FAMILY LAW PROJECT

CHILD GUARDIANSHIP, CUSTODY AND ACCESS

Report for Discussion No. 18.4

October 1998

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

FAMILY LAW PROJECT

CHILD GUARDIANSHIP, CUSTODY AND ACCESS

Report for Discussion No. 18.4

October 1998

ISSN 0834-9037
ISBN 1-8960-7820-6

ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

The members of the Institute's Board are The Hon. Mr. Justice B.R. Burrows; C.W. Dalton; A. de Villars, Q.C.; The Hon. Judge N.A. Flatters; W.H. Hurlburt, Q.C.; H.J.L. Irwin; P.J.M. Lown, Q.C. (Director); Dr. S.L. Martin, Q.C.; Dr. D.R. Owram; The Hon. Madam Justice B.L. Rawlins; N.C. Wittmann, Q.C. (Chairman) and Professor R.J. Wood.

The Institute's legal staff consists of P.J.M. Lown, Q.C. (Director); R.H. Bowes; C. Gauk; J. Henderson-Lypkie, M.A. Shone and V.R. Stevenson. W.H. Hurlburt, Q.C. is a consultant to the Institute.

The Institute's office is located at:

402 Law Centre,
University of Alberta,
Edmonton, Alberta, T6G 2H5.

Phone: (403) 492-5291;
Fax: (403) 492-1790.

The Institute's electronic mail address is:

reform@alri.ualberta.ca.

This and other Institute reports are available to view or download at the ALRI website: *http://www.law.ualberta.ca/alri/*.

ACKNOWLEDGEMENTS

To take on a wholesale revision of provincial family law is an ambitious task. Not only is the task a comprehensive one, but it is also one which requires appropriate balancing of the interplay between different elements in the family law legislation, and an ability to keep up-to-date in an area where social attitudes, public policy, and the law are rapidly changing. Finding this balance has been a challenge. For example, when we first commenced the project, we did not anticipate the existence of child support guidelines and the effect they would have on provincial support legislation. However, despite the added time which is necessitated by the need to accommodate such changes, the materials are current as of June 1998.

There are a number of people who must be acknowledged for their contribution to this collection of reports for discussion. This has always been a special project, funded by the Law Foundation as part of its special projects fund. We acknowledge not only the financing, but also the understanding and patience of the Foundation, while the project has undergone some redefinition and expansion, and while the work has been internalized from external consultant to internal counsel.

The preliminary research work was carried out by Professor Julien Payne from the University of Ottawa, who had assisted the Institute in previous projects relating to family law. Professor Payne took the first cut at many of the areas which are covered in these Reports for Discussion. When the work was brought in-house, the counsel in charge of the project was Ms. Margaret Shone, and it is Ms. Shone who has borne the responsibility for carrying and managing the project through its redefinition, expansion, and various updates to its present form. This large and challenging task takes considerable time, effort, and attention, and we acknowledge with gratitude Mrs. Shone's dedication to the task at hand.

Early in the project, we were able to use the services of a consultative committee whose names are set out at the end of these acknowledgements. Madam Justice Russell also attended some of the meetings with respect to child support. Later in the project, we relied more heavily on a number of readers and commentators who took the time to examine our drafts and recommendations in detail and provide feedback on them. In particular we would like to acknowledge the assistance of Ms. Jeanette Fedorak from the Department of Justice, Ms. Jean McBean from the firm of McBean Becker, Ms. Terry Hodgkinson from the firm of Barr Picard, and Judge Hugh Landerkin from the Provincial Court Family Division in Calgary.

Our Board, as always, is assiduous in its review and commentary on the policy issues that are put before it, and the reports which describe issues and decisions. Two Board members in particular have made a very significant contribution to this project, and it is appropriate to single out the contribution of Judge Nancy Flatters and Dr. William Hurlburt.

As with any Institute project, there are many others who have given willingly and gladly of their time to attend meetings, answer questions, or provide feedback on specific issues. To the many who fall into that category, we thank you for your understanding and contribution.

The next phase in this project will be to coordinate our efforts with the Department of Justice and the Department of Family and Social Services, as the Provincial legislative agenda unfolds over the next 3 to 4 years. We look forward to receipt of the views and comments of all those who are interested in and work in the area of family law. Those comments will be incorporated into the final product, which we hope will provide a more modern and rational family law scheme for the Province of Alberta.

Project Committee Members:

Annalise Acorn	Clark W. Dalton
Christine Davies, Q.C.	Peggy Hartman
W.H. Hurlburt, Q.C.	Jean M. McBean, Q.C.
Leonard J. Pollock, Q.C.	Peter Lown, Q.C.
Bruce Ziff	

PREFACE

This report is designed to be read in conjunction with ALRI RFD No. 18.1, *Family Law Project: Overview*.

The *Overview* shapes the framework for consideration of the issues raised in ALRI RFD No. 18.2 on *Spousal Support*, ALRI RFD No. 18.3 on *Child Support* and ALRI RFD No. 18.4 on *Child Guardianship, Custody and Access*. It also provides background information that is common to all three RFDs.

The *Overview* is designed so that it can be read in conjunction with any one of these RFD's individually or the set as a whole.

Following consultation and the finalization of the recommendations in these three reports and in Report No. 65 on *Family Relations: Obsolete Actions*, published in March 1993, we intend to propose that all of our recommendations be consolidated into a single family law statute for Alberta.

INVITATION TO COMMENT

The Reports for Discussion (RFDs) are not final reports. They are reports of our tentative conclusions and proposals. The ALRI's purpose in issuing the Reports for Discussion at this time is to allow interested persons the opportunity to consider these tentative conclusions and proposals and to make their views known to the ALRI. Any comments sent to the ALRI will be considered when the ALRI Board of Directors determines what final recommendation, if any, it will make to the Alberta Minister of Justice and Attorney-General.

Comments on this report should be in the Institute's hands by June 30, 1999. Comments in writing are preferred. Our address is:

Alberta Law Reform Institute,
402 Law Centre,
University of Alberta,
Edmonton, Alberta, T6G 2H5.

Fax: (403) 492-1790

reform@alri.ualberta.ca

Table of Contents

ALRI Family Law Project

Reports

Report No. 65—*Family Relationships: Obsolete Actions* (March 1993)

Report for Discussion No. 18.1—*Overview* (October 1998)

Report for Discussion No. 18.2—*Spousal Support* (October 1998)

Report for Discussion No. 18.3—*Child Support* (October 1998)

Report for Discussion No. 18.4—*Child Guardianship, Custody and Access* (October 1998)

Statutory Provisions Under Review

Child Welfare Act, R.S.A. 1984, c. C-8.1, Part 5

Domestic Relations Act, R.S.A. 1980, c. D-37

Maintenance Enforcement Act, S.A. 1985, c. M-0.5 (as to power of court to enforce its own order)

Maintenance Order Act, R.S.A. 1980, c. M-1 (as to spousal and child support)

Parentage and Maintenance Act, S.A. 1990, c. P-0.7

Provincial Court Act, R.S.A. 1980, c. P-20, Part 3

Surrogate Court Act, R.S.A. 1980, c. S-28, ss 10, 13

Abbreviations

ALRI	Alberta Law Reform Institute
CIR	Canadian Institute for Research
CRILF	Canadian Research Institute for Law and the Family
CWA	*Child Welfare Act*
Divorce Act	*Divorce Act, 1985*, R.S.C. 1985 (2nd Supp.), c. 3
DRA	*Domestic Relations Act*
FPTFLC	Federal/Provincial/Territorial Family Law Committee
MEA	*Maintenance Enforcement Act*
MOA	*Maintenance Order Act*
P&MA	*Parentage and Maintenance Act*

PCA	*Provincial Court Act*
RFD	Report for Discussion
SCA	*Surrogate Court Act*
SCC	Supreme Court of Canada

Related ALRI Publications

Reports

ALRI Report No. 20—*Status of Children* (June 1976)

ALRI Report No. 27—*Matrimonial Support* (March 1978)

ALRI Report No. 25—*Family Law Administration: The Unified Family Court* (April 1978)

ALRI Report No. 26—*Family Law Administration: Court Services* (April 1978)

ALRI Report No. 43—*Protection of Children's Interests in Custody Disputes* (October 1984)

ALRI Report No. 45—*Status of Children, Revised Report, 1985* (November 1985)

ALRI Report No. 52—*Competence and Human Reproduction* (February 1989)

Report No. 53—*Towards Reform of the Law Relating to Cohabitation Outside Marriage* (June 1989)

ALRI Report No. 60—*Status of Children: Revised Report, 1991* (March 1991)

Reports for Discussion

ALRI Report for Discussion No. 6—*Sterilization Decisions: Minors and Mentally Incompetent Adults* (March 1988)

ALRI Report for Discussion No. 15—*Domestic Abuse: Toward an Effective Legal Response* (June 1995)

Research Papers

ALRI Research Paper No. 13—*Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (March 1981) (Vol. 1, *Summary Report*; vol. 2, *Technical Reports*)

ALRI Research Paper No. 20—*Court-Connected Family Mediation Programs in Canada* (May 1994)

LIST OF GENERAL PREMISES

[See RFD No. 18.1, Overview]

GENERAL PREMISE 1*Compatibility with federal Divorce Act*. Alberta legislation should be compatible with the federal *Divorce Act*.

GENERAL PREMISE 2*Inclusiveness*. The substantive law and remedies embodied in Alberta legislation on family matters should be as inclusive as is constitutionally open to a province or territory.

GENERAL PREMISE 3*Effective remedies*. Alberta legislation should ensure that effective remedies are available on separation.

GENERAL PREMISE 4*Equality among children*. Rights and responsibilities relating to children should be based on the relationship between parent and child rather than the relationship between the child's parents.

GENERAL PREMISE 5*Individual fairness*. The law should retain the flexibility necessary to achieve fairness in an individual case.

GENERAL PREMISE 6*Consistency with other Alberta legislation*. Alberta legislation on spousal support and child support, guardianship, custody and access should be consistent with other Alberta law.

GENERAL PREMISE 7*Consistency with legislation in other Canadian provinces and territories*. In developing legislation for Alberta, policy makers should consider whether it is desirable for Alberta legislation to be consistent with legislation in other Canadian provinces or territories.

GENERAL PREMISE 8*Uniform substantive law regime*. Alberta legislation should create a uniform and coherent regime of substantive family law.

GENERAL PREMISE 9*Choice of court*. Given the existing court structure, Alberta legislation should allow parties to choose the forum in which the remedy is sought, Provincial Court, Family Division, or Court of Queen's Bench.

GENERAL PREMISE 10 *Public* v. *private law*. The recommendations for the reform of family law must show an understanding of the interrelationship between private and public law rights and responsibilities.

PART I — SUMMARY OF REPORT

This Report for Discussion (RFD) has to do with the responsibilities of parents, or parent substitutes, to provide care, guidance, control and protection in bringing up children.

Children are born dependent. Therefore, provision must be made for their daily care and upbringing as they move from infancy through childhood to adulthood, recognizing that as children mature they become increasingly capable of caring for themselves and making their own decisions. The existing law leaves much to be desired. To illustrate, some of Alberta's statutory provisions are out-dated (e.g. linking parenting ability to the absence of fault for marriage breakdown); some are overlapping or inconsistent (e.g. guardianship provisions in three different statutes); and some have uncertain scope (e.g. applying to "children of the marriage" but not necessarily to children whose parents have never been married). Our recommendations provide a framework for parental decisionmaking with respect to children and for the exercise of court jurisdiction, where necessary, by way of judicial discretion or other power or authority conferred by statute. We make specific recommendations about how parenting responsibilities should be shared where the parents are living separate and apart from each other and cannot agree between themselves.

This RFD is one of a set consisting of RFD No. 18.1, *Family Law Project: Overview*; RFD No. 18.2, *Spousal Support*; RFD No. 18.3, *Child Support*; and RFD No. 18.4, *Child Guardianship, Custody and Access*. Taken together, their purpose is to contribute to the provision of a clear, sound, contemporary legislative framework for Alberta family law that will assist decisionmaking by courts, litigants and other persons dealing with family law matters. If implemented, the recommendations will modernize Alberta family law by bringing it more closely into line with the federal *Divorce Act* and legislation in other provinces. Ten "General Premises" have guided us in making recommendations for reform. They are developed in RFD No. 18.1.

This RFD is divided into three sections. Section I (chapters 1-3) is introductory. Section II (chapters 4-9) develops the substantive law policy surrounding guardianship, custody and access. Section III (chapters 10-15) explores matters relating to court proceedings and orders.

Section I: Introduction

1. Existing law

Under the existing law in Alberta, the responsibility for raising a child usually falls to the parents. Their responsibilities flow from the common law concept of "guardianship" — a concept which eludes precise definition but is understood in modern times to signify a bundle of responsibilities and rights held by an adult, usually the child's parents, to be exercised for the benefit of the child. "Custody" and "access" are included among the "incidents" of guardianship. They provide a foundation for the allocation of parental responsibilities and rights. "Custody" is the principal incident.

We explain in Chapter 3 that in some jurisdictions, legislation gives the word "custody" a broad meaning which approximates the common law concept of "guardianship." The meaning attributed to "custody" in the *Divorce Act* is an example. In contrast, in our conceptualization, "guardianship" defines the full bundle of responsibilities and rights associated with raising a child. It involves responsibility for the long-term well-being of the child. "Custody" has a narrower meaning. It has to do with the day-to-day care of the child. "Access" encompasses contact with the child by a guardian (or other person) who does not have custody.

1. Definitions

We define "parent" as we did in RFD No. 18.3 to mean the mother or father of a child, as determined by biological connection, adoption or a court finding. Generally, the parents of a child are also the child's guardians, but being recognized as a "parent" is not synonymous with having the status of a "guardian." For the purposes of this RFD, it is the definition of "guardian" rather than "parent" that is important. We define

"guardianship," "guardian"and "child" in Chapter 6 (see discussion under heading II.3 of this summary).

Section II: Substantive Law Policy

1. Best interests of the child

What standard should be used to make guardianship, custody and access decisions? We discuss this issue in Chapter 4. Currently, the courts apply the test of the "best interests of the child" in guardianship, custody and access disputes, regardless of whether the dispute is brought under Alberta legislation or under the *Divorce Act*. The universal application of this test reduces the impact of the statutory differences in the law and produces consistent decisionmaking in practice. The "best interests" test has been criticized because it provides an indeterminate standard. However, no more adequate test has been advanced. This being said, we recommend that all guardianship, custody or access decisions should be made in the best interests of the child. We further recommend that this test should be the paramount consideration.

2. Conceptualizing the parental role

How should the law conceptualize the parental role? In Chapter 5, we discuss four possible approaches. One approach, and the most radical, would be to start from square one and build a child-centred model of the parent-child relationship. Those who advocate this approach argue that much of the existing law is based on adult possessory rights linked to genetics, not functional parenting as viewed from the child's standpoint. The second approach would be to build on the traditional concepts of guardianship, custody and access. The third approach would be to adopt the *Divorce Act* approach under which "custody" is given a wide meaning, much like "guardianship" traditionally. The fourth approach would be to introduce the concept of "shared parental responsibilities" which would involve adopting a new terminology to describe the division of responsibilities where the parents live separate and apart. The proponents of this approach assert that a child has a right to know and be raised by two parents. They

emphasize that parenting responsibilities do not end when the parents separate.

We consider the ramifications of adopting one or another of these approaches before recommending that Alberta stay with the known concepts of guardianship, custody and access. We think that these concepts allow for practical working solutions that will provide care, control and upbringing in the best interests of the child. The law should encourage parents (or other guardians) who are living separate and apart to enter into consensual arrangements for shared parenting. Where they cannot agree (a situation which we consider to be the exception rather than the rule) and subject to the discretion of the court acting in the best interests of the child to order otherwise, we think it preferable to give one parent (or other guardian) sole custody and clear decisionmaking authority over the child and to give the parent (or other guardian) who does not have custody complementary guardianship powers, including contact with the child. In our view, this approach is more likely to bring stability to the child's life than continuing disagreement between parents (or other guardians) under a court order for shared parenting. We call this approach the Sole Custody Model of parental responsibilities and rights.

3. Guardianship

a. Defining "guardianship"

What is guardianship? Who is a child for purposes of guardianship? Who are or should be the guardians of a child and how is their guardianship established? How is guardianship brought to an end? We explore possible answers to these questions in Chapter 6.

We define "child," for the purpose of "guardianship," to mean an unmarried person under the age of 18 years. As previously stated, for the purposes of this RFD, it is the definition of "guardian" rather than "parent" that is important. We define "guardian" as a person who has the authority to exercise the powers of guardianship with respect to a child. We define "guardianship" to have the meaning attributed to it at common law, and to

include: (1) the responsibility of an adult person for the control and custody of the child, the responsibility for making decisions relating to the care and upbringing of the child and the responsibility to exercise all powers conferred by law upon a parent who is a guardian of a child; and (2) the rights necessary to carry out this responsibility. Our definition of "guardianship" does not include "trusteeship" (which some jurisdictions refer to as "guardianship of a child's property" in contrast with "guardianship of a child's person.")

Where a child's parents, or other guardians, are living together, they share guardianship, making decisions cooperatively. Where they are living separate and apart, guardianship must also be shared. If the guardians are unable to agree between (or among) themselves on how to carry out their responsibilities, the law must provide an answer. To provide for this situation, we make a distinction between a "custodial guardian" and a "non-custodial guardian." The powers, responsibilities, rights and duties of custodial and non-custodial guardians are set out in Chapter 7 (see heading II.4 of this summary).

We also make a distinction between a "parent guardian" and a "non-parent guardian." We recommend that a non-parent guardian should have the same power, responsibilities, rights and duties as a parent guardian, except the duties to give the child love and affection and to support the child from the guardian's personal resources.

b. Establishing guardianship

Guardianship may be established by statute, court appointment or nomination by an existing guardian.

Statutory guardian. We recommend that statute should provide that the mother and father, provided that he meets certain criteria, are the joint guardians of their child under the age of 18 years. To be a statutory guardian, we recommend that the father must have: (1) been married to the mother when the child was born; (2) been married to the mother not more

than 300 days before the birth of the child; (3) cohabited with the mother for at least 12 consecutive months immediately before, during or after the birth of the child and acknowledged paternity; or (4) married the mother of the child after the child was born and acknowledged his paternity. This recommendation embodies, but slightly modifies, the existing law.

Court-appointed guardian. We recommend that the court should have power to appoint a guardian to act jointly with any other guardian or as the child's sole guardian. The court should make its decision in the best interests of the child. We recommend legislating sixteen factors that the court may consider with respect to the appointment of a guardian.

Nominated guardian. We recommend that a guardian should be able to name a guardian to act if the nominating guardian dies or becomes mentally incapable of being a guardian. Once the triggering event occurs, the nominated guardian should step into the nominating guardian's shoes. Our recommendations include provisions to govern the formalities of such nominations.

c. Ending guardianship

We recommend that guardianship should terminate when: (1) the child reaches 18 years of age or marries; (2) the guardian dies; (3) a court orders the guardian's removal; or (4) in the case of a nominated guardian, the guardian resigns.

d. Resolving disputes between guardians

Whether they are empowered by statute, appointed by the court or nominated by an existing guardian, guardians may be involved in disputes regarding their respective roles. Legislation should provide for the expeditious resolution of disputes between guardians.

4. Custody

Which parent (or other guardian) should be the custodial guardian and which the non-custodial guardian where the parents (or other guardians) are living separate and apart and cannot agree how to share their parenting responsibilities? In Chapter 4, we recommended that any decision should be made in the best interests of the child. In Chapter 7, we examine different legislative approaches to assist the court in making its determination. Those approaches include enacting one or more of the following: (1) factors for the court to consider; (2) intermediate level rules; (3) statutory presumptions; or (4) a two-step assessment process. We conclude by recommending the enactment of a list of eighteen factors that the court may consider in making a custody determination. The court should be able to order that the guardians share custody jointly (although, given our Sole Custody Model, we think that this choice would be exceptional). In addition, the court should be able to make an order to prevent a parent or other person from unlawfully withholding or removing a child from the jurisdiction. It should also be empowered to grant or refuse an order for the production of a child.

Unless otherwise ordered by the court or agreed to by the parties in writing, the custodial guardian should have the day-to-day care and control of the child, including fifteen powers, responsibilities and rights which we identify specifically. In addition, we would require the custodial guardian to give at least thirty days' written notice to any other guardian of the intention to change the child's residence, including when the change will be made and where the new place of residence will be.

5. Access

Various persons may wish to have contact with a child. Some will be guardians; some will not. Those persons who are not guardians may be parents or non-parents. Like other decisions, decisions about who should have access to a child should be made in the child's best interests. To this end, in Chapter 8, we recommend that legislation should specify that access is the right of the child. Where it is in the child's best interests, the court should have the discretion to make an order allowing contact between the

child and one or more of the following persons: (1) a non-custodial guardian; or (2) any other person where the child's parents, if alive, are living separate and apart, or where one or both of the child's parents are deceased. We recommend against the enactment of a presumption that access to a parent, or anyone else, is in the child's best interests. As we did with respect to custody, we recommend the enactment of a list of factors, fourteen in this case, that the court may consider in making a custody determination. Because access is the child's right, the conferral or withholding of contact with the child should not be used to reward or punish a parent for compliance or non-compliance with the child support obligation.

Unless otherwise ordered by the court or agreed to by the parties in writing, a non-custodial guardian should have reasonable access to the child and be enabled to exercise the fifteen powers, responsibilities and rights which we identify specifically. A non-guardian who is given access to the child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.

6. Parenting agreements

In Chapter 9, we recommend that legislation should permit the parents (or other guardians) of a child to enter into a written agreement with respect to matters pertaining to the upbringing of a child. Where the guardians live together, or the agreement is made in anticipation that they will live together, the agreement should not include provisions to govern custody of, or access to, the child in the event that the relationship breaks down in the future. The court should be able to disregard any provision of a parenting agreement pertaining to the incidents of guardianship, including custody or access. This power should be exercised in the best interests of the child.

Section III: Court Proceedings

1. Applicants

The existing law is peppered with provisions governing who may apply for guardianship, custody or access. The case law interpreting these provisions, or developed by the superior courts in the exercise of their jurisdiction *parens patriae*, adds to the complexities. The recommendations we make in Chapter 10 are intended to simplify the law. Certain persons should be eligible to apply for guardianship as of right. They are: a parent, a person standing in the place of a parent in relation to a child, a relative of the child or a step-parent of the child. Any other person should be able to apply, on behalf of the child, with the leave of the court. Only a guardian should be eligible to apply for custody. A guardian should also be eligible to apply for access, as should a non-guardian who is a parent, person standing in the place of a parent, relative of the child, or a step-parent. As in the case of guardianship, any other person should be able to apply, on behalf of the child, with the leave of the court.

2. Guardianship, custody or access order

In our opinion, acting in the best interests of the child, a court making a guardianship, custody or access order should have wide discretionary powers to make whatever decisions it sees fit. Those powers should include the power to divide the incidents of guardianship among the child's guardians. We so recommend in Chapter 11. It is implicit in our previous recommendations that the court should be able to make guardianship, custody or access orders in favour of one or more persons. We make this recommendation explicit in Chapter 11. We recommend, further, that the court should have power to make a guardianship, custody or access order on such terms, conditions or restrictions as the court thinks fit and just. This power should include the power to give directions for the supervision of the custody of, or access to, a child by another persons or body who has consented to act as supervisor. Where the parties agree and the court is satisfied that the order would be in the child's best interests, the court should have discretion to grant a consent order without holding a hearing, and to incorporate in its order

all or part of a provision in a written agreement previously made by the parents (or other guardians). Finally, in conjunction with proceedings for child guardianship, custody or access, we recommend that the court should have power to grant an order for exclusive use of all or part of the family home and exclusive use of any or all household goods for the benefit of a child. The court's ability to exercise this power would arise on application with notice to all persons who may be entitled to be added as parties to the proceeding.

3. Variation order

Over time, the circumstances of the child or a guardian may change or evidence that was not previously available may come to light. In such a situation, the court should have power to vary, suspend or discharge a guardianship, custody or access order, or any provision in it, and we so recommend in Chapter 10. On an application for a variation order, the court should consider the same factors and apply the same criteria as it would in an application for a guardianship, custody or access order. The court should also be able to exercise the same discretion and powers of disposition that it had on the original application.

4. Interim order

Interim orders allow the court to make a temporary order until the issue of guardianship, custody or access can be determined in the main proceeding. In Chapter 13, we recommend that the court should have power to make an interim guardianship, custody or access order, including an *ex parte* interim order, as the court sees fit. In making an order, the court should consider the same factors and apply the same criteria as it would on the application in the main proceeding. The court should also be able to exercise the same discretion and powers of disposition that it has on an original application.

5. Duration of order

In Chapter 11, we recommended that the court should be able to impose terms, conditions or restrictions on a child guardianship, custody or access order.

In Chapter 14, we recommend that that power should include the power to specify the time for which the order will endure. Specifically, the court should have power to make a guardianship, custody or access order (including a variation order or an interim order) for a definite or indefinite period or until the happening of a specified event (but not to extend beyond the termination of guardianship by the operation of law: see heading II.3.c of this summary). A guardianship, custody or access order should remain in force until it is replaced by a subsequent order (on either variation or appeal) granted by a court of competent jurisdiction within Alberta. The jurisdiction of the court under Alberta law should continue in effect unless and until a court makes a custody or access order in a proceeding under the *Divorce Act*.

6. Related court powers

Courts exercising jurisdiction over child guardianship, custody or access should have certain additional powers. In Chapter 15, we recommend that the Rules of Court and forms should facilitate joint applications for guardianship, custody and access. By "joint application," we mean a procedure by which parties who are in agreement about the result they are seeking may apply jointly for guardianship, custody or access. It should not be necessary to designate one as applicant and the other as respondent. We recommend, further, that the court should be able:

on its own motion, to add a party to the proceedings or require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party;

to require a person or public body to disclose information indicating the whereabouts of a proposed respondent or child;

to direct some degree of privacy in a guardianship, custody or access proceeding and to prohibit the publication or broadcasting of information that comes out in the proceeding;

to make an order for the payment of costs, including, on an application for an interim order, an order for interim costs and disbursements.

Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court should have discretion to apply the Alberta Rules of Court. Any new child guardianship, custody or access legislation should operate retroactively.

PART II — REPORT

SECTION I — INTRODUCTION

CHAPTER 1 BACKGROUND

A. Family Law Project

This report is designed to be read in conjunction with ALRI Report for Discussion (RFD) No. 18.1, *Family Law Project: Overview*. RFD No. 18.1 shapes the framework for consideration of the issues raised in this RFD on *Child Guardianship, Custody and Access* and the companion RFDs on *Spousal Support* and *Child Support.*

RFD No. 18.1 provides background information that is common to all four RFDs. Its contents include:

- a description of the project — how it is organized, its history and scope, related ALRI work, and other relevant considerations;
- an exposition of problems common to family law reform efforts;
- a discussion of the constitutional division of legislative and judicial powers;
- consideration of the impact of federal family law and policy on provincial law; and
- development of the general premises that guide our recommendations for family law reform.

B. Scope and Organization of this Report

This report is about the responsibilities of parents, or persons taking the place of parents, to provide care, guidance, control and protection in bringing up children. Those responsibilities are contained within the operative concepts of guardianship, custody and access.

The purpose of this report is to make recommendations that will provide a clear and sound contemporary framework for parental decision making with respect to children and for the exercise of court jurisdiction, where necessary, by way of judicial discretion or other power or authority conferred by statute.

The report concerns the operation of the concepts of guardianship, custody and access as a matter of private law. It does not include child protection as a matter of public law. Child protection is regulated by the *Child Welfare Act* (*CWA*)[1] which authorizes the state to intervene for the purpose of providing protective services to children under 18 years of age whose "survival, security or development" is endangered. In doing so, the

---

[1] S.A. 1984, c. C-8.1. Under the *CWA*, the areas of risk that may justify a public law intervention include physical injury, emotional injury and sexual abuse by the guardian or others from whom the guardian is unable or unwilling to protect the child.

A "physical injury" is defined to involve a "substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth": s. 1(3)(b).

"Emotional injury" involves "substantial and observable impairment of the child's mental or emotional functioning that is evidenced by a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development": s. 1(3)(a)(i). To justify an intervention under the Act, there must be reasonable and probable grounds to believe that the emotional injury is the result of rejection; deprivation of affection or cognitive stimulation; exposure to domestic violence or severe domestic disharmony; inappropriate criticism, threats, humiliation, accusations or expectations of or towards the child; or the mental or emotional condition of the guardian of the child or chronic alcohol or drug abuse by anyone living in the same residence as the child: s. 1(3)(a)(ii).

"Sexual abuse" involves inappropriate exposure or subjection to "sexual contact, activity or behaviour including prostitution related activities: s. 1(3)(c).

CWA sets the minimum standard which must be met by persons having private law responsibilities toward children.

In this report, we do not make recommendations for establishing parentage in cases where parentage is in issue. We intend that the provisions in the *Domestic Relations Act* (*DRA*),[2] Part 8, will continue to apply, but amended with respect to the legal presumption of paternity as we recommended in RFD No. 18.3 on *Child Support*.[3] These provisions are based on recommendations we made in our Report Nos. 20, 45 and 60 on the *Status of Children*.[4]

Other topics excluded are: adoption; the parentage of a child conceived with the assistance of new reproductive technology; proof of parentage; the guardianship of adult children; the enforcement of child guardianship, custody and access orders; child abduction under civil or criminal law; and the management of a child's property.[5]

Like the RFDs on Spousal Support and Child Support, this report is divided into three sections.

Section I introduces the topic. It includes: Chapter 1, which provides background information; Chapter 2, which sets the context for reform by outlining the purpose of child guardianship, custody and access law and its statutory and historical foundation; and Chapter 3, which explores matters relating to the need for reform.

---

[2] R.S.A. 1980, c. D-37.

[3] RFD No. 18.3, Rec. No. 8.3(b).

[4] ALRI Report No. 20, *Status of Children* (June 1976); ALRI Report No. 45, *Status of Children, Revised Report, 1985* (November 1985); and ALRI Report No. 60, *Status of Children: Revised Report, 1991* (March 1991).

[5] See RFD No. 18.1 commencing at 4.

Section II deals with the substantive law relating to child guardianship, custody and access. It includes: Chapter 4, which adopts the bests interests of the child as the basis for making decisions about child guardianship, custody or access; Chapter 5, which explores different approaches that may be taken to reform of the substantive law; Chapter 6, which discusses issues relating to the umbrella concept of guardianship; Chapter 7, which deals with custody, a major incident of guardianship; Chapter 8, which looks at access, a topic closely related to custody; and Chapter 9, which examines the effect of agreements between the parents or guardians of a child on the jurisdiction of the court.

Section III is on matters relating to court proceedings for child guardianship, custody or access. It includes: Chapter 10, which describes the persons who may apply for an order or guardianship, custody or access; Chapters 11, 12 and 13, which contains recommendations with respect to specific powers the court requires in relation to a guardianship, custody or access order, or a variation order or interim order, respectively; Chapter 14, which deals with matters relating to the duration of a guardianship, custody or access order; and Chapter 15, which discusses some related court powers.

C. Terminology

The meaning attached to the terms "child," "parent," and "guardian" are central to an understanding of the discussion in this report. We expand on theses definitions in later chapters.

1. Child

By "child," we mean an unmarried person under the age of 18 years.[6]

2. Parent

In RFD No. 18.3 on *Child Support*, we recommended that Alberta adopt the following definition of "parent":[7]

---

[6] For further discussion, see *infra*, Chapter 6 at 78-79.

[7] RFD No. 18.3, Rec. No. 7.3 at 53.

For purposes of child support law, Alberta should adopt the following definitions:

(1) "parent" means the mother or father of a child;

(2) "mother" means

(a) the biological mother of the child,

(b).in the case of adoption, the adoptive mother of the child, or

(c) a woman who has been found by a court to be the mother of the child;

(3) "father" means

(a) the biological father of the child,

(b) in the case of adoption, the adoptive father of the child, or

(c) a man who has been found by a court to be the father of the child.

(4) "person standing in the place of a parent" means a person who has demonstrated a settled intention to treat a child as a child of their family.

Certain presumptions assist the application of this definition:[8]

(a) a woman is presumed to be the biological mother of the child where she gave birth to the child,

(b) a man is presumed to be the biological father of the child where

(i) he satisfies one of the criteria set out in section 63(1) of the *DRA* , but repealing section 63(1)(d) and substituting "the person cohabited with the mother of the child for at least 12 consecutive months immediately before, during or after the time of birth of the child and has acknowledged that he is the father of the child", or

(ii) he has otherwise acknowledged that he is the father of the child.

[8] RFD No. 18.3, Rec. No. 8.3 at 54.

Where circumstances exist that give rise to a presumption that more than one person might be the father of a child, no presumption as to paternity should be made.[9]

Generally, the parents of a child are also the child's guardians, but being recognized as a "parent" is not synonymous with having the status of a "guardian". For the purposes of this report, it is the definition of "guardian" rather than "parent" that is important and it is not necessary to discuss the meaning of "parent" further.

It should be noted that persons other than parents may perform the functions of a parent without holding legally recognized status.

3. Guardian

"Guardian" means a person who has the authority to exercise the powers, responsibilities and rights of guardianship with respect to a child.

4. Guardianship

Alberta family legislation does not define the word "guardianship" as it relates to children. Our definition of "guardianship" is consistent with its meaning under the existing Alberta law:[10]

> "guardianship" has the meaning attributed to it at common law and includes
>
> (a) the responsibility of an adult person for the control and custody of the child, the responsibility for making decisions relating to the care and upbringing of the child and the responsibility to exercise all powers conferred by law upon a parent who is a guardian of a child, and
>
> (b) the rights necessary to carry out this responsibility.

---

[9] RFD No. 18.3, Rec. No. 9.3 at 54.

[10] See *infra*, Rec. No. 7.4 at 87.

This definition modifies the definition proposed in ALRI Report No. 60 on *Status of Children*.[11]

5. Custody

Alberta family legislation does not define "custody." We use the term "custody" to mean that part of the bundle of rights and responsibilities that constitute guardianship which has to do with control over the child's living arrangements, daily care and guidance.

6. Access

Alberta family legislation does not define "access." We use the term "access" to mean the right of the child to have contact with particular persons.

D. Statutory Framework

In exploring the responsibilities of parents, or other adults, for bringing up children, we will examine the following statutory provisions:

[11] ALRI Report No. 60, *supra*, note 4 at 17, *Proposed Status of Children Act*, s. 1(e).

· the *Domestic Relations Act* (*DRA*),[12] Part 7, which contains core provisions relating to guardianship, custody and access, and Part 8, which provides for the establishment of parentage;[13]

· the *Provincial Court Act* (*PCA*),[14] Part 3, which confers jurisdiction on the Provincial Court of Alberta to make custody or access orders;

· the *Child Welfare Act* (*CWA*),[15] Part 5, which confers jurisdiction on the Provincial Court to order private guardianship in specified circumstances;[16] and

· the *Surrogate Court Act* (*SCA*),[17] sections 10 and 13, on guardianship after a parent's death.

---

[12] *Supra*, note 2.

[13] Part 8 was enacted in 1991, as was an amendment to Part 7, s. 47, to provide for the joint parental guardianship of children born outside marriage in designated circumstances: *Family and Domestic Relations Statutes Amendment Act, 1991*, S.A. 1991, c. 11. These provisions are based on recommendations made in the ALRI reports on the *Status of Children*, *supra*, note 4. We recommend that the *DRA*, Part 8, be continued in force with minor amendments to s. 63 (legal presumption of paternity), as recommended in RFD No. 18.3 on *Child Support*, Rec. No. 8.3.

[14] R.S.A. 1980, c. P-20.

[15] *Supra*, note 1.

[16] Ibid. ss. 49-54.

[17] R.S.A. 1980, c. S-28.

CHAPTER 2 CONTEXT OF REFORM

A. Purpose of Law: Care and Upbringing of Child

The ALRI examined the law relating to responsibility for the care and upbringing of children in its three reports on the *Status of Children*[18] and in its work on *Competence and Human Reproduction*.[19] In setting out the purpose of this report, we borrow extensively from discussions in these documents.

Because children are born dependent, provision must be made for the daily care and upbringing of children during their development from birth to adulthood:[20]

> Children have limited intellectual, physical, social psychological and economic resources. They are born in a state of total dependence, requiring constant care.

The need for care continues through minority although, as children mature, they become increasingly capable of caring for themselves and their mental capacity to make personal decisions is recognized for some purposes of the law:[21]

> As they mature, they gradually acquire the capacity to care for themselves. At some point they are deemed to be fully capable of caring for themselves, and become adults. At birth a child is not capable of

---

[18] *Supra*, note 4.

[19] ALRI Report No. 52 (February 1989). This report was preceded by ALRI RFD No. 6, on *Sterilization Decisions: Minors and Mentally Incompetent Adults* (March 1988). The law on parental authority is explained in greater detail in RFD No. 6.

[20] Nicholas Bala and J. Douglas Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983), 15 *Ottawa L. Rev.* 274 at 293.

[21] *Ibid*.

> exercising any rights on his own behalf; his parents, some other person or agency, or the state must do this. In certain matters, a child may acquire legal rights and responsibilities before becoming an adult. Upon becoming an adult, the former "child" acquires a full range of legal and citizenship rights, to be exercised in his own right.

The responsibility for raising a child ordinarily falls to the parents, as the child's "natural" guardians, from whom an affection for the child is assumed to flow naturally and who, because of the nature of their relationship to the child, are thought to be most likely to exercise the rights and powers of guardianship in the best interests of the child.

B. Alberta Statutes

As stated in chapter 1, in Alberta, legislative provisions pertaining to child guardianship, custody and access are currently found in the *Domestic Relations Act* (*DRA*), Parts 7 and 8; the *Child Welfare Act* (*CWA*), Part 5; the *Provincial Court Act* (*PCA*), Part 3; and the *Surrogate Court Act* (*SCA*), sections 10 and 13. We will start with the *DRA* because it is Alberta's principal family law statute.

1. *DRA*

Part 7 of the *DRA*, sections 45-61, regulates the guardianship and custody of minors. A "minor" (in our terminology, a "child") is a person under 18 years of age. For the purposes of Part 7, section 45 defines "Court" to mean the Court of Queen's Bench, or a judge of the Surrogate Court sitting in chambers. Sections 46-53 have to do with guardianship, and sections 54-61, with custody and access.

Part 8, on establishing parentage, is relevant to the interpretation of Part 7 because it provides the basis for identifying the persons who have obligations as parents under Alberta law. The provisions of Part 8 are based on recommendations we made in our three ALRI reports on the *Status of Children*.[22] We do not revisit Part 8 in this report.

---

[22] *Supra*, note 4 ; see especially Report No. 60 at 4-8 and 19.

a. Guardianship, sections 46-53

Section 46 specifies the powers of a guardian. Unless otherwise limited, the guardian has the custody of the child's person and the care of the child's education.[23] The guardian also has the authority to act for and on behalf of the child, appear on the child's behalf in court, and manage the child's estate.[24]

---

[23] Ibid. s. 46(d).

[24] Ibid. s. 46(a), (b) and (c).

Section 47(1) makes the mother and the father, provided that he satisfies one of the conditions set out, joint guardians of their child automatically from birth.[25] To be a guardian, the father must be or have been married to the mother when the child was conceived or born,[26] have cohabited with the mother for a year immediately before the child's birth,[27] or have married the mother after the child was born and acknowledged paternity.[28] The recognition of a cohabiting father as guardian follows a recommendation we made in ALRI Report Nos. 20, 45 and 60.

Part 7 contains four provisions for the appointment of guardians in addition to those constituted under section 47(1). Under section 48, a parent may appoint a person to serve as guardian after that parent's death (a "testamentary guardian"). The guardian so nominated acts jointly with any other guardian of the child. Under sections 47(2), 49 or 50, the court may make an appointment. Section 47(2) empowers the court to appoint as guardian a person declared to be a parent pursuant to Part 8. The appointment must be in the best interest of the child. Section 49 empowers the court to appoint a guardian to act jointly with the child's father or mother or a guardian nominated by a deceased parent. Under section 50, the court may appoint a guardian for a child who has no parent or guardian, or whose parent or guardian "is not a fit and proper person" to be the child's guardian. The effect of an order in that case is to terminate the guardianship of the person who is unfit. Appointments under sections 49 and 50 may be of persons as guardians of the child's person or property, or both.

---

[25] Case law establishes that a father is presumed to be a joint guardian only if he satisfies the conditions set out in the *DRA*, s. 47(1): *S.(J.W.)* v. *M.(N.C.)* (1993), 50 R.F.L. (3d) 59 (Alta. C.A.). Section 47(2), which provides for the appointment, as guardian, of a person declared by the court to be a father under Part 8 (Establishing Parentage), cannot be used where a child is the subject of a permanent guardianship order made under the *CWA*. In this case, the applicant must satisfy the conditions for the termination of permanent guardianship that are specified in the *CWA*: *Hambleton* v. *Green* (1996), 142 D.L.R. (4th) 369 (Alta. Q.B.).

[26] *DRA*, s. 47(1)(b)(i) and (ii).

[27] *Ibid*. s. 47(1)(b)(iii).

[28] *Ibid*. s. 47(1)(b)(iv).

Under section 51, a guardian of a child's property is required to furnish the security, if any, ordered by the court.

Section 52 gives the court power to remove guardians "for the same causes for which trustees are removable". This language suggests that it refers to persons who are guardians of the child's property. Alternatively, a guardian may resign in accordance with any terms and conditions the court imposes.

Section 53 abolishes "guardianship *in socage*, by nature and for nurture." These are forms of guardianship exercised over the child's person at common law.

b. Custody, sections 54-61

The main provision is section 56. Section 56(1) empowers the court to make orders awarding custody or access to a child's father or mother. The application may be made by the father, mother or child. In making an order, section 56(2) requires the court to consider three factors:

- the welfare of the minor,
- the conduct of the parents, and
- the wishes of the mother and the father.

Section 56(3) allows the court to vary or discharge the order on the application of either parent or a testamentary guardian. The court also has power to order costs (section 56(4)), or child support (section 56(5)).

Under section 54, the court may declare a parent unfit to have custody of the children of the marriage. This is not a general power. It arises only where the court pronounces a judgment for judicial separation or a decree of divorce. A parent who is declared unfit "is not entitled as of right to the custody or guardianship of those children on the death of the other parent."

Section 55 permits the parents to "enter into a written agreement with regard to which parent will have the custody, control and education" of the children of the marriage. Where the parents are unable to agree, either parent may apply to the court for its decision.

The next four sections relate to an application for "an order for the production or custody" of a child. The application may be made by a parent or "other responsible person" who is defined as "a person legally liable to maintain a minor or entitled to the custody of a minor." The provisions do not say how an application for an order for the production of a child is to be brought. The reference may be to the prerogative remedy of *habeas corpus*. Sections 57 and 59 give the court discretion to refuse the order where the applicant has abandoned or deserted the child, misconducted themself or been unmindful of their parental duties. Section 58 allows the court to order the applicant to pay to "the person, school or institution" bringing up the child the costs properly incurred. Section 60 allows the court, in refusing the order for production or custody, to make an order ensuring that the child is brought up in the religion which the applicant has a legal right to require.

Finally, section 61 provides that, when they do not conflict with the *DRA*, "the rules of equity prevail in matters relating to the custody and education of minors."

Remarkably, these sections have remained unchanged during the thirty-year time period that major reforms have been implemented in Canada under federal divorce legislation[29] and under provincial legislation in most Canadian provinces and territories.[30]

Historically, these provisions applied only to the children of a married couple. Today, the restriction of these sections to children of the marriage is less certain. The *Canadian Charter of Rights and Freedoms* (the *Charter*) and the United Nations *Convention on the Rights of the Child*, which Canada has ratified,

---

[29] Divorce legislation was initially enacted by the federal Parliament in 1968: *Divorce Act*, S.C. 1967-68, c. 24, later consolidated as R.S.C. 1970, c. D-8.

