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CUSTODY AND GUARDIANSHIP

I

INTRODUCTION

A child is a legally incapacitated person, recognition of the fact that it cannot provide for its own maintenance, education and protection. These needs must be provided by some adult or institution. Generally they are provided by the child's parents within the context of the family unit. However, when the family unit breaks down, for whatever reason, decisions must be made as to who is to have physical care and control of the child, who is under a duty to maintain it, and who is to control its education and upbringing. The law concerning custody and guardianship has developed as an attempt to provide a means whereby these questions can be answered. The purpose of this paper will be to examine the present law relating to guardianship and custody and to discuss the problems which exist with a view to suggesting changes which might be made to ensure that the legal system provides the best means possible for resolving these issues.

Canadian courts appear to be operating upon established judicial principles with little regard for what the statutes they act under actually say. At present this is perhaps just as well because a literal reading of the statutes could create problems in that the statutes do not necessarily express the commonly accepted principles upon which matters relating to infants are determined. Also, many of the provisions of the Alberta Domestic Relations Act, R.S.A. 1970, c. 113, are copied from a series of English reform acts which began in 1873 and ended in 1925. These acts were primarily intended to extend to the mother of an infant the same rights held by the father; provisions which were adequate then may no longer satisfy the present requirements. At present the system works as well as it does because little attention is paid to the statutes. One function of this paper will be to evaluate the present procedure and if it seems

adequate to recommend changes in the present legislation to bring it into line with what is actually being done.

The area of greatest confusion is the relationship between the concepts of "guardianship" and "custody" of an infant. Theoretically and historically the two have been quite distinct concepts but this distinction has become blurred. "Guardianship" has become a term which is seldom used except perhaps with regard to testamentary guardians. In making custody orders concerning infants the courts seldom refer to their guardians at all. This is particularly true in the case of disputes between parents; s. 37 of the Domestic Relations Act which constitutes both parents as joint guardians of their infant unless otherwise ordered by the court is almost never mentioned.

In virtually every dispute concerning control of an infant what is at issue is not who is the infant's guardian but rather who is to have custody of the infant. This is reasonable because custody embodies the most important right with respect of the infant--that of day-to-day physical control. However, custody can have either a restricted meaning or a wide meaning and since when the courts pronounce custody orders they do not indicate precisely what they mean, confusion as to what rights have been granted arises. This confusion was clearly described by Sachs L.J. in Hewar v. Bryant (1969), 3 All E.R. 578 at 584-5:

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

Sachs L.J.'s comments must be qualified in one respect. Custody awards in Canada do not include the right to administer the infant's estate. Custody in its wide sense may more accurately be equated with guardianship of the person of the infant since in no instance will the right to custody carry with it the right to guardianship of the infant's estate.

As pointed out by Sachs L.J. when "custody" is used in its wider meaning it is virtually the equivalent of guardianship of

the infant's person. The failure of the courts to discuss the powers included in an award of custody leaves the status of a guardian who does not have custody of the infant very vaguely defined. Defining the residual powers remaining in a guardian who lacks custody is made more difficult because the rights and duties of guardians have never been exhaustively defined; it is possible to enumerate many of the duties which may arise but there is no single all inclusive definition.

There are varying points of view regarding the utility of guardianship of the person. The Ontario Law Reform Commission suggests that guardianship is little more than a historical remnant and has been displaced by custody. This conclusion is not surprising considering the emphasis upon custody in child disputes as well as the wide meaning given to custody by many courts. However, New Zealand, Australia and British Columbia have either implemented or recommended a definite role for guardianship of the person. These proposals generally define guardianship as the complete "bundle of rights" of which custody, in the limited sense of physical care and control, is one included right which may be carved out by a court order. Unless the court order specifies otherwise such awards of custody include only the right to physical care and control of the infant leaving intact the larger bundle of rights included in the concept of guardianship. Anne Russell in her paper on guardianship, done for the Institute, suggests a similar extension of the role of guardianship in Alberta.

Before it is possible to determine whether the concept of guardianship of the person still has a viable role in our letal system it is necessary to examine the concepts of guardianship and custody more carefully. Precise definition of either term will be difficult because they have been used ambiguously and often interchangeably.

II
GUARDIANSHIP

A. History

Historically, guardianship was part of the feudal law; Anne Russell in her paper "Guardianship" lists ten different forms of guardianship under the old law.[1] Many of the forms of guardianship were highly specialized and have little relevance to the modern situation. Most have been abolished by statute[2] or because of their unique characteristics have no relevance to Alberta.[3] Still of relevance in Alberta are testamentary, statutory and chancery-guardians. These will be discussed below.

The term "guardian" is sufficiently wide to include a parent, for parents were regarded at common law as the natural guardians of their children. Natural guardianship must be distinguished from the feudal forms of guardianship by nature and guardianship for nurture both of which were abolished by s. 38 of the Domestic Relations Act. Guardianship by nature was intended only to cover the heir apparent of the father and guardianship for nurture extended only to the custody of the person of those infants who were not heirs apparent and continued only until they reached the age of fourteen. Natural guardianship arises automatically upon the birth of the child and extends until the child reaches the age of majority.

The early common law recognized the natural parental duties of protecting and maintaining one's legitimate minor children. However, the machinery for enforcing these duties was almost

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[1] p. 2-3, n. 6.

[2] Statute of Tenures 1660, 12 Chas 2, c. 24, ss. 8, 9, 10; Domestic Relations Act, R.S.A. 1970, c. 113, s. 38.

[3] For example, guardianship by prerogative and guardianship by special custom. See supra, n. 1.

wholly ineffectual and while recognized as legal obligations, the parent's duties were virtually unenforceable. The duty to protect carried with it the right to guardianship of all minor children and since the father was considered to be the only member of the family physically capable of protecting the infants, his right to guardianship was absolute. The father was considered to be the only natural guardian of his legitimate infants and the mother had no rights at all to her children. For example in R. v. DeManneville[4] Lord Eldon held that the court had no jurisdiction to give custody of a nursing infant to its mother and enforced the father's claim to possession. Only in cases where the father's conduct was such as to imperil the children's life, health, or morals in some grave manner was his absolute control interfered with.

Upon the death of the father, the mother became guardian of her children until they came of age. This right arose out of the mother's right of custody for nurture and was given limited recognition by an Act of 1557.[5] However, after the passage of the Abolition of Tenures Act of 1660 even these limited rights could be abrogated by the father if he chose to appoint a testamentary guardian of his infants, to the exclusion of the mother.

Bromley[6] points out that physical control was the kernal of the father's rights in that without it the others could not be enforced. The procedural machinery of the common law courts could only enforce the right to possession or physical control. This means used was a writ of habeas corpus directing that possession of the child be delivered to the father. This early emphasis upon the right to physically control the infant (i.e. the

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[4](1804), 5 East. 221.

[5]4 and 5 Phillip and March, c. 8, s. 4.

[6]P.M. Bromley, Family Law 4 ed. London: Butterworths, 1971, p. 263

right to "custody" in its limited sense) has continued to the present despite the fact that the modern judicial system has developed alternative methods of enforcing a guardian's rights. The father's right to physical possession of the infants was limited in that if the children were of the "age of discretion" (fourteen for boys and sixteen for girls) no writ would be issued without their consent.[7] However, subject to this limitation and to certain exceptional circumstances where the infant was gravely endangered by remaining with the father, the right of a father to the guardianship and custody of his children was absolute at common law.

The rights of the father were somewhat less in the courts of equity which also exercised jurisdiction in matters relating to custody. The jurisdiction to intervene between parent and child was derived from the prerogative power of the Crown as parens patriae to interfere to protect any person within the jurisdiction not fully sui juris. In the case of infants the Crown as the ultimate feudal overlord was concerned in the administration of their estates. The management of the estate of an infant was sought after as a source of revenue and power for the guardian. The Crown sought to regulate the appointment and conduct of guardians both to protect the infant, and at times, as a source of revenue for the Crown; this regulation of guardianship for profit was particularly prevalent during the period of the Court of Wards. After the abolition of the Court of Wards in 1660 the position of a guardian came to be regarded as more a position of trust than a source of profit. The parens patriae power exercised by the Lord Chancellor, as the King's representative, which had fallen into abeyance when the Court of Wards was established in 1540,[8] began to be used more and more extensively after the Court of Wards was abolished. With the waning of the feudal era, less emphasis was placed upon questions of property

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[7] R. v. Howes (1860), 3 E. & E. 332.

[8] 32 Hen. 8, c. 46.

and more was placed upon the person of the infant. However, prior to 1847 the courts of equity would generally not intervene in a custody matter unless the infant possessed property.[9] The jurisdiction exercised by the Lord Chancellor came to be exercised by the Court of Chancery and under the Judicature Acts of 1873 and 1875 this jurisdiction was passed to the High Court. The Judicature Acts specifically provided that in matters relating to custody of infants, the rules of equity should prevail. A similar provision may be found in s. 16 of the Alberta Judicature Act.[10]

These provisions are significant because equity approached the question of custody on a different basis than the courts of common law. The Courts of Equity left the common law duties of the parents untouched but were willing to interfere with the exercise of parental rights. At common law, a father could always enforce his right to custody except in exceptional circumstances; however in equity the paramount consideration was the welfare of the child which might involve interfering with the father's rights. The courts were therefore faced with the problem of maintaining a balance between the rights of the father and the authority of the court as parens patriae to intervene for the welfare of the child.

Even before the enactment of the Judicature Acts, the jurisdiction of the Court of Chancery had gained ascendancy over that of the common law in matters of custody. Equity's procedure was better adapted to deal with disputes concerning children. The courts of common law were limited to the writ of habeas corpus and could only enforce the right to physical control. However, Chancery acted in personum and thus could not only make orders concerning matters such as education but could also ensure that they were carried out. The court could appoint a guardian to whom

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[9] Re Flynn 12 Jur 713; Re Spence (1847), 2 Ph. 247.

[10] R.S.A. 1970, c. 193.

custody could be assigned, even during the father's life. Or, if it chose, the court might make an infant a ward of the court in which case the court became the infant's guardian. Any interference with the court's actions could be punished as contempt of court. When it felt the welfare of a child required it, the Court of Chancery would grant an injunction to prevent the issue of a writ of habeas corpus or to prevent the carrying into force of a writ already issued.

At first the difference in approach between equity and common law was more apparent than real. Equity was extremely reluctant to interfere with the father's rights unless there was positive evidence of grave misconduct. One of the best judicial statements of this viewpoint was made in Re Agar-Ellis.[11]

> It is conceded that by the law of this country the father is undoubtedly charged with the education of his children. The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt, the law may take away from him this right or may interfere with his exercise of it, just as it may take away his life or his property or interfere with his liberty, but it must be for sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such right by a course of conduct which would make a resumption of his authority capricious and cruel towards the children. But, in the absence of some conduct by the father entailing such forfeiture or amounting to such abdication, the Court has never yet interfered with the father's legal right. It is a legal right with, no doubt, a corresponding legal duty; but the breach or intended breach of that duty must be proved by legal evidence before that right can rightfully be interfered with.

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[11](1878) 10 Ch. D. 49 at 71, 72.

Such an attitude on the part of the Court seemed to be subordinating the best interests of the child to the rights of the father.

Re Agar-Ellis was decided in 1883 but in the following years the attitude of the courts changed. Increased emphasis was placed upon the welfare of the infants involved and it was not as readily presumed that the interests of the infant were best served by remaining with the father. This change marked a greater shift away from the common law position than the court in Re Agar-Ellis was prepared to take. The paramount consideration clearly became the welfare of the infant. Illustrative of this changed attitude is the decision in R. v. Gyngall[12] in which Lord Esher M.R. gave perhaps the best judicial explanation of the parens patriae power:[13]

> "The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of the child, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise, and may not be doing what a wise, affectionate, and careful parent would do. The Court may say in such a case that, although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise, affectionate and careful parent would not do. The court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right...The Court must exercise this jurisdiction with great care, and can only act when it is shown that either the conduct of the parent, or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but--I will not say "essential," but--clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded; but...where it is so shown, the Court will exercise its jurisdiction accordingly."

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[12](1893) 2 Q.B. 232 (C.A.)

[13]Id. 241-242.

As a consequence of his change in attitude the courts became far more willing to act to protect infants, even from their parents. Moreover, as the position of the father was eroded, that of the mother became stronger.

The judicial changes in the position of the law were parallelled by changes in the enacted laws. Talfourd's Act, 1839[14] was a decisive point in the history of family law for it empowered the Court of Chancery to allow a mother access to her children and, in the case of infants under seven, to order that the infants "shall be delivered to and remain in the Custody of the Petitioner until attaining such Age" (i.e. seven). The Act specifically provided that no order was to be made if the mother had been guilty of adultery. The statute is significant because for the first time the mother had been given some rights to her children even against the father.

The Matrimonial Causes Act,[15] provided that in its final decree the Court might make such provision "as it may deem just and proper with respect to the Custody, Maintenance, and Education of the Children the Marriage of whose Parents is the Subject of such Suit or other Proceeding,..." This provision only applied in the case of proceedings under the Act but it gave the Court discretion to make whatever order it chose with no limitation upon its right to award the children to the mother.

The Custody of Infants Act, 1873[16] repealed Talfourd's Act. It extended the court of equity's power to award "custody or control" to the mother so that the Court could now award custody to the mother until the child reached sixteen. The proviso

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[14] 2 & 3 Vict., c. 54.

[15] 20 & 21 Vict., c. 85, s. 35.

[16] 36 & 37 Vict., c. 12.

respecting the mother's adultery was not repeated. The Act also specified that agreements in separation deeds regarding the custody or control of the infants of a marriage were enforceable so long as they were for the child's benefit. Previously, an agreement by the father to give up custody of the infant to another was considered to be void as against public policy unless the father had proven to be unfit.[17]

The Guardianship of Infants Act, 1886[17a] further extended the rights of the mother. The father could no longer defeat the mother's right to guardianship upon his death by appointing a testamentary guardian for the statute provided that the mother was to act jointly with any guardian so appointed. Also for the first time the mother was given limited powers to appoint testamentary guardians. The statute also provided that the court could award custody to the mother with no restriction upon age.

The Custody of Children Act, 1891[18] gave the court the discretion to refuse an application for a writ of habeas corpus from a parent who had abandoned or deserted his child or allowed the child to be brought up at another person's expense unless the parent could show that he was fit to have custody of the infant claimed. If, at the time of the parent's application for custody, the child was being brought up by another person the court could upon awarding custody to the parent, order him to pay the whole or part of the costs incurred in bringing the child up. However, in Re O'Hara[19] it was pointed out that such an order should not be made if it would prejudice the parent's ability to care for the child. Even though the parent might be deprived of custody, the Act provided that the court might order that the child be brought up in the religion in which the parent has a "legal right" to require that the child should be brought up in.

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[17] Swift v. Swift (1865) 34 Beav. 266.

[17a] 49 & 50 Vict., c. 27.

[18] 54 & 55 Vict., c. 3.

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The Guardianship of Infants Act 1923[19a] gave statutory effect to the rule that in any dispute relating to an infant the court must regard the infant's welfare as the first and paramount consideration. The mother was given the same right to appoint testamentary guardians as the father and it was stated that neither the father nor the mother should from any point of view be regarded as having a claim superior to the other. As a result of the now equalized position between the parents of a child it was necessary to extend to the father the same right to apply for custody as had previously been extended to the mother. This was accomplished by the Administration of Justice Act of 1928.[20]

The Guardianship of Minors Act, 1971[21] repealed the Acts of 1886 and 1925 and consolidated their provisions into the new Act. However, it made no changes in the substantive law. In the absence of an order vesting custody in the mother, none of these Acts affected the common law rule that guardianship is vested exclusively in the father. This was generally of little consequence because the right to custody or guardianship is usually only important when the marriage breaks down at which time it is likely to be the subject of a court order. In any case, the Guardianship Act of 1973[22] provided that "a mother shall have the same rights and authority as the law allows to a father, and the rights of mother and father shall be equal and be exercisable by either without order." The Act also made provision for either parent to make application to the court when the parents could not agree on any question affecting the infant's welfa:

[19a] 15 & 16 Geo. 5, c. 26.

[20] 18 & 19 Geo. 5, c. 26.

[21] 1971, c. 3.

[22] 1973, c. 29.

Finally, the Childrens Act, 1975[23] provided a means whereby certain specified third parties might apply to the court to receive "legal custody" of a child. This change was necessary because the previous acts had been limited to consideration of disputes between parents; third parties had no standing to apply for custody or guardianship unless they were testamentary guardians.

Upon passing under the control of the Dominion government the North-west Territories received the law of England as it stood on July 1, 1870 except where it was inapplicable to local conditions or where it had been altered by Dominion statute. English law was to remain in force until altered either by the Dominion government or by Ordinances passed by the Lieutenant-Governor-in-Council of the Territories. This meant that the Territories received English law as it stood prior to the major reforms. As of 1870, English law only gave the mother a right to custody of children under the age of seven.[24] The Territories also received the Matrimonial Causes Act of 1857 but its provision regarding custody does not seem to have been widely used.

The first North-west Territories Ordinance I have located relating to custody was the Judicature Ordinance, Number 2 of 1886. This ordinance permitted the court to appoint guardians of infants if they did not have a father living or any legal guardian to take care of their persons or estates. The ordinance permitted the mother to petition the court to be appointed guardian of her infants if the father were dead even though he might have appointed testamentary guardians. The mother could herself appoint testamentary guardian "if it shall seem advisable and in the interests of the infant to do so." The practice and procedure relating to guardianship was to conform as nearly as circumstances

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[23]1975, c. 72.

[24]Supra. n. 14.

admitted to that of England but a judge might vary it to save expenses. In similar terms to the wording of Talfourd's Act the ordinance provided that the mother might apply for an order of access to any infant and if the children were under twelve, the judge might order the delivery of the infant into the custody and control of the mother. The Ordinance added:

> As a rule the father shall have the custody and control of his infant children; but it shall be lawful for the Court or any Judge, on a proper case made for that purpose, to order any infant, child or children to be delivered into the sole custody and control of the mother,...any law, usage or custom to the contrary notwithstanding.

The language of this provision implies that except in the case of children under twelve, some finding of unfitness would have to be made against the father before the mother was entitled to custody. No access or custody order was to be made in favor of a mother who had committed adultery or whose improper conduct or habits of life rendered her unfit.

Despite the changes made in the English law during this period the 1886 Ordinance remained the law in the North-west Territories and later in Alberta, with only minor alterations, until 1913 when the Alberta legislature passed the Infants Act.[25] This act brought Alberta law into near conformity with English law by adopting verbatim the substantive portions of the English acts of 1886 and 1891. Section 2 of the Infants Act (section 5 of the English Act of 1886), provided that the court might make such order as it saw fit regarding the custody of an infant having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father. However, unlike the English Act, the section retained the prohibition regarding an order for custody or access to a mother against whom

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[25]S.A. 1913 (2nd session) c. 13.

adultery had been established. Sections 4, 5, 6 and 7 of the Infants Act reproduced verbatim the provisions of the 1891 English Act which has been discussed above.

A mother of an infant became guardian of the infant upon the death of the father either alone, or jointly with any guardian appointed by the father. The mother could also appoint a testamentary guardian to act after the death of the father and herself or to act jointly with the father if the court found that the father was for any reason unfitted to be the sole guardian of his children. These provisions were identical to sections 2 and 3 of the English Act of 1886. The Infants Act also provided that the Court might appoint guardians for an infant if there were no parent or lawful guardian or if such parent or guardian were not a fit and proper person to have the guardianship of the infant. Guardians were to be removable for the same causes which trustees were removable and, unless limited by the Court appointing them, their authority included the right to act for and on behalf of the infant, and included authority with respect to both the infant's property and the care of his person. The Act provided that in any question relating to the custody and education of infants the rules of equity should prevail.

