *supra*. The principle incidents of custody are the ultimate decision-making power and primary care and control. These the mother had. She was agreed upon as the sole custodian.[60]

(d) — The Term "Access"

Even more elusive is the definition of access. Although repeatedly referred to within the Act, no definition is provided for access within the English version of the Act, while the French version simply provides that "*'Access' comporte le droit de visite*."[61] "Access" is, however, qualified under section 16(5) as at least entitling an access parent "the right to make inquiries, and be given information, as to the health, education, and welfare of the child." Access has been deemed to include a right of the non-custodial parent to direct relevant inquiries regarding the child to third parties, such as the child's school principal or doctor.[62] However, this provision stops short of stipulating that an access parent must be informed or consulted prior to child-related decisions being taken by the custodial parent.

As access is not even defined and custody can mean different bundles of obligations and rights depending upon the judge dealing with the issue, Parliament has created a jurisprudential void. Diverse judges understandably interpret these undefined words quite differently, creating statutorily induced uncertainty.

5. — Custody and Access Dispositions

(a) — Types of Custody

The *Divorce Act* confers a broad discretionary jurisdiction on the judiciary to make custody and access orders simultaneously or following a decree for divorce. Although a range of possible custody orders exists, sole custody remains the most frequently reached resolution agreed to by the parties or ordered by the courts. Statistics Canada data indicate that in 1990, 27,367 divorces involving custody orders were granted under the *Divorce Act*. Of the 47,631 children affected, 73.3 percent were awarded to mothers, 12.2 percent to fathers, 14.3 percent to joint custody and fewer than 1 percent to a person other than the mother or father.[63]

(i) — Sole custody

It is generally accepted in Canadian law that, in the absence of directions to the contrary, an order granting "sole custody" to one parent signifies that the custodial parent shall exercise all powers of the legal guardian over the child to the exclusion of the non-custodial parent.[64] This type of order, sometimes termed a "unitary order," implies that all parental rights are vested in the custodial parent, even though the non-custodial parent may be granted a right of access to the child.

In *Taylor v. Taylor*,[65] Chambers J. noted his discomfort with specifically apportioning custody and access, expressing reluctance to grant orders dividing the parental bundles between the parents due to his fear that in cases where some trouble or dispute arises, it may be difficult to determine where one parent's authority ends and the other's begins. He concluded that "There should be no room for uncertainty in a field such as [custody law]."[66]

However, an access parent is not without recourse when in disagreement with decisions taken that affect the child. He or she retains the right to go to court and have concerns reviewed by the court, which may qualify the authority of the custodial parents by varying the original custody disposition either under section 17 of the *Divorce Act* or under the superior court's power of *parens patriae*.

This regime for resolving disputes regarding the child following divorce, while not inexpensive, allows courts implicitly to grant to the custodial parent the authority to make decisions over the objections of the non-custody parent, in reliance upon the capacity of the latter to "appeal" decisions when necessary. To allow the non-custodial parent the right to directly impede child-related decisions from being carried out, would likely lead to an increased need to have disputes settled by the courts which would not be practical.[67]

(ii) — Joint custody

At one time the rage in the United States, joint custody at its peak was statutorily endorsed by the laws of 34 states.[68] A corresponding demand for adoption of projoint custody laws never materialized in Canada. While section 16(4) of the *Divorce Act* grants a court the option to order joint or shared custody between spouses, it falls short of endorsing any presumption in favour of joint custody.[69]

The term "joint custody" is used to designate three main possibilities in the division of parental rights: (1) joint physical custody; (2) joint legal custody; or (3) a combination of joint physical and legal custody. Joint physical custody refers to the

right and responsibility to provide the child with a home and to make day-to-day decisions during the time which the child spends in that parent's direct care. Joint physical custody need not be divided on a 50/50 basis and may alternate on a biweekly, weekly, monthly or so on interval.[70] Joint legal custody signifies that each parent is to have an equal voice in making long-range decisions regarding the child's upbringing and welfare.[71]

In practice, joint custody appears not to be the resolution of choice in Canadian courts, currently being implemented in between 12 to 14 percent of all divorce decrees.[72] Canadian courts remain reluctant to order joint custody over the objections of one of the parties due to the essential need for cooperation in co-parenting arrangements.[73] However, notwithstanding this commonly held practice, the Saskatchewan Court of Appeal has recently stated that consent need not always be required and granted an appeal imposing joint custody, a further demonstration of the unpredictable nature of custody laws in Canada.[74]

(iii) — Custody held by third parties

While it remains a rare occurrence, sole or joint custody held by a third party is within the scope of section 16(4) of the *Divorce Act*. Grandparents are most frequently these third parties, although practical reservations exist within society regarding the upbringing of a child by parental figures of senior years. Often, under such arrangements, joint legal custody or generous access privileges are conferred upon one or both parents, an indication that the courts look to the grandparents to provide the day-to-day stability of physical custody for the child, while seeking to maintain the benefits of contact with the parents.[75]

(b) — Access

Traditionally referred to as "visitation rights," access is the privilege extended to the non-custodial parent to visit and maintain a parental relationship with the child. The purpose of access is to promote a normal parent-child relationship; however, the non-custodial parent is "not [to] change or alter the child's mode of life or ... interfere in any way with the child's upbringing."[76] Orders for access are commonly made without specific provisions as to the timing and extent of the access, in an effort to allow the former spouses flexibility to make arrangements suitable to their circumstances. Only about 23 percent of access orders take a structured form, such as specific timetables or conditions regarding access.[77] A court will normally grant sole custody to one parent and "reasonable access" or "liberal access" to the other parent.

Section 16(8) ("best interest")[78] of the *Divorce Act* expressly endorses a child-oriented approach to decisions regarding access, just as with custody, which may subordinate the interests of either parent.[79] Access, like custody, is granted according to the sole criterion of the best interests of the child.[80] Section 16(10) ("maximum contact") endorses the benefit for the child of access, but there is nothing automatic about the granting of access to the non-custodial parent. Nonetheless, access is recognized as a benefit to the well-being of children in the vast majority of circumstances and will not be denied unless there are specific reasons presented as to why it should be withheld.[81] Access is assessed in terms of its long-term benefits for the child. In attempting to define the test used to determine whether to grant access privileges, Matheson J. stated in *Michel v. Hanley*:

> In Family Law in Canada, Christine Davies, it is suggested, at p. 542, that it is not because of a "right" possessed by a parent that access may be granted if there is no danger to the child in doing so, but because it is perceived that incalculable benefits will accrue to the child from contact with both parents. The benefits were generally described as having more than one parent available to influence the development of the child, and to provide affection, confirm, companionship, and emotional and material support. Viewed in this context, the "right" to access is not absolute, to be denied only when danger to the child is perceived, but to be granted only after assessing the presumed benefits which will accrue to the child upon the exercise of the "right".[82]

Access is more than merely a right to visit. Exercising access involves a transfer of the "lawful care or charge" of the child from the custodial parent to the non-custodial for the duration of the access period.[83] With whom the "right of access" lies has in the past been a question of some dispute. Abella J.A. has recently stated:

> The child's best interests must be assessed not from the perspective of the parent seeking to preserve access, but from that of the child entitled to the best environment possible. It is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an adult to be accountable. This by no means eliminates the adult's wishes from the equation; it means that those wishes cannot always be accommodated. It is the *child's* right to

> see a parent with whom she does not live, rather than the parent's right to insist on access to that child. That access, its duration, and quality, are regulated according to what is best for the child, rather than what is best for the parent seeking access.[84] [Emphasis added.]

That observation is consistent with the earlier contention of Wilson J. in reference to the right of child support: "[T]he benefit accrues to the individual whose legal right it is. The duty to support the child is a duty owed to the child not to the other parent."[85] Similarly, on the issue of the "right of custody," L'Heureux-Dubé J. stated in *Young v. Young*:

> The power of the custodial parent is not a "right" with independent value which is granted by the courts for the benefit of the parent, but is designed to enable that parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child's right to a parent who will look after his or her best interests.[86]

From a practical vantage point, regardless of the legal fiction surrounding its definition, access remains a privilege that confers both obligations and authority over the child, even if for only a temporary period.

Surprisingly, access dispositions are not victims of the inherent inconsistencies which bedevil other areas of family law. Judges have, with reasonable consistency, recognized the benefit to children of the companionship and influence of their parents and other interested third parties. Section 16(10) did not mandate the shift from judicial attitudes towards maximum contact but merely enhanced that attitude by the vast majority of judges on the courts.

(c) — Restricted Access

Access privileges may be denied, supervised, restricted, or reduced if found to be outside the ambit of the best interests criterion. Such dispositions will be ordered in circumstances where access is seen as a perceived threat to the child, or when necessary to ensure the safety of the child. Such arrangements may also be ordered under circumstances where an access parent is acting adversely to the authority of the custodial parent, or rarely as a penalty for not honouring support obligations. [87]

(d) — Third Party Access

Third parties may apply for custody or access under section 16(1) of the *Divorce Act*, but require leave of the court in order to seek such privileges under section 16(3) of the *Divorce Act*. Grandparents, aunts and uncles, older siblings, or extended family members, perhaps even religious communities, Indian Bands, child care homes or hospitals, or others, may all be interested parties in custody and access dispositions, but, whatever the strength of the relationship with the child, any access right is still granted only in accordance with the best interests of the child.[88] Nonetheless, the right of non-parents to seek access is recognized as a benefit to children in some circumstances, though the number of third party access orders remains statistically negligible at less than 1 percent of all dispositions. The wishes of the child are likely to have some bearing on such third party dispositions.[89]

(e) — Uncertainty Regarding Custody and Access

Judicial uncertainty exists in relation to custody and access.[90] As stated above, custody is not a word that has a narrow singular meaning: it may mean care and control of the child, or it may mean all of the rights of guardianship.[91] Identifying whether custody is merely the right to possession of the child, and thus only one element of guardianship of the person, or whether custody covers a greater range of parental rights over the child, akin to guardianship of the person, has been a primary source of debate and litigation.[92]

Historically, under common law. the term "guardianship" was a wide concept indicative of a duty and a corresponding legal ability to maintain control and care for a child: conversely, custody, which was an incident of guardianship, referred to the physical possession of a child.[93] Today, due to the broad definition given to custody under the Act, custody is often used to incorporate both concepts, and is regarded as virtually synonymous with the rights of guardianship.[94] This wider sense of the term covers a range of duties and powers including the bundle of legal rights associated with the child's care, control, education, health, and religion.[95]

It is generally recognized that the rights of an access parent presently fall short of the fundamental right to participate actively in decisions affecting the welfare or development of the child, unless that right is specifically bestowed by the court when

making the custody order.[96] As Spencer L.J. stated in *Pierce v. Pierce*:

> Ex. 1, "the story of Katie", prepared by Mrs. Pierce but reflecting Mr. Pierce's attitudes towards access, and his evidence given before me, all make it abundantly clear that he has not yet grasped the fact that the mother's custody gives her the right to direct Katie's education and upbringing, physical, intellectual, spiritual and moral. His own role through a right of access is that of a very interested observer, giving love and support to Katie in the background and standing by in case the chances of life should ever leave Katie motherless.[97]

Under the authority of an unqualified sole custody order, a custodial parent assumes full legal guardianship over her child to the exclusion of the access parent. In the words of Mr. Justice Thorson in the Ontario Court of Appeal decision *Kruger v. Kruger*:

> In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility.[98]

However, the view that the non-custodial parent should be given an increasing role in the upbringing of the children is gaining support within the legal community. Currently in Canada it is unclear to what extent a custodial parent should communicate with an access parent regarding major decisions relating to the welfare of the child. A growing minority of jurists are pressing to amplify the voice of non-custodial parents in decision-making. To achieve this end, they suggest a more even distribution of parental rights between the custodial and non-custodial parent rather than continuing to allocate rights on the conventional "all or nothing" basis. Recent decisions, notably *N. v. N.* of the British Columbia Court of Appeal, have stressed the importance of the role of the non-custodial parent: "An order awarding custody to one parent does not prevent the non-custodial parent from carrying out his or her responsibilities of playing a meaningful role in the child's life."[99] "The father in this case is eager to play a responsible and continuing role as a parent. The order that was made does not prevent the father from carrying out his responsibilities to his children as a loving parent."[100]

According to Professor Berend Hovius,[101] the Canadian court system is beginning to reassess the traditional roles assigned in law to the custodial parent and the access parent. He contends that, increasingly, courts are accepting the view that parental powers should be more evenly distributed between the parents in order to encourage the child to develop a meaningful relationship with both. A concurrent view is held by Judge Norris Weisman. In his article "On Access after Parental Separation" he presents sociological research which indicates that children who foster stable, ongoing relations with both parents are more likely to deal efficiently with the adverse effects of parental separation. Judge Weisman concludes that

> it seems that the ideal situation is for children to have a balanced and "normalized" relationship with both parents, despite the separation. The visiting parent should be involved in all relevant aspects of the child's life, including school, friends, leisure, and work time. Children who are not forced to divorce a caring parent are said to do better socially, emotionally, and academically.[102]

The increasing trend toward more evenly distributed privileges and obligations between the parents is creating growing uncertainty regarding the rights of custodial and non-custodial parents. Moreover, what level of consistency will remain between individual cases if the courts move to a more fluid system of allocating parental rights? Predictably, such a move might cause custody laws to become even more uncertain.

Viewed appropriately, access is a right of the child, not the parent, and courts should examine the issue solely from a child-centred perspective. Cases often use commendable language about the best interests of the child being the paramount or sole consideration, but in reading cases like *King v. Low*[103] or *Moores v. Feldstein*,[104] one still gets the flavour of parental rights of access being assumed and presumed. In *Family Law in Canada*,[105] Christine Davies states that it is not because of a "right" possessed by a parent that access may be granted, but because it is perceived that incalculable benefits will accrue to the child from contact with both parents. However, uncertainty abounds in the area of access, in part because, while judges state there are no parental rights, and in so doing genuflect before the altar of best interests, judicial assumptions about the rights of parents within the access context cloud the thinking of judges.

This submission is evidenced by recent jurisprudential stirrings of concern. Norris Weisman of the Ontario Court of Justice, in "On Access after Parental Separation" "After parental separation," presupposes a relationship with the child often not present with children born to unmarried parents. Even so, the conclusion of the article is that children who did maintain contact with their fathers showed little evidence that the access was either beneficial or harmful to them. The data unanimously held that where parents are embroiled in conflict, and that conflict is ongoing, long-term and sometimes

irreversible harm will result to the children. Mr. Justice Weisman writes:

> [T]he court is faced with unpalatable alternative. Denying access to a deserving non-custodial parent rewards a custodial parent for unreasonable behaviour, and it is clearly unfair to both parties. This decision may, however, be the only option fair to the child. If the court opts for fairness between the parties and makes an access order, the child may be put at risk. 106

In short, parents' rights are coming ahead of the best interests of the child.