[30] See e.g., *Family Relations Act*, R.S.B.C. 1996, c. 128; *Children's Law Act*, R.S. Nfld. 1990, c. C-13; *Children and Family Services Act*, S.N.S. 1990, c. 5; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as amended by S.O. 1992, c. 32; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33; *Children's Law Act*, S.S. 1990, c. C-8.1; *Children's Act*, R.S.Y. 1986, c. 22.

support equality for all children. As well, judges have interpreted the words "mother," "father" and "parent" to have their ordinary meaning.[31]

2. *Child Welfare Act*

[31] See e.g. *White* v. *Barrett*, [1973] 3 W.W.R. 193 (Alta. C.A.).

Matters pertaining to guardianship of the person of a minor may arise pursuant to the *CWA*.[32] This Act regulates the power of the state to intervene for the purpose of providing protective services to children under 18 years of age whose "survival, security or development" is endangered.[33] As stated in Chapter 1, it establishes the minimum standard which a parent or guardian must satisfy in carrying out their responsibilities toward a child.

The *CWA*, Part 5, empowers the Provincial Court of Alberta to appoint the applicant as a private guardian of a child who has been in the continuous care of the applicant for more than 6 months[34] or who is the subject of a permanent guardianship order or agreement.[35] When a private guardianship order is made, the applicant is the guardian for all purposes, notwithstanding Part 7 of the *DRA*.[36]

Part 5 applies irrespective of any child welfare intervention having occurred. To an extent, it duplicates the authority for the court appointment of a guardian under the *DRA*. However, its provisions, which are more detailed procedurally, differ in several respects.

First, the applicant must have had continuous care of the child for more than 6 months.[37] (This requirement may be waived.[38])

Second, the court must be satisfied that:[39]

---

[32] S.A. 1984, c. C-8.1.

[33] See *supra*, Chapter 1 at 12.

[34] *CWA*, s. 49(1). The child or applicant must reside in Alberta.

[35] Ibid. s. 49(1.1). The Court can waive the residence or 6-month continuous care conditions: s. 49(2).

[36] Ibid. s. 54. Case law holds that the authority to grant guardianship under the *CWA* necessarily implies the authority to grant custody and access: *A.W.* v. *K.S.* (1995), 183 A.R. 147 (Alta. Prov. Ct.).

[37] *Ibid*. at s. 49(1).

[38] *Ibid*. at s. 49(2).

- the applicant is able and willing to assume the responsibility of a guardian towards the child, and
- it is in the best interests of the child to make the order.

[39] *Ibid.* at s. 53. An application cannot be made in respect of a child who is in care pursuant to a temporary guardianship order or during the appeal period following a permanent guardianship order: ss. 49(3) and (4). However, an application may be made in respect of a child who is in the permanent care of the Department of Social Services.

Third, the court may terminate the guardianship of any other guardian, including a parent, if:[40]

- the court is satisfied that the other guardian of the child consents to the termination, or
- for reasons that appear to it to be sufficient, the court considers it necessary or desirable to do so.

Both the applicant and the child, if 12 years of age or more, must consent to the order, although the court may dispense with this requirement in the best interests of the child.[41]

On hearing an application, the court may require the applicant to provide a report "prepared by a qualified person" respecting[42]

> (a) the suitability of the applicant as a guardian,
>
> (b) the ability and willingness of the applicant to assume the responsibility of a guardian towards the child, and
>
> (c) whether it is in the best interests of the child that the applicant be appointed as a guardian of the child.

Where the child is not the subject of a permanent guardianship order or agreement, the *CWA* authorizes a director of child welfare to conduct an investigation with respect to the proposed guardianship and make representations at the hearing.[43]

---

[40] *Ibid.* at s. 54(1). This could include a guardian appointed under the *DRA*.

[41] Ibid. s. 52.

[42] Ibid. s. 51(1).

[43] Ibid. s. 51(3) and (4).

Notice of the application for a private guardianship order must be given to the child's guardian, the child if the child is 12 years of age or over, and a director of child welfare if a director is not the applicant.[44] The court can modify the notice requirements.

3. *Provincial Court Act*, s. 32

[44] Ibid. s. 50.

The *DRA* provisions coexist with the *PCA*,[45] Part 3, which regulates the jurisdiction of the Provincial Court of Alberta to deal with family matters. Section 32(1) empowers the Provincial Court to make an order for custody or access where the child's parents are living apart and there is a dispute. The jurisdiction exists regardless of the child's birth within or outside marriage. The order may confer custody or access on "either parent or any other person". In making the order, the court is to have regard to the best interests of the child. The *Provincial Court Amendment Act, 1997* adds section 32.1 which came into force October 1, 1997. This section gives a grandparent who is refused access to a child the right to apply for an order. In making an order, the court is required, in section 32.1(4), to:

> ... take into consideration only the best interests of the child as determined by reference to the needs and other circumstances of the child including
>
> (a) the nature and extend of the child's past association with the grandparent, and
>
> (b) the child's views and wishes, if they can be reasonably ascertained.

The order must yield to an order of the Court of Queen's Bench: section 32(9) provides that to the extent that it "is in variance with an order of the Court of Queen's Bench, the order made under this section is void."

4. *Surrogate Court Act*

---

[45] *Supra*, note 14. See also: Walder G.W. White, "The Family Division of the Provincial Court of Alberta—A Jurisdictional Discussion," published in Legal Education Society of Alberta, *Custody of Children: Current Aspects* (March 9 and 10, 1981); and The Hon. Hugh F. Landerkin, "Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model" (1997), 35 Alta. L. Rev. 627.

The *SCA*[46] governs the exercise of jurisdiction over succession to property in the estate of a deceased person. The *SCA*, in section 10, assumes that the Surrogate Court of Alberta has jurisdiction to make orders concerning the guardianship of children. In exercising this jurisdiction, the *SCA* gives the Surrogate Court the same powers as the Court of Queen's Bench or a judge of that court "in all matters or applications touching or relating to the appointment, control or removal of guardians, the security to be given, the custody, control of or right of access to a minor and otherwise."[47] A grant of letters of guardianship by either court has the same force and effect.[48] The exercise of the surrogate court jurisdiction does not affect the jurisdiction of the Court of Queen's Bench over the same matters.[49]

C. Applicable Historical and Common Law

i) Nature and scope

Guardianship is the foundational concept on which the Alberta statutory provisions are built. However, none of these provisions spells out the meaning of guardianship. This is left to the law imported into Alberta from England historically and to the common law which fills in around the edges of modern statute law.

The role of parents, as guardians of their child, is far-reaching.[50] First, parents have the responsibility to provide their children with the "necessaries of life." These include food, clothing, shelter and other essentials (*e.g.* medical treatment).[51] Second, they have the responsibility to raise their children. A

---

[46] *Supra*, note 17.

[47] Ibid. s. 10(1).

[48] Ibid. s. 10(2).

[49] Ibid. s. 10(3).

[50] Whereas historically, it may have been correct to refer to the "rights and duties" of guardians, today it is more accurate to describe the function in terms of "powers and responsibilities": Great Britain, The Law Commission, Working Paper 91, *Family Law—Review of Child Law: Guardianship* (London: H.M.S.O., 1985) at 9-10.

[51] According to Blackstone, this duty is wholly statutory. It arose under in the English Poor Laws.

desirable upbringing includes care, control, guidance and supervision, and involves making decisions on the child's behalf. Third, parents have the authority to make decisions about important matters in the child's life. Fourth, they are expected to give the child love and affection.

As has been seen, some of the responsibilities associated with guardianship are set out in the *DRA*. In addition to the *DRA*, these include the right to decide the child's name;[52] the right to grant or refuse consent in matters concerning the child, *e.g.*, adoption[53] or marriage;[54] and the right to notice of matters affecting the child, *e.g.* proceedings to establish parentage, or proceedings for a temporary or permanent guardianship order, or for a private guardianship order, under the *CWA*.[55]

The responsibility and authority of parents is to be exercised "for the welfare" or "in the best interests" of the child.

1. Age of discretion

The responsibilities of parents, as guardians, "dwindle" or diminish as the child approaches adulthood and becomes increasingly capable of providing for himself and making his own decisions. Different children mature at different rates. Therefore, the extent of the diminution at any given age will vary from child to child and purpose to purpose until the child attains majority.[56] Where a minor has mental capacity to make a legally binding decision, the parental authority for the purpose ceases. Consent to medical treatment is an example.

---

[52] *Change of Name Act*, R.S.A. 1980, c. C-4, ss. 4.1, 5, 6, 7, 7.1 and 11.

[53] *CWA*, s. 56.

[54] *Marriage Act*, R.S.A. 1980, c. M-6, s. 18.

[55] ALRI Report No. 60, *supra*, note 4 at 7.

[56] See *Gillick* v. *West Norfolk Area Health Authority*, [1985] 3 All E.R. 402 at 418-24 (H.L.); *Hewer* v. *Bryant*, *infra*, note 76 at 582; *J.S.C. and C.H.C.* v. *Wren* (1986), 76 A.R. 115 at 117-18 (Alta. C.A.); *Johnston* v. *Wellesley Hospital* (1970), 17 D.L.R. (3d) 139 at 144-5 (Ont. H.C.).

2. Parents unwilling or unable

Where the parents are unable or unwilling to assume the responsibility of caring for their child, statute law provides for the substitution or addition of another person as the child's guardian. This may occur through state intervention under the *CWA* or by court appointment under either the *DRA* or the *CWA*.

Except to the extent that the authority of the guardian is circumscribed by statute or the terms and conditions of an order made under it, the common law is in effect. The guardian's authority has essentially the same scope as the parent's authority, although the guardian does not share the parent's duty to maintain the child from his own resources, or to give him love and affection.[57]

3. Limits of guardianship authority

The outer limits of the acceptable conduct of parents or other guardians toward children in their charge are established by the criminal law[58] and child welfare legislation.[59] In addition, the *DRA* authorizes the court to declare a parent unfit to have the custody of a child.[60]

D. Canada—*Divorce Act*

The *Divorce Act*,[61] section 16, confers the power to award corollary relief by way of orders for the custody of, or access to, the children of divorcing or divorced spouses.[62]

---

[57] Walder G.W. White, "A Comparison of Some Parental and Guardian Rights" (1980), 3 *Can. J. Fam. L.* 219.

[58] For a brief account of the protections afforded by the criminal law, *see* Paul Atkinson, "What legal protection is there for young people who may be subject to physical or mental abuse?" (1986), 11 *Resource News* 27 at 27-28.

[59] *Supra*, note 1.

[60] *DRA*, s. 54.

[61] R.S.C. 1985, c. 3 (2nd Supp.).

[62] These sections supersede section 11 of the *Divorce Act , 1968*, *supra*, note 29. Parliament has not seen fit to exercise its potentially broad marriage power: *see* Law Reform Commission of Canada, *The Distribution of Legislative Authority in Family Law* (December 1972), prepared by Leslie Katz; *see also* Leslie Katz, "The Scope of the Federal Legislative Authority in Relation to Marriage"

Section 2(1) defines "custody" to include "care, upbringing and any other incident of custody."

Section 16(1) gives the court jurisdiction to make an order "respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage." The application may be made "by either or both spouses or by any other person." Section 16(4) provides that the order may grant the custody or access "to any one or more persons".[63]

Factors for the court to consider in making an order are set out in section 16(8):

> [In making an order] 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.

This opens up a potentially unlimited field for judicial inquiry.

Under section 16(9), the past conduct of the person seeking custody or access is not relevant unless it relates to the ability of a person to act as a parent.

The *Divorce Act* encourages maximum contact between the child and each parent. Section 16(10) requires that the court:

(1975), 7 Ottawa L. Rev. 384. It did not exercise its constitutional power to enact divorce legislation until 1968.

[63] Bills proposing amendments to the *Divorce Act* that would give grandparents the right to apply for custody or access were introduced in the House of Commons in 1995, 1996 (2nd Session of the 35th Parliament) and 1998 (Bill C-340 which received first reading February 13, 1998). However, none has been enacted.

> [apply] 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.[64]

In addition, section 16(5) gives a spouse who is granted access "the right to make inquiries, and to be given information, as to the health, education and welfare of the child." This section does not include a person who is not a spouse.

Similar criteria apply to variation proceedings under section 17.

[64] See also *Children's Law Act*, S.S. 1990, c. C-8.1, s. 6(5)(a); compare *Children's Act*, R.S.Y. 1986, c. 22, s. 30 whereby, "in determining the best interests of the child", the court is required to consider, *inter alia*, "(g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child."

As part of its federal power, Parliament can specify the court or courts that will have jurisdiction to decide matters that fall within its legislative competence. For the purpose of its application in Alberta, the *Divorce Act*, section 2(1), defines "court" as the Court of Queen's Bench of Alberta.[65] This means that in Alberta judicial jurisdiction over divorce, including corollary orders for custody and access, is vested exclusively in the Court of Queen's Bench of Alberta.

E. Other Provinces and Territories

Most provinces or territories in Canada have enacted modern family law statutes within the last decade or two. Old or new, as in Alberta, these statutes endorse the "welfare of the child" or, more commonly, the "best interests of the child" as the determinative criterion in custody and access disputes.[66]

F. Law Elsewhere

---

[65] *Ibid.* Constitutional limitations imposed by section 96 of the *Constitution Act, 1867* preclude comprehensive jurisdiction being conferred upon the Provincial Court of Alberta.

[66] *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 24 (best interests of child are paramount; specific factors designated as indicative of child's best interests; conduct only relevant to parenting capacity); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 2 (best interests of child are paramount), s. 39(3) (conduct only relevant to parenting ability); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1 (definition of "best interests of the child" by reference to specific factors), s. 129(2) (custody orders to be based on best interests of child); s. 129(3) (access to be determined on basis of best interests of child); *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31 (custody and access to be determined on basis of best interests of child; specific factors designated as indicative of child's best interests; domestic violence to be taken into account but past conduct otherwise considered only when relevant to parenting ability), s. 71 (best interests of child are the first and paramount consideration); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 18(5) (welfare of child is paramount); *Children and Family Services Act*, S.N.S. 1990, c. 5 (court to consider welfare of child, conduct or circumstances of the parents and the wishes of the father and mother); *Children's Law Reform Act*, R.S.O. 1990, c. C.12,
s. 24; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 15 (custody and access to be determined on basis of best interests of child); *Children's Law Act*, S.S. 1990, c. C-8.1, ss. 8 and 9 (custody and access to be determined having regard only to best interests of child in light of designated factors; past conduct only relevant to parenting ability); *Children's Act*, R.S.Y. 1986, c. 22, s. 1 (best interests of child prevail over wishes of parent) and s. 30 (specific factors designated as indicative of child's best interests; past conduct not considered unless relevant to parenting ability; no presumption based on age or sex of child; rebuttable presumption in favour of sole physical custody but joint legal custody).

Legislators in England[67] and in several American states have legislated the principle of shared parental responsibilities after marriage breakdown or divorce. Judith Ryan described statutory innovations in Florida, Maine and Washington, as well as England in her study, *Parents Forever: Making the Concept a Reality for Divorcing Parents and Their Children*.[68] In endorsing this principle, these legislators have abrogated the traditional terminology of "custody" and "access" in favour of the language of parental responsibilities "in an attempt to focus on the parent's ongoing obligations for their children post-separation and divorce."

Legislating the principle of shared parental responsibilities involves a functional shift in conceptual thinking. This reform goes much further than a mere change in language or terminology. We will say more about this choice in Chapter 4 on the Approach to Reform.

G. Court Jurisdiction *Parens Patriae*

---

[67] *Children Act (England), 1989*. See Andrew Bainham, "*The Children Act, 1989*" [1990] Fam. Law 143, 192, 230, 270, 311, 362. See also Andrew Bainham, *Children: The New Law* (Bristol: Jordan & Sons, 1990; David Hershman and Andrew McFarlane, *Children: Care Law and Practice* (Bristol: Jordan & Sons, 1991). And see Great Britain, The Law Commission , Law Com. No. 172, *Family Law—Review of Child Law: Guardianship and Custody* (1988); Scottish Law Commission, Discussion Paper No. 88, *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* (October, 1990).

[68] Prepared for the Canada Department of Justice (March 31, 1989).

In addition to any jurisdiction expressly conferred on it by statute, the Court of Queen's Bench of Alberta has power to exercise an inherent *parens patriae* jurisdiction over matters pertaining to guardianship of the person or custody of a child.[69] Jurisdiction *parens patriae* is a residual jurisdiction founded on necessity which is available to fill a gap in legislation.[70] Historically, jurisdiction *parens patriae* was exercised by superior courts on behalf of the king. The king was the protector (literally the father) of his subjects and responsible to look after persons who were unable to look after themselves. In Alberta, the *Judicature Act* gives the Court of Queen's Bench the same jurisdiction and powers in "all matters relating to infants, idiots or lunatics" that the English Court of Chancery had on 15 July 1870.[71] The Court of Chancery was the court that exercised the king's *parens patriae* power over infants. It would appear, from the *SCA*, section 10, that the Surrogate Court also has jurisdiction *parens patriae* and as such will have as its paramount concern the welfare of the child.

The *parens patriae* jurisdiction is broad, sweeping and expansive.[72] The jurisdiction is capable of adaptation to meet changing times and situations. It eludes definition, and for that reason is unlikely ever to be fully replaced by statute. It continues to be available to fill in around the edges of protection

---

[69] Historically, the *parens patriae* power was exercised only by judges of superior courts. According to judicial interpretation of s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly the *British North America Act, 1867*), powers that were exercised only by judges of superior courts prior to confederation — today, judges who are appointed federally — cannot be conferred on judges who are appointed provincially. Because of this constitutional limitation, judges of the Provincial Court of Alberta do not have power *parens patriae*.

[70] *Copeland* v. *Price* (1997), 152 D.L.R. (4th) 439, 206 A.R. 276 (Alta. C.A.), citing *Beson* v. *Director of Child Welfare* (NFLD.), [1982] 2 S.C.R. 716 at 722.

[71] R.S.A. 1980, c. J-1, s. 5(3)(a); see also s. 5(1)(a) and s. 7.

[72] *See* e.g. *Re Eve* (1986), 31 D.L.R. (4th) 1 (SCC), also reported as *E. (Mrs.)* v. *Eve* [1986] 2 S.C.R. 388, for a comprehensive discussion of the origins, nature and scope of the *parens patriae* power in Canada. In the judgment in that case the *parens patriae* jurisdiction is described as a jurisdiction that is for the benefit of the person and is founded on necessity; that eludes definition; that is preventive as well as retrospective; that is an expanding jurisdiction; that is a jurisdiction for which far-reaching limitations in principle must nevertheless exist; that must be exercised in accordance with its underlying principle, that is, to do what is necessary for the protection of the person for whose benefit it is exercised; that cannot be exercised in the interests of others; and that is at all times to be exercised with caution.

legislation such as the *CWA*.[73] Because the jurisdiction is a protective one, the *parens patriae* power, like the authority of the parents or guardians who are supervised under it, must be exercised for the benefit ("in the best interests") of the minor being protected.

[73] One might think that the *CWA* provides a complete code for the protection of children so that the power of the Court of Chancery representing the Crown as *parens patriae* would be superseded. Canadian cases, however, hold to the contrary and the *parens patriae* jurisdiction of Canadian superior courts over infants is generally recognized: see e.g. *Re H.I.R.* (1984), 30 Alta. L.R. (2d) 97 (Alta. C.A.); *Lutz* v. *Legal Aid Manitoba* (1982), 37 A.R. 351, 29 R.F.L. (2d) 337 (Alta. C.A.); *Beson* v. *Director of Child Welfare for Province Newfoundland* (1982), 44 N.R. 602, 39 Nfld. & P.E.I. R. 326; 111 A.P.R. 236, 142 D.L.R. (3d) 20 (S.C.C.)

CHAPTER 3 NEED FOR REFORM

A. Problems with the Existing Statute Law

The main problems in the existing law are described in RFD No. 18.1. Some of the concepts and some of the language in the *DRA*, Part 7, are seriously outdated. For example, the *DRA*, section 54, links parental unfitness to marital fault: a parent can be declared unfit to have custody if that parent's misconduct provided the grounds for the order for judicial separation or divorce. The custody and access provisions appear to be limited to "children of the marriage," although *Charter* requirements and judicial interpretations have led to some extension of the apparent meaning of the words. Children of the marriage may include children who have been accepted by a married couple as of part of their family but does not otherwise include children whose parents have never been married. Statutory fragmentation, overlap and inconsistency leads to incoherency in the law. For example, three different statutes — the *DRA*, *CWA* and *SCA* — contain differently worded sections empowering three different courts — the Court of Queen's Bench, the Provincial Court (Family Division) and the Surrogate Court — to make guardianship orders. The differences are difficult to justify[74] and they hinder the access of non-specialist lawyers and members of the general public to the law which is difficult to locate and understand. Differences between the *Divorce Act* and family law provisions enacted provincially further add to the complexities. For example, the *Divorce Act*, section 16(5), gives an access parent "the right to make inquiries, and to be given information, as to the health, education and welfare of the child" whereas the Alberta statutes are silent on this matter. The impact of many of these differences is reduced substantially because the courts apply the criterion of the "best interests of the child" in all custody and access disputes, regardless of the statutory basis of the application.

---

[74] As long ago as 1975, the Royal Commission on Family and Children's Law for British Columbia recommended that family law legislation be consolidated in a single enactment for the purpose of promoting uniform procedures, standards and criteria in all courts that exercise jurisdiction over guardianship, custody and access: Fifth Report, Part VI, Custody, Access and Guardianship (Vancouver, B.C., March 1975) at 5.

B. Confusion of Terms

A major complication facing the reform of family law in Canada stems from the diverse use that is made of similar terms in different provinces or territories.

1. Child's Person

(1) Guardianship

The existing Alberta law takes a traditional approach to the upbringing of children. Under this approach, guardianship is an all-embracing concept. It constitutes the full bundle of rights and responsibilities needed to bring up a child. As has been pointed out, Alberta legislation does not define "guardianship." Its meaning is rooted in history and the case law.

Constitutionally, guardianship is regarded as a matter falling within the provincial legislative domain. The *Divorce Act* makes no reference to guardianship.

a. Custody

Alberta legislation does not define "custody".[75] Under the traditional approach, custody is viewed as an "incident"—albeit the most important incident—of guardianship.

Federally, the *Divorce Act*, section 2(1), stipulates that

> "custody" includes care, upbringing and any other incident of custody.

Differences in approach in Alberta, under federal legislation and under legislation in other provinces give rise to confusion over the meaning of custody.

---

[75] The *International Child Abduction Act*, R.S.A. 1980, c. I-6.5, provides that the Convention on the Civil Aspects of International Child Abduction applies in Alberta. Article 5 of the Convention, which is included as a Schedule to the Act, states that, for purposes of the Convention,

> "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

i. Two meanings

The word "custody" is open to different interpretations. Two meanings of "custody", one wide and one narrow, were observed in the English case of *Hewer* v. *Bryant*:[76]

> [It] is essential to note that amongst the various meanings of the word 'custody' there are two in common use in relation to infants ... that need to be carefully distinguished. One is wide — the word being used in practice as almost the equivalent of guardianship; the other is limited and refers to the power physically to control the infant's movements ...

Confusion has also been encountered in Canada. The Ontario Law Reform Commission commented, in 1973, that legislatures and courts in Canada have used the terms guardianship and custody "loosely, often interchangeably, to the point where it is now a matter of conjecture what the rights and duties of guardians and custodians are."[77]

ii. Narrow meaning

In its narrow meaning, custody refers to the power physically to control the child's movements:[78]

> This power of physical control over an infant by a father in *his own right* qua guardian by nature and the similar power of a guardian of an infant's person by testamentary disposition was and is recognised at common law; but that strict power (which may be termed his 'personal power') in practice ceases on their reaching the years of discretion. When that age is reached habeas corpus will not normally issue against the wishes of the infant. Although children are thought to have matured far less quickly—compared with today—in the era when the common law first

---

[76] [1969] 3 All E.R. 578 at 584 *per* Sachs L.J.

[77] Ontario Law Reform Commission, *Report on Family Law, Part III, Children* (1973) at 88-89. For corresponding confusion in British Columbia, see Royal Commission on Family and Children's Law, *Fifth Report, supra*, note 74 at 3. See also J.M. Eekelaar, "What Are Parental Rights?" (1973), 89 L.Q.R. 210.

[78] *Hewer* v. *Bryant*, *supra*, note 76 at 584-85.

> developed, that age of discretion which limits the father's *practical* authority (see the discussion and judgment in *R.* v.*Howes* (1860), 3 E.& E. 332) was originally fixed at 14 for boys and 16 for girls. ...

Under this view, the custodial parent does not have pre-emptive control over the child to the exclusion of the non-custodial parent. Full consultation between parents is required on the education or religious upbringing of the child and any other major matter affecting the child's long-term growth and development. Parental disagreements are resolved by the court.[79]

iii. Wide meaning

In its wide meaning, custody is used as almost the equivalent of guardianship:[80]

> In its wider meaning the word 'custody' is used as if it were almost the equivalent of 'guardianship' in the fullest sense—whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of the court. (I use the words 'fullest sense' because guardianship may be limited to give control only over the person or only over the administration of the assets of an infant.) Adapting the convenient phraseology of counsel, such guardianship embraces a 'bundle of rights', or to be more exact, a 'bundle of powers', which continue until a male infant attains 21,[81] or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned)

---

[79] See *Dipper* v. *Dipper*, [1981] Fam. 31 at 45-46 (Ormrod, L.J.) and 48 (Cumming-Bruce, L.J.), [1980] 3 W.L.R. 626, [1980] 2 All E.R. 722 (Eng. C.A.). Compare *Young* v. *Young*, *infra*, note 103, and *infra*, Chapter 11 (discussion of terms and conditions affecting mobility of custodial guardian). For legislative endorsement of a broad definition of guardianship of the person and a narrow definition of custody, see *Family Law Amendment Act (Australia), 1987*, No. 181, ss. 63E and 63F.

[80] *Hewer* v. *Bryant*, *supra,* note 76 at 585.

[81] In Alberta, the appropriate age would be eighteen by virtue of the *Age of Majority Act*, R.S.A. 1980, c. A-4.

> to apply to the courts to exercise the powers of the Crown as *parens patriae*. It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, i.e., such personal power of physical control as a parent or guardian may have.

The wide meaning is usually applied to "custody" under the federal *Divorce Act*.[82] The word "includes" in the statutory definition of "custody" is read to imply that the term embraces a wider range of powers than those specifically designated in section 2(1).[83] "Custody" might thus be equated with "guardianship of the person."[84] That being the case, the non-custodial parent, who is faced with an *unqualified* order for "sole custody" in favour of the other parent, is relegated to the role of an interested party whose contribution to the growth and development of the child will be contingent on the good will or cooperation of the custodial parent.

This interpretation is consistent with the preponderance of judicial authority in Canada.[85] For example, in *Kruger* v. *Kruger*, Thorson, J.A., of the Ontario Court of Appeal, observed:[86]

---

[82] See *Payne on Divorce*, 2nd ed. (Butterworths, 1988) at 144-146.

[83] *Payne on Divorce*, 4th ed. (Toronto: Carswell, 1996) at 365, citing *Anson* v.*Anson* (1987), 10 B.C.L.R. (2d) 357 (B.C. Co. Ct.) at 368.

[84] *Ibid.* at 365-66, citing *Young* v.*Young*, *infra*, note 103 at 184 (R.F.L.).

[85] In 1973, the Ontario Law Reform Commission, *supra*, note 77, concluded that judges generally use "custody" in its wider meaning:

> A review of Ontario cases, conducted against a background of Ontario and federal statutes, does, we submit, suggest that when judges and others speak of awards of "custody" they in fact refer to the wider meaning of the word described by Sachs L.J. in *Hewer v. Bryant*.

[86] (1979), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52 at 78, 104 D.L.R. (3d) 481 (Ont. C.A.). In Ontario, the *Children's Family Law Reform Act* uses the word "guardian" to denote responsibility for the child's property, rather than the child's person: see *supra*, heading B.2.

> 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 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.

It should be noted that some recent case law suggests that Canadian courts are slowly moving away from the notion that a custodial parent has pre-emptive rights.[87]

Family legislation in Ontario, Newfoundland, Saskatchewan, the Yukon and British Columbia also embodies the wide meaning.[88]

b. Access

---

[87] See *Young* v. *Young*, *infra*, note 103 (religious upbringing), and Chapter 11, *infra* (terms and conditions restricting the mobility of the custodial parent).

[88] *Family Relations Act*, R.S.B.C. 1996, c. 128, ss. 27(4), provides that a person granted custody on divorce, nullity or judicial separation "is sole guardian unless a tribunal of competent jurisdiction transfers custody or guardianship to another person." In *Pearce* v.*Pearce*, [1977] 5 W.W.R. 572 at 575 (B.C.S.C.), Spencer, J. stated that the parent who is granted custody has the sole right to determine the child's education and physical, intellectual, spiritual and moral upbringing.

Alberta family legislation does not define "access".[89] Like custody, under the traditional approach, access is viewed as an "incident" of guardianship. When viewed as a right of the child, access also exists independently of guardianship. Alberta case law supports this independent existence.

The English version of the *Divorce Act* provides no definition of "access." The French language version provides, in section 2(1), that "'Accès' comporte le droit de visite." Under the *Divorce Act*, a spouse who is granted access privileges is entitled to make inquiries and receive information concerning the health, education or welfare of the child.[90] This right exists in the absence of a court order to the contrary. It does not extend to any person other than a spouse who has been granted access privileges.[91]

---

[89] Article 5 of the Convention on the Civil Aspects of International Child Abduction, which is included as a Schedule to the *International Child Abduction Act*, *supra*, note 75, states that, for purposes of the Convention,

> "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[90] *Divorce Act*, *supra*, note 61, s. 16(5).

[91] Compare *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20(5), which is not confined to spouses or parents and which provides as follows:

> **Access**
>
> 20.(5) The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and be given information as to the health, education and welfare of the child.

See also *Family Maintenance Act*, R.S.M. 1987, c. F20, ss. 39(4) and (5) (access of non-custodial parent to school, medical, psychological and dental records).

Where "sole custody" is granted to a parent under the *Divorce Act*, the non-custodial parent with access privileges is deprived of rights and responsibilities that vested in that parent as a joint guardian of the child prior to divorce.[92] Although a parent who has been granted access privileges may have limited powers to make decisions when an emergency necessitates action and the custodial parent is unavailable, these limited powers fall short of any basic right to actively participate in all decisions affecting the child's welfare and development.[93]

As explained by Spencer, J. of the Supreme Court of British Columbia, the role of the non-custodial parent with access privileges is that of a very interested observer, giving love and support to the child in the background and standing by in case the custodial parent dies.[94]

2. Child's Property

Similar confusion arises in relation to the language used to describe responsibility for a child's property.

Traditionally, guardianship included responsibility for the child's property as well as the child's person. In fact, the concept of guardianship probably was developed initially more out of concern about control over a child's property than about nurturance of the child's person.[95] The *DRA*, section 46(c),

---

[92] *Payne on Divorce*, *supra*, note 83 at 361-62, citing *Young* v. *Young*, *supra*, note 103, quoting with approval from *Kruger* v. *Kruger* (1979), 11 R.F.L. (2d) 52 at 78 (Ont. C.A.).

[93] *Payne on Divorce, ibid.* at 362, note 19.

[94] *Ibid.* at 362, notes 20 and 21.

[95] See Law Reform Commission of the Australian Capital Territory, *Report on Guardianship and Custody of Infants* (Canberra: Australian Government Publishing Service, 1974) at 10:

> The guardian may, in the normal exercise of his quasi-parental authority, forbid or restrict the actual enjoyment of property by the infant, just as a parent may; but he is accountable to his ward for all property of the ward which has come, or ought to have come, under his control. His position in this respect is similar to that of a trustee, and he is treated as such; *Duke of Beaufort* v. *Berty* (1721) 1 P. Wms. 703; *Mathew* v.*Brise* (1851), 14 Beav. 341. For example, he is not allowed to make a profit out of the infant's property, or purchase it. He

gives the child's guardian "the care and management" of the child's estate and permits the guardian to "receive any money due and payable" to the child and "give a release in respect of it." The provisions of the *Minor's Property Act* are more detailed.[96] The *Minor's Property Act* empowers the Court of Queen's Bench to confer various powers on the guardian or another person to deal with real property, settle matters or receive monies on behalf of a child.[97]

a. Trusteeship

In Alberta, modern legislation employs the word "trusteeship" with respect to responsibility for property, and the word "trustee" to refer to a person who is responsible to look after another person's property. This is true of the *Dependent Adults Act*, first enacted in 1976. In that Act, "trusteeship" is used in reference to property and "guardianship" is reserved for use with respect to responsibility for the person. The *Trustee Act* and the *Public Trustee Act* generally use the word "trustee" to describe duties and responsibilities with respect to property. However, the *Public Trustee Act*, in section 4(h), refers to "guardianship" in relation to the property of a minor. Most likely, this provision is a relic of the common law.

---

is bound to manage the property in a prudent manner, and is justified expending the income of the property for this purpose.

Though there are some rules such as these, the position of the guardian in relation to the infant's property has never been completely clear or satisfactory. ...

[96] R.S.A. 1980, c. M-16.

[97] Ibid. ss. 4-15.

Similarly, in Australia, the Law Reform Commission has determined that "guardianship" appropriately refers to parental rights and responsibilities in respect of the person of a child and that "trusteeship" is more appropriate terminology to use when dealing with the property rights of a child:[98]

> Ample provision is made in modern law for the protection of infants in respect of their property, by the appointment and removal, if necessary, of trustees. Guardianship in our opinion need relate only to the person of the child: just as it is unnecessary to give parents any rights or powers over their children's property (save of course the right and power to control the fact, and manner, of the children's enjoyment of it in the exercise of normal parental authority) so it should be unnecessary to make any such provision for guardians. The attempt to make such provision has been unsatisfactory, and the need for it does not exist. The modern law of trusteeship is a complete substitute.

b. Guardianship

Legislation in several provinces now confines the meaning of the term "guardianship" to "guardianship of the property of the child" and uses the term "custody" synonymously with the former concept of "guardianship of the person". The legislation is based on the suggestion of the Ontario Law Reform Commission in 1973 that a useful distinction would be to speak of guardianship of the property of a minor and custody of the person:[99]

> Our studies have led us the conclusion that despite the normal use of the terms "guardianship" and "custody" in describing the rights and duties of adults in relation to children in their charge, a distinction may be more realistically and usefully drawn between guardianship of the property of a minor and guardianship of the person of a minor.

---

[98] See *supra*, note 95 at 10.

[99] *Supra*, note 77.

Ontario enacted this recommendation in its *Children's Law Reform Act*.[100] Newfoundland, Saskatchewan and the Yukon have followed the Ontario lead.[101]

3. Recommendation for Alberta

In Chapters 5, we discuss what approach should be taken to family law reform in Alberta and, in Chapters 5 and 6, we recommend what terms should be employed in order to implement that approach.

---

[100] R.S.O. 1990, c. C.12, s. 20 (custody), ss. 48-62 (guardianship of minor's property) and s. 78 (rule of construction to deal with changes in terminology).

[101] See *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 26 (custody), ss. 55-68 (guardianship of minor's property) and s. 82 (rule of construction to deal with changes in terminology); *Children's Law Act*, S.S. 1990, c. C-8.1, s. 2(d), (g) and (h) (definitions of "custody", "guardian of the property of a child" and "legal custodian") and ss. 30-39 (guardianship of property of a child); *Children's Act*, R.S.Y. 1986, c. 22, s. 28 (definition of "custody") and ss. 60-74 (guardianship of property of child).

CHAPTER 4 DECISION MAKING IN BEST INTERESTS OF CHILD

A. Existing Law

i) Statute law

Currently, the *Divorce Act* and several provincial or territorial statutes in Canada specifically endorse "the best interests of the child" as the test for the determination of issues relating to a child's person or property.

In Alberta, the "best interests" test is prescribed in the following statutory provisions pertaining to the care, protection and upbringing of children:[102]

(1) *DRA*, section 47(2) (guardianship order),

(2) *CWA*, sections 49(1.1) and (2), 51(1)(c), 52(2), 53(1) and 54(3) (private guardianship),

(3) *PCA*, section 32 (custody or access order),

(4) *P&MA*, section 4(2) (action by Director on request for assistance relating to support of a child or mother),

[102] The "best interests" test is also specified in the following statutory provisions: (1) *CWA*, s. 2 (matters to be considered in Decision making relating to a child in need of protective services) and several sections having to do with the protection of children as a matter of public law, and s. 63(1) (adoption orders); (2) *Dependent Adults Act* (numerous sections relating to the court appointment of a guardian for an adult and the exercise of power and authority by the guardian); (3) *Social Development Act*, s. 5(2) (disclosure of information about a person or dependant of a person who has applied for or received a social allowance or handicap benefit); (4) *Young Offenders Act*, ss. 9(1) (summons of parent) and 10(1.2) (publication of report identifying child); and (5) *Minors' Property Act*, s. 15 (court confirmation of settlement in respect of injury to child).

(5) *Change of Name Act*, section 14(3) (dispensing with consent to change of child's name), and

(6) *Public Trustee Act*, section 7(6) (maintenance and education of minors).

Formerly, the "best interests of the child" was expressed as the "welfare of the child" or "minor." The phrase "welfare of the minor" is still found in two *DRA* provisions:

(1) section 56(2)(a) (custody or access order in favour of either parent), and

(2) section 59 (court order for the delivery of a minor to a parent or other responsible person).

The CWA refers to the "welfare and interests of children" in sections 2.1(3)(a) and 2.1(5)(b) (role of the Children's Advocate).

The *Divorce Act*, in sections 16(8) and 17(5), enacts the "best interests of the child" as the statutory test for making decisions about the custody of, and access to, a child. These provisions have been challenged as infringing the protection of freedom of religion and expression under the *Canadian Charter of Rights and Freedoms*. In upholding them, the Supreme Court of Canada has stated that the "best interests" test is value neutral and cannot be seen on its face to violate any right protected by the Charter:[103]

> It would seem to be self-evident that the best interests test is value neutral, and cannot be seen on its face to violate any right protected by the *Charter*. Indeed, as an objective, the legislative focus on the best interests of the child is completely consonant with the articulated values

[103] *Young* v. *Young* (1993), 108 (4th) 193, 49 R.F.L. (3d) 117 (S.C.C.) at 236-37 (D.L.R.), *per* L'Heureux-Dubé J. See also *P.(D.)* v. *S.(C.)* [1993] 4 S.C.R. 141, (1993), 108 D.L.R. (4th) 287 (S.C.C.), also reported as *Droit de la famille — 1150* (1993), 49 R.F.L. (3d) 317, (sub nom *P.(D.)* v. *S.(C.)*) 159 N.R. 241 (C.S.C.), upholding the constitutionality of the Quebec C.C.L.C., Article 30, which affirms the best interests of the child standard. (In this case, the parents were cohabitants.)

> and underlying concerns of the *Charter*, as it aims to protect a vulnerable segment of society by ensuring that the interests and needs of the child take precedence over any competing considerations in custody and access decisions.

"Best interests" is a positive test, encompassing a wide variety of factors:[104]

> The "best interests of the child" can be regarded as the term employed to refer to the spectrum of considerations encompassed by the needs of the child, as distinct from those of any other party, in the determination of custody and access disputes. The fact that it must be applied to the facts of each case does not militate in favour of its unconstitutionality. Rather, this feature is part and parcel of what makes decisions in the best interests of the child possible at all.

1. *Parens patriae* jurisdiction of superior court

[104] *Ibid*. at 239.

Where the statute law is silent, the superior courts exercise their *parens patriae* jurisdiction to fill in the gaps left by the legislation.[105] These courts employ the "best interests of the child" as the test for decision making regarding the care, upbringing and protection of children. It is in the exercise of this jurisdiction that the "best interests of the child" has been judicially proclaimed to be the basis on which decisions are made in proceedings brought under the *DRA*, Part 7.[106]

2. Consistency in practice

As we commented in Chapter 3, because the "best interests" test is universally applied, a high degree of consistency exists in decision making throughout Canada, notwithstanding the differences in the legislated provisions. For example, the language of the *DRA*, Part 7, and the *PCA*, Part 3, is markedly different from the language of the *Divorce Act*. In practice, however, the judicial approach to custody and access under all three statutes is remarkably similar.

B. Meaning of "Best Interests of the Child"

Much has been written about the meaning of "best interests of the child". A vast literature, far too extensive to be examined here, is in existence.[107] In Chapter 7, we cite several leading articles on the application of the "best interests" test in custody and access disputes.

Some of the discussion on "best interests" is theoretical in nature, drawing from empirical data and experience relating to children in general. Much of the

---

[105] See description of the *parens patriae* jurisdiction of the court, *supra*, Chapter 2, heading G.

[106] See generally, Christine Davies, *Family Law in Canada*, (Toronto: Carswell, 1984) at 311.

[107] Books on the topic include: Joseph Goldstein et al, *The Best Interests of the Child: The Least Detrimental Alternative* (New York: Free Press, 1996); Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights* (Oxford: Clarendon Press; New York: Oxford University Press, 1994); Christopher F. Clulow, *In the Child's Best Interests? Divorce-Court Welfare and the Search for a Settlement* (London: Tavistock, 1987); Joseph Goldstein, Anna Freud and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1979); and Joseph Goldstein, Anna Freud and Albert J. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979). A keyword search of articles on "best interests" in the Index to Legal Periodicals revealed more than 100 articles published within the last 10 years.

discussion — in particular, the discussion found in the case law and legal articles — focuses on the application of the "best interests" test in circumstances relating to an individual child.

Despite all that has been written about the "best interests" test, no definitive statement can be made. As the FPTFLC has stated:[108]

> The statutory test governing child custody and access decisions is really quite simple to summarize. The best interests of the child must be the paramount, if not the sole consideration. However, although the test can be simply summarized, it is difficult to apply because the concept "best interests" has many interrelated components and by its very nature is indeterminate.

Over 70 years ago, speaking of the "welfare of the child," Beck J.A. of the Alberta Court of Appeal stated:[109]

> 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 the 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

---

[108] Canada, Federal/Provincial/Territorial Family Law Committee, Custody and Access: Public Discussion Paper (March 1993) at Appendix C.

[109] *O'Leary* v. *O'Leary* [1923] 1 W.W.R. 501 at 527, 19 Alta L.R. 224 at 253, [1923] 1 D.L.R. 949 (Alta. C.A.). See also *Leboeuf* v. *Leboeuf and Germain* [1928] 1 W.W.R. 423, 23 Alta L.R. 328, [1928] 2 D.L.R. 23 (Alta. C.A.) *per* Beck, J.A..

> 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.

More recently, in her dissenting judgment in *Young* v. *Young*,[110] L'Heureux-Dubé J. of the Supreme Court of Canada provides an interesting account of the evolution of the best interests test. She notes that the "best interests" test "gained ascendancy as the proper focus of custody decisions at the same time as courts moved toward the equality of women in custody decisions."[111]

The "best interests" of a child is regarded as an all-embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child.[112] The court must look not only at the child's day-to-day needs but also to the child's longer term growth and development.

In a very real sense, the "best interests" test is not a test at all but a legal aspiration:[113]

> Clearly, there is an inherent indeterminacy and elasticity to the "best interests test" 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 interest.

---

[110] *Supra*, note 103.

[111] *Ibid.* at 176 (R.F.L.).

[112] *Delaurier* v. *Jackson,* [1934] S.C.R. 149, [1934] 1 D.L.R. 790; *In Re Wilson* (1963), 49 M.P.R. 401 (Nfld. C.A.).

[113] *MacGyver* v.*Richards* (1995), 11 R.F.L. (4th) 432 (Ont. C.A.) at 443, *per* J.A.

It is characterized by its fluidity and flexibility to respond to the circumstances of each individual child, and this is its strength.

In exchange for this flexibility, however, certainty is sacrificed.[114] The use of this indeterminate standard is open to the following criticism:[115]

> [Indeterminacy] 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.