The Infants Act was amended in 1920.[26] The most important change was the designation of the mother and father of an infant as its joint guardians, neither possessing any greater rights. This was an advance upon the English law which extended rights to the mother but did not actually constitute her a guardian. As a consequence of this amendment it was necessary to extend the right to apply for custody to the father as well as the mother since the father no longer retained custody as of right. The qualification upon the mother's right to appoint a testamentary guardian was removed; both parents now had the right to appoint testamentary guardians to act jointly with the surviving spouse;

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[26] S.A. 1920, c. 10.

in the absence of such a testamentary guardian, the surviving parent was to be the sole guardian of the infant's person. Guardians were to have authority over both the infant's person and his estate. The qualification respecting the mother's adultery was removed and the statement that the rules of equity were to prevail was modified by adding that they prevailed when not in conflict with provisions of the Act.

The provisions of the Infants Act, as amended, regarding custody and guardianship were incorporated into Part IX of the Domestic Relations Act of 1927.[27] These provisions have remained essentially unaltered to the present except that after 1941 the parents of an infant were no longer to be considered guardians of their infant's estate in addition to his person.[28]

B. Of the Estate

Before examining the present Alberta law concerning guardianship it is necessary to distinguish between two types of guardians, the guardian of the infant's person and the guardian of the infant's estate. The two guardians may be the same person or they may be separate individuals. At common law a guardian of the person had no authority over the infant's property[29] but a testamentary guardia was considered to be custodian of both the person of the infant and the infant's estate.[30] This created the curious situation that the parent as natural guardian was guardian only of the infant's person yet by statute he could appoint a testamentary guardian who was guardian of both the infant's person and estate. However, neither a testamentary guardian nor a parent had the right to use any money or to dispose of any property belonging to the infant

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[27] S.A. 1927, c. 5.

[28] S.A. 1941, c. 104.

[29] Re Marquis of Salisbury v. Ecclesiastical Commissioners (1876) 2 Ch. D. 28.

[30] In Re Andrews 8 Q.B. 1953; Talbot v. Earl of Shrewsbury, 4 My & Cr. 673; Arnott v. Bleasdale, 4 Rm. 387; Duke of Beauford

without the intervention of the court. Therefore although the testamentary guardian was the custodian of the estate of the infant, when it came to taking any action on the part of the infant, that action had to be expressly ratified by the courts and if not so ratified was not binding upon the infant.[31] This is recognition of the fact that as regards the ward's property, the guardian is a trustee in every respect, with precisely the same powers and duties as a trustee has over any trust property; and as a trustee he is bound to account to his beneficiary, the ward, when his guardianship comes to an end.[32]

The present provisions of the Infants Act[33] require an application to be made for the court's consent before any real estate belonging to the infant is disposed of. Such application is to be made in the name of the infant by his next of friend or guardian but should not be made without the consent of the infant if he is over 14 unless the court so directs or allows. The court may allow a disposition of the infant's property if it is necessary or proper for the maintenance of the infant or if the infant's interest requires or will be substantially promoted by such a disposition. The money arising from the disposition is to be applied as the court directs. Provision is also made for obtaining the court's permission for payment of dividends to the guardian or any other person for the maintenance and education or otherwise for the benefit of the infant, the sanctioning of marriage settlements, and confirming the settlement of an action by the infant in respect of an injury to the infant. The only qualification upon the court's power is that such a disposition of the infant's estate must not be contrary to the provisions of a will or conveyance by which the estate was devised or granted to the infant.

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[31] Re Shewin, Re Langley [1927] 2 W.W.R. 609 (Sask. K.B.)

[32] Bromley, p. 321.

[33] R.S.A. 1970, c. 185.

The present provisions of section 52 of the Domestic Relations Act require every guardian who purports to act as guardian of the estate, with the exception of the Public Trustee, to furnish such security as may be ordered by the court. These provisions were enacted in 1941[34] amending the Domestic Relations Act of 1927. The 1927 Act defined 'guardian' to mean both the guardian of the estate and the person of the infant. Unlike under the previous Infants Act, there was no requirement that a guardian post security as ordered by the court, before being entitled to manage the infant's estate. This omission was severely criticized in Re Pulkrabek[35] by the Alberta Court of Appeal and the 1941 amendment sought to remedy this defect. The definition of 'guardian as including guardianship of the infant's estate was removed and the present section 52 was enacted.

The effect of this provision is that any guardian of the infant must make application either for letters of guardianship under the Surrogate Courts Act for appointment as guardian of the estate, in which case he will be required to post a bond, or, by application under section 52 of the Domestic Relations Act in which case he is also required to post a bond.

The ultimate effect is that unless any guardian of the infant makes such an application, the Public Trustee is, for all intents and purposes, the only guardian authorized to deal with the estate of any infant in the province of Alberta. Furthermore, section 7 of the Public Trustee Act[36] provides that any monies or estate to which an infant is entitled other than wages or salaries shall be in trust to the Public Trustee unless a guardian has been appointed by issue of letters of guardianship. Anne Russell suggests that the effect of section 7 is to clearly

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[34] Supra. n. 28.

[35] [1928] 3 W.W.R. 323.

[36] R.S.A. 1970, c. 301.

override the provisions of section 52 of the Domestic Relations Act because section 52 makes no provision for the granting of letters of guardianship. She concludes that unless letters of guardianship are issued pursuant to the Surrogate Courts Act the Public Trustee shall be guardian of the estate of every infant in the province.

Russell states that in practice this provision is circumvente by the appointment of an executor to act as trustee of the estate of the infant children of the testator in which case the trustee is governed by the provisions of the Trustee Act.[37] A similar practice has been followed in England since the property laws of 1925 and there guardianship of the estate is virtually obsolete. In almost every case property in which an infant has an interest, will be vested in trustees; and although the guardians may be appointed trustees for this purpose, it will be in the latter capacity and not in the former that they will control the property.[3

Even in cases in which trustees are appointed the Public Trustee is entitled to notice of any application made through a court in respect to the property or estate of an infant and, when served with notice, becomes guardian ad litem of the estate of the infant. The Public Trustee has the function of acting as the official or ex officio trustee of the property of any infant in the province. However, he is not ex officio guardian of the person of infants, nor is he vested with any of the responsibilities or obligations incidental thereto.

In view of the present state of the law in Alberta the issue arises; does s. 52 serve any useful purpose? Most of Part 7 of the Domestic Relations Act deals with guardianship of custody of the infant's person. The guardian of the infant's estate is really a trustee and this position can best be dealt

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[37] R.S.A. 1970, c. 373.

[38] Bromley, p. 322.

with in the provisions relating to the law of trustees. Also it would appear that there is a conflict between s.52 and s.7 of the Public Trustee Act which renders the provisions of s.52 invalid until letters of guardianship are obtained under the Surrogate Courts Act. Therefore it is suggested that for the purposes of Part 7 of the Domestic Relations Act "guardian" be defined as limited to the guardianship of the person of the infant and that the provisions in s.52 dealing with the guardianship of an infant's estate be repealed.

It is also suggested that the rights and duties of the guardian as set out in section 52(2) should be repealed. The rules of court make provisions for the appointment of the next friend or the appointment of a guardian ad litem thus rendering subsections (a) and (b) unnecessary. If the provisions regarding guardianship of the estate of the infant are to be removed, subsection (c) is redundant. Finally subsection (d) could better be dealt with in a definition of the term "guardian." Also in view of the accepted meaning of the term "guardian" it is possibly redundant. The possibility of including a definition of a "guardian" and the rights and duties of a guardian will be discussed in greater detail later.

Finally, it is submitted that consideration be given to changing the terms applied, so as to permit the guardian of the estate to be known as the trustee of the estate and retaining the use of the term guardian as it pertains to the guardian of the person. This proposal is contained in Anne Russell's paper and was first made by Mr. Sandy Hogan of the office of the Public Trustee. This proposal could help to alleviate some of the confusion regarding the theory of guardianship, particularly in relation to testamentary matters. It would clarify the position under wills in which the executor is named as trustee of the estate of the infant and some third party is named as guardian of the infant. The position of guardian of the infant's estate

is already that of a trustee and the change in terminology would merely recognize that fact. There would be nothing to prevent the testator from appointing a single person to both offices but it should be clear that they are two separate and distinct offices. This change in title would also remove the incongruity arising from the fact that the appointment of the guardian of the person of the infant is effective from the date of death of the testator whereas the appointment of the guardian of the estate is only effective from the date of issue of the letters of guardianship under the application under the Surrogate Court. A change such as that proposed would require amendment of the Surrogate Court Act to make it clear that letters of guardianship extend only to the guardianship of the person and provision would have to be made empowering the court to appoint a person trustee of the estate. The Public Trustee Act would also have to be amended to show that the Public Trustee is the trustee of the estate for all infants in the province unless a trustee of the estate is appointed under the Surrogate Court Act.

C. Of the Person

Guardianship of the person has been defined as a bundle of rights exercisable by the guardian over an infant until the infant reaches the age of majority (see the statement of Sach L.J. supra). To be accurate this definition must be expanded because the office of guardianship also carries with it a number of duties owed by the guardian to his ward. Basically a guardian has the same rights and duties with respect to the person of his ward as a parent has with respect to his legitimate child (Bromley, p. 321). There are differences between the two relationships: a biological parent is always the biological parent but guardianship terminates when the ward reaches the age of majority; there is no right of inheritance between a guardian and his ward; it is unclear whether a guardian can change the domicile of his ward although a parent of an infant can do so (see Volume IX of the

Ontario Law Reform Commission Study at p. 37). The rights and duties of a parent or guardian are subordinate always to the protective guardianship of the Crown as parens patriae. In exercise of this power the Crown will intervene if it feels that any infants within the jurisdiction need the protection of the court.

The term "guardian" is sufficiently wide to include a parent, for parents are regarded at common law as the natural guardians of their children and now s. 39 of the Domestic Relations Act deems them to be the joint guardians of their children. Therefore in the remainder of this paper guardian should be taken to include a parent unless it is specifically stated otherwise. Where there is difference in the relationship between a parent and their infant and any other guardian and that infant this difference will be noted.

1. Rights and Duties of a Guardian

The rights and duties of guardians are only vaguely defined. As pointed out by Bevan (Law Relating to Children, p. 396) there has never been the foundation for a comprehensive definition of guardianship. The common law never developed a comprehensive definition and confined itself to generalities such as the "parental authority." Statutes added duties and conferred rights upon guardians but only in piecemeal fashion. Those Acts which did attempt to formulate a comprehensive definition were reduced to generalities. For instance the British Mental Health Act, 1959, 7 and 8 Eliz. 2, c. 72, attempts to define the rights and duties of guardians appointed under the Act and defines them as "all such powers as would be exerciseable by them or him...as if he were the father...." The New Zealand Guardianship Act 1968, No. 63, defines guardianship in s. 3 as:

> The custody of a child (except in the case of a testamentary guardian and subject to any custody order made by the court) and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect to the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the role of guardian of a child;

The British Children Act, 1975, c. 72, defines the parental rights and duties "as all the rights and duties which by law the mother and father have in relation to a legitimate child."

Both courts and legislatures are necessarily confined to such generalities as control or upbringing or parental authority because it is impossible to exhaustively list all the rights and duties which may arise in caring for a child. However, such terms as "parental authority" are too broad to give any real understanding of the nature of a guardian's office. Consequently it is necessary to examine the rights and duties of a guardian in more detail.

The rights and duties arising under guardianship are so interwoven that what may in one instance be a right may in another context become a duty. Consequently any separation of the incidents of guardianship into rights and duties is somewhat artificial. However, for the sake of convenience a separation will be made.

Where there is only one guardian he will prima facie have the right to the custody of his ward. However, this right may be limited by the terms of the guardian's appointment (either by the court or by the parent) and by the fact that there may be more than one guardian. In this case, unless the guardians are the child's parents living together and acting as his joint guardians, one of the guardians may seek an order of custody which would

vest custody in him; when a guardian is acting with a surviving parent, it will usually be the parent who is entitled to custody, unless it is contrary to the child's welfare. One joint guardian may not forcibly remove the ward from the custody of the other (Gilbert v. Schwenck (1845), 14 M. & W. 488).

A guardian has the right to control the activities of his ward and a duty to exercise that right, even though the ward has attained the years of discretion (Kay v. Johnston (1856), 21 Beau 536). At common law this included the right to consent to the marriage of a ward over 16. The court could assist a guardian who was trying to prevent his ward from marrying an unsuitable person by ordering the other party not to allow the marriage to take place in penalty of being held in contempt of court (Lord Raymond's Case (1734), Cas. & Talbot 58). In Alberta consents to marriage are dealt with under the Marriage Act, R.S.A. 1970, c. 226, as amended. A person under 18 but over 16 (marriages under 16 are prohibited) requires the consent of both parents. However, where the parents are separated or divorced the consent can be given by the parent or other person who has "legal custody" of the minor. Legal custody is not defined but presumably it would mean custody that was recognized by a court order or incorporated in a separation agreement. Only where both parents are dead or mentally incompetent is the consent to be given by a guardian. The Marriage Act provides that person over 16 may apply to a judge of the Supreme or District Court who may at his discretion grant an order dispensing with the consent. In New Zealand the Guardianship Act contains in s. 14 a provision whereby a minor of or over the age of 16 who is affected by a decision or a refusal of consent by a parent or guardian can apply to the court to review the decision:

> (1) A child of or over the age of 16 years who is affected by a decision or by a refusal of consent by a parent or guardian in an

> important matter may (unless the child is under the guardianship of the Supreme Court) apply to a Magistrate who may, if he thinks it reasonable in all the circumstances to do so, review the decision or refusal and make such order in respect thereto as he thinks fit.
>
> (2) Any consent given by a Magistrate pursuant to this section shall have the same effect as if it had been given by the parent or guardian.
>
> (3) Nothing in this section shall limit or affect the provisions of the Marriage Act 1955 with respect to consents to the marriage of minors.

It submitted that thought should be given as to whether there is any value in adopting such a section in Alberta.

Along with custody the most important right of a guardian is the right to direct the religious training and the secular education of the infant. These rights are subject to certain limitations and will be discussed below in the context of the duties of a guardian.

Criminal liability will be incurred for taking a ward under the age of 14 out of a guardian's custody in the same circumstances as for a parent (s. 250 Criminal Code). In regard to civil liability, no action will be at the suit of a guardian under the Fatal Accidents Act and, unlike a parent, a guardian has no right to the services of his ward and cannot bring an action for loss of services unless actual services were being rendered to him by the child (Bromley 320, fn. 6; 329).

At common law, a duty to protect the ward physically and morally will clearly arise once the guardian assumes his role as guardian. If the guardian fails in his duty to protect the infant the court will exercise its parens patriae jurisdiction to make the infant a ward of the court, thereby placing the infant under the protection of the court. In Alberta this jurisdiction

is exercised through the process of neglect proceedings under Part II of the Child Welfare Act. In temporary wardship proceedings jurisdiction is exercised by the Juvenile Court while the District Court exercises jurisdiction in permanent wardship proceedings. It is beyond the scope of this paper to discuss neglect proceedings. However, if the court determines that an infant is a neglected child as defined by the Child Welfare Act it can make the infant a ward of the court under the guardianship of the Director of Child Welfare. A temporary wardship order merely suspends the operation of the powers of any guardian for the duration of the wardship order but a permanent wardship order terminates any former guardianship. In addition, a failure by a parent or guardian to protect the infant may lead to prosecution under either s. 42 or s. 43 of the Child Welfare Act. Although the duty to protect the infant is not expressed in positive terms, failure by a guardian to do so jeopardizes the continuance of the guardianship and may render the guardian liable to criminal prosecution.

A guardian's position to his ward was wholly fiduciary at common law: there is no common law duty to maintain a ward except out of such property of the ward as may come into the guardian's hands. A guardian is not liable for necessaries supplied to his ward unless he personally authorized their supply. A guardian's duty with respect to maintenance may be distinguished from that of a parent. The common law recognized a positive legal duty upon parents to maintain their infants but lacked the means of enforcing the duty. Parents are now placed under a duty to maintain their children by the Maintenance Order Act, R.S.A. 1970, c. 222. In matrimonial proceedings the court may order either parent to make payments for the maintenance of their children. This is covered by the Divorce Act in respect to divorce proceedings and by the Domestic Relations Act in other matrimonial proceedings. Section 46(5) of the Domestic Relations Act provides

that the court may order either the mother or father to make such payment from time to time as the court deems reasonable for the maintenance of the infant. Also within the section the court is empowered to order payment out of any estate to which the infant is entitled if the court deems it necessary for the infant's maintenance. It is not proposed to discuss s. 46(5) in terms of the necessity or adequacy of maintenance but it is submitted that consideration should be given to the question of whether a section on maintenance should be included in the portion of the Act which deals with guardianship and custody or whether it should be moved to another section of the Act

A guardian may not be under the same positive legal duty do maintain the infant as is the parent. However, any person having the care, custody, control or charge of a child may be criminally liable under either the Child Welfare Act or s. 197 of the Criminal Code for failure to provide necessaries. Failure to maintain the infant would also be grounds for neglect proceedings under Part II of the Child Welfare Act which might result in the guardianship being suspended or terminated. In cases in which a parent or "other responsible person" has allowed an infant to be brought up by another person at the expense of that other person, or where the court considers that the failure to maintain the child amounted to abandonment or desertion of the infant, the court may in the exercise of its discretion refuse to allow the parent or other responsible person to regain custody of the infant (s. 47 and s. 49 Domestic Relations Act). If the court orders the infant delivered to the parent or other responsible person it may order them to reimburse either in whole or in part the person who has brought the infant up (s. 48). Therefore although the duty of a guardian to maintain the infant is less explicit than that of a parent it exists because failure to do so may jeopardize the continuance of the guardianship or render the guardian liable to criminal prosecution.

A guardian is under the same statutory duty as parent to ensure that the ward receives an elementary education (School Act, R.S.A. 1970, c. 329). But in addition, the guardian must see that the ward is educated in a manner befitting his station and expectations (Re Tremblay (1920), 48 O.L.R. 321; Bromley 328), which in many cases will mean higher, university and professional training if the circumstances warrant. Generally parents are not bound to give their children a better education than that required by the School Act. However, Anne Russell suggests (p. 20) that in divorce proceedings the courts are able to order a parent to contribute to the education of their children even beyond the usual statutory requirement. She suggests that this jurisdiction only arises in divorce proceedings either because the divorce legislation creates a new obligation upon the parents as Johnson J.A. held in Crump v. Crump, [1971] 1 W.W.R. 449 or because in divorce the court is exercising its inherent equitable jurisdiction as parens patriae, which enables it to control the exercise of the natural parental authority and in so doing is unfettered by statute law respecting custody, maintenance or education of infants.

By and large, a guardian's liability for the acts of his ward is the same as a parents: he will be liable if he has authorized or ratified the act, and he will also be liable for a tort if it has been caused by his negligence in failing to prevent its commission.

The guardian is under a duty to bring up the infant in the faith in which he would have been brought up had his parents been alive. Any attempt to change the ward's faith would be grounds for the removal of a guardian (Re Collins, [1950] Ch. 498). At common law the right of the father to determine the religious faith in which his children were to be brought up, both during his lifetime and after his death, was even stronger than his right to custody. Only rarely where there was some grave

misconduct on his part did he forfeit his right, and it prevailed even in those cases where the child was living with the mother, so that the effect of bringing him up in his father's religion was likely to adversely affect her relationship with the child (Hawksworth v. Hawksworth (1871), 6 Ch. App. 539), and even where the father was dead (Andrews v. Salt (1873), 8 Ch. App. 622; see generally Talbot v. Shrewsbury (1840), 4 My. & Cr. 672; Hill v. Hill (1862), 31 L.J. Ch. 505).