Similarly, in "Comments on the Law of Access"[107] Graham Berman, a staff psychiatrist with the Hospital for Sick Children in Toronto, writes that the courts sometimes focus wrongly on the perceived right of a parent to have access, to the detriment of the child:

> A number of well-known cases have led to the imposition on a child of visits with a parent who is virtually a stranger. It should be clear from our discussion that this is unlikely to be of benefit to the child. There is no established relationship within which meaningful mutual affection can exist.[108]

In *Child Access and Modern Family Law* Jill F. Burrett writes:

> The adversarial system's tradition of protecting the rights of parties to a proceeding at all costs allows litigation over access to become extremely protracted in some instances, so that there is a very real risk that the overriding principle that the welfare of the child (who is not of course a party to the proceedings) is paramount, can not be upheld.
>
> [T]he potential benefits of access are not always sufficient to warrant the introduction of contact with the parent after a lengthy absence.[109]

J.G. McLeod talks of presumptive rules as they relate to custody. He writes,

> Natural parents, in raising their children, normally create strong emotional and psychological bonds, ... however, where the parental bonds are weak between the biological parent and the child, the situation may be otherwise. It is no longer considered as important as it once was that a child be exposed to his heredity whatever the consequences. The dissent of L'Heureux-Dubé J. in *Young*, I submit, is supportive of the same re-examination of this issue.[110]

There is no magic in blood. The concept has been recognized as regards adoptions in *Racine v. Woods*[111] and *King v. Low*[112] but biological relationships seem to be subconsciously awarded significance on applications for access. Blood is insignificant for adoptions. It is insignificant in child-protection cases. Yet the same judges applying the best interests of the child test and ignoring mythical parental rights in child protection cases will, in access cases, do hoop stands to provide access. *Scherf v. Tassou* is noteworthy:

> The fact remains however that there are circumstances under which the welfare of children is to be best promoted by a denial of access to one parent. Continued access to the father in this case would, in my opinion, exacerbate and continue the turmoil, tension, and anxiety which is already extant in the relationship of these parties. Also see *Trudell v. Doolittle*, Abbey Prov. J. (Ont. Prov. Ct.); *Michel v. Hanley* (1988), 12 R.F.L. (3d) 372; *Stroud v. Stroud* (1974), 4 O.R. (2d) 567, 18 R.F.L. 237; and *Akister v. Rasmussen* (1991), 30 R.F.L. (3d) 346.[113]

Any impact upon the custodial spouse impacts upon the child. Nothing is more important to the child than the strength and capacity of the custodial parent. Based on the impact of access on the custodial spouse, it is appropriate that access be discontinued in certain situations.[114]

While these authorities address only inferentially a different attitude regarding the children born inside and outside of marital or near-marital relationships, they suggest the genesis of jurisprudential changes which currently manifests itself with indecision, depending upon the place of the judge on the learning curve or levels of enlightenment as defined, rightly or wrongly, by psychiatrists and psychologists. The whole *Divorce Act* mandate for maximum contact seems at times at variance with the best interests of the child. The presumptive tendencies of North American law, with parliament, judges and two generations of lawyers assuming benefit from access, is in part inconsistent with empirical data from non-legal areas of study, such as Goldstein, Freud and Solnit[115] and Baris and Garrity.[116]

(f) — Foreign Jurisdictions

Decision-making in custody and access is largely within the discretion of trial judges. Limits on discretion have flowed from

the important *Wednesbury* principles.[117] In the family law setting, the *Wednesbury* principles are overly broad:

> For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said to be acting "unreasonably". Similarly, there might be something so absurd that no sensible person could ever dream that it lay within the power of the authority.[118]

Other common law jurisdictions, most notably England, have asserted the role which a non-custodial parent should play in charting their children's future. In *Dipper v. Dipper*,[119] the English Court of Appeal concluded that a custodial parent has no preemptive rights over a non-custodial parent in making decisions regarding a child of their former marriage. The Court recognized that full consultation should occur between the parents for any major decision affecting the child's welfare and that in the event of a disagreement, the courts may be called upon to decide the fate of the child. In the words of Ormrod L.J.:

> It used to be considered that the parent having custody had the right to control the child's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court.[120]

American jurisprudence also favours a more participatory role by both parents in the decision-making process regarding the children. In fact, many states are subject to legislation which stresses the benefits of the child living under joint custody arrangements.[121]

6. — Best Interests of the Child

(a) — Common Law Definition

It has been recognized that the governing consideration in determining questions regarding custody and access is what stands in the welfare or best interests of the child. As long ago as 1923, Beck J.A., of the Appellate Division of the Supreme Court of Alberta, observed:

> The paramount consideration is the welfare of the children; subsidiary to this and as a means of arriving at the best answer to that question are the conduct of the respective parents, the wishes of the mother as well as of the father, the ages and sexes of the children, the proposals of each parent for the maintenance and education of the children; their station and aptitudes and prospects in life; the pecuniary circumstances of the father and the mother — not for the purpose of giving custody to the parent in the better financial position to maintain and educate the children, but for the purpose of fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration, even, I think, in a case like the present where both parties are of the same religion, for the probabilities as to the one or the other of the parents fulfilling their obligations in this respect ought to be taken into account. Then an order for the custody of some or all of the children having been given to one parent, the question of access by the other must be dealt with.[122]

Similar criteria apply throughout Canada, the United States and the United Kingdom. In *McKee v. McKee*, a Canadian appeal to the judicial committee of the Privy Council, it was stated:

> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody; see *Re Laurin*, [1927] 3 D.L.R. 136, 60 O.L.R. 409, following *Ward v. Laverty*, [1925] A.C. 101. So also it is the law of Scotland, see *M'Lean v. M'Lean*, [1947] S.C. 79, and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield.[123]

(b) — Canadian Divorce Legislation

While the "best interests of the child" has long been the principle applied in judicial decisions across Canada, it was not given explicit statutory recognition until the enactment of the 1986 *Divorce Act*.[124] Under the *Divorce Act* of 1968, section 11(1) prescribed that

> Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make

. . . . .

(c) an order providing for the custody, care and upbringing of the children of the marriage.

The *Divorce Act* of 1986 enacted a new test under which a court, in making an order for custody or access, "shall take into consideration only the *best interests of the child* of the marriage as determined by reference to the condition, means, needs and other circumstances of the child."[125] This criterion reflects Parliament's acceptance of prevailing jurisprudential views that a child is a legal entity in his or her own right whose best interests should determine his or her parenting arrangements after divorce.[126] As enunciated by the Manitoba Court of Appeal: "This represents a shift in emphasis. Whereas the child's best interests were previously paramount, they became as a result of this subsection the only consideration."[127]

Only three Canadian jurisdictions (Alberta, Nova Scotia, and the Northwest Territories) have not yet statutorily endorsed the best interest standard, utilizing instead the older prescription of making custody and access orders with "regard to the welfare of the infant, the conduct of the parents, and the wishes of the mother and father."[128] In practice, however, there is no significant difference between the standards applied by judges in all the provinces. All courts apply the same broad standard, that being decisions based upon the best interests of the child. This uniform practice reflects both the wide judicial acceptance of the best interests standard and the significant impact which the existence of the *Divorce Act* has had on the evolution of a nationally accepted approach in taking child custody decisions.[129]

It is noteworthy, however, that, on application of the best interests test, the Ontario Court of Appeal has recently acknowledged "that the custodial parent's best interests are inextricably tied to those of the child" within her or his care, thus indicating an appreciation by the courts of the interconnection between the well-being of a child and of a custodial parent.[130]

(c) — Applicability of the Best Interests Test

The application of the best interests test arises only in the context of a dispute between separated parents. It is not applicable to a child-related dispute when two parents live together, or when they can agree to a decision about the child's care. Abella J.A. confirmed the court's deference to decisions jointly arrived at by the parents when she recently stated:

> Absent of the kind of neglect which triggers child welfare legislation, parents are largely free to make whatever decisions they feel are best for their children. Parents who separate but *can* agree as to the child's care, are subject to no outside scrutiny of what they determine to be in the child's best interests.[131]

Thus, for example, a grandparent or other third party could not launch an application to impede a decision taken jointly by the parents on the basis that the court may determine the decision to be inconsistent with the best interests of the child.

(d) — Determining the Best Interests of the Child

While section 16(8) of the *Divorce Act* provides that the best interests of the child are to be determined by reference to the condition, means, needs and other circumstances of the child, little clarification is provided under the Act as to what potential factors may be considered. Reference is thus made to the principles developed by the courts in exercising their authority to ascertain what is meant by "best interest." The leading authority on this issue is the unanimous judgment of the Supreme Court of Canada in *King v. Low*,[132] where McIntyre J. formulated the best interests test thus:

> The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.[133]

It has also been the practice in some cases, most notably *T. (K.A.) v. T. (J)*,[134] to employ provisions of the Ontario *Children's Law Reform Act*[135] ("CLRA") as guidelines in the determination of the best interests of the child under the *Divorce Act*. Section 24(2) of the CLRA states:

> In determining the best interests of the child for the purpose of an application under this Part in respect of custody or access to a child, a court shall consider all the needs and circumstances of the child including,

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons involved in the care and upbringing of the child;

(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Alberta and one Saskatchewan case seem slightly at variance with the best interests test, discussing what the Albertans call a "Fitness Test." *D. (W.) v. P. (G.)*,[136] *S. (R.) v. L. (A.)*[137] and *Langdon v. York* are notable. The Alberta Court of Appeal in *D. (W.) v. P. (G.)*[138] stated that the test to be applied in a custody dispute between a natural parent and non-parent is the "fitness test" rather than the best interests test. Kerans J.A. held that so long as there is a "fit" parent willing to take custody of a child, a non-parent, no matter what his or her relationship is to the child or what he or she can provide to the child, cannot contest custody with the parent.

> I understand the rules to be that a stranger to the child — including a governmental agent — cannot wrest custody from the lawful guardian of the child without first demonstrating that the lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons. But, in a contest between two recognized guardians, the person who can offer superior parenting will prevail. The first is the "fitness" rule; the second is the "best interests" rule.
>
> My conclusion ... reaffirms the "fitness" rule, and does not seek to over-ride it. Specifically, I do not say, as is sometimes said, that the "best interests" test is the only test ...
>
> Like most aphoristic observations [referring to the best interest test], that is an oversimplification. This can be simply illustrated: on the application of the best interests rule, the supposed rights and feelings of parents and other adults are irrelevant. The question is simply which of the two competing claims to custody can offer the best for the child. Even a fit parent, then, might lose custody to somebody who offers superior parenting. If this rule were applied without restriction, it would mean that every fit parent of every child — even those lawfully and happily married — is exposed to the constant risk that some stranger might seek custody of his or her child simply by offering a better deal. ... Such an extreme statement of the best interest rule has never been accepted in our society.
>
> . . . . .
>
> Of course it is not in the best interests of the child that he be left in the hands of an unfit person. The problem lies in the converse: shall a child always be taken from a fit guardian and put in the hands of one who is more fit? The answer is: not necessarily.[139]

One would have thought that there was no magic in blood and that biology is not a trump card, but not only does Alberta talk about a fitness test but one also finds the language of a "legal stranger" used often in this line of authorities. *D. (W.) v. P. (G.)* was decided 13 years ago, but there are also two recent Alberta decisions to the same effect. The *S. (R.) v. L. (A.)* and *Langdon v. York* decisions of the Alberta Court of Queen's Bench affirm the fitness test from *D. (W.) v. P. (G.)*. These cases also state that only parents or guardians are entitled to apply for custody of children in most circumstances.

Although the *Child Welfare Act* was enacted in Alberta following the *D. (W.) v. P. (G.)* decision and purports to impose the best interests test rather than the fitness test in guardianship disputes, various other Provincial Court decisions also have followed the reasoning of Kerans J.A. Provincial Court Judge Cook-Stanhope addressed this issue in *N. (F.G.) v. L. (J.R.)*,[140] stating:

> Subsequent to the decision in *W.P. v. G.P.*, a new *Child Welfare Act* was introduced in Alberta. Section 49 gave equal guardianship jurisdiction to the Provincial Court concurrently with court of Queen's Bench and the Surrogate Court. The circumstances in *W.D. v. G.P.* had brought into focus the inequities in the law which favoured the birth mother over the birth father in a custody contest, where the parties were not married. The so-called "deeming" jurisdiction was an unusual extension of the powers of an inferior court and has been the subject of a considerable amount of jurisprudence and discussion. The new guardianship jurisdiction in the *Child Welfare Act* seemed to present a solution for those cases where it was felt guardianship status was a legal condition precedent to a simple custody application under the *Provincial Court Act*.[141]

Later, Judge Cook-Stanhope stated:

> In my opinion, s. 49 of the *Child Welfare Act* has changed the legal position stated by Kerans, J.A. in *W.P. v. G.P.* where he said:
>
> > I understand the rules to be that a stranger to a child, including a governmental agent, can not wrest custody from the lawful guardians of the child without first demonstrating that lawful guardian has either abandoned or neglected the child, or without offering other commanding reasons.
>
> In fact, the case is now that any adult person who has had continuous care of a child for more than 6 months may apply, and even if the continuous care is less than 6 months, such a claimant may indeed "wrest custody from the lawful guardians" provided that claimant satisfies the Court that it is in the best interests of that child to do so.[142]

In *Hanon v. Bolander*[143] Landerkin Prov. J. stated:

> Clearly, since *W.D. v. G.P.*, the laws concerning the putative father generally has improved in two respects.
>
> First, the primary Court to hear guardianship is now the provincial court in light of Madam Justice Veit's decision, *B. (W.A.) v. M. (L.M.)*, (1988) 96 A.R. 45. Private guardianship applications under the *Child Welfare Act* now invoke the best interest test as opposed to the fitness test in the Court of Queen's Bench under the *Domestic Relations Act*. [144]

In *Ochapowace First Nation v. A. (V.)*,[145] Sherstobitoff J.A., writing for the Court, seemed to be of a similar view regarding rights of parents if they are competent:

> The decision of the chambers judge can also be read as saying that where, as here, there are two parents who are competent, willing, and able to assume all of the responsibilities of legal custody of the children, some extraordinary circumstances must exist before a third party may be found to have a sufficient interest to permit it to challenge a parent for custody. It should be carefully noted here that the competence and the ability of a parent to assume custody of a child refers to exactly what the words mean, and not to the suitability of a parent to sever the best interests of a child as opposed to the suitability of someone else competing for custody. That is a separate issue governed by s. 8 of the *Act*
>
> . . . . .
>
> That brings us to the question of whether any extraordinary circumstances sufficient to permit an application by a third party to displace the parental right to custody exist in this case.[146]

(e) — Assumptions Respecting the Best Interests of the Child

Although the best interests of the child criterion exists as the sole consideration (with the possible exception of Alberta and less so Saskatchewan) in determining custody or access on or after divorce, certain assumptions are commonly present in the judicial resolution of custody matters. Thus, while each disposition is judged upon its individual merits, the courts nonetheless endeavour to maintain a certain level of consistent evaluation in exercising their discretion.

The shift to refocusing on children's rights over parental rights is a development which continues to require definition. McLachlin J. in *Young v. Young* commented on the historical development of this concept:

> The express rule that matters of custody and access should be resolved in accordance with the "best interests of the child" is of relatively recent origin. Under the common law regime of the 18 and 19th centuries the governing principle in a custody dispute was the rule of near-absolute paternal preference. ... The rule was defended on pragmatic grounds, including what was thought to be the general interest of children. ... In truth, the rule probably had more to do with the

acceptance of the father's dominant right in all family matters, which in turn found its roots in the notion of the inherent superiority of men over women.

The rule of paternal preference was displaced by a rule establishing in the mother a primary right to custody of a child of tender years. ... Later still there arose a presumption in many foreign jurisdictions and to a more limited extent in Canada, of maternal preference. ... This presumption, like the paternal preference rule, was justified on pragmatic grounds; the welfare of the child was the often cited reason for the presumption. So justified, the presumption carried the seeds of its own demise. Courts increasingly looked behind the preference to focus directly upon what was in the child's interest, which was sometimes found to conflict with a maternal preference.

By the 1970s, a number of western countries had accorded statutory recognition to a "best interests" or "welfare of the child" test. Questions relating to the weight to be given these interests, and the proper means of understanding these interest, remained. In England, the child's welfare is stipulated as the "first and paramount" consideration. ... English jurisprudence indicates that the child's welfare has, in fact, become the sole consideration. ... In Norway, decisions in respect of custody shall "mainly" (or "primarily") consider the interests of the child. ... In practice it appears that other criteria do not simply function as "tiebreakers" where the interests of the child would be equally well served by either parent, but can, in certain cases, determine the issue.[147]

McLachlin J. commented on section 16(8) of the *Divorce Act*:

First, the "best interests of the child" test is the *only* test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look *only* at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.

. . . . .