One consequence is that the outcome of any trial may be largely influenced by the attitudes and background of the presiding judge.

---

[114] *Supra*, note 108 at 7, 19.

[115] Robert H. Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975), 39 Law & Contemp. Probs. 226 at 282-292 (footnotes omitted).

However well-founded these criticisms may be, the fact remains that no more adequate test has been advanced. In one author's words, "while the indeterminate best-interests test may not be good, there is no available alternative that is plainly less detrimental."[116] The "best interests of the child" is the test applied in jurisdictions throughout Canada. In our view, Alberta legislation should expressly provide that it is the basis on which guardianship, custody and access decisions are to be made, and we so recommend.

RECOMMENDATION No. 1.4
All decisions with respect to guardianship, custody or access should be made in the best interests of the child.

C. Best Interests: the "Paramount" or "Sole" Consideration?

In some jurisdictions, judicial opinion has differed on the question whether the "best interests of the child" is the "paramount" or the "sole" consideration to be applied to custody and access dispositions. We agree with a former Chief Justice of Newfoundland that this issue is one more of form than substance:[117]

> Some judges have said that the welfare of the child, though the paramount consideration, is not the only one. Whilst accepting that this is so I find upon reflection that the other considerations which the courts have dealt with all relate back directly or remotely to the child's welfare.

RECOMMENDATION No. 2.4The "best interests of the child" should be the paramount consideration.

---

[116] *Ibid.* at 282.

[117] *Re Peddle* (1973), 3 Nfld. & P.E.I.R. 489 at 490-91 (Nfld. S.C.) (Furlong, C.J.N.). Compare Davies, *supra*, note 106 at 311.

D. Child's Parents Living Separate and Apart

i) Parental role: two contrasting approaches

Usually, the child will live with both parents and the parents will share the responsibility for the child's upbringing. However, with the current high rate of divorce and movement among adults in and out of cohabiting relationships, growing numbers of children live with only one parent — the "custodial" parent. Where the custodial parent and the other parent — the "access" parent — cannot agree, a tension surrounds their respective roles. The Supreme Court of Canada is divided in its opinion about how the best interests of the child should be met in this situation.[118] Should the custodial parent have sole responsibility or "control" over the child's life and relationships, or should parental responsibility be shared? We will say more about this issue in Chapter 5.

1. Best interests of the child v. parental rights

With the current changes in family structure, few families today are "nuclear" families consisting of one father, one mother and two children:

> ... as adults move through different relationships, the children form varied attachments with members of the different "families". Indeed, many children today have two sets of parents and four sets of grandparents. The reality of modern life is that a biological relationship may become of decreasing importance to the child as the number and nature of the individuals who have contact with the child changes.

Increasingly, courts and legislators are called on to make decisions regarding the position of persons other than parents who have had a role in the child's upbringing.

---

[118] *Young* v. *Young*, *supra*, note 103; *P.(D.)* v. *S.(C.)*, *supra*, note 103. Similar considerations apply to custody or access disputes whether the proceedings are brought under the federal *Divorce Act* or provincial legislation.

Although the courts purport to concern themselves only with the best interests of the child, in fact they frequently become entangled with concern over the standing of the parties before the court to exercise rights that fall within the umbrella of guardianship. One outcome of the "best interests" test, in an appropriate case, might be to place a psychological parent (i.e. an adult who is a parent as seen from the child's standpoint) on an equal footing with a biological parent.

The recommendations we make later in later chapters of this report will help to delineate the position in law of the parents and other persons who are serving in a parenting role.

2. Lack of empirical evidence

Few attempts been made to measure the respective merits of different forms of parenting arrangements. Writing in 1970, one pair of reviewers characterized the available data as "woefully inadequate."[119] Their observations are equally tenable today in both Canada and the United States:

> The studies may have some marginal utility in directing the attention of parents, court-employed social workers and judges to the potential areas of vulnerability in children of divorce under varying conditions; but the data can hardly be considered dispositive for purposes of choosing among alternative formulations of custody adjudication doctrines: interpretations have been prejudiced by stereotypes; measurement instruments have frequently been meaningless; categorizations of both antecedent and consequent variables have been sloppy; appropriate control groups have been rare, and crucial pretests nonexistent; the available data, by and large, relate to gross and long-range consequences for children of divorce or single-parent households and not to the immediate choices judges must make in disputed custody cases; many of the relevant and important questions have not been studied at all. In short, the interdisciplinary millennium—for custody adjudication, at any rate—is not at hand. Yet legislation to govern custody adjudication must

[119] Phoebe C. Ellsworth and Robert J. Levy, "Legislative Reform of Child Custody Adjudication" (1970) 4 Law and Society Rev. 167 at 201-202.

> be drafted; and a host of legislative issues must be faced. Choices will have to be made whether or not social science has provided sufficient relevant data to inform them.

The Federal/Provincial/Territorial Family Law Committee identified four assumptions commonly found in the case law:[120]

a) *Status quo:* Where the respective claims of the parents are evenly balanced the court should preserve the status quo.[121]

> [Courts will be inclined to grant custody to the mother in circumstances where she was the primary caregiver during the marriage.]

b) *The tender years doctrine:* Children of tender years should usually be placed in the custody of their mother.

---

[120] *Supra*, note 108.

[121] But, in Alberta, see *R.* v. *R.*(1983), 34 R.F.L. (2d) 277 (Alta. C.A.), holding that the trial judge did not err in departing from the *status quo*, and stating, at 284, that "it is at the time of an interim custody disposition that one should not lightly disturb de facto arrangements," and that "courts should take great care not to permit a new status quo (created by delay) to decide what was not decided by the interim disposition."

c) *Keep siblings together:* In the ordinary course of events, the court should avoid the separation of siblings.[122]

d) *Child preference:* Significance should be attached to the wishes of an older child.

Another assumption, that the court should lean in favour of the "primary parent," could be added to this list.[123]

In recent years, there has been a tendency among courts and legislators to favour parenting arrangements that encourage maximum contact of the child with both parents and provide for them to share responsibility for the child's upbringing.

While it is important that current knowledge, social trends and realities be considered in making decisions relating to the "best interests" of children, given the incomplete, fluctuating and uncertain state of the data, these should be approached with caution.

---

[122] In Alberta, see *R.* v. *R.*, *ibid.* at 285-287, agreeing with the trial judge that the mother does not have a "right" to the custody and care of a child during the child's "tender years," and that "in this age of changing attitudes ... judges must decide each case on its own merits, with due regard to the capacities *and* attitudes of each parent."

[123] In *K.(M.M.)* v. *K.(U.)* (1990), 28 R.F.L. (3d) 189, 76 Alta. L.R. (2d) 216 (sub. nom. *Kastner* v. *Kastner*, 109 A.R. 241) (Alta. C.A.), leave to appeal refused (1991), 31 R.F.L. (3d) 366 (S.C.C.), the Alberta Court of Appeal endorsed the "primary parent" approach to custody. This approach which was originally articulated in *Garska* v. *McCoy* (1981), W. Va. 276 S.E. 357 (S. Ct. of Appeals), and, other things being equal, favours awarding custody to the parent who was primarily responsible for child rearing before the marriage broke down — the parent who "has wiped [the children's] noses, bathed them, maintained their health, driven them to school, tutored [them], taken them to church and arranged for their daycare:" *K.(M.M.)* v. *K.(U.)* at 204 (R.F.L.). And see Richard Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984), 3 Yale Law and Policy Review 168.

CHAPTER 5 APPROACH TO REFORM

A. Conceptualization of the Parental Role: Options for Reform

We have identified four major options for reform of the law relating to child guardianship, custody and access. The first approach would require a fundamental examination of the values that underlie the existing law and their reformulation on the basis of the child's perspective. The second approach would be to build on the traditional approach which adopts the narrow meaning of custody, seeing custody and access as incidents of guardianship.[124] The third approach would be to adopt the wide meaning of custody employed in the federal *Divorce Act*. The fourth approach would be to introduce innovative reform based on the concept of shared parental responsibilities.

B. Four Possible Approaches

i) Develop a child-centric model of the parent-child relationship

Barbara Bennett Woodhouse challenges the existing theoretical foundation for the determination of children's interests by demonstrating the extent to which the existing law grounds them in adult rights.[125] She advocates the adoption of a new conceptual foundation which she calls "generism." "Generism" would involve attaching greater weight to the child's relationships with adults who respond to a child's needs (functional parenting relationships), and less weight to the genetic relationship which gives a parent a possessory interest in the child irrespective of that parent's functional involvement. In short, her child-centric model of the parent-child relationship would take the concept of "best interests" further in the direction of the child.

---

[124] The narrow and wide meanings of "custody" were explained in Chapter 3, *supra*, heading B.1.B.

[125] Barbara Bennett Woodhouse, "Hatching the Egg: A Child-Centered Perspective on Parents' Rights" (1993), 14 Cardozo Law Rev. 1747. We thank the Hon. Hugh Landerkin, Judge of the Family Division of the Provincial Court of Alberta, for bringing this publication, and others, cited *infra*, note 272, to our attention.

Taking Woodhouse's approach would require a fundamental rethinking about parenting looked at from the child's point of view. It could lead to the attachment, in law, of greater weight to the contribution of adults who enrich the child's life through their caring participation in it and less weight to the contribution of those who provided the genetic material for the child's conception. Much can be said in its favour. However, in the General Premises underlying this project, we have endorsed consistency with the *Divorce Act* and legislation in other Canadian jurisdictions. Therefore, we have concluded that such fundamental reshaping of family law lies beyond the scope of this project.

1. Build on the traditional approach: guardianship, custody and access

Under the traditional approach, parents who are married to each other are joint guardians of their child.[126] While they are living together with the child, the law assumes that they will cooperate in carrying out the responsibilities of guardianship toward their child. If the marriage breaks down and they decide to live separate and apart, they remain joint guardians. If, after marriage breakdown, they cannot agree between themselves on how to exercise their responsibility as guardians jointly, the court has power to grant custody of the child to one parent and to grant, or deny, access to the other.

Whether as a result of practical circumstances or terms and conditions established by court order, the custodial parent tends to be far more involved in the child's life than the non-custodial parent and the non-custodial parent sometimes fades into oblivion. The custodial parent exercises the decision making authority with respect to the daily care and control over the child. The custodial parent's role is primary and the non-custodial parent's role secondary.

---

[126] The mother is a guardian of her child in every case: *DRA*, s. 47(1). This section now includes as guardian a father who is not married to the mother where he had lived with the mother for at least a year immediately before the child's birth; s. 47(2) allows the court to appoint as guardian a man who has been declared to be the father under Part 8 of the Act.

When a strict view of this approach is taken, the access parent is little more than a stranger to the child, having the right to be in contact with the child but not to be consulted or participate in decisions about how the child is raised. When in contact with the child, the access parent must honour the lifestyle established for the child by the custodial parent. To override a decision made by the custodial parent, the access parent must show that the care arrangements are not in the child's best interests. Access is likely to be denied where the parents are unable to cooperate.[127]

When a more relaxed view of this approach is taken, the custodial parent's authority may be limited to decisions on day-to-day matters. Courts or legislators may give the other parent the right to be consulted on major decisions, for example, decisions regarding the child's religious upbringing, education, residence or medical treatment. The non-custodial parent also remains a guardian. In Ontario, the Court of Appeal has held that:[128]

> ... a custodial parent does not have the right to change unilaterally the child's residence. Inherent in custody is the right to make day-to-day decisions, but not the right to make major decisions in the absence of parental agreement or a court order.

The approach of placing sole responsibility with the custodial parent has the advantage of producing consistent decision making and lifestyle choices for the child. On the other hand, it seems harsh to relegate the access parent to the role of a stranger, simply because the access parent cannot agree with the

---

[127] See e.g., *M.(B.P.)* v. *M.(B.L.D.E.)* (1992), 42 R.F.L. (3d) 349, 97 D.L.R. (4th) 437, 59 O.A.C. 19 (Ont. C.A.), leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) 232 (note), 157 N.R. 348 (note) (S.C.C.).

[128] James G. McLeod, annot. *Young* v. *Young* (1993), 49 R.F.L. (3d) 129 at 132, citing *Carter* v. *Brooks* (1990), 30 R.F.L. (3d) 53, 77 D.L.R. (4th) 45, 2 O.R. (3d) 321 (Ont. C.A.). (Under the *Divorce Act*, the court has power to order the custodial parent to notify any person who is granted access to the child of an intended change in residence.)

custodial parent or because the access parent has become inconvenient as a result of the custodial parent's involvement in a new relationship.[129]

A criticism is that the distinction between custody and access sets up a power struggle between the parents that moves the focus of attention away from the child. Although the best interests of the child is the test applied in determining which parent will have custody, this approach has the ring of a contest of rights that exacerbates the relationship between the parents rather than fostering cooperation between them:[130]

> The awarding of custody to one parent has frequently been viewed as a "prize", a sign of "winning" the child.

One attraction of the option of building on the traditional approach is its consistency with the terminology of other Alberta statutes that deal with guardianship and trusteeship. Guardianship is a cornerstone of the *CWA*, and its retention for private law purposes would facilitate an understanding of the interrelationship between the public and private aspects of child care, control and protection.

2. Adopt the *Divorce Act* approach: custody and access

A second option for reform would be to adopt the approach taken in the *Divorce Act*, which has been followed in Ontario, Saskatchewan and the Yukon. The *Divorce Act* addresses marriage breakdown situations, rather than ongoing marriages. Under the *Divorce Act*, custody attains a meaning synonymous with guardianship under the traditional approach. In the past, this approach has given the custodial parent considerable authority and left very little for the access parent.

The criticisms that apply to the traditional approach are stronger when applied to the *Divorce Act* approach. The imbalance has led to elevation of the

---

[129] McLeod, *ibid*.

[130] Janet Walker, "From Rights to Responsibilities for Parents: Old Dilemmas, New Solutions" (1991), 29 Family and Conciliation Courts Review 361 at 361-64. See also Andrew Bainham, "The *Children Act, 1989*: Welfare and Non-Interventionism" [1990] Fam. Law 143.

concept of "joint custody" in an effort to recognize and restore a meaningful role for both parents.

Because divorce is intended to terminate the marital bond without destroying parent-child bonds, it might be contended that "custody" under the *Divorce Act* should be more circumscribed and that custody orders under that Act should simply confer day-to-day care and control of a child without prejudice to the residual rights of a non-custodial parent as a joint guardian of the child. On this hypothesis, a non-custodial parent would be entitled to make a continuing input into long-term decisions relating to the child's health, welfare, education and upbringing. The objection may be taken that many sole custodial parents would perceive this as conferring privilege and control upon the non-custodial parent without any corresponding responsibility.[131]

Another point is that the *Divorce Act* applies only to the children of married persons who are divorced or seeking to divorce. Provincial law embraces the parent-child relationship both within and outside marriage. Retaining the concept of guardianship would provide a means of defining the persons who bear the primary parenting responsibilities toward a child, whatever the relationship between the parents.

3. Introduce an innovative approach: shared parental responsibilities

In current thinking, a breakdown in the parental relationship does not end the responsibility of the parents to the children:[132]

---

[131] Compare the following observations concerning joint custody that appear in Canada, Department of Justice, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation* (May, 1990) at 107:

> Careful analysis of the interviews where women did express dissatisfaction suggest that the major difficulty they were experiencing was that their ex-husband was not sharing equally in parenting the children. Simply, there is a gap between what men and women perceive as an adequate level of quality of parenting and patterns and definitions of what constitutes equality developed over the life of the marriage persist into the post-divorce situation. These perceptions hardly lend weight to the contention that joint custody is simply male domination and control in another guise or that children are, in such arrangements, forced to spend time with abusive fathers.

[132] Ryan, *supra*, note 132 at 1-7 and 21, citing Meyer Elkin, 13 Conciliation Courts Rev. (September

> The fact that the divorce terminates the legal relationship between husband and wife does not mean that the familial relationship is ended. A divorce court should be authorized to end a marriage, but not the family, for the family cannot be ended where there are children. It is indeed "until death do us part."

Courts and legislators have been moving away from an approach that separates the responsibilities of parents toward their children into custody and access. The *Divorce Act* and statutes in several provinces promote maximum contact, the right of a parent with whom the child does not live to be notified of the intention to change the child's residence, and the right of that parent to make inquiries and receive information concerning the child's health, education or welfare. The current trend sees parents sharing parental responsibility. Where the parents are unable to agree between themselves, the court parcels out the powers that are incidental to parenthood. Both parents have a strong and involved role.

1975).

Under this approach, the access parent has "virtually ... custodial rights while the child is in his or her care."[133] The access parent may even have the right "to share his or her everyday lifestyle with the child, regardless of whether the custodial parent approves." The assumption is that it is good for the child to know both parents through direct experience of them:[134]

> The child can only develop a close relationship with the access parent by getting to know him or her as a real person who is free to speak openly about his or her views, motivations, and hopes. Such a meaningful relationship cannot develop if the access parent is only an emasculated shadow who cannot honestly communicate that which is close to his or her heart.

One consequence of greater involvement of non-custodial parents or courts is a reduction in the decision making power which a custodial parent may need to be effective as a parent.

The promotion of shared parenting responsibilities is an approach that recognizes a child's right to know and be raised by two parents. It removes the win-lose aspect of the custody-access approach. Importance is attached to the continued meaningful participation of both parents in the life of their child. The parents share responsibilities which are allocated to suit the circumstances. The approach recognizes the fact that very few parents who separate or divorce are incapable of making some positive contribution to the growth and development of their children. The law exhorts them to work together for the benefit of the child. For this approach to succeed, the parents must be capable of cooperating with each other.

---

[133] *Young* v. *Young* (1990), 29 R.F.L. (3d) 113, 50 B.C.L.R. (2d) 1, 75 D.L.R. (4th) 46 (B.C.C.A.). On the facts of the case, the B.C.C.A. imposed restrictions on the rights of the access parent but the S.C.C. removed them: *Young* v. *Young*, *supra*, note 103. The concept of shared parental responsibility has been legislated in Great Britain, under the *Children's Act*, as well as in several American states.

[134] W. Glen How and Sarah E. Mott-Trille, "*Young* v. *Young*: A Re-evaluation of the Rights of Custodial and Access Parents" (1992), 8 C.F.L.Q. 356-367.

The trend in this direction is finding its way into Canadian law.[135] In a Manitoba case, Twaddle, J.A., speaking for the three justices of the Manitoba Court of Appeal, stated:[136]

> The effect of the amendments of 1983 [to the *Manitoba Family Maintenance Act*] taken together is to emphasize the contribution which each parent can make to the development of his or her child even after cohabitation of the parents has ceased. The court must give effect to the legislative intent by crafting its orders to maximize the opportunities which both parents have to make such a contribution, recognizing, of course, that not in all cases is a parent able or willing to do so and that in some cases, regrettably, a child's best interests would not be served by such an order.

Another example is provided by the judgment in the Ontario case of *Harsant* v. *Portnoi*.[137] In this case, the parties entered into a "shared parenting agreement" whereby their child would reside primarily but not exclusively with the mother. The agreement specifically dealt with other matters such as future education, medical decisions, religious exposure, extra-curricular activities and restrictions on travel. The agreement also provided that the parties could incorporate its terms in a court order. An application was brought, on consent, to incorporate the agreement in a judgment under the *Children's Law Reform Act*.[138] The application was successful. The parties obtained an order "granting the parties an order to share in the parenting of Jeffrey and incorporating the paragraphs dealing with residence, education, medical decisions, religion, extra-curricular

---

[135] *Payne on Divorce*, *supra*, note 83 at 366-371.

[136] *Abbott* v. *Taylor* (1986), 2 R.F.L. (3d) 163 (Man. C.A.) at 170-172.

[137] (1990), 74 O.R. (2d) 33, 27 R.F.L. (3d) 216 (Ont. H.C.). See *Payne on Divorce*, *supra*, note 83 at 368, note 52 and following.

[138] Now R.S.O. 1990, c. C.12.

activities, communication, travel and dispute resolution."[139] In rendering judgment, Granger, J. stated:[140]

> In my opinion, the term "shared parenting" is more reflective of society's view today and more in tune with the best interest of this child. The court is able to look behind the label attached to the arrangement and determine its purpose and what it hopes to achieve. This agreement, whether called a shared parenting agreement or a joint custody order, deals with all the responsibilities of custody for Jeffrey.

---

[139] *Hartsant* v. *Portnoi*, *supra*, note 137 at 41.

[140] *Ibid.* at 39.

The shared parental responsibilities approach has been legislated in England and in leading American jurisdictions. In her paper comparing innovative legislation in Florida, Maine, Washington and England, Judith Ryan comments:[141]

> The legislation (or proposed legislation) in all four jurisdictions studied for this Report shares a common goal, that is, there is a conscious shift away from an adversarial struggle over custodial labels when parents separate and divorce towards a more cooperative, child-centered approach, focussing on the needs of children and the importance of planning for their future care. All four jurisdictions have chosen to do this by deleting the usual references to "custody", "access" and "visitation" from their legislation (at least where these terms previously applied to parents), and replacing these terms with the language of "parental responsibilities".

If this approach were to be adopted, we would recommend retaining the concept of guardianship as a means of identifying the persons between or among whom the parenting responsibilities are to be shared. The concept of custody would be abandoned. The concept of access would be abandoned with respect to parents (or other guardians), but retained for non-guardians in a close relationship with the child.

The question would arise whether Alberta should initiate this approach (*i.e.* shared parenting responsibilities) without waiting for reform of the *Divorce Act*.

C. Other Options for Reform

Other options for reform could be used in combination with one or another of the three main options. We will look at three of these: (1) functional plain language, (2) statutory presumptions and (3) non-legislative measures.

1. Endorse functional plain language

Another approach for reform would be to require the use of functional plain language, that is, language that the parents and children can understand. The

---

[141] *Supra*, note 132, c. IV.

adoption of this approach would involve abandoning the words "guardianship," "custody" and "access" and using everyday language to describe the way in which the responsibilities are allocated between the parents in each individual case.

The abandonment of the present legal terminology would not amount to a mere linguistic change. It would provide the basis for a functional approach that could accommodate the notion that parents are forever, notwithstanding the breakdown or dissolution of the parents' relationship.

The two judgments just cited—*Abbott* v. *Taylor*[142] and *Hartsant* v. *Portnoi*[143]—lend credence to the notion that the time may be ripe to jettison the use of such ambiguous terms as "custody", "joint custody" and "access". They support the view that parenting roles and the feasibility of shared parenting after marriage breakdown do not require the use of legal jargon that itself fuels disputes and the prospect of future protracted litigation.

In the judgment of the Manitoba Court of Appeal in *Abbott* v. *Taylor*, Twaddle J.A. continued:[144]

> The language of custody orders has ordinarily followed the language of the statute. Custody has, however, several aspects. If effect can be given to the statutory intention by the use of language more easily understood by the parties to the proceedings and the child whose custody is in issue, there can be no objection to it provided all the responsibilities of custody

---

142 *Supra*, note 136.

143 *Supra*, note 137.

144 *Supra*, note 136 at 170-171. The reasoning in *Abbott* v. *Taylor* is particularly persuasive when the application before the court concerns interim parenting arrangements: *Davis* v. *Davis* (1986), 3 R.F.L. (3d) 30, at 32-22 (Man. Q.B.). Where appropriate, orders respecting interim parenting arrangements may be tailored to approximate the situation that existed during matrimonial cohabitation, thus stressing the importance of the child spending "quality" time with each parent: *Cox* v. *Cox* (1986), 43 Man. R. (2d) 72 (Man. Q.B.); see also *Friesen* v. *Petkau* (1985), 8 R.F.L. (3d) (Man. Q.B.). In addition to determining the residential aspects of the parenting arrangements, the court should determine whether ultimate decision-making authority should vest in one or both parents: see *Davis* v. *Davis*, *supra*; compare *Cox* v. *Cox, supra*.

> are conferred on the parents between them. I do not prescribe this choice of language, but approve of it when required in the best interests of the child.
>
> In the case at bar the learned Associate Chief Justice chose to use ordinary language in expressing the responsibilities which each parent should exercise with respect to the child. In principle, for the reasons I have just given, this course is acceptable ...

The Ontario decision in *Hartsant* v. *Portnoi* also supports the adoption of easily understood language in parenting agreements. In pronouncing judgment in that case, Granger, J. did not simply rubber stamp the consent application. He gave careful consideration to the legal implications of his decision. After acknowledging that the two parents were able to work together to promote the best interests of their child, Granger, J. followed *Abbott* v. *Taylor* and upheld the right of the parents to use the more easily understood language of "shared parenting" in preference to the legal terminology of "joint custody". He stated:[145]

> The purpose of a custody order is to provide for the care, control and maintenance of the child and as that purpose is achieved by the shared parenting agreement, the order need not incorporate the word 'custody'. Thus, this arrangement can be the subject of a consent judgment and is an order contemplated by s. 28(a) of the [*Children's Law Reform Act*].
>
> In these times with growing divorce rates, many separated spouses wish to maintain a meaningful role in their child's life. The use of the word "custody" may be inappropriate as its fails to recognize that parental responsibilities continue after spouses decide to separate. We must not forget that the purpose of any order is to ensure that the arrangement is in the best interest of the child. The child is entitled to be cared for by both of his or her parents and any court order should promote and maintain the relationship between child and parent.

---

[145] *Supra*, note 137 at 39.

We note that mediators with a behavioural science background encounter no difficulty in avoiding the use of the legal terms "custody" and "access". Their natural inclination is to think in terms of parenting responsibilities, whether from the perspective of the parents or the child.

The process of change can start with the lawyers drafting domestic contracts or minutes of settlement that seek to resolve parenting crises. They can begin now to draft comprehensive and readily understandable terms respecting parenting responsibilities. While lawyers may be reluctant to abandon the legal concepts of "custody" and "access" that have been hallowed over the years in legislative enactments and judicial pronouncements, in our view, the use of ordinary language instead of the legal concepts of custody and access in determining parenting rights on marriage breakdown should not be merely "acceptable". It should be encouraged.

2. Enact statutory presumptions for the distribution of parenting responsibilities

(1) Joint custody

Under the existing divorce law, it is always open to the court to split the incidents of custody between divorcing parents or to grant an order for "joint custody".[146] Although orders for joint custody have taken a variety of forms, it is generally accepted that all such orders give something less than exclusive authority to either parent.[147]

Orders for joint custody are the exception rather than the rule. Federal government statistics compiled a decade ago indicate that divorced mothers receive sole custody in 72 percent of the cases, divorced fathers receive sole custody in 16 percent of the cases and that joint custody orders are granted in 12 percent of the cases.[148]

---

[146] *Divorce Act,*, *supra*, note 61, s. 16(4). And see generally Julien D. Payne and Brenda Edwards, "Co-operative Parenting After Divorce: A Canadian Perspective", published in *Payne's Divorce and Family Law Digest*, Essays tab, at E-117, reprinted in (1989), 11 Adv. Qtly 1.

[147] *Ibid.* at E-120.

[148] Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1990), 22 Ottawa L. Rev. 139 at 211-213, citing Department of Justice, *supra*, note 131.

Some persons advocate the implementation of a "statutory presumption of joint custody" on marriage breakdown or divorce. Such a legal presumption, of necessity, must be provisional and not conclusive. It begs the question of the circumstances that would rebut the presumption. Its opponents argue that the burden of upsetting such a presumption would open the door to a continued emphasis on spousal misconduct and the concept of unfitness to parent. This would produce a negative perspective.

It is our view that Alberta should not legislate a presumption of "joint custody".

a. Four variations

Four alternative sets of presumptions that could be enacted statutorily are discussed in chapter 7 on custody.[149] They are the enactment of:

- Mnookin's intermediate level rules;[150]

[149] The views of Schneider are relevant to this discussion: Carl E. Schneider, "Discretion, Rules and Law: Child Custody and U.M.D.A.'s Best Interests Standard" (1991), 89 Michigan L. Rev. 2215. He analyses the relationship between judicial discretion and rules in the context of custody disputes, and finds it to be extremely complex. He demonstrates that the exercise of judicial discretion in custody matters is not nearly as indeterminant as other authors have described it, but is in fact fettered in many ways.

[150] *Supra*, note 115.

- Ellsworth and Levy's statutory presumptions;[151]
- Chambers' starting premises; or[152]
- Bala and Miklas' statutory or judicial presumptions.[153]

By way of example, Mnookin proposes the enactment of intermediate level rules to assist courts to determine the best interests of the child where a dispute exists about the allocation of parenting responsibilities. The rules would be that:

· Custody should never be awarded to a claimant whose limitations or conduct would endanger the health of the child.

· The court should prefer a psychological parent (i.e. an adult who has a psychological relationship with the child from the child's perspective) over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent.

· Subject to the two rules noted above, natural parents should be preferred over others.

3. Take non-legislative measures

The adoption of this option would involve taking initiative in the areas of research, judicial education, parenting education and improved counselling and mediation services. It could be used in conjunction with any of the other approaches. Again, the emphasis tends to be on building cooperation between the parents in fulfilling their continuing role as parents to their children. Non-legislative measures can be employed to help parents learn to put their own

---

[151] *Supra*, note 119.

[152] David L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984), 83 Mich. L. Rev. 477.

[153] Nicholas Bala and Susan Miklas, "Rethinking Decisions About Children: Is the Best Interests of the Child Approach Really in the Best Interests of Children?" (Toronto: The Policy Research Centre on Children, Youth and Families, 1993).

feelings toward each other aside and focus their attention on working together as parents in the best interests of their children.

We will comment specifically on three non-legislative measures:

· *Parenting education*. The Court of Queen's Bench of Alberta requires persons who are parties to a proceeding in which custody, access or child support is in issue to attend a "Parenting After Separation Seminar" within two months of the origination of the action (in the case of a plaintiff) or service of the originating document (in the case of a defendant).[154] This requirement applies to divorces, actions for judicial separation, and proceedings under the *P&MA* or *DRA*. An application for interim support, custody or access with respect to child under 16 years of age cannot be brought until the applicant has attended the seminar. Ordinarily, the party setting the actions down for trial must file proof of attendance at a seminar. However, there is no requirement to take the seminar where the children are all 16 years of age and over or where both parties certify in writing that they have entered into a written agreement settling all issues between them. In addition, the court has power to exempt a party from proof of attendance before filing where: "a. interim custody is being sought incidental to an *ex parte* restraining order where there is domestic violence, b. kidnapping or abduction of a child has occurred, [or] c. a unilateral change in *de facto* custody of a child has taken place." In these circumstances, the party granted the exemption must attend the course within a month of the date the exemption is granted. The seminar is offered jointly by the Alberta Family and Social Services, Alberta Justice and the Court of Queen's Bench. It consists of a six hour workshop, delivered in two 3-hour sessions. Its purpose is "to assist parents in understanding the process and effects of divorce and to encourage parents to make positive choices about how they will continue to parent their children after divorce."[155] The workshop includes "information and discussion about divorce and

---

[154] Court of Queen's Bench of Alberta, Family Law Practice Notes (September 1, 1997), s. 1.

[155] Alberta Justice and Alberta Family and Social Services, *Parenting After Separation: Participant's Manual* at 2.

its effects on both parents and children; how to communicate more effectively; what the legal process involves; parenting plans; and mediation."[156]

[156] *Ibid.*

· *Individualized parenting plans*. Individualized parenting plans hold the potential to accommodate the positive contributions that each separated or divorced parent can and should make towards the growth and development of their children.[157]

· *Use of non-judicial processes to resolve parenting disputes*. The judgment in *Harsant* v. *Portnoi*[158] approves the use of non-judicial processes to resolve parenting disputes. The agreement under consideration explicitly defined a dispute resolution process to deal with issues that might arise in the future. The parents agreed to refer future disputes to a third party, such as a relative or friend. If they could not agree on such an appointment, then the services of a designated professional mediator were to be invoked. As a last resort, if mediation proved unsuccessful, the parties agreed to refer the dispute for adjudication by a court of competent jurisdiction.

In approving the incorporation of the terms of the agreement in a court order, as provided in the agreement, the court acknowledged the right of parents to determine the process for resolving future disputes concerning their child. In this, the judgment in *Hartsant* v. *Portnoi* goes further than the judgment in *Abbott* v. *Taylor*.[159]

It is important to realize that the principles articulated by Granger, J. in *Harsant* v. *Portnoi* involved a factual situation where both parents consented to have the terms of their parenting plan incorporated in an order of the court. By acknowledging that different considerations would apply if the parties to an agreement were locked in conflict, the judgment in *Harsant* v. *Portnoi* recognizes that cooperative parenting cannot be mandated by judicial decree.

---

[157] For an excellent review of the use of parenting plans in the State of Washington, which like Maine and Florida has legislatively moved away from the terminology of "custody" and "access", see Ryan, *supra*, note 132. The relationship between the movement away from traditional terminology and a functional shift towards a sharing of parental rights and responsibilities after marriage breakdown or divorce is analysed in detail in this report. For a statutory presumption of "joint legal custody", see *Children's Act*, R.S.Y. 1986, c. 22, s. 30(4).

[158] *Supra*, note 137.

[159] *Supra*, note 136.

D. State Rules, Court Determination or Parental Decision making

i) Reform in England

The distinction between custody and access which allows the custodial parent to "assume a powerful position, frequently 'calling the shots' regarding the ongoing contact with the other parent ... has done little to encourage *both* parents to retain responsibility for their children."[160]

In an effort to redress this deficiency, the *Children Act (England), 1989*, which took effect October 14, 1991, endorses a policy of minimal judicial intervention:[161]

> The state's role is to help parents fulfill these responsibilities rather than to interfere in their everyday affairs. To support this principle the *Children Act 1989* is fundamentally noninterventionist. A court must not make orders in relation to a child unless it is satisfied that the order will positively contribute to the welfare of the child.

The Act proceeds from a presumption that court orders will not be necessary and none will be awarded "automatically".[162] Rather, the orders "are designed to provide practical remedies if and when problems arise." They must address a demonstrable need.

However, translating the non-intervention principle into practice poses a challenge:[163]

---

[160] Walker, *supra*, note 130 at 361-64; see also Bainham, *supra*, note 130.

[161] Walker, *ibid*.

[162] *Ibid*.

[163] *Ibid*.

> Maintaining a balance between the welfare principle and the non-intervention principle will present the greatest challenge of those administering the Act.

1. Non-intervention: a Canadian example

Traditionally, courts have jealously guarded their own jurisdiction. Agreements to mediate or arbitrate disputes are not necessarily binding on courts to whom one of the parties subsequently has recourse. *Harsant* v. *Portnoi* constitutes a breakthrough in terms of judicial reactions to private contractual arrangements for the resolution of parenting disputes. The judgment of Granger, J. validates such arrangements without impairment of the court's ultimate right to intervene if the best interests of the child so require.

Insofar as it encourages the initiation of private arrangements, the judgment in *Harsant* v. *Portnoi* may be read as giving support to a non-interventionist approach to decision making in carrying out parental responsibilities toward a child. Here again, it goes further than the judgment in *Abbott* v. *Taylor*.

In the judgment, Granger, J. stated:[164]

> There is little doubt that the parties are entitled to enter into a domestic agreement which includes a dispute resolution procedure. In this case, the parties are requesting that the dispute resolution procedure be made part of the judgment. By providing that resort can be had to the court if the procedure fails or if there is an emergency affecting the welfare or safety of the child, the parties have acknowledged the court's *parens patriae* jurisdiction to act on matters concerning the best interest of the child.
>
> The dispute resolution provision is a structural method of attempting to achieve a compromise on difficult and contentious parenting decisions. The parents have experienced difficulty resolving their differences in the past and required the assistance of a third party to arrive at this

---

[164] *Supra*, note 137 at 41.

> agreement. Paragraph 12 attempts to achieve, by a structured procedure involving a third party, what cohabiting parents do every day in raising and caring for their children.
>
> It is beyond dispute that a compromise decision, accepted by both parents, is in the best interest of a child as opposed to a winner/loser result in court proceedings.
>
> Accordingly, I have no doubt that a dispute resolution procedure as it relates to matters which do not immediately affect the child's welfare or safety is in the best interest of the child and is an incident of custody.
>
> If one parent chose to ignore this procedure and apply directly to court to determine an incident of custody which was not critical in time, I would stay the application until the dispute resolution procedure had been exhausted. If a parent chose to ignore the dispute resolution procedure, I would view such action as failing to consider the best interest of the child and an indication of his or her ability as a parent.

The judgment in *Harsant* v. *Portnoi* recognizes that court orders are no substitute for sound consensual planning by family members themselves. In doing so, it has been seen to represent a "constructive step forward".[165]

E. Recommendations

We think that the province of Alberta should be cautious before making an innovative shift to shared parental responsibilities. We prefer to work with known concepts. We would encourage the use of language that is oriented toward practical working solutions that will provide care, control and upbringing in the best interests of the child. We would avoid the use of language based on the "rights" of parent or child.

---

[165] Julien Payne, "A Review of Guardianship, Custody and Access under the Domestic Relations Act of Alberta," a research paper prepared for the ALRI (March 1992) at 146.

We note that changes in terminology are relatively insignificant if they stand alone; to be meaningful, they must reflect new concepts or processes. We note further that changing the terminology relating to parental responsibilities for the upbringing of children would necessitate a review of the concepts and terminology in related Alberta statutes.[166]

The law should encourage parents to enter into consensual arrangements for shared parenting. Where they cannot agree (a situation which we consider to be the exception rather than the rule) and subject to the discretion of the court acting in the best interests of the child to order otherwise, we think it preferable to give one parent sole custody and clear decision making authority over the child with access to the other parent, as appropriate in the circumstances. This approach is more likely to bring stability to the child's life than continuing disagreement between parents under a court order for shared parenting.[167] We call this approach the Sole Custody Model of parental responsibilities and rights. Unless the court orders otherwise, the incidents of custody and access should be as recommended in Chapters 7 and 8.

RECOMMENDATION No. 3.4Alberta should enact legislation that builds on the existing concepts of guardianship, custody and access.

RECOMMENDATION No. 4.4

---

[166] For example, *Change of Name Act*, R.S.A. 1980, c. C-4; *Child Welfare Act*, S.A. 1984, c. C-8.1; *Extra-Provincial Enforcement of Custody Orders Act*, R.S.A. 1980, c. E-17; *International Child Abduction Act*, S.A. 1986, c. I-6.5; *Marriage Act*, R.S.A. 1980, c. M-6, s. 18; *Minors' Property Act*, R.S.A. 1980, c. M-16; *Provincial Court Act*, R.S.A. 1980, c. P-20; *Young Offenders Act*, S.A. 1984, c. Y-1, s. 1(g).

[167] For a useful review of current research on the effects of marital conflict, parental adjustment, custody and access on children following divorce, see Joan B. Kelly, "Current Research on Children's Post Divorce Adjustment — No Simple Answers" (1993), 31 Fam. & Conciliation Courts Rev. 29.

Alberta law should encourage parents, or other guardians, to work out their own arrangements for sharing parenting responsibilities without requiring the use of judicial process or court order.

RECOMMENDATION No. 5.4

The Sole Custody Model set out in Recommendations 23.4 to 35.4 should apply to parents living separate and apart who cannot agree about sharing their parenting responsibilities.

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

	Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]	**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]
A.	***Basic Meaning***		
A.1	Guardianship provides the basis for the allocation of parental responsibilities and rights; it constitutes the organizing principle	Day-to-day care and control of child	Contact with child (based on assumption that it is in the child's best interests to have contact with both parents)
B.	***Incidents***		
		NOW REC.	NOW REC.
B.1	GUARDIAN (PARENT OR NON-PARENT)		
B.1.1	"[M]ay act for and on	Yes Yes	Yes Only with

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

	Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
	behalf of the minor" (*DRA*, s. 46(a))				consent of custodial guardian
B.1.2	"[M]ay appear in court and prosecute or defend an action or proceedings in the name of the minor" (*DRA*, s. 46(b))	Yes	Yes	Yes	Only with consent of custodial guardian
B.1.3	"[A]fter furnishing any security the Court requires ..., has the care and management of the estate of the minor ..." (*DRA*, s. 46(c))	Yes	[Not included in this project]	Yes	[Not included in this project]
		NOW	REC.	NOW	REC.
B.1.4	"[H]as the custody of the person of the minor and the care of his education" (*DRA*, s.	Yes	Yes	?	No

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

	Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
	46(d)) Includes: (a) custody of child, where guardians live together; (b) access to child, where guardian lives apart from child				
B.1.5	(Parent) may appoint testamentary guardian (*DRA*, s. 48)	Yes (parent)	Yes (any guardian)	Yes (parent)	Yes (any guardian)
B.1.6	Responsible to protect child (extreme failure to protect leads to *CWA* intervention)	Yes	Yes	Yes • may apply for custody where custodial parent	Yes

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

		Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
					unfit • may take custody where custodial parent dies	
			NOW	REC.	NOW	REC.
B.2	PARENT ONLY					
B.2.1	(Parent) shall give child love and affection (common law)		Yes (parent)	Yes (parent)	Yes (parent)	Yes (parent)
B.2.2	(Parent) shall provide child with the "necessaries of life" from parent's personal resources (*MOA,* s. 2)		Yes (parent)	Yes (parent)	Yes (parent)	Yes (parent)

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

	Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
C.	***Specific decision areas***				
C.1	Make lifestyle choices for child	Yes	Yes	Maintain communication with child; visit with child on terms as agreed or ordered by court	Maintain communica-tion with child; visit with child on terms as agreed or ordered by court
		NOW	REC.	NOW	REC.
C.2		?	Accommodate reasonable	?	May request

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
		requests from access parent for information about matters relating to child's health, welfare and education		information on child's health, education and welfare from third parties (as under *Divorce Act*, some provincial statutes)
C.3			?	Exercise guardianship powers consistent with parenting decisions of custodial guardian

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

		Guardianship		**Custodial Guardianship** **[Guardian (parent or non-parent) with whom child lives]**		**Non-custodial Guardianship*** **[Guardian (parent or non-parent) with whom child does not live]**	
C.4	Discipline child	Yes	Yes			?	Yes, as reasonable when in contact with child
C.5	Decide child's religious upbringing	Yes (*DRA*, s. 60)	Yes			?	No
		NOW	REC.			NOW	REC.
C.6	Make medical treatment decisions	Yes	Yes			?	Urgent/ emergency medical treatment decisions only
C.7	Decide child's name	Yes	Yes			Yes (usually; see *Vital Statistics*	Yes (no change)

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

	Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
				Act)	
C.8	Grant or refuse consent in matters concerning the child, *e.g.*	Yes = consent required unless a statutory exception applies or dispensed with by court			
C.8.1	• adoption (*CWA*, ss. 56, 57)	Yes	Yes	Yes	Yes
C.8.2	• marriage of child under 18 years (*Marriage Act*, s. 18)	Yes	Yes	No	No
C.8.3	• private guardianship (*CWA*, s. 52)	Yes	Yes	Yes	Yes
C.8.4	• change child's name (*Change of Name Act*, ss . 7, 7.1, 11, 12)	Yes	Yes	Yes	Yes
		NOW	REC.	NOW	REC.

PARENTAL RESPONSIBILITIES AND RIGHTS

SOLE CUSTODY MODEL

(unless otherwise ordered by the court or agreed to by the parties in writing)

		Guardianship	**Custodial Guardianship** [Guardian (parent or non-parent) with whom child lives]		**Non-custodial Guardianship*** [Guardian (parent or non-parent) with whom child does not live]	
C.9	Receive notice of matters affecting the child, *e.g.* in proceedings for:					
C.9.1	• declaration of parentage (*DRA*, s. 66)	Yes	Yes		Yes	Yes
C.9.2	• adoption (*CWA*, s. 60)	Yes	Yes		Yes	Yes
C.9.3	• child welfare — apprehension, supervision, temporary or permanent guardianship order (*CWA*, s. 18, 19, 21, 27)	Yes	Yes		Yes	Yes
C.9.4	• private guardianship order (*CWA*, s. 50)	Yes	Yes		Yes	Yes

PARENTAL RESPONSIBILITIES AND RIGHTS SOLE CUSTODY MODEL **(unless otherwise ordered by the court or agreed to by the parties in writing)**	**Guardianship**	**Custodial Guardianship** **[Guardian (parent or non-parent) with whom child lives]**	**Non-custodial Guardianship*** **[Guardian (parent or non-parent) with whom child does not live]**
C.10 Other?	?		?