In Ontario the father's common law position has been expressly preserved by s. 24 of the Infants Act which provides that "Nothing in this Act changes the law as to the authority of the father in respect of the religious faith in which his child is to be educated." Both Alberta and Saskatchewan have similar provisions but there is a difference in the wording (s. 47 Infants Act, R.S.S. 1965, c. 342; s. 50 Domestic Relations Act, R.S.A. 1970, c. 113); Alberta and Saskatchewan adopted the wording of the Custody of Children Act, 1891, 54 & 55 Vict., c. 27, rather than the Ontario provision. Section 50 provides:

> (1) If upon an application by a parent or other responsible person for the production or custody of an infant, the court is of the opinion
>
> (a) that such parent or other responsible person ought not to have the custody of the infant, and
>
> (b) the infant is being brought up in a different religion from that in which the parent or other responsible person has a legal right to require that the infant should be brought up,
>
> the court may make such order as it thinks fit to ensure that the infant is brought up in the religion in which the parent or other responsible person has a legal right to require that the infant be brought up.

(2) Nothing in this Act

(a) interferes with or affects the pwoer of the court to consult the wishes of the infant in considering the order that ought to be made, or

(b) diminishes the right that an infant now possesses to the exercise of free choice.

Section 50 does not make it clear, as does Ontario's s. 24, that what is referred to is the father's common law right; the words used are "parent or other responsible person", not "father". In 1891 when the section was first enacted there would have been little problem in determining who was referred to. The only parent with a legal right to determine what religion the infant was brought up in was the father or a testamentary guardian he had appointed. However, the English Court of Appeal held in Re Collins, [1950] 1 All E.R. 1057, that a guardian must today observe the mother's wishes as well as the father's. The court emphasized that the paramount consideration is the infant's welfare rather than the wishes of the parents. The Alberta statute does not have a provision making the infant's welfare the paramount consideration but it contains s. 39 which the English Act lacks. This constitutes the mother a joint guardian of the infant with the father and affects a change in the common law. It could now be argued that the mother too has a legal right to require that the infant be brought up in a particular religion and that the father's common law right is no longer to automatically prevail. The statute is therefore ambiguous on this point.

However, the Supreme Court of Canada in DeLaurier v. Jackson, [1934] 1 D.L.R. 790 at 791 held that the court may, in the exercise of its equitable jurisdiction, require that any right of the father must give way to the paramount consideration which is the welfare and happiness of the child. The case involved an application for a writ of habeas corpus to be

directed to the foster parents of the child. The Ontario Supreme Court rejected the order and on appeal the applicants relied heavily upon s. 24 of the Infants Act. The Supreme Court dismissed the appeal. In the case of Re Bennett Infants, [1952] 3. D.L.R. 699 at 705, Roach J.A. stated the principle in this way:

> It is not for the court to decide as between two religions. The authority reserved to the father by s. 24 of the Act is subject to this--that the wishes of the father prevail only if they are not displaced by considerations relating to the welfare of the children upon the whole of the facts of the case.

Both De Laurier and Bennett were cited by Farthing J. in Bateman v. Bateman (1964), 47 W.W.R. (N.S.) 641 at 657 (Alta. S.C.) when he refused the father's claim to the right to control the religious upbringing of his children:

> Nowhere in our Domestic Relations Act is the word "father" used regarding the religious training of children, as it is in s. 24 of the Infants Act of Ontario. In Alberta the word used is "parent". From the Ontario cases above discussed we have seen that, despite s. 24, the courts have not hesitated to disregard the father's wishes in this respect when it was considered in the best interests of the child to do so. If that can be done in Ontario, a fortiori it can be done in Alberta.

Farthing J's judgment was affirmed on appeal (1965), 51 W.W.R. (N.S.) 633 (Alta. A.D.). In each level of court it was stated that the principle expressed in De Laurier was applicable in Alberta. De Laurier was also recently applied by the Ontario Court of Appeal in Maestrello v. Maestrello (1976), 20 R.F.L. 287.

All of the above cases concerned custody disputes in which religion was a major factor. However, there have been at least two cases in which the father sought to control the

religious and secular education of an infant in the custody of its mother. In Re Smith, [1952] 2 D.L.R. 778 (Ont. C.A.), a father applied to have his 14-year old son educated in the Anglican faith and to have him attend a public secondary school. The mother had violated a written agreement that the son be educated in the Protestant faith. The trial judge granted an interim order granting the father's requests. He applied s. 24 and doubted the applicability of De Laurier v. Jackson to the narrow issue before him. Upon appeal the Court of Appeal held that De Laurier was clearly the rule of law applicable in the case but upon the facts they did not seem to feel that the paramount consideration of the child's welfare required the suspension of the father's right to direct the religious education of his child.

In contrast, the Court of Appeal in MacDonald v. MacDonald, [1955] 1 D.L.R. 422 (Ont. C.A.) refused a father's application for the right to control the religious upbringing of his 3-year old daughter whose custody the trial judge awarded to the mother. The Court of Appeal applied De Laurier and at 431 MacKay J.A. stated:

> On appeal counsel for the defendant contended that by virtue of sec. 24 of the Infant's Act, the judgment of the trial judge should, notwithstanding that custody was awarded to the plaintiff, have given control of the religious upbrining of the infant to the defendant. We do not think that it would be in accordance with the general welfare of the child to separate her religious upbringing from her home training, and we agree with the trial judge upon this point.

Similar views were expressed by Jenkyn J. in the Australian case of Strum v. Strum (1973), 8 R.F.L. 130 (N.S.W.S.C.). He felt that, other things being equal, the religious upbringing of the child should be in the hands of the parent having legal custody. A prime reason for this feeling was that separating

the child's religious training from her upbringing could create disharmony in the home, separating the children from the custodial parent. This view seems to be widespread and the courts are reluctant to separate the religious upbringing of the children from that of the custodial parent particularly in the case of young children.

Section 50 as it is presently worded is ambiguous. Consideration should be given to either modifying it or repealing it. Is a provision with respect to religion necessary? If so it is submitted that the section should not attempt to differentiate between the parents in regard to religion, this should be determined according to what is in the child's best interests. The Alberta courts seem to have recognized this rule but any possible conflict between it and the statute ought to be removed. If there is to be any provision with regard to religion it should be a provision which seeks to ensure that when the parents are deprived of custody the infant will still be brought up in their faith. The section would therefore apply to disputes between parents and third parties rather than disputes between parents. It is also submitted that even in cases in which the parent's right is sought to be preserved it should be made clear that the welfare of the infant must be the paramount consideration in matters of religion as well as in other aspects of custody and guardianship.

2. Termination of Guardianship

Once appointed a guardian normally remains such until the ward reaches the age of majority. However, a number of events may occur which will terminate the guardianship at an earlier date. The guardian's duties will clearly cease if the ward dies; they automatically determine when he comes of age. The death of a sole guardian also terminates the guardianship, although the

deceased guardian's personal representatives will be liable for any breach of trust committed by the guardian in his dealings with the ward's property. Where one of two testamentary guardians dies, the survivor is entitled to act (Eyre v. Shaftsbury (1725), 2 P. Wms. 103) but if one guardian appointed by the court dies the guardianship of all the others automatically determines as well (Bromley 332; Bevan 410, each citing Bradshaw v. Bradshaw (1826) 1 Russ 528) although they are almost invariably reappointed.

The effect of the ward's marriage upon the guardianship is uncertain. It depends partly upon how much reliance is placed upon some very old cases. In these cases if a male ward marries, the powers of a testamentary or court appointed guardian are not determined as regards his estate (Mendes v. Mendes (1748), 1 Veg. Sen. 89). It is not as clear whether guardianship of his person is determined but the general consensus is that it is not (Eyre v. Shaftsbury, supra). The marriage of a female ward was held to have determined the guardianship of her person although not of her estate (Mendes v. Mendes, supra; Roach v. Garvin (1748), 1 Ves. Sen. 157). These are very old cases and their results can no longer be regarded as certain. The distinction between male and female is not in accord with contemporary social philosophy and would likely not be upheld. No act expressly states that guardianship terminates upon marriage but it is unlikely that in a marriage accepted as valid by the court the cour would allow the guardian to interfere with the person of his ward although the ward's estate might still be subject to the guardian's authority until the ward reached the age of majority.

Like a trustee, a guardian once having accepted the office cannot resign it at will but only with the leave of the court and upon such terms as the court deems just (Spencer v. Chesterfield (1752), Amb. 146; sec. 43(2) Domestic Relations Act).

However, the court is unlikely to require an unwilling guardian to continue to act since this is not likely to be in the ward's interest.

A guardian may be removed by the court whenever the welfare of the infant so demands (Re McGrath, [1893] 1 Ch. 143 (C.A.); Re X., [1899] 1 Ch. 526 (C.A.)). The Alberta Act provides in s. 43 that testamentary guardians and guardians appointed by order or letters of guardianship are removable by the court for the same causes that trustees are removable. Section 42 provides that where it is determined that the parent or lawful guardian is not a fit and proper person to have the guardianship of the infant the court may appoint a guardian for the infant. The section does not confer any right to remove the existing guardian but such a right is contained in s. 43 and in the inherent jurisdiction of the court discussed in Re McGrath to remove a guardian when it is in the infant's welfare to do so. The inherent jurisdiction is wider than the jurisdiction conferred by s. 43 in two ways. First, the power is not limited to removing guardians in cases of actual misconduct; a guardian may be removed merely because a change in circumstances render it for some reason better that the infant have a new guardian. For example, in F. v. F. (1902), 1 Ch. 688, a guardian changed her own religion to become a Catholic and although she made no attempt to influence her Protestant ward the court felt that she should be removed. Secondly, the inherent power of the court extends to removing a parent as guardian of the infant if the interests of the infant require it (Re McGarth, supra; Johnstone v. Beattie 10 Cl & F. 42 cited in In Re M., [1918] 1 W.W.R. 579 (Alta. C.A.)). This power is not expressly conferred by the Domestic Relations Act but s. 51 provides that the rules of equity shall prevail in questions relating to the custody and education of infants when they do not conflict with the Act. Section 39 of the Domestic Relations Act makes the parents of an infant the joint guardians of the infant but only unless

otherwise ordered by the court. Therefore by making an order under its inherent parens patriae jurisdiction terminating or suspending the parent's right of guardianship, the court is not acting in conflict with the provisions of the Act. Sections 42 and 43 and the question of whether there should be a provision in the Act providing for the removal of any guardian will be discussed more fully later in the paper.

A guardian's rights and duties may also be suspended or terminated by neglect or adoption proceedings. Neglect proceedings are taken under Part II of the Child Welfare Act and if a child is found by the court to be a neglected child the court may make a wardship order. Such an order commits the child to the custody and guardianship of the Director of Child Welfare and takes precedence over any previous custody or guardianship order. A temporary wardship order merely suspends the rights of previous guardians for the duration of the order during which time the Director is the child's guardian to the exclusion of all others. However, a permanent wardship order makes the Director the sole legal guardian of the infant and terminates the rights of any existing guardians. This procedure is similar to the English practice of having the infant made a ward of the court by an exercise of the court's parens patriae jurisdiction. The English courts still adopt this practice (e.g., In Re T (Infants), [1968] Ch. 704 (C.A.)) but it has never been adopted by the Canadian courts (Robinson, 553) and in view of the Child Welfare Act there seems little need for it.

Adoption proceedings are taken under Part III of the Child Welfare Act and an adoption order has the effect of severing all ties between the adopted child and his natural parents. The child becomes the child of the adopting parents as if it had been born to those parents in lawful wedlock. An adoption

would also presumably terminate any existing guardianship of the infant. However, before a child can be adopted the consent of the guardians of the child must be obtained unless for reasons provided in the Act the judge chooses to dispense with the guardians' consent.

III
CUSTODY

A. Meaning

When a court makes a custody order what rights are given to the custodian by the order? Clearly an award of custody carries with it the right to the physical care and control of the child. This is the so-called "narrow" definition of custody. But the right to physical care and control is the most important right which can be exercised over an infant. The person with such control has the most immediate and most extensive effect upon any infant under their care; more general long range control over matters such as education or religion may be important but they do not affect the child as personally or as deeply. The breadth of this power of physical care and control was pointed out by Crawford J. in Capodici v. Capodici (1967) 12 F.L.R. 129 (Tas. S.C.)

> A child is controlled in many aspects of its life by the person having the right to control him--the hours which he keeps, the way in which he dresses, the way in which he conforms to customs and conventions, obedience to the law, the hours which are to be spent on homework or school activities outside school hours, what duties he performs in the home, the subjects such as music or art, whether and when the child will visit friends and relatives, whether the child may attend entertainments, how he will travel, how he will spend his holidays--and no doubt there are many others to which I have not referred. If the wife is to control all these matters, what control is left to the husband in respect of them? What other "say" could the husband have in the general upbringing of the child?

Clearly most of the powers described by Crawford J. must be exercised by the person who has actual physical custody of the ch It would be impractical for an absentee parent or guardian to attempt to determine such matters or to seek to enforce such decisions as they did make. The Courts could not become involved in policing such minor domestic matters as when a child is to go to bed. Consultation between parents could often lead to friction and bitter disputes. In any case the ensuring uncertainty would certainly not be to the benefit of the infants involved. Consequently there has never been any suggestion that a guardian who is not entitled to custody has any say in these matters.

The extreme importance of physical control over the child is perhaps the major reason for the decline in the discussion of guardianship. Even at common law, physical control was the kernel of the father's rights in that the others could not be exercised without it. The procedural machinery of the common law was geared to protect only this right (Bromley p. 263) and this was what litigants sought. The rights of a guardian without custody have always been extremely limited and so it is not surprising that virtually all disputes have concerned custody rather than guardianship. The heavy emphasis on custody and the virtual disappearance of guardianship as a basis for litigation have led to an expansion in the meaning of the word "custody" toward the wider meaning discussed by Sachs L.J. in Hewar v. Bryant quoted at the beginning of this paper. There are few cases in which the courts actually discuss what they mean by custody so it is difficult to determine just what further rights beyond physical care and control an award of custody confers upon the custodian.

In England custody has become virtually synonomous with guardianship and, in fact, has virtually supplanted it. Bromley uses the word "custody" to denote the whole bundle of rights vested in a parent or guardian while using the words "care and

control" or "possession" to denote the limited right of physical control (p. 288). This position is most clearly shown by the practice of the English courts in giving one parent "custody" and the other parent "physical care and control."

In Wakeham v. Wakeham [1954] 1 All E.R. 434 Denning L.J. recognized the concept of such a split order as "entirely realistic." In that case the mother had broken up the marriage, deserting her husband and taking the children with her. The husband had no means for bringing up the children himself but Denning L.J. held:

> By giving the father the custody, it recognizes that he, the innocent party, is at least entitled to a voice in the bringing up of the child or children, and also to the consideration of the court when any question arises as to what is to be done for the child. ...but the father's views are also entitled to consideration, and that is why the order for custody should be given to him, although solely for practical reasons, the mother may have the care and control.

One need not agree with the reasoning of Denning L.J. as to why the father was entitled to custody but it is clear that Lord Denning saw custody as comprising more than the mere right to physical care and control.

In Re W (J.C.) (an Infant) [1963] 3 All E.R. 459 (C.A.) Upjohn L.J. in discussing the meaning of "custody" in section 5 of the Guardianship of Infants Act, 1886 remarked:

> I agree with the learned judge to this extent, that in s. 5 of the Act of 1886 "custody" has its wide legal meaning. If an order is made granting custody to parent A without more, it would include care and control of the infant or, if he does not want care and control, power to direct with whom the infant shall reside; it also gives that parent the right to organize the infant's religious and general education and his general upbringing.

The Court of Appeal held that the trial judge was in error in holding that he did not have jurisdiction to make a split custody order and they awarded "custody" to the father and "physical care and control" to the mother. This case is of particular interest in Alberta because s. 5 of the 1886 Act is in all essential words identical to s. 46 of the present Domestic Relations Act which is the section under which the court is given the power to make awards of custody. Approval of the concept of divided custody was given again by the Court of Appeal in L v. L [1966] 1 W.L.R. 1079 at 1083. The concept of split orders will be discussed more extensively later but for the present it is sufficient to note that the English courts appear to regard an award of custody as being equivalent to an award of guardianship.

The division in England appears to be between "custody" which is a residual control over matters which will later require attention and will have an important effect on the infant's life, and "care and control" which is control over the child's day to day activities. Neither right is clearly defined and as noted by Wallace J. in Semple v. Semple (1965) A.L.R. 248 "it seems difficult to appreciate where care and control ends and custody begins." He added:

> It seems to me that this type of order may conflict with what I regard as a good principle, that there should not be responsibility without power.

This is the major problem with such divided orders in that it seems difficult to see how the parent with "custody" but not "care and control" can enforce any decisions they make. Also there appear to be no reported cases which recognize the rights of a parent with "custody" except in a general way. However, these difficulties do not seem to have bothered the English courts and such orders are quite common.

Such orders are made in Canada as well but they are less common and not as widely accepted. The more common order is that of custody to one parent and access to the other. The courts do not generally define what they mean by custody but they seem to assume that it includes the right to control the child's upbringing and education. Parents' right to control the religion of their infants and the effect of the statutory provisions in regard to religion were discussed under the powers of guardians, supra. Generally it can be said that the courts are reluctant to divide an infant's religious training from its home environment and an award of custody will carry with it the right to determine the child's religion (e.g. Bateman v. Bateman, supra., (Alta. A.D.)) Professor Robinson states at p. 546:

> The parent or person who has the custody of a child usually has the right to the care and control of the child and may dictate the manner in which the child is to be brought up and educated.

The Ontario Law Reform Commission states that an award of custody deprives the other parent of all decision making power over the child although support may still be required. These statements are supported by those cases in which there has been a discussion of the extent of a custody order.

In Gubody v. Gubody [1955] 4 D.L.R. 693 (Ont. S.C.) Spence J was concerned with determining the meaning of access and whether the father in the case should have access to his daughter but in his judgment he made a number of comments which indicated his conception of a custody order at p. 697:

> ...the father's contact with his daughter must be that of a person who visits her, who spends some time with her, but who cannot change or alter her mode of life or have any general direction of the child's conduct. That is a matter for custody and that has already been settled and is not before this Court at the present time.

and at p. 699:

> In each case it must be clearly understood by the father that what he is entitled to do is to be with his daughter and apart from the mother, but that he is only to have the ordinary control of a child necessary for the well-being of the child during the hours they are together, and he is not in any way to interfere with the child's upbringing.

This case was decided under the Ontario Infants Act which like the Domestic Relations Act makes both parents joint guardians of their infant. However, the father deprived of custody, did not have any control over the child's upbringing.

In Benoit v. Benoit (1972) 6 R.F.L. 180 (Ont. Prov. Ct.) the judge referred to Gubody for guidance and stated at p. 182-83:

> It is necessary to distinguish between custody and access. I cannot find any authority that specifically defines custody. I consider custody to mean that it is the full responsibility and control for providing physical nurture as well as mental and emotional nurture of children--for providing physical care, educational training and guidance in all matters that are considered of importance in the healthy rearing of a child.

In Huber v. Huber (1975) 18 R.F.L. 378 (Sask. Q.B.) the court chose to make a "split order" upon the English model citing Re W. supra, in which custody was awarded to the father and physical care and control was given to the mother. The Court defined custody in the following terms at p. 382:

> When custody is used in that sense it means that the parent having custody retains the right of supervising the education, religious training and general upbringing of the children and the making of decisions having a permanent effect on their lives and development.

In Wentzell v. Wentzell (1971) 3 R.F.L. 122 (Sask. Q.B.) the conduct of the father in phoning the Departments of Social Welfare and Education concerning the mother and the child was held to be interference with the mother's custodial rights and was prohibited.