I would summarize the effect of the provisions of the *Divorce Act* on matters of access as follows. The ultimate test in all cases is the best interests of the child. This is a positive test, encompassing a wide variety of factors.[148]

McLachlin J. commented on the "best interests of the child" test:

Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.[149]

In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*[150] the Court dealt with whether a parent had the right to refuse a blood transfusion for his infant child due to religious beliefs and whether this right was protected by section 7 of the *Canadian Charter of Rights and Freedoms*. Iacobucci and Major JJ. stated:

The rights enumerated in the *Charter* are individual rights to which children are clearly entitled in their relationships with the state and all persons — regardless of their status as strangers, friends, relatives, guardians, or parents.

... The nature of the parent-child relationship is thus not to be determined by the personal desires of the parent, yet rather by the "best interests" of the child. In *Young*, *supra*, at p. 47 L'Heureux-Dubé J. ... commented that:

> The proposition ... is one of duty and obligation to the child's best interests.
>
> ... One cannot stress enough that it is from the perspective of the child's interests that these powers and responsibilities must be assessed, as the "rights" of a parent are not a criterion.

The exercise of parental beliefs that grossly invades the "best interests" of the child is not activity protected by the right to "liberty" in s. 7.[151]

Returning to *King v. Low*, McIntyre J., commenting on a custody dispute between a natural mother and adoptive parents, stated:

The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general

> psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult. Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.[152]

In *M. (B.P.) v. M. (B.L.D.E.)*[153] Abella J.A. addressed a father's claim to access:

> But the central figure in the assessment is the dependent child. And that is why, despite the fact that s. 24(2)(g) refers to "the relationship by blood or through an adoption order between the child and each person who is a party to the application," the existence of such a relationship guarantees no rights to custody or access ...
>
> But while the father submits that, as the father, he is automatically entitled not to be prevented from seeing his child, it is clear, as Wilson J. said in *R. (A.N.) v. W. (L.J.)*, [1983] 2 S.C.R. 173, ... that "the law no longer treats children as the property of those who gave birth but focuses on what is in their best interests."[154]

In *Racine v. Woods*[155] Wilson J. dealing with parental consent to an adoption and the "best interests" of the child, stated:

> This does not mean, of course, that the child's tie with its natural parents is irrelevant in the making of an order under the section. It is obviously very relevant in a determination as to what is in the child's best interests. But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, *a child is not a chattel in which its parents have a proprietary interest*; it is a human being to whom they owe serious obligations.[156] [Emphasis added.]

In *Phelps v. Andersen*[157] a father applied for sole custody of an 8-year-old girl who had been in the custody of her parental grandmother for more than half of her life. The child's biological mother opposed the father's application and also wanted sole custody of the child. Jones Prov. J. granted custody of the child to the paternal grandmother, stating:

> I am cognizant of the fact that the paramount consideration in my decision must be which custodial disposition would be in the best interests of the child, taking into consideration all the needs and circumstances of this particular child.[158]

James G. McLeod states: "Thus, the notion that similar considerations drive custody and access cases under the *Divorce Act* as under provincial legislation has been approved."[159]

McIntyre J. in *King v. Low*[160] reviewed the historical development of the law and its change in focus. In many cases the right to access is now referred to as a right of the child.

It is not the law that a parent seeking custody or access must prove the value to the child of parental contact. This is presumed by the law.

The basic legal principle is stated in section 16(10) of the *Divorce Act* and also in section 6(5) of the *Children's Law Act*. This principle was echoed by McIntyre J. in *K. (K.) v. L. (G.)*, where he stated:

> I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighting the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. ... Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside.[161]

In *Emmel v. Emmel*[162] Gerein J. affirmed a rebuttable presumptive onus of proof regarding access:

> I take it as settled law that in determining whether a parent should have access to a child, a court looks only to the best interests of the child. At the same time, absent unusual circumstances, it is desirable that a child have access to the non-custodial parent.

He then went on to quote with approval the comments of Klebuc J. in *Sekhri v. Mahli*:[163]

> I agree that the concept of a parent having a fundamental right of access to his or her child as stated in *Tremblay* is no longer the law in the context of the *Divorce Act*. At the same time I am satisfied there exists a rebuttable presumption

favouring the granting of access unless there is solid evidence confirming a real risk of danger or harm to the child, or not possible long-term benefit to the child from continued contact with the non-custodial parent: *H. v. J.* (1991), 34 R.F.L. (3d) 361; affirmed (1992), 40 R.F.L. (3d) 90 (Sask. C.A.). I further conclude that the onus of proving the aforementioned exceptions, or otherwise establishing that access would not be in the best interest of the child, rests on the party opposing the granting of access. Where it is alleged that the access sought would be of no present or future benefit to the child, such allegation should be supported by the opinion of a qualified professional who has counselled the child for a sufficient length of time to arrive at an informed opinion. Generally, non-professional opinions should be given little or no probative value except where the unchallenged evidence before the court is such that it could with a substantial degree of certainty arrive at the same opinion.[164]

(i) — Tender years doctrine

First introduced in the *Custody of Infants Act, 1839*, the "tender years doctrine" survived as a well respected criterion. This rule, that children of tender years belong with their mother, has been said to be "a rule of human sense rather than a rule of law."[165] However, due to changing roles of women and men within the labour force and in the upbringing of their children, the strength of this doctrine is now in dispute. American courts now tend to refer to a gender-neutral "primary caregiver doctrine," under which the primary parent is assumed to have an advantage in seeking custody of a child of tender years regardless of gender. Under that doctrine, the courts take into consideration the child-rearing roles which each parent discharged prior to custody proceedings as a factor in determining who has the best potential to serve as the custodial parent. As stated by Beck J. in *Jordan v. Jordan*, "the role of the primary caregiver, without regard to the sex of the parent, is a substantial factor which the trial judge must weigh in adjudicating a custody matter where the child is of tender years."[166]

The Ontario Court of Appeal has stated that under the tender years doctrine a mother who has been the primary caregiver may be deprived of custody to a young child only where "very compelling reasons" exist.[167] While the doctrine has presumably become gender-neutral, the reality is that the bulk of childcare of young children continues to be performed by mothers. This reality has not changed with the statutory recognition in section 20(1) of the *Children's Law Reform Act* that the father and mother of a child are equally entitled to custody of the child. The tender years doctrine reflects that a young child is more likely to be cared for by the child's mother and, if that is the case, it is in the best interest of the child to remain with the mother unless there are other compelling reasons to uproot the child in the child's best interests. As such, the doctrine tends to serve as an advantage to women more frequently.[168] I do not find that the learned trial Judge erred in his consideration of the tender years doctrine.

(ii) — Preservation of the status quo

Children who appear to be living happily and successfully under their current arrangements are unlikely to be disturbed by the courts in custody proceedings. A court, in an attempt not to aggravate the effects of divorce on a child, will seek to preserve the environment to which the child has become accustomed, whenever possible. While the practical effect of changing a child's place of residence and school has the potential of creating discomfort and social adjustment, the courts primarily seek to preserve relationships over geographical locations.[169] Preservation of temporary arrangements resulting from interim custody has been relinquished to an argument of little weight in contested trial proceedings.[170] Although the prospect of a child being shuffled back and forth between parents as a result of a change in custody is unappealing in practice, as it may cause a child confusion and discomfort, the court views the *long-term* best interests of the child as the primary concern in determining custody.[171]

(iii) — Splitting siblings

The interests of children are generally seen to be best served by avoiding custodial arrangements which split the siblings between the parents. Social interaction between siblings is viewed by the courts as a significant benefit. Certainly, an argument that children be evenly split amongst the parents in order to allow both the opportunity to participate in the role of child-rearing would be unacceptable and inconsistent with the best interests of the children, even under circumstances where the parental abilities of the former spouses are evenly matched. As stated by Granger J. in *Hurdle v. Hurdle*:

> [A] court ... should strive to ensure that siblings are raised together in order that they can enjoy the company of their brothers and sisters. The evidence should be extremely compelling before a judge should grant a judgement or order which would separate the children in their formative years.[172]

(f) — Uncertainty Regarding Best Interests

In resolving custody disputes, the differences which exist between families generate great pressure to treat each case on its facts. Indeed, recent criticism of presumptions surrounding custody has encouraged the emergence of the best interests test as the paramount consideration when determining the status of children.[173] As a result of abandoning such presumptions, custody law today reflects a "complicated and chaotic multiplicity" of factors.[174] In his article on indeterminacy, University of California Law Professor Bob Mnookin addressed problems regarding the best interests standard in stating:

> The first theme is that the determination of what is "best" or "least detrimental" for a particular child is usually indeterminate and speculative. For most custody cases, existing psychological theories simply do not yield confident predictions of the effects of alternative custody dispositions. Moreover, even if accurate predictions were possible in more cases, our society today lacks any clear-cut consensus about the values to be used in determining what is "best" or "least detrimental."[175]

Professor Mnookin's contends as a result that, due to the indeterminacy of what is in the best interests of a particular child, the formulation of rules relating to custody is problematic. Accordingly, good reason exists to question the discretionary powers exercised by trial court justices in the resolution of custody dispute.[176]

Similar acceptance of the problems surrounding the indeterminacy of best interests has been made by Canadian courts. Abella J.A. of the Ontario Court of Appeal has stated:

> Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests [*sic*] which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention.[177]

Nonetheless, this unavoidable fluidity is important in attempting to deliver individual justice under the circumstances of each case.

7. — Conduct

(a) — Past Conduct

Before 1968, the primary ground for divorce in Canada was adultery, often resulting in the "guilty" spouse becoming socially ostracized with resulting custody being awarded to the "innocent" parent. Views relating to custody were equally conservative in nature. Accordingly, stringent restrictions were commonly ordered in granting a parent visitation rights to a child, in an effort to maintain the custodial parent's absolute right over care and control of the child.[178]

Section 11 of the *Divorce Act* of 1968 declared that a court, if it thought fit and just to do so, could regard the "conduct of the parties" as a relevant consideration in resolving custody issues. In contrast, as part of the family law reform initiative towards no-fault divorce, section 16(9) of the *Divorce Act, 1986* stipulates that "the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent to a child." Consequently, a court may not prejudice the application of a parent attempting to gain custody or access to a child simply on the basis of spousal misbehaviour, such as adultery. Instead, parenting ability and conduct that affects the child are to be judicially considered under the Act. No correlation is presumed to exist between spousal conduct and parenting ability. As stated by de Grandpre J. for the Supreme Court of Canada in *Talsky v. Talsky*: "I agree with the trial Judge that a wife who is 'well nigh impossible' as a wife may nevertheless be a wonderful mother."[179]

The statutory change concerning conduct is reflective of the attitude of most judges over the last 20 years, many of whom have acknowledged that custody and access dispositions must not be employed as a means of penalizing a parent for spousal misconduct but must instead be resolved by reference to the best interests of the child.[180]

(b) — Parental Conduct

Section 16(9) does not exclude the courts from taking into account the parental roles displayed by each parent during the marriage or following separation. Past or present conduct with respect to the child may be a critical factor in the determination of custody or access dispositions or in imposing conditions, terms, and restrictions upon such orders. The nature and quality of the child's past relationship with each parent is an important consideration.[181] The court's regard for the role of the primary caregiver is an illustration of this consideration. Furthermore, in determining what custodial placement serves the best interests of the child, the willingness of a prospective custodial parent to facilitate the child's contact with the

access spouse will normally be of substantial importance by virtue of section 16(10) (maximum contact) of the Act.[182]

(c) — Allegations of Misconduct in Relation to the Child

Unsubstantiated allegations of relevant past conduct being levelled by one or both parents as a weapon in custody battles appear to be increasingly common. Unfortunately, such allegations of inappropriate conduct within the family environment can often shift the focus of a court's inquiry away from a decision of what is in the child's best interests towards an investigations of whether the alleged misconduct actually took place. Moreover, the prejudicial effect of such allegations, even if unfounded, may affect the court's ability to make a determination based upon the best interests criterion free of bias. In fact, in an effort to discourage such allegations, it has been held that a parent who makes unsubstantiated allegations of misconduct without substantive evidence cannot complain if the trial judge decides in favour of the other parent on the basis that the latter has not exaggerated his or her case.[183]

8. — Maximum Contact Principle

(a) — Statutory Provision

Subsection 16(1) of the *Divorce Act* presents the court with an additional consideration when determining custody issues; that being adherence to the maximum contact principle:

> In making an order under this section, the court shall give effect to *the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child* and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact. [Emphasis added.]

The principle of maximum contact exists as a matter of public policy, it being the generally accepted view that continued contact with the non-custodial parent will be in the best interests of the child in the majority of cases. This view represents not only the current view of legislators, but is also the accepted view held by social scientists. In her book, entitled *Child Custody and Divorce*, Susan Maidment notes that

> There is currently widespread professional agreement that it is in the child's interest to maintain a continuing relationship with both natural parents, and the closer and more normal that relationship can be, the better it is for the child.[184]

(b) — Practical Effect

Some experts, however, take an opposing view on what constitutes a healthy level of access. They argue that the key factor in a child's well-being is a low level of conflict between his or her parents, stressing that conflict between parents has been identified as a great source of difficulty for both parents and the child. Contact with a non-custodial parent can involve complex emotional feelings which may be unsettling for a child, particularly in situations where animosity persists between parents.[185] Furthermore, parents may jockey for the child's affection through gifts and unbridled leniency towards discipline of the child. Spoiling a child in a bid to become the preferred parent does not serve the best interests of the child.

Nonetheless, most of the judiciary and the legal community appear to be in agreement with the benefits of maximum contact. In a survey conducted by the Department of Justice as part of the evaluation study on the effects of the *Divorce Act*, family law practitioners were asked for their opinion on the effects of the maximum contact principle.

> The question was asked, what effect, if any, this principle had on (1) negotiating custody and access arrangements and (2) the disposition of custody and access at trial. The responses were split equally between those who believed that the maximum access guideline had produced no effect and those who felt it had encouraged more liberal access.[186]

Of those lawyers who believed that the principle had an effect, most indicated that the maximum contact principle either helped ensure generous access through fear that custody might otherwise be denied due to appearing unwilling to facilitate access; or, that clients faced with the prospect of a contested custody battle could be encouraged to act more reasonably in negotiating with the other parent.[187]

(c) — The American Experience

It is noteworthy, however, that many American jurists do not share the same enthusiasm about policies similar to the maximum contact principle. Although most American writing focuses upon joint custody, it having been statutorily endorsed in many states, its effects are comparable to those under the maximum contact principle. The main criticism in the United

States is that such provisions may cause undue weight to be given to maximum contact without sufficient regard to the primary criterion of which parent is most able to raise the child in a manner consistent with his or her best interests. In her research on the effects that maximum contact legislation had in California during the 1970s, Professor Lenore Weitzman noted that

> An unwilling parent is more likely to be coerced into a joint custody "agreement" in states with a "friendly parent" rule. Such rules require courts to consider which parent would be most likely to provide the other parent "with frequent and continuing access to the child" when the court makes a sole custody award. Because of their potential for duress and coercion in arriving at joint custody "agreements," friendly parent rules have been opposed by several bar associations. [188]

This contrasting view to that of the Canadian law practitioners' survey may serve as a warning on the effects of maximum contact: statutory presumptions in favour of joint custody in the United States and the maximum contact principle in Canada may aid practitioners in the resolution of custodial arrangements, but the long-term consequences of these precepts may be detrimental to both the child and the custodial parent.

The fear that reluctance to agree to generous access may be construed negatively by the courts is especially prevalent amount women trying to avoid contact with abusive husbands. Not surprisingly, women in these situations may be adverse to generous access, particularly when it places them at risk or subject to the control of the abusive non-custodial parent. A further danger is that an abusive parent may use the requirement that the custodial parent facilitate maximum contact as an argument why he or she should be granted sole custody.[189] One American commentator has stated:

> Parents who believe joint custody is not in their child's best interests will either "agree" to joint custody or "bargain." Few will risk going into court against a parent seeking joint custody. Children suffer either way — by an unworkable joint custody arrangement or by the custodial parent's "bartering away" of financial resources necessary for the child's support.[190]

It should be emphasized that while negative aspects of the Canadian policy of maximum contact can be demonstrated through comparison to California's presumption in favour of joint custody, joint custody itself is not encouraged by either legislation or the judiciary in Canada. In recent years the number of joint custody dispositions granted under the *Divorce Act* has remained at between 12 to 15 percent of all orders.[191]

9. — Religious Upbringing

The Supreme Court of Canada decisions of *Young v. Young*[192] and *D. (P.) v. C. (S.)*[193] have initiated a re-examination of the meaning of "custody" and "access" and the elusive concept of the *best interests of the child* in custody and access proceedings. Both cases centred upon disputes between custodial and non-custodial parents regarding the right of the access parent to include the child in his or her religious beliefs and practices.