* TP Access (non-guardian) is different. It will involve only specified contact or visiting privileges together with the powers necessary for the protection of any child who has been placed in the care of an adult for the time being (*e.g.* a babysitter).

CHAPTER 6 GUARDIANSHIP

A. Introduction

i) Existing statutes

In chapter 2, we described child guardianship provisions in the three Alberta statutes that provide for it: the *DRA*, the *CWA* and the *SCA*.[168] In this chapter, we will consider issues relevant to the reform of this law. In doing so, where relevant, we will look more closely at some of the existing provisions.

1. ALRI Report No. 60

In this report, we modify the definition of guardianship we recommended in ALRI Report No. 60 on *Status of Children*. We reproduce that definition here in order to examine its specific components:[169]

> "guardianship" means "guardianship of the person of a minor child and includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon a parent who is a guardian of a child."

2. Chapter organization

---

[168] In *Williams* v. *Williams* (1995), 13 R.F.L. (4th) 152 (Alta. Q.B.), the court identified four guardianship regimes: 1. private guardianship under *CWA*, Pt. 5, quoting ss. 49, 52, 53; 2. guardianship of minors under *DRA*, Pt. 7; 3. permanent and temporary guardianship under *CWA*, Pt. 3; and 4. *PCA*, s. 32(2). The first, second and fourth "regimes" fall under the private law. The third "regime" has to do with child protection as a matter of public law. The fourth "regime" is identified as such because case law holds that only a guardian may apply for custody or access under the *PCA*, s. 32: *S.(R.)* v. *L.(A.)* (1994), 6 R.F.L. (4th) 19 (Alta. Q.B.).

[169] ALRI Report No. 60, *supra*, note 4 at 17.

This Chapter is organized around four questions. First, we ask who is a child for purposes of guardianship? Second, we investigate what guardianship means. Third, we consider who are or should be the guardians of a child and how their guardianship is established. Here, we discuss three means of establishing guardianship: enactment in statute, appointment by the court or nomination by an existing guardian. Fourth, we discuss ways in which guardianship comes to an end. These include resignation by a guardian and removal of a guardian by the court.

B. Who is a "Child" for purposes of Guardianship?

i) Age cut-off

The definition of "guardianship" in ALRI Report No. 60 is restricted to a minor child. In Alberta, a minor is a person under 18 years of age.[170]

This recommendation is consistent with the existing law under which child guardianship ceases when a child attains 18 years of age, as do custody and access orders.

A cut-off age of 18 years is compatible with the *Divorce Act* which defines "child of the marriage" in section 2(1):

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (b) is the age of majority 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.

The *Divorce Act* definition applies to child support and to custody or access claims. Although the dual use of this definition has not presented practical problems

[170] *Age of Majority Act*, *supra*, note 81, s. 1.

for the courts, the exercise of judicial discretion over support and custody disputes has often resulted in fundamentally different approaches.[171] For example, a court may order support to be paid for a child over the age of majority who is in full-time attendance at a university. It is inappropriate, however, for courts to grant custody orders with respect to such children.[172] In fact, Canadian courts rarely grant custody orders after a child has attained sixteen years of age.[173]

---

[171] Richard Gosse and Julien D. Payne, "Children of Divorcing Spouses: Proposals for Reform", published in *Studies on Divorce* (Ottawa: Law Reform Commission of Canada, 1975) at 130.

[172] *Ibid.* at 142.

[173] See *Payne on Divorce*, *supra*, note 82 at 144; Davies, *supra*, note 106 at 518; and Gosse and Payne, *supra*, note 171 at 143.

The cut-off ages specified in legislation in other Canadian provinces or territories vary from age 16 to age 19.[174]

We recommend that, for purposes of guardianship, Alberta legislation should define a child as a person under 18 years of age. This recommendation is in line with the basic cut-off age we have recommended with respect to the child support obligation.[175]

1. Unmarried

A person under 18 years of age who marries has moved out of the sphere of parental control and taken on the responsibilities of adult life. We think that the definition of "child" should exclude married persons. Unmarried parents under 18 years who have children of their own would be included in the definition.

RECOMMENDATION No. 6.4Alberta legislation should define "child", for purposes of guardianship, as an unmarried person under 18 years of age.

C. What is "Guardianship"?

i) Not statutorily defined

---

[174] Gosse and Payne, *ibid.* at 144. For relevant provincial legislation establishing the provincial age of majority (18 years of age in several provinces, including Alberta, and 19 years of age in others) as the age cut-off for guardianship, custody and access orders, see: *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 1; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1; *Children's Law Act*, R.S. Nfld. 1990, c. C-13, ss. 24(2) and 73 (right of child over 16 years to withdraw from parental control); *Family Maintenance Act*, R.S.N.S. 1989, c. 160, ss. 2(c) and 18(2); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 18(2) and 65 (right of child over 16 years to withdraw from parental control); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 1(2); *Children's Law Act*, S.S. 1990, c. C-8.1, s. 2(b); *Children's Act*, R.S.Y. 1986, c. 22, s. 28(2).

[175] ALRI RFD No. 18.3 at 46 and Rec. No. 6.3(a) at 51. In exceptional circumstance, where the child is unable to withdraw from parental charge, we have recommended that the court have discretion to order child support beyond the age of majority.

As stated in Chapter 2, the guardianship of a child is the most important of the rights and obligations that can be entrusted to a parent. That is because children are necessarily dependent and must look to adults for the fulfilment of their material and emotional needs. Guardianship is a responsibility: the rights and obligations associated with it exist for the benefit of the child, not the parent.[176]

The *DRA* does not define the terms "guardian" or "guardianship". The abolition, by section 53, of the ancient categories of guardianship "in socage, by nature and for nurture" sheds modest light on its meaning.[177]

The definition in the *CWA* does not go much further. It defines "guardian" to mean:[178]

> (i) a person who is or is appointed a guardian of the child under Part 7 of the *Domestic Relations Act*, or

---

[176] For relevant legislation in other Canadian provinces and territories that may be of assistance, see *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 29 (loss of guardian), s. 30 (appointment by court, consent of child, third parties), s. 31 (security), s. 32 (application for directions) and s. 33 (resignation); *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 26 (custody), ss. 55-68 (guardianship of minor's property) and s. 83 (rule of construction to deal with changes in terminology); *Guardianship Act*, R.S.N.S. 1989, c. 189; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20 (custody), ss. 48-62 (guardianship of minor's property) and s. 78 (changes in terminology); *Children's Law Act*, S.S. 1990, c. C-8.1, s. 2(d)(g) and (h) (definitions of "custody", "guardian of the property of a child" and "legal custodian"), s. 6(2) (court may authorize parent to appoint guardian of property of a child) and ss. 30-39, (guardianship of property of a child); *Children's Act*, R.S.Y. 1986, c. 22, s. 28 (custody) and ss. 60-74 (guardianship of property of a child).

[177] What is guardianship in socage? See Anne H. Russell, "Guardianship," a research paper prepared for the ALRI (February 26, 1973), at 34:

> Guardianship in socage, which was the feudal guardianship of lands inherited by infants, guardianship by nature, which was the guardianship of the eldest son for the purposes of heredity of title and guardianship for nurture of an infant up to the age of 14 are abolished in section 38 of the [*Domestic Relations Act*, R.S.A. 1970, c. 113].

[178] *CWA*, s. 1(1)(k).

(ii) a person who is a guardian of the child under an agreement or order made pursuant to this Act.

With respect to guardianship, the *SCA* simply confers on the Surrogate Court the same powers, jurisdiction and authority that the *Court of Queen's Bench Act* gives to the Court of Queen's Bench or a judge of that court. It includes no definition.

To understand what the statutes mean when they refer to "guardianship" or "guardian", it is necessary to draw on the meaning assigned to these words historically and in the case law.

1. A bundle of responsibilities

As discussed in Chapter 2,[179] modern notions of guardianship usually describe it as a bundle of rights and responsibilities held by an adult, usually a child's parent, to be exercised for the benefit of the child. Where the parents live separate and apart, guardianship provides the basis for the allocation of parental responsibilities and rights, that is to say, it constitutes the organizing principle.

Custody is the principal incident of guardianship. Access is closely related to custody. We gave examples of other incidents of guardianship in Chapter 2, in the description of the existing Alberta law.[180]

The definition in ALRI Report No. 60 speaks of the rights of the guardian. We think that the essence of guardianship has to do with the guardian's responsibilities toward the child, not the guardian's "rights", although in order to carry out their responsibilities to the child, the guardian necessarily has

---

[179] *Supra*, Chapter 2, heading C, on the application of the historical and common law.

[180] *Supra*, Chapter 2, headings B.1.A and C.1; see also *supra*, Chapter 5, Sole Custody Model Chart commencing at 71.

some rights in law, e.g. to consent to medical treatment, etc. We have amended the recommendation accordingly.

2. Distinctions relating to guardianship

(1) Guardianship v. trusteeship

The definition in ALRI Report No. 60 is restricted to guardianship of the person of the child. It does not include responsibility for management of the child's property. This appears to contrast with the role of a guardian under the existing Alberta law. The *DRA*, section 46, envisages that, ordinarily, control over the person and the property of a minor will be vested in the same person. Section 46(c) declares that a guardian:

> 46(c) after furnishing any security the Court requires under section 51, has the care and management of the estate of the minor, whether real or personal, and may receive any money due and payable to the minor and give a release in respect of it.

Section 51 requires each guardian of the estate of a minor "to furnish the security, if any, ordered by the Court."[181] (It is not entirely clear whether section 46(c) applies to all guardians or only to testamentary guardians, although we are hard-pressed to find a reason for giving testamentary guardians wider powers than other guardians.)

The exclusion from guardianship of responsibility to manage the child's property is consistent with reforms enacted in England. The *Children Act (England), 1989*, in section 5(6), clarifies the legal effects of guardianship by limiting it to "guardianship of the person" and excluding "guardianship of the estate."[182]

---

[181] Compare *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 25, which renders a guardian both guardian of the person and property, and gives the guardian the powers of a trustee, including responsibility for the care and management of the child's estate and the power to deal with property and apply it for the child's benefit.

[182] See Bainham, *supra*, note 130 at 192, 230, 270, 311 and 362. See also Andrew Bainham, *Children: The New Law*, Jordan & Sons, Bristol, 1990; and David Hershman and Andrew McFarlane, *Children: Care Law and Practice* (Bristol: Jordan & Sons, 1991). And see Great Britain, The Law Commission, Law Com. No. 172, *Family Law - Review of Child Law: Guardianship and Custody* (1988); and Scottish

> The use of this concept means that it will no longer be necessary to preserve the distinction between guardianship of the person and guardianship of the estate. The latter will only arise (if at all) in circumstances prescribed by rules of court (s.5(11) and (12)).

One argument for excluding a child's property from "guardianship" is that the law of trusts now occupies the field. Accordingly, "trusteeship", rather than "guardianship", is more appropriate modern terminology to use when dealing with the management of a child's property.[183] By distinguishing between "guardianship" and "trusteeship," guardianship can be confined to responsibility for a child's person.

Law Commission, Discussion Paper No. 88, Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property, (October, 1990).

[183] Law Reform Commission of the Australian Capital Territory, *supra*, note 95 at 10.

In Alberta, the *Dependent Adults Act* takes the approach of distinguishing between "guardianship" and "trusteeship" and confining "guardianship" to responsibility for a dependent adult's person. We took this approach in our project on the Surrogate Court Rules. This approach has also been taken in Australia.[184]

Another choice would be to adopt the Newfoundland, Ontario, Saskatchewan and Yukon distinction between "guardianship" and "custody" by confining "guardianship" to matters relating to a minor's property.[185] "Custody" could then be used in its broad sense to signify guardianship of a minor's person. If this approach were adopted, it would be necessary to confer discretionary powers on the courts to grant custody to more than one person and to divide incidents of custody.[186]

We prefer to limit the meaning of "guardianship" to "guardianship of the child's person" and to use the word "trusteeship" in relation to responsibility for the care and management of a child's estate. We make this choice in the interests of consistency with other Alberta legislation, and our view that this language makes the functional distinctions clear.

a. Guardianship v. custody

As just discussed, the definition of guardianship in ALRI Report No. 60 distinguishes "guardianship" from custody. Under this definition, custody is an incident of guardianship, not the equivalent.[187] "Guardianship" involves

---

[184] Australia, *Family Law Amendment Act, 1987*, No. 181, ss. 63E and 63F.

[185] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 26 (custody), ss. 55-68 (guardianship of minor's property) and s. 83 (rule of construction to deal with changes in terminology); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20 (custody), ss. 48-62 (guardianship of minor's property) and s. 78 (rule of construction to deal with changes in terminology); *Children's Law Act*, S.S. 1990, c. C-8.1, s. 2(d), (g) and (h) (definitions of "custody," "guardianship of property of a child" and "legal custodian") and ss. 30-39 (guardianship of property of a child); *Children's Act*, R.S.Y. 1986, c. 22, s. 28 (definition of "custody") and ss. 60-74 (guardianship of property of child). And see *supra*, Chapter 3.

[186] See e.g., *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 20.

[187] Compare the *Divorce Act*, s. 2(1) and case law interpreting it. Under that Act, the definition of "custody" is broad, making it almost synonymous with "guardianship".

responsibility for the long-term welfare of the child, whereas "custody" refers to day-to-day care of the child. This is in accordance with our recommendation in Chapter 4 on the Approach to Reform.

b. Custodial v. non-custodial guardianship

In the usual situation, where both parents are living together with their child, as joint guardians they share the full panoply of powers, responsibilities and rights that the law attaches to guardianship. Issues relating to the allocation of the responsibilities associated with guardianship tend to arise when the guardians are living separate and apart. According to the Sole Custody Model we recommend, guardianship may be custodial or non-custodial. The custodial guardian is the guardian with whom the child lives. A non-custodial guardian is a guardian with whom the child has contact but does not reside. The responsibilities of a custodial guardian are set out in Chapter 7, and the responsibilities of a non-custodial guardian, in Chapter 8.

3. Main responsibilities of guardian

(1) Authority (*DRA*, section. 46)

The *DRA*, section 46, specifies four areas in which a guardian has authority. A guardian

> (a) may act for and on behalf of the minor,
>
> (b) may appear in court and prosecute or defend an action or proceedings in the name of the minor,
>
> (c) after furnishing any security the Court requires under section 51, has the care and management of the estate of the minor, whether real or personal, and may receive any money due and payable to the minor and give a release in respect of it, and
>
> (d) has the custody of the person of the minor and the care of his education.

With regard to section 46(1)(c), we stated in Chapter 1 that our Project does not include review of the law concerning the management of a child's property and we drew a distinction in Chapter 3 between guardianship and trusteeship. Those

words notwithstanding, until a thorough review is made of the law concerning the management of a child's property, we think that section 46(c) should be retained. It would be risky simply to change the language from "guardianship" to "trusteeship" until research has been done into the law with respect to a child's property. We do not want our recommendations to leave an hiatus in the law.

With regard to section 46(1)(d), we note that this provision does not restrict custody to cases where the parents or guardians are living together. However, later sections of the *DRA* provide for resolution of questions about custody and access where the child's parents are living separate and apart.

a. Upbringing of child (*DRA*, sections. 54-61)

Generally, the *DRA* does not elaborate on the responsibilities of a guardian for bringing up a child. They must be found elsewhere in the law. However, sections 54-61 specifically cover custody (the major incident of guardianship) and access.

In contrast, the *Dependent Adults Act*,[188] which empowers the Surrogate Court to appoint a guardian to make personal decisions for a "dependent adult," lists several areas in which a court may authorize a guardian to make decisions.[189] Those areas include:[190]

- residential and living arrangements;
- education and training;
- social activities;
- daily living routines (including diet and dress);
- employment;
- legal proceedings (excluding estate matters);

---

[188] R.S.A. 1980, c. D-32.

[189] A "dependent adult" is a person who is repeatedly and continuously unable (i) to care for himself, and (ii) to make reasonable judgments in respect of matters relating to his person: *Ibid.* s. 6(1).

[190] *Ibid.* s. 10(2).

· and health care.

Under the existing law, acting within the boundaries established under the *CWA* and criminal law, a guardian is responsible to make decisions in the following areas relating to a child's upbringing:

- lifestyle choices for the child
- discipline of the child
- religion
- medical treatment
- child's name

The guardian has the authority to grant or refuse consent in various matters concerning the child. These matters include: the child's adoption;[191] the marriage of a child under 18 years of age;[192] private guardianship of the child;[193] and changing the child's name.[194]

In addition, the guardian is entitled to receive notice of certain matters affecting the child, for example, proceedings for: a declaration of parentage;[195] adoption;[196] apprehension, supervision, or temporary or permanent guardianship;[197] or a private guardianship order.[198]

---

[191] *CWA*, ss. 56, 57.

[192] *Marriage Act*, *supra*, note 54, s. 18.

[193] *CWA*, s. 52.

[194] *Change of Name Act*, *supra*, note 52 , ss.1, 7, 7.1 and 12.

[195] *DRA*, s. 66.

[196] *CWA*, s. 60.

[197] *CWA*, ss. 18, 19, 21 and 27.

[198] *CWA*, s. 50.

The guardian may also be under a common law duty to care for and protect the child. The failure to carry out this duty may lead to state intervention by way of proceedings under the *CWA* or the criminal law taken against the guardian for the child's protection.

b. Appointment of substitute guardian (*DRA*, section 48)

The *DRA*, section 48, gives a parent authority to appoint a person to be the guardian of a child in the event of that parent's death. The appointment may be made by deed or will. The person appointed guardian shares responsibility jointly with the other parent or a guardian appointed by the other parent. This form of appointment is commonly known as "testamentary guardianship".

Notably, the existing law does not permit a parent to appoint a person to be guardian while that parent is still alive, in the event of the parent's mental incapacity to act as a guardian. We say more about appointment by a parent under heading D.3.

c. Duty to foster independent decision making (*DAA*, s. 11)

Under the *Dependent Adults Act*, the guardian is required to exercise their power and authority:[199]

> (a) in the best interests of the dependent adult,
>
> (b) in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgments in respect of matters relating to his person, and
>
> (c) in the least restrictive manner possible.

It would be possible to borrow some of the language from this provision for use in describing the guardian's role toward a child. However, it would not be appropriate to incorporate paragraph (c) because there are times when it may be in the child's best interests for a parent to place restrictions on the child.

---

[199] *Ibid.* s. 11.

d. Restriction of powers (*DRA*, section 56)

The guardianship authority specified in the *DRA*, section 46, exists except where "otherwise limited." Those limitations may exist under statute or be imposed by court order.

4. Definition of guardianship: recommendation

We recommend that Alberta enact the following definitions of "guardianship" and "guardian." These definition modify the definition proposed in ALRI Report No. 60.

RECOMMENDATION No. 7.4Alberta legislation should define "guardianship" and "guardian" as follows:

(1) "guardianship" has the meaning attributed to it at common law and includes

(a) the responsibility of an adult person for the control and custody of the child, the responsibility for making decisions relating to the care and upbringing of the child and the responsibility to exercise all powers conferred by law upon a parent who is a guardian of a child, and

(b) the rights necessary to carry out this responsibility.

(2) a "guardian" is a person who has the authority to exercise the powers of guardianship with respect to a child.

RECOMMENDATION No. 8.4

Alberta legislation should provide that, unless a court orders otherwise, where the guardian lives with the child, the guardian has all the powers, responsibilities, rights and duties of guardianship attributed to a custodial guardian by Recommendation No. 28.4.

5. Guardianship powers: parent v. non-parent

A guardian may be either a parent or a non-parent.[200] In Alberta, the powers and duties of a guardian who is not a parent derive from the common law. As stated in chapter 2, at common law a guardian generally has the same powers and duties as a parent. However, unlike a parent, a guardian who is not a parent does not have a duty to support the child from personal resources or a duty to give the child love and affection.[201] We agree with the common law position.

RECOMMENDATION No. 9.4A non-parent guardian should have the same powers, responsibilities, rights and duties as a parent guardian, except the duties to give the child love and affection and to support the child from the guardian's personal resources.

D. Who is a Guardian?

---

[200] Generally, the role is identical, but see *supra*, Rec. No. 9.4, and *infra*, Rec. No. 28.4(8) and (9).

[201] White, *supra*, note 45.

A guardian may obtain their authority from one of three sources: statute, court appointment or nomination by an existing guardian.[202] (There is authority indicating that a child who is without a guardian may be able to nominate their own guardian, but it is more of historic than present interest.[203])

1. Statutory guardianship

(1) Mother and father as joint guardians

Under the *DRA*, s. 47(1), the mother and the father, if he satisfies specified conditions, are joint guardians of their child. "Mother" is not defined. Section 47(1) provides:

> **47**(1) Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are
>
> (a) the mother, and
>
> (b) the father, if
>
> (i) he was married to the mother of the child at the time of birth of the child,
>
> (ii) he was married to the mother of the child and the marriage was terminated by
>
> (A) a decree of nullity of marriage granted not more than 300 days before the birth of the child, or
>
> (B) a judgment of divorce granted not more than 300 days before the birth of the child,
>
> (iii) he cohabited with the mother of the child for at least one year immediately before the birth of the child, or

---

[202] The policy discussion on statutory, court-appointed and guardian-nominated guardians draws, in part, on research work completed for the ALRI in 1973 by Russell, *supra*, note 177 at 53-61.

[203] *Halsbury's Laws of England* (3rd ed.), vol. 21, at 207, para. 459.

> (iv) he married the mother of the child after the birth of the child and has acknowledged that he is the father of the child.

The current wording, enacted in 1991, embodies the substance of recommendations made in ALRI Report Nos. 20, 45 and 60 to eliminate differences in the legal relationship between parent and child arising from the birth of a child within or outside marriage.[204]

We are now inclined to amend the wording of section 47(1)(b)(iii) to describe a father who cohabited with the mother of the child for a period of at least 12 consecutive months calculated to include a period of time immediately before, during which or after the child was born and has acknowledged that he is the father of the child. This amendment would emphasize that the bond established between the father and the child after the child's birth is more important to guardianship than the length of time the father cohabited with the mother before the child's birth.

We recommend that the contents of section 47(1) of the *DRA* be retained but with the amendment we have discussed.

In making this recommendation, we recognize that it carries forward a distinction between the grounds upon which the presumption of paternity should operate and the grounds for statutory guardianship. The presumption of paternity, contained in the *DRA*, Part 8, casts a broader net over those individuals who might be called upon to take financial responsibility for the child, whereas the statutory guardianship has a narrower focus. This narrower focus identifies as guardians those who have a demonstrated commitment to the upbringing of the child.

As stated in Chapter 1, we do not propose to revisit Part 8 of the DRA, on establishing parentage. The provisions in Part 8 are based on recommendations

---

[204] *Supra*, note 13, s. 2, enacting recommendations made in ALRI Report Nos. 20, 45, and 60, *supra*, note 4 at 4-8 and 19 (Report No. 60), especially.

we made in our Report Nos. 20, 45 and 60 on the *Status of Children* and we see them continuing to exist alongside the recommendations we make in this project.

a. Mother as sole guardian

By implication, where the conditions specified in section 47(1) that constitute the "father" as a guardian are not met, the mother is the sole guardian of her child. Note, however, that other sections in the *DRA* allow the court to make an order appointing a guardian to act jointly with her.[205] A deceased parent also has the authority to name a guardian to act jointly with the surviving parent.

RECOMMENDATION No. 10.4Alberta legislation should provide:

Unless a court of competent jurisdiction otherwise orders, the joint guardians of a minor child are

(a) the mother, and

(b) the father, if

(i) he was married to the mother of the child at the time of birth of the child,
(ii) he was married to the mother of the child and the marriage was terminated by

(A) a decree of nullity of marriage granted not more than 300 days before the birth of the child, or

(B) a judgment of divorce granted not more than 300 days before the birth of the child,

---

[205] See *infra*, heading D.2.

(iii) he cohabited with the mother of the child for at least 12 consecutive months calculated to include a period of time immediately before, during which or after the child was born and has acknowledged that he is the father of the child, or

(iv) he married the mother of the child after the birth of the child and has acknowledged that he is the father of the child.

2. Appointment by court

(1) Existing law

(a) DRA

Three sections in the *DRA* empower the court to appoint a guardian. Section 47(2) empowers the court to appoint as a guardian a person declared to be a parent under Part 8. Section 49 empowers the court to appoint a guardian to act jointly with the child's father or mother or a testamentary guardian appointed by a deceased parent. Section 50 empowers the court to appoint a guardian where (i) a minor has no parent or lawful guardian, or (ii) the parent or lawful guardian is not a fit and proper person to have guardianship.[206]

(a) Appointment of person declared to be a parent under Part 8, section 47(2)

The *DRA*, in s. 47(2), empowers the court to appoint a parent as guardian. Section 47(2) says:

> If, on the application of a person declared to be a parent under Part 8, the Court is satisfied that it is in the best interest of the child and that the applicant is able and willing to assume the responsibility of a guardian

[206] A guardianship order that is not based on sufficient evidence may be set aside on appeal: *F.(K.L.)* v. *K.(M.F.)* [1997] 1 W.W.R. 558 (B.C.S.C.).

> towards the child, the Court may appoint the person as a guardian jointly with any other guardian.

The applicant must be a person declared to be a parent under Part 8 of the Act. Part 8, provides for the establishment of parentage where no presumption exists, or where a person wishes to overturn the presumption. It is under Part 8 that the court may declare a man who does not satisfy the conditions set out in section 47(1) to be the father.

Before making an appointment under section 47(2), the court must be satisfied that it in the best interest of the child. The appointment is as guardian of the person. The person appointed acts as a guardian "jointly with any other guardian."[207]

(b) Appointment of person to act jointly with existing guardians, section 49

Section 49 of the *DRA* enables the court to appoint a guardian to act either jointly with a child's father or mother or with the testamentary guardian named by a deceased parent. Appointments may be made "from time to time." The person appointed becomes a guardian of the child's person and estate.

[207] Case law indicates that it is not appropriate to issue an order under the *DRA*, s. 47, that would divest natural parent of their right as against a stranger; the *DRA*, s. 50, should be used in such cases: *W.(K.K.)* v. *R.(E.J.)* (1989), 69 Alta. L.R. (2d) 95, 102 A.R. 106 (Alta. Q.B.). However, it is not entirely clear when the child's "best interests" test is to be used and when the parental "fitness test" is to be used: *Williams* v. *Williams*, *supra*, note 81 at 157 (R.F.L.).

The intent under section 49 is ambiguous. Section 49 may have been intended to be read with section 48, which would limit its operation to testamentary situations. Nevertheless, current practice does not so restrict it and applications for guardianship may be brought under this section by persons such as grandparents, stepparents or same-sex partners. Section 49 is also difficult to read in connection with two parents.[208] It seems to be directed at the situation where one of the parents has survived and the deceased parent has not named a testamentary guardian. However, as worded, its lends itself to the broader interpretations under which the court may add a guardian even where both parents are alive and have status as guardians of their child.

(c) Appointment in absence of guardian or appropriate guardian, section 50
Section 50 operates on the application of the child ("a minor") or anyone on the child's behalf. It empowers the court to a appoint one or more guardians of the child's person and estate, or either of them. Section 50 is not to be used where the purpose of application is to facilitate a child's adoption.[209] Joint guardianship in these circumstances is properly sought under the private guardianship provisions in the *CWA*, Part 5.[210]

No parent or lawful guardian. Section 50(1)(a) covers a situation where the child finds themself with no legal guardian. That situation would be unusual. Other legal responses are available. For example, the *CWA* permits a child in need of protection to be taken into the care and placed under the guardianship of a director of child welfare. As well, the Public Trustee may act as guardian of the estate of a child where the child finds themself without a proper guardian.[211]

---

[208] *W.(K.K.)* v. *R.(E.J.)*, *ibid*.

[209] *DRA*, s. 50(2), enacted S.A. 1994, c. 36, s. 25.

[210] *W.(K.K.)* v. *R.(E.J.)*, *supra*, note 207 at 114 (A.R.): "... Parts 5 and 6 of the Child Welfare Act [private guardianship and adoption] were designed to deal with contested situations that arise in adoption proceedings."

[211] *Public Trustee Act*, R.S.A. 1980, c. P-36, ss. 4(a), (f), (h) and 6. It is preferable that the Public Trustee not become guardian of the person because of the potential that exists for conflict between the roles of guardian of the person and trustee of the estate.

Parent or lawful guardian unfit. Section 50(1)(b) gives the court jurisdiction to appoint a guardian where "the parent or lawful guardian is not a fit and proper person to have the guardianship" of the child.[212] Case law makes a distinction between the test applied where the person seeking to unseat an existing guardian is a guardian and where that person is a legal stranger. In a contest between guardians, the test is best interests. The test for changing guardianship in "legal stranger" situations is unfitness, not best interests.[213]

ii. CWA

(i) Private guardianship order

As stated in Chapter 2, the *CWA*, Part 5, empowers the Provincial Court to appoint a private guardian of a child who has been in the continuous care of the applicant for more than 6 months, or who is the subject of a permanent guardianship order or agreement. When a private guardianship order is made the applicant is the guardian for all purposes, notwithstanding Part 7 of the *DRA*. The test for guardianship under the *CWA* is the best interests of the child rather than the fitness of the current guardian.[214] Parts 5 & 6 of the *CWA* were designed to deal with contested situations that arise in adoption proceedings.[215]

(a) Adoption

Another source of guardianship authority, an order of adoption, is found in the *CWA,* Part 6. An order of adoption may be made by a judge of the Court of Queen's Bench where[216]

---

[212] We recommend the repeal of the provisions relating to a parent or guardian who is "not a fit and proper person" and the substitution of court power to remove a guardian where the court is satisfied that the removal of a person as guardian is in the best interests of the child: see *infra*, heading E.2.

[213] *Knight* v. *Knight* (1992), 132 A.R. 341 (Alta. Prov. Ct.), at 352, citing *W.D.* v. *G.P.* (1984), 41 R.F.L. (2d) 229 (Alta. C.A.).

[214] *Williams* v. *Williams*, *supra*, note 77 at 154 (R.F.L.).

[215] *W.(K.K.)* v. *R.(E.J.)*, *supra*, note 207.

[216] *CWA*, s. 63(1).

> (a) the applicant is capable of assuming and willing to assume the responsibility of a parent toward the child, and
>
> (b) it is in the best interests of the child that the child be adopted by the applicant.

As stated previously, an adoption order places the adopted child and the adopting parent in the relationship of a biological child and parent as if the child had been born to the adopting parent in lawful wedlock.[217] In this report, when we use the word "parent," we include an adoptive parent.

iii. SCA

As stated in Chapter 2, with respect to guardianship, the *SCA* simply confers on the Surrogate Court the same powers, jurisdiction and authority that the *Court of Queen's Bench Act* gives to the Court of Queen's Bench or a judge of that court.

The usual procedure for the appointment of a guardian is by way of application to the Surrogate Court for a grant of letters of guardianship.

---

[217] *Ibid.* s. 64(1).

Rules established under the *SCA* formerly provided that an application for letters of guardianship must be accompanied by the consent of the child where the child is 14 years of age or over[218] and an affidavit containing specified information.[219] These *Rules* were replaced by new *Rules* which are the product of the ALRI project on the Surrogate Court Rules.[220] The new *Rules* are silent with respect to guardianship. The underlying intention is that the Court of Queen's Bench will handle the jurisdiction.

Where a deceased parent has named a guardian under the *DRA*, section 48, the need for letters of guardianship is subject to question. If a court order is needed to give effect to the nomination, the person becomes a court-appointed guardian and the parent nomination is little more than an expression of a parent's wish.

b. Relationship to other guardians

---

[218] *The Surrogate Rules*, Alta. Reg. 20/71 as am. Alta. Reg. 167/73, 328/73, 307/75 and 185/83.

[219] *Surrogate Court Rules*, Alta. Reg. 167/73; 185/83.

[220] ALRI Report No. 73, *Revision of the Surrogate Rules* (May 1996). The principal statutory amendments of ALRI RFD No. 10, *Revision of the Surrogate Rules* (October 1991) were enacted in the *Miscellaneous Statutes Amendment Act, 1992*, c. 21, s. 47. The Rules and Forms were enacted by OC 32/95 (Alta. Reg. 130/95).

An opportunity exists to clarify the existing law and expand the situations in which courts can confer guardianship over a child's person. As in the case of private guardianship under the *CWA*, an expanded understanding of the guardianship function would allow the court to fashion orders that recognize the role performed by persons who are serving in a parenting role but which do not sever the existing legal relationship between parent and child. For example, taking this approach, which is probably available under the existing law, would give parents and step-parents an option to adoption.[221] As commented in the case of *Copeland* v. *Price*,[222]

> I know of no bar to more than two guardians for a child. So the person who wants to assume a new role in the child's life can be made a guardian, and the two natural parents can remain, or become, guardians.

We recommend the enactment of legislation authorizing the court to appoint a guardian to act jointly with any one or more of the father or mother of the child or any other guardian.[223] Unless the court orders otherwise, the appointment should have no other legal effect on the parent-child relationship. The decision should be made in the best interests of the child.

---

[221] See Elizabeth J. Aulik, "Stepparent Custody: An Alternative to Stepparent Adoption" (1979), 12 Univ. Cal. Davis L. Rev. 604. See also *Fifth Report of the Royal Commission on Family and Children's Law*, *supra*, note 74 at 23-24, Rec. 8:

> Where there is an application to adopt, the court should be able to deny the application and substitute instead an order for guardianship if it thinks that it is in the best interests of the child to do so.

[222] (1997), 152 D.L.R. (4th) 439, 206 A.R. 276 (Alta.) at 447 (D.L.R.), *per* Coté J.A., suggesting that adoption may be unwise where there is a well-established relationship between the child and one natural parent.

[223] Regarding the need for guardianship and the number of guardians, see *Re J.A.G.* (1996), 45 Alta. L.R. 331 (Alta. Prov. Ct.). In this case, a grandmother and her partner applied, with the mother's consent, to be appointed guardians of a child along with the mother who would remain a guardian. The court held that the child's best interests would be served by appointing the grandmother as a guardian and that it was not necessary to appoint the grandmother's partner as well.

RECOMMENDATION No. 11.4

The court, acting in the child's best interests, should have power to appoint a guardian of the person of a child to act jointly with any other guardian or guardians of the child or as the sole guardian of the child.

c. Factors for court to consider in determining the child's best interests

The *DRA* is generally silent about the factors the Court of Queen's Bench or the Surrogate Court should consider when making decisions about guardianship. Their *parens patriae* jurisdiction, as superior courts, enables them to fill in the legislative gaps in the best interests of the child.

Before making a private guardianship order under the *CWA*, Part 5, the Provincial Court must be satisfied that[224]

> (a) the applicant is able and willing to assume the responsibility of a guardian towards the child, and
>
> (b) it is in the best interests of child.

As well, the child must have been in the continuous care of the person applying for guardianship for a period of more than 6 months preceding the application, although the court may waive this requirement in the best interests of the child (*CWA*, s. 49(2)(b). Several other specifics are legislated.[225]

We think it would be useful for legislation to list factors for the court to consider in making a guardianship decision in the best interests of the child. Under our recommendation, consideration of the listed factors is permissive, not mandatory.

---

[224] *CWA*, s. 49(1).

[225] For a fuller description, see Chapter 2, heading B.2.

RECOMMENDATION No. 12.4

Alberta law should provide that, in making a guardianship decision that is in the best interests of the child, the court may consider any of the following factors:

(1) the need for guardianship;

(2) the motivation of the person seeking guardianship;

(3) the wishes of any existing guardian;

(4) the plans the person seeking guardianship has for the child, including the desirability of maintaining continuity in the child's life;

(5) the child's relationship with the person seeking guardianship;

(6) if the child is twelve years of age or older, the views and preferences of the child;

(7) the suitability of the person seeking guardianship, having regard to

(a) the child's age;

(b) the child's

(i) health, emotional well-being and special needs,

(iii) physical, psychological, social and economic needs;

(8) the ability and willingness of the person seeking guardianship to make decisions with respect to the child's guidance and education, special needs, and the provision of the necessaries of life;

(9) the child's religious upbringing;

(10) the child's ethnic and cultural heritage;

(11) whether the person seeking guardianship has ever acted in a violent manner towards

(a) this or any other child,

(b)the child's parent or other guardian, or

(c) a member of their household;

(12) the connection of the person seeking guardianship with any other guardian;

(13) the effect on the child if more than one person is appointed guardian

(14) the capacity of the person seeking guardianship to cooperate with an existing guardian;

(15) the methods for assisting cooperation in resolving disputes between guardians and the willingness of the person seeking guardianship to use those methods;

(16) any other factor the court considers relevant.

3. Nomination by guardian

(1) Two situations

Our discussion addresses two situations, those in which the nomination will operate on the death of the nominating guardian and those in which the nomination will operate in the event that the guardian becomes mentally incapable of acting as a guardian.

a. Guardian's death

(a) Existing law

As already stated, the *DRA*, section 48, allows a parent — either the mother or the father — to name a guardian to fulfil the responsibilities of the parent should the parent die. The person named acts jointly with any other guardian.

Section 48 is a re-enactment of the *Abolition of the Old Tenures Act, 1660*.[226] That Act enabled the father of a person under the age of 21 years to appoint a guardian of the child after his death. The nomination was effective even against the claim of the child's mother for custody.

In the absence of a statutory provision authorizing it, the nomination of a testamentary guardian has no legal effect.[227] A provision conferring the authority to name a testamentary guardian in Ontario was repealed in 1923 although other legislation in Ontario left the law in some doubt.[228] Studies prepared by the Family Law Project of the Ontario Law Reform Commission recommended that the office of testamentary guardian be restored by statute in Ontario so that either or both parents may name a guardian of their children by deed or will.

i. Authority to name a testamentary guardian

Who should have the authority to name a testamentary guardian? Under the *Children Act (England), 1989*, a testamentary guardian may be appointed by the court or nominated by a parent with parental responsibility or a guardian.[229] The Scottish Law Commission has recommended that "a guardian should be able to appoint another individual to take his or her place as the child's guardian in the event of his or her death."[230]

---

[226] 12 Can. II, c. 24.

[227] *Scott* v. *Scott*, 15 D.L.R. (3d) 374 (N.B.) where it was held that the *Abolition of Old Tenures Act of 1660* is not in force.

[228] Compare *Re Doyle* [1943] O.W.N. 119 and *Re McPherson Estate* [1945] O.W.N. 533.

[229] Great Britain, *Children Act, 1989*, s. 5(13).

[230] Scottish Law Commission Discussion Paper 88, *supra*, note 182, para 3.5, Rec. 12.

(a) Parents who are guardians

Different considerations may apply to parents in different situations. We will consider three: (1) custodial parents; (2) non-custodial parents; and (3) parents who are temporarily deprived of parental authority.

Custodial parents. Section 48 refers to "a parent". There is little doubt that parents who are constituted as guardians by statute or named as guardians by the court have authority to nominate a guardian under section 48. In ALRI Report No. 60, we recommended that "parent" in section 48 be defined to mean "a parent who is a guardian of the child."[231]

Non-custodial parents. Where the parents are living separate and apart, should the non-custodial parent have the power to name a testamentary guardian? A custody order granted on separation or divorce does not deprive the parent of guardianship but merely of the physical custody of the child. Generally, the parent retains the right to supervise the upbringing of the child to a certain extent. It may be desirable to enable the parent to make a testamentary nomination to ensure such supervision after the parent's death. We recommend that a non-custodial parent should be able to appoint a testamentary guardian.

Parents temporarily deprived of parental authority. Although section 29(2) of the *CWA* permits a director of child welfare to exercise guardianship to the exclusion of the parent under a temporary guardianship order, as long as a parent remains a guardian, a nomination pursuant to section 48 likely would be valid.[232] State intervention to protect the child would not inhibit the parent's ability to name a testamentary guardian or the

---

[231] ALRI Report No. 60, *supra*, note 4 at 29 (s. 23 of proposed *Status of Children Act*). An adoptive parent is in the same position as a parent constituted as a guardian by virtue of the operation of the *CWA*, s. 65, and the *DRA*, s. 47.

[232] In *Re Wood* (1972), 5 R.F.L. 25 (B.C.S.C.), the Court held that a temporary guardianship order under the *Protection of Children Act* did not prevent the father, who was not deceased, from appointing the maternal grandparents as guardians of the infant by deed subsequent to temporary order of guardianship under the *Protection of Children Act*. Equity was held to prevail and the court directed that the child be delivered to the grandparents as legal guardians.

testamentary guardian's ability to act if the parent dies. We recommend that a parent who has been temporarily deprived of parental authority should be able to appoint a testamentary guardian.

(b) Parents who are not guardians

This category includes parents whose children have been placed under permanent guardianship order, parents whose children have been adopted and parents who have been declared unfit. The ability of a parent to name a testamentary guardian where that parent is not a guardian or has been permanently deprived of parental authority is questionable. It is incongruous that a parent who does not have these powers during that parent's lifetime should be entitled to name a guardian to act on death. A parent in this category should not have the authority to name a testamentary guardian.

(c) Guardians who are not parents

We have recommended that a non-parent guardian should have the same powers, responsibilities and rights as a parent guardian with two exceptions.[233] The power to name a testamentary guardian is one of the usual incidents of guardianship when it is held by a parent and we see no reason to treat other guardians differently.[234]

(d) Recommendation

A guardian, whether parent or non-parent, should be able to name a guardian of the person or property of a minor to act in the stead of the nominating guardian on that guardian's death.

---

[233] Rec. No. 9.4, *supra* at 88.

[234] In British Columbia, the *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 25(2), gives a guardian who is not a parent the same powers and duties as a parent except the power to appoint a guardian.

RECOMMENDATION No. 13.4

A guardian of a child, either parent or non-parent, should have the power to name a guardian to act on the nominating guardian's death.

ii. Scope of responsibilities

Under the *DRA*, as at common law, a testamentary guardian was guardian of both the person and the estate of the child.[235] This was peculiar because the parent was a guardian of the person only. The *DRA* modifies the common law. Section 46(c) gives a guardian (parent included) the care and management of the estate of the minor. The court may first require the guardian to furnish security under section 51. Section 51 requires each guardian of the estate of a minor to furnish the security, if any, ordered by the court. The opposite approach is taken in England. There, the nomination by a guardian confers powers, responsibilities and rights with respect to the child's person but not the child's estate.[236] Guardians are given "parental responsibility,"[237] and the child's estate is dealt with separately.[238]

As stated in RFD 18.1, the *Overview* to this project, our recommendations are limited to "guardianship of the person" of a child. Issues relating to the management and protection of a child's property, which would include the effect of section 46(c), are left for law reform in a future project.[239]

---

[235] In *Re Andrews*, 8 Q.B. 153; *Talbot* v. *The Earl of Shrewsbury*, 4 My. & Cr. 673; *Arnott* v. *Bleasdale*, 4 Rm. 387.

[236] Great Britain, *Children Act, 1989*, s. 5(11).

[237] *Ibid.* s.5(6).

[238] Bainham, *supra*, note 82.

[239] For a discussion of the distinction between guardianship (by which we mean "guardianship of the person") and trusteeship (sometimes referred to as "guardianship of the estate"), see *supra*, Chapter 6, heading B.3.a.

iii. Relationship between nominated guardian and surviving parent or guardian

What should be the relationship between a nominated guardian and the surviving parent? Should they act jointly without any distinction as to their positions, or should the nomination take effect only when the surviving parent dies or ceases to be a guardian of the child? The situations will vary.

(a) Parents living together at time of death

Under the *DRA*, section 48, the testamentary guardian acts jointly with any other guardian. The relationship between a testamentary guardian and a surviving parent is highly sensitive.[240] If the testamentary guardian is a guardian jointly with the surviving parent, there would be no distinction in their positions.