B. Orders that can be made

Courts in custody cases have a wide discretion as to the type of order they will make. The Domestic Relations and Family Court Acts provide that the court may make such order "as it sees fit" regarding the custody of the children. The Divorce Act provides that the court may make an order "providing for the custody, care, and upbringing of the children of the marriage." A court is not required to make an order under section 11 in every case where there are children of the marriage as defined by the Divorce Act, and often in the case of older minor children will decline to do so. (Sharpe v. Sharpe (1974) 14 R.F.L. 151 (Ont. S.C.)). There are no restrictions placed upon the type of order which the court can make and it would appear that this is at the discretion of the judge.

This is most apparent in the willingness of the courts to make awards of custody to persons other than the parents involved in the custody dispute. While the circumstances which call for such an award are quite rare, when they occur the courts have placed custody in third parties rather than the parents. Statistics Canada figures show that of the 31,406 children who were the subject of custody awards on divorce in Canada in 1971, at least 112 were awarded to a third person. The statistics do not show who these third persons are. The courts have exercised this power under the Divorce Act and there has been no challenge to their jurisdiction. Sections 10 and 11 have been held to be constitutionally valid (refer to jurisdiction section) so that if these provisions are sufficiently broad to permit awards of custody to third persons there would appear to be no problem. However, if the sections were held to be not wide enough there might be some question as to whether an express provision permitting such awards would be ultra vires the powers of the federal parliament

In interpreting provisions very similar to those of s.46 of the Domestic Relations Act in Re Fulford and Townsend (1972) 5 R.F.L. 63 the Ontario Court of Appeal held that section meant

that an application could be launched by either parent, and upon that application the court could make such order as it saw fit including awarding custody to a third person. The court disapproved of the position taken by Wright J. in Robson v. Robson [1969] 20 R. 857 in which he interpreted the Infants Act as limited to awarding custody only to either parent. However, they approved Wright J's statement that the court could award custody to a third person in the exercise of the parens patriae jurisdiction Similarly Dubensky J. in Humphreys v. Humphreys (1972) 4 R.F.L. 64 exercised his inherent jurisdiction to award custody to the maternal grandparents upon an application by the infants' mothers for custody. In Campbell v. Campbell (1972) 4 R.F.L. 148 (Sask. Q.B.) the court directed that the child be placed in the joint custody of the father and his mother in order to ensure the continuance of the child in a favorable environment. This order came upon an application by the infant's mother to vary a previous order made under the divorce decree giving the husband custody. It was noted in Kerr v. McWhannel (1975) 16 R.F.L. 185 (B.C.C.A.) that in proper cases, custody and access rights can be given to persons who have no legal relationship to the child involved. It was thus seem that there is no restriction placed upon whom custody may be given to by the Domestic Relations Act and that, in any case, there is inherent equitable jurisdiction in the Court which enables it to award custody to third persons. It is an open question whether the inherent jurisdiction could be exercised by a divorce court or whether the Divorce Act has ousted the jurisdiction of the courts a parens patriae insofar as divorce suits are concerned.

The Alberta Family Court Act provides in s. 10 that:...

> ...a judge may, on an application therefor, make such order as he sees fit regarding

(c) the custody of the child, and

(d) the right of access to the child

by either parent or any other person, having regard to the best interests of the child.

This is the only relevant Alberta statute which recognizes the right of the court to grant custody to third parties. A provision to this effect may also be found in the B.C. Family Relations Act S.B.C. 1972, c. 20, s. 25(1)(d). In the divorce field legislation in Australia (Matrimonial Causes Act 1959, c.s., No. 104, c. 85(3)) and California (California Civil Code, s. 4600) also have such provisions.

It submitted that the present discretion exercised by the courts in awarding custody to third parties when the circumstances warrant, is beneficial and should be expressly recognized. At present there is some confusion as to whether access can be given to third parties or only to parents. The phrasing of s.46(1) could be interpreted to limit the right of the courts in regard to access of granting access only to the parents of the infant. The section reads:

> ...the Court may make such order as it sees fit regarding the custody of the infant and the right of access to the infant of either parent.

Both this section and s.10 of the Family Court Act quoted above could be interpreted to restrict the right to award custody in the care of The Family Court Act and access in the case of the Domestic Relations Act to parents. This would be particularly disturbing in the case of the Family Court because it could not remedy this defect by exercising an equitable jurisdiction since it lacks this jurisdiction.

Therefore it is suggested that both sections be amended to make it clear that upon an application for custody being made the court has jurisdiction to make such order as it sees fit having regard to the welfare of the infant regarding custody and right of access to the infant, and that the court is not restricted in its orders to granting either custody or access to only the parents of the infant.

Although willing to exercise their discretion in granting custody to third parties, the courts are more conservative when it comes to the type of custody order that they will make. Generally they confine themselves to awarding custody to one party, with or access to the other. This attitude does not appear to be because the courts feel that they lack jurisdiction to make other types of orders since other orders have been made and have not been challenged. There are a number of other options open to the court besides a simple custody-access order:

(1) a "split custody" order on the English model in which custody is awarded to one party while care and control is awarded to the other. (Re W. [1964] Ch. 202; Wakeham v. Wakeham [1954] 1 W.L.R. 366; Re Perry (1962) 33 D.L.R. (2d) 216 (N.S.S.C. in bonco)).

(2) "joint" legal custody to both parties with one party to have care and control of the infant (Jussa v. Jussa [1972] 2 All E.R. 600 (Fam. D.); S. v. S (1965) 109 Sol. to 289 (P.D.A.)).

(3) "divided" custody in which each party has custody of the infant for part of the year.

(4) full custody with care and control to one party but extended access granted to the other party (suggested by Upjohn L.J. in Re W., supra and applied in Long v. Long (1968) 12 F.L.R. 456 (N.S.W. Sup. Ct.)).

(5) an order giving care and control to one party but making no order as to custody which will leave the parties whatever control over the infant they could exercise aside from the custody order (Re M. (infants) [1967] 3 All E.R. 1071 (C.A.)).

Some of these orders have been made in Canada, particularly in the last five years but they are still the exception. One of the earliest was in Re Perry, supra. The Nova Scotia Supreme Court dismissed the mother's appeal from the denial of her application for a writ of habeas corpus calling for the delivery of the child to the mother from a foster parent who had raised the child for almost all of its seven years. The court held:

> "although the mother was awarded custody of the child in the previous divorce proceedings, custody does not necessarily mean actual physical custody, but means the right to the care and control of a child and the mother still has legal custody of the child even though it may remain in the formal custody of the respondent. (Head Note).

The court did not specify what rights remained in the mother by virtue of her having "legal custody" of the infant but it would seem that like the English courts they were separating custody of the infant from the actual physical care and control of the infant.

Campbell v. Campbell (1972) 4 R.F.L. 146 (Sask. Q.B.) and Farkasch v. Farkasch (1972) 4 R.F.L. 337 (Man. Q.B.) were both cases in which "joint custody" was awarded. In Campbell the court varied a previous custody order which had given custody of an infant to its father. Instead custody was given to the father and the father's mother. The court felt that this would secure the child in the grandparent's home which he felt was the best environment but it did not discuss any further what authority each custodian had. In Farkasch the judge awarded "joint custody" of the infant to the divorcing spouses. However, "actual physical custody" was awarded to the father whom the judge considered more mature and more aware of the responsibilities of a parent. He did not state in his judgment what continuing responsibilities "joint custody" implied so far as the mother was concerned.

In Buchko v. Buchko (1973) 11 R.F.L. 252 (Sask. Q.B.) the judge felt that there was not much to choose between the homes offered by the two parents, the mother who lived in Ontario and the father who lived in Saskatchewan. The judge ordered that custody be divided between the parents, the mother having the children from September to June while the father was to have "custody and control" during the summer months. Each party was to have reasonable access to the children when they are in the custody of the other party. There was no discussion of what should be done if a long term decision regarding the children had to be made.

In MacRae v. MacRae (1974) 15 R.F.L. 270 (P.E.I. S.C.) the judge felt that no order should be made awarding sole custody to either parent. He noted that under the Children's Act, s. 79(1) the father and mother were joint guardians equally entitled to the custody control and education of the infant. The court therefore discmissed both the petition and counterclaim in regard to custody and ordered that the petitioner and the respondant should be joint guardians of the children and committed the custody, control and education of the infants to the parents jointly The order further provided that the infants should reside with mother. The father was granted extensive access rights involving at least every second weekend of each month and either July or August.

In Miller v. Miller (1975) 17 R.F.L. 92 the Manitoba Court of Appeal confirmed an order of a trial judge in which he gave joint custody of the children to the parents with actual physical custody to the father. The court felt that the trial judge had considered all the relevant factors and carefully considered the welfare of the children. They could see no reason to disturb his judgment. In the recent case of Parker v. Parker (1976) 20 R.F.L. 232 (Man C.A.) the Court of Appeal confirmed an order in which

there was to be joint custody of the two infants by the mother and father. The children were to remain in the care and control of the mother during the months of September to June and in the care and control of the father during the summer months with weekly acces to the non-custodial parent. The wife was a member of the Ecumenical Institute and she and the children lived in premises occupied by the Institute. The judge ordered that no commitment in regard to the children be made to the Institute unless consented to by both parties. The Court of Appeal felt that the trial judge's conclusions were "reasonable and proper in the circumstances."

In Huber v. Huber (1975) 18 R.F.L. 378 (Sask. Q.B.) the judge discussed the English cases and decided that the circumstances were such that a "split order" would be appropriate. The father was given custody of the children but their "care and control (physical possession)" was to remain with the mother. The judge particularly commended the parents for their "reasonable and generous attitude" in allowing almost unlimited access. The judge recognized that the children needed the care of the mother but felt that the father should be involved actively in the education, training and general upbringing of the children. He felt that the father should have the authority to be involved in the making of important decisions having a permanent effect on the life and development of the children. He believed that the children have a right to more than a "weekend father."

Extended access was granted in Beauroy v. Beauroy (1970) 1 NSR (2d) 531 (C.A.) such access to be for all weekends, all school holidays and two days a week after school. In Long v. Long (1968) 12 F.L.R. 456 (N.S.W. Supr. Ct.) Begg J. felt that in light of earlier Australian cases he should not make an order for divided custody but he felt that the mother should look after the children for the major part of their daily lives and the father was the proper person to have the responsibility for making

the important decisions relating to the children's upbringing, their schooling and religious instruction. He therefore made an order that the father was to have custody of the children but that the mother was to have access to them during the weekdays and for half of the summer holidays. The judge commented that this extended access included the duty to care for and control the childr

Orders which split custody between the parents have been criticized, particularly in Australia. In Marks v. Marks [1965] ALR 241 (N.S.W. Sup. (d)) the court refused to make an order giving one parent custody and the other parent care and control. Begg J. stated:

> It seems to me that, except in very rare cases, care and control must accompany the award of legal custody and it seems inappropriate that an endeavour should be made in the ordinary case to direct the various constituents of such legal custody.

In Semple v. Semple (1964) 5 F.L.R. 114 (N.S.W. Sup. Cd.) Wallace J. said of the English "split order":

> With great respect I find that I have some difficulty in appreciating the effect of such an order in that it seems difficult to appreciate where care and control ends and custody begins.

He added:

> It seems to me that this type of order may conflict with what I regard as a good principle, that there should not be responsibility without power.

Similar viewpoints were expressed in Travnicek v. Travnicek (1966) 7 F.L.R. 440 (Vict. S.C.) and Capodici v. Capodici (1967) 12 F.L.R. 129 (Tas. S.C.). In Travnicek Barber J. felt that:

> Practical experience in the matrimonial jurisdiction leads to the conclusion that any separation of the responsibility for the child's upgringing and the authority to control it would in most cases end unsatisfactorily and in some cases disastrously.

He emphasized that the welfare of the child was the paramount concern and felt that the courts must resist the temptation to "console the successful petitioner by an order for legal custody where the circumstances are such as to require the actual care and control to remain with the respondent." Similar views were expressed in Cupodici but in the circumstances of the case an order for joint custody was appropriate with care and control to the mother.

Such orders have also been criticized in Canada. In McCahill v. Robertson (1974) 17 R.E.L. 23 (Ont. H.C.) Weatherston J. said at p. 23-24:

> My judgment is based on the very strong feeling that divided custody is an inherently bad thing. A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere.

In E. v. E. and C. (1966) 56 W.W.R. 368 at 374 (B.C.S.C.) Gould J. said:

> As to awarding custody for one part of the year to one spouse and for the balance to the other, I am of the view that in the case of children of this act [7 and 11] such would be an almost certain road to emotional instability and a deprivation of the very necessary feeling of parental and home security. Unusually generous access provisions to the father would, in my view, have the same undesirable effect to a lesser degree.

These views are in constrast to the viewpoint of the English Family Division in Jussa v. Jussa [1972] 2 All E.R. 600 which felt that:

> ...when one has two wholly unimpeachable parents of this character who could, I think, be reasonably contemplated as capable of co-operating with each other in the interests of the children whom they both love, there can be no serious objection to an order for joint custody, and many advantages for the children from that order;

The Australian and English courts do not seem to differ so much upon legal principle for both recognize the authority of the courts to make split or divided orders but their attitudes on when such orders should be made are significantly different. The Australian courts favor making such awards only in exceptional cases while the English courts are willing to make such awards if there is a reasonable possibility that the parents will cooperate.

The attitude of the Canadian courts is somewhere between the Australian and English approaches. Such awards have been criticized but they are also being made with increasing frequency in the last five or six years. Courts which have made awards do not seem to require exceptional circumstances before so doing. Practices vary between provinces with many of reported cases in which some form of split order was made occurring in Manitoba or Saskatchewan. I have been able to find no reported cases of an Alberta court making such an award.

Criticism of division of custody seems to center around two points: the difficulty of defining the extent of each parent's responsibility and the increased possibility of disputes between custodians disrupting the stability of the child's home. The feeling seems to be that it would be better for the infant to have a stable home environment controlled by one parent than an

unsettled situation in which the infant does not know who to turn to for guidance. Some courts also feel reluctant to give a parent the responsibilities concerning the child without the power to fulfill their responsibilities.

These are valid criticisms and it might be that the circumstances which warrant a continued sharing of responsibility between divorced spouses would be rare. Some degree of maturity on the part of the parents and a willingness to co-operate in the interests of the children would be necessary if arrangements for joint responsibility were to work. In many cases personality conflicts, other obligations or new marital relationships may make it impossible for the parents to co-operate. However, if the parents can co-operate continued close contact with both parents can lessen the impact of the divorce and prove beneficial for the infants involved. Therefore it is recommended that the legislation make clear that the court can make whatever award is appropriate in the circumstances.

C. Effect upon Guardianship

Although not as ready as the English courts to make split custody orders the Canadian courts seem to have adopted the wide definition of custody as containing almost all the powers historically associated with guardianship. This attitude is reflected in sections 10 and 11 of the Divorce Act which authorize the making of orders to provide for the "custody, care and upbringing of the children of the marriage." Canadian courts have treated these terms as having a collective meaning--the right to raise children, and a custody order is assumed to comprise them all. The Divorce Act remains silent regarding guardianship. Presumably this means that guardianship remains to be dealt with under provincial legislation. However, a custody order made under the Divorce Act would undoubtedly bind a guardian as well as the non-custodial parent.

Under the Family Court Act the judge is able to make an order to do with "the custody of or access to the child." There are no provisions with respect to guardianship, and since the Family Court is not a superior court and has only the power conferred upon it by statute, the Court's power is limited to custody and access orders. It has no inherent equitable jurisdiction to enable it to deal with guardianship and the statute does not confer the necessary authority.

The Domestic Relations Act is the only relevant statute which deals with guardianship but in addition to guardianship questions, the statute confers a power upon the court to consider

questions of custody. S. 44 provides that a parent whose misconduct is the cause of a decree of judicial separation or divorce may be declared to be a "person unfit to have custody of the children." Such a person will not be entitled as of right to custody or guardianship upon the death of the other parent. S. 45 permits the parents of an infant to enter into a written agreement with regard to which parent will have the "custody, control and education of the children." If the parents fail to agree they may apply to the court which will make such order as it sees fit regarding the custody of the infant and the right of access of either parent. S. 46 governs who may apply, the considerations to be taken into account and makes provision for variations of the order made. S. 52(2)(d) provides that except where the authority of a guardian appointed or constituted by virtue of the Act is otherwise limited the guardian shall continue to have the custody of the person of the infant and the care of his education.

It thus appears that under none of the statutes does an award of custody terminate a previously existing guardianship relationship. The Divorce Act contains no mention of guardianship although it does provide that the court can make provision for authority normally associated with a guardian. It is possible that any federal attempt to deal with guardianship would be ultra vires in that the federal power with regard to custody comes under the heading of Marriage and Divorce while guardianship would not. The Family Court Act clearly cannot affect guardianship because this is beyond its jurisdiction. The Domestic Relations Act which does deal with guardianship does not provide for the termination of a guardian's office upon an award of custody. An award of custody may limit the guardian's powers but it does not terminate his office.

This has been recognized by the courts in respect to natural guardianship of the person. In Re Sharp Infants Adoption (1962) 40 W.W.R. 521 (B.C.C.A.) Davey J.A. stated at p. 525:

> In reaching this decision, I am not unmindful that the purpose of the so-called right of access is more than provision of an opportunity to gratify parental affection for the children; it is also a right of visitation to enable the parent to discharge adequately his remaining duties as guardian of the person and estate of his child. The preservation of the right of access may be important to the welfare of the child to ensure that it is being properly maintained and cared for by the parent having its custody, a matter I fear from some of the reported cases which is sometimes overlooked.

An Australian case, Capodici v. Capodici, supra. also commented upon the effect of a custody order:

> An order for custody to the mother or other person does not deprive a father of all his rights and obligations in respect of his child. He remains, subject to the rights conferred on the person to whom custody is given by the court, the natural guardian of the child, and among the residual rights which remain to him are any rights which he may have at law with regard to the control of the child. It follows that if an order is made transferring the custody of the children to the wife, in this case the husband still remains the guardian of the children, qualified only by the wife's right to custody. In applications to the court concerning the children he would therefore not only have the standing as a party but also he would have the right to claim as the guardian of the child carrying out his duty of protecting or guarding the child from danger, harm or loss.

A similar decision was reached by Buckley J. in Re T. (an Infant) [1962] 3 All E.R. 970 in which he determined that an award of custody did not terminate the father's natural guardianship and that therefore the wife had no right to change the child's surname without the father's consent. The case of Y. v. Y. (1974) 14 R.F.L. 336 (English Court of Probate) dealt with a similar situation in which the mother had unilaterally changed the surname of the infants. The court discussed Re T. and agreed that an award of custody did not terminate the father's natural guardianship but

it held that neither parent would unilaterally change the infant's surname and that therefore the issue came to be decided upon the best interests of the infant. Since several years had elapsed the court held that the surname should not be changed back. A recent Saskatchewan case, Wallace v. Wallace (1976) 20 R.F.L. 324 (Sask. Q.B.) without discussing the issue of guardianship held that an award of custody to the mother did not give her the right to change the infant's surname without the father's consent.

It was recognized in S. v. S. [1941] 1 W.W.R. 205 (Alta. S. C.) that the mother of an infant was its natural and legal guardian even though her parents had been awarded custody of the child under the divorce decree. The mother was refused in her application for custody but was given the right of extended access to the child. The court did not discuss what the mother's rights as guardian were with regard to the infant.

It therefore seems reasonably clear that an award of custody of an infant does not in itself destroy the status of guardianship. Custody is only one of a bundle of rights held by a guardian and a custody order merely severs this right from the total bundle. However, as discussed above, an award of custody comprises so many of the rights historically associated with guardianship that if the right to custody has been carved out of the bundle of rights possessed by the guardian, what remains?