(a) — Prior to the S.C.C. Decisions

Before *Young* and *D. (P.) v. C. (S.)*, Canadian courts had generally upheld the notion that a custodial parent had the right to determine the religious upbringing of a child. The courts appeared generally unconcerned with the merits of one religion over another, but sought to ensure that stability and consistency in religious upbringing was provided to the child. The Saskatchewan Court of Appeal has ruled that the courts are not to attempt to dictate religious philosophy to either parent; their role is simply to take into account how the distinct beliefs of each parent would bear upon the well-being of the child and grant custody accordingly.[194] The New Brunswick Court of Appeal took a complementary position in *Fougere v. Fougere*[195] determining the religious rights of the access parent to be of secondary interest to the overall welfare of the child.

However, the decision by the British Columbia Court of Appeal in *Young v. Young*[196] brought this traditional view into question by declaring that the courts must apply the common law and statutory provisions, including the *Divorce Act*, in a manner consistent with the constitutional values espoused in the *Charter of Rights and Freedoms*.[197] The Court held that each parent, custodial or non-custodial, has the fundamental freedom of religion under section 2(a) of the *Charter*, to adopt and to follow whatever religious belief he or she chooses and to teach and disseminate his or her beliefs to their children both during and following the marriage. Accordingly, the Court of Appeal concluded, by a majority decision, that Mr. Young's fundamental freedom of religion under section 2(a) of the *Charter* was not "limited by the powers bestowed upon the custodial mother."[198]

(b) — Decisions at the S.C.C.

On appeal to the Supreme Court of Canada, *Young v. Young* and *D. (P.) v. S. (C.)* produced conflicting outcomes, leaving the law in this area confused and uncertain. In *Young* the majority of the Judges rejected the validity of a trial judge's order restricting religious activities during access. Conversely, in *D. (P.) v. C. (S.)* the majority refused to overturn a similar order restricting access.

(i) — Charter rights

All seven Judges agreed that if the *Charter* does apply to custody and access disputes, the criterion of the best interests of the child does not contravene it. Madam Justice McLachlin's view in *Young* has been summarized as follows:

> Religious expression not in the best interests of the child is not protected by the *Charter* because the guarantee of freedom of religion is not absolute and does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct not in the best interests of the child, even absent of the risk of harm, amounts to an "injury" or intrusion on the rights of others and is clearly not protected by this *Charter* guarantee.[199]

McLachlin reiterated her view in *D. (P.). c. S. (C.)*:

> Articles 653 and 654 C.C.Q. and art. 30 C.C.L.C. affirm the "best interests of the child" standard — the same started as in the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Suppl.), ss. 16(8), 16(10) and 17(5). ... The standard, and the articles that set it forth, are constitutional, and infringe no entrenched rights.[200]

However, the Court was not in agreement on the fundamental question of whether the *Charter* applies to parental custody and access disputes. Madam Justice L'Heureux-Dubé, in her majority opinion in *D. (P.) v. C. (S.)* and her minority opinion in *Young*, espoused a return to the traditional position that a custodial parent should have sole decision-making over the religious upbringing of the children within his or her care to the exclusion of all other parties, including the access parent. This is consistent with the contemporary view taken by Canadian courts, namely that religious education is one of the elements of custody over which the custodial parent has exclusive control in the absence of any agreement or court order to the contrary.[201] This also represents the widely accepted view of other common law jurisdictions:

> [I]n the absence of sound countervailing reasons the decision should rest with the party who has legal custody of the child ... There could not be other than discord engendered in the respondent's [custodial parent's] household if she were compelled to acquiesce in the child committed to her care being brought up in a faith to which she profoundly objects. [202]

L'Heureux-Dubé J. further concluded the *Charter* is inapplicable to private disputes referred to the courts. Its purpose is to protect the individual from the coercive power of the state, and provide a mechanism of review for persons who find themselves unjustly burdened or affected by the actions of government. She contended that the *Charter* is not intended to regulate the affairs of private citizens.

L'Heureux-Dubé J. also opined that section 32 does not include the judiciary as a level of government covered by the scope of the *Charter*, and therefore judicial orders respecting private disputes could not be covered by the *Charter*.[203] Section 32 dictates that the *Charter* applies to governments and legislatures.[204]

> [T]he *Charter* does not apply to private disputes between parents in a family context ... We are dealing here with the judiciary, a separate branch of government within the meaning of s. 32 of the *Charter*. The *Charter*, accordingly, will not apply here to the order of a court in a family matter.[205]

(ii) — Best interests criterion

The more difficult question with which the Court struggled was not whether restricting "religious access" infringed an access parent's religious rights under the *Charter*, but how the term "best interests of the child" should be defined in such disputes. In his review of these two decisions, practitioner John Syrtash credits diverging opinions on this point as the source of the opposing results:

> In particular, the Judges were polarized into three different camps. Two of the camps gave divergent and conflicting explanations of what the term "best interests" means in the circumstances under which religious rights should be curtailed. I am convinced that the third camp, comprising of Mr. Justice Cory and Mr. Justice Iacobucci "switched sides" between the two camps, even though the facts of the cases, in my opinion, were not so dissimilar as to have lead to a different result. It is my thesis that the ambivalence of these two Judges on this critical issue has now led to a situation where the lower courts, family law lawyers and their clients have no consistent guidelines on how to approach such disputes.[206]

The notable result of his split is that it leaves the parameters of custody and access even more uncertain than before these decisions.

10. — Mobility Rights

A second domain of custody law receiving current attention is that of the custodial parent's mobility rights. Mobility rights regulate a parent's freedom to relocate to a new community with the child of his or her former marriage. Courts may take exception to such an action, as it is likely to adversely affect a child's ability to exercise regular and frequent access with the non-custodial parent. And thus the issue becomes what is in the best interests of the child weighing the advantages and motivation for the move against the disadvantages of lost benefits of access.

These opposing principles, freedom of movement versus maximum contact, have caused inconsistencies in how the courts arrive at decisions regarding the mobility of a child from a divorced family. Some judges look favourably on the benefits of mobility; others see the preservation of a good relationship with both parents as paramount, in view of the access interests of the child. As a consequence, there is a critical level of uncertainty pertaining to what standards must be achieved in order to succeed in convincing a court that a proposed move is a benefit or hardship to the child.

> Some judges appear to have taken the position that it is the custodial parent's right to move with the child unless the move is seen to be "unreasonable". The onus would seem to be on the parent challenging the move to show it would be detrimental to the child or for an unreasonable purpose.
>
> . . . . .
>
> An alternative view focuses on the disruption of access caused by the move. This view is said to be supported by subsection 16(10) of the *Divorce Act* which seems to encourage the maximization of parental access and subsection 16(7) that specifically allows a court to order a 30 day notice of change of residence.[207]

Several important judgments on this topic have recently been handed down by the judiciary, including three by the Supreme Court of Canada[208] and two by the Ontario Court of Appeal.[209]

(a) — Statutory Provisions

There is no specific statutory guidance in the *Divorce Act* or provincial legislation respecting a parent's right to move with his or her child to a new community. However, the following subsections are the usual focus of argument in mobility cases:

> 16. (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to the child of the change, the time at which the change will be made and the new place of residence of the child.
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child. ...
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

(b) — Contextual Setting

Current trends in our society also recognize the importance of freedom on mobility. Within a global society, but also across a land as diverse as Canada, the need to be mobile in order to gain advancement is common. Many are faced with the need to be mobile in order to succeed both in their careers and personal lives. The right to mobility is guaranteed by section 6 of the *Charter* and represents a concern for single, married, and divorced persons.

Contemporary psychological and legal opinion asserts that it is desirable for a child of divorced parents to maintain a strong continuing relationship with both the custodial and non-custodial parent promoted through generous contact with both parents.[210] Further, most research contends that frequent brief contact is better for the child than infrequent long contact; and that the regular presence of both parents leavens the influence of the other to be reasonable in the upbringing of the child. Belief in this concept is so widely acknowledged that it has received formal recognition under the maximum contact principle enunciated in section 16(10) of the *Divorce Act*.

It is noteworthy that a non-custodial parent has never been impeded by the courts from relocating to a new community regardless of the motivation. Accordingly, under what circumstances may a court restrict a custodial parent from relocating in a *bona fide* effort towards self-advancement.

(c) — Previous Decisions

Litigation respecting mobility is far from a new issue. In 1884, in one of the first actions over the competing rights of custodial and non-custodial parents, the English Court of Appeal was called upon to resolve a dispute in *Hunt v. Hunt* between a mother with a right of access and a custodial father, a military officer, who had been given a posting in Egypt.[211] In finding in favour of the father's right to move, Fry L.J. stated:

> The deed appears to be only to give the wife a right of access to [the children] where they may happen to be, and to hold that it obliges the husband to keep the children in such a place that she can conveniently have access to them, would create formidable difficulties, for how could it be determined what was the limit to the places to which the husband might take them.[212]

The sole element which their Lordships could envisage as a bar to the right of mobility would be if the custodial parent were acting unreasonably or with the ulterior motive of defeating access, which were not the circumstances in the case. The *Hunt* decision was subsequently followed not only in England but also in Canada.[213] Ninety years later, the Ontario Court of Appeal came to a conclusion consistent with *Hunt* in *Wright v. Wright*.[214] There, in granting a custodial mother the right to move with her children from Ontario to Alberta, Mr. Justice Evans stated:

> The applicable law may be summarized as follows: Absenting all consideration of unreasonableness, which, in the circumstances of this case is not a factor, the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of such specific terms with respect to access as would clearly indicate that the parties must have intended that the children remain in close proximity if the specified right of access provided in the agreement was to be an effective right.[215]

Subsequent Ontario cases, most notably *Field v. Field*[216] and *Landry v. Lavers*,[217] also rendered judgments in favour of custodial mobility. In the *Field* decision the Judge made a significant declaration not dealt with in previous cases: the "best interests of the child," in his opinion, were served by allowing the move with the custodial parent. Decisions until that time had made no reference to the best interests principle, which, although not embodied in statutory form at that time, was the paramount common law principle for deciding custody and access disputes.

(d) — A Return to Best Interests

The Supreme Court in the foregoing three cases talked about best interests but did little to flesh out the concept. Questions regarding what stands in the best interests of the child remain the concern of most adjudications respecting mobility rights. On this issue, the New Jersey case of *D'Onofrio v. D'Onofrio* stated:

> [C]hildren, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation by the non-custodial parent must be considered.[218]

The view that a child's best interests were served by allowing a new family to develop and improve was followed in Canada by *Korpesho v. Korpesho*:

> The new unit must be allowed to live its life as freely as possible, even to the extent of moving out of Winnipeg and out of Manitoba in order for the new husband to secure his monthly income. It is certainly in the interests of the child that his new father have a secured income, rather than to force the new father to seek new employment or to apply for unemployment insurance or social assistance. It is not in the interests of the child that he be returned to his natural father since the prior contested hearing decided just the opposite, namely, that custody should be placed in the hands of the mother.
>
> The new couple must be allowed to build a new life around the new husband and his employment. In order to do so, with as little economic or other disruption as possible, it must have the necessary mobility certainly within Canada. If the couple is to have mobility the child must follow his new parents.[219]

As enunciated in these decisions, the assessment of the best interests of the child is conducted from a wide perspective, taking into account the economic and psychological health of the new family unit as it impacts on the best interests of the child. A proposed move, under challenge from an access parent, also may be scrutinized under evidence of *mala fides* intentions to defeat access rights by relocation. As no statutory provisions exist relating to custodial mobility, how to evaluate such evidence and who carries the onus of proving or disproving the merits of a move remain questions on which case law is divided.

In *Appleby v. Appleby (De Martin)*,[220] the mother with interim custody wished to move to California from Ontario for better employment opportunities. Although the mother's desire to move was found not calculated to deny access to the father, the Court denied her application. The children were well settled and well adjusted in Ontario and California offered no support network of relatives or friends. The Court noted the uncertainty of deciding each case on individual facts and refused the move.

> No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts in which way are the best interest of the children met. While I sympathize with the mother and her sincere desire and motives for moving to California, particularly given the difficulty she has experienced with the receipt of the child support, however, it is I suggest even to her clear that the children's father, notwithstanding, has been a concerned and caring parent and one who enjoys a close bond with his children. And thus in my view, considering all factors, including the provisions of s. 16 of the *Divorce Act*, under which provisions this decision must be taken, I cannot conclude a move to California is in the children's best interests and direct, until further order that the children be required to have their permanent place of residence with this mother in the city of Mississauga.[221]

In *Johnson v. Johnson*[222] the mother, who had *de facto* custody, wished to move to Calgary with the 5-year-old son. The father had an extremely close relationship with the child and argued that if the move were allowed, the child's contact with his Native heritage would be lost. The court determined that existing case law had been decided under the previous *Divorce Act* (1970) and noted that under the new *Divorce Act* (1985) the best interests of the child were not just a "paramount" consideration but the only consideration. The Court went on to conclude that the child's best interests required frequent contact with his father and so declined to allow the mother's move even though it acknowledged that such an order restricted a person's right to move wherever he or she pleased.

In *T. (K.A.) v. T. (J.)*[223] the mother wished to move with the children from Ontario to British Columbia. The Court followed the reasoning in *Johnson*, stating that the only consideration was to be the best interests of the children. It held that the present state of the law did not require special circumstances before a court could impose limitation on either a custodial or an access parent and concluded that it was not discriminatory against custodial parents for the court to determine what was in the best interests of the children. The only requirement is that the court satisfy itself that any order will operate in the children's best interests, taking into account the "conditions, means, needs and other circumstances" of the child, including the child's right to have as much contact with both parents as possible.

The Ontario Court of Appeal's 1990 decision in *Carter v. Brooks*[224] renewed uncertainty regarding such questions. This case centred around a custodial mother and her new husband's proposal to move to British Columbia in order that the husband might pursue (in the words of the trial Judge) "a sound, legitimate business opportunity with the potential remuneration for him beyond that which he currently enjoys in what is as secure as any employment can be, here, in the Brantford area."[225] The appeal Court upheld the trial Judge's decision to restrict the mobility of the child on the basis that such a move was inconsistent with the child's best interests. The appellate Court also asserted that the best interests criterion was the sole consideration regarding mobility, and that this principle was not to be applied based upon a mechanical set of rules. In delivering his judgment, Morden A.C.J.O. stated:

> As far as the state of the law is concerned, the proper course now [is] to make it clear that the only principle that governs is that of the best interests of the child and that it does not assist in applying this principle to rely upon a mechanical proposition such as that quoted in *Landry* which includes the expression "*the right to remove*" (emphasis added). This is not to say that a parent who has custody may not have important interests bearing on the best interests of the child which are entitled to considerable respect in the resolution of issues related to asserted access rights of the other parent.
>
> . . . . .
>
> I think that the preferable approach in the application of the standard is for the court to weigh and balance the factors which are relevant and the particular circumstances of the case at hand, without any rigid preconceived notion as to what weight each factor should have. I do not think that the process should begin with a general rule that one of the parties

> would be unsuccessful unless he or she satisfies a specified burden of proof. This overemphasizes the adversary nature of the proceeding and depreciates the court's *parens patriae* responsibility. Both parents should bear an evidential burden. At the end of the process the court should arrive at a determinate conclusion on the result which better accords with the best interest of the child. If this is impossible then the result must necessarily be in accordance with the legal *status quo* on the issue to be decided.[226]

Factors that the Court identified for possible consideration regarding mobility included (1) the existence of a custody decision, by court order or by agreement; (2) the nature of the relationship between the child and the access parent; (3) the reason for the move; (4) the distance of the move; and (5) the views of the child.