[240] See Great Britain, The Law Commission, Law Com. Working Paper No. 91, *Guardianship* (1985), paras 3.30-3.40 and Law Com. No. 172, *supra*, note 182, paras 2.26-28.

Under the existing law in Alberta, where the parents were living together prior to one parent's death, the courts are likely to give the other parent custody of the child ahead of any other guardian unless good reason exists to depart from this position.[241] As in the case of a dispute between parents, where a dispute arises between the surviving parent and the nominated guardian, the best interests of the child would prevail.

In England, the general rule now is that the effect of the nomination will be deferred until the surviving parent dies or ceases to have parental responsibility for the child:[242]

> Where the child was living in a united family when one parent died, the objective is to protect the survivor from unwelcome interference by an outsider. If the survivor should desire outside support, it was thought that this could be sought informally and ought to be a matter of choice. The onus will now be on the appointed guardian to bring the issue of the child's welfare to court if he is not happy.

Previously, the law in England was similar to the law in Alberta: testamentary guardianship usually took effect immediately on the death of a parent so that the parental role was shared by the guardian and the survivor.[243]

The general aim of the new scheme is "to balance the claims of the surviving parent and the wishes of the deceased in the way which will be best for the child."[244]

---

[241] In *Loewen* v. *Rau et ux.* [1972] 3 W.W.R. 8 (Sask. Q.B.), the court held that, notwithstanding the appointment by the wife of a testamentary guardian upon her death, the right of the natural father to the custody of this child was not to be lightly interfered with when the child's welfare would not be endangered by granting custody to the father. The court considered the natural rights of the father as paramount to all others unless very serious and important reasons required that they be disregarded. The effect of the provision, in the Saskatchewan *Infants Act*, that a testamentary guardian shall act jointly with the surviving parent is not discussed.

[242] Great Britain, *Children Act, 1989*, s.5(8); Bainham, *supra*, note 130 at 194.

[243] The current provision brings the law in England into line with the law in other member countries of the Council of Europe: Bainham, *ibid*.

[244] Bainham, *Ibid.* citing Law Com. No. 172, *supra*, note 182, para. 2.27.

The Scottish Law Commission, on the other hand, recommended the retention of the existing rule that "a guardian appointed by a parent to act after his or her death is not precluded from accepting office merely because the other parent is surviving:"[245]

> In many of these cases it might well be desirable for an appointment of a guardian to be capable of coming into operation, even although there is a surviving parent somewhere.

It reasons that if the nominating parent does not wish the appointment to take effect until after the other parent's death, it can be stated in the appointment. If the nominating parent does not so provide, "the more flexible solution, which is more likely to ensure that there is someone to look after the child's interests, is not to preclude a guardian from accepting office merely because there is a surviving parent in existence."[246]

(b) Parents living separate and apart

Preferring the surviving parent may seriously undermine the effect of the power of a parent to name a testamentary guardian, particularly where the parents are separated or divorced prior to the death of the spouse.

In the case of parents who are separated, the English sections prefer a surviving parent with a residence order (*i.e.* custody) over a testamentary guardian.[247] With the exception of a joint residence order (*i.e.* both parents have custody),[248] where the deceased parent had a residence order at the date of death, the guardian takes office immediately:[249]

---

[245] Scottish Law Commission, Discussion Paper No. 88, *supra*, note 182, Rec. 16 (para. 3.12), at 52-53.

[246] *Ibid.*

[247] Great Britain, *Children Act, 1989*, s. 5(7), (8) and (9).

[248] *Ibid.* s. 5(9).

[249] *Ibid.* s.5(7); Bainham, *supra*, note 130 at 194.

> The Commission was of the view that a residential parent should be able, and indeed encouraged, to provide for the future upbringing of the child in the event of his own death.

This means that the appointed guardian and surviving parent share parental responsibility. If either the parent or guardian wishes to change the arrangement, the onus will be on "the person wishing to challenge the existing arrangements".[250]

(c) Discussion: when should a nominated guardian take office?

Designing legislative distinctions that accurately anticipate the factual situations that may arise is problematic. The English provisions have attracted a number of criticisms. One criticism is that where the deceased parent had a residence order, the legislation leaves it uncertain whether the nominated guardian or surviving parent is entitled to take over physical care of the child. Talk of challenging existing arrangements does not make sense where neither of them has custody of the child:[251]

> It would have been preferable if the legislation had spelled out whether the guardian or survivor had priority over the matter of the child's physical care. Where the deceased was living with a step-parent, who was also the appointed guardian, the child's household may be preserved but even here, it is not at all clear that the step-parent will be a more appropriate care giver than the survivor.

A second criticism is the seeming assumption that a non-residential (*i.e.* non-custodial) parent "should not resume physical care automatically on the death of the residential parent":[252]

---

[250] Bainham, *ibid.* at 195, citing Law Com. No. 172, *supra*, note 182, para. 2.28.

[251] Bainham, *ibid*.

[252] *Ibid*.

> Why should this judgmental assumption be made? Non-residential parents remain parents with parental responsibility and may in many cases maintain an active interest in their children. Would it not have been more consistent with this notion of continuing responsibility to have placed confidence in them in the first instance, subject to the right of the appointed guardian to seek the court's assistance in appropriate cases?

A third criticism is found in the report of the Scottish Law Commission, which was not convinced that the exception for joint residence order covers all cases:

> It is quite possible for the parents of a child to be separated and yet for there to be no custody order (or residence order) in favour of one of them. The father, for example, may simply have abandoned his family. Moreover, the idea that both parents should retain full parental responsibilities and rights after separation, and not seek court orders unless this is necessary in the interests of the child, is gaining ground.

As the Scottish Law Commission has commented, permitting a nominated guardian to act after the death of the nominating parent provides a more flexible solution than the English general rule deferring the effect of the nomination until the surviving parent dies or ceases to have parental responsibility for the child. It is more likely to ensure that there is someone to look after the child's interests. Given the changing structure of families, in the future there may be more cases of separated parents where there is no custody order. This makes questionable the wisdom of hinging the testamentary guardian’s position on the existence or absence of such an order. The distinction may not, in fact, operate in the best interests of the child. As previously stated, if the nominating guardian does not wish the guardianship to take effect until after another guardian's death, the nominating guardian can so provide.

(d) Surviving parent declared unfit

The *DRA*, section 50, empowers the court to appoint a guardian where "the parent or lawful guardian is not a fit and proper person to have the guardianship of the minor". The parent or lawful guardian is not removed under this section. Removal is possible under section 52, but the removal is for the "same causes for which trustees are removable" which suggests the section is directed to guardianship of the estate.

Section 54(1) authorizes the court pronouncing a judgment for judicial separation or a decree of divorce to declare the parent responsible for the marriage breakdown "to be a person unfit to have the custody" of the children. By section 54(2), the parent declared to be unfit "is not entitled as of right to the custody or guardianship of those children on the death of the other parent." This wording does not prevent the parent from applying for custody or guardianship at that time. Section 54(3) provides that the court may revoke the declaration of unfitness at any time.

Later in this chapter, under heading E.2, we recommend that the provisions dealing with parental unfitness be replaced by giving the court power to remove a parent as guardian. In other words, under our recommendations a parent will either be or not be a guardian. There will be no intermediate status.

(e) Recommendation that nominated guardian act jointly with surviving guardian

In our view, Alberta legislation should provide that, unless the nomination provides otherwise, testamentary guardianship should take effect immediately on the death of the nominating guardian. The nominated guardian should then act jointly with any other guardian of the child.

If this recommendation is not accepted, a number of questions about when the testamentary guardianship should take effect will have to be answered. Some examples are: Should it take effect immediately on death of the appointing parent no matter what? Only if that parent had custody at death? Must the custody be under an order? Only after the death of the surviving parent? Should a non-custodial parent have to demonstrate having taken a suitable interest in the child?

RECOMMENDATION No. 14.4Unless the nominating guardian stipulates otherwise, testamentary guardianship should take effect immediately on the nominating guardian's death and the appointed guardian should act jointly with any other guardian of the child.

iv. Formalities

(i) Method of nomination

The English legislation "aims to facilitate the private appointment of guardians by relaxing the formal requirements."[253] There, to be effective, appointments need only be made in writing, dated and signed. It is no longer necessary to draw up a deed or will.[254] We agree with this change and recommend it for Alberta.

(a) Revocation of nomination

The English legislation allows the guardian making the nomination to revoke it. The Scottish Law Commission recommends the enactment of similar legislation.[255] We agree that the nominating guardian should be able to revoke the nomination.

(b) Acceptance of nomination

---

[253] Bainham, *supra*, note 130 at 194.

[254] Great Britain, *Children Act, 1989*, s.5(5); Bainham, *ibid*.

[255] Scottish Law Commission, Discussion Paper No. 88, *supra*, note 182, para 3.7.

The English Act permits a nominated guardian to disclaim their nomination within a reasonable time.[256] The Scottish Law Commission recommends that a nomination "not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention."[257] We think Alberta legislation should expressly provide that a guardianship nomination does not take effect until it is accepted expressly, or impliedly by unequivocal conduct.

(c) Nomination of more than one guardian

Where more than one guardian is named, and unless the nomination expressly provides otherwise, the Scottish Law Commission recommends the enactment of a provision allowing any one or more of the persons so named to accept the appointment.[258] We endorse this recommendation.

(d) Requirement of letters of guardianship

Does a testamentary guardian appointed by a parent have authority to act without the benefit of a court order or letters of guardianship? Under the existing law, it is probably unnecessary to make application for letters of guardianship pursuant to the *Surrogate Court Act* where a deceased parent has nominated a testamentary guardian.[259] We have concluded that a court order or letters of guardianship should not be necessary.

(e) Recommendations

---

[256] Great Britain, *Children Act, 1989*, s. 6(5).

[257] Scottish Law Commission, Discussion Paper No. 88, *supra*, note 182, para 3.8.

[258] *Ibid.* para. 3.9.

[259] In *Re Pritchard* [1930] 2 W.W.R. 112. Compare *Re Shaleski* [1927] 1 W.W.R. 355 (Man. C.A.) in which Fullerton J.A., dissenting, stated by way of obiter that a guardian appointed by a will does not become the guardian by the mere act of appointment; the appointment must be given effect by the Surrogate Court; until this is done, it has no binding effect. Legislation in Manitoba stated that the Surrogate Court may give effect to a testamentary appointment. No such provision is found in the Alberta *Surrogate Court Act*. The majority of the court held that an order of the court granting the mother custody of her infant child would not deprive the father of the right to appoint a testamentary guardian.

RECOMMENDATION No. 15.4The nomination of a guardian should be effective if it is made
(a) by will, or
(b) in a written document that has been signed, witnessed and dated.

RECOMMENDATION No. 16.4The nominating guardian should be able to revoke the nomination.

RECOMMENDATION No. 17.4A guardianship nomination should not take effect until accepted expressly, or impliedly by unequivocal conduct.

RECOMMENDATION No. 18.4If more than one person is nominated as a guardian, any person so nominated should be entitled to accept the nomination, even if it is declined by any other nominee, unless the nominator expressly provides otherwise.

b. Guardian's temporary absence or mental incapacity

Notably, the existing law does not permit a guardian to name a person to act as guardian where the guardian is temporarily absent from the jurisdiction or where the guardian loses the mentally capacity to fulfil the role of a guardian.

We recommend that legislation be enacted to permit such nominations. The nomination would have a purpose similar to an enduring power of attorney

or an advance directive with respect to personal matters in that it would allow a guardian to plan for contingencies that may occur while the guardian is still alive. The nomination should take effect on the occurrence of the event or condition identified in the nominating document and in accordance with its terms.

RECOMMENDATION No. 19.4A guardian should be able to appoint a person to act in their place in the event of the guardian's temporary absence or incapacity to act as a guardian.

E. When Does Guardianship End?

i) Guardian's resignation

The *DRA*, section 52(2) permits a testamentary guardian or a guardian appointed by order or letters of guardianship to resign as a guardian with court permission. The court has power to impose any terms and conditions on the resignation that it considers just. We recommend the retention of this provision.

1. Guardian's removal by court order

(1) Statutory guardian

In Alberta the removal of a parent as guardian occurs only through adoption, the issue of a permanent guardianship order or the termination of other guardianship when a private guardianship order is made under the *CWA*.[260]

The *CWA*, section 54(2), authorizes the court making a private guardianship order to make an order terminating the guardianship of any other guardian of the child if the other guardian consents, or if, "for reasons that appear to it to be sufficient, the Court considers it necessary or desirable to do so." Section 54(2) operates notwithstanding Part 7 of

[260] *CWA*, ss. 65(2) (adoption), s. 32(3) (permanent guardianship order) and s. 54(2) (private guardianship).

the *DRA*. It therefore authorizes the removal of a statutory guardian, a court-appointed guardian or a nominated guardian.

Under the *DRA*, the court can make a finding that the parent "is not a fit and proper person" to have guardianship[261] or that the parent who caused the marriage breakdown is "a person unfit to have the custody" of children of the marriage in which case the parent "is not entitled as of right to the custody or guardianship of those children on the death of the other parent."[262] However, no section clearly empowers the court to remove the parent as a guardian.[263]

We think that legislation should empower the court to remove a statutory guardian.

a. Court-appointed guardian

The *DRA*, section 52, empowers the court to remove "guardians appointed by order or letters of guardianship." The power appears to be directed to guardianship of the child's property because the section specifies that these guardians can be removed "for the same causes for which trustees are removable."

---

[261] *DRA*, s. 50(b).

[262] *DRA*, s. 54. This declaration may be revoked: *Ibid.* s. 54(3).

[263] Compare legislation in New Zealand, which enables the court to deprive a parent of the guardianship of his child if the court is satisfied that the parent is for some grave reason unfit to be a guardian of the child or is unwilling to exercise the responsibilities of a guardian: *Guardianship Act, 1968*, No. 63.

The *CWA*, section 54(3), permits the court to terminate a private guardianship order where a parent or other guardian "is capable of resuming and willing to resume the responsibilities of guardianship of the child" and "it is in the best interests of the child to do so".[264] The consent of the child is required where the child is 12 years of age or over.[265]

We recommend that the court should be empowered to remove a court-appointed guardian.

b. Nominated guardian

In addition to guardians appointed by order or letters of guardianship, the *DRA*, in section 52, empowers the court to remove a testamentary guardian. The power is exercisable "for the same causes for which trustees are removable."

We agree that the court should be able to remove as guardian a person nominated by a guardian.

RECOMMENDATION No. 20.4The court, where it is of the opinion that the guardian's removal is in the best interests of the child, should have power to remove any guardian.

2. Child's maturation

(1) Attaining age of majority

---

[264] *DRA*, s. 54(3) is not available to a person whose guardianship is terminated under s. 54(2).

[265] *CWA*, s. 54(4).

The Scottish Law Commission recommends that once a guardian has accepted office, the guardianship should be terminated only by the child's attaining the age of 16 years, the death of the child or the guardian, or a court order.[266] We agree with these reasons for termination, except that the child's age cut-off should be 18 years rather than 16 years.

a. Marrying

We would add two other circumstances. The first circumstance would be when the child marries.

b. Establishing independence

The second circumstance would be when the child establishes a life independent of the parent or guardian (at common law, a "mature minor").

3. Guardian's death

It is obvious that guardianship cannot continue when the guardian dies.

RECOMMENDATION No. 21.4Except where an appointment or nomination provides for earlier termination, guardianship should be terminated by

(a) the guardian's resignation;

(b) the child (i) attaining the age of majority, or

(ii) marrying;

(c) the guardian's death; or

(d) a court order to remove the guardian.

F. Resolution of disputes between guardians

---

[266] Scottish Law Commission, Discussion Paper No. 88, *supra*, note 182, para. 3.16 at 133-134. Recommendation 18 of the Scottish Law Commission may be usefully compared to subsection 63F(3) of Australia, *Family Law Amendment Act, 1987*, No. 181 which provides that a guardianship or custody order terminates when a child attains 18 years of age or marries. For specific definitions of "guardianship" and "custody", see Australia, *Family Law Amendment Act, 1987*, s. 63E(1) and (2).

Whatever the source of their authority (statute, court appointment or nomination by an existing guardian), guardians may be involved in disputes regarding their respective roles. The *DRA* does not contain specific provision whereby application may be made to the court to resolve a dispute between guardians. We think that it would be a good idea for legislation to provide for the expeditious resolution of disputes, as does legislation in New Zealand. On an application by a guardian, the court should be able to decide how the responsibilities shall be managed, including, in the case of a contest between a statutory guardian (*i.e.*, a parent) and a nominated guardian, whether they shall act jointly or whether one of them shall be the child's sole guardian.

RECOMMENDATION No. 22.4Legislation should provide for the expeditious resolution, by the court, of disputes between guardians.

CHAPTER 7 CUSTODY

A. Custody: An Incident of Guardianship

As stated in Chapter 3 under heading C.1.B, the meaning of the term "custody" is ambiguous. Used in its broad sense, it is synonymous with "guardianship of the person" but in its narrow sense it is confined to day-to-day care and control of the child. In this Chapter, "custody" takes on its narrow meaning as an incident of guardianship. This is in keeping with our recommendation in Chapter 5 that Alberta enact legislation that builds on the existing concepts of guardianship, custody and access.

B. Existing Law: A Review

The existing law is summarized in chapter 2. Here, we will highlight provisions that are relevant to the issue of child custody.

1. Alberta

(1) *DRA*, section 56

As stated in chapter 2, the *DRA*, section 56, requires the court to have regard to three factors in any application for custody, namely:

- the welfare of the minor,
- the conduct of the parents, and
- the wishes of the mother and the father.

Pursuant to judicial pronouncements, the "welfare of the child" — now largely superseded by the language "best interests of the child" — has long been considered the paramount consideration in custody proceedings.

a. *PCA*, section 32

The *PCA*, section 32, empowers the Provincial Court to make an order for custody or access. In doing so, the Court must have regard to the best interests of the child. No factors are specified. Case law now requires that applicants under this section must first be guardians.[267] Case law also indicates that once an application is made under the *CWA*, by "necessary implication," custody and access orders can, and maybe even should, be made within that jurisdiction.[268]

2. *Divorce Act*

The *Divorce Act*, section 16(8), requires the court making a custody order to "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." Similar criteria apply to variation proceedings under section 17(5). The declaration, in the *Divorce Act*, that the best interests of the child shall be determined by reference to the "condition, means, needs and other circumstances of the child" opens up a potentially unlimited field for judicial inquiry.

Section 16(9) prohibits the court from taking past conduct into consideration "unless the conduct is relevant to the ability of that person to act as a parent". Section 17(6), which applies to variation proceedings, is similar. These sections reflect the predominant trend of judicial decisions under the predecessor *Divorce Act*, enacted in 1968, even though section 11 of that Act specifically required the courts to have regard to the "conduct of the parties". Most judges have long acknowledged that custody dispositions must not seek to impose a penalty for spousal misconduct or confer a reward on an unimpeachable spouse.

---

[267] See e.g. *R.S.* v. *A.L.* (1994), 158 A.R. 227 (Alta. Q.B.); *A.W.* v. *K.S.* (1995), 183 A.R. 147 (Alta. Prov. Ct.) ; and *Lemire* v. *Lemire* (1992) (unreported, No. 3906-00122 Q.B.). See also *W.D.* v. *G.P.* (1984), 41 R.F.L. (2d) 229, 5 W.W.R. 289, 54 A.R. 161 (Alta. C.A.) (new *CWA* enacted subsequently); and *White* v. *Barrett* [1973] 3 W.W.R. 193 (Alta. C.A.) (on the plain meaning of "parent" and "father" under the *PCA* predecessor section: *Family Court Act*, R.S.A. 1970, c. 133, s. 10). See *infra*, Chapter 10 for further discussion of the existing law with respect to the issue of standing to apply for guardianship, custody or access.

[268] *V.F.* v. *J.L.* (1994), 163 A.R. 1 (Alta. Prov. Ct.); *A.W.* v. *K.S.*, *ibid.*

Section 16(10) requires the court to "give effect to the principle that a child ... should have as much contact" with each parent as is consistent with the child's best interests. For this purpose, the court is required to "take into consideration the willingness of the person for whom custody is sought to facilitate such contact." It has been objected that the emphasis on cooperation unfairly tips the balance against a custodial parent who has been the victim of violence at the hands of the other parent.

Joint custody may be ordered under section 16(4), which authorizes the court to make an order granting custody to "any one or more persons."

3. Other provinces

Several provinces and territories, including British Columbia, New Brunswick, Newfoundland, Ontario, Saskatchewan and the Yukon, have legislated the child's best interests as the basis for decision and statutorily designated particular factors that the courts must take into account in determining the best interests of a child.[269]

C. Current Trends

Over the past century, two dramatic shifts in custody have occurred—from a strong paternal preference, to a strong maternal preference, and from a strong maternal preference to the present day philosophy that the father and the mother are forever.

Where the child and the child's parents have lived together, common sense suggests that, ordinarily, the parents' separation or divorce should not sever their bonds with the child. Each parent should be able to enjoy a continuing meaningful relationship with the child. This possibility will be affected adversely if the parents engage in persistent conflict after separation and divorce. The point also loses much of its force where a parent totally withdraws from the child's life or where a child is born outside marriage and a bond has not been established with the absent parent.

---

[269] *Supra*, note 66.

Under the *Divorce Act*, increased recognition of the importance of preserving the bond between child and parent is manifested by changes in orders for joint custody and access. Before 1968, orders for joint custody were statistically insignificant. By the late 1980s, they had grown to represent 12 per cent of all custody dispositions on divorce.[270] Twenty-five years ago, access orders entitled the non-custodial parent to spend a few hours with the child at the weekend and a few days with the child during school holidays. Today, a non-custodial parent is likely to be granted access privileges one or more nights every week and from Friday to Sunday on alternate weekends together with substantial time sharing during school vacations.

Other changing attitudes toward the parental role relate to the weight attached to the wishes of the child, the role of the primary caregiver, the place of ethnic and cultural diversity, the role of religion, altered perceptions of morality, concern about domestic violence and the significance of sexual orientation.

D. Determination of Best Interests: Legislative Options

---

[270] *Supra*, note 131 at 133-136.

In the discussion of legislative options, we draw from three independent reviews of empirical data conducted in the United States in 1970, 1975, and 1984,[271] and from four studies, published in the early 1990s.[272] From these studies, it can be concluded that the "best interests of the child" — the existing basis on which custody decisions are made — is an indeterminate standard and that little is known about the consequences of alternative custody dispositions.[273]

In the twenty-five years spanned by these studies, there has been only modest advance in the availability of sophisticated data that evaluates alternative custody dispositions and points the way to appropriate statutory reforms. The dearth of sound empirical data has contributed to widely divergent conclusions about the future direction that legislators should take with respect to the determination of the child's best interests in custody disputes.

We will discuss four approaches to legislative reform. The first approach is to enact a list of factors for the court to consider. The second approach is to enact a set of intermediate level rules for the court to apply. The third approach is to legislate a set of statutory presumptions or formal preferences to guide litigants, lawyers and the court. The fourth approach is to require courts to engage in a two-step process which commences with an assessment of the child's developmental needs and then moves to assessment of each parent's ability to meet the child's needs.

1. List of factors

---

[271] Ellsworth and Levy, *supra*, note 119; Mnookin, *supra*, note 115; Chambers, *supra*, note 152.

[272] Schneider, *supra*, note 149; Bala and Miklas, *supra*, note 153; Barbara Bennett Woodhouse, *supra*, note 125; and Joan V. Kelly, *supra*, note 167.

[273] *Ibid.*

This approach is taken currently in Canada. Both courts and legislators have listed many factors for the courts to consider in determining a child's best interests in a custody dispute.[274]

The *Custody and Access: Public Discussion Paper* lists 22 factors found in provincial or territorial legislation. They are:[275]

- the conduct of the parents
- the wishes of the father and the mother
- the health and emotional well-being of the child including any special needs for care and treatment
- where appropriate, the views of the child
- the love, affection and similar ties that exist between the child and other persons

---

[274] See *Payne's Divorce and Family Law Digest*, Richard De Boo Publishers, §22.0 PARENTING RIGHTS. Provinces or territories that have statutorily designated particular factors include British Columbia, New Brunswick, Newfoundland, Ontario, Saskatchewan and the Yukon: *supra*, note 66. In determining whether an existing custody and access arrangement made under the *Divorce Act* should be varied because of a custodial parent's intention to move out of the jurisdiction with the child, the Supreme Court of Canada stated, in *Goertz* v. *Gordon* (1996), 134 D.L.R. (4th) 321, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177, that the court should consider the following factors, among others (at 342 (D.L.R.)):

> (a) the existing custody arrangement and relationship between the child and the custodial parent;
> (b) the existing access arrangement and the relationship between the child and the access parent;
> (c) the desirability of maximizing contact between the child and both parents;
> (d) the views of the child;
> (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
> (f) disruption to the child of a change in custody;
> (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

The court also held that the "maximum contact" principle in ss. 16(1) and 17(9) is mandatory but not absolute.

[275] Federal/provincial/territorial Family Law Committee, *Custody and Access: Public Discussion Paper, supra*, note 108 at 51-52 (Appendix B).

- education and training for the child
- the capacity of each person to whom guardianship, custody, or access rights and duties may be granted to exercise these rights and duties adequately
- the effect upon the child of any disruption of the child's sense of continuity
- the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child
- the child's cultural and religious heritage
- the length of time the child has lived in a stable home environment
- 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 the special needs of the child
- the ability of each parent seeking custody or access to act as a parent
- plans proposed for the care of the child
- the permanence and stability of the family unit with which it is proposed that the child will live
- the relationship by blood or through an adoption order between the child and each person who is a party to the application
- the personality, character and emotional needs of the child
- the physical, psychological, social and economic needs of the child
- the capacity of the person who is seeking custody to act as legal custodian of the child
- the home environment proposed to be provided for the child
- the plans that the person who is seeking custody has for the future of the child
- the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child

Listing factors to be considered in determining a child's best interests does not eliminate the perennial problem of indeterminacy. Nevertheless, by focusing attention on specific matters thought to be of significance to the welfare

or best interests of a child, it does provide some structure for the exercise of judicial discretion.[276]

2. Intermediate level rules

In his 1975 review of empirical data, Mnookin proposes that three intermediate level rules be statutorily enacted to assist courts to determine the best interests of the child where a dispute exists about the allocation of parenting responsibilities. They are:

> First, custody should never be awarded to a claimant whose limitations or conduct would endanger the health of the child ...
>
> Second, the court should prefer a psychological parent (i.e., an adult who has a psychological relationship with the child from the child's perspective) over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent. ...
>
> Third, subject to the two rules noted above, natural parents should be preferred over others. ...

[276] See Bainham, *supra*, note 130.

Mnookin notes that intermediate rules "make the resolution by adjudication of some private disputes relatively straightforward." However, "these three standards would not ... dispose of ... controversies between two natural parents, neither of whom would endanger a child's physical health, where both are psychological parents."[277] Such controversies constitute "a very large class of private disputes" whose "resolution ... by adjudication poses a genuine dilemma."

He goes on to consider six additional rules that could be imposed in these cases, but concludes that none of them "seems preferable to the best-interests standard." The six additional rules he considers are awarding custody:[278]

> (1) on the basis of the sex of the parent (e.g., maternal preference);
>
> (2) to the parent of the same sex as the child;
>
> (3) to the richer parent;
>
> (4) to the parent who would spend more time with the child;
>
> (5) to the parent chosen by the child; or
>
> (6) to the parent whose psychological relationship with the child would be "less detrimental".

The lack of adequate empirical data means that any shift to a more rules-based approach to legislating child custody dispositions must be viewed with caution:[279]

> ... the very inability to make predictions about the consequences of alternative custody dispositions and the lack of a social consensus about the values that should inform child rearing make the formulation of rules—by the court or the legislature—very problematic at the present time.

---

[277] Mnookin, *supra*, note 115 at 282-283..

[278] *Ibid.* at 283.

[279] *Ibid.*

3. Statutory presumptions

Three of the studies from which we have drawn propose the introduction of statutory presumptions to guide judges exercising judicial discretion and lawyers and litigants settling custody issues.

a. Ellsworth and Levy (1970)

In their 1970 review of empirical data, Ellsworth and Levy recommended that "[legislation] should articulate ... a series of 'presumptions' which under ordinary circumstances would relieve the judge of extensive fact-finding and decision-making responsibility".[280] These presumptions would operate "instead of ... an abstract and valueless instruction that the judge be guided by the 'best interests of the child'."

Ellsworth and Levy endorsed two fundamental presumptions. First, legislation should presume the mother to be "the appropriate custodian—at least for young children, and probably for children of any age."[281] This presumption is based on the extremely high percentage of cases in which "custody is awarded to the mother—with ample justification and very frequently with the husband's acquiescence." Second, a natural parent should be entitled to custody as against a third party.[282]

In addition to these two major presumptions, Ellsworth and Levy made three additional suggestions. They proposed that custody legislation "should delineate the circumstances under which the child's choice is (a) relevant, and (b) dispositive."[283] They also suggested that the legislation "should include a provision that specifically prohibits modification petitions for a given period

---

[280] Ellsworth and Levy, *supra*, note 119 at 202.

[281] *Ibid.*

[282] *Ibid.* at 204-207.

[283] *Ibid.* at 207.

(one or two years, at least) following the initial decree in the absence of a showing (by affidavit only) of extraordinary circumstances — e.g. that the child's physical health is seriously and immediately endangered by the present circumstances."[284] Finally, they proposed that custody legislation should take account of non-adversarial methods of custody adjudication, such as independent assessments by "[providing] a procedural framework to which new modes of adjudication can conform and should expressly adopt those modes that appear likely to improve custody hearings and/or dispositions."[285]

b. Chambers (1984)

[284] *Ibid.* at 209.

[285] *Ibid.* at 210.

In his 1984 review of empirical data, Chambers[286] also recommends the legislation of certain statutory presumptions, or "starting premises". However, the conclusions he formulated in light of his review of empirical data are somewhat different from those of Ellsworth and Levy. Chambers suggested that:[287]

> ... judges would be wise to adopt as a starting point for their thinking about "children's best interests" the premise that children five or under should in general remain with their primary caretaker.

He proposed the enactment of a formal preference for primary caretakers. This preference could be overturned only where the other parent adduces "clear-and-convincing" evidence that he or she is the more suitable placement. The clear-and-convincing evidence standard of proof is perceived as more stringent than a "preponderance of evidence" test.

The presumption in favour of the primary caretaker would apply "only to disputes involving children up to five years of age."[288] For children between the ages of six and twelve, Chambers had "no suggestions for a new rule." Courts would simply have to make do with the unweighted "best interests" test in its current form.[289] For the oldest children, children twelve or so who have reached adolescence, states might adopt a rule permitting the children to choose for themselves.[290]

---

[286] Chambers, *supra*, note 152.

[287] As previously stated, the Alberta Court of Appeal endorsed the "primary parent" approach to custody in *K.(M.M.)* v. *K.(U.)*, *supra*, note 51.

[288] *Ibid.* at 561-563.

[289] *Ibid.* at 564.

[290] *Ibid.*

Chambers also endorsed "the wider use of joint legal and joint physical custody."[291] He recommended that "legislatures should explicitly deprive courts of the power to disallow joint custodial arrangements voluntarily agreed upon by the parties" in the absence of a strong probability of serious harm to the child.[292] This recommendation, which endorses a policy of minimal judicial intervention,[293] did "not flow from the belief that parents who choose joint custody will invariably be serving their children's needs, but rather from the belief that courts are rarely in a better position to determine that some other arrangement will be better for the child."[294]

In the converse situation, where the parents disagree on joint custody, Chambers "would recommend to legislatures that they act to deprive courts of the power to impose joint custody over the objections of one or both parents."[295]

c. Bala and Miklas (1993)

Bala and Miklas also conclude that the best interests of the child standard offers little real guidance:[296]

> The best interests formula is vague, and requires decision-makers to inject into any dispute their own values, biases and beliefs about what will be "best" for someone else's children.

At the same time, they conclude that the "abandonment of a 'best interests' standard for decision-making is "politically, symbolically and morally impossible." They

---

[291] *Ibid.* at 565.

[292] *Ibid.*

[293] As to a policy of minimal judicial intervention in custody and child protection proceedings in England, see Bainham, *supra*, note 130.

[294] Chambers, *supra*, note 152 at 565.

[295] *Ibid.* at 566.

[296] Bala and Miklas, *supra*, note 153 at 127.

recommend, instead, that the law should have "certain clear presumptions about what is in a child's best interests." These presumptions "would best be developed and implemented by the legislatures" but, even without legislative action, they "may be useful for lawyers, assessors, mediators and parents for settling cases."

Bala and Miklas recommend the adoption of presumptions in four areas, noting that most of them are already being "slowly developed by Canadian judges and lawyers." Those areas are: (i) new concepts of shared parenting after separation, (ii) the primary caregiver presumption, (iii) the wishes of older children, and (iv) the presumption of continued parental relationship. In formulating these presumptions, they have attempted to work from "'the bottom up." In other words, the presumptions are " based on how parents actually make their own arrangements, with the legal rules reflecting parental attitudes and decisions, rather than having legal rules unrealistically imposed on parents."[297] In addition to these presumptions, they assume that parents "will have access to mediation and other services to assist them in resolving disputes."[298] They also emphasize that "the results of existing research, despite its limitations, must be taken into account in the continuing effort to make our laws more sensitive to the needs of children" on parental separation.[299]

i. Shared parenting after separation: new concepts

In this area, Bala and Miklas recommend the use, in court orders and domestic contracts, of a new terminology to describe parenting responsibilities:[300]

> Agreements and court orders should be based on the concepts of "parenthood," and the development of a post-separation "parenting plan" that makes use of such concepts as "primary and secondary

---

297 *Ibid.* at 137.

298 *Ibid.* at 138.

299 *Ibid.* at 140.

300 *Ibid.* at 129.

> residence," "continuing relations" provisions, "specific issue provisions" and "prohibitions."

The new terminology would "'lower the stakes' when parents disagree about issues."[301] Certain presumptions should apply. One presumption would be that it will be in the best interests of children that both parents will continue to exercise rights of parenthood after separation. Another presumption would be that both parents should be involved in decision-making after separation, at least in a consultative role.[302]

ii. Primary caregiver presumption

When parents cannot agree and the court becomes involved, a primary caregiver presumption should apply to the best interests of a child aged seven or under:

> ... in cases brought to the courts for resolution there should be a presumption that it will be in the best interests of a young child (seven and under) to continue to have their primary residence with the parent who was the "primary caregiver" when the family unit was intact.

---

[301] *Ibid.* at 128.

[302] *Ibid.* at 130.

A weaker presumption should apply to children aged 8 to 13 years. Both presumptions should be rebuttable if it can be "clearly demonstrated" that the operation of this presumption will be contrary to the best interests of the child. The "primary caregiver" would be defined by factual criteria, such as:[303]

> ... who was the most involved in feeding, disciplining, interacting with, playing with, clothing, entertaining and instructing the child, and making arrangements for the care or education of the child by others.

iii. Wishes of older children

A presumption should permit children aged 14 and over to "choose the parent with whom they will have a primary residence, and determine the extent of their relationship with the other parent."[304] They add that the views of younger children should always be conveyed to decision makers, but that their express wishes should be a less important factor. Bala and Miklas would make this presumption "somewhat weaker than other presumptions" for two reasons. First, children (especially younger children) should not be pressured into becoming involved in resolving disputes between their parents. Second, decision makers should be able to "assess the reasons why children are articulating particular preferences."[305]

iv. Presumption of continued parental relationship

---

303 *Ibid.* at 132.

304 *Ibid.* at 134.

305 *Ibid.*

Finally, there should be a presumption "that it is in the best interests of the children to have frequent and predictable contact with both parents."[306] This contact should be "on a schedule that accords with the child's developmental needs." The presumption would be set aside where it is "demonstrated that such involvement poses a significant risk to the child's physical or emotional well-being.[307]

4. Two-step process

The fourth approach is the adoption of a two-step process for determining a custody dispute. It has been proposed by Marvin C. Holz, a Judge of the Milwaukee Circuit Court in Wisconsin.[308] The first step would be to assess the child's developmental needs, including psychological, emotional, education and physical needs. The second step would be to make a comparative assessment of each parent's ability to meet those needs.

Assessment of the child's developmental needs would include consideration of the following factors:

· The child's adjustment to home, school and community;

· The quality of relationships between the child and parents, siblings and others;

· Consideration of the child's preference, if any, and reasons therefore;

· Effect of uprooting the child measured by its emotional impact, adaptability of the child and temporary disturbance versus long term gain.

Assessment of the parent's ability to meet the needs of the child would include consideration of the following factors:

· The quality and permanence of the proposed living environment for the child;

· The history of their proper responsibility for the care of the child and the existing emotional ties;

---

306 *Ibid.* at 135.

307 *Ibid.*

308 Queensland Law Society Journal (February 1981) at 6-7, citing an article entitled "Guidelines for Guardians Ad Litem - Custody Disputes".

· The capacity and disposition to provide love and affection, care and supervision, support and education and other special needs of the child;

· The physical and mental health of each parent, including work, social adjustment and educational background;

· The reasons for requesting custody;

· The attitude towards visitation by the non-custodial parent (i.e. access).

This approach has certain attractions, although the designated lists might incorporate other factors to be found in current Canadian provincial legislation.[309]

5. Recommendation

We recommend further that Alberta legislation should set out a list of factors for the court to consider in determining the child's best interests in a custody dispute. This is the approach taken in legislation reforming family law in other provinces and we think it appropriate for Alberta as well. In recommending that Alberta legislate a list of factors, we depart from the *Divorce Act*, section 16(8), which refers simply to "the best interests of the child ... as determined by reference to the condition, means, needs and other circumstances of the child." However, we intend that the legislated list we recommend should service as a guide to decision makers. Ultimately, as it is under the *Divorce Act*, the decision under the provincial law will be made in the "best interests of the child."

E. Factors

What factors should be legislated? We will consider several. In the discussion that follows, factors (1) to (12) embody traditional considerations whereas factors (13) to (20) embody more modern considerations. This is not an exhaustive discussion. Each of these factors gives rise to a vast body of legal literature — monographs, periodical articles, case law.

1. Child's age

---

[309] *Supra*, note 66.

The child's age has been regarded as a relevant factor for some purposes. Examples include the application of a maternal preference for the custody of younger children,[310] and the consideration of the child's wishes, particularly those of an older child.

2. Child's needs

A wide-angle view is taken of the child's needs. One or another statute in Canada has specified needs using language such as the following:[311]

- health, emotional well-being and special needs;
- personality, character and emotional needs; and
- physical, psychological, social and economic needs.

3. Parent's sex

Currently, one of the factors to which Canadian courts attach special importance is the inclination of the courts to grant custody to the mother in circumstances where she was the primary caregiver during the marriage.[312] In contrast, historically, the father was entitled to custody of his legitimate children while the mother was entitled to custody of her illegitimate child. Of course, the discretionary weighing of a factor is different from spelling out a preference in a rule. As Mnookin pointed out, sex-based rules would be inappropriate "because they reflect value judgments and sexual stereotypes that our society is in the process of rejecting."[313] Moreover, the courts would likely find that sex-based rules infringe the guarantee of equality right under *Charter*, section 15, and any infringement would be difficult to justify under section 1.

4. Child's relationship with parent

---

[310] Alberta courts no longer recognize a maternal preference: *R.* v. *R.*, *supra*, note 121.

[311] Federal/provincial/territorial Family Law Committee, *Custody and Access: Public Discussion Paper*, *supra*, note 108 at 51-52 (Appendix B).

[312] *Ibid.* See also Payne and Edwards, *supra*, note 146.

[313] Mnookin, *supra*, note 115.

Legislation often requires the court to consider the child's relationship with each parent. In Newfoundland, the *Children's Law Act* lists both the relationship created by "love, affection and emotional ties"[314] and the relationship that exists by "blood or adoption."[315]

The nature and quality of the child's past relationship with each spouse is an important consideration under the *Divorce Act*, sections 16(8) and 17(5). For example, the fact that one spouse has assumed the primary responsibility for child care during the marriage is important, particularly when the child is young and in need of close supervision and attention.[316] The past relationship between the child and each parent must be evaluated, however, in light of changing circumstances arising on or after separation or divorce. Economic considerations, for example, may compel a former full-time parent to seek employment.

Mnookin discusses imposing a rule which would require the court to choose the parent whose psychological relationship with the child would be "less detrimental."[317] He concludes by doubting that existing psychological theories are capable of providing "the basis to choose generally between two adults where the child has some relationship and psychological attachment to each."[318]

5. Child's relationship with other persons

---

[314] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(a). These words hint at the concept embodied in the "primary caregiver" presumption.

[315] *Ibid.* s. 31(2)(h).

[316] *Harden* v. *Harden* (1987), 54 Sask. R. 155, 6 R.F.L. (3d) 147 (Sask. C.A.) at 151. See also Susan B. Boyd, "Potentialities and Perils of the Primary Caretaker Presumption" (1990), 7 Can. Fam. L.Q. 1 and for strong criticism of this presumption, see Bruce Ziff, "The Primary Caretaker Presumption: Canadian Presumptions on an American Development" (1990), 4 Int. J. Law & Fam. 186. On the economic implications of assuming the role of primary caretaker, see *Willick* v. *Willick*, (1994), 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161 (S.C.C.), at 434 (D.L.R.), *per* L'Heureux-Dubé, J.

[317] He was an early proponent of giving preference to the "primary caregiver" in custody disputes.

[318] Mnookin, *supra*, note 115.

The child's relationship with persons other than the parents is also identified as a factor in some legislation. The Newfoundland *Children's Law Act* refers both to "other family members residing in child's household"[319] and "persons involve in the care and upbringing of the child."[320] As well, the FPTFLC has identified as an assumption commonly found in the case law, the disinclination of the courts to split the siblings between the parents.[321]

6. Child's wishes

The child's wishes are another factor often considered.[322] The requirement to consider the "views and preferences of the child" may be qualified by language such as "when the views and preferences can reasonably be ascertained"[323] or "if old enough to express a meaningful preference."[324]

The wishes of children of all ages have gained in importance over time.

Mnookin posits reasons why caution should be exercised in applying this factor:[325]

> Having the child choose has much to commend it. The child, after all, is the focus of social concern. Moreover, in the face of indeterminacy, why

---

[319] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(a)(ii).

[320] *Ibid.* s. 31(2)(a)(iii).

[321] Federal/provincial/territorial Family Law Committee, *Custody and Access: Public Discussion Paper*, *supra*, note 108.

[322] As previously discussed, Woodhouse, *supra*, note 125, advocates a child-centric redefinition of values, arguing that the current model of decision making is adult-centric, that is, it adopts values that serve the interests of adults more than the needs of children. Bala and Miklas recommend that the law should adopt a presumption in favour of honouring the wishes of a child 14 or over on the issues of residence and contact with the other parent: *supra*, note 153 at 126.

[323] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(b).

[324] Maine Revised Statutes, Ann. tit. 19-A, (1995, eff. Oct. 1, 1997), § 1653-3C.

[325] Mnookin, *supra*, note 115 at 285.

> not have the child's values inform the choice? The child, better than the judge, may have an intuitive sense of the parent's love, devotion, and capacity. But particularly for infants, this standard is little more than a random process, and for the younger child, what would this standard mean? Would the child be able to express a preference? If so, would the child's choice be pressured or corrupted by the pre-litigation behaviour of one parent? Is it desirable or fair to ask the child to choose? This rule might make the child, in the parents' eyes, responsible for the choice. This might often be a very great burden for the child. Furthermore, if the child were made responsible, the child's relationship with the nonchosen parent might be substantially injured. Many states now require a judge to consider a child's expressed preference in applying the best-interests standard, and the choice of those young people twelve to fourteen years of age or older is by statute often made dispositive. Perhaps this age could be lowered, but in all events, the existing practice appears preferable to a rule that would require the child to choose and then make that choice determinative for all cases.