1. Residual Rights

Here a distinction must be made between parents and other guardians because certain statutes confer rights upon parents which are not conferred upon other guardians. A parent retains the right to apply to vary the terms of the custody order (Divorce Act s. 11(2); Domestic Relations Act s. 46(3); Family Court Act s. 10(7)), and thus in appropriate cases may obtain custody. This is at present almost the only means by which a non-custodial

parent can safeguard the infant's welfare and since it will only be effective when there is a change in circumstances which makes it in the interests of the infant to vary the order, it can only be used in exceptional situations. A court will not order a change in custody merely because the parents disagree concerning some decision which will affect the child's future. There is no provision short of variation by which a non-custodial parent can enforce whatever rights they have and this is probably one factor which makes the Courts view custody as containing all rights concerning the upbringing of the child. Rights of guardians other than parents to vary custody orders are limited. There is no right for anyone but the parties to the divorce to apply to vary the order under the Divorce Act and under the Domestic Relations Act only the parents, or after the death of either parent, a guardian appointed under the Act may apply to vary the order. Thus unless one of the parents has died, only the parents have a right to apply to vary the order. Under the Family Court Act only the parents of the child or the child, who may apply with or without any person interested on his behalf, may apply for an order and presumably only the same persons could apply for variation.

If either parent or guardian has been awarded access rights they may of course exercise them. However, many of the arguments supporting the granting of access rights to non-custodial parents do not apply to guardians, to whom the child may have no ties at all and consequently non-parental guardians are less likely to be given access rights. Further, the rights conferred in an access order do not give the recipient any rights over the child other than the right of physical control during the period spent with the child.

All guardians retain the right to be advised of neglect proceedings (Child Welfare Act R.S.A. 1970 c. 45, s. 19) or adoption proceedings (Child Welfare Act, s. 54). Also the consent

of the guardians of an infant is generally required before the infant can be adopted although the consent may be dispensed with if the judge sees fit.

Parents are often obliged to provide maintenance for the support of the child but it is unlikely that a similar duty is imposed upon other guardians of the person. Guardians of an infant's estate are of course obliged to account to the infant and their duties are unaffected by a custody order. The reason other guardians do not have a duty similar to parents is that no positive duty has been placed upon them to maintain the infant. If they do not have custody they could not be prosecuted for neglecting the child since they had no control over him.

A guardian may retain authority with respect to the infant's religious education (s. 50 Domestic Relations Act) but as discussed earlier the courts are reluctant to separate a child's religious training from the question of his custody. In most cases the custodian will also have the right to determine the infant's religion if the custodian is a parent. If the custodian is not a parent the courts may require that the infant be brought up in the religious faith that the guardian instructs. However, even in such a case if it is felt that reserving authority to the guardian is not in the infant's best interest the guardian will lose this right.

Professor Robinson suggests that a non-custodial parent is entitled to be provided with information from the other parent regarding the child's education, upbringing and welfare, and in this context, to the co-operation of all teachers, physicians and other such persons who come into contact with the child (p. 547). This proposition is stated in positive terms but the case he cites as authority, Davis v. Davis [1963], 42 W.W.R. 257 (Sask. Q.B.), does not seem to go that far. In that case, the father was given custody of a mentally-ill child and access was denied to the mother

on the condition that the father made available at all times all information concerning the welfare of the child. The judge emphasized that the mother was to have the co-operation of the physchiatrists, teachers, and other persons who were, by the direction of the father, in contact with the child. The father was to encourage these contacts. This decision was made on the particular facts for the welfare of the infant and did not express a general principle.

It would also appear that the surname of an infant cannot be unilaterally changed by the mother without the father's consent even if the mother has been awarded custody. However, the father also does not have the right to unilaterally change the infant's surname without the mother's consent. (See cases cited supra.). Presumably a third party custodian could not change an infant's surname without the parent's consent except through adoption proceedings.

Some of these residual rights of guardians and non-custodial parents have been conferred by statute while others have existed at common law. However, together they do not amount to a very extensive authority over the infant. Virtually all important questions are left to be determined by the custodian. It becomes easy to see why the Ontario Law Reform study felt that guardianship was an obsolete concept which had been replaced by custody. It also justifies the statement made by Richard Gosse in a research paper prepared for the Canada Law Reform Commission that

> When custody is awarded under the Divorce Act, then, the person to whom custody is being awarded is being made something like the equivalent of the legal guardian of the person of the child.

If custody is today virtually the equivalent of what guardianship was historically, then is there any viable role left for the concept of guardianship?

IV
NEED FOR GUARDIANSHIP

It is submitted that there is a viable role for the concept of guardianship. The fact that residual rights remain with a guardian despite the custody order indicates that an award of custody is not sufficient in itself to cover all aspects of the infant's care. Also custody has never been concerned with testamentary appointments or administration of the infant's estate. Guardianship is a concept broad enough to cover all aspects of an infant's care; an attempt to expand custody to replace guardianship creates confusion because custody is then being used in two widely different senses. The concept of a guardian, retaining those rights not included in a custody order is simpler and clearer than attempts to distinguish between "legal custody," "actual custody," "possession," "care and control," "joint custody," "divided custody," and other terms now used by the courts.

Courts in nearly every jurisdiction have recognized the benefit of giving both parents some control over the infant in certain circumstances. They recognize that one party has to have the physical care and control over the infant but they want to provide the other parent with some role in the infant's upbringing. Guardianship could accomplish this purpose without the need for the multiplicity of orders now made. An award of physical care and control could be made to one parent in which case all other rights would be retained by both parents as joint guardians.

A number of aspects of the present system require some change. Persons caring for children not their own should be given some legal status in relation to the child without necessarily severing all ties between the natural parents and the infant. In situations in which the welfare of the infant requires it, third persons should be able to obtain some legal standing in order to apply for custody of the infant. Also there should be provision

for resolution of disputes between parties having control of the infant. It is submitted that guardianship provides a more flexible tool for achieving these ends and that custody is more useful when confined to the issue of who shall control the child.

It is therefore recommended that the present system be amended within the overall framework of the concept of guardianship. This was done in the New Zealand Act in which for the purposes of the Act

> "Custody" means the right to possession and care of a child. "Guardianship" means the custody of a child (except in the case of a testamentary guardian and subject to a custody order made by the Court) and the right of control over the upbringing of a child, and includes all rights, powers and duties in respect of the person and upbringing of a child that were at the commencement of this Act vested by any enactment or rule of law in the sole guardian of a child; and "guardian" has a corresponding meaning.

"Upbringing" is defined in s.2 as including the education and religion of a child. The New Zealand Act is quite different from our present system in that it limits "custody" to what is referred to in Canada or England as "possession" or "physical care and control." The effect of a custody order in New Zealand would only give one parent the right to physically control the child while both parents would jointly retain the other rights. This would be similar in effect to a "joint custody order."

It is suggested that a definition provision in the Alberta statute would be useful in clarifying the present confusion as to the limits of custody and guardianship. But before a section similar to the New Zealand one is adopted it must be considered whether it wished to make "joint custody" orders the rule rather

having them only in certain circumstances, when the welfare of the infant requires it. If not, then the New Zealand section must be modified. This might not be done by including The New Zealand definition of "upbringing" as including education and religion and empowering the judge if he chose to make an award of the custody and upbringing of a child to one parent. The effect of this order would be similar to the present effect of a custody order and would leave the other parent as guardian with only residual rights and no control over the upbringing of the child. This would return the advantages of the present system while clearing up some of the confusion of terms. It might also cause the courts to consider the merits of joint decision-making by both parents when possible rather than the traditional custody/access order.

In the following sections it is proposed to examine the present provisions of Part VII of the Domestic Relations Act and to recommend changes which should be made. These recommendations are founded upon the premise that there will be a continuing role for the concept of guardianship of the person.

V

THE PRESENT DOMESTIC RELATIONS ACT--Part 7

Part 7 of the Domestic Relations Act is entitled Guardianship and its provisions comprise the Alberta law regarding guardianship. It is recommended that consideration be given to removing Part 7 from the Domestic Relations Act and placing it in a separate act which deals only with the guardianship of infants. This is presently done in British Columbia, Saskatchewan, Ontario and in England and New Zealand. The advantage to such a procedure is that it would clearly distinguish questions of custody and guardianship from other matters dealt with under the Domestic Relations Act.

Whether or not a separate act is provided, the present Act requires close examination. Therefore it is proposed to deal with it section by section.

A. Section 37 and 38

Section 37 defines "Court" as used in Part 7 to mean the Supreme Court of Alberta, or a judge of the surrogate court sitting in chambers. The surrogate court is included because under the Surrogate Courts Act it has the same equitable jurisdiction in regard to infants as the Supreme Court. Any change in this section would involve a change in the present court system and as such is beyond the scope of this paper. Reference should be made to the Institute's work on a unified family court.

Section 38 abolishes guardianship in socage, by nature and for nurture. It is recommended that this section be retained because repeal of this section might lead to confusion as to whether these old feudal forms of guardianship have been revived.

B. Section 39

Section 39 provides that unless otherwise ordered by the Court the father and mother of an infant are the joint guardians of their infant, and the mother of an illegitimate infant is the sole guardian of the illegitimate infant. The effect of this section has been discussed earlier. It is submitted that this section should be retained because it is useful in making clear that the parents of an infant are also its guardians and it also makes it clear that the mother and father have equal rights since they are the joint guardians of the infant. However, it should be noted that the Institute has recommended changes to the portion of the section dealing with illegitimate infants. Reference should be made to the Institute's paper on illegitimacy. It is submitted that the reforms suggested there should be incorporated in any amendment of Part 7 of the Act.

C. Appointment and Removal of Guardians--Sections 40, 41, 42, 43 and 44

As mentioned above, the common law recognized a natural guardianship of the parents which arose automatically upon the birth of an infant and continued until the infant reached his majority. This status has been statutorily recognized by s. 39 of the Domestic Relations which provides that unless otherwise ordered by the Court, the father and mother of an infant are the joint guardians of their infant and the mother of an illegitimate infant is the sole guardian of that infant. It is not proposed to discuss the position of the parents of an illegitimate infant as this has been covered separately by the Institute. What should be noted is that parents of an infant became its guardians automatically upon the birth. There is therefore the dual relationship of guardian and ward, and parent and child created upon the birth of the infant.

Unlike natural guardians, other forms of guardians do not become guardians until they are appointed as such. There are three types of guardians who are appointed: testamentary guardians, statutory guardians, and Chancery guardians. Section 40 of the Domestic Relations Act enables either parent of an infant to appoint by deed or by will a person to be guardian of the infant after the death of such parent. The person so appointed shall act jointly with the other parent or with the guardian appointed by the other parent. Because such an appointment is testamentary in nature, to be valid it must conform to the law relating to wills. It is suggested that the power to appoint a testamentary guardian is one which should be preserved; it enables the parents of an infant to make provision for the custody and care of their children in the event of the parent's deaths. It could also be particularly important in the case where parents are separated or divorced and the parent having custody wishes to ensure that the children ar protected upon the parents death. Otherwise great hardship could b

caused by the other parent acquiring sole guardianship of the infant. However, it should be noted that if the welfare of the children requires it, the court may refuse to let the surviving parent regain custody (Gorden v. Gorden (1976) 20 R.F.L. 355 (Ont. H. Ct.). The study prepared for the Family Law Project of the Ontario Law Reform Commission recommended that such a power be granted by statute so that parents could appoint testamentary guardians. The power to do so had been repealed in Ontario in 1923 although other legislation left the law in some doubt.

There has been considerable disagreement over whether the word "parent" as used in the Domestic Relations Act includes the father of an illegitimate child even though by s.39 the mother of such an infant is its sole guardian. It is not proposed to deal with this issue since it has been covered in the Institute's paper on Illegitimacy.

A testamentary guardian's appointment as guardian of the person of the infants takes place upon the death of the testator without the need for letters of guardianship from the Surrogate Court. This seems apparent from the fact that there is no requirement under the Domestic Relations Act for a testamentary guardian to receive any form of certification before he can act. Also testamentary guardians are always referred to separately from those appointed by court order or by letters of guardianship. However, as discussed previously, if a testamentary guardian should seek to act as guardian of the infant's estate he may not do so unless he receives letters of guardianship from the Surrogate Court.

It would seem that a parent deprived of custody of the infant still has the right to appoint a testamentary guardian since s.40 does not limit this right in any way. A custody order does not in itself deprive a parent of the natural guardianship

of the infant although it does limit their power with respect to the infant. In Re Wood (1972) 5.R.F.L. 25 (B.C.S.C.) a father executed a deed under s.15 of the B.C. Equal Guardianship of Infants Act appointing his parents to be the legal guardians of one of his children, who was at that time under the temporary guardianship of a children's aid society pursuant to the Protection of Children Act. The court held that although the right of the father to custody of the infant had been suspended during the duration of the temporary wardship order he could still make a valid appointment which took effect upon the termination of the temporary wardship order. The judge further concluded that the best interests of the infant required that he be delivered into the care of the grandparents as legal guardians.

Relying upon the paramount welfare of the infants the court in Re Brown, Brown, Brown and Hotredt (1974) 15 R.F.L. 172 (B.C.S.C.) refused to give effect to the appointment, by the father of the infants of his sister and her husband as guardians of the infants. The father had been convicted of manslaughter in the death of the mother and for a period of about two years the children had been staying with their maternal grandmother. The court concluded that the welfare of the children required that the children remain with the grandmother and stated; "Obviously, a parent cannot oust the jurisdiction of the court to determime what is in the best interests of the child." In Re M. (1973) 11 R.F.L. 232 (Alta. S.C.) the father of an infant was found not guilty by reason of insanity of the murder of his wife. Both the brother of the wife and the sister of the husband along with their respective spouses applied under section 42 of the Domestic Relations Act for guardianship of the infant. The infant's father subsequently executed an affidavit and a consent to guardianship for his sister. The judge, Moore J. found that when the documents were executed the father was of sound mind and he held that since the father had been found not responsible for the mother's death his wishes should be given some consideration. However, the judge

granted the application of the sister not upon this basis but upon the basis that it was in the best interests of the infant to d so.

Section 40 permits a "parent" to appoint a testamentary guardian. Thus it would appear that even if the parent has been deprived of his parental rights by a permanent wardship order or by being declared to be unfit and divested of his natural guardianship it could be argued that the right to appoint a testamentary guardian persists. It would be unlikely to do so in the case of a parent whose child had been adopted since this severs the parent-child relationship. It is submitted that a parent whose parental rights have been divested by the court should no longer have the right to appoint a testamentary guardian.

Therefore it is submitted that s.40 be amended to clearly indicate that only a parent having lawful guardianship of the infant should be able to make an appointment. Consideration should be given to whether the power to appoint testamentary guardians should continue to be limited to parents or whether it should be extended to all persons who have been awarded guardianship of the infant.

It is suggested that, as recommended by Ms. Russell the legislation might take the following form:

Testamentary Guardian

(1) Any parent having legal guardianship of an infant may by deed or will appoint another person to be guardian of the infant after the death of the aforementioned parent.

(2) The person so appointed guardian of the infant shall be referred to as a testamentary guardian and shall act

jointly with any other guardian of the infant.

Under sections 41 and 42 the court is given the power to appoint guardians of the infant. Section 41 enables the court to appoint a guardian to act jointly with the mother or father of the infant or with the testamentary guardian appointed by the father or mother. The section refers to the guardian acting jointly with the mother or father. This seems to imply that the power under this section is limited to situations in which there is only one surviving parent, and the deceased parent has not appointed a testamentary guardian.

Also the court may appoint a guardian to act with the guardian appointed by the deceased mother or father which would seem to apply to a situation in which both parents are deceased but one of them has appointed a testamentary guardian. The section appears to have been meant to be read in context with section 40 and to apply to situations in which only one parent survives or has appointed a testamentary guardian and the court feels that the interests of the child require another guardian to be appointed. However, in R. v. Gingell (1974) 12 R.F.L. 228 (Alta. C.A.) was of the opinion that the father of an illegitimate child could have applied under s. 41 to be appointed as guardian to act jointly with the mother. The section as it is presently worded is ambiguous and the purpose of the section is not clear.

Section 42 is also ambiguous although potentially of large scope. Initially the section contemplates a situation in which there has been a lapse of guardianship and the infant finds himself with no legal guardian. This was the section under which the father of an illegitimate child applied for her guardianship in Nelson v. Findlay (1974) 15 R.F.L. 181 (Alta S.C.). In such a case the court may appoint a guardian or guardians. This situation may also be dealt with under the Child Welfare Act R.S.A. 1970, c.45

where an infant who is without proper parental control or who is not under proper guardianship or who is an orphan may be deemed to be a neglected child and may be committed to the temporary or permanent care and control of the Director of Child Welfare. In such a case, the Director of Child Welfare becomes the guardian of the infant for as long as the wardship order lasts. As discussed earlier in such cases the Public Trustee will act as guardian of the estate of the infant. The value of s. 42 is that it enables persons other than the Director of Child Welfare to apply for and be appointed to the guardianship of the infant if it is in the best interests of the infant.

The section also gives the court jurisdiction to appoint a guardian or guardians in addition to the existing guardians if it is shown that the parent or lawful guardian is not a fit and proper person to have the guardianship of the infant. This was the provision under which both parties applied for guardianship in the care of Re M discussed above when the father was being detained after being acquitted of the mother's murder on the grounds of insanity. However, it should be noted that the section although allowing the court to appoint new guardians makes no provision for the removal of a guardian found to be unfit. Under section 43 it is provided that testamentary guardians and guardians appointe by order or letters of guardianship are removable by the court for the same causes for which trustees are removable. Therefore a guardian found to be unfit could be removed by the court but there is no similar provision for a court order divesting a parent of their natural guardianship. Section 39 does provide, however, that the father and mother of the infant are the joint guardians of an infant "unless otherwise ordered by the court." By implication this gives the court the power to terminate a parent's right of guardianship although no grounds upon which the court may act are specified. The court of equity when acting to protect an infant would suspend the parent's natural guardianship

and might appoint additional guardians but they did not expressly revoke the parent's guardianship. S. 39 seems to have extended the law in this area.

A major problem concerning s.42 is exactly who may apply to the court under the section. The section states that the application may be made by an infant or by anyone on behalf of the infant. It is not made clear whether a person applying must appear with the consent of the infant although this does not appear necesary from the wording of the section. It appears that anyone can seek to apply under the section if there are either no legal guardians or the court is prepared to find the present legal guardians unfit. This does not give the right to apply unless these two criteria are met and it is submitted that there are situations in which it might be in the child's interest to extend the right to apply for guardianship to third parties despite the reluctance of the court to make a finding of unfitness against the existing guardians.

Sections 41 and 42 give the court the authority to appoint guardians in certain situations but the exact extent of these sections is uncertain and there is no general power given to the court to appoint guardians for the infant. This has not prevented the court from acting when it saw fit because there is an inherent jurisdiction in the courts of equity to appoint and remove guardians Once equity had established its right to supervise guardians and wards, it followed as a corollary that the Court of Chancery had the power to appoint guardians (Bromley, p. 322). Section 16 of the Judicature Act R.S.A. 1970, c. 198 vests the powers exercised by Chancery in all matters relating to infants in the Supreme Court of Alberta. The Surrogate Courts Act R.S.A. 1970, c.357 provides in s.13 that the jurisdiction of the Surrogate Court is the same as given by the Judicature Act to the Supreme Court in all matters relating to the appointment, control or removal of guardians and the custody, control of and right of access to the

infant. As recognized by s.37 of the Domestic Relations Act this extends the parens patriae jurisdiction to the Surrogate Court. The usual procedure for the appointment of a statutory guardian is by way of application to the Surrogate Court for a grant of letters of guardianship although such an appointment can also be made by court order pursuant to sections 41 or 42.