The *Carter* decision met with substantial criticism within the legal community. In his synopsis of the effects of the judgment Professor James McLeod stated:

> The *Carter* case provides arguments both to those who wish removal to be easier and to those who wish it to be more difficult. When all is said and done, it is questionable whether *Carter v. Brooks* advances or changes the law in substance on the point.
>
> . . . . .
>
> Is seems clear that Morden A.C.J.O. is uncomfortable with handling custody in the adversarial setting. He envisages litigation where neither parent or both parents have the onus of establishing what is in the best interests of the child. With respect, this seems unrealistic. The fact is, there must be a starting point.[227]

The Ontario Court of Appeal subsequently revisited this position in *MacGyver v. Richards*.[228] By a majority judgment, the Court concluded that in determining the best interests of the child, courts should show deference to the parent with whom custody of the child has been entrusted:

> That is the very responsibility a custody order imposes on a parent, and it obliges — and entitles — the parent to exercise judgments which range from the trivial to the dramatic...
>
> ... [T]he court should be overwhelmingly respectful of the decision-making capacity of the person in whom the court or the other parent has entrusted primary responsibility for the child.[229]

In essence, this case enunciates a presumption in favour of the custodial parent where disputes arise.

The view expressed in *MacGyver* was subsequently followed in *Lapointe v. Lapointe*[230] by the Manitoba Court of Appeal. There, in upholding the custodial parent's right to relocate with the child, the Court prescribed a six-point test by which the rights of the custodial parent may be judged. It includes an onus placed upon the non-custodial parent to demonstrate the move to be unworthy where the custodial parent holds an unfettered right of custody. Conversely, where mobility is restricted under the custody order, responsibility to justify the move then falls upon the custodial parent.[231] The Court also espoused the view that the decisions of custodial parents should be given significant weight.

> In all but unusual cases, the custodial parent is in a better position than a judge to decide what is in the child's best interests. A judge can scrutinize the decision, ensure that it is reasonable and even say, when clearly shown, that the custodial parent's decision is not in fact in the child's best interests, but initially it is the person entrusted with the responsibility of bringing up the child who probably knows best.[232]

Appellate decisions on mobility have been rendered in Ontario, Quebec, Manitoba, and Saskatchewan.

Jones. v. Jaworski[233] is the leading case in Alberta dealing with the removal of children from the jurisdiction. In that case, the parties had a joint custody agreement, the terms of which were incorporated into the decree nisi. Pursuant to the agreement, the children were to have their ordinary residence with the mother and the father's access was specified. Without notice to the father, the mother unilaterally moved the children to Ontario and the father sought their return. The Court held that the onus of proving that the move was in the best interests of the children was with the mother because she had initiated the change. The Court held that there was no evidence that the move was in the children's best interests and thereby ordered that if the mother decided to remain in Ontario the children were to live with their father. If she decided to remain in Alberta, there was no change in circumstances sufficient to vary the existing custody order. In that case, the Court was not prepared to trade a certain situation for an uncertain one.

Veit J. has rendered two decisions that bear on the issue. In *B. (C.B.) v. B. (M.J.)*[234] a mother was restrained from moving to British Columbia with the children on the basis that the departure from Alberta would make it impossible to maintain a relationship between the children and their father and there was no "over-arching benefit" to the children from this interference in the parental relationship. On the same day, Veit J. rendered a decision in *H. (J.M.) v. C. (M.J.)*[235] restraining a father with primary residence in a joint custody situation from moving to Ontario, where he had been transferred by his employer, the R.C.M.P. Madam Justice Veit seemed to put weight on the fact that the parties had joint custody in that she noted the mother was not merely "an access parent." She went on to indicate that had there been a sole custody order, greater weight might have been given to the custodial parent's decision about where to live. She found that the father's reasons for leaving the jurisdiction were valid in relation to his career but because there was another viable option (custody to the mother) and because the departure would interfere with the relationship between the children and their mother, the children should not be allowed to leave the jurisdiction.

In *Tucker v. Tucker*[236] a mother who had entered into a "shared parenting agreement" with the child's father lost custody when she evidenced an intention to move to Vancouver from Calgary. The agreement contained a clause that provided neither parent would change residence from Calgary without the written consent of the other or an order of the court and an acknowledgment that it was in the child's best interest to have both parents residing in the same city. It was the evidence of the assessor that it was in the child's best interests to remain in Calgary and that there was no "value added" for him to move to Vancouver with his mother. The Court stated that the greater the change proposed, the stronger should be the evidence required of the moving parent to prove an absence of detriment to the child. The moving parent must prove that the child's needs dictate a change. If all else is equal, it cannot be in any child's best interests to substitute an uncertain situation for a certain one.

In a decision of Mr. Justice Dea in *Petrie v. Petrie*[237] the mother of an infant with sole custody was ordered to return the child to Alberta from British Columbia, where she had moved without notice to the father to take up residence with a new partner. Justice Dea determined that the move was not in the best interests of the child. While recognizing that the relocation might be in the interest of the mother, he relied on section 17(5) of the *Divorce Act*, stating that the issue to be determined is whether or not the changes are in the best interest of the child. He held that the relocation isolated the child from his father and made contact with extended family members more difficult, and noted the practical difficulties of the father in exercising access.

MacGyver is also important on uncertainty per se:

> Clearly, there is an inherent indeterminacy and elasticity to the "best interests" tests which makes it more useful as legal aspiration than as legal analysis. It can be no more than an informed opinion made at a moment in the life of a child about what seems likely to prove to be in that child's best interests. Deciding what is in a child's best interests means deciding what, objectively, appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention.
>
> . . . . .
>
> This argues, it seems to me, for particular sensitivity and a presumptive deference to the needs of the responsible custodial parent who, in the final analysis, lives the reality, not the speculation, of decisions dealing with the incidents of custody. The judicial perspective should acknowledge the overwhelming relentless nature of the custodial responsibility and respect its day-to-day demands.
>
> . . . . .
>
> [T]he custodial parent must be understood as bearing a disproportionate amount of responsibility. The reality and constancy of that responsibility cannot be said to be the same as the responsibilities imposed on the parent who exercises access and sees the child intermittently. During those days or hours when parents without custody are not with the child, they are largely free to conduct their lives in any way they choose. The same cannot be said for parents with custody, most of whose decisions and choices are restricted by their role as the only adult legally responsible for the child.
>
> . . . . .
>
> Custody is an enormous undertaking which ought to be pre-eminently recognized by the courts in deciding disputed issues incidental to that custody, including mobility. The right or wish to see a child every weekend or two may be of genuine benefit to a child; but it cannot begin to approach the benefit to a child of someone who takes care of him or her every day. The scales used to weigh a child's best interests are not evenly balanced between two parents when one is an

occasional and the other a constant presence. They are both, usually, beneficial. But, *prima facie*, one is demonstrably more beneficial than the other. As La Forest J. stated in *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at 589, 173 N.R. 83 at 126:

> The right of access is, of course, important but ... it was not intended to be given the same level of protection ... as custody.[238]

In *Green v. Green*[239] the Court granted the wife custody notwithstanding that her choice of employment took her 500 miles away from the husband's residence.

In *Yuzak v. Friske*[240] the Court found that the mother had primarily cared for schoolchildren. The mother was granted custody of the children and allowed to take the children overseas for 2 years while she worked.

In *Catellier v. Catellier*[241] the father remained in the matrimonial home and sought custody. The Court found that the mother had been the primary caregiver for the children prior to the separation. The mother was awarded custody. The Court held that it is more important to recognize the children's attachment to people than to places or surroundings.

Finally, in *Re Laverty*[242] three children, the eldest with Down Syndrome, were all moved from Saskatoon to Toronto to be with their mother. The Court implicitly found that the status quo of relationships and caregivers was more important than the status quo of residence.

(e) — S.C.C.: Gordon v. Goertz, P. (M.) v. B. (L.G.) and W. (V.) v. S. (D.)

W. (V.) v. S. (D.)[243] adds little to *Goertz*, but what the V.W. decision does not say is of some consequence. It does not find fault with the father, as the custodial parent, moving from the United States to Quebec. The case also does not address the correlation of the passage of time to the best interests of the child. The litigation in the United States concluded in the 1980s and concluded in Canada in the 1990s at the trial level, following a motion in the Superior court of Quebec filed on May 6, 1991.

Uncertainty, which is both endemic and understandable in the matrimonial field, is easily demonstrated by the three recent Supreme Court cases on mobility rights. The cases are not inconsistent. However, they do not accomplish the impossible task of establishing meaningful rules in this area of the law.

In *Goertz*[244] the mother with custody intended to move to Australia to study orthodontics. The father applied for custody of the child or alternatively an order restraining the mother from moving from Saskatoon. The Judge hearing the application to change custody relied on the finding of fact by the first Judge that the mother was the proper person to have custody and allowed the mother to move to Australia, granting the father liberal access but to be exercised only in Australia. The Saskatchewan Court of Appel upheld the order. The Supreme Court allowed the appeal in part by removing the restriction by which access might only be exercised in Australia, holding that an application to vary cannot serve as an indirect route of the initial custody order. The Court held that there was a fresh inquiry into the best interests of the child though each case turns on its own unique circumstances. The new location of the child must be weighed against the continuation of contact with the access parent and the "maximum contact" principle from sections 16(10) and 17(9) of the *Divorce Act* is mandatory but not absolute. La Forest and L'Heureux-Dubé JJ. held that the notion of custody encompasses the right to choose the child's place of residence.

The decision is a strong statement for the rights of the custodial parent. The decision does not even include an analysis of the reason for the move, although presumably a move based on caprice or a determination to minimize access might have been dealt with differently.

> All too often, such applications have descended into inquires into the custodial parent's reason or motive for moving.
>
> ... Usually, the reasons or motives for moving will not be relevant to the custodial parent's parenting ability. ... However, absent a connection to parenting ability, the custodial parent's reasons for moving should not enter into the inquiry.[245]
>
> The judge will normally place great weight on the views of the custodial parent, who may be expected to have the most intimate and perceptive knowledge of what is in the child's interest.[246]

McLachlin J. analyzed the arguments supporting a presumption in favour of the custodial parent resulting from relocation and concluded that there is no such presumption and thus no burden of proof on either parent once the initial burden of

demonstrating a change of circumstances has been satisfied.[247]

> Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case. ...
>
> In the end, the importance of the child remaining with the parent in whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all of the circumstances, old as well as new?[248]

L'Heureux-Dubé and La Forest JJ. however, came close to holding that the custodial parent has a right to determine the child's place of residence:

> This construction is consistent with the presumptive "right" of a parent entitled to custody to change the residence of his or her minor children, unless such removal would result from "prejudice" to their "rights or welfare." The dispositive issue is, accordingly, not whether relocating is itself "essential or expedient" either for the welfare of the custodial parent or the child, but whether a change in custody is "essential or expedient for the welfare of the child."[249]

L'Heureux-Dubé J. made the further comment that:

> Changes of residence, which might imply a move to another province, territory or country for instance, are inevitable in light of the economic needs and the growing mobility of our society as well as the desirable objective that individuals rebuild their lives after divorce or separation.[250]

L'Heureux-Dubé J., speaking for herself, La Forest and Gonthier JJ. and in significant part for McLachlin, Sopinka and Cory JJ., also noted that Proulx J.A. has said that "there is attached to the right of custody a right to decide where the child will live."[251]

> Thus, the concept of custody under the *Civil Code of Quebec*, as at common law and under the *Divorce Act*, can not be distinguished from the concept of custody and the Convention and the Act. Since these different systems all give this concept a broad meaning that is distinct from access rights, and that includes, *inter alia*, the right to choose the child's place of residence.[252]

P. (M.) v. B. (G.L.)[253] adds nothing to the inquiry. A mother returned from Quebec to France with her young daughter. The child was 6 years old at the time of the Supreme Court's decision, and had not seen her father since 1992. The mother was in contempt of court orders in Quebec and France. Still, one wonders how it could have been in the best interests of the child that she be returned to a father whom she did not know. The father had conceded custody to her which had been recognized by the courts. Presumably she is a competent parent. Nonetheless the Supreme Court refused to grant the mother's appeal and ironically included talk in the judgment of the best interests of the child. Without additional evidence it would be difficult to overcome the assumption that this mother who was fully competent to have custody somehow became less competent because she disobeyed court orders. The case seems to have put protection of the judicial system ahead of the best interests of this particular 6-year-old.

However, just when it seemed that the Supreme Court had made the muddy waters of the mobility cases clear, the Ontario Court of Appeal rendered *Woodhouse* and *Luckhurst*. In companion judgments released June 4, 1996, Heather Woodhouse was refused permission to move to Scotland with her new husband. The majority gave great weight to the importance of maintaining the access relationship between the boys of the first marriage, 5 and 7, and their father. Osborne J.A., however, writing in dissent, insisted that the trial Judge should not have relied so heavily upon the testimony of the assessor, who seemed to assume that contact with the access parent is always of paramount concern when determining what is in the best interests of the child. McLachlin J., according to Osborne J.A., so stressed the need to consider each child and each circumstance individually, that any decision based on the case at hand should not be considered contrary to the guidance provided by the Supreme Court.[254] Osborne J.A. clearly felt that if *Goertz* is to be accurately followed, maximal uncertainty should prevail. At the same time in *Luckhurst* the Court would not overrule a decision permitting Brenda Luckhurst to move 8-year-old twins from London, Ontario, to Coldberg. Mrs. Luckhurst had also remarried and her new husband could not find work in the London area. The Court of Appeal held there were no hard and fast rules on child mobility. Uncertainty reemerges. Lawyers seeking absolutes should have been physicists.

11. — Representation of Children

Galligan J. commenced an address regarding the protection of child rights in custodial disputes by posing the question "Does our present legal machinery adequately protect the interests of children when disputes arise between the mother and the

father? I regret to say the answer must be in the negative."[255] It is a principle of common law jurisprudence that all the parties affected by a dispute have a right to participate in the legal process. However, ordinarily the child is not a true participant. Thus, while the best interests test requires that the sole consideration be the interests of the child, the child is normally not afforded the opportunity to define those interests for himself or herself.[256]

As no one truly represents the child litigant, parents may consciously or subconsciously bargain away the rights of the children or be intimidated by the other parent into giving up those rights. Some family law practitioners avow that in addition to representing their true client, the parent, they also undertake the responsibility to represent and protect the interests of the child. In his research on the topic, Lloyd Perry, Q.C. suggests that that assertion is laudable, but impossible to achieve and inconsistent with a lawyer's primary mandate.

> I recall the declaration of Baron Brougham in the celebrated case in the house of Lords — "An advocate[,] by the sacred duty which he owes to his client, knows in the discharge of that office ... but one person in the world[,] that client and none other."[257]

As a result of not having been part of the process, children, particularly in the range of 10 to 13 years of age, may also resent custody arrangements and work to subvert such decisions. Although the courts may take into account the wishes of the children at that age, they are still left to their own discretion as to what stands in the best interests of the child.[258] As opined by Goldstein, Freud and Solnit, many decisions are "in name only" for the best interests of the specific child and are in fact fashioned to meet the needs and wishes of competing spousal claimants.[259] *Gordon v. Goertz* and the two other Supreme Court cases that accompany it have not ended the issues of uncertainty regarding mobility rights, and have added nothing on the issue of best interests, but can generally be seen as having significantly strengthened the position of custodial parents.