7. Home stability

The stability of the child's home—past, present and proposed—is another factor named for consideration. The language varies. Examples include: "the length of time the child has lived in a stable home environment";[326] "the duration and adequacy of the child's current living arrangements";[327] or "the permanence and stability of the family unit with which it is proposed that the child will live"[328] Preservation of the status quo when the children are living in a stable home environment is also one of the common assumptions found in the case law in Canada.[329]

8. Continuity in child's life

---

[326] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(c).

[327] Maine Revised Statutes, *supra*, note 324, § 1653-3D.

[328] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(g).

[329] Federal/provincial/territorial Family Law Committee, *Custody and Access: Public Discussion Paper*, *supra*, note 108.

Another factor is "the desirability of maintaining continuity" of the child's current living arrangements.[330] This factor might include consideration of "the child's adjustment to the child's present home, school and community."[331] It is closely associated with "primary caregiver" considerations.

9. Parenting ability

Yet another factor is "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 the special needs of the child."[332]

Mnookin warns against the pitfall of relying on the length of time spent with the child rather than assessing the quality of the interaction:[333]

> A standard that awards custody to the parent able to spend more time with the child would ignore qualitative differences in time spent with the child and thus might not be justifiable from the perspective of what is good for the child. In all events, because the test would require a prediction of the amount of time each parent would spend with the child, it would be very difficult to apply and would invite exaggeration and dishonesty in litigation.

---

[330] Maine Revised Statutes, *supra*, note 324, § 1653-3D. In Alberta, legislating a preference for preserving the *status quo* would contradict the reasoning in *R.* v. *R.*, *supra*, note 121.

[331] *Ibid.* § 1653-3D.

[332] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(d).

[333] Mnookin, *supra*, note 115 at 284-285.

He also rejects a wealth-based standard:[334]

> A wealth-based standard has similar weaknesses, for wealth and child rearing ability are not known to be coincident, and a test that preferred the richer parent for that reason alone would be seen as unfair.

10. Past conduct

As has been seen, the *Divorce Act*, sections 16(9) and 17(6), prohibits the court from considering past conduct that is not relevant to the person's parenting ability. These sections do not exclude consideration of the contributions, or lack of contributions, made by either or both spouses to the rearing of their children during matrimonial cohabitation or after the cessation of cohabitation.

Like the *Divorce Act*, most of the provincial statutes expressly stipulate that the conduct of the parties is only relevant insofar as it affects parenting ability.[335]

Not too many years ago, a parent living in an adulterous relationship would be automatically disqualified as a "fit" parent for custody. The so-called "guilty" spouse, whose conduct was perceived as having brought the marriage to an end, would be denied custody as against the "innocent" spouse. Today, courts strive to disregard spousal misconduct, which does not reflect on parenting ability. Courts are more concerned with the stability of non-marital cohabitation than with traditional perceptions of the "morality" of the relationship.

The threat of bitterly contested custody and access disputes based on allegations and counter-allegations of spousal misconduct survives the enactment of sections that tie the relevance of conduct to parenting ability. Whether spousal misconduct is perceived as relevant or irrelevant to "the ability of that person

---

[334] *Ibid.* at 284.

[335] *Supra*, note 66.

to act as a parent of the child," in the final analysis, may depend on the perspective of the trial judge in the particular case.

Not all judges agree with Grandpré, J., of the Supreme Court of Canada, who concurred with the trial judge's observation that "a [spouse] who is well-nigh impossible as a [spouse] may nevertheless be a wonderful parent."[336]

Even if spousal misconduct is only relevant insofar as it provides insight into the parenting qualities of the respective spouses, the following observations on the interpretation and application of the *Divorce Act*, sections 16(8) and 17(5), are likely to attract some attention in the interpretation and application of sections 16(9) and 17(6). In *Krasnyk* v. *Krasnyk*, Matas, J.A. stated:[337]

> The conduct of the parties in relation to the events leading up to the separation can provide a valuable insight into a person's character and sense of responsibility and how he or she would respond to the exigencies of being the sole custodial parent. It is in that sense that fault may be of relevance in considering the welfare of the children.

We consider "past domestic violence" as a separate factor.[338]

11. Religion

In Alberta, the *DRA*, section 60, applies where the court refuses to make a custody order in favour of a parent or other responsible person. "Other responsible person" is defined in section 57(1) as "a person legally liable to maintain a minor or entitled to the custody of a minor."

Section 60(1) empowers the court to make any order it thinks fit to ensure that the child is brought up in the religion "in which the parent or other

---

[336] *Talsky* v. *Talsky*, [1976] 2 S.C.R. 292, 7 N.R. 246, 21 R.F.L. 27, at 29, 62 D.L.R. (3d) 267.

[337] (1978), 5 R.F.L. (2d) 17, at 20 (Man. C.A.).

[338] See *infra*, heading E.16.

responsible person has a legal right to require" that the child be brought up. In considering the order that ought to be made, s. 60(2)(a) preserves the power of the court to consult the wishes of the child. S. 60(2)(b) declares that nothing in the Act "diminishes the right" that a child "now possesses to the exercise of free choice."

Former judicial opinion that "religion is always a matter for consideration"[339] in determining the welfare of a child has lost much of its force. Nevertheless, cases centred upon the religious upbringing of a child do arise.[340]

The role of a parent in the religious upbringing of a child has some protection under the *Canadian Charter of Rights and Freedoms*. In the case of *Young* v. *Young*, a father with access to his child challenged the constitutionality of sections 16(8) and 17(5) of the Divorce Act which require that judicial decisions regarding custody and access be made in the best interests of the child.[341] He claimed that the use of the best interests test to curtail his right to share his religious beliefs with his children infringed his right to freedom of religion and expression under the *Canadian Charter of Rights and Freedoms*. The Supreme Court of Canada upheld the constitutionality of the best interests test, describing it as a value neutral test that cannot be seen on its face to violate any right protected by the Charter. In another case, *P.(D.)* v. *S.(C.)*,[342] the Supreme Court of Canada held that the *Civil Code of Lower Canada*, article 30, is consistent with the underlying values in the *Charter* and that the broad discretion it confers on the courts is not unconstitutionally vague. Article 30 establishes that the best interests test governs a non-custodial parent's right of access to their child.

---

339 *O'Leary* v. *O'Leary* [1923] 1 W.W.R. 501, 19 Alta L.R. 224, at 253, [1923] 1 D.L.R. 949 (Alta. C.A.) at 527 (W.W.R.), *per* Beck, J.A. See also *Lebouef* v. *Lebouef and Germain* [1928] 1 W.W.R. 423, 23 Alta L.R. 328, [1928] 2 D.L.R. 23 (Alta. C.A.).

340 See e.g. *Young* v. *Young*, *supra*, note 103; *P.(D.)* v. *S.(C.)*, *supra*, note 103; *Hockey* v. *Hockey* (1989), 69 O.R. (2d) 338, 60 D.L.R. (4th) 765, 35 O.A.C. 257, 21 R.F.L. (3d) 105 (Ont. Div. Ct.).

341 *Young* v. *Young*, *ibid.*

342 *Supra*, note 103.

Both cases establish that the best interests test allows genuine discussion of religious belief between a parent and child and this discussion should not be curtailed by court orders, unless the sharing threatens to subject the children to real physical or psychological harm. Furthermore, the custodial parent has no "right" to limit access. In *Young* v. *Young*, the Court determined, on the facts of the case, that any perceived harm to the children could not be said to outweigh the benefits of unrestricted access. Three justices dissented, stating that the parental authority to make decisions concerning the education, religion, health and well-being of the child rests with the custodial parent. Placing this authority with the custodial parent is necessary, in the best interests of the child, in order to enable that to discharge effectively their obligations and responsibilities toward the child and to remove potential sources of conflict. In *P.(D.)* v. *S.(C.)*, the Supreme Court of Canada refused to intervene to overturn two conditions imposed by the trial judge on a father whose Jehovah's Witness "religious fanaticism" was disturbing to the child. The trial judge's order precluded the father from "indoctrinating" the child, although he was allowed to teach her the Jehovah's Witness religion, and it prohibited him from engaging the child in religious activities until she was capable of choosing her own religion.

The adoption of our Sole Custody Model for use in cases where the parents are unable to resolve the issues between themselves reflects the reasoning of the dissenting judges in *Young* v. *Young*. We think that our recommendations satisfy the *Charter* requirements because we would allow the court to vary access under the Sole Custody Model as appropriate in an individual case.

12. Parent's sexual orientation

Although human rights legislation is moving in the direction of protection against discrimination on the basis of sexual orientation, the sexual orientation of a parent may still attract particular attention from the courts. Case law establishes that a parent's sexual orientation should only be considered if "that aspect of the parent's make-up and lifestyle" affects the child's well-being.[343] It is not in itself a ground for refusing custody.

---

[343] *Bezaire* v. *Bezaire* (1980), 20 R.F.L. (2d) 358 (Ont. C.A.). See also, *e.g.*: *K.* v. *K.* [1976]

13. Ethnic and cultural heritage

2 W.W.R. 462 (Alta. Prov. Ct.); *Re Gere*, A.J. No. 774, reported at (1996), 45 Alta. L.R. (3d) 331 (Alta. Prov. Ct.); and *Ouellet* v. *Ouellet* [1996] O.J. No. 1720, reported as *O.(K.A.)* v. *O.(D.G.)* (1996), 2 O.T.C. 357 (Ont. Gen. Div.).

In the changing mosaic of Canadian society, ethnic and cultural diversity has emerged as a contemporary issue.[344] Child protection legislation typically lists "the child's cultural and religious heritage" as a factor to be considered in making child care decisions.[345] The wider question whether "private" custody litigation should be governed by the same basic criteria as public law intervention by way of child protection proceedings falls beyond the scope of this project.[346] We nevertheless believe that a child's "ethnic and cultural heritage" is an important factor in custody and access disputes.[347]

14. Parenting plan

It is becoming increasingly common for courts and legislators to require the persons seeking custody to submit parenting plans, that is, "plans proposed for the care and upbringing of the child."[348]

---

[344] See Frederick H. Zemans, "Cultural Diversity in Custody Disputes", published in Rosalie S. Abella and Claire L'Heureux-Dubé, *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) at 137. See also Judge Murray Sinclair, Donna Phillips and Nicholas Bala, "Aboriginal Child Welfare in Canada", published in Nicholas Bala, Joseph P. Hornick and Robin Vogl, *Canadian Child Welfare Law* (Toronto: Thompson Educational Publishing Inc., 1991), Ch. 8. And see generally John T. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992).

[345] In New Brunswick, where the "best interests of the child" criterion applies equally to custody and access proceedings and to child protection proceedings, "the child's cultural and religious heritage" is included in the list of factors to be considered for both purposes: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 1.

[346] See Mnookin, *supra*, note 115 at 292:

> For the child-protection function, legal standards define the circumstances that justify coercive governmental intervention into the family in particular. Here, the use of indeterminate standards is unjust and unwise. It provides the state with too much power to intervene into the family, and it has very adverse consequences for children who have been removed from parental custody for reasons of child protection. That the purpose of coercive state intervention is high-minded and for the benefit of the child does not justify the failure to develop better defined legal standards that limit the wide discretion presently given to professionals involved in juvenile court child-neglect proceedings and the foster-care system.

[347] And see British Columbia, Tenth Report of the Royal Commission on Family and Children's Law, *Native Families and the Law* (May, 1975).

[348] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2)(f).

15. Contact with other parent

Another factor that is weighed in judicial practice and appears in legislation is "the capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access."[349] This is sometimes described as the "friendly parent" consideration.

[349] Maine Revised Statutes, *supra*, note 324, § 1653-3H.

The *Divorce Act*, in sections 16(10) and 17(9), endorses the practice of granting liberal or generous access privileges to the non-custodial parent. These sections require the court to "give effect to the principle that a child ... should have as much contact with each spouse" as is consistent with the child's best interests. Other factors being equal, where one parent is prepared to encourage maximum contact and the other is not, the court may be inclined to grant custody to the so-called "friendly parent."[350] A further consequence of these sections is that a custodial parent who seeks to deny or restrict access by the non-custodial parent bears a heavy onus to establish that the denial of restriction is in the best interests of the child.[351]

We commented previously that this provision puts a spouse who has been the victim of domestic violence at the hands of the other spouse at a disadvantage in a custody dispute. For this reason, we hesitate to recommend that provincial legislation replicate the *Divorce Act*, section 16(10). Section 16(10) may also be inappropriate with respect to extra-marital children.

Our recommendation makes contact with the other parent just one of many factors, including incidents of past violence, for the court to consider.

16. Past domestic violence

Modern legislation may call specific attention to domestic violence. In fact, contemporary issues of spousal misconduct are far more likely to focus on domestic violence[352] than on the adultery of a parent. In Newfoundland the *Children's Law*

---

[350] *Payne on Divorce*, *supra*, note 83 at 359.

[351] *Ibid.* at 423.

[352] See Mary-Jo Maur Raycroft, "Abuse and Neglect Allegations in Child Custody and Protection Cases", published in *Bala et al*, *supra*, note 344, Ch. 10; Nicholas Bala and Jane Anweiler, "Allegations of Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire?" (1987), 2 Can. F.L.Q. 343; Meredith Sherman Fahn, "Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter" (1991), 25 Fam. L.Q. 193; Thomas M. Horner and Melvin J. Guyer, "Prediction, Prevention and Clinical Expertise in Child Custody Cases in Which Allegations of Child Sexual Abuse Have Been Made" (1991), 25 Fam. L.Q. 217 and 381. See also Patricia A.M. Horsham, M.D., Practical Guidelines to the Assessment of the *Sexually Abused Child* (Ottawa: Canadian Public Health Association, 1989).

Act, requires the court to consider whether the person has ever acted in a violent manner towards:[353]

- his or her spouse or child;
- his or her child's parent; or
- another member of the household.

Otherwise, under this provision, "a person's past conduct is relevant only to the extent that court thinks it will affect the person's ability to act as a parent."

17. Parent's motivation

[353] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(3); see also Maine Revised Statutes, *supra*, note 324, § 1653-3L and 3M.

Legislation in Maine lists as a factor "the motivation of the parties involved and their capacities to give the child love, affection and guidance."[354] Ryan comments on this factor in a paper prepared for Justice Canada:[355]

> "The motivation of the parties involved", coupled with "their capacities to give the child love, affection and guidance" is important in that many custody disputes which are actually litigated in court appear to be fuelled more by feelings related to the marital breakdown than by a concern for the children's needs. In many cases, the reasons stated by the parties for seeking custody do not reflect their underlying motivations, nor may these reasons even be accurate. For example, one party may be seeking revenge for a marital infidelity by alienating his or her spouse from the children; another may be attempting to "save face" with friends, relatives, business associates or even the children; while yet another may be attempting to prolong the marital relationship and contact with the other spouse. In any contested custody case, it is likely that parental motivation will be a complex mixture of factors and therefore, it is important that the Court examine parental motivation in order to determine the real issues between the parties. As one author has pointed out:
>
> > The difficulties presented to the Court in carrying out this analysis are not to be underestimated. It is not to be expected that one parent will present with a clearly positive motivation and one without. The stated reasons for seeking custody may not completely reflect the underlying motivation or even be accurate. It is likely that parental motivation will be found to be a complex of factors. The Court will be required to weigh and compare motivations in order to assess that which is more appropriately parental. Such analysis is vital to arriving at a living arrangement for the child which reflects the reality of the personalities and inter-personal dynamics involved. Only through a realistic assessment of such factors can the Court hope to reach a decision that will minimize future difficulties and re-litigation. Such an

---

[354] Maine Revised Statutes, *supra*, note 324, § 1653-3F.

[355] Ryan, *supra*, note 132.

> analysis is, in some respects, easier and perhaps less repugnant than those currently being performed by the Court.
>
> Hence, directing the Court to look to the motivation of the parties involved is a useful and important exercise.

18. Parent's capacity to cooperate

A second novel factor listed in the Maine legislation is "the capacity of each parent to cooperate or to learn to cooperate in child care."[356] Of this factor, Ryan says:[357]

> This provision is forward-looking in the sense that it anticipates that even though the marital relationship may have been conflictual, parents have the capacity to change and to learn how to cooperate with respect to their children following a separation and divorce.

19. Dispute resolution

A third factor found in the Maine legislation is "methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods."[358] According to Ryan:[359]

> This factor directs the Court to address methods such as mediation, conciliation, and counselling which may be available to assist parents to cooperate and resolve disputes, and to consider as well each parent's willingness to use those methods. This implies a positive recognition that parents can learn to cooperate and to resolve their own disputes if resources are made available to them outside the courtroom. It is yet

---

[356] Maine Revised Statutes, *supra*, note 324, § 1653-3I.

[357] Ryan, *supra*, note 132.

[358] Maine Revised Statutes, *supra*, note 324, § 1653-3J.

[359] Ryan, *supra*, note 132.

> another example of the public policy of encouraging the mediated resolutions of disputes between parents in Maine.

20. Effect of sole parenting authority

Yet another novel factor listed in the Maine legislation is "the effect on the child if one parent has sole authority over the child's upbringing."[360] Ryan comments:[361]

> This presumably would include the possibility that the parent without meaningful input into the decisions affecting the child's welfare, may, over time, withdraw parental contact. This provision implies an awareness of the current divorce research, particularly that of Wallerstein and Kelly who found that the children who make the best post-divorce adjustment are those who maintain meaningful contact with both parents post-separation and divorce. Other researchers have found that where one parent has sole custody of the children, the other frequently withdraws from contact with the children over time.
>
> Other effects of parental sole authority may include the perpetuation of a struggle for control between the parents and the possibility of future litigation over child custody. These are all highly relevant factors to be considered in making a determination of the appropriate sharing of parental rights and responsibilities on separation and divorce.

21. Any other factor

---

[360] Maine Revised Statutes, *supra*, note 324, § 1653-3K.

[361] Ryan, *supra*, note 132.

Typically, legislation includes a "basket clause" to catch unspecified factors. Two examples of the wording of such a clause are: "all the needs and circumstances of the child"[362] and "all other factors having a reasonable bearing on the physical and psychological well-being of the child."[363]

22. Recommendations

RECOMMENDATION No. 23.4

Alberta law should provide that, in making a custody determination that is in the best interests of the child, the court may consider any of the following factors:

(1) the child's age;

(2) the child's

(a) health, emotional well-being and special needs,

(b) personality, character and emotional needs, and

(c) physical, psychological, social and economic needs;

(3) the nature and quality of the child's relationship with each guardian;

(4) the child's interaction with other persons residing in the child's household or involved in the care and upbringing of the child;

(5) if the child is twelve years of age or older, the views and preferences of the child;

---

[362] *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 31(2).

[363] Maine Revised Statutes, *supra*, note 324, § 1653-3N.

(6) the duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live;

(7) the desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community;

(8) the ability and willingness of each guardian to provide the child with guidance and education, the necessaries of life and the special needs of the child;

(9) the child's religious upbringing;

(10) the child's ethnic and cultural heritage;

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

(12) contact with the child's parent or other guardian;

(13) whether the guardian has ever acted in a violent manner towards

(a) this or any other child,

(b) the child's parent or other guardian, or

(c) a member of their household;

(14) the motivation of each guardian and their capacities to give the child love, affection and guidance;

(15) the capacity of each guardian to cooperate or to learn to cooperate in child care;

(16) methods for assisting cooperation between or among guardians and resolving disputes and each guardian's willingness to use those methods;

(17) the effect on the child if one guardian has sole authority over the child's upbringing; and
(18) any other factor the court considers relevant.

RECOMMENDATION No. 24.4The past conduct of the person seeking custody is irrelevant unless it affects parenting.

F. Joint Custody

The *Divorce Act*, in s. 16(4), authorizes the court to make an order granting the custody of a child "any one or more persons." This section provides the authority for joint custody orders.[364]

[364] For provincial legislation to similar effect, see *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 35; *Family Services Act*, S.N.B. 1980, c. F-2.2, ss. 129(2) (custody) and 129(3) (access); *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 33; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 28; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 5; *Children's Law Act*, S.S. 1990,
c. C-8.1, s. 6; *Children's Act*, R.S.Y. 1986, c. 22, s. 33. See also *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 39(2)(c) (joint parental custody).

Until this decade, Canadian divorce jurisprudence substantially supported the conclusion that, in the absence of directions to the contrary, an order granting "custody" to one parent gave that parent powers akin to a guardian of the child and left the other parent with access privileges only. In Chapter 5, where we discussed possible approaches to reform, we described the current trend toward shared parenting responsibilities.[365] Nevertheless, it is because of the former kind of thinking that the term "joint custody" takes on significance in the context of divorce. Joint custody in effect preserves the status of each parent as an active guardian.

When is it appropriate for the court to order "joint custody"? The current position in Canada is summarized in the following passage:[366]

> Although some courts have held it acceptable to order joint custody, notwithstanding the objections of either or both parents, where there is hope that the parents can and will co-operate, they are in a minority. The overwhelming preponderance of judicial opinion in Canada asserts that joint custody should not be ordered where the parents are unwilling to co-operate in decision-making that affects the growth and development of their children or where there is substantial interspousal hostility. Different considerations now seem to apply where there has been a pre-existing pattern of joint custody prior to adjudication. If a court is satisfied that shared parenting arrangements have worked in the past and are in the best interests of the children, a subsequent application to change the arrangements may be denied. Parents who have agreed to an order for joint custody either through mediation or in minutes of settlement must make every effort to make it work. This is not to say that the courts will not subsequently change a joint custody order to sole custody where the parents cannot co-operate and the court feels that it is in the best interests of a child to return to its original home and friends and the full-time attention of one parent, especially where the child is exhibiting behavioural problems and needs a more stable environment.

---

[365] See Chapter 5, *supra*, heading B.3.

[366] Payne and Edwards, *supra*, note 146. And see generally, Jay Folberg, *Joint Custody and Shared Parenting*, 2nd ed. (New York: Guilford Press, 1991).

The use of the word "contact" in the *Divorce Act*, sections 16(10) and 17(9), suggests that these provisions were not intended to promote joint or shared custody dispositions but were intended to promote maximum access privileges as between the child and the non-custodial spouse.[367]

We recommend that Alberta legislation should give the court power to grant custody to one or more persons. Under our recommendations, a person to whom custody is awarded must be a guardian. Given the Sole Custody Model that we have endorsed, we would not expect the court to grant custody to more than one person where the relationship between the guardians involved is acrimonious; that is to say, where the guardians are unable to cooperate with each other, the court should order sole custody. However, the power to grant custody to more than one person should be available for use in cases where the guardians are able to cooperate and in cases that lie in the grey zone between cooperation and non-cooperation, as sometimes occurs under the existing law.[368] As provided in our earlier recommendations, the court would have discretion to make an order that varies the attributes ordinarily associated with custodial guardianship.

RECOMMENDATION No. 25.4

The court, acting in the child's best interests, should have power to make an order granting custody to any one or more persons who are guardians.

---

[367] *Payne on Divorce*, *supra*, note 83 at 359.

[368] See e.g. *P.(T.M.A.)* v. *P.(F.A.)* (1995), 14 R.F.L. (4th) 290, 30 Alta. L.R. 317 (Alta. Q.B.), granting joint custody in a contested divorce case, with one parent providing "residential care". The effect is similar to joint guardianship under our recommendations, where the parents ordinarily continue to share parental responsibility, but with one parent having custody of the child and the other having generous access. See also *Raugust* v. *Steeves* (1996), 181 A.R. 269, 116 W.A.C. 269 (Alta. C.A.), a case involving "divided custody" or "split custody." The Court decided that equal time at 4-week intervals was too disruptive for a 3-year-old child where the parents lived some distance apart and reduced the father's custodial period to 2 weeks every two months with access in between.

G. Declaration That Parent Unfit to Have Custody

The *DRA*, section 54(1), empowers a court pronouncing a judgment for judicial separation to declare a parent unfit to have the custody of minor children of the marriage. We recommended the abolition of an action for judicial separation in Phase 1 of this Project.

Section 54(2) provides that such a parent is "not entitled as of right" to the custody or guardianship of the children on the death of the other parent. Pursuant to section 54(3), however, a court may at any time revoke a declaration of parental unfitness.

If the concept of parental fitness to have custody were to be retained, it would be necessary to enact a provision that functions independently of other matrimonial actions. However, we see no need to retain the power to declare a parent unfit to have the custody of a child. Under our approach, the court would not award custody to a parent where such an order would be contrary to the child's best interests. In an extreme case, the court would be able to remove a parent as a guardian.

H. *DRA*: Other Matters in Existing *DRA*

i) Unlawful withholding or removal of child

DRA, sections 57 and 59, specifies when a court may decline to make an order for the production or custody of a minor. As stated in chapter 3, they apply where the applicant parent or "other responsible person" has abandoned or deserted the child, misconducted themself or been unmindful of their parental duties. We do not think it necessary to retain these sections as currently worded. We do think, however, that Alberta legislation should contain provisions to prevent a parent or other person from unlawfully withholding

or removing a child from the jurisdiction.[369] It should also give the court discretion to grant or refuse an order for the production of the child.[370]

RECOMMENDATION No. 26.4

Alberta legislation should contain provisions to prevent the unlawful withholding or removal of a child by either parent or any third party.

RECOMMENDATION No. 27.4

The court should have discretion to grant or refuse an order for the production of a child depending on the circumstances of the child and merits of the application.

1. Rules of equity

---

[369] For legislation elsewhere, see e.g. *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 36 (order where child unlawfully withheld) and s. 37 (application to prevent unlawful removal of child). For other statutory provisions that confer powers on courts with respect to guardianship, custody and access, see *infra*, note 446.

[370] The court already has the procedural means to require a child to be brought before it if the court so wishes. The prerogative remedy of *habeas corpus* provides this power. A superior court might also use its power to order in contempt of court anyone who refuses to comply with an order made *in personam*. And see *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 36, 37 and 38 (contempt of orders of Ontario Court (Provincial Division)). Regarding a "Chasing Order," see *Thomson* v. *Thomson*, [1994] 3 S.C.R. 551.

Section 61 provides that, when they do not conflict with the *DRA*, "the rules of equity prevail in matters relating to the custody and education of minors."[371] We do not think it necessary to state this in a family law statute.[372] Legislating the best interests of the child will achieve the same result by allowing all judges, whether federally or provincially appointed, to make decisions that are appropriate to the individual child.

I. Powers and Responsibilities of Custodial Guardian

In Chapter 5, we recommended that Alberta law should build on the existing concepts of guardianship, custody and access. Where the parents live together with the child, both parents will be custodial guardians. Where the parents live separate and apart from each other, they should be encouraged to enter into agreements with respect to custody and access. Where they are unable to agree, the law should give one parent sole custody and clear decision making authority over the child with access to the other parent, as appropriate in the circumstances. We thought that this approach would be more likely to bring stability to the child's life than continuing disagreement between the parents under a shared parenting arrangement. We recommended that the law should set out the responsibilities of the custodial and non-custodial guardian respectively.

In this Chapter, we recommend that, unless a court otherwise orders or the parties otherwise agree in writing, a custodial guardian has the full panoply of powers, responsibilities and rights that the law can confer on a guardian, including, in particular, the day-to-day care and control of the child.

---

[371] See *W. (K.K.)* v. *R. (E.J.)*, *supra*, note 207; *Kiehlbauch* v. *Franklin* (1979), 20 A.R. 31 (Alta. S.C., Trial Div.). Under the existing law, only courts consisting of judges appointed federally enjoy equitable jurisdiction. In Alberta, the *Judicature Act*, *supra*, note 71, ss. 4 and 5, confers equitable jurisdiction on the Court of Queen's Bench and the Court of Appeal. S. 16 provides that the rules of equity shall prevail over the common law in a case where they conflict.

[372] We note that in *K.K.* v. *G.L. and B.J.L.* (1984), 44 R.F.L. (2d) 113 (S.C.C.), the Court relied on a similar provision in N.W.T. legislation as authority for exercising the *parens patriae* power in a custody dispute between a child's birth mother and his adoptive parents. Under the *parens patriae* doctrine, the welfare of the child is paramount.

In Chapter 8, we will make recommendations with respect to the powers, responsibilities and rights of a non-custodial guardian.

RECOMMENDATION No. 28.4

Unless otherwise ordered by the court or agreed to by the parties in writing, the custodial guardian of the child should have the day-to-day care and control of the child, including the following powers, responsibilities and rights:

(1) may act on behalf of the child

[NOTE: SEE *DRA*, S. 46(A).]

(2) may appear in court and prosecute or defend an action or proceedings in the name of the child,

[NOTE: SEE *DRA*, S. 46(B).]

(3) may decide where the child is to live, whether permanently or temporarily,

(4) may decide with whom the child is to live and with whom the child is to associate,

(5) may make decisions relating to the child's education

[NOTE: REGARDING SS. (3), (4) AND (5), SEE *DRA*, S. 46(D).]

(6) may appoint a person as guardian to act in the event of the guardian's death or incapacity,

[NOTE: COMPARE *DRA*, S. 48.]

(7) shall protect the child,

[NOTE: EXTREME FAILURE TO PROTECT LEADS TO *CWA* INTERVENTION.]

(8) if a parent, shall give the child love and affection,

(9) if a parent, shall provide the child with the necessaries of life from the parent's personal resources,

[NOTE: COMPARE MOA, S. 2(2) AND (3).]

(10) shall accommodate reasonable requests from a non-custodial guardian for information about matters relating to the child's health, welfare and education

[NOTE: COMPARE *DIVORCE ACT*, S. 16(5); SOME PROVINCIAL STATUTES.]

(11) may discipline the child

(12) may decide the child's religious upbringing

(13)may make medical treatment decisions,

(14) may grant or refuse consent in matters concerning the child, *e.g.*,

(a) adoption [NOTE: SEE *CWA*, SS. 56, 57.]

(b) marriage [NOTE: SEE *MARRIAGE ACT*, S. 18.]

(c) private guardianship [NOTE: SEE *CWA*, S. 52.]

(d) change of name [NOTE: SEE *CHANGE OF NAME ACT*, SS. 7, 7.1, 11, 12.]

(15) is entitled to receive notice of matters affecting the child, e.g. proceedings for

(a) declaration of parentage [NOTE: SEE *DRA*, S. 66.]

(b) adoption [NOTE: SEE *CWA*, S. 60.]

(c) child welfare apprehension, supervision, temporary or permanent guardianship [NOTE: SEE *CWA*, SS. 18, 19, 21, 27.]

(d) private guardianship [NOTE: SEE *CWA*, S. 50.]

J. Notice of Intended Change of Child's Residence

In an attempt to balance the potentially competing interests of the custodial and non-custodial parents and those of the children of the marriage, the *Divorce Act*, section 16(7), expressly empowers the court to require a person who is granted custody of a child of the marriage to give notice of any intended change of the child's residence to any person who has been granted access privileges. Where an order is made, in the absence of any direction from the court stipulating any other period of time, notice shall be given at least thirty days before the intended change. Given such notice, a person with access privileges will have the opportunity to challenge the intended change of residence in court or seek a variation of the custody or access arrangements for the purpose of preserving meaningful contact with the child.

We agree with the general intent of this provision. However, we would modify it to require the custodial guardian to give notice, in writing, of an intended change of residence to any other guardian as a matter of right. This requirement would be subject to the written agreement of the parties or court order otherwise. It would also be subject to the power of the court to abridge this time period.

What about notice to a non-guardian who has been granted access to a child? In Chapter 8, we will recommend that the court should have power to specify the powers, responsibilities and rights of a non-guardian with access. In Chapter 11, we recommend that the court should have wide discretionary powers to attach terms, conditions or restrictions to an order according to the circumstances of the case. In this Chapter, we have made our recommendation with respect to the powers, responsibilities and rights of a custodial guardian subject to an order of the court. Read together, these recommendations would empower the court to order a custodial guardian to notify a non-guardian of an intended change of the child's residence where the court is of the opinion that the non-guardian should be notified.

RECOMMENDATION No. 29.4

Unless otherwise ordered by the court or agreed to by the parties in writing, at least thirty days before changing the child's place of residence, the custodial guardian shall notify any other guardian, in writing, of the time at which the change will be made and the new place of residence of the child.

CHAPTER 8 ACCESS

A. Introduction

Ordinarily, a guardian will be a parent and a non-guardian, a non-parent. However, some guardians are not parents and some parents are not guardians.

Our recommendations treat all guardians (parent or non-parent) the same with respect to custody and access. Where the guardians of a child do not live together and one guardian is granted custody, the other guardian ordinarily will be granted liberal or generous access.

In some circumstances, persons who are not guardians, but who have played a significant role in the child's life, may also be granted access. A person who is neither a parent nor a guardian, but who has played a significant role in the child's life, may be granted access. Such a person may be a grandparent, sibling, aunt or uncle or other relative or, perhaps, a stepparent or other person with whom the child has lived. The category of "non-parent" is open.

In this chapter we will look at access issues as they relate to both guardians and non-guardians. With respect to guardians, much of what was stated in chapter 6 on custody also applies to access. This includes the description of the statutory sources of the existing law, the choices of approach to reform and the factors that the court should consider in making access decisions. With respect to non-guardians, other considerations arise and we examine them separately.

B. Existing Law: A Review

i) Alberta

The existing law is summarized in chapter 2. Here, we will highlight provisions that are relevant to the issue of child access.[373]

a. *DRA*

[373] In addition to the provisions described, it is possible that the "principle of necessary implication" empowers the court to grant access under the private guardianship provisions even when denying guardianship: *V.F.* v. *J.L.* (1994), 163 A.R. 1 (Alta. Prov. Ct.).

The *DRA*, section 56, applies to access orders, as well as custody. "Access" is not defined. Section 56(1) empowers the court to make an order granting access to the child's parent. Historically, if not currently, an application was restricted to children whose parents were married to each other.[374] Parents who apply under this section are presumptively fit.[375]

As stated in chapter 6, where jurisdiction exists, the court has power to make any order it sees fit. Section 56(2), which covers applications for custody and access, requires the court to have regard to three factors, namely:

> (a) the welfare of the minor,
>
> (b) the conduct of the parents, and
>
> (c) the wishes of the mother and the father.

Pursuant to judicial pronouncements, the "welfare of the child" — now largely superseded by the language "best interests of the child" — has long been viewed as the paramount consideration.

The court does not have jurisdiction under section 56(1) to grant access to a birth parent following an adoption order.[376] Where continuing contact between the child and the birth parents is sought, joint guardianship with access rights to the birth parent would be a more appropriate remedy than an adoption order:[377]

---

[374] Today, case law establishes that, ordinarily, the words "parent," "father" and "mother" should be given their current plain meaning. Giving these words their plain meaning, in the context of today's society, no distinction about the application of the Act should be drawn on the basis of the relationship (marital or non-marital) between the parents: *White* v. *Barrett*, [1973] 3 W.W.R. 193 (Alta. C.A.). The Court in *White* v. *Barrett* adopted the rule of construction used by the Supreme Court of Canada in *Re Duffell; Martin* v. *Duffell*, [1950] S.C.R. 737, [1950] 4 D.L.R. 1. It applies where nothing in the statute gives the words a different meaning.

[375] *W.D.* v. *G.P.*, *supra*, note 267 at 233.

[376] *Copeland* v. *Price*, *supra*, note 222.

[377] *Ibid.* at 447 (D.L.R.), *per* Coté J.A.

> Where there is a well-established relationship between the child and one natural parent, adoption may be unwise. Private guardianship may be much better: I know of no bar to more than two guardians for a child. So the person who wants to assume a new role in the child's life can be made a guardian, and the two natural parents can remain, or become, guardians.

However, the residual *parens patriae* jurisdiction is available where a legislative gap exists. There may well be circumstances in which, in the absence of guardian consent, access post-adoption is in the child's best interests, for example, in a step-parent and relative adoption. There may also be cases "where the child has had a prior relationship with a biological parent, foster parent, grandparent or sibling where the continuation or re-establishment of the contact is in the child's best interests."[378] Because "[t]here are no statutory provisions which address these situations," the superior courts may exercise their *parens patriae* jurisdiction.[379]

b. *PCA*, s. 32

The *PCA*, section 32, empowers the Provincial Court to make an order for custody or access where the child's parents are "in fact living apart from one another." The Act does not define "access." Section 32 specifically states that the order may give access to "either parent or any other person." Case law appears to establish that in order to seek access under section 32, a parent must be a guardian.[380]

---

[378] *Ibid.* at 445.

[379] *Ibid.*

[380] The case law is unclear about whether a father who is not a guardian can apply for access under the *PCA*, s. 32. A 1994 decision rendered by the Alta. Q.B. purports to restrict applications under the *PCA*, s. 32, to guardians: *R.S.* v. *A.L.*, *supra*, note 267. Prior to 1994, the Prov. Ct. heard applications by "putative" fathers: see e.g. *G.D.G.* v. *B.H.K.* (1992), 136 A.R. 324 (Alta. Prov. Ct.) at 327, citing *W.D.* v. *G.P.*, *supra,* note 267, in which the court deemed the putative father to be a guardian of his child, as authority for the redress of inequality between the status of putative married fathers in respect of custody disputes concerning children born outside marriage and reasoning that "it follows that the same inequality as it relates to access disputes has been redressed in the same fashion." Some cases decided subsequently have interpreted *R.S.* v. *A.L.* to require the applicant to be a parent-guardian: *A.W.* v. *K.S.*, *supra*, note 267. Other cases have

In ordering access, the Court must have regard to the best interests of the child. No factors are specified. By section 32(5), the court may grant interim access pending the hearing of an application under section 32. Section 32(9) provides that an order made under section 32 is void to the extent that it is "in variance with an order of the Court of Queen's Bench."

---

interpreted it as restricting custody applications to fathers who are guardians, but not access applications. See also discussion *supra*, Chapter 7, heading B.1.B, and *infra*, Chapter 10.

The *Provincial Court Amendment Act, 1997* adds section 32.1 which came into force October 1, 1997. This section gives a grandparent who is refused access to a child the right to apply for an order. In making an order, the Court must consider only the best interests of the child. The "best interests" are to be "determined by reference to the needs and other circumstances of the child including (a) the nature and extent of the child's past association with the grandparent, and (b) the child's views and wishes, if they can be reasonably ascertained. This provision answers case law which holds that, unless they are guardians, grandparents lack status to apply on their own behalf for access under the *PCA*, section 32.[381]

2. *Divorce Act*

The *Divorce Act* applies to children of the marriage with respect to whom orders are made on or after divorce, or during the divorce proceedings. Sections 16(1) and (2) empower the court to make an access order. Access is not defined in the English version of the Act. Section 2(1) of the French version stipulates that "'Accès' Comporte le droit de visite".

The application may be made by a spouse or, with leave, by any other person.[382] Section 16(4) authorizes the court to grant access to any one or more persons, including a person who is not one of the divorced or divorcing spouses.

As in an application for custody, section 16(8) requires the court making an access order to "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." Similar criteria apply to variation proceedings under section 17(5). As stated in chapter 6, the declaration, in the *Divorce Act*, that the best interests of the child shall be determined by reference to the

---

[381] See e.g. *Knight* v. *Knight* (1992), 132 A.R. 341 (Alta. Prov. Ct.). Because the *DRA* is silent with respect to the right of grandparents to apply for access, a grandparent can apply by petitioning a superior court under its *parens patriae* jurisdiction. Alternatively, where the circumstances permit, a grandparent could apply for guardianship and then apply for access as a guardian.

[382] *Divorce Act*, s. 16(3).

"condition, means, needs and other circumstances of the child" opens up a potentially unlimited field for judicial inquiry.

Sections 16(9) and 17(6) prohibit the court from taking past conduct into consideration "unless the conduct is relevant to the ability of that person to act as a parent".

Sections 16(10) and 17(9) are central to the access issue. They require the court to "give effect to the principle that a child ... should have as much contact" with each parent as is consistent with the child's best interests. As stated in chapter 6, under these sections, in determining custody, the court is required to consider "the willingness of the person for whom custody is sought to facilitate such contact."

Section 16(5) gives a spouse with access the "right" to make inquiries and receive information concerning the health, education or welfare of the child. This right extends only to spouses and not to other persons with access. Section 16(5) presumably entitles a spouse with access to direct relevant inquiries to the custodial parent or to a third party, such as the child's doctor or school principal. It does not expressly require the custodial parent to consult with the spouse who has access before making decisions relating to the child's health, education and welfare.[383]

Section 16(7) empowers the court to require the custodial parent to notify persons with access of the intention to change the child's residence, when the change will be made and what the new place of residence will be. The notice must be given at least thirty days in advance, or within the period specified by the court.

3. Other provinces

---

[383] *Payne on Divorce*, *supra*, note 83 at 361.

Several provinces and territories, including British Columbia, New Brunswick, Newfoundland, Ontario, Saskatchewan and the Yukon, have legislated the child's best interests as the basis for access, as well as custody, decisions. These statutes contain provisions which, similar to section 16(5) of the *Divorce Act*, entitle the parent with access to obtain information concerning the child. The statutorily-designated factors that the courts must take into account in custody decisions generally encompass access decisions as well.[384] However, legislation may identify the conditions for access specifically, as in Saskatchewan. There, the *Children's Law Act* provides:[385]

> 9(1) In making, varying or rescinding an order for access to a child, the court shall:
>
> (a) have regard only for the best interests of the child and for that purpose shall take into account:
>
> (i) the quality of the relationship that the child has with the person who is seeking access;
>
> (ii) the personality, character and emotional needs of the child;
>
> (iii) the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care; and
>
> (iv) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child; and
>
> (b) not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to care for the child during the times that the child is in his or her care.

C. Access: The Right of the Child

---

[384] *Supra*, note 66.

[385] S.S. 1990, c. C-8.1, s. 9.

Like guardianship and custody, access determinations are based on the best interests of child.[386] For this reason, courts consistently describe access as a right of the child.[387] We agree with this approach, and recommend that it should be set out in legislation.

RECOMMENDATION No. 30.4Alberta legislation should specify that access is the right of the child.

D. No Legislated Presumption that Access in Child's Best Interests

Although the courts view access as a right of the child, they place parents on a different footing than non-parents. The difference is in the onus of proof. (The case law talks of "parent" and "non-parent". Our recommendations would insert the words "guardian" and "non-guardian" in the place of "parent" and "non-parent".)

1. Parents

---

386 *Young* v. *Young*, *supra,* note 103.

387 See e.g. *Copeland* v. *Price*, *supra*, note 222 at 445 (D.L.R.), citing *British Columbia (Superintendent of Family & Child Service)* v. *Stuart*, [1985] B.C.J. No. 21 (C.A.) at para 2, for the statement that "[I]n the context of the *parens patriae* jurisdiction, 'access is more properly described as a right of the child rather than a right of a parent'".

Even though access is a right of the child, it may not be appropriate to let a young child make the choice. In *Stretch* v. *Stretch* (1996), 186 A.R. 26 (Alta. Q.B.) at 37, the court stated that the burden of deciding whether to visit the access parent should not be placed on young children:

> ... it presents an impossible and wholly inappropriate burden on them. Children's wishes and preferences should be taken into account but the court must have regard to the age and maturity of the children. I view the age of 11 years too young for them to make such a decision.

Julian Payne suggests that, rather than characterizing access as a right of child or parent, it may be better to look upon it as a mutual right.

Children are regarded as having a right to maintain frequent and continuing contact with both parents. The courts start from the position that it is in a child's best interests to know both parents. The person opposing parent access must show, as an exception to this starting premise or presumption, that access is contrary to child's best interests in the circumstances of the case.[388] The reason could be that the non-custodial parent is unfit, continued contact poses a real risk of harm to the child or the parent has little of benefit to contribute to the child's long-term development.[389] Courts generally strive to encourage or facilitate parental access, for example, by providing for a structured, supervised access, even where there is evidence to support the allegation against the parent seeking access.[390]

The presumption that access is in the child's best interests will operate where the non-custodial parent is a guardian. As stated in Chapter 5, a parent may be a guardian automatically by virtue of the operation of the *DRA*, section 47(1), pursuant to court order where parentage has been established or by adoption.