It is submitted that the present sections 41 and 42 are inadequate in that they are ambiguous and further do not extend the right to apply for guardianship far enough. Applications for guardianship could provide remedies which have not previously existed or may provide better remedies than those presently available. In particular, applications for guardianship might include applications by foster parents to obtain legal control of an infant in their charge, applications by step-parents to obtain equal legal rights with the natural guardians of a child to whom the step-parent stands in loco parentis, and may provide remedies for relatives who have been caring for the children but have been unable or unwilling to pursue the only remedy available to them, which is that of adoption. An application for guardianship would be distinct from an application for custody in that it would involve an extension of full parental rights and obligations. The applicant would be attempting to achieve a locus standi before the court and once having achieved this locus he might then seek to apply for custody. As discussed elsewhere, it is uncertain at present whether a third party is entitled to commence custody proceedings for the purpose of divesting a parent of custody.

Such a guardianship order would give the guardian parental powers and obligations but would not deprive a parent of all his rights of natural guardianship. The two guardians would then act jointly.

It is submitted that s. 41 should be repealed and replaced with a section similar to s. 3 of the English Guardianship of Minors Act. Such a section might take the following form:

> Where no guardian has been appointed by the deceased parent or in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent the court may, if it thinks fit, appoint a guardian to act jointly with the surviving parent or with the guardians appointed by such other parent.

This section would make clear the discretion of the court to appoint additional guardians if it saw fit to do so in a testamentar situation.

It is further submitted that a new section should be enacted replacing section 43 and recognizing the equitable jurisdiction of the Supreme and Surrogate Courts. This could be in terms similar to s. 6 of the English Guardianship of Minors Act:

> (1) The court may, in its discretion, on being satisfied that it is for the welfare of the infant, remove from his office any guardian of the infant, including a parent, and may also, if it deems it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.
>
> (2) A guardian referred to in subsection (1) except a parent, by leave of the court may resign his office on such terms and conditions as the court deems just.

Subsection 1 would make it clear that the court had the power to remove any guardian including a parent if the welfare of the infant required it.

The Manitoba Child Welfare Act, contained a provision similar to that proposed:

> 112(1). The Juvenile Court may appoint a guardian of the person of a child under the age of eighteen years, and may remove a guardian so appointed with or without appointing another in his place.

The Manitoba Court of Appeal in Ducharme v. Richardson et ux. (1973) 9 R.F.L. 223 rejected the argument that the Juvenile Court did not have the power to appoint a guardian other than the mother or father without the consent of the mother or father. The Court, citing an earlier decision in Re Cavers (1933) 63 Man. R. 314 felt that the words of the statute were clear and should be given effect to. The Court also held that a guardian so appointed acts alone and not as a joint guardian with the parent. It should be noted however that the Manitoba statute does not contain a provision making the parents of an infant its joint guardians. The court felt that the court under the Child Welfare Act had the power to displace the father's common-law rights although it might have decided differently if the parent's rights to guardianship had been statutory. Subsection (2) is a re-enactment of ss.2 of s. 43 of the present Act and provides the means whereby a guardian can resign his office.

It is suggested that section 42 be repealed and legislation similar to the following be enacted (this proposed legislation is taken from Anne Russell's paper on guardianship):

Statutory Guardianship

(1) The Court may upon an application appoint a guardian of the infant to act jointly with any other guardian of the infant or to act as sole guardian of the infant.

(2) An application for the appointment of a guardian may be made by

a) A person standing in loco parentis to the infant; or
b) A relative of the infant; or
c) A step parent of the infant; or
d) With the leave of the court, any person on behalf of the infant,

(3) The court may upon the application for guardianship appoint a guardian to act jointly with any other guardian of the infant if the court is satisfied that the welfare of the infant demands it.

(4) The court upon an application for guardianship may suspend the rights and obligations of a parent having guardianship if the court is satisfied that for some grave reason such parent is unfit or is unwilling to exercise the responsibility of a guardian.

Legislation such as that proposed would formalize and place on a clear statutory basis the procedure by which third parties may apply to appointed guardians. There is a need to establish some basis upon which third parties may establish a standing before the court in matters concerning an infant to whom they are related in some fashion. Subsection 2 recognizes and meets this need without the present requirement of unfitness necessarily being required.

Section 44 of the Domestic Relations Act provides:

44(1) The Court pronouncing

(a) a judgment for judicial separation, or

(b) a decree of divorce, either nisi or absolute

may thereby declare the parent by reason of whose misconduct the decree is made to be a person

unfit to have the custody of the children, if any, of the marriage.

(2) The parent declared to be unfit to have the custody of the children of the marriage is not entitled as of right to the custody or guardianship of the children on the death of the other parent.

This provision was enacted at the time when adultery was the main ground for divorce and appears to have been intended to prevent the deaulting parent from obtaining custody upon the death of the custodial parent. The punative aspect of this section is not in keeping with the trend away from the fault concept in divorce proceedings. Parental conduct is already a factor considered by the courts in awarding custody and this section encourages the idea of a custody dispute as a contest between the parents with the child as a reward rather than an inquiry into what arrangement is best for the child. This section places the desire to punish the parent above the welfare of the child; a parent whose conduct breaks up the marriage may still be the best available custodian for the child. Therefore it is recommended that s. 44 be repealed sinces its provisions may conflict with what is best for the child.

D. Resolution of Disputes Between Guardians

The present Domestic Relations Act provides in various sections that two or more individuals shall act as joint guardians of an infant: Section 39 makes the mother and father joint guardians of their infants; section 40 states that a testamentary guardian shall act jointly with the other parent or with the guardian appointed by the other parent; section 41 allows the court to appoint a guardian to act jointly with the father or mother of the infant or with the guardian appointed by the deceased father or mother; section 42 allows the court to appoint additional guardians but says nothing about removing the existing guardians. At present there exists no procedure whereby joint guardians can resolve a dispute between them over the infant.

A guardian could attempt to have the other removed under s. 43 if the other guardian was a testamentary guardian or had been appointed by order or letters of guardianship. However, the section appears to be limited to situations in which the specified guardians have been guilty of some breach of trust and it does not appear to apply to a situation in which guardians merely disagree. A guardian could also apply under s. 42 to show that the other guardian is not a fit and proper person to have the guardianship of the infant. However, the section does not expressly provide that the court may then remove a guardian found to be unfit although this might be implied or the inherent jurisdiction of equity to suspend the rights of a guardian when the infant's interests require it might be invoked. However, such a procedure would only appear to be open when a finding of unfitness can be made against one of the guardians. It does not appear to cover a situation in which both guardians are fit but they do not agree upon what is best for the infant. Where there is a disagreement between joint guardians the court has the power to remove one of them if the ward's interests so require (Duke of Beaufort v. Berty (1721), 1 P. Wms. 703). This drastic remedy may not be appropriate as a means of resolving some issues concerning the child's upbringing.

Unlike the English or New Zealand statutes, the Alberta Act does not provide that guardians who disagree may apply to the court to solve the dispute. This can cause problems because in Gilbert v. Schwenck (1845) 14 M. & W. 488 at 493 the Court of Exchequer laid down the rule that one of two joint guardians cannot act in defiance of the other and that each has equal power. In practice this problem seldom arises because one of the guardians will have custody of the child and custody, as defined by the Canadian courts, includes the power to control almost everything relating to the child's life that might be in issue. However, should changes be made which increase the role in the upbringing of an infant of a guardian who does not have custody of the infant it

will be necessary to make some provision for resolving disputes between guardians. If greater use is made by the courts of divided, joint or split custody orders again some provision must be made for resolving disputes between the custodians. Also even if the system is unchanged the present Act makes no provision for resolving disputes between guardians when no custody order has been made. There are circumstances, for example, in the case of parents who are living together, when an award of custody is not an appropriate means of resolving the dispute.

Therefore it is recommended that a provision similar to s. 13(1) and (2) of the New Zealand Act be enacted:

> 13. Disputes between guardians--(1) When more than one person is a guardian of a child, and they are unable to agree on any matter concerning the exercise of their guardianship, any of them may apply to the court for its direction, and the Court may make such order relating to the matter as it thinks proper.
>
> (2) Where more than one person has custody of a child, and they are unable to agree on any matter affecting the welfare of the child, any of them may apply to the Court for its direction, and the Court may make such order relating to the matter as it thinks proper.

E. Custody Agreements--Section 45

Section 45 of the Domestic Relations Act is a re-enactment of the English Custody of Infants Act, 1873 36 & 37 Vict., c. 1 which provided for the first time that an agreement in a deed of separation that the father should give up custody to the mother was not void as being contrary to public as being contrary to public policy. Prior to that statute any such agreement would have been void (Lord St. John v. Lady St. John (1803) 11 Ves. 526; Hope v. Hope (1857) 8 De G.M. & G. 731) unless the father had been proven to be unfit to be a guardian (Swift v. Swift (1865) 34 Beav. 266).

The courts will not consider themselves bound by agreements between parties respecting the welfare of the children and will refuse to enforce such agreements if it is deemed to be not in the best interests of the children. The Alberta Supreme Court in W. v. W. [1943] 1 W.W.R. 502 held that a provision in the separation agreement by which the parties agreed that a child of theirs should be given in custody to a certain third person was not binding on the court, the paramount consideration being the welfare of the child. A similar decision was reached by the Quebec Supreme Court in Tse v. Chen (1975) 17 R.F.L. 176 (Que. S.C.) In England and New Zealand the statutes expressly provide that such an agreement will not be enforced if in the opinion of the court it is not in the best interests of the infant to do so. It is suggested that a similar provision be added to s. 45 to confirm the principle upon which the Canadian courts appear to act.

The Supreme Court of Canada has held that the express power given to parents to enter into such an agreement regarding the custody of their children is not abrogated by the fact that an order of the court dealing with custody is in effect (Kruger v. Brooker [1961] S.C.R. 231). Thus where the parties to a divorce proceeding in which there has been an order of custody made subsequently enter into an agreement which alter an undertaking given to the court by one of the parties, the court will respect that agreement so long as it is in the best interests of the children. This Supreme Court decision was prior to the enactment of the federal Divorce Act and it might now be held that insofar as section 45 appears to give the power to vary a custody order made under the Divorce Act it is ultra vires. However, should the parties desire to change such custody arrangements after the divorce they could apply to have the custody order varied by the court which granted the divorce.

The major problem with regard to a current arrangement concerning the custody of the children of the marriage is that it

is not readily enforceable. Unless it is embodied in a court order, the parent deprived of custody by the agreement may feel free to remove the child from the other parent at any time. In such a case the parent from whose care the child was removed would probably have to apply for custody under the Domestic Relations Act and a custody hearing would be held. It is submitted that the fact that such orders may be difficult to enforce is not sufficient reason to repeal section 45 in that the section encourages the amicable settlement of custody matters which might otherwise have to become court proceedings. If the parents can agree regarding custody without the need for court proceedings they should be encouraged to do so. Further, in bitter custody disputes, even court orders of custody have not prevented the other parent from taking the infant and fleeing the jurisdiction. Therefore it is recommended that the provisions of s. 45 be retained

A further issue which should be considered is whether parents or other guardians or custodians should have the right to transfer custody or guardianship of the infant to a third party. The present Act gives each parent, but no other individual, the power to appoint testamentary guardians to act after the parent's death but it does not expressly give any person the right to transfer any of their legal rights to a third party. In the absence of statutory sanction any such transfer would not make the third parties legal guardians or custodians. This could only be done by court order or by the receipt of letters of guardianship. Without these, any rights of the third party would depend upon the rights of the parent or other guardian or custodian; the third party would have no independent rights. This would also seem to be the case in New Zealand whose Act, like the Alberta statute contains neither a sanction, nor a prohibition of such a transfer.

The B.C. Equal Guardianship of Infants Act R.S.B.C. 1960, c. 303 allows any parent, guardian or other person having the care

or charge of an infant, including a charitable society authorized to exercise the powers conferred by the Act, to constitute some other person to be guardian of the infant although this does not relieve the transferor of responsibility in case the new guardian fails to perform his duties. If the infant is over 14, in the case of a boy, or 12, in the case of a girl, the consent of the infant is required for such a transfer.

On the other hand, the English Guardianship Act 1973, c. 29 i s.1(2) prohibits the transfer by the parents of the whole or any part of their rights and authority except that they can make such a transfer between themselves which is to operate only during their separation while married.

It is suggested that parents or other guardians not be allowed to opt out of their duties by transferring such authority to a third party. If it is desired to obtain legal recognition of a transfer of the child's care and control to a thirty party, then that party should apply to the court for letters of guardianship. Or consideration could be given to incorporating a provision similar to that of s.33 of the English Children Act 1975 c. 72. This authorizes a relative or step parent who applies with the consent of a person having "legal custody" and with whom the child has had his home for at least three months prior to the application, or any person who applies with the consent of a person having "legal custody" and with whom the child has lived for at least twelve months to apply to the court for an order vesting legal custody in him. "Legal custody" is defined in s. 86 to mean so much of the parental duties as relate to the person of the child (including the place and manner in which his time is spent. This concept is much like our conception of guardianship and a similar provision to s. 33 could be included in the proposed section respecting who may apply to be appointed a guardian of the child.

The advantage of such a section would be that it would permit the transfer of legal rights when the interests of the child required it but this decision would be at the discretion of the court rather than being left to the parents. By this means the court could ensure that such a transfer really was in the best interests of the children.

If it is decided to incorporate a section similar to s. 15 of the B.C. Act it is recommended that a provision be added that such a transfer will not be enforced if, in the opinion of the Court, it is not in the best interests of the infant.

F. Applications for Custody--Section 46

The rights of persons other than the parents of an infant to apply for custody of the infant are not clearly defined. There appears to be no right under the Divorce Act for a third party to apply for custody in a divorce proceeding although the judge may award custody to a third party. Since custody is dealt with under the Divorce Act as ancillary to divorce the lack of status for a third party to apply is understandable.

The only provisions relating to who may apply for custody of an infant in the Domestic Relations Act are s. 45(2) and s. 46(1) Section 45(2) provides that if parents fail to reach agreement on the matters provided for in s. 45(1) (i.e. the custody, control and education of the children of the marriage) either parent may apply to the court for its decision. Section 46(1) provides that upon the application of the father or mother of an infant or an infant who may apply without a next of friend, the court may make such order as it sees fit regarding the custody of the infant and the right of access to the infant. No provision is made for any persons other than the parents of the infant and the infant itself to make an application for custody.

It is difficult to understand exactly why the infant is given the right to apply for an order respecting his custody or how such a procedure is to operate. Russell comments:

> Since both the right to custody and the right to access of an infant must by their very nature reside in some person other than the infant, it is difficult to comprehend why the legislature enacted a provision enabling the infant to apply for an order regarding its own custody. Since the infant himself is not bound by the custody order or the order of access, he not being a party to the order, it is suggested that even in such situations in which the infant finds the parent's right of access onerous to the infant that the infant has the right to simply refuse to abide by the provisions of the order.

Russell also points out that although the infant has the right under 46(1) to apply for an order, once the order is made the infant is given no right under s. 46(3) to apply for a variation of the order. The usefulness of this provision is doubtful. Young children would have to act through some other person in any case and would not understand what was going on. Older children could refuse to abide by the terms of the order and the courts would then be less likely to seek to enforce it against the wishes of the children. If this provision was intended to provide for situations in which the infant is in the custody of a third party it is suggested that those persons be given the right to apply for custody directly. This would clarify what was intended. If the section was intended to provide a means for the infant to come before the court in its own right it is suggested that the section should be amended to make this clear and to set forth the procedure by which it may be done.

The Family Court Act provides in s. 10(2) that an application may be made by either parent or by the child who may appear with our without any person interested on his behalf. The wording of this section is slightly different from s. 46(1) and is easier to interpret as giving a person other than the parents the right to apply for custody. But again this can only be done through the child and not directly. It is suggested that the type of changes recommended in the Domestic Relations Act should also be made in the Family Court Act.

The Domestic Relations Act provides that a testamentary guardian is to act jointly with the other parent and this would seem to imply that the rights should be accorded to the appointed guardian as are held by the parent. Yet in the present Act makes no provision for guardians other than parents to apply for custody. Anne Russell suggests that if the provisions of s. 40 are to be given any weight there should be no distinction for an application for custody between testamentary guardians and a parent ahd an application for custody between parents, both of whom are equal joint guardians of the infant. The testamentary guardian should stand in the shoes of the deceased parent and the only issue should be what will best satisfy the welfare of the child.

This is in contrast to the case of Loewen v. Rau et ux [1972] 3 W.W.R. 8 (Sask. Q.B.) which held that notwithstanding the appointment of a testamentary guardian by the wife the right of the natural father to custody was not to be lightly interfered with where the child's welfare would not be endangered by granting custody to the father. The court considered the natural rights of the father as being paramount to all others unless very serious and important reasons required his rights be disregarded. The court did not consider s. 23 of the Infants Act of Saskatchewan R.S.S. 1965, c. 342 where it is provided that a testamentary guardian shall act jointly with the surviving parent. Russell suggests that this case may seriously undermine the right of a parent to appoint a testamentary guardian particularly if the parents are separated or divorced.

Although the statutes do not provide for persons other than parents applying for custody there have been cases in which the courts have heard applications from other parties. In the American case of Finlay v. Finlay 148 N.E. 624 Cardosa J. held that apart from divorce and separation proceedings it is possible for a third party to obtain an

adjudication of custody by means of an ordinary equity suit. He held that the remedy was based on the inherent jurisdiction as parens patriae of the Court of Chancery and that the court need not act only upon the motion of a parent. Cordosa J. leaned heavily upon the following passage in R. v. Gyngall [1893] 2 Q.B. 232 (C.A.) at p. 327:

> "But there was another and an absolutely different and distinguishable jurisdiction, which has been exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent . . . I think that they rightly assumed to exercise the other and independent jurisdiction, viz., that of the Court of Chancery. The existence of that jurisdiction is beyond dispute. In the case of *Re Spence* (1847), 2 Ph. 247, Lord Cottenham, L.C., said: 'I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas* [*corpus*] for the protection of the person of *anybody* who is suggested to be improperly detained. This Court interferes for the protection of *infants, qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal.'"

This jurisdiction referred to be Lord Esher M.R. has been expressly preserved by s. 16 of the Judicature Act. The effect of this inherent jurisdiction is uncertain in relation to the Domestic Relations Act because s. 51 provides that the rules of equity are to prevail unless contrary to the provisions of the Act. In McMaster v. Smith (1972) 6 R.F.L. 143 (Ont. S.C.) Grant J. had to determine if the grandmother of an infant could apply for its custody. Counsel for the mother contended that the grandmother had no right to make application because such proceedings were governed by the Infants Act of which s. 1(1) was nearly identical to Alberta's s. 46(1), (2) and (3). Grant J. held that under

the statute only a parent could apply for custody (the Ontario section did not extend the right to the infant as the Alberta section does) but that the present application was based not upon the Act but upon the court's inherent jurisdiction. Grant J. held that he had this jurisdiction and continued at p. 146:

> I can find no suggestion in any of the cases that proceedings for the custody of infants in the Court of Chancery could only be inititated by a parent of the child. To so hold would greatly circumvent the exercise of the Court's duty to infants. As to the argument that the Infants Act has excluded such jurisdiction except where the application is made by a parent, the answer is that it would require the clearest language in the statute before such a restriction would apply.

Citing Re Maher (1913) 28 O.L.R. 419 Grant J. held that a statute could only encroach upon this inherent jurisdiction if enacted in the clearest and most positive terms. The grandmother thus could apply although on the facts custody was awarded to the mother. It is suggested that a similar decision would likely be reached by the Alberta courts. However, the Family Court would still be limited in who could apply because it cannot exercise the inherent jurisdiction possessed by the Supreme Court.