12. — Further Concerns

(a) — The Gender Battle

Acceptance of judicial dispositions regarding custody and access is often a problem in family law. The reality remains that no matter how innovative, thoughtful, and forceful a custody order may appear on paper, a determined parent may, through non-compliance, frustrate the court's intent to regulate the terms of custody and access. Technical arguments and the threat of legal sanctions will not overcome the determination of an obstinate parent to control parenting arrangements. As Hugh Stark and Kitstie MacLise, legal practitioners, have observed:

> When settling custody, guardianship and access, the ability of the parties to cooperate should be considered. It is pointless to simply specify reasonable access if one or both of the parties are unreasonable.[260]

Debate over who holds an advantage in litigating custody continues to be divided on gender lines. The most common criticism enunciated by men is that mothers are looked upon more favourably by the courts. Men suggest that women have an unfair advantage in custody disputes and that principles such as the tender years doctrine operate as a maternal presumption. They argue that statutory recognition of equal rights for fathers should be enacted, including mandatory joint custody legislative provisions to ensure continued paternal involvement post-separation and divorce.

However, studies performed as part of the *Evaluation of Divorce Act* program suggest that while it is true that mothers receive custody in the majority of cases this is often the result of an agreement between the spouses and not by order of the court. Men interviewed as part of the study often agreed that children need the primary care of their mothers. That pattern continues to reflect the underlying social reality, in which mothers usually assume the major share of the day-to-day care of their children after divorce, as they commonly do during marriage. Because of the deeply ingrained social patterns that support women's greater investment in their children, it seems unlikely that this pattern will change in any fundamental way in the near future. In 1990, of the 47,631 children affected by divorce of their parents, 73.3 percent were awarded to their mothers, 12.2 percent to their fathers, and 14.3 percent to joint custody.

In fact, statistics show that the determinative advantage in gaining custody lies with the parent who originally petitioned for divorce, and that men meet with particular success in gaining custody under circumstances where they have initially sought custody.[261]

Women's groups, in contrast, contend that gender equity in the field of custody is unworkable and would be largely symbolic. They further postulate that the present system continues to favour men by assessing their child-rearing abilities by a much less demanding standard than that applied to women. They allege that men's efforts to play a more active part in childcare can be unduly applauded by the courts.[262] Advocates of this theory point to cases such as *Tyndale v. Tyndale*.[263] In that case, a

judge granted custody to the father, who was self-employed, over a mother, who was in full-time employment, even while acknowledging that the male spouse had "only really became a father to the boys after separation." Nonetheless, the Judge reached his decision on the basis that the father would have greater flexibility to care for his children regardless of his relative inexperience. Women's advocacy groups' resulting contention is that courts tend to look down upon women who cannot play the conventional role of a full time mother. However, within today's society, how could a woman satisfy a judge of economic stability without being a member of the labour force?[264]

American literature puts forward similar arguments. In her book *Mothers on Trial* Dr. Phyllis Chesler contends:

> I challenged the myth that fit mothers always win custody — indeed, I found that when fathers fight they win custody 70 percent of the time, whether or not they have been absentee or violent fathers. Although 80 to 85 percent of custodial parents are mothers, this doesn't mean that parents have won their children. Rather, mothers often retain custody when fathers choose not to fight. Fathers who fight tend to win custody because mothers are held to a much higher standard of parenting.
>
> When fathers persist, a high percentage win custody because judges tend to view the higher male income and the father-dominated family as in the "best interests of the child." Many judges also assume either that the father who fights for custody is rare and should be rewarded for loving his children, or that something is wrong with the mother.[265]

(b) — Generational Transmission

Prior to the 1920s each divorce had to be resolved individually through the passage of an Act of Parliament. The *Divorce Act, 1968* introduced no-fault divorce. There is an ongoing societal continuum leading to divorce being more easily granted and accepted. Even traditionally conservative societies, most notably Eire, are not demonstrating acceptance of divorce.

The current generation of young people is the first to grow up in a society where divorce is common. While parental divorce appears to have little effect on the decision of adult offspring to have children themselves or on the quality of relations they share with their children, it does appears to have a pronounced effect on their own marital success, particularly amongst women.[266]
The effects of growing up in a divorced or a troubled marriage are hotly debated subjects amongst sociologists. A study sampling the tendencies of Colorado State University students[267] found that for students from both intact and divorced families, the existence of parental marital conflict in their own home was a significant predictor of their attitudes towards marriage. Results indicated that studies from intact families had a more positive self-perception of their sociability as compared to students from divorced families. Moreover, the findings indicated that among students from divorced backgrounds, *parental conflict following divorce was one of the most significant factors in predicting their future views regarding marriage and relationships*.[268]

> [The] results showed that greater parental conflict after the divorce was a significant predictor of more negative attitudes toward marriage. This result is consistent with the findings with all students. Parental conflict influences attitudes toward marriage.[269]

The study concluded that offspring of divorced families may have surmised that disagreement leads to divorce and, therefore, it is not an acceptable quality of a healthy relationship. This may reflect a lower commitment to marriage or a greater willingness to leave an unhappy marriage. Conversely, individuals who came from intact families may have a greater appreciation and acceptance for the role which disagreement plays within a relationship.[270] Such trends can be identified within the baby boomers generation. Everyone knows of a marriage where the couple are unhappy but who remain together for the so-called "benefit of the children." Many of these couples wait until their children have passed their formative years or are no longer living in the family home before openly acknowledging their marriage is unworkable. Of course, most children sense that their parents are having martial problems and thus such a setting is unlikely a positive family environment. In fact, an American study entitled *Transmission of Marital and Family Quality over the Generations* found that the effects of remaining in an unhappy marriage are actually more adverse to the children's development than the negative effects of divorce: "The number and magnitude of the coefficients would suggest that divorce is much less damaging to the marital and family lives of children than staying married to a partner with whom one is unhappy.[271] The resulting contention is thus that the crucial element to allowing for the proper development of a child of a failed marriage is to foster the development of a stable and loving relationship with both parents. Providing such a formative environment is essential to stemming the rate of divorce amongst future generations:

> It is significant to note that conflict prior to divorce was not a significant predictor of [an offspring's] sexual behaviours or relationship factors while conflict after the divorce was ... if the parents experience great conflict after the marriage

has ended, the children may be more likely to have a more severed or conflicted relationship with the non-custodial parent.[272]

13. — Support Uncertainty

Discretionary awards of interim and final support orders are permitted by the *Divorce Act*. The legislation gives little guidance on the factors to be used to determine amounts of support. The *Divorce Act* mandates consideration of the condition, means and needs of both spouses. It mandates consideration of economic hardship and disadvantages arising from the marriage apportioning the financial consequences from childcare and promoting self-sufficiency.

Theoretically, the supported spouse, usually the female, is entitled to a standard of living comparable to that enjoyed during marriage, which is not to be lower than the standard of living of the supporting spouse. *Casselman*,[273] *Kraus*,[274] and *Leatherdale*[275] so hold, but in practice women usually experience significant financial disadvantage and a disproportionately reduced standard of living to that of their former husband. Having custody exacerbates the problem.

The federal and Provincial legislation all provides that support dispositions are within the discretion of trial judges. The federal and provincial recommendations may bring consistency in child support, but nothing of the kind is anticipated for spousal support. Indeed, many judges consider support to be temporary, with a view to encouraging economic self-sufficiency, rather than premised on need.

While some judges have advocated with determination the view that economic pressure upon a former spouse to put her back into the workforce is appropriate, others have recognized the difficulty in finding positions for older women and the economic loss and loss of earning potential occasioned by marriage.[276] The discretionary nature of decision-making continues to cause a dichotomy in decision and general uncertainty in this area.

14. — Indeterminacy

Legal fields are configured by judges and legal authorities and posited law is innately indeterminate: "Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal material and methods permit multiple outcomes to law suits."[277] Indeterminacy contributes to uncertainty because it allows choice rather than directing decision-making. This is a serious problem in the fact-related family law area, where so-called "common sense" and culture impact radically upon decision-making.

J. Stick writes that lawyers routinely take into account factors that cannot be introduced formally into submissions to the court or decisions by judges and that we have a system "in which lawyers rely unconsciously on arguments that can not be explicitly stated and still be followed."[278] But they are followed and they are highly significant.

Discretionary decision-making really means that the judge has autonomy within broad rules to exercise personal judgment and assessment. In matrimonial law, which is affected by moral attitudes and societal attitudes, both of which have been in flux since at least the First World War, the result has been that judges, in either leading or following changing attitudes, have imposed widely divergent decisions.

Discretion means the factors to be taken into account are not specific. There is no expressed requirement.[279] Because discretion is applied in determining the standards which apply, applying the standards to the facts as found by the fact-finder, and deciding whether the facts justify or do not justify the making of a decision (in that no decision or a delayed decision can often have monumental impact),[280] makes it profoundly significant that in most of family law, decision making is deemed to be discretionary and without effective appellate review, decision is divergent.

15. — Configuring the Legal Field

According to Kennedy,[281] a judge's political sensibilities define the personal sense of justice with which each judge addresses each fact situation. Judges in all areas of the law "manipulate" the issues that comprise the "legal fields" relative to the particular case that they must resolve, in order to construct a legal argument and a fact pattern that supports their preferred outcome for the case. Judges have an initial impression of how a case should be resolved before they consider the facts, precedents, and statutes. Judges' perceptions affect their assessments of fact; they configure based on the "unrational" and the "impacted." "Unrational" is a determination by a judge that the precedents do not apply because they were decided "on their

facts with minimum argumentation and narrow or concousory or obviously logically defective holdings."[282] "Impacted" are "needy disposed precedents."[283] Judicial activity is little more than an application of rules; cases decide themselves. The task, according to Kennedy, is to make the field appear impacted to the Judge and thereby to achieve the outcome sought by counsel.

This phenomenon exists in all areas of the law. One might state, pejoratively, that judges manipulate fact-finding and case application to achieve the result which they perceive as fair or orderly. They do not do so subconsciously and consciously.

The background of the judge impacts tremendously upon his or her approach to family law dispositions. While judges have no so-called common sense approach to communications law, mining issues, contractual disputes between banks, every judge believes that his or her instincts about fairness within the family and regarding children are normal; thus the unrational impacts more significantly in this area of the law than others, creating uncertainty and inconsistencies. It is these inconsistencies which have caused women's groups in Canada generally to decry court dispositions which they perceive are too often unfair to women, based on the fact that the Bench is largely made of 50-and 60-year-old middle-class male liberals. But even with the advent of a significant number of 40-year-old female liberals, the tendency of judges to bring their own attitudes creates uncertainty. The judiciary cannot be a jury of Canadian humanity, including grade 6 dropouts, truck drivers, unemployed Inuit, Jamaican landed immigrants, but the creation of fields of configuration imposed upon a common sense approach in family law matters makes the significance of the judge overpowering and uncertainty troublesome. Kennedy argues that judges take to their work political and personal perceptions of justice which characterize their assessments of fact situations as well as the application of the law.

Legal theorists argue that democratic principles are not offended by unelected judges redirecting the law because the legitimacy of this activity is based upon the implicit belief that judges act only in accordance with the law, and will suspend personal views. As Kennedy puts it, "the only permissible course of action for a judge facing a conflict between the law and how he wants [a case] to come out is always to follow the law."[284] Kennedy's point is that reliance on such a proposition is ridiculous. Judges cannot overcome their personal views. Often they are not even fully conscious of their personal views. They are middle-class, largely liberal, and, where conservative, their even more conservative and rather self-satisfied position within society, added to the narrow cloistered lifestyle in which most judges exist, sipping, indeed often posting one another, on their own bathwater, means that in the family law field, they apply attitudes which are extremely significant and sometimes all-pervasive in decision-making.

> I am free to work in the legal medium to justify [the outcome of the case that I want]. How my argument will look in the end will depend in a fundamental way on the legal materials — rules, cases, policies, social stereotypes, historical images — but this dependence is a far cry from the inevitable determination of the outcome in advance of the legal materials themselves.[285]

Wrenching changes in family law have flowed from decisions over the years in the Supreme Court which relate to the changing nature of that Court. Our courts of appeal basically follow the often changing leadership of the Supreme Court. At the trial level, with case law supporting disparate dispositions on seemingly similar factual situations, trial judges and, often even more significantly, chambers judges, as the victims of the unrational, apply wholly uncertain law in the name of individuals with a reliance upon appellate jurisdictions to uphold their discretion.

16. — Uncertainty in Conclusion

Under the best interests criterion, each child's future is judged individually. What is special to this child? What are her or his needs, capacities, abilities, and how does this individual relate to his or her parents? What are the circumstances in this home or family? These are the issues that have properly emerged as determinative factors in the adjudication. However, a problem with the individualization of custody decision-making is that it becomes discretionary for judges, and thus subject to arbitrary and idiosyncratic decision-making.

Even in something so simple as assessing support for children, we have laboured under a system with markedly diverging awards given on apparently similar facts. The noted author Alastair Bissett-Johnson[286] implicitly supports a formula for child care costs, pointing out that the formula exists in most American states.[287] The Alberta Court of Appeal in *Levesque*[288] attempted an orderly approach with a rough figure of 20 percent of the parents' gross income in a single-child family and 32 percent in a two-child family. The federal and provincial support recommendations attempt to address the dissatisfaction of Canadians who anecdotally discover that they are paying much more or receiving much less than others in similar circumstances and resent the uncertainty. The Davies[289] article on support is also noteworthy in this area.

The inherent uncertainty of the law regarding family law and children particularly has an evident impact on society. This is not a new pattern, nor is it an issue peculiar to Canadian case law. Over 30 years ago, New York law professor Henry Foster and Doris Freedy observed this dilemma regarding child custody criteria and concluded that the law of custody should not be an obstacle to sound solutions to the urgent social and human problems facing society.[290] They conceded that

> One of the most difficult tasks facing the courts in the development of a pragmatic jurisprudence is the shaping of decisional standards, rules, and exceptions, which will achieve a workable compromise between the values of flexibility and certainty. Nowhere has the task proved more challenging than in the area of child custody.[291]

Similarly, in his investigation of the state of custody laws in the United States, Professor Robert Mnookin focuses upon the degree to which the legal standards are discretionary. He observes that within child custody disputes, the determination of what is in the best interests of the child for a particular child is usually indeterminate:

> [T]he use of an indeterminative standard such as "best interests" raises fundamental questions of fairness, largely removes the special burden of justification that is characteristic of adjudication, and involves the use of the judicial process in a way that is quite uncharacteristic of traditional adjudication.[292]

Unfortunately, the concept of the best interests of the child has no objective content, unlike such concepts as distance or mass. Whenever the term "best" is used, the question arises, "best" according to whom? The state, the parents, and the child might all be cited as sources for such a determination.[293] As Professor Mnookin concludes:

> Deciding what is best for the child poses a question no less ultimate that the purposes and values of life itself ... [W]here is the judge to look for the set of values that should inform the choice of what is best ...?[294]

Accepting this analysis, are the courts the proper forum for decision-making regarding children, or should the legal system show greater deference to the authority of psychologists, laymen adjudicators, or should it look to the family itself to resolve such issues?

Due to the personal effect a custody order has on the day-to-day lives of the parties, its success relies in part on cooperation between the former spouses in order to be effective. To assist in this process, judges should strive to make orders as flexible and workable as possible: "The parent, not the judge, will be left to live with the daily consequences of caring for the child within the limits of that one judicial pronouncement."[295]

Given the inherent uncertainty of the law, current thinking seems to suggest that the legal system should aim to foster a higher degree of self-determination by family members. New use of language and new methods may thus be required. Alternative dispute resolution methods, facilitory negotiation or mediation and pretrials — all may provide potential for alleviating some of the problems currently generated by an adversarial legal process premised on uncertain criteria.

Alternative forms of dispute resolution often meet with good results. Decision-making by this process may be no more certain than the general uncertainty that bedevils matrimonial law, but this kind of custody and access disposition generally results in a high level of acceptance by the litigants, as it is their settlement which they have accepted and to which they have agreed rather than a court's decision which has been imposed upon them.