---

[388] With regard to access by a man who contracted with the mother to be "sperm father," see *Johnson-Steeves* v. *Lee* (1997), 50 Alta. L.R. (3d) 340, [1997] 6 W.W.R. 608, 203 A.R. 192 (Alta. Q.B.).

[389] See e.g. *Sekhri* v. *Mahli*, [1994] 1 W.W.R. 170 (Sask. Q.B.); *Snow* v. *Snow* (1986), 74 N.S.R. (2d), 180 A.P.R. 329 (N.S. Fam. Ct.).

[390] On occasion, access may be granted even where this is contrary to the child's wishes: see e.g. *Snow* v. *Snow*, *Ibid.* in which the court granted access in order to foster a renewed relationship between a father and his daughter.

The presumption is likely to be less strong where the parent is not a guardian. Nevertheless, even in this situation, courts are more likely to award access to parents than to non-parents.[391]

Because an adoption order terminates the legal relationship between the parent and child, usually the natural parent will be denied access after adoption. However, access may be found to be in the best interests of the child, for example, in a stepparent adoption, where the child is aware of the natural parent.[392]

The courts attach importance to the right of a child whose parents come from two different cultures to know both.[393] Nevertheless, the child's overall best interests and safety comes first.[394]

A custodial parent's failure to provide access may lead to a change of custody. However, the court will consider the net effect of any such

---

[391] See e.g., *Schon* v. *Hall* (1991), 35 R.F.L. (3d) 161 (B.C.C.A.) where access of birth father through a very brief relationship was not cut out, but reduced with review a year later. In *D. (K.W.)* v. *J. (D.Z.)* (1983), 49 A.R. 355 (Alta. Prov. Ct.) the court refused to restrict the birth father's access when the parents separated, there being no evidence that continued access was not in best interests of child. The court stated that "... it is in the best interest of children that they have some relationship with both their birth parents, regardless of the legal relationship between those parents." The child in this case still referred to the applicant as "Daddy."

[392] See e.g., *Silk* v. *Silk* (1985), 46 R.F.L. (2d) 290, 34 Man. R. (2d) 293 (Q.B.) holding that where the adoption arises out of protection proceedings, access will be denied except in exceptional cases because the parent has forfeited his rights and it can hardly be in the child's interests to be exposed to someone he has to be protected from: James G. McLeod (1986), 2 R.F.L. 415-416, commenting on *Cyrenne* v. *Moar* (1986), 2 R.F.L. 414 (Man. C.A.).

[393] In *Brusselers* v. *Shirt* (1996), 183 A.R. 27 (Alta. Q.B.), the court held that a child in this situation had a right to know the father despite the father's abusive behaviour toward the child's mother and other women in the past.

[394] In *Ffrench* v. *Ffrench* (1995), 122 D.L.R. (4th) 685 (N.S.C.A.), the court rejected the father's argument that he should be awarded custody because of his status as a member of a cultural minority. The access order that had been granted by the trial judge recognized the necessity and importance of the father's influence in the development of the children's black identity. The father was African-Canadian, the mother, Caucasian.

change on the best interests of the child. In making its decision, the court must weigh the recent evidence, not stale evidence.[395]

[395] In *Kubel* v. *Kubel* (1995), 169 A.R. 29, 15 R.F.L. (4th) 356 (Alta. C.A.), the court overturned the trial decision, holding that the trial judge had attached insufficient weight to the mother's significant improvement in compliance with access over the preceding eight months.

The court will go to some length to facilitate contact.[396]

2. Non-parents

Children may also have a right to maintain contact with grandparents and other significant third parties. With modern-day changes in family structure, the range of relationships a child may experience while growing up is expanding. Few families in current society are "nuclear" families consisting of one father, one mother and two children:[397]

> ... as adults move through different relationships, the children form varied attachments with members of the different "families". Indeed, many children today have two sets of parents and four sets of grandparents. The reality of modern life is that a biological relationship may become of decreasing importance to the child as the number and nature of the individuals who have contact with the child changes.

---

[396] In *F.(E.)* v. *S.(J.S.)* (1995), 17 R.F.L. (4th) 283, 34 Alta. L.R. (3d) 158 (Alta. C.A.), the Chambers judge granted unsupervised access, one occasion at a time, to the father of a child over the mother's objections. The father had previously admitted to sexually abusing a child from the mother's previous marriage but later sought therapy and rehabilitation and subsequently had been allowed unsupervised access to his own child. The trial court, which "was keeping a very, very close watch on the family," stood ready to immediately review any unsatisfactory incident. The Court of Appeal upheld the order, pending a full custody hearing, stating that the judge "was committed to the idea that it is possible to rehabilitate the relationship between the offending parent and the children, all without unreasonable risk to the child," and explaining (at 286 (R.F.L.)):

> [Our society] does not assume that once a parent has committed an act of abuse they are forever afterwards an unreasonable risk, and despite efforts at rehabilitations. ... But our society encourages therapy, and attempts to reconcile families after situations like this. This Court, over 10 years ago, dealing with sentencing criminal sexual abuse, said that in some occasions the abuse is so great the court will use the punishment to destroy the family unit. If the offence is great enough, the person should never have another chance. But, on other occasions, the court may not do that. It may instead craft a sentence tailored to rehabilitation of the family unit.

[397] James G. McLeod, annot. *Tramble* v. *Hill*, *infra*, note 399 at 85-86.

As has been said, decisions about access by non-parents are based on an analysis that views access as the right of the child. Unlike parents, no access presumption exists for non-parents. The courts require non-parents seeking access to demonstrate that access would be in the child's best interests.[398]

Non-parents are unlikely to be guardians. Where a non-parent is a guardian, it is doubtful whether access would be presumed to be in the best interests of the child. At the same time, it fairly may be supposed that the courts would look on access with favour. Among other factors, the decision may require an examination of the relationship between the guardian and the child and whether the guardian has given the child love and affection.

---

[398] See e.g. *Lapp* v. *Dupuis* (1985), 45 R.F.L. (2d) 28 (Man. C.A.) and *Desjardins* v. *Desjardin*s (1993), 39 Man. R. (2d) 140 (Q.B.).

Grandparents constitute the largest category of third persons seeking access. Often, the grandparents are in-laws of the custodial parent. The grandparent's son or daughter may have separated or divorced from the custodial parent, or died. The custodial parent may have moved away with the children, or the custodial parent may think the grandparents are meddling and so deny access. Where both parents are alive, grandparent access is likely to be tied to the access of their son or daughter who is the non-custodial parent. Where the father has killed the mother and custody has been given to the maternal grandparents, the paternal grandparents are able to obtain access unless there is too much strife between the families or the paternal grandparents allow contact between the child and father and this causes the maternal grandparents concern.[399]

In the United States over the past two decades, grandparent rights groups have actively lobbied for the enactment of grandparent visitation statutes. Today, statutes in all 50 states give grandparents the right to apply for access.[400] Like the American statutes, the recent *Provincial Court Act* amendment in Alberta is merely a procedural vehicle: it does not confer substantive rights. Grandparents seeking access may have to "demonstrate the existence of some special circumstance or condition" before they will be heard.[401] Scholars have commented that the law should facilitate "non-parent" rather than "grandparent" access:[402]

> ... once a decision is made to allow individuals other than parents to petition for visitation privileges, there is no good reason for restricting this limited right to the child's grandparents; siblings, other relatives, even

---

[399] See *e.g. Tramble* v. *Hill* (1987), 7 R.F.L. (3d) 85 (Ont. U.F.C.) where "one of the major factors militating against the paternal grandmother's claim for access was that she would continue contact between the child and the father—something that posed a real risk for the child's future development."

[400] Samuel V. Schoonmaker III, William H. Narwold and Roberta Hatch, "Third-Party Access to Children: Update on Constitutional Issues" (1991), 25 Fam. L.Q. 117.

[401] *Ibid.*

[402] See e.g. Howard G. Zaharoff, "Access to Children: Towards a Model Statute for Third Parties" (1981), 15 Fam. L.Q. 165-203.

> other individuals with whom the child has established significant ties should also have this right.

Another observation is that as family structures in society change, it is becoming more exceptional for grandparents to have so much involvement in a child's life that the child would be harmed if that involvement were to cease:[403]

> ... as children move through different relationships, the role historically occupied by grandparents will increasingly be occupied by surrogates. As contact with a natural parent weakens, the child's contact with that person's parents (the grandparents) will weaken even more.

Recognition of a child's right to have important relationships protected is a significant move. Nevertheless, courts may be hesitant to award non-parent access because non-parent access intrudes on the custodial parent's time with the child and diminishes that parent's ability to take responsibility for raising the child. In an era when the judicial system is already strained, it is open to question whether non-parent challenges to custodial parent access decisions ought to be litigated in court. Litigation is likely to create stress for the child, heighten the animosity between the custodial parent and the person seeking access and be a financial drain on the parties. As has been observed, "The anger present in any interfamily dispute over a child can be every bit as heated as the anger present in a divorce."[404]

From a practical standpoint, for most grandparents and collateral family members, the main hope for access continues to lie in establishing and maintaining a good relationship with the child's custodial parent.

---

[403] McLeod, *supra*, note 397.

[404] Sandra Joan Morris, "Grandparents, Uncles, Aunts, Cousins, Friends: How is the court to decide which relationships will continue?" (Fall 1989), Family Advocate 11.

We think that the court should have discretion to award access to a parent or non-parent in the best interests of the child. In contrast with the *Divorce Act*, there should be no legislated presumption that access to a parent, or anyone else, is in the child's best interests.[405]

We consider the question of standing to apply for access in Chapter 10 on applicants.

RECOMMENDATION No. 31.4

The court, acting in the child's best interests, should have power to make an order granting access to a child to any one or more of the following persons:

(a) a non-custodial guardian, or

(b) any other person where

(i) the child's parents, if alive, are living separate and apart, or

(ii) one or both of the child's parents are deceased.

E. Selected Factors

Diverse factors have a bearing on the determination of whether access is in the best interests of a child. Some of these factors are set out in this section.

1. Relationship between child and person seeking access

One important factor is the quality and length of the relationship between the child and the person seeking access. Is the person related to the child

---

[405] *Divorce Act*, s. 16(10), which provides for a child's "maximum contact" with an access parent by requiring the court to

> ... 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.

by blood or marriage? Has the person lived with the child? Has the person parented the child? For how long? What love, affection and emotional ties exist between the child and the person seeking access? If the relationship was long enough and the bonds strong enough, access may be granted.

2. Relationship between person with custody and person seeking access

Another factor is the relationship between the person with custody and the person seeking access. If a high degree of acrimony is present, access may be denied.[406]

3. Child's personality

The Saskatchewan provision lists "the personality, character and emotional needs of the child" as one of four factors to be considered in awarding access to a child.

4. Parenting skills

[406] See e.g. *Lachance* v. *Cloutier* (1982), 18 Alta. L.R. (2d) 328 (Alta. Prov. Ct.).

Yet another factor that the courts consider is the parenting ability of the person seeking access.[407]

5. Wishes of child

The wishes of the child are also a factor that the courts consider. The child's wishes are not decisive although they become more important as the child grows older.[408] The courts recognize that forcing access upon a child who resists generally will only serve to heighten animosities. They also recognize that the child's best interests may be contrary to what the child desires.[409]

6. Wishes of person with custody

The wishes of the person having custody are given considerable weight where a non-parent seeks access.

7. Child's schedule

If access is ordered between the child and a number of adults, access may become more disruptive than beneficial to the child. Other considerations include "the child's needs to maintain a stable schedule, to participate in activities, or even to have unstructured free time."[410]

8. Consistent decision making and lifestyle

Multiple access arrangements and inconsistent influences may cause a child confusion.

---

[407] See e.g. *McKay* v. *Sambles* (1991), 36 R.F.L. 383 (N.B.Q.B.), a case in which the father did not have the parenting skills for unsupervised access, supervised access would be awkward and stressful for the child, and the father had little of benefit to contribute to the child.

[408] See e.g. *Vignaux-Fines and Fines* v. *Chardon* [indexed as: *C.(G.)* v. *V.-F.(T.)*] (1987), 9 R.F.L. (3d) 263 (S.C.C.), in which the court decision respects the wishes of two children in their early teens who ran away from their father several times to live with their aunt and uncle.

[409] See e.g. *Sekhri* v. *Mahli*, *supra,* note 389.

[410] Morris, *supra*, note 404.

9. Child's heritage

Contact with the extended family may serve to protect and nurture the child's sense of identity.

10. Past conduct of person seeking access

Provisions in the *Divorce Act* and in legislation in some provinces prohibit the court from taking the past conduct of any person into consideration unless the conduct is relevant to the ability of that person to parent the child or to care for the child during access visits.[411]

11. Recommendation

RECOMMENDATION No. 32.4

Alberta law should provide that, in making an access determination that is in the best interests of the child, the court may consider any of the following factors:

(1) the child's age;

(2) the child's

(a) health, emotional well-being and special needs,

(b) personality, character and emotional needs, and

(c) physical, psychological, social and economic needs;

(3) the nature and quality of the child's relationship with the person seeking access;

(4) if the child is twelve years of age or older, the views and preferences of the child, which shall be given considerable weight;

(5) the child's ethnic and cultural heritage;

---

[411] See e.g. *Children's Act*, S.S. 1990, c. C-8.1, s. 9(1).

(6) the parenting ability of the person seeking access;

(7) whether the person seeking access has ever acted in a violent manner towards

(a) this or any other child,

(b) the child's parent or other guardian, or

(c) a member of their household;

(8) the wishes of the person with custody of the child;

(9) the relationship between the custodial guardian and the person seeking access;

(10) the child's needs to maintain a stable schedule, to participate in activities, or to have unstructured free time;

(11) the motivation of the person seeking access and their capacity to give the child love, affection and guidance;

(12) the capacity of the person seeking access to cooperate or to learn to cooperate with the custodial guardian;

(13) methods for assisting cooperation with the custodial guardian and resolving disputes and the willingness of the person seeking access to use these methods;

(14) any other factor the court considers relevant.

F. Terms and Conditions

In Chapter 11, we recommend that the court should have wide powers of discretion in exercising jurisdiction over guardianship, custody and access. That discretion would allow the court to attach terms and conditions to

an order. We give examples relating to specific terms of access and supervisory orders in that chapter.

G. Connection Between Access and Spousal or Child Support

Access and support generally are not to be tied together. However, the court may take the cost of exercising access rights into consideration as a factor in setting child support. Cases where the court has done so include: *Pisko* v. *Pisko*,[412] in which the court reduced the monthly child support payable in order to facilitate access, and *M.(C.)* v. *M.(C.)*,[413] a case involving children of the marriage and children born outside marriage whom the court said should be treated equally.[414] Of note, the Federal Child Support Guidelines allow the court to depart from the tables where "a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time."[415] In such a case, one of the factors the court must take into account is "the increased costs of shared custody arrangements."[416]

Support is sometimes used as a carrot or stick in order to facilitate access. In one Alberta case, the judge warned the mother that her support might be suspended if she continued to thwart the father's access.[417]

One thing is certain. Because access is the right of the child, access decisions must be made in the best interests of the child. We recommend

---

[412] (1997), 151 D.L.R. (4th) 189, 200 A.R. 330, 146 W.A.C. 330 (Alta. C.A.).

[413] *M.(C.)* v. *M.(C.)* (1995), 18 R.F.L. (4th) 337 (Alta. Q.B.).

[414] See also *Sekhri* v. *Mahli*, *supra,* note 389, a case in which the court indicated that it would consider reducing the child support award from $300 to $200 per month if the father initiated the necessary steps for child access. The reduction in support payments would assist the father to defray such costs as obtaining a social worker to supervise access.

[415] Federal Child Support Guidelines (established under the *Divorce Act*, s. 26.1, by SOR/97-175, gazetted April 16, 1997, effective May 1, 1997), s. 9.

[416] *Ibid.* s. 9(b).

[417] *McDonald* v. *McDonald* (1993), 140 A.R. 364 (Alta. Q.B.).

that any measures adopted by the court should adhere to this standard. As a general rule, the conferral or withholding of contact with the child should not be used to reward or punish a parent for compliance or non-compliance with the child support obligation.

RECOMMENDATION No. 33.4

The conferral or withholding of contact with the child should not be used to reward or punish a parent for compliance or non-compliance with the child support obligation.

H. Powers and Responsibilities of Non-Custodial Guardian

In Chapter 5, we recommended that Alberta law should build on the existing concepts of guardianship, custody and access. In Chapter 7, we made recommendations with respect to the powers and responsibilities of a custodial guardian. We emphasized that parents who live separate and apart from each other should be encouraged to enter into agreements with respect to custody and access. However, where they are unable to agree, the law should give one parent sole custody and clear decision making authority over the child with access to the other parent, as appropriate in the circumstances. In our view, this approach would be more likely to bring stability to the child's life than continuing disagreement between the parents under a shared parenting arrangement.

In this Chapter, we recommend that, unless a court otherwise orders or the parties otherwise agree in writing, a non-custodial guardian should have the powers, responsibilities and rights set out below.

RECOMMENDATION No. 34.4

Unless otherwise ordered by the court or agreed to by the parties in writing, the non-custodial guardian of the

child should have reasonable access to the child, and the following powers, responsibilities and rights:

(1) with the consent of the custodial guardian, may act on behalf of the child,

[NOTE: COMPARE *DRA*, S. 46(A).]

(2) with the consent of the custodial guardian, may appear in court and prosecute or defend an action or proceedings in the name of the child,

[NOTE: COMPARE *DRA*, S. 46(B).]

(3) may appoint a person as guardian to act in the event of the guardian's death or incapacity,

[NOTE: COMPARE *DRA*, S. 48.]

(4) shall protect the child,

[NOTE: EXTREME FAILURE TO PROTECT LEADS TO *CWA* INTERVENTION.]

(5) may take custody where the custodial parent dies,

(6) if a parent, shall give the child love and affection,

(7) if a parent, shall provide the child with the necessaries of life from the parent's personal resources,

[NOTE: COMPARE MOA, S. 2(2) AND (3).]

(8) may maintain communication with the child and visit the child on terms as agreed by the parties or ordered by the court,

(9) may request from the custodial guardian information about matters relating to the child's health, welfare and education,

[NOTE: COMPARE *DIVORCE ACT*, S. 16(5); SOME PROVINCIAL STATUTES.]

(10) is entitled to receive at least thirty days notice from the custodial guardian of an intended change in the child's place of residence,

[OR LESS IF COURT ABRIDGES TIME: SEE REC. 29.4.]

(11) may exercise guardianship powers consistent with the wishes of the custodial guardian,

(12) may discipline the child as reasonable when in contact with the child,

(13) may make urgent or emergency medical treatment decisions for the child,

(14) may grant or refuse consent in matters concerning the child, *e.g.*,

(a) adoption,

[NOTE: SEE *CWA*, SS. 56, 57.]

(b) marriage,

[NOTE: SEE *MARRIAGE ACT*, S. 18.]

(c) private guardianship,

[NOTE: SEE *CWA*, S. 52.]

(d) change of name, and

[NOTE: SEE *CHANGE OF NAME ACT*, SS. 7, 7.1, 11., 12.]

(15) is entitled to receive notice of matters affecting the child, *e.g.*,

(a) declaration of parentage,

[NOTE: SEE *DRA*, S. 66.]

(b) adoption,

[NOTE: SEE *CWA*, S. 60.]

(c) child welfare apprehension, supervision, temporary or permanent guardianship,

[NOTE: SEE *CWA*, SS. 18, 19, 21 27.]

(d) private guardianship.

[NOTE: SEE *CWA*, S. 50.]

I. Powers and Responsibilities of Non-guardian with Access

The situation of a non-guardian seeking access is different. Here, we recommend that the law ordinarily should respect the authority of the custodial guardian. However, the court should have discretion to make an access order where the custodial guardian has denied access to a non-guardian and the court is satisfied that access is in the child's best interests. The non-guardian would have the powers, responsibilities and rights granted by the court making the access order.

RECOMMENDATION No. 35.4

A non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.

J. Specific Terms of Access

We will discuss the power of the court to attach terms and conditions to an access order in Chapter 11.

CHAPTER 9 PARENTING AGREEMENTS

A. Existing Law

The *DRA*, section 55(1), empowers married parents who are not living together, or who are divorced or judicially separated, to enter into written agreements with respect to "the custody, control and education of the minor children of the marriage". The *PCA*, section 31, permits the court to make a consent order on the terms agreed on if the parties to an application are in agreement respecting the matters in question. The court has discretion to do so without holding a hearing. The *Divorce Act* does not mention agreements where child custody or access is concerned.

Case law establishes that agreements are to be encouraged and will be taken into consideration, although they are not binding on the court.[418]

B. Previous ALRI Recommendations

In ALRI Report No. 60 on the *Status of Children*, the ALRI proposed amendments to section 55(1) for the purpose of conferring corresponding contractual powers on both married and unmarried parents.[419]

In ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage*, the ALRI proposed that "Domestic Contracts" should be sanctioned by a "new Family Support or Domestic Relations statute".[420]

---

[418] See minority judgment in *Gordon* v. *Goertz* (1996), 19 R.F.L. (4th) 177, [1996] 2 S.C.R. 2, 134 D.L.R. (4th) 321 (S.C.C.) at 236 (R.F.L.), for statement that parental agreements entered into between parents regarding children are "entitled to respect and deserving of encouragement," but they are "not binding on courts and must be based on the best interests of children assessed from the vantage point of the child." See also *Lenney* v. *Lenney* (1996), 24 R.F.L. (4th) 381, 194 A.R. 50 (Alta. Q.B.), where the court held that unless the best interests of the child require the court to deal with the application immediately, an agreement to mediate future conflicts that was incorporated in the divorce judgment must be satisfied before the court will hear an application.

[419] *Supra*, note 4.

[420] ALRI Report No. 53, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (June

1989) at 24.

The draft legislation in Part IV of ALRI Report No. 53 is modelled on statutory provisions that are operational in several Canadian provinces.[421] It provides for three types of domestic contracts, namely marriage contracts, cohabitation agreements and separation agreements. All three types of contract provide means whereby parties can seek to regulate the economic and parenting consequences of their relationship during its subsistence and on its termination.[422] Marriage contracts are entered into by persons before or during their marriage. Cohabitation agreements are entered into by unmarried persons of the opposite sex before or during their cohabitation. Separation agreements are entered into by persons of the opposite sex, whether married or not, who have cohabited but are living apart.

In the draft legislation, section 15 empowers a separated couple to "agree on their respective rights and obligations, including ... (c) the right to direct the education and moral training of their children; and (d) the right to custody of and access to their children ...".

Sections 13 and 14 regulate marriage contracts and cohabitation agreements. They empower parties to agree on "(c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children ...". What will be in the best interests of the child if the relationship between the parents breaks down cannot be satisfactorily anticipated in advance. Existing statutory provisions to similar effect in several provinces, including Ontario where they have existed since 1978, have not caused any apparent difficulties. This is in spite of the fact that distinctions between rights over "education and moral training" and rights over "custody and access" may appear to be blurred.

---

[421] *Ibid.* at 61-65, ss. 12-22. For an overview of provincial legislation as it stood ten years ago, see ALRI, Issues Paper No. 2, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (October 1987) at 86-112.

[422] For definitions of the three types of domestic contract, see RFD No. 18.2 on *Spousal Support*, Chapter 6, heading A.

The proposed legislation for Alberta, like existing statutory provisions in other provinces, does not envisage that parents will enjoy unfettered contractual rights. Section 17(1) of the draft legislation confers an overriding discretion on the court to disregard any parenting provision in a domestic contract where the best interests of the child justify judicial intervention. It is worded as follows:[423]

> In the determination of any matter respecting the support, education, moral training or custody of or access to a child, the court may disregard any provision of a domestic contract pertaining thereto where, in the opinion of the court, to do so is in the best interests of the child.

C. Discussion

The recommendations in ALRI Report No. 53 do not embrace agreements between parents who do not, have not and do not intend to live together, whereas the amendment to the *DRA*, section 55(1), proposed in ALRI Report No. 60 would allow parents in this situation to make arrangements by written agreement.

We think that Alberta legislation should permit parents or other guardians to enter into agreements with respect to the incidents of guardianship and the upbringing of their children. Our recommendations are based on sections 13(1), 14(1), 15 and 17(1) of the draft Act proposed in ALRI Report No. 53, but modified to make provision for agreements between the guardians of a child, whatever their relationship to each other may be.

We have chosen to substitute the term "parenting agreement" for "domestic contract" in the former recommendation. A "parenting agreement" might be included as part of a domestic contract as defined in Report No. 53, but would not be restricted to a document that is tied to the marriage or cohabitation of the parents or their separation after marriage or cohabitation.

---

[423] ALRI Report No. 53, *supra*, note 420, Draft Act, s. 17(1).

As recommended in Report No. 53, where the guardians live together, or the agreement is made in anticipation that they will live together, that agreement should not include provisions regarding the right to the custody of or access to their child.

In every case, the court should have power to disregard the agreement where the terms of the agreement are not in keeping with the best interests of the child.

RECOMMENDATION No. 36.4

(1) The guardians of a child may enter into a written agreement with respect to matters pertaining to the upbringing of the child.

(2) Where the guardians referred to in subsection (1) live together, or the agreement is made in anticipation that they will live together, that agreement shall not include the right to custody of or access to the child.

RECOMMENDATION No. 37.4The court, acting in the child's best interests, should have power to disregard any provision of a parenting agreement pertaining to the incidents of guardianship, including custody or access.

SECTION III — POWERS AND PROCEDURES

CHAPTER 10 APPLICANTS

A. Existing law

i) Alberta

The existing Alberta legislation is peppered with provisions governing who may apply for guardianship, custody or access. The case law interpreting these provisions or developed by the superior courts in the exercise of their *parens patriae* jurisdiction adds to the complexities.

a. *DRA*

Under the *DRA*, section 47(2) permits a person declared to be a parent under Part 8 to apply for guardianship. Section 50 permits application by a minor, or anyone on behalf of the minor where the minor "has no parent or lawful guardian" or the parent or lawful guardian is "not a fit and proper person" to have guardianship. Section 55 permits either parent to apply for "custody, control and education" of a child if the parents fail to reach agreement on these matters. Section 56(1) permits the father or mother of a minor, or a minor ("who may apply without a next friend") to apply for custody of, or the "right of access" of either parent to, the child. Section 57(2) permits a parent or "other responsible person" to apply for the "production or custody" of a child.

According to the case of *Langdon* v. *York*, a person standing *in loco parentis* to a child has standing to apply for guardianship under the *DRA*, section 49.[424] Section 49 is the section that authorizes the court to appoint a guardian to act jointly with the father or mother of a child or with a testamentary guardian named by a deceased parent. In this case the mother

[424] *Langdon* v. *York* (1994), 161 A.R. 279 (Alta. Q.B.).

had placed the child with the applicants for adoption but later changed her mind. The applicants sought sole guardianship or, alternatively, joint guardianship with the mother.[425]

b. *PCA*

[425] The test for guardianship may differ depending on whether the applicant is a birth parent or a "legal stranger": *Malette* v. *Mallete* [1989] A.J. No. 540 (Alta. C.A.).

The *PCA*, section 32(2), permits either parent, or the child ("who may apply with or without any person interested on his behalf") to apply for custody of and the right of access to the child. A person applying on behalf of a child is not an applicant in their own right. For custody, it is now generally accepted that the applicant must be a guardian[426] and that a putative father who is not a guardian does not have standing.[427] In short, a "legal stranger" has no status. For access, the issue of the standing of a "father" who is not a guardian is less clear.[428] We mentioned earlier that where guardianship is conferred under the *CWA*, custody and access issues may have to be resolved under that Act, not the *PCA*.

Section 32.1(3) permits a grandparent or the child, "with or without any person interested on his behalf," to apply for the right of access to a child. The child must be "under the age of 16 years."[429] "Grandparent" is defined to mean "a grandparent of a child whether related to the child by blood, marriage or adoption."[430] As just stated, prior to the enactment of section 32.1, parent guardians were the only parties with standing.[431]

c. *CWA*

Part 5 of the *CWA* permits "any adult who has had the continuous care of a child for a period of more than 6 months" to apply for a private guardianship order. Where the child is the subject of a permanent guardianship order or agreement, section 49(1.1) permits a director to apply on behalf of an applicant if "the applicant consents in writing," and "the director is satisfied that it is in the child's best interests."

---

426 *R.S.* v. *A.L.*, *supra*, note 267.

427 *A.W.* v. *K.S.*, *supra*, note 267; compare *W.D.* v. *G.P.*, *supra*, note 267.

428 See e.g. *R.B.F.* v. *K.G.* (1993), 147 A.R. 376 (Alta. Prov. Ct.) *per* Landerkin, P.C.J.

429 *PCA*, s. 32.1(1)(a).

430 *Ibid.* s. 32.1(1)(b).

431 See *W.D.* v. *G.P.*, *supra*, note 267 at 353; *Knight* v. *Knight*, *supra*, note 381.

2. *Divorce Act*

Section 16(1) of the *Divorce Act*, 1985 provides that an application for custody or access may be made "by either or both spouses or by any other person". Section 16(3) requires non-parents to obtain the leave of the court to apply for access. The Act does not specify the basis for granting leave. It is important to recognize that "custody" under the *Divorce Act* takes on a wide meaning, akin to guardianship under the Alberta law.

3. Parens patriae jurisdiction

In loco parentis status gives a person standing to apply for guardianship, custody or access under the equitable jurisdiction of the superior courts.[432]

4. Other provinces

The provisions governing who may apply for guardianship, custody or access also vary in other provinces. For example, in Ontario, *Children's Law Reform Act*, section 21, provides:[433]

> 21. A parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child.

No leave of the court is required. In contrast, in Nova Scotia, an application may be made by "a parent or guardian or other person with leave of the court."[434] In Saskatchewan, an application may be made by "a parent or other person having,

---

[432] See e.g. *W. (K.K.)* v. *R. (E.J.)*, *supra*, note 207 (this case contains a good review of cases on the *DRA* sections on guardianship, custody and fitness, up to this date); *Langdon* v. *York*, *supra*, note 424, cited in *Williams* v. *Williams*, *supra*, note 168.

[433] R.S.O. 1990, c. C.12, s. 21. See also: *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 27; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 4; *Children's Act*, R.S.Y. 1986, c. 22, s. 33(1); and *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 38 (any person may apply).

[434] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 18(2).

in the opinion of the court, a sufficient interest."[435] As with the *Divorce Act*, it is important to recognize that "custody" takes on its wide, not narrow, meaning in some of these jurisdictions.

[435] *Children's Law Act*, S.S. 1990, c. C-8.1, s. 6(1). This Act will be repealed when the *Children's Law Act, 1997* is proclaimed in force. The same persons may apply under the 1997 Act, s. 6(1).

Some jurisdictions specifically permit a minor who is or has been married, or who is a parent, to bring proceedings without a next friend or guardian *ad litem*.[436]

B. Persons Who May Apply

i) Guardianship

We think that some persons should be entitled, as of right, to apply for guardianship of a child. We would include in this category: a parent,[437] a person standing in the place of a parent, a relative, and a step-parent. It is important, of course, to distinguish between the right to apply and the disposition of an application on its merits. In every case, the court would make its decision to grant or refuse guardianship to the applicant in the best interests of the child.

We would allow any other person to apply for guardianship, but that person would have to obtain the leave of the court to do so.

We would not take the Saskatchewan approach of legislating a threshold test requiring the applicant to show a sufficient interest before the case will be heard. This approach is similar to, but perhaps less flexible than, the "leave of the court" requirement that we would impose on persons who are not entitled to apply for guardianship as of right. Where leave of the court is not required, the court would be able to dismiss, on its merits, an application which is not in the best interests of the child. As a matter of procedure, the Alberta Rules of Court permit a court to strike out a pleading that is "scandalous, frivolous or vexatious" and to stay, dismiss or enter judgment accordingly.[438] Where a matter is not otherwise provided for in the *PCA* or regulations under it, these Rules govern proceedings in the Provincial Court as well as in Court of Queen's Bench.[439]

---

[436] See e.g. *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 4(2) (married child); *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 70(1) (minor who is a parent); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 64(1) (minor who is a parent).

[437] For the definition of "parent," see *supra*, Chapter 1, heading C.2.

[438] A.R. 129.

[439] *PCA*, s. 19.1(2).

RECOMMENDATION No. 38.4The following persons should be eligible to apply for guardianship:
(a) a parent;
(b) a person standing in the place of a parent in relation to a child;
(c) a relative of the child;
(d) a step-parent of the child; or
(e) with the leave of the court, any other person on behalf of the child.

1. Custody

We have recommended that the court should have power to grant custody only to a guardian. Therefore, we recommend that only a guardian of a child should be able to apply for custody. This does not mean that the two issues — guardianship and custody — must be decided at different times. The two applications could be consolidated such that the custody application would be heard immediately after the guardianship application had been determined.[440]

RECOMMENDATION No. 39.4Only a guardian of the child should be eligible to apply for custody.

2. Access

In chapter 8, we recommended that the court should be empowered to award access to any person where it is in the best interests of the child to have contact with that person. Here again, it is our view that some persons should be entitled to apply for access to a child as of right, but that others

[440] A.R. 229.

should require leave of the court to bring an application. The persons who should be entitled to apply for access are:

- a guardian, or
- a non-guardian who is a parent, a person standing in the place of a parent in relation to the child, a relative of the child or a step-parent.

Any other person should be required to obtain the leave of the court to bring an application.

RECOMMENDATION No. 40.4

The following persons should be eligible to apply for access to a child:

(a) a guardian,

(b) a non-guardian who is

(i) a parent,

(ii) a person standing in the place of a parent in relation to a child,

(iii) a relative of the child,

(iv) a step-parent of the child,

(c) with the leave of the court, any other person on behalf of the child.

C. Time When Application Made: Unborn Child

In New Brunswick, section 1 of the *Family Services Act* [441] provides that "'child' ... includes ... an unborn child" whereas, in British Columbia,

[441] S.N.B. 1980, c. F-2.2.

section 21 of the *Family Relations Act* [442] reflects the traditional common law approach by providing as follows:

> 21. "child" includes a child not yet born on the death of the child's father or mother but subsequently born alive;

We recommend that the court should be empowered to grant orders for guardianship, custody or access in proceedings brought before the birth of a child but that such orders should not take effect until the birth of the child.

In making this recommendation, we are fully aware of the decisions of the Supreme Court of Canada that hold that a foetus must be born alive in order to enjoy legal rights.[443]

RECOMMENDATION No. 41.4The court should have power to grant guardianship, custody or access orders before the birth of a child but such orders should not take effect until the birth of the child.

---

[442] R.S.B.C. 1996, c. 128.

[443] See *e.g.*, *Daigle* v. *Tremblay*, [1989] 2 S.C.R. 530, 102 N.R. 81, holding that a potential father cannot veto a woman's decision to undergo an abortion. It is a matter for speculation whether or not these decisions will be found to preclude guardianship, custody or access orders being granted prior to a child's birth.

CHAPTER 11 GUARDIANSHIP, CUSTODY OR ACCESS ORDER

A. Wide Discretion

In Chapter 6, we recommended that the court should have power to appoint a guardian to act jointly with any other guardian or as the sole guardian of the person of the child.[444] In Chapter 7, we recommended that a custodial guardian should have the powers, responsibilities and rights of guardianship set out in Recommendation No. 28.4 "unless otherwise ordered by the court or agreed to by the parties in writing." Similarly, in Chapter 8 we recommended that a non-custodial guardian should have the powers, responsibilities and rights set out in Recommendation No. 34.4 "unless otherwise ordered by the court or agreed to by the parties in writing." In Chapter 8, we also recommended that a non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.[445]

---

[444] *Supra*, Rec. No. 11.4 at 96.

[445] *Supra*, Rec. No. 35.4 at 168.

In exercising the powers reserved to it by these recommendations, we intend that the court, acting in the best interests of the child, should have wide powers of discretion to make the guardianship, custody or access decisions that it sees fit.[446] The discretionary powers should include the power to divide the incidents of guardianship among the guardians. We recommend accordingly.

RECOMMENDATION No. 42.4The court should have wide powers of discretion in exercising jurisdiction over guardianship, custody and access.

---

[446] For legislation in other Canadian provinces and territories that confers wide powers on the courts in the exercise of their discretionary jurisdiction over guardianship, custody and access, see: *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 9 (interim orders), s. 10 (consent orders), s. 11 (incorporation of agreement in court orders), s. 35 (joint custody, access) and ss. 36.1 and 37 (non-molestation orders); *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 11 (tracing whereabouts of parent), s. 13 (occupation of family residence), s. 48 (consent orders), s. 49 (disclosure of address) and s. 50 (penalties); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 128 (non-molestation orders), s. 129 (custody and access), s. 132 (restraining orders), s. 132.1 (apprehension of child; role of police) and
s. 132.2 (prevention of removal of child; passports); *Children's Law Act*, R.S. Nfld. 1990, c. C-13, s. 33 (custody, incidents of custody, access), s. 40 (supervision orders), s. 41 (enforcement of access, compensatory access, expenses, mediation), s. 42 (non-molestation), s. 43 (unlawful withholding of child), s. 45 (prohibiting removal of child), s. 46 (contempt of powers of provincial courts), s. 47 (information as to address), s. 76 (consent orders) and s. 80 (interim orders); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 28 (custody, incidents of custody, access), s. 34 (supervision orders), s. 34a (not proclaimed) (enforcement of access, compensatory access, expenses, mediation), s. 35 (non-molestation), s. 36 (unlawful withholding of child), s. 37 (prohibiting removal of child), s. 38 (contempt powers of provincial courts), s. 39 (information as to address) and s. 72 (interim orders); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 5 (custody, incidents of custody, access), s. 10 (consent orders, incorporation of contract), s. 20 (non-molestation), s. 21 (order where child unlawfully withheld), s. 22 (prohibiting removal of child) and s. 25 (information as to address of persons); *Children's Law Act*, S.S. 1990, c. C-8.1, s. 6 (custody, incidents of custody, access, any additional order, authorization of parent to appoint guardian, interim orders, notice of change of residence, sharing parental responsibilities), s. 7 (*ex parte* interim orders), s. 18 (powers to enforce custody and access orders), s. 23 (non-molestation), s. 24 (unlawful withholding of child), s. 26 (enforcement of access, compensatory access, security, mediation), s. 27 (payment of expenses), s. 28 (information as to address) and s. 29 (contempt of court); *Children's Act*, R.S.Y. 1986, c. 22, s. 33 (custody, incidents of custody, access), s. 35 (supervision orders), s. 36 (non-molestation orders), s. 46 (unlawful withholding of child), s. 47 (prohibiting removal of child), s. 48 (order for disclosure of whereabouts of person) and s. 77 (no award of costs).

RECOMMENDATION No. 43.4The powers of discretion should include the power of the court, acting in the child's best interests, to divide the incidents of guardianship among the guardians.

B. Order Granting Guardianship, Custody or Access to One or More Persons

One feature of a broad discretionary jurisdiction would be the power of the court to make an order granting guardianship, custody or access to one or more persons.

1. Guardianship

In Chapter 6, we recommended that the court should have power to appoint a guardian to act jointly with any other guardian or as sole guardian.[447] This recommendation gives the court power to make an order granting guardianship to one or more persons.

2. Custody

We also think it should be open to the court to order that custody shall be shared between two or more persons, provided that each of those persons is a guardian of the child. There are two situations to consider: those in which the guardians agree to share custody and those in which they do not.

Certainly, the sharing of custody by agreement between the guardians should be permissible in law. Where the parties consent to an order providing for shared custody, the court should have power to make it. Where the parties have entered into an agreement about custody, the court should be able to incorporate the terms of that agreement relating to shared custody into an order.

---

[447] *Supra*, Rec. No.11.4 at 96.

We have stated that where the guardians cannot agree, our Sole Custody Model should apply, but we made this recommendation subject to an order of the court otherwise. We have difficulty envisaging situations where, in the absence of agreement by the guardians, a court would find shared custody to be in the best interests of the child. However, we acknowledge that such a case may arise and recommend that the court, acting in the best interests of the child, should have the discretion to order that custody be shared in cases where the guardians are unable to agree.[448]

3. Access

[448] Under our recommendations, custody could only be granted to a person who is a guardian. This contrasts with the *Divorce Act*, s. 16(4) and diverse provincial statutes to similar effect. Under s. 16(4), the discretionary jurisdiction to grant custody or access "to any one or more persons" is sufficiently broad to permit a court to grant "joint or shared custody" as between the parents themselves and also as between the parents and third parties, such as grandparents or other close family relatives and persons who stand *in loco parentis* to a child. Our recommendations on guardianship take the place of such provisions.

Legislation in some other provinces also empowers the court to divide the incidents of custody between the parents or between parents and third parties, if it is concluded that such a disposition is in the best interests of the child. Again, our recommendations on guardianship take the place of such provisions.

In Chapter 8, we recommended that the court should have power to make an order granting access to a child to a non-custodial guardian or any other person where the child's parents, if alive, are living separate and apart, or one or both of the child's parents are deceased.[449] Within these prescriptions, the number of persons to whom a court may order access to a child would be limited only by the determination of what is in the best interests of the child.

RECOMMENDATION No. 44.4The court should have power to make guardianship, custody or access orders in favour of one or more persons.

C. Terms and Conditions

The broad discretionary jurisdiction of the court which we have recommended be enacted in legislation would allow the court to attach terms and conditions to a guardianship, custody or access the order. This power is present under the existing law.

1. Existing law

Section 16(6) of the *Divorce Act* permits the court to make custody or access orders for a definite or indefinite period and subject to such other terms, conditions or restrictions as the court thinks fit and just.[450] Similar powers may be exercised in variation proceedings under the authority of section 17(3) of the Act. Pursuant to these sections, the courts have express authority to grant a temporary or fixed term order for custody or access and such an order may be subject to review at a later date or on the expiration of the fixed term.

---

[449] *Supra*, Rec. No. 31.4 at 162.

[450] In this discussion, we consider the power of the court to made orders subject to terms and conditions. In Chapter 14, we look at the period for which the order will endure.

Certain provisions in Alberta legislation also confer a broad discretion on the court making a guardianship, custody or access order to attach such terms and conditions as it thinks fit. For example, the *DRA*, section 52(2), provides that a guardian may, by leave of the Court, resign his office "on any terms and conditions the Court considers just." Section 56(1) provides that the Court "may make any order it sees fit" regarding the custody of a child and the right of access to the child of either parent. Where the conditions set out in the section are met, section 60(1) provides that the Court "may make any order it thinks fit" to ensure that the child is brought up in the religion in which the parent or other responsible person has a legal right to require that the minor be brought up.

In addition to their jurisdiction under statute, the superior courts enjoy a broad protective power under their *parens patriae* jurisdiction.

2. Three examples

How do the courts make use of this broad discretionary jurisdiction? Three examples follow:

a. Mobility of custodial guardian

The courts are generally reluctant to limit the powers of the custodial parent by attaching conditions to a custody order. However, the emphasis, in recent years, on a child's right to develop and maintain a relationship with both parents has led courts, more and more often, to include directions that limit or preclude the custodial parent from removing the children from the jurisdiction without the consent of the non-custodial parent or a further order of the court.[451]

---

[451] The adoption of our Rec. No. 29.4 that "the custodial guardian should have a duty to notify any other guardian of an intended change of residence at least thirty days ahead of time" would facilitate a requirement for parental consent or court direction. With respect to the case law, see e.g.: *Carter* v. *Brooks* (1990), 30 R.F.L. (3d) 53 (Ont. C.A.); *Jones* v. *Jaworski* (1989), 18 R.F.L. (3d) 385 (Alta. Q.B.); *Halvorson* v. *Cheesman*, [1993] A.J. No. 520 (Alta. Q.B.); *Tucker* v. *Tucker* (1994), 148 A.R. 306 (Alta. Q.B.) (written shared parenting agreement, mother sought sole custody in order to move, application refused); *P.(M.)* v. *L.B.(G.)* (1995), 130 D.L.R. (4th) 382 (S.C.C.) (mother's actions in removing child from jurisdiction in breach of condition in agreement denied court the information needed, father's evidence showed he was capable of caring for child, custody awarded to father); *Johnson* v. *Johnson* (1997), 28 R.F.L. (4th) 25, 196 A.R.