In a B.C. case Re Green et al (1976) 20 R.F.L. 369 the applicants sought a declaration that they were the lawful guardians of the infant and that custody be awarded to them, they having de facto custody. Opposing counsel argued that Harvey L.J.S.C. as a local judge of the Supreme Court lacked jurisdiction to hear the applications because the applicants were not parents of the infnat involved. It was recognized that there was an inherent jurisdiction in the Supreme Court to hear such petitions but it was

contended that a local judge of the Supreme Court had only the jurisdiction conferred by the Equal Guardianship of Infants Act and that this Act only gave parents the right to apply. Harvey L.J.S.C. held that he had jurisdiction to hear the application. He relied upon s. 23 of the Act which provided that nothing in the Act affected the court's jurisdiction with respect to the appointment or removal of guardians and also upon s. 22 which provided that the rules of equity were to prevail in matters relating to infants.

Situations in which a third party applies for custody are quite rare. Most custody disputes are between parents and third parties are not usually involved. Also in many cases where a third party is involved that person will have physical custody of the child and it is the parent who is applying for an order of custody. This brings the issue before the court within the provisions of the Domestic Relations Act and the court can then make any order it sees fit including an award of custody to the third party. However, there are situations in which a person other than the parents of an infant may have valid reasons for applying for custody and at present the Alberta statutes have no provision for such an application. Such persons must rely upon the inherent jurisdiction of the Supreme and Surrogate Courts, a jurisdiction uncertain in its extent.

It is therefore recommended that the Act be amended to allow persons other than parents to apply for custody. However, this raises a number of issues which must be resolved: what persons should be able to apply for custody?; shall non-parental guardians be placed in a stronger position in applying for custody than persons with no legal relation to the child; and if persons other than parents are permitted to apply what considerations should the court take into account?

It is recommended that the right to apply for custody be extended at least to all guardians of the infant's person rather than merely the infant's parents. Guardians have duties toward their wards and the most important means that they have of protecting the infant's rights is by assuming the custody of the infant. It seems strange to allow the appointment of guardians who have a right to the infant's custody and then not to provide a means whereby such guardians can apply for the custody of the infant. It is also recommended that when a legal guardian applies for custody of an infant even when the opposing party is a parent that the only issue should be what arrangement best protects the interests of the child. It could be argued, that these changes would ignore a natural parents' right to custody of their children. However, a parent who has custody of their child and is a fit parent would be in little danger. First, it will seldom be in the best interests of an infant to remove it from the custody of a fit parent and second, the courts have always been reluctant to remove children from their parents without grave cause and this attitude is likely to continue.

Anne Russell recommends that applications for custody be limited to parents or other legal guardians. Thus a person other than a parent seeking custody would first have to obtain letters of guardianship. In England prior to the Children Act, 1973 a third party seeking custody would first have to have the child declared a ward of the court and then apply to the court for custody. The Children Act provides that the following persons may apply for an order of "legal custody":

> 1. a relative or step parent applying with the consent of a person having legal custody and with whom the child has lived for at least the 3 months prior to the application.

2. any person applying with the consent of a person having legal custody with whom the child has lived for at least 12 months including the 3 prior to the application.

3. any person with whom the child has lived for at least 3 years including the 3 months prior to the application.

The New Zealand Act provides that "the court may from time to time, on application by the father or mother, or a step parent, or a guardian, of a child or with the leave of the court by any other person, make such order with respect to the custody of the child as it thinks fit."

It is suggested that a provision similar to the New Zealand section be enacted in Alberta in place of s. 46(1). This section would prevent frivolous suits by third parties but it would give the court discretion to allow third parties to apply if the situation warranted. It would also extend the right to apply to guardians other than the parents. It is recommended that in any application the only consideration be the welfare of the infants involved.

Section 46(2) sets out the factors the court shall consider in making an order under s. 46(1). This section shall be dealt with separately later in the paper as part of the section on Considerations in Custody Disputes.

Section 46(3) allows the court to alter, vary or discharge the order (made under s. 46(1)) upon the application of either parent, or after the death of either parent on the application of a guardian appointed under Part 7. Until the death of one of the parents the section limits the right to

apply to vary the order to the parents of the infant. At present this is sensible because under s. 46(1) as it now reads applications are limited to the mother and father of the infant or the infant but if section 46(1) is amended, as recommended to allow applications for custody by persons other than the parents then it is submitted that this section should also be amended to allow those persons who can apply for custody to apply for variation of the order which is made.

Section 46(4) as amended by S.A. 1973, c. 61 provides that the court may in each case referred to in section 46(1) make such order as to costs as it considers just. This section appears reasonable and no change is recommended.

Section 46(5) allows the court to make an order for the maintenance of the infant. It is beyond the scope of this paper to discuss maintenance obligations but it is submitted that consideration should be given to removing this section on maintenance from the portion of the Domestic Relations Act which deals with guardianship and custody and placing the section elsewhere in the Act.

G. Discretion to Refuse Custody--Sections 47, 48, and 49

Sections 47, 48, and 49 are re-enactments of the Custody of Children's Act 1891, 54 and 55 Vict., c. 3 which gave almost unlimited discretion to the court to refuse an order for the custody of a child. The Act was concerned with issues of custody not between parents but between parents and a third party. Prior to the enactment of this Act a parent or other person who had the legal right to the custody of the child could obtain possession

by means of an application for habeas corpus or by petition to the Court of Chancery. (Re Spence (1847) 2 Ph. 247). Under that procedure the court had the power to refuse the application but only on grounds of gross immorality (R. v. Clarke, Re. Race (1857) 7 C & B 186). The statute of 1891 confirmed the discretion of courts, which had been developed by the courts of equity, to refuse to order that possession of a child be given to a person if the cour considered it not to be in the best interests of the child to do so.

The present test as set out in s.47 is that if a parent or "other responsible person" (defined as a person legally liable to maintain an infant or entitled to its custody) applies for the production or custody of an infant and the court is of the opinion that the parent or other responsible person has

(a) abandoned or deserted the infant, or

(b) otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the infant,

the Court may, at its discretion, decline to make the order applied for. Section 49 provides that the Court shall not make an order for the delivery of the infant to the parent or other responsible person unless the court is satisfied that the order for the delivery of the infant would be for the welfare of the infant where the parent or other responsible person has:

(a) abandoned or deserted his infant, or

(b) allowed his infant to be brought up by another person or by a school or institution at the expense of that other person or at the expense of the institution

> for such length of time and under such circumstances as to satisfy the Court that the parent or other responsible person was unmindful of his parental duties.

It is suggested that these two sections are useful in making clear the court's discretion to refuse to order custody delivered to persons who would otherwise have the right to require that the child be delivered, if the welfare of the infant requires it. However, it is suggested that the two sections could be combined into one section which would avoid some of the duplication which exists at present. It is submitted that 49(b) should be repealed in that it is only one specific type of conduct which might lead the court to refuse delivery. It is submitted that the new section could take a form similar to the following:

> (1) A person legally liable to maintain an infant or entitled to custody of an infant is hereinafter called an "other responsible person."
>
> (2) If upon an application made by a parent or other responsible person for an order for the protection or custody of an infant the Court is of the opinion that the parent or other responsible person
>
> (a) has abandoned or deserted the infant, or
> (b) has otherwise so conducted himself that the Court is satisfied that the parent or other responsible person was unmindful of his parental duties.
>
> the Court shall not make an order for the delivery of the infant to the parent or other responsible person unless the Court is satisfied that an order for the delivery of the infant would be for the welfare of the infant.

One other question which ought to be considered is whether the designation "parent or other responsible person" should be changed. At present the definition would seem to include any guardian of the infant as well as any person who has received custody of the infant, and any person legally liable to maintain an infant. However, it might be made clearer that the section is intended to include guardians other than parents if "parent" were followed in the sections by the words "or other guardian" so that the phrase would read "parent or other guardian or other responsible person."

Although it is recommended that sections 47 and 49 be preserved it is submitted that s. 48 should be repealed. Section 48 enables the court to order the parent to reimburse the third party for costs incurred in bringing up the infant if the court determines that the infant should be given up to the parent or other responsible person.

At present such third parties could apply to the Department of Health and Social Development under section 8 of the Social Development Act R.S.A. 1970, c. 345 for a social allowance on behalf of the child; such aid was not available at the time the provision was first enacted. Also, in practice a third party who has any intention of retaining custody of a child and proceeding with an application for adoption is advised not to pursue the parent for maintenance of that child,with the intention of subsequently proving that the parent has been unmindful of its parental responsibility in failing to support.

It must also be considered that if the court is to order a child to be returned to the custody of the parent or other responsible person and if the court makes an order under s. 48, the effect may well be to jeopardize the welfare of the infant in that any payment which the parent or other responsible person was forced to make might diminish their powers of providing for the children.

This recognized by the court in Re O'Hara [1900] 2 I.R. 232 at 245 which held that such orders should not be made if they might jeopardize the future welfare of the infant.

H. Religion--Section 50

Section 50 has been fully discussed previously in the section on the rights and duties of guardians.

I. Rules of Equity--Section 51

Section 51 of the Act provides that the rules of equity when they do not conflict with the Act prevail in questions relating to the custody and education of infants. This is in addition to s. 16 of the Judicature Act which provides that the Supreme Court of Alberta shall have the same jurisdiction in respect to infants as that exercised by the Court of Chancery. Other provincial statutes dealing with the custody merely provide that the rules of equity shall prevail. The English Act (Guardianship of Minors Act 1971, c. 3) contains no such section apparently feeling that section 1 of the Act which provides in matters of custody the welfare of the child shall be the first and paramount concern is sufficient. However it does provide in s. 17(1) that nothing in the Act shall restrict or affect the jurisdiction of the High Court appoint or remove guardians or otherwise in respect of minors. The New Zealand Act (Guardianship Act, 1968, No. 63) provides that the provisions of the Act will have effect in place of the rules of the common law and of equity relating to the guardianship and custody of children except that in matters not provided for in the Act the Court shall have all powers in respect of the persons of children as the Court had immediately before the commencement of the Act.

It is suggested that it would be useful to have a section in the Domestic Relations Act preserving the equitable jurisdiction of the Court in matters not covered by the Act. However, in

matters covered by the Act, the Act should prevail. This would promote greater certainty in the law while not restricting the courts unduly in that the proposed legislation is drafted in terms wide enough to preserve judicial discretion. Also certain decisions of the courts of equity give the father a pre-eminent position, all other things being equal. These cases have been cited and applied recently in New Brunswick whose Judicature Act provides that in matters of custody and education of infants, the rules of equity shall prevail; the only other legislation in New Brunswick is a provision which appears in both the Habeas Corpus Act and the Rules of Court to the effect that in deciding between the claims of the parents it is the duty of the court to take into consideration the interests of the infant. The most recent case was Pollard v. Pollard (1974) 14 R.F.L. 49 (N.B.C.A.) in which the court applied the earlier case of Re Hudson and Hudson (1968) 68 D.L.R. (2d) 191 (N.B.C.A.) to hold that all other things being equal the father was entitled to the children.

By making it clear that the statute is to prevail over the rules of common law and equity it will be possible to lay to rest some of the early cases decided in another era which have occasionally influenced the courts. However, if such a step is to be taken, it must also be made clear that the paramount consideratic is to be the welfare of the infants involved. The New Zealand Act contains such a provision. The topic of the considerations to be applied in a custody dispute is dealt with atlength elsewhere in the paper. The point to be noted here is that if the provisions of the Domestic Relations Act are to have effect in place of the rules of common law and equity the Act must make it clear what principles are to be applied.

In conclusion, it is recommended that s. 51 of the current Act be repealed and replaced with something similar to s. 33(1) and (3) of the New Zealand Guardianship Act 1968, No. 63:

(1) Except as otherwise expressly provided in this Act, the provisions of this Act shall have effect in place of the rules of the common law and of equity relating to the guardianship and custody of children.

(2) In matters not provided for by this Act, the Court shall continue to have all such powers in respect of the persons of children as the Court had immediately before the commencement of this Act.

J. Section 52

The final section in Part 7 is section 52. This section has been fully discussed in the section of the paper dealing with guardianship of the estate.

K. Summary of Recommendations

1. For the purposes of Part 7 of the Domestic Relations Act "guardian" be defined as limited to guardianship of the person of the infant.

   (a) The provisions of s. 52 dealing with the guardianship of an infant's estate should be repealed.

   (b) The rights and duties set out in s. 52(2) should be repealed.

   (c) The use of the word guardian should be limited to the guardian of the person of the infant and the guardian of the estate of the infant should be known as the trustee of the estate.

2. Consideration should be given to allowing a child over 16 to apply to the Court to review a parent or guardian's decision.

3. S. 50 should be modified or repealed. If it is considered that a special section with regard to religion is necessary the section should not give one parent preference over the other; the matter should be determined with regard to the child's best interests. The section should only apply in disputes between parents and third parties to ensure that even if the parents are deprived of custody of the child it will still be brought up in their faith.

4. The present discretion exercised by the courts in awarding custody to third parties when the circumstances warrant should be expressly recognized.

   (a) s. 46(1) of the Domestic Relations Act and s. 10 of the Family Court Act should be amended to make it clear that the Court is not restricted in who it can grant custody or access to.

5. The custody legislation should make it clear that the court can make whatever type of custody award is appropriate in the circumstances of the particular case.

6. The concept of guardianship should be retained. The present system should be amended within the overall framework of the guardianship concept.

   (a) The Alberta statute should define "custody" and "guardianship."

7. Consideration should be given to removing Part 7 from the Domestic Relations Act and enacting a separate act dealing solely with the guardianship and custody of infants.

8. S. 39 should be retained but should be amended to incorporate the recommendations made in the Institute's paper on Illegitimacy.

9. S. 40 should be retained so as to give parents the right to appoint testamentary guardians.

   (a) Consideration should be given to whether other guardians of the infant besides the parents should have the power to appoint testamentary guardians

   (b) The present s. 40 should be amended to indicate that only a parent with lawful guardianship can make an appointment.

10. S. 41 is ambiguous as presently worded and should be amended to make clear that what is referred to is the discretion of the court to appoint additional guardians if it sees fit in a testamentary situation.

11. S. 42 should be repealed and replaced with a section clarifying upon what basis third parties can apply to be appointed guardians of an infant.

12. S. 43(1) should be repealed and replaced with a section making it clear that the court can remove any guardian, including a parent, if it is in the interests of the infant to do so.

   (a) The present s. 43(2) should be retained.

13. S. 44 should be repealed because its provisions may conflict with what is best for the infant.

14. A new section should be enacted which allows guardians of an infant to apply to the court to resolve any issue upon which they cannot agree.

15. S. 45 should be retained as it encourages amicable settlement of the custody issue between parents.

    (a) The section should be amended to make it clear that it does not apply if a custody order has been made in divorce proceedings.

16. Consideration should be given as to whether provision should be made allowing parents or other guardians to transfer their rights and duties to third parties.

    (a) It is recommended that such transfers be prohibited unless sanctioned by the court.

17. S. 46(1) should be amended to clarify the position of an infant applying for an order regarding its own custody. Consideration should be given to what this provision was intended to do and whether it is necessary.

    (a) If it was intended to provide for situations in which the infant is in the custody of a third party, it is suggested that the third party be given the right to apply for custody directly and not through the infant.

    (b) If it was intended to provide a means for the infant to come before the court on its own the section should be amended to make this clear and to set forth the procedure by which it may be done.

18. S. 46(1) should be amended to allow persons other than parents to apply for custody.

    (a) The right to apply for custody should be extended to all guardians of the infant.

    (b) Other persons should be allowed to apply with the leave of the court.

19. S. 46(3) should be amended to allow those persons permitted under an amended s. 46(1) to apply for custody to apply for a variation of the order which is made.

20. S. 46(4) should be retained without change.

21. Consideration should be given to moving s. 46(5) to another part of the Act.

22. Sections 47 and 49 should be combined into one section to avoid duplication. Consideration should be given to making it clear that the section includes guardians other than parents.

23. S. 48 should be repealed.

24. S. 51 should be repealed and replaced with a section which makes it clear that in matters covered by the Act the provisions of the Act shall have effect in place of the common law rules and the rules of equity.

VI

CONSIDERATIONS IN CUSTODY DETERMINATION

Section 46(2) provides that in making an order as to custody under subsection (1), the Court shall have regard to the welfare of the infant, the conduct of the parents, and to the wishes of the mother and of the father. This is the only guidance given to the Court as to what factors to consider in determining who is to have custody of the infant. Although relatively few cases are determined under the Domestic Relations Act since the enca ment of the Divorce Act, it would still be of great importance to determine what factors the courts actually consider in awarding custody. Once this is determined, s. 46(2) can then be examined to determine if it is adequate or if it requires change.

The solution to the issue of who is to get custody of a child is often more complicated than a simple yes-no answer. Indeed, there are many questions subsidiary in nature to the ultimate issue of who is to get custody which must be answered.

> ..."What is best for the child?" Such is the law and it is the law of wisdom. In groping for the proper answer to this ultimate question there are many elements which must be considered. Do these parents, and in most instances that means the father, possess the wherewithal to provide material necessities and maybe some comforts" Unless both parents are utterly fit, we must grant custody to one or to the other, and so we look at these two existing alternatives. What kind of home life would the mother provide and what kind can the father provide and continue to work and earn a living? Will their actual upbringing day by day be entrusted to a housekeeper, a maid, paternal grandparents, or a second wife? If to grandparents, what are their

> ages and what has been their prior relationship to these children? How old are the children and who has actually week by week reared them during these first years of their lives? Are they too young to be taken away from their mother? Are they old enough to have definite ideas of their own as to where they wish to go? If there is more than one child, should the children be separated or kept together? What kind of care has each parent been providing in the past? Which home will likely least disturb and upset the child or children emotionally and physically? Should we consider part-time or divided custody? These are some of the questions we must ponder in our search for the ultimate conclusion.[39]

The presence of judicial discretion in custody dispute cases has caused much confusion. Indeed, certain "principles' that judges rely on in rendering decisions are sometimes thought to carry the weight of propositions of law or presumptions of evidence. They are not. They are merely tools--a means to an end--whereby the judge hopefully renders a decision most beneficial to the welfare of the child.

In an article on custody,[40] Alex Campbell lists certain principles which judges resort to in custody disputes:

> " A child under five, of either sex, ought to be with his mother. This applies particularly if the child is ill or sickly or handicapped. A child 5-10 also probably needs his mother. The mother figure, the substitute mother, the woman performing the role of mother with all care and affection, may be as good as the natural or biological mother. But the substitute mother may not have been on the scene fulfilling this role since birth or an early age, and she may not have the same sense of commitment to the role as the natural or biological mother • • •

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[39] from Paxton v. Paxton 319 S.W. 2d 280 (Mo. 1958) as cited in Goldstein and Katz, The Family and the Law (1965) 870.

[40] Alec Samuels, Custody and Access: Law, Principles and Practice (1974), 4 Family L. 141.

A girl ought to be with her mother, and have maternal understanding and loving support, especially when passing through puberty, menstruation and adolescence and all the female emotional problems associated with growing up.

A boy ought to be with his father, especially as he grows up and gets bigger, *e.g.* ten and over, and becomes interested in manly pursuits such as sport, because a mother on her own may suffocate him with affection and either make him effeminate or "cissy" or cause him to rebel, with discipline problems, whereas a growing lad needs the society and support and discipline and mutual worldly interest of a hero figure, a father (F).