Evidence of the flexible and uncertain nature of family law is rife throughout the case law. L'Heureux-Dubé J. in *Willick v. Willick* articulated the purpose of such indeterminacy in stating that:

> Parties must be encouraged to settle their difficulties without coming before the courts on each and every occasion. Nonetheless, the threshold test cannot be applied properly unless the sufficiency of the change in circumstances is evaluated against the backdrop of the particular facts of the case at hand. It is important to point out that the Act does not qualify "change" but merely states that "the court shall satisfy itself that there has been *a change*". ... [T]he diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the *Divorce Act* provisions.[296] [L'Heureux-Dubé J.'s emphasis.]

L'Heureux-Dubé J. reaffirmed these views in *B. (G.) v. G. (L.)* and concluded that "under the 1985 *Divorce Act*, courts retain a discretionary power the exercise of which will depend on the particular facts of each case and which will be exercised in accordance with the factors and objectives mentioned in the 1985 Act."[297]

L'Heureux-Dubé J. focused on uncertainty:

> The main purpose of the 1968 Act was, first, to standardize divorce throughout Canada and to provide additional

grounds for divorce. Further, the statute entitled courts to make corollary orders for support and custody upon granting divorce. Support orders had to take into account the conduct as well as the condition, means and other circumstances of the parties. The Law Reform Commission of Canada described the law of support in the following terms:

> Before that time [the 1968 Act], the right to maintenance on divorce could only be lost as a result of a judicial determination, based on known, settled and preexisting rules of law, that the claimant spouse had committed a matrimonial offence. The 1968 Act changed the law to allow the court to award maintenance in any event, but the result has been a maintenance rule that is both arbitrary and uncertain. The Act now requires that the award be based on the court's evaluation of conduct in addition to a consideration of the spouses' condition, means and circumstances. This means that the financial implications of a maintenance claimant's marital economic experience are always subject to the uncertainty of a behavioural evaluation according to whatever criteria a judge may find compelling. The proper standard of conduct is not defined by law, nor is the nature of the relationship between conduct and financial rights. Both these matters are, according to one appellate court decision, "within the entire and absolute discretion" of the trial judge. These inherently subjective standards lack the certainty that is essential if justice is to be done in determining the economic consequence of marriage breakdown, where the outcome will often represent the fruits of the labour of the spouses' adult lifetimes.[298]

One must say that, prior to the trilogy, the state of the law was no clearer. Describing the effect of the more or less incoherent approach taken by courts Chouinard J., in *Messier v. Delage*, [1983] 2 S.C.R. 401, said the following (at page 409):

> I cannot state the matter any better than Judge Rosalie S. Abella of the provincial court, Family Division, for the judicial district of York in Toronto, did in an article entitled "Economic Adjustment on Marriage Break-down: Support," (1981), 4 *Family Law Review* 1. She wrote the following at p. 1:
>
> > To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the *Divorce Act* (RSC 1970 c D-8) and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches.[299]
>
> Most importantly, however, and notwithstanding the above observations, while the onus of proving the sufficiency of the change in condition, means, needs or other circumstances rests upon the applicant ... the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the *Divorce Act* provisions.[300]

A litany of the facts in specific cases with apparently inconsistent decision-making would in some senses demonstrate uncertainty over custody. However, a critic of the previous statement could legitimately argue that because the cases are fact-specific, inconsistency is not only to be expected and unavoidable but desirable. Uncertainty is a predictable result of the application of the best interests notion to determining custody. Idiosyncratic and inconsistent decision-making is the evil accompanying the uncertainty which is necessary to do individual justice to each individual child.

Footnotes

*	E.F Anthony Merchant, Q.C. of Merchant Law Group, Regina, Saskatchewan. Evatt F.A. Merchant, LL.M. Student-at-Law, Saskatchewan.
1	Statistics Canada, *A Portrait of Families in Canada* (Ottawa: Queen's Printer, November 1993) at 11, 17-18, tables 1.8 and 1.9.
2	Canada, Department of Justice, *Evaluation of the Divorce Act — Phase II: Monitoring and Evaluation* (Ottawa: Queen's Printer, May 1990) at 55.
3	Ibid.
4	J.D. Payne, "The Mediation of Family Disputes" in Payne, ed., *Payne's Divorce and Family Law Digest* (Toronto, De Boo) 84-1861.
5	B.J. Schutz et al., *Solomon's Sword: A Practical Guide to Conducting Child Custody Evaluations* (San Francisco: Jossey-Bass, 1989) at 14.
6	J. Wall & C. Amadio, "An Integrated Approach to Child Custody Evaluation: Utilizing the 'Best Interest' of the Child and Family Systems Frameworks" (1994) 21:3/4 J. Divorce & Remarriage 39 at 55.
7	J.D. Payne & B. Edwards (1989-90) 11 Advocates' Q. 1 at 23.
8	N. Weisman, "On Access after Parental Separation" (1992), 36 R.F.L. (3d) 35.

9	*MacGyver v. Richards* (1995), 11 R.F.L. (4th) 432, 22 O.R. (3d) 481 (C.A.).
10	*N. v. N.* (1994), 3 R.F.L. (4th) 133 at 134.
11	*Kolsun v. Kolsun* (1989), 19 R.F.L. (3d) 306 at 308 (Man. Q.B.); *Smith v. Smith* (1987), 12 R.F.L. (3d) 50 at 53 (B.C.S.C.).
12	R.S.C. 1985 (2nd Supp.), c. 3, s. 8(1).
13	N. Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Can. J. Fam. L. 15.
14	R.H. Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of lnterdeterminacy" (1975) 39 L. & Contemp. Prob. 226 at 251-252.
15	Above, note 9 at 488-489 (O.R.).
16	[1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117.
17	*Droit de la famille — 1150*, 49 R.F.L. (3d) 317, (sub nom. *D. (P.) v. S. (C.)*) [1993] 4 S.C.R. 141.
18	(1990), 30 R.F.L. (3d) 53, 2 O.R. (3d) 321 (C.A.).
19	Above, note 9.
20	*Harsant v. Portnoi* (1990), 27 R.F.L. (3d) 216 at 222, 74 O.R. (2d) 33 (H.C.).
21	[1970] 1 Q.B. 357 at 371, [1969] 3 All E.R. 578.
22	In this regard see below, sections 4(c) and 4(d) and, for the recent case law regarding terminology, sections 5(a)(i), 5(a)(ii) and 5(e).
23	Above, note 12.
24	S.C. 1967-68, c. 24.
25	*Evaluation of the Divorce Act — Phase II*, above, note 2 at 38.
26	Judges of the Unified Family Court, and in Saskatchewan judges of the Family Law Division of the Court of Queen's Bench, exercise their jurisdiction under appointments from both the federal and provincial levels of government.
27	*Jones v. Jenks* (1964), 48 W.W.R. 698 at 700 (B.C. S.C.).
28	P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 15.5(c).
29	*Children's Aid Society of Halifax (City) v. McIlveen* (1980), 20 R.F.L. (2d) 302 (N.S. Fam. Ct.).
30	(U.K.), 30 & 31 Vict., c. 3.
31	*Papp v. Papp*, [1970] 1 O.R. 331 at 338, 8 D.L.R. (3d) 389.
32	*Mercer v. Clark* (1989), 90 N.S.R. (2d) 4 (Fam. Ct.).
33	[1971] Ch. 270 at 276, [1970] 3 All E.R. 705 (C.A.).
34	*Carter v. Brooks*, above, note 18 at 329-330.
35	*Young v. Young*, above, note 16 at 101.
36	Mnookin, above, note 14 at 254.
37	[1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345, [1993] 1 W.W.R. 481 (hereinafter cited to R.F.L).
38	J.G. McLeod, "Case Comment: *Moge v. Moge*" (1992), 43 R.F.L. (3d) 455 at 464.

39	*Moge v. Moge*, above, note 37 at 364.
40	(sub nom. *R. v. Multiform Manufacturing Co.)* [1990] 2 S.C.R. 624 at 630, 58 C.C.C. (3d) 257.
41	[1995] 4 W.W.R. 505 (Sask. U.F.C.).
42	Ibid. at 514 and 517.
43	*M. (B.P.) v. M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.); leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) 232 (note) (S.C.C.).
44	*Abdo v. Abdo* (1993), 50 R.F.L. (3d) 171, 109 D.L.R. (4th) 78 (Ont. C.A.).
45	(1977), 22 N.S.R. (2d) 432 at 441 (T.D.).
46	*Cunningham v. Cunningham* (1975), 26 R.F.L. 121, 13 N.B.R. (2d) 641 (Q.B.).
47	*Miller v. Miller* (1988), 13 R.F.L. (3d) 80 (Ont. H.C.).
48	*Coakwell v. Baker* (1994), 4 R.F.L. (4th) 345 at 349 (Ont. Gen. Div.).
49	Above, note 10.
50	(1988), 16 R.F.L. (3d) 121 at 124 (B.C. S.C.).
51	Surgical removal of a brain tumour had left her with very little frontal lobe.
52	(1990), 84 Nfld. & P.E.I.R. 63 at 68 (Nfld. T.D.).
53	(1988), 10 R.F.L. (3d) 437 at 444 (Sask. Q.B.); affirmed (1988), 14 R.F.L. (3d) 225 (Sask. C.A.). See also *Keen v. Keen* (1990), 30 R.F.L. (3d) 172 (Sask. Q.B.).
54	(1989), 18 R.F.L. (3d) 46 at 48-49 (Sask. Q.B.).
55	See also *Day v. Day* (1975), 18 R.F.L. 56 (Alta. S.C.); *Sweet v. Sweet* (1971), 4 R.F.L. 254 (Ont. S.C.); *Matthews v. Matthews* (1988), 11 R.F.L. (3d) 431 (Nfld. T.D.); *Law v. Law* (1986), 2 R.F.L. (3d) 458 (Ont. H.C.).
56	*Clarke v. Clarke* (1987), 7 R.F.L. (3d) 176 at 178 (B.C. S.C.).
57	Above, note 21 at 372.
58	A. Bissett-Johnson & D.C. Day, *The New Divorce Law* (Toronto, Carswell: 1986) at 46.
59	17 R.F.L. (4th) 1, [1995] 10 W.W.R. 609.
60	Ibid. at 622 (W.W.R.).
61	Translation: access comprises the right of visitation.
62	*Boyd v. Wegrzynowicz* (1991), 35 R.F.L. (3d) 421 (B.C. S.C.).
63	Statistics Canada, "Divorces, Canada and the Provinces, 1990" by L. Lapierre in *Health Reports 1991*, vol. 3, no. 4 (Ottawa: Queen's Printer, 1992) at 383.
64	*Kruger v. Kruger* (1979), 11 R.F.L. (2d) 52 (Ont. C.A.).
65	(1972), 11 R.F.L. 126 (Tasmania S.C.).
66	Ibid. at 127.
67	*Dipper v. Dipper*, [1980] 2 All E.R. 722 at 733 (C.A.).

68	Canada, Department of Justice, *Custody and Access: Public Discussion Paper* (Ottawa: Queen's Printer, March 1993) at 29.
69	*Colwell v. Colwell* (1992), 38 R.F.L. (3d) 245 (Alta. Q.B.).
70	J.D. Payne, *Payne on Divorce*, 4th ed. (Toronto: Carswell, 1996) at 412.
71	*Templeman v. Templeman* (1990), 29 R.F.L. (3d) 71 (Ont. Dist. Ct.).
72	*Evaluation of the Divorce Act — Phase II*, above, note 2 at 133-134.
73	*Colwell v. Colwell*, above, note 69; *Hamilton v. Hamilton* (1992), 43 R.F.L. (3d) 13 (Alta. Q.B.); *Mueller v. Mueller* (1992), 39 R.F.L. (3d) 328 (B.C. S.C.).
74	*Wilson v. Grassick* (1994), 2 R.F.L. (4th) 291 (Sask. C.A.); leave to appeal to S.C.C. refused (1994), 7 R.F.L. (4th) 254 (note) (S.C.C.).
75	*Coolen v. Coolen* (1990), 96 N.S.R. (2d) 50 (N.S. T.D.); *Demerchant v. Clark* (1989), 102 N.B.R. (2d) 205 (Q.B.).
76	*Gubody v. Gubody*, [1955] O.W.N. 548 at 552, [1995] 4 D.L.R. 693 (H.C.).
77	*Evaluation of the Divorce Act, Phase II*, above, note 2 at 111.
78	See below, section 6.
79	*Hamilton v. Hamilton*, above, note 73.
80	*Lambright v. Lambright* (June 5, 1990), Edmonton Appeal 9003-0129-AC (Alta. C.A.).
81	*Simmchen v. Potter* (1991), 33 R.F.L. (3d) 430 (N.B. Q.B.); affirmed (1992), 39 R.F.L. (3d) 149 (N.B. C.A.).
82	(1988), 12 R.F.L. (3d) 372 at 374 (Sask. Q.B.); see also *Young v. Young*, above, note 16.
83	*R. v. Petropoulos* (1990), 29 R.F.L. (3d) 289 at 293 (B.C. C.A.).
84	*MacGyver v. Richards*, above, note 9 at 491-492 (O.R.).
85	*Richardson v. Richardson*, [1987] 1 S.C.R. 857, 7 R.F.L. (3d) 304 at 313.
86	Above, note 16 at 37-38.
87	*Doucette-Clarke v. Boyle* (1989), 92 N.S.R. (2d) 188 (Fam. Ct.).
88	*Salter v. Borden* (1991), 31 R.F.L. (3d) 48 (N.S. Fam. Ct.).
89	*Fennell (Martin) v. Fennell* (1989), 92 N.S.R. (2d) 266 (Fam. Ct.).
90	*Taylor v. Taylor*, above, note 65.
91	*Read v. Read*, [1982] 2 W.W.R. 25 at 29 (Alta. C.A.); leave to appeal to S.C.C. refused (1981), 34 A.R. 540n (S.C.C.).
92	In fact, the definition of guardianship or custodianship itself can vary from jurisdiction to jurisdiction, as it is a matter of provincial legislative authority, regardless of whether custody is sought under provincial or federal statute. See further: *Re M.* (1990), 146 A.P.R. 114 (P.E.I. T.D.).
93	*Todd v. Davison*, [1972] A.C. 392 (H.L.).
94	*Hewar v. Bryant*, above, note 21.
95	*Pierce v. Pierce*, [1977] 5 W.W.R. 572 (B.C. S.C.).
96	*Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (B.C. Co. Ct.).

97	Above, note 95 at 574-575.
98	Above, note 64 at 78.
99	Above, note 10 at 133 (from the headnote).
100	Ibid. at 134 per Lambert J.A.
101	"The Changing Role of the Access Parent" (1993) 10 C.F.L.Q. 123.
102	Above, note 8 at 50.
103	*K. (K.) v. L. (G.)*, 44 R.F.L. (2d) 113, *(*sub nom. *King v. Low)* [1985] 1 S.C.R. 87.
104	(1973), 12 R.F.L. 273 (Ont. C.A.).
105	(Toronto: Carswell, 1984).
106	Above, note 8 at 39.
107	(1979), 9 R.F.L. (2d) 69.
108	Ibid. at 78.
109	J.F. Burrett, *Child Access and Modern Family Law*: *A Guide for Family Law Practitioners and Counsellors* (Toronto: Carswell, 1989), at 9, 14.
110	J.G. McLeod, *Introduction to Family Law* (Toronto: Butterworths, 1983) at 117.
111	*R. (A.N.) v. W. (L.J.)*, 36 R.F.L. (2d) 1, *(*sub nom. *Racine v. Woods)* [1983] 2 S.C.R. 173 at 185.
112	Above, note 103 at 103-104.
113	(1978), 12 A.R. 487 (T.D.).
114	*Abdo v. Abdo*, above, note 44; *M. (B.P.) v. M. (B.L.D.E.)*, above, note 43. See also *Re Maher* (1975), 25 R.F.L. 252, 10 Nfld. & P.E.I.R. 224 (Nfld. T.D.); *Stokes v. Stokes* (1974), 19 R.F.L. 326 (Ont. S.C.); *Lachance v. Cloutier* (1982), 18 Alta. L.R. (2d) 328 (Fam. Ct.); and *Sort v. Poppelwell* (1988), 13 R.F.L. (3d) 192 (Sask. Q.B.).
115	*Beyond the Best Interests of the Child* (New York: Free Press, 1980).
116	*Children of Divorce: A Developmental Approach to Residence and Visitation* (De Kalb, I11.: Psytec Inc., 1988).
117	*Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223, [1947] 2 All E.R. 680 (C.A.).
118	Ibid. at 229.
119	Above, note 67.
120	Ibid. at 45-46.
121	*Custody and Access*, above, note 68 at 29.
122	*O'Leary v. O'Leary*, [1923] 1 W.W.R. 501 at 527.
123	[1951] A.C. 352, [1951] 2 D.L.R. 657 at 666.
124	Canadian Advisory Council on the Status of Women, *Child Custody and Access Policy: A Brief to the Federal/Provincial/ Territorial Family Law Committee* (Ottawa: Queen's Printer, February 1994) at 7.
125	Section 16(8).