233, 141 W.A.C. 233 (Alta. C.A.); *Re Picken and Pratt* (1997), 149 D.L.R. (4th) 347 (Alta. Q.B.); *Pisko* v. *Pisko* (1997), 151 D.L.R. (4th) 189, 200 A.R. 330; 146 W.A.C. 330 (Alta. C.A.); *J.R.D.* v. *D.M.P.* (1996), 183 A.R. 313 (Alta. Q.B.) (following majority in *Gordon* v. *Goertz*, mother's proposed move restricted); *Trueman* v. *Nicholson*, *infra*, note 480.

See also: Terry L. Hodgkinson, "Leaving Town: Whose Best Interests," 20 LawNow (No. 4) 20; Harold Niman, "Restrictions on Mobility of Children in Custody Cases: An Update" (1991), 12 Adv. Qtly 293; and Julien D. Payne and Eileen Overend, "The Co-Parental Divorce: Removing the Children from the Jurisdiction" (1984), 15 Revue Générale De Droit 645.

The decision to impose or remove a restriction on the mobility of the custodial guardian is made in the best interests of the child.[452] Although the principle that the child should have maximum contact with each parent is mandatory, it is not absolute.[453] As in every case, what is in the best interests of the child depends on all the circumstances. However, such restrictions on the constitutionally guaranteed right of mobility should not be lightly imposed in the absence of cogent evidence that the best interests of the child will be served by imposing the restriction.

The breach of a condition by the continuing wrongful removal of the child from the jurisdiction may lead to:

- an enforcement proceeding under the *Hague Convention*[454]

- an indefinite adjournment of any application by the offending party in civil family law proceedings[455]

- an abduction charge under the *Canadian Criminal Code*[456]

However, there is no tort of interference with access in the circumstances of a domestic dispute involving custody and access to children.[457]

---

[452] *Gordon* v. *Goertz*, *supra*, note 418; see also *infra*, Chapter 12, on variation orders.

[453] *Gordon* v. *Goertz*, *ibid.*

[454] *W.(V.)* v. *S.(D.)*, [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481 (S.C.C.).

[455] In *F.(E.)* v. *S.(J.S.)*, *supra*, note 396, the court held that it is a contempt of court to remove children and refuse to return them and the court will not hear an application by the offending party until the contempt is purged.

[456] See e.g. *R.* v. *Enkirch* (1982), 31 R.F.L. (2d) 25 (Alta. C.A.) (access parent moved child from city of Calgary contrary to court order, joint guardianship not a defence to a charge of taking a child in this circumstance) and *R.* v. *Dawson* (1996), 141 D.L.R. (4th) 251 (S.C.C.) (custodial parent who vanished with child, thereby negating effect of court order that other parent have liberal access, was guilty of abduction, *i.e.*, taking with the intent to deprive the other parent of the possession of the child).

[457] *Sturkenboom* v. *Davies*, [1997] 2 W.W.R. 11 (Alta. C.A.) on appeal from [1993] 7 W.W.R. 32;

b. Specific Terms of Access

Where the child's parents have an amicable, or at least a satisfactory, working relationship, the courts often will grant an order for "reasonable", "liberal" or "generous" access. Such an order provides for flexibility and enables the spouses to work out arrangements for access that accommodate the circumstances of the child and the parents.

(1993), 11 Alta. L.R. 147 (Alta. Q.B.) (suit by father against maternal grandfather who had assisted mother to remove children from jurisdiction without the father's knowledge or consent).

Where the spouses are not likely to be able to work out the terms of access between themselves, or where other special circumstances exist, the court may spell out the terms of access to be enjoyed by the non-custodial parent. Before making an order, the court must have adequate evidence on which to base the condition.[458] The order also may:[459]

- fix the time or restrict the hours during which access can occur
- specify the place where access privileges are to be enjoyed
- condition access on the wishes of the child[460]
- prohibit the non-custodial parent from consuming or being under the influence of drugs or alcohol when exercising access privileges
- restrain the non-custodial parent from taking the child out of the jurisdiction
- order "one or both parents to attend therapy with access to be restricted until the therapy is successfully concluded"[461]

---

[458] *Bainton-Howe* (1995), 11 R.F.L. (4th) 89 (Alta. C.A.).

[459] For examples of other conditions, see: *A.H.T. and C.L.T.* v. *E.P. and G.P.* (1995), 178 A.R. 60 (Alta. C.A.); *T.(A.H.)* v. *P.(E.)* (1995), 20 R.F.L. (4th) 115 (Alta. C.A.); *Brusselers* v. *Shirt*, *supra*, note 393 (father not to degrade women in child's presence, denial of access for four months if new girlfriend); *Stretch* v. *Stretch*, *supra*, note 387 (father to complete effective parenting for handicapped program); *F.(E.)* v. *S.(J.S.)*, *supra*, note 396 (6 weeks supervised access followed by one unsupervised access period and assessment); *Giles* v. *Giles* (1995), 17 R.F.L. (4th) 139 (Alta. C.A.) (restriction on time within which future applications could be made); and *Millar* v. *Millar* (1996), 41 R.F.L. (3d) 193; 181 A.R. 243; 116 W.A.C. 243 (Alta. C.A.) (access subject to condition that, without further court order, father and his parents to make "no further inquiries, examinations or consultations involving possible sexual abuse of the children").

[460] See generally, Julien D. Payne and Kenneth 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.

[461] Claire Klassen, "Access to Parents — A Child's Right," 20 LawNow (No. 4) 17, at 19.

- direct that access privileges shall be exercised under the supervision of a third party by reason of the non-custodial parent's emotional state, tendency towards violence, or non-compliance with a prior custody order

The failure to abide by such conditions is likely to result in further access restrictions or even the termination of access.

An access order may permit the non-custodial parent to take the children out of the country for a particular reason, such as a family reunion. In such a case, the court may:

- order the posting of a bond to assuage the custodial parent's fear that the children will not be returned and to provide the custodial parent with sufficient funds to trace the children in the event of their non-return

- take additional steps to ensure that the custodial parent is aware of the children's whereabouts and to facilitate tracing in the event of their abduction by the non-custodial parent[462]

Like the *Divorce Act*, section 16(6), we think that Alberta legislation should confer a wide powers on the court to attach any terms and conditions it sees fit and just when granting guardianship, custody or access orders.

RECOMMENDATION No. 45.4

The court should have power to make a guardianship, custody or access order on such terms, conditions or restrictions as the court thinks fit and just.

---

[462] *Sofroniou* v. *Sofroniou* (1986), 4 R.F.L. (3d) 88 (Ont. Prov. Ct.); see also *MacDonald* v. *Finkelman* (1976), 26 R.F.L. 302 (Ont. S.C.) (interim access).

c. Supervision order

Legislation in several Canadian provinces provides authority for supervision orders.[463] The Ontario *Children's Law Reform Act*,[464] section 35, is one example. It states:

> 35(1) Where an order is made for custody of or access to a child, a court may give such directions as it considers appropriate for the supervision of the custody or access by a person, a children's aid society or other body.
>
> (2) A court shall not direct a person, a children's aid society or other body to supervise custody or access as mentioned in subsection (1) unless the person, society or body has consented to act as supervisor.

An Alberta analogy can be found in the *CWA*, which applies to children in need of state protection. Section 26(3) of that Act stipulates that a supervision order shall:

> (a) require that a director supervise the child within the residence of the child, and
>
> (b) set out reasonable terms in respect of
>
> (i) the frequency of visits at the residence by a child welfare worker,
>
> (ii) the assessment or treatment of the child or any person residing with the child, and
>
> (iii) any other terms the Court considers necessary.

We recommend that Alberta enact statutory provisions that empower a court making a custody or access order to grant a supervision order. A supervision order

---

[463] *Supra*, note 446.

[464] R.S.O. 1990, c. C.12, s. 34.

should not be made unless the person or body to whom directions for supervision are made in the order has consented to act as supervisor.

RECOMMENDATION No. 46.4The court should have power to give such directions as it considers appropriate for the supervision of the custody of, or access to, a child by another person or other body, provided that person or body has consented to act as supervisor.

D. Consent Orders

A consent order is commonly understood to be an order to which the parties to the proceeding have agreed such that the court may grant an order without holding a hearing. In a different context, legislation sometimes requires that a particular person give consent to an order before it is made.

1. Parties' consent

As stated in RFD No. 18.2 on *Spousal Support* and RFD No. 18.3 on *Child Support*, the *PCA*, section 31, expressly empowers the Provincial Court of Alberta to grant consent orders. Custody and access orders fall within the ambit of this provision. Section 31 provides:[465]

> 31(1) If the parties to an application
>
> (a) are in agreement respecting the matters in question, and
>
> (b) consent to an order on the terms agreed on,
>
> the Court in its discretion may make the order without holding a hearing.

---

[465] Compare the *Minor's Property Act*, R.S.A. 1980, c. M-16, s. 15, which authorizes the court to make an order confirming a settlement where it appears that the settlement is in the child's best interests. Although the order is, in essence, a consent order, as a matter of practice, the court still requires the parties to file an affidavit in order to satisfy itself that the requirements of the Act are met. The parties attach the agreement to the affidavit of consent. The court may attach the agreement to the order or write the terms of the agreement into the order itself.

(2) An order made under subsection (1) has the same force and effect as an order made after a hearing.

Legislation in other provinces makes similar provision. For example, the British Columbia *Family Relations Act*, in sections 10 and 11, provides:[466]

10(1) With the written consent of the person against whom the order is made, a court may make an order under this Act against the person without a hearing, the completion of a hearing or the giving of evidence.

(2) An order made by consent shall not exceed the terms of the consent.

(3) Unless the ground is specifically admitted in the consent, the giving of a written consent under this section shall not be deemed to be an admission of a ground alleged in the proceeding.

11. Where a court makes an order under this Act, the court may incorporate in its order all or part of a provision in a written agreement previously made by two or more parties to the proceeding, providing the provision is relevant to the proceeding.

We recommend that Alberta should legislatively empower the courts to make consent orders with respect to guardianship, custody or access. In doing so, the legislation should authorize the court to incorporate in an order provisions contained in a written custody or access agreement previously made by the parties.

RECOMMENDATION No. 47.4

(1) Where the parties consent to a guardianship, custody or access order and the court is satisfied that the order is in the child's best interests, the court in its discretion may grant a consent order without holding a

---

[466] R.S.B.C. 1996, c. 128.

hearing and such an order has the same force and effect as an order made after a hearing.

(2) A court granting a guardianship, custody or access order may incorporate in its order all or part of a provision in a written agreement previously made by the parties.

2. Child's consent

The *CWA*, section 52, requires the consent of the child, if 12 years of age or over, before the court makes a private guardianship order, although if it is satisfied that it is in the best interests of the child to do so, the court can make an order dispensing with the consent. There is no corresponding provision in Part 7 of the *DRA*.

We do not think that the consent of the child should be a prerequisite to a guardianship order. Recommendation No. 12.4 asks the court to consider the views and preferences of a child who is 12 years of age or older, along with other factors that we have set out to guide the court in making a decision. In our opinion, this Recommendation adequately meets any underlying concern that the views of the child will not be properly respected.

3. Proposed guardian's consent

The *CWA*, section 52, also requires the consent of "the guardian of the child" to a private guardianship order. The court may dispense with the guardian's consent if it is satisfied that this would be in the child's best interests. As in the case of the child's consent, we do not think that the consent of an existing guardian should be a prerequisite to a guardianship order. Recommendation No. 12.4 asks the court to consider several relevant factors, including "the wishes of any existing guardian." In our opinion, this Recommendation adequately meets the concerns that may underlie the *CWA* provision.

E. Possession of Matrimonial Home and Use of Household Goods

The *Matrimonial Property Act* (*MPA*), section 19, permits the court, on application by "a spouse", to make orders relating to the possession of the matrimonial home and use of household goods. Among other factors, before making an order the court is required to consider "the needs of any children residing in the matrimonial home."[467] Indeed, the presence of children is often the reason that the custodial parent is granted possession of the matrimonial home under these provisions.

[467] *MPA*, s. 20(b).

The *MPA* defines "spouse" to include "a former spouse and a party to a marriage notwithstanding that the marriage is void or voidable."[468] It is likely, but as yet not certain, that "spouse" will be interpreted to include persons who are living in a marriage-like relationship. If the application of the *MPA* is restricted, children whose parents are not now and never have been married to each other would be placed at a disadvantage to other children insofar as the security of their home is concerned.

In conjunction with proceedings for child support, we recommended that the court should have power to grant an order for exclusive use of all or part of the family home and exclusive use of any or all household goods for the benefit of a child.[469] The court's ability to exercise that power would arise on application and on notice to all persons who may be entitled to be added as parties to the proceeding. We think that the court should have the same power in conjunction with proceedings for guardianship, custody or access.

RECOMMENDATION No. 48.4

In conjunction with proceedings for child guardianship, custody or access, on application and on notice to all persons who may be entitled to be added as parties to the proceedings on the application, the court should have power to grant an order for exclusive use of all or part of the family home and exclusive use of any or all household goods for the benefit of a child.

F. Protection against Domestic Abuse

---

468 *MPA*, s. 1(e).

469 ALRI RFD No. 18.2, Rec. No. 22.2, and ALRI RFD No. 18.3, Rec. No. 27.3(h).

Statutory provisions in many provincial statutes throughout Canada empower courts to grant non-molestation orders in custody and access disputes in order to prevent the harassment of spouses, parents and children.[470] Protection against domestic abuse is the subject of ALRI Report No. 74 issued in February 1997.[471] We do not address it here.

---

[470] *Supra*, note 446.

[471] The *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, received Royal Assent on April 30, 1998. It will come into force on Proclamation. The Act is built on Recommendations made in ALRI Report No. 74, *Protection Against Domestic Abuse* (February 1997) but departs from them in several respects as to jurisdiction.

CHAPTER 12 VARIATION ORDER

A. Guardianship

Alberta legislation does not contain a general power to vary a guardianship order. Some provisions in the *DRA* embody the power inferentially. The *DRA*, section 52(1), authorizes the court to remove "testamentary guardians and guardians appointed by order or letters of guardianship ... for the same causes for which trustees are removable. The removal of a guardian could constitute a variation or a guardianship order granted previously. Section 52(2) allows the court to attach terms and conditions when granting a guardian leave to resign, and these terms and conditions could also serve to vary a previous order. Section 54, empowers the court to declare a person unfit to have the custody of children. A person declared to be unfit is "not entitled as of right to the custody or guardianship of those children on the death of the other parent," but the court "may at any time revoke the declaration".

We have recommended that the court should have power to remove a guardian[472] and the removal of a guardian could operate to vary a guardianship order granted previously. We have also recommended that the court may attach terms and conditions to a guardian order and we think that there could be circumstances where it would be appropriate for the court to vary those terms and conditions. We examine the question of when variation should be possible under heading D.

B. Custody

The *DRA*, section 56(3), allows the court to "alter, vary or discharge" a custody order. It is silent about the basis for decision. The *PCA*, section 32(7), allows the court to "review" an order made under section 32 and "confirm, vary or discharge the order."

---

[472] *Supra*, Rec. No. 20.4 at 111.

Under the *Divorce Act*, principles similar to those that apply to the original application for custody also apply to an application to vary a custody order.[473] Pursuant to s. 17(5), before varying an order, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of the child that warrants a variation of custody. In making the variation order, the court is to "take into consideration only the best interests of the child as determined by reference to [the change]," although the inquiry is not confined to "the change" alone.[474] The discretionary power to vary a subsisting custody order is exercised cautiously. Existing custody arrangements will not lightly be disturbed unless the evidence cogently demonstrates that the best interests of the child will be served by changes being made.[475]

The Supreme Court of Canada considered the *Divorce Act*, section 17(5) in the case of *Gordon* v. *Goertz*.[476] This case establishes that there are two stages to the decision making process. First, the applicant must meet the threshold test of change, considering only the change that has occurred since the order was issued. After that, the court undertakes a fresh inquiry and the best interest test applies. Both parents bear the burden of introducing evidence from which the court may make a decision. The inquiry does not begin with a legal presumption in favour of the custodial parent.[477]

---

[473] See *Divorce Act*, *supra*, note 61, ss. 16 and 17.

[474] *Gordon* v. *Goertz*, *supra*, note 418.

[475] See *Payne on Divorce*, *supra*, note 83, at 436.

[476] *Gordon* v. *Goertz*, *supra*, note 418.

[477] A minority of the court would have taken a different approach. As in the majority judgment, first the applicant would have to meet the threshold test of material change, determined in accordance with the guidelines set out in *Willick* v. *Willick* (1994), 119 D.L.R. (4th) 405, [1994] 3 S.C.R. 670, 6 R.F.L. (4th) 161 (S.C.C.). The court would then assess the impact of that change and undertake a fresh inquiry only where the magnitude of the change had made the original order irrelevant. With regard to the child's place of residence, ordinarily custody includes the right to choose the child's place of residence and restrictions on this right should be the exception, not the rule. Where the custodial parent plans to move with the child and no restrictions have

C. Access

The *DRA*, section 56(3), and the *PCA*, section 32(7), also allow the court to vary an access order.

D. Discussion

In what circumstances should the court have jurisdiction to vary a guardianship, custody or access order?

---

been imposed, the onus would be on the non-custodial parent to show change of residence will be detrimental to child. However, where an agreement or court order restricts the mobility of the custodial parent, the onus would shift to the custodial parent to show that the change will not be detrimental to the child.

Because decisions on guardianship, custody and access must be made in the best interests of the child, these decisions should never be regarded as final. They should be able to be reviewed virtually at any time.[478]

Under the *Divorce Act*, the jurisdiction to vary is tied to the existence of "a change" in the condition, means, needs or other circumstances of the child. In our RFDs on *Spousal Support* and *Child Support*, we recommended that the court should have power to vary an order if the court is satisfied that a change of circumstances has occurred since the making of the previous order, or "evidence of a substantial nature not available on the previous hearing has become available." In making the variation order, the court would be required to take that change of circumstance or evidence into consideration.

We recommend that the court should have jurisdiction to vary a guardianship, custody or access order in the same circumstances. On an application for a variation order, the court should consider the same factors and apply the same criteria as it would on an original application. The court should also be able to exercise the same discretion and powers of disposition that it had on the original application.

RECOMMENDATION No. 49.4The court should have power to vary, suspend or discharge a guardianship, custody or access order where the court is satisfied that (a) there has been a change in the condition, means, needs or other circumstances of the child or any guardian occurring since the making of the custody order or the last variation order made in respect of that order, or

---

[478] *Vignaux-Fines and Fines* v. *Cjardon*, *supra*, note 408.

(b) evidence of a substantial nature that was not available on the previous hearing has become available.

RECOMMENDATION No. 50.4On an application for a variation order, the court should consider the same factors and apply the same criteria as it would on an original application.

RECOMMENDATION No. 51.4
On an application for a variation order, the court should have the same discretion and powers of disposition as it would on an original application.

CHAPTER 13 INTERIM ORDER

A. Existing Law

The *DRA*, Part 7, is silent on the subject of interim orders. Interim guardianship, custody and access orders are possible in the exercise of the court's *parens patriae* jurisdiction.[479] Alternatively, such orders could be regarded as necessarily incidental to the exercise of jurisdiction over guardianship, custody or access by a superior court.[480]

The *PCA*, section 32(5), empowers the Provincial Court of Alberta to "make an interim order regarding the custody of and right of access to the child" pending the hearing of an application for custody or access.

Like the *DRA*, the *CWA*, Part 5, is silent with respect to interim guardianship and the incidents of custody and access. In *Williams* v. *Williams*, the mother had left the child in the care of the child's paternal grandmother and uncle and they obtained a guardianship order under the *CWA*. That order was characterized as an interim order because it was obtained in an *ex parte* proceeding.

Statutory authority to grant interim orders is found in the *Divorce Act*[481] and in legislation in other provinces.[482]

---

[479] *W. (K.K.)* v. *R. (E.J.)*, *supra*, note 207, (interim custody granted to *in loco parentis* applicants for guardianship in a contest between them and one of the birth parents).

[480] In *Trueman* v. *Nicholson* (1995), 169 A.R. 391; 97 W.A.C. 391, 15 R.F.L. (4th) 320 (Alta. C.A.), a divorce case, the father applied for an interim custody order to prevent the mother from moving out of the jurisdiction contrary to a joint custody agreement between the parents. The court declined to grant the order, relying instead on the strength of the mother's undertakings to abide by the disposition at trial and not to seek any postponement of the trial.

[481] *Supra*, note 61, s. 16(2).

[482] See statutory provisions cited *supra*, note 446.

In interim orders, the courts tend to maintain the status quo. Case law indicates that it is important for the court to stipulate the interim nature of an order.[483]

B. Discussion

On what basis should an interim order be made? Courts have frequently stated that when the children are living in a stable home environment, preservation of the *status quo* is a compelling circumstance in proceedings for interim custody, more so than in proceedings for permanent custody determined after a trial of the issues in open court.[484]

We considered whether legislation should state a preference for the preservation of the *status quo* on an interim custody application or, conversely, whether it should specifically direct that an interim custody order shall not operate to the prejudice of the other parent in the main custody proceeding.

Ideally, the custody hearing would be held promptly. In actuality, the interim order often becomes the long-term order — the more time that passes, the more likely it is to become contrary to the best interests of the child to alter the existing custody arrangement. That is to say, in reality, courts are reluctant to disturb the *status quo* whenever custody is in dispute.

We have concluded that the answer to this difficulty lies not in modifying the factors that affect an interim order but in improving the administration of justice to reduce long waits, perhaps by facilitating mediation (to assist the parties to resolve disputes by themselves) and introducing case management in difficult cases.

---

[483] *Slezak* v. *Slezak* (1993), 149 A.R. 51; 63 W.A.C. 51 (Alta. C.A.).

[484] In Alberta, see *R.* v. *R.*, *supra*, note 121; see also *Payne on Divorce*, *supra*, note 83, at 383-384.

We recommend that Alberta enact legislation that expressly empowers the courts to grant an interim guardianship, custody or access order. The power to grant an interim order should include the power to grant the order *ex parte* when the court considers it appropriate to do so. In making an interim order, the court should consider the same factors and apply the same criteria as it would on the application in the main proceeding.

RECOMMENDATION No. 52.4The court should have power to make an interim guardianship, custody or access order, including an *ex parte* interim order, as the court sees fit.

RECOMMENDATION No. 53.4On an application for an interim order, the court should consider the same factors and apply the same criteria as it would on the application in the main proceeding.

RECOMMENDATION No. 54.4
On an application for an interim order, the court should have the same discretion and powers of disposition as it would on the application in the main proceeding.

CHAPTER 14DURATION OF ORDER

A. Time limit in order

We have recommended that Alberta legislation should empower the court to impose terms, conditions or restrictions on a child guardianship, custody or access order.[485] That power should include the power to specify the time for which the order will endure. Accordingly, we recommend that Alberta legislation should empower the court to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event. Our recommendation is based on the provisions of the *Divorce Act*, section 16(6).

RECOMMENDATION No. 55.4The court should have power to make a guardianship, custody or access order for a definite or indefinite period or until the happening of a specified event.

B. Effect of divorce proceedings

In RFD No. 18.3 on *Child Support*, we recommended:[486]

> Alberta legislation should provide that:
> (1) The jurisdiction of the court under Alberta law to award or vary child support continues in effect unless and until the court makes an order with respect to child support in a divorce proceeding under the *Divorce Act* (Canada).
> (2) The court with jurisdiction in a divorce proceeding under the *Divorce Act* (Canada) may determine the amount of arrears owing under a child

---

485 *Supra*, Chapter 11, heading C (terms and conditions), and Rec. No. 45.4 at 190.

486 ALRI RFD No. 18.3, Rec. No. 41.3.

> support order granted under provincial law and make an order respecting that amount at the same time as it makes an order under the *Divorce Act* (Canada).
> (3) If a marriage is terminated by divorce or judgment of nullity and no order with respect to spousal support is made in the divorce or nullity proceedings, an order for support made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.

We recommend the enactment of a similar provision with respect to custody or access orders. It is unnecessary to include a guardianship order because, constitutionally, guardianship is a matter that falls within provincial, not federal, legislative competence.

RECOMMENDATION No. 56.4

Alberta legislation should provide that:

(1) The jurisdiction of the court under Alberta law to make or vary a child custody or access order continues in effect unless and until the court makes an order with respect to child custody or access in a divorce proceeding under the *Divorce Act* (Canada).

(2) If a marriage is terminated by divorce or judgment of nullity and no order with respect to child custody or access is made in the divorce or nullity proceedings, an order for child custody or access made under provincial law continues in force according to its terms, as does the jurisdiction of the Court under provincial law.

C. Appeal pending

We recommend that a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of

competent jurisdiction. As under the existing law, we would empower the court to make an order otherwise.[487]

RECOMMENDATION No. 57.4

Unless the court orders otherwise, a child guardianship, custody or access order should remain in force until it is replaced by a subsequent order granted by a court of competent jurisdiction.

[487] In *Slezak* v. *Slezak, supra*, note 483, the Alberta Court of Appeal stayed the effect of a Court of Queen's Bench custody order until the mother filed a written undertaking, signed and sealed and with an affidavit of execution, accepting specified conditions.

CHAPTER 15 RELATED COURT POWERS

A. Application by One or More Persons Acting Jointly

Section 16(1) of the *Divorce Act* envisages the possibility of a joint application for custody and access by "both spouses". Joint applications are also legislatively endorsed in the Québec Code of Civil Procedure.[488]

We think it should be possible to bring a joint application for guardianship, custody or access in Alberta. By "joint application," we mean a procedure by which parties who are in agreement about the result they are seeking may apply jointly for guardianship, custody or access. It should not be necessary to designate one party as applicant and the other as respondent.

RECOMMENDATION No. 58.4 The Rules of Court and Forms should facilitate joint applications for guardianship, custody and access.

B. Court Power to Add Party to Application

Courts should be empowered, on their own motion, to add additional parties to guardianship, custody or access proceedings or at least to require that persons having an interest in the proceedings be notified and given an opportunity to appear and be heard.

RECOMMENDATION No. 59.4

---

[488] Article 813.1 of the Québec Code of Civil Procedure reads as follows:

> Art. 813.1. Except where prohibited by law or by circumstances, any application by way of a declaration or motion may be made jointly.

In proceedings with respect to guardianship, custody or access, the court should have power, on its own motion, to add a party to the proceedings, or to require that notice of the proceedings and an opportunity to appear and be heard be given to a person who is not a party.

C. Neutral Style of Cause

We would like to see a neutral style of cause adopted in all guardianship, custody and access applications instituted in the province of Alberta, whether such applications arise under provincial family law or under the *Divorce Act*. The style of cause in every case should be "In re Doe" instead of "Doe versus Doe" or "Between Doe and Doe".

D. Locating Children and Parents

In Chapter 7, we recommended that Alberta legislation should contain provisions to prevent the unlawful withholding or removal of a child by either parent or any third party. We also recommended that the court should have discretion to grant or refuse an order for the production of a child depending on the circumstances of the child and merits of the application.

In furtherance of these recommendations, we propose the enactment of statutory provisions that will assist authorities to trace missing parents and children and promote the release or exchange of information with extra-provincial and federal data banks. The enactment of such provisions would be consistent with legislation in other provinces[489] and with the recommendations we made in our RFDs on spousal support and child support.

---

[489] See *Family Relations Act*, R.S.B.C. 1996, c. 128, ss. 39-41; *Family Orders Information Release Act*, R.S.N.S. 1989, c. 161; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 39; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 25; *Children's Law Act*, S.S. 1990, c. C-8.1, s. 28; *Children's Act*, R.S.Y. 1986, c. 22, s. 48.

An example of legislation in another province is found in the Ontario *Children's Law Reform Act*.[490] Section 39 of that Act provides:

> 39(1) Where, upon application to a court, it appears to the court that,
>
> (a) for the purpose of bringing an application in respect of custody or access under this Part, or
>
> (b) for the purpose of the enforcement of an order for custody or access,
>
> the proposed applicant or person in whose favour the order is made has need to learn or confirm the whereabouts of the proposed respondent or person against whom the order referred to in clause (b) is made, the court may order any person or public body to provide the court with such particulars of the address of the proposed respondent or person against whom the order referred to in clause (b) is made as are contained in the records in the custody of the person or body, and the person or body shall give the court such particulars as are contained in the records and the court may then give the particulars to such person or persons as the court considers appropriate.
>
> (2) A court shall not make an order on an application under subsection (1) where it appears to the court that the purpose of the application is to enable the applicant to identify or to obtain particulars as to the identity of a person who has custody of a child, rather than to learn or confirm the whereabouts of the proposed respondent or the enforcement of an order for custody or access.
>
> (3) The giving of information in accordance with an order under subsection (1) shall be deemed for all purposes not to be a contravention of any Act or regulation or any common law rule of confidentiality.
>
> (4) This section binds the Crown in right of Ontario.

---

[490] R.S.O. 1990, c. C.12.

In RFD No. 18.3 on *Child Support*, we recommended that legislation should authorize the court, on motion, to make an order requiring a person or public body "to provide the court or the moving party with any information that is shown on a record in the person's or public body's possession or control and that indicates the proposed respondent's place of employment, address or location."[491]

There, and in RFD No. 18.2 on *Spousal Support*, we raised the possibility of conflict with the provisions of Alberta's *Freedom of Information and Privacy Act* (*FOIP Act*). By section 5(2), the provisions of the *FOIP Act* prevail unless another Act or a regulation under the *FOIP Act* "expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act." Our examination of the *FOIP Act* led us to the view that the issue of disclosure is one of policy.

[491] RFD No. 18.3, Rec. No. 51.3.

For the purpose of a guardianship, custody or access proceeding, should information about the whereabouts of a person ever be accessible from a third party? If yes, should its accessibility differ depending on who holds the information — government or a private sector entity? We think it should be accessible. Moreover, we can see no reason why the government should be treated differently from a private sector entity. We have concluded that a court order requiring disclosure of information relating to the whereabouts of a child or a parent, guardian or other proposed respondent should bind the Crown, and, in so doing, prevail over Alberta's *FOIP Act*.[492]

RECOMMENDATION No. 60.4

Alberta legislation should provide that:

(1) The court may, on motion, make an order under subsection (2) if it appears to the court that, in order to make an application for a child guardianship, custody or access order, the applicant needs to learn or confirm the whereabouts of the proposed respondent or child.

(2) The order shall require the person or public body to whom it is directed to provide the court or the applicant with any information that is shown on a record in the person's or public body's possession or control and that indicates the place of employment, address or location of the proposed respondent or child.

E. Protection of Privacy

In RFD No. 18.2 on *Spousal Support* and RFD No. 18.3 on *Child Support*, we made recommendations for legislation giving the court discretion to direct some degree of privacy in family proceedings, including discretion to

---

[492] RFD No. 18.3, Rec. No.52.3.

prohibit the publication or broadcasting of information relating to applications in family proceedings. We repeat those recommendations here.

RECOMMENDATION No. 61.4

Staying within Charter boundaries, Alberta legislation should give the court discretion to direct some degree of privacy in family proceedings.

RECOMMENDATION No. 62.4

The discretion conferred on the court to direct some degree of privacy in family proceedings should include the discretion to prohibit the publication or broadcasting of information relating to applications in family proceedings.

F. Costs

In RFD Nos. 18.2 and 18.3, we recommended that Alberta legislation should empower the court to make an order with respect to the payment of costs, including the power to require one party to make a payment to another party on account of interim costs and disbursements of and incidental to the application. We repeat those recommendations here.

RECOMMENDATION No. 63.4

Alberta legislation should empower the court to make an order with respect to the payment of costs.

RECOMMENDATION No. 64.4

Alberta legislation should give the court discretion, on an application for an interim order, when it thinks it fit

and just to do so, to make an order requiring one party to make a payment or payments to or for the benefit of the child, a parent or another party on account of interim costs and disbursements of and incidental to the application.

G. Application of Rules of Court

In RFD No. 18.2 on *Spousal Support*, we reproduced section 19.1 of the *PCA* which allows the Provincial Court to apply the Alberta Rules of Court, modified as needed, where the *PCA* or regulation does not provide a specific practice or procedure in order to ensure an expeditious and inexpensive resolution of the matter. There, and in RFD No. 18.3 on *Child Support*, we emphasized, by way of recommendation, that the Provincial Court should have discretion to apply the Alberta Rules of Court in family law matters where statute or regulation does not provide for a specific practice or procedure. We repeat that recommendation here.

RECOMMENDATION No. 65.4

Where statute or regulation does not provide for a specific practice or procedure, the Provincial Court should have discretion to apply the Alberta Rules of Court in family law matters.

H. Retroactive Effect of Legislation

In RFD No. 18.3 on *Child Support*,[493] we mention that several cases challenged the application of the *P&MA*, which took effect January 1, 1991, to situations where the child was born before this Act became law. In order to avoid difficulties such as this, we recommend that the legislation enacting our recommendations should be expressed to operate retroactively.

---

[493] RFD No. 18.2, Chapter 8, under heading A.2.

RECOMMENDATION No. 66.4

The legislation enacting the new child guardianship, custody and access law should expressly state that it operates retroactively.

PART III — LIST OF RECOMMENDATIONS

(1) the need for guardianship;
(2) the motivation of the person seeking guardianship;
(3) the wishes of any existing guardian;
(4) the plans the person seeking guardianship has for the child, including the desirability of maintaining continuity in the child's life;(5) the child's relationship with the person seeking guardianship;
(6) if the child is twelve years of age or older, the views and preferences of the child;
(7) the suitability of the person seeking guardianship, having regard
to (a) the child's age;
(b) the child's
(i) health, emotional well-being and special needs,
(iii) physical, psychological, social and economic needs;
(8) the ability and willingness of the person seeking guardianship to make decisions with respect to the child's guidance and education, special needs, and the provision of the necessaries of life;
(9) the child's religious upbringing;
(10) the child's ethnic and cultural heritage;
(11) whether the person seeking guardianship has ever acted in a violent manner towards
(a) this or any other child,
(b)the child's parent or other guardian, or
(c) a member of their household;
(12) the connection of the person seeking guardianship with any other guardian;
(13) the effect on the child if more than one person is appointed guardian(14) the capacity of the person seeking guardianship to cooperate with an existing guardian;
(15) the methods for assisting cooperation in resolving disputes between guardians and the willingness of the person seeking guardianship to use those methods;
(16) any other factor the court considers relevant.....98

RECOMMENDATION No. 13.4
A guardian of a child, either parent or non-parent, should have the power to name a guardian to act on the nominating guardian's death. 101

RECOMMENDATION No. 14.4
Unless the nominating guardian stipulates otherwise, testamentary guardianship should take effect immediately on the nominating guardian's death and the appointed guardian should act jointly with any other guardian of the child.....107

Alberta law should provide that, in making a custody determination that is in the best interests of the child, the court may consider any of the following factors:
(1) the child's age;
(2) the child's
    (a) health, emotional well-being and special needs,
    (b) personality, character and emotional needs, and
    (c) physical, psychological, social and economic needs;
(3) the nature and quality of the child's relationship with each guardian;
(4) the child's interaction with other persons residing in the child's household or involved in the care and upbringing of the child;
(5) if the child is twelve years of age or older, the views and preferences of the child;
(6) the duration, stability and adequacy of the child's current living arrangements or the permanence, stability and adequacy of the family unit with which it is proposed that the child will live;
(7) the desirability of maintaining continuity in the child's living arrangements, including consideration of the child's current or anticipated adjustment to home, school and community;
(8) the ability and willingness of each guardian to provide the child with guidance and education, the necessaries of life and the special needs of the child;
(9) the child's religious upbringing;
(10) the child's ethnic and cultural heritage;
(11) the plans proposed for the care and upbringing of the child;
(12) contact with the child's parent or other guardian;
(13) whether the guardian has ever acted in a violent manner towards
    (a) this or any other child,
    (b) the child's parent or other guardian, or
    (c) a member of their household;
(14) the motivation of each guardian and their capacities to give the child love, affection and guidance;
(15) the capacity of each guardian to cooperate or to learn to cooperate in child care;
(16) methods for assisting cooperation between or among guardians and resolving disputes and each guardian's willingness to use those methods;
(17) the effect on the child if one guardian has sole authority over the child's upbringing; and
(18) any other factor the court considers relevant.....142

RECOMMENDATION No. 24.4
The past conduct of the person seeking custody is irrelevant unless it affects parenting.....142

RECOMMENDATION No. 25.4
The court, acting in the child's best interests, should have power to make an order granting custody to any one or more persons who are guardians.144

RECOMMENDATION No. 26.4
Alberta legislation should contain provisions to prevent the unlawful withholding or removal of a child by either parent or any third party.146

RECOMMENDATION No. 27.4
The court should have discretion to grant or refuse an order for the production of a child depending on the circumstances of the child and merits of the application.....146

RECOMMENDATION No. 28.4
Unless otherwise ordered by the court or agreed to by the parties in writing, the custodial guardian of the child should have the day-to-day care and control of the child, including the following powers, responsibilities and rights:
(1) may act on behalf of the child
[NOTE: SEE *DRA*, S. 46(A).]
(2) may appear in court and prosecute or defend an action or proceedings in the name of the child,
[NOTE: SEE *DRA*, S. 46(B).]
(3) may decide where the child is to live, whether permanently or temporarily,
(4) may decide with whom the child is to live and with whom the child is to associate,
(5) may make decisions relating to the child's education
[NOTE: REGARDING SS. (3), (4) AND (5), SEE *DRA*, S. 46(D).]
(6) may appoint a person as guardian to act in the event of the guardian's death or incapacity,
[NOTE: COMPARE *DRA*, S. 48.]
(7) shall protect the child,
[NOTE: EXTREME FAILURE TO PROTECT LEADS TO *CWA* INTERVENTION.]
(8) if a parent, shall give the child love and affection,
(9) if a parent, shall provide the child with the necessaries of life from the parent's personal resources,
[NOTE: COMPARE MOA, S. 2(2) AND (3).]
(10) shall accommodate reasonable requests from a non-custodial guardian for information about matters relating to the child's health, welfare and education
[NOTE: COMPARE *DIVORCE ACT*, S. 16(5); SOME PROVINCIAL STATUTES.]
(11) may discipline the child

(12) may decide the child's religious upbringing
(13)may make medical treatment decisions,
(14) may grant or refuse consent in matters concerning the child, *e.g.*,
(a) adoption [NOTE: SEE *CWA*, SS. 56, 57.]
(b) marriage [NOTE: SEE *MARRIAGE ACT*, S. 18.]
(c) private guardianship [NOTE: SEE *CWA*, S. 52.]
(d) change of name [NOTE: SEE *CHANGE OF NAME ACT*, SS. 7, 7.1, 11, 12.]
(15) is entitled to receive notice of matters affecting the child, e.g. proceedings for
(a) declaration of parentage [NOTE: SEE *DRA*, S. 66.]
(b) adoption [NOTE: SEE *CWA*, S. 60.]
(c) child welfare apprehension, supervision, temporary or permanent guardianship [NOTE: SEE CWA, SS. 18, 19, 21, 27.]
(d) private guardianship [NOTE: SEE CWA, S.50.] 148

RECOMMENDATION No. 29.4
Unless otherwise ordered by the court or agreed to by the parties in writing, at least thirty days before changing the child's place of residence, the custodial guardian shall notify any other guardian, in writing, of the time at which the change will be made and the new place of residence of the child. 149

RECOMMENDATION No. 30.4
Alberta legislation should specify that access is the right of the child. 157

RECOMMENDATION No. 31.4
The court, acting in the child's best interests, should have power to make an order granting access to a child to any one or more of the following persons:
(a) a non-custodial guardian, or
(b) any other person where
(i) the child's parents, if alive, are living separate and apart, or
(ii) one or both of the child's parents are deceased. 162

RECOMMENDATION No. 32.4
Alberta law should provide that, in making an access determination that is in the best interests of the child, the court may consider any of the following factors:
(1) the child's age;
(2) the child's
(a) health, emotional well-being and special needs,
(b) personality, character and emotional needs, and

(c) physical, psychological, social and economic needs;
(3) the nature and quality of the child's relationship with the person seeking access;(4) if the child is twelve years of age or older, the views and preferences of the child, which shall be given considerable weight;
(5) the child's ethnic and cultural heritage;
(6) the parenting ability of the person seeking access;
(7) whether the person seeking access has ever acted in a violent manner towards
(a) this or any other child,
(b) the child's parent or other guardian, or
(c) a member of their household;
(8) the wishes of the person with custody of the child;
(9) the relationship between the custodial guardian and the person seeking access;
(10) the child's needs to maintain a stable schedule, to participate in activities, or to have unstructured free time;
(11) the motivation of the person seeking access and their capacity to give the child love, affection and guidance;
(12) the capacity of the person seeking access to cooperate or to learn to cooperate with the custodial guardian;(13) methods for assisting cooperation with the custodial guardian and resolving disputes and the willingness of the person seeking access to use these methods;
(14) any other factor the court considers relevant.....165

RECOMMENDATION No. 33.4
The conferral or withholding of contact with the child should not be used to reward or punish a parent for compliance or non-compliance with the child support obligation.....166

RECOMMENDATION No. 34.4
Unless otherwise ordered by the court or agreed to by the parties in writing, the non-custodial guardian of the child should have reasonable access to the child, and the following powers, responsibilities and rights:
(1) with the consent of the custodial guardian, may act on behalf of the child, [NOTE: COMPARE *DRA*, S. 46(A).]
(2) with the consent of the custodial guardian, may appear in court and prosecute or defend an action or proceedings in the name of the child,
[NOTE: COMPARE *DRA*, S. 46(B).]
(3) may appoint a person as guardian to act in the event of the guardian's death or incapacity,
[NOTE: COMPARE *DRA*, S. 48.]
(4) shall protect the child,
[NOTE: EXTREME FAILURE TO PROTECT LEADS TO *CWA* INTERVENTION.]

(5) may take custody where the custodial parent dies,
(6) if a parent, shall give the child love and affection,
(7) if a parent, shall provide the child with the necessaries of life from the parent's personal resources,
[NOTE: COMPARE *MOA*, S. 2(2) AND (3).]
(8) may maintain communication with the child and visit the child on terms as agreed by the parties or ordered by the court,
(9) may request from the custodial guardian information about matters relating to the child's health, welfare and education,
[NOTE: COMPARE DIVORCE ACT, S. 16(5); SOME PROVINCIAL STATUTES.]
(10) is entitled to receive at least thirty days notice from the custodial guardian of an intended change in the child's place of residence,
[OR LESS IF COURT ABRIDGES TIME: SEE REC. 29.4.]
(11) may exercise guardianship powers consistent with the wishes of the custodial guardian,
(12) may discipline the child as reasonable when in contact with the child,
(13) may make urgent or emergency medical treatment decisions for the child,
(14) may grant or refuse consent in matters concerning the child, e.g.,
(a) adoption,
[NOTE: SEE *CWA*, SS. 56, 57.]
(b) marriage,
[NOTE: SEE MARRIAGE ACT, S. 18.]
(c) private guardianship,
[NOTE: SEE *CWA*, S. 52.]
(d) change of name, and
[NOTE: SEE CHANGE OF NAME ACT, SS. 7, 7.1, 11., 12.]
(15) is entitled to receive notice of matters affecting the child, e.g.,
(a) declaration of parentage,
[NOTE: SEE *DRA*, S. 66.]
(b) adoption,
[NOTE: SEE *CWA*, S. 60.]
(c) child welfare apprehension, supervision, temporary or permanent guardianship,
[Note: See *CWA*, ss. 18, 19, 21 27.]
(d) private guardianship.
[NOTE: SEE *CWA*, S. 50.].....168

RECOMMENDATION No. 35.4
A non-guardian with access to a child should have the powers, responsibilities and rights agreed to by the custodial guardian or ordered by the court.....168

RECOMMENDATION No. 36.4