126	Special Lectures of the Law Society of Upper Canada 1993, *Family Law: Roles, Fairness and Equality* (Toronto: Carswell, 1994) at 95-96.
127	*Lapointe v. Lapointe*, above, note 59 at 35.
128	The *Infants Custody Act*, R.S.N.S. 1989, c. 228, s. 3; the *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 56(2); and the *Domestic Relations Act*, R.S.N.W.T. 1988, c. D-8, s. 28(2).
129	N. Bala & S. Miklas, *Rethinking Decisions about Children: Is the "Best Interests of the Child" Approach Really in the Best Interests of Children?* (Toronto: Policy Research Centre on Children, Youth & Families, 1993) at 13-14.
130	*MacGyver v. Richards*, above, note 9 at 491.
131	Ibid. at 489.
132	Above, note 103.
133	Ibid. at 101.
134	(1989), 23 R.F.L. (3d) 214 (Ont. U.F.C.).
135	R.S.O. 1990, c. C.12.
136	(1984), 54 A.R. 161 (C.A.).
137	(1994), 6 R.F.L. (4th) 19 (Alta. Q.B.).
138	(1994), 161 A.R. 279 (Q.B.).
139	Above, note 136 at 164-165
140	[1994] A.J. No. 947 (Prov. Ct.).
141	Ibid. at para. 14.
142	Ibid. at para. 24.
143	[1993] A.J. No. 1040 (Prov. Ct.).
144	Ibid. at paras. 22, 23.
145	(1994), 10 R.F.L. (4th) 152 (Sask. C.A.).
146	Ibid. at 158-159.
147	Above, note 16 at 115-116 (S.C.R.).
148	Ibid. at 117-118.
149	Ibid. at 117.
150	(1994), [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 1.
151	Ibid. at 432-433.
152	Above, note 103 at 101.
153	Above, note 43.
154	Ibid. at 359.
155	Above, note 111.

156	Ibid. at 185.
157	[1994] O.J. No. 2382 (Ont. Prov. Div.).
158	Ibid. at para. 32.
159	Annotation to *Young v. Young* (1994), 49 R.F.L. (3d) 129 at 132.
160	Above, note 103 at 93-101.
161	Ibid. at 101.
162	(1994), Saskatoon U.F.C. 588/90 (Sask. Q.B.).
163	(1993), [1994] 1 W.W.R. 17 (Sask. Q.B.).
164	*Sekhri v. Mahli*, ibid. at 180.
165	*Talsky v. Talsky* (1973), 11 R.F.L. 226 at 229 (Ont. C.A.); reversed on other grounds (1975), [1976] 2 S.C.R. 292, 21 R.F.L. 27.
166	*Jordan v. Jordan*, 448 A.2d 1113 at 1115 (Pa. Super. Ct. 1982).
167	*S. (B.A.) v. S. (M.S.)* (1991), 35 R.F.L. (3d) 400 at 406.
168	*Jane Doe v. John Doe* (1990), 28 R.F.L. (3d) 356 at 364-365 (Ont. Dist. Ct.); affirmed (1990), 29 R.F.L. (3d) 450 (Ont. C.A.).
169	*Catellier v. Catellier* (1987), 51 Man. R. (2d) 22 (Q.B.).
170	*Stark v. Stark* (1988), 16 R.F.L. (3d) 257 (B.C. S.C.); rev'd in part (1990), 26 R.F.L. (3d) 425 (B.C. C.A.); leave to appeal to S.C.C. refused (1991), 31 R.F.L. (3d) 466 (S.C.C.).
171	*B. (S.H.) v. F. (R.)* (1988), 83 N.S.R. (2d) 422 (Fam. Ct.).
172	(1991), 31 R.F.L. (3d) 349 at 352 (Ont. Gen. Div.).
173	A.M. Oster, "Custody Proceeding: A Study of Vague and Indefinite Standards" (1968) 5 J. Fam. L. 21 at 37-38.
174	Mnookin, above, note 14 at 227.
175	Ibid. at 229.
176	Ibid. at 230.
177	*MacGyver v. Richards*, above, note 9 at 489 (O.R.).
178	W.G. How & S.E. Mott-Trille, "*Young v. Young*: A Re-evaluation of the Rights of Custodial and Access Parents" (1992) 8 C.F.L.Q. 356 at 362.
179	Above, note 165 at 29 (21 R.F.L.).
180	Payne & Edwards, above, note 7 at 3-5.
181	*Hyde v. Hyde* (1982), 19 Sask. R. 429 (Q.B.).
182	See below, section 8.
183	*Lin v. Lin* (1992), 38 R.F.L. (3d) 246 (B.C. C.A.).
184	(London: Croom Helm, 1984) at 253.
185	*Custody and Access*, above, note 68 at 9-10.

186	Ibid. at 11.
187	Canada, Department of Justice, *Consultation with Family Law Lawyers on the Divorce Act, 1985* (Ottawa: Queen's Printer, May 1989) at 16.
188	L.J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985) at 246.
189	J. Schulman & V. Pitt, "Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children" (1982) 12 Golden Gate U. L. Rev. 538 at 556.
190	Ibid. at 555.
191	*Evaluation of the Divorce Act, Phase II*, above, note 2 at 133. See also "Divorces, Canada and the Provinces, 1990," above, note 62 at 383.
192	Above, note 16 (on appeal from British Columbia).
193	Above, note 17 (on appeal from Quebec).
194	*Brown v. Brown* (1983), 39 R.F.L. (2d) 396.
195	(1987), 6 R.F.L. (3d) 314, 77 N.B.R. (2d) 381; leave to appeal to S.C.C. refused (1987), 8 R.F.L. (3d) xxxx (note), 82 N.B.R. (3d) 90 (note) (S.C.C.).
196	(1990), 29 R.F.L. (3d) 113, 50 B.C.L.R. (2d) 1 (C.A.) (hereinafter cited to R.F.L.). The *Young* decision followed an earlier decision of the Ontario Divisional Court in *Hockey v. Hockey* (1989), 21 R.F.L. (3d) 105, 69 O.R. (2d) 338 (Ont. Div. Ct.).
197	How & Mott-Trille, above, note 178 at 362.
198	*Young v. Young* (B.C. C.A.), above, note 196 at 219.
199	Headnote to *Young*, above, note 16 at 13, summarizing McLachlin J. at 121-122. Justice McLachlin was a little less positive on the question of the absence of the risk of harm than the summary would suggest.
200	Above, note 17 at 195.
201	J.T. Syrtash, "Practical Tips on Religious and Other Access Disputes: How to Decipher and Apply the Conflicting Definitions of 'Best Interests' in *Young v. Young* and *D.(P.) v. C.(S.)*," in the Ontario Bar Admissions 1993 Textbook (Toronto: Ontario Bar Assn., 1993) at F-7.
202	*Sturm v. Sturm* (1973), 8 R.F.L. 140 at 144 (N.S.W. S.C.).
203	Syrtash, above, note 201 at F-3 and F-4.
204	*Young v. Young*, above, note 16 at 90.
205	*P.(D.) v. S.(C.)*., above, note 16 at 181.
206	Syrtash, above, note 201 at F-5.
207	*Custody and Access*, above, note 68 at 8-9.
208	*Gordon v. Goertz*, [1986] 2 S.C.R. 27, 19 R.F.L. (4th) 177; *Droit de la famille — 1763*, 19 R.F.L. (4th) 341, (sub nom. *W. (V.) v. S. (D.)*) [1996] 2 S.C.R. 108; *P. (M.) v. L. (G.)*, [1995] 4 S.C.R. 592, 18 R.F.L. (4th) 185.
209	*Woodhouse v. Woodhouse* (1996), 20 R.F.L. (4th) 337 (Ont. C.A.); *Luckhurst v. Luckhurst* (1996), 20 R.F.L. (4th) 373 (Ont. C.A.).
210	J.D. Payne & K.L. Kallish, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family" (1981) 13 Ottawa L. Rev. 215.
211	(1884), 28 Ch. D. 606.
212	Ibid. at 613.

213	*Douglas v. Douglas*, [1948] 1 W.W.R. 473 (Sask. K.B.); *Lamond v. Lamond*, [1948] 1 W.W.R. 1087 (Sask. K.B.); *Beck v. Beck*, [1949] 2 W.W.R. 1175, [1950] 1 D.L.R. 492 (B.C. C.A.).
214	(1973), 12 R.F.L. 200, 40 D.L.R. (3d) 321.
215	Ibid. at 324 (D.L.R.).
216	(1978), 6 R.F.L. (2d) 278 (Ont. H.C.).
217	(1985), 45 R.F.L. (2d) 235, 17 D.L.R. (4th) 190 (Ont. C.A.).
218	144 N.J. Super. 200 at 204; affirmed 144 N.J. Super. 352 (N.J. Super Ct. — App. Div. 1976).
219	(1982), 31 R.F.L (2d) 449 at 452 (Man. C.A.).
220	(1989), 21 R.F.L. (3d) 307 (Ont. H.C.).
221	Ibid. at 315.
222	(June 22, 1989), Doc. Hamilton-Wentworth V/1322/88 (Ont. U.F.C.).
223	Above, note 134.
224	Above, note 18.
225	Ibid. at 323 (O.R.).
226	Ibid. at 326-328.
227	Annotation to *Carter v. Brooks* (1991), 30 R.F.L. (3d) 54 at 54-55.
228	Above, note 9.
229	Ibid. at 491 (O.R.).
230	Above, note 59.
231	Ibid. at 10-11.
232	Ibid. at 12.
233	(1989), 18 R.F.L. (3d) 385 (Alta. Q.B.).
234	(1993), 142 A.R. 53 (Q.B.).
235	(1993), 142 A.R. 210 (Q.B.).
236	(1994), 148 A.R. 306 (Q.B.).
237	(1994), 159 A.R. 311 (Q.B.).
238	Above, note 9 at 489-491 (O.R.).
239	(1983), 27 Sask. R. 205 (Q.B.).
240	(1983), 26 Sask. R. 243 (U.F.C.).
241	Above, note 169.
242	(1978), 94 D.L.R. (3d) 402 (Sask. Q.B.).

243	Above, note 208.
244	*Gordon v. Goertz*, above, note 208 at 48 (S.C.R.) per McLachlin J.
245	Ibid. at 48.
246	Ibid. at 54.
247	Ibid. at 59.
248	Ibid. at 60-61.
249	Ibid. at 85, quoted from *In Re Marriage of Burgess*, 51 Col. Rptr. 2d 444 at 452-453 (1996).
250	Ibid. at 87.
251	Ibid. at 74.
252	Ibid.
253	*P. (M.) v. L. (G.)*, 18 R.F.L. (4th) 185, (sub nom. *P. (M.) v. L.B. (G.))* [1995] 4 S.C.R. 592.
254	See *Woodhouse*, above, note 209 at 370.
255	*Reid v. Reid* (1975), 25 R.F.L. 209 at 215 (Ont. Div. Ct.).
256	"The Roles and Rights of Children in Divorce Actions" (1966) 6 Can. J. Fam. L. 1.
257	Prov. guide, at 66.
258	W. Gaylin & R. Macklin, *Who Speaks for the Child? The Problems of Proxy Consent* (New York: Plenum Press, 1982) at 126.
259	Above, note 115 at 54.
260	H.G. Stark & K.J. MacLise, *Domestic Contracts* (Toronto: Carswell) (looseleaf) at 39.
261	*Evaluation of the Divorce Act, Phase II*, above, note 2 at 100-01, table 4.18.
262	S. Boyd, "Child Custody and Working Mothers" in S.L. Martin & K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 168.
263	(1985), 48 R.F.L. (2d) 426 (Sask. Q.B.).
264	*Custody and Access*, above, note 68 at 14.
265	Excerpts taken from the introduction of *Mothers on Trial* (New York: Harcourt Brace & Co., 1991) as reported in *Ms. Magazine* (May/June 1991) at 47.
266	A. Booth et al., "Transmission of Marital and Family Quality over the Generations" (1982) 13(2) J. Divorce 42.
267	L. Gabardi et al., "Intimate Relationships: College Students from Divorced and Intact Families" 18:3/4 J. Divorce & Remarriage.
268	Ibid. at 25 and 37.
269	Ibid. at 50.
270	Ibid.
271	Booth et al., above, note 266 at 55.

272	Gabardi et al., above, note 267 at 51.
273	*Casselman v. Pasluns* (1974), 3 O.R. (2d) 132 (C.A.).
274	*Krause v. Krause*, 19 R.F.L. 230, [1975] 4 W.W.R. 738 (Alta S.C.); varied 23 R.F.L. 219, [1976] 2 W.W.R. 622 (Alta. C.A.).
275	*Leatherdale v. Leatherdale*, [1982] 2 S.C.R. 743, 30 R.F.L. (2d) 225.
276	[C]ourts may have unrealistic expectations about the opportunities to older women to make careers for themselves ... the courts may feel compelled to speculate on the ability of the dependent spouse to become trained or education ... to sell herself in a marketplace indifferent to both the experienced and the older job applicant. Canadian Institute for Research, *Matrimonial Support Failures: Reasons, Profiles, and Perceptions of Individuals' Involved*, vol. 1 (Edmonton: Institute of Law Research and Reform) at 14.
277	K. Kress, "Legal lndeterminacy" (1988) 77 Calif. L. Rev. 283.
278	"Can Nihilism Be Pragmatic?" (1986) 100 Harvard L. Rev. 332.
279	D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986) at 31.
280	Ibid. at 9.
281	D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 J. Legal Education 518.
282	Ibid. at 566.
283	Ibid. at 569.
284	Ibid. at 559.
285	Ibid. at 526.
286	"Reform of the Law of Child Support" (1996) 74 Can. Bar Rev. 585.
287	J. Munsterman, *Child Support Guidelines: A Compendium* (Arlington Va: National Center for State Courts, 1991) in Australia and England.
288	*Levesque v. Levesque* (1994), 4 R.F.L. (4th) 375, 20 Alta. L.R. (3d) 429.
289	C. Davies, "The Emergence of Judicial Child Support Guidelines" (1995) 13 C.F.L.Q. 89 and S.M. Cretney & J. Masson, *Principles of Family Law*, 5th ed. (London: Sweet & Maxwell, 1990) at 387-388.
290	H. Foster & D. Freedy, "Child Custody" (1964) 39 N.Y.U. L. Rev. 423 at 630.
291	Ibid. at 423.
292	Mnookin, above, note 14 at 292.
293	D. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984-85) 83 Mich. L. Rev. 477 at 488.
294	Above, note 14 at 260.
295	*MacGyver v. Richards*, above, note 9 at 490.
296	[1994] 3 S.C.R. 670 at 733, 6 R.F.L. (4th) 161. See also Sopinka J. at 688.
297	[1995] 3 S.C.R. 370 at 399, 15 R.F.L. (4th) 201.
298	Ibid. at 383.
299	Ibid. at 387.

300	Ibid. at 396, quoted from L'Heureux-Dubé J.'s own judgment in *Willick*, above, note 296 at 734.

End of Document	