Brothers and sisters ought to stay together if possible, and they will need each other more if the marriage of the parents has broken down. Furthermore rather than divide the family 50:50, one of two, or two of four, children to each parent, it is better, recognising that one parent has unfortunately gone, to keep the rest of the family together as a unit, *i.e.* all the children with the remaining parent, thus minimising the upheaval and distress for the children. Where there are several children, the eldest a girl, care must be taken to ensure that she is not placed in the position of a substitute mother carrying duties and responsibilities beyond her years. Deep sibling hostility, where it exists, should be taken into account. The possibility of future brothers and sisters has impressed some Judges recently, *e.g.* mother has remarried and is pregnant and children by first marriage are still small. But it must be remembered that the future children will be step-siblings and a step relationship can create problems.

The parent with de facto care and control, especially if it has lasted for some considerable time, is likely to be in a strong position. Psychiatric evidence today increasingly emphasises the damaging or potentially damaging effects of a change of care and control, especially where a change of loyalty and affection may be involved. The old judicial idea that time quickly healed the wound and the tears quickly dried away is not accepted. The baby up to six months will apparently be quite happy with any mother figure. From six to 24, or 36, months, when recognition of identity has taken place, a change from the mother, or identified mother figure, can be extremely traumatic, with lasting damaging effects.

For the older child there may well be an extremely good existing relationship within the family with other members of the family, *e.g.* grandparents or uncles and aunts, and such relationships ought not to be lightly disturbed by a change of care and control except for very good reason.

The small child needs a full time parent, and here the mother tends to score heavily because the father is normally in full time employment, although he may have remarried or otherwise be able to provide a full time mother substitute. In the case of the pre-school child a parent needs to be home all day, apart from nursery school time (if any). In the case of the primary and junior school child a parent should be home until the child leaves for school and again when the child returns. The secondary school child can probably manage with a door key, provided there is someone to cook meals and provide general supervision. There are various views about the step-mother. She may, though it is unlikely, be the ogre of mythology and literature. She may be a competent and affectionate mother

A parent sometimes turns, or tries to turn, the child against the other parent. This is deplorable and unpardonable, and a factor against that parent. Nonetheless if that parent succeeds in his deplorable purpose then the Judge must have regard to the reality of the situation, *i.e.* child extremely hostile to the defamed parent and extremely unwilling to go to him.

The wishes of the child may be relevant. But a young child cannot appreciate the significance of the situation and should never be placed in the cruel dilemma of being asked to choose between father and mother, for he loves them both. Only when the child is (say) twelve or more should his wishes be taken into account. And it is usually better for a social worker to be asked to make a report, including in that report if appropriate an expert appraisal of the wishes of the child and their significance and importance, rather than to bring the child to the court, though the Judge might in the case of a child of (say) 15 find it helpful to see the child personally.

The parent who makes an hysterical or abusive scene in court should not be surprised if the Judge forms an unfavourable impression of the emotional stability and parental fitness of that parent. The uncooperative and obstructive parent, who in contempt of a court order refused access to the other parent, and who does not attend the hearing, must not be surprised if custody is transferred to the other parent.

The kidnapping parent gives a poor impression, having resorted to self help rather than judicial determination, without waiting for the merits of the dispute and the best interests of the child to be ascertained. But there may be overriding factors still favouring the kidnapping parent.

The parent who has not had much contact with the child, especially for a longish period, and especially if this was the fault of that parent, will be in a weak position. The child ought not to be suddenly, or even by stages, thrust upon a stranger, or comparative stranger.

The foreign or overseas or national or cultural or linguistic element may be important. There is no rule that Britain is a better place than anywhere else. The child ought not to be deprived of his country or culture, whatever that might be, or thrust into a strange country or culture. Language, education, culture, indeed the whole sense of security, may dictate one country rather than another. The black child who has spent ten continuous years since birth with an English family may well be "English", and to send him to (say) Ghana may be to send him to a "foreign" country and culture in which he would be completely "alien".

A bad spouse is not necessarily a bad parent. The adulterous parent is not *per se* to be deprived of care and control, though adultery indicates a willingness to put selfish gratification before duty to family. If the adulterous mother were deplorably promiscuous, went to live with the father's brother, *i.e.* her brother-in-law, the child's uncle, and shamefully neglected the child, then the adultery would probably be seen as aggravated and disabling.

> Religion is a very delicate matter. The Judge cannot pronounce one religion or denomination to be superior to another, or belief to be superior to agnosticism or atheism. If he can resolve the dispute without reference to religion he will often do so. Sometimes, however, religion is the essence of the dispute. The following propositions in practice are likely to appeal to him:
>
> (i) A child ought not to have to switch denominations if he has been closely involved and once he is old enough to appreciate differences, because otherwise his faith may be totally destroyed.
>
> (ii) The devout or committed parent should be preferred to the indifferent or casual parent.
>
> (iii) Christianity is to be preferred to atheism, because the child should have the opportunity of learning about the Christian ethic and the Christian heritage, which is the foundation of our society, and the opportunity of being brought up in an environment openly rejecting dishonesty, lying, adultery and the other sins. Naturally at majority the young person must decide for himself.
>
> (iv) Mainstream denominations are to be preferred to minority or unusual or eccentric denominations, *e.g.* exclusive brethren, if only because the child ought not to be subject to the risk of social isolation.
>
> (v) Christianity is to be preferred to non-Christian religions if only because Christianity is the principal and traditional and culturally indigenous religion in our society and again the risk of social isolation is to be avoided.
>
> Economic factors are not likely to loom large. Naturally the child must have a roof and a bed and food and clothes and adequate financial provision. But the well-to-do parent has little if any advantage over the poor parent. Parental love and affection is what the Judge is looking for, not the pony in the paddock, and in any event the well-to-do parent can be ordered to make appropriate financial provision. Moral and psychological factors are the crucial factors. Economic factors are comparatively marginal.
>
> The parent contending with a stranger naturally has prima facie a strong case by virtue of being the parent, but the interests of the child still continue as the first and paramount consideration."[41]

It can be seen from having read the above that there is a need to determine which inferences can safely be relied on and which should be regarded as irrelevant or subject to modification.

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[41] Ibid., p. 142, 143.

As a result of an increase in the divorce rate, there has been a corresponding increase in the complexities of family relations. The court, having been charged with the assessment of a child's needs, requires the assistance of social workers.

The concept of 'welfare and happiness of the infant,' by its ambiguous nature, suggests that inherent in this 'principle' are many factors which are beyond the immediate comprehension of the court. In an article on custody and the role of a social worker,[42] Daley suggests that social workers can be used:

(1) as expert witnesses to assist the court in reaching the truth

(2) as trained experts to observe human behaviour and diagnose

(3) to study and report the needs of a child

(4) to observe the child at a tender age and communicate with him at a later age.

Once the (a) welfare and happiness needs of the child have been determined and (b) the collateral issue as to where these needs can best be met has been determined, then the possibility that "child custody proceedings, more than other litigation may be a cover for real conflicts: a power struggle ...which culminates in a decision that indicates a preference for

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[42]Timothy T. Daley, Custody, Social Worker and the Court (1975), 18 R.F.L. 14.

certain social values over others"[43] will hopefully be minimized.

The court, in reaching its decision "tends to look at the evidence as a whole and form an impression as to which result would be in the best interests of the child rather than proceeding through a check-list of factors and placing them one by one upon some imaginary scale."[44]

There has been much discussion over whether the standards used by judges should be codified or whether judges should be unhindered and free to use their discretion as is currently the situation.

In an article for the University of Toronto Law Journal,[45] Bradbrook states several reasons as to why judicial discretion should be limited:

(1) Supreme Court judges are no more qualified than the average layman to work out what is best for the child.

(2) It is undesirable to leave a system of adjudication whereby different judges would

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[43]Katz, Foster Parents Versus Agencies: A Case Study in the Judicial Application of the "Best Interests of the Child" Doctrine (1965), 65 Mich. L. Rev. 145 at 153.

[44]L.R. Robinson, Custody and Access, in Mendes de Costa, Studies in Canadian Family Law, Vol. 2 (1972) 576.

[45]Adrian J. Bradbrook, The Role of Judicial Discretion in Child Custody Adjudication in Ontario (1971), 21 U. of T.L.J. 402.

> make different custody orders in the same fact situation. There is a need for conformity since each judge has his own subjective opinion.

He then suggests alternatives:

> (1) create a number of rebuttable presumptions that could be applied in all custody litigations.
>
> (2) use trained workers to make the reports and have the judges interview the children as well. Judges would then base their answers on the findings of the trained worker.

Criticism, says Bradbrook, has been levelled at the above two alternatives. The first alternative does not suggest nor provide any general consensus as to what presumptions should be established. The second suggestion is impractical because of a scarcity of trained workers, lack of special training by judges in dealing with psychological and psychiatric reports, and the fact that psychological and psychiatric studies have not yet progressed far enough to enable valid judgments to be made.

In an article by Title,[46] he suggests that the trend in the United States is away from giving the court open-ended discretion and in saying so refers to a Michigan Statute wherein the "best interests of the child" is codified.[47]

> "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:

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[46]Peter S. Title, The Father's Right to Child Custody in Interparental Disputes, (1974-75), 49 Tul. L. Rev. 189.

[47]Mich. Stat. Ann § 25.312(3) (Supp. 1974).

(a) The love, affection and other emotional ties existing between the competing parties and the child.

(b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any.

(c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home.

(f) The moral fitness of the competing parties.

(g) The mental and physical health of the competing parties.

(h) The home, school and community record of the child.

(i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.

(j) Any other factor considered by the court to be relevant to a particular child custody dispute.

It is the purpose of this section of the paper to analyze the various components which are said to be the substance of any decision made as regard the child's welfare and best interests.

A. Paramount Consideration

The classic statement in Canadian law about custody adjudications is found in McKee v. McKee[48] where Lord Simonds stated: "It is the law of Ontario (as it is the law of England)

[48] McKee v. McKee, [1951] 2 D.L.R. 657 (Privy Council).

that the welfare and happiness of the infant is the paramount consideration in questions of custody....To this paramount consideration all others yield."[49] As such, a father who breached an agreement with his wife in that he was not supposed to remove the infant from outside of the United States still received custody of his son because, in the eyes of the court, the breach was but one factor to consider in the overall assessment of the infant's needs and welfare.

Robinson in his article[50] suggests that there is a problem of interpretation as to whether the other considerations mentioned in McKee are merely factors which form the basis of determining the child's best welfare or whether these are other factors to be considered in addition to the welfare and happiness of the child. Although Robinson suggests that this is not really relevant in light of the fact that judges do look at the evidence as a whole rather than proceeding through a check-list of factors, the factors may be an effective procedure by which a judge is able to focus on the child's best interests albeit some of these factors may not form the basis of determining the paramount consideration in the particular dispute.

In a textbook written by Davies,[51] the author notes the fact that although section 11 of the Divorce Act does not state that the welfare of the child is the paramount consideration in questions of custody, the principle expressed by Lord Simmonds in McKee v. McKee[52] for custody disputes generally is applicable in the field of divorce.

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[49] Ibid., p. 666.

[50] Supra note 44 at 576.

[51] C. Davies, Power on Divorce and other Matrimonial Causes--Volume 1 (3rd Ed. 1976) 228-232.

[52] Supra note 48.

In O'leary v. O'leary,[53] Beck J.A. at p. 978 defined the best interests of the child in the following manner:

> "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 child, but for the purpose of fixing the amount to be paid by one or both parents for the maintenance of the children. The religion in which the children are to be brought up is always a matter for consideration, even, I think, in a case like the present where both parties are of the same religion, for the probabilities as to the one or other of the parents fulfilling their obligation in this respect ought to be taken into account."

In Bateman v. Bateman,[54] Smith C.J.A., in deciding a custody dispute involving two parents of different religions said that the father's rights to control the religious education of his children, as a common-law right, is now subject to the provisions of the Domestic Relations Act. As such "...(this common law right) be measured by the rules of equity (Delaurier v. Jackson, [1934] S.C.R. 149) which under the provisions of Section 54 of the Act, prevail in Alberta and that by reason of those provisions, the rules of equity recognize the welfare of the child as the paramount consideration."[55]

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[53] O'leary v. O'leary, [1923], 1 W.W.R. 501; 19 Alta. L.R. 22 [1923] 1 D.L.R. 942 at 978 (Alta. S.C.A.D.) as cited again in Lebou v. Lebouef, [1928] 1 W.W.R. 423; [1928] 2 D.L.R. 23; 23 Alta. L.R. 328 (Alta S.C.A.D.)

[54] Bateman v. Bateman (1965), 51 W.W.R. 633 affirming 47 W.W. 641; 45 D.L.R. 2266 (Alta S.C.A.D.).

[55] Ibid., p. 636.

In this context, Lindley L.J. in Re McGrath[56] stated at p. 148, "But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as the physical well-being. Nor can the ties of affection be disregarded."

Danckwerts L.J. in Re Adoption Application No. 41/61[57] in an often quoted passage stated:

> "But I would respectfully point out that there can only be one "first and paramount consideration," and other considerations must be subordinate. The mere desire of a parent to have his child must be subordinate to the consideration of the welfare of the child, and can be effective only if it coincides with the welfare of the child. Consequently, it cannot be correct to talk of the pre-eminent position of parents, or of their exclusive right to the custody of their children, when the future welfare of those children is being considered by the court."[58]

Disbery J. in Re Misfeldt and Shapansky[59] at page 552 stated, "Indeed, when administering the prerogative the child's welfare is the only consideration, be the child legitimate or illegitimate."

B. Parents versus strangers

A controversial area is that of whether natural parents have a higher priority over strangers to the custody of their children. In Hepton v. Maat,[60] Rand J. at page 1 said:

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[56] In re McGrath, [1893] 1 Ch. 143.

[57] Re Adoption Application No. 41/61, [1963] 1 Ch. 315; [1962] 3 All E.R. 553.

[58] Ibid., p. 329; 560.

[59] Re Misfeldt and Shapansky (1973), 35 D.L.R. (3d) 543; [1973] 2 W.W.R. 551; 9 R.F.L. 360 (Sask. Q.B.); for a good perusal of the law, see also Boarer v. Schatz, [March 1975] W.W.D. (Alta. S.

[60] Hepton v. Maat, [illegible]

> "It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: prima facie the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that the fundamental natural relation be severed."

Later on, Rand J. reiterated his views on the subject when he stated:[61]

> "The view of the child's welfare conceives it to be, first within the warmth and security of the home provided by his parents; when through a failure with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties."

Such a view was adopted by Donahue J. in the case of Re Moores and Feldstein.[62] where he awarded custody of the infant to the natural mother. He concluded that although Mrs. Moores (real mother) may have intended to give the child to the Feldsteins for adoption, it was clear to him that there was no indifference by Mrs. Moores as regard her child--she was therefore entitled to custody. On appeal to the Ontario Court of Appeal, Dubin J.A. found the law not to be so settled. He stated:[63]

> "In tracing the development of the legal principles which guide the court in carrying out its responsibilities to infants, Lord McDermott in the case of J. v. C., [1970] A.C. 668, 703; [1969] 1 All E.R. 788, put it this way: "The authorities are not consistent and the way along which they have moved towards a broader discretion, under the impact of changing social conditions and the weight of opinion has many twists and turns."

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[61] Ibid., p. 2.

[62] Re Moores and Feldstein, [1974] 12 R.F.L. 273 (Ont. C.A.)

[63] Ibid., p. 280.

Dubin J.A. continues his analysis of the law by stating that counsel's submission in J. v. C.[64] to the effect that the natural parents are prima facie entitled to the child was rejected by the House of Lords. Their Lordships, says Dubin J.A. also expressed disapproval of Re Agar-Ellis[65] and Re Carroll[66] wherein early common law views in favour of the right of natural parents to the custody of their children were expressed. Dubin J.A. concludes that as a result of the judgment in J. v. C.[67] the present state of the law in England, as was set forth in Re Adoption Application No. 41/61[68] is that there can only be one consideration,[69] that being the welfare of the child. The trial judge, says Dubin J.A ., erred in treating the statement in Hepton v. Maat[70] as a formula. Having found that the child was not abandoned nor the mother unfit, Donahue J. concluded that the child had to be returned to the mother because the child would naturally benefit by being returned to its mother. Dubin J.A. emphasizes the fact that it is the duty of the court to view all the circumstances relevant to what is in the best interests of the child, including a consideration of blood relationships. (For an excellent analysis of the case Re Moores and Feldstein and its implications see an article by Weiler and Berman).[71]

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[64] J. v. C., [1970] A.C. 668; [1969] 1 All E.R. 788 House of Lords).

[65] Re Agar-Ellis (1883), 24 Ch. D. 317.

[66] Re Carroll, [1931] 1 K.B. 317.

[67] Supra. note 64.

[68] Supra. note 57.

[69] Supra. note 58.

[70] Supra. notes 60 and 61.

[71] Karen M. Weiler and Dr. Graham Berman, Re Moores and Feldste A Case Comment and Discussion of Custody Principles (1974), 12 R.F.L. 294.

Weiler and Berman in this article[72] suggest that the decision in Re Moores and Feldstein is a landmark decision. The Court of Appeal, in reluctantly disturbing a lower court's judgment on a) an error of law and b) in the conclusion drawn from the facts made a new inroad in custody disputes.

> "Despite the valiant attempt of the Ontario Court of Appeal to make it seem otherwise, the decision in Re Moores and Feldstein is a departure from precedent. It is a landmark decision in Ontario not only because it extends the principle that the welfare of the child is the paramount consideration to be considered in custody disputes between parent and non-parent, but because it considers the welfare of the child apart from the wishes of the natural parent. The decision of the Court of Appeal is also remarkable because it has given effect to views respecting custody which have not hitherto been considered "legal" views. It is hoped that the decision will form the basis for a new, more realistic view of the best interests of the child by considering the effects of a resolution of a custody dispute on the child himself apart from the merits of the competing parents. [73]

In an article called "Child Custody Rebutting the Presumption of Parental Preference;"[74] John Hunter gives two basic rules on child custody: (a) natural parents have higher preference than strangers and (b) the best interests of the child is supreme . He states that when the natural parents can and will provide a better environment for the child, either rule will produce the same result. He suggests that if the two rules conflict, the latter rule is to be preferred and in espousing his position states:[75]

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[72] Ibid., p. 294.

[73] Supra. note 71 at 304.

[74] John L. Hunter, Child Custody-Rebutting the Presumption of Parental Preference (1972), 43 Miss. L.J. 247.

[75] Ibid., p. 253.

> The presumption that the best interest of the child is with the parents does not always hold up under the light of psychological examination. This presumption overlooks the present relationship which exists between a child and his psychological parent. This type of relationship promotes normal childhood development. Although at birth the potential for this type of relationship may be greater between the biological parent and the child, after prolonged interaction with another parent figure, the child's emotional stability may best be protected by leaving his custody with the psychological parent rather than awarding custody to the biological parent.

Supporting evidence for the above statement is given when he continues by stating:[76]

> "Psychological research has revealed that the trauma of separating a child from the custody of an adult with whom an effective relationship exists may be psychologically equivalent in its detriment to the orphaning of that child (from Ellsworth and Levy, Legislative Reform of Child Custody Adjudication--An Effort to Rely on Social Science Data in Formulating Legal Policies, 4 Law and Society Rev. 161). The better position would seem to be that the best interest of the child is served by maintaining his custody with his psychological parent particularly in those cases where a court has adjudicated that the biological parent has abandoned the child. To gain custody the abandoning parent should have the burden of proving not only his own reformation, but also the unfitness of the psychological parent to continue to maintain custody of the minor child.

Hunter considers several factors that must be adjudicated. They include:

(1) the length of time the child has been with the parent substitutes

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[76] Supra. note 74.

(2) the circumstances and conditions of the initial placement and the conditions agreed upon for its termination

(3) the reasonableness of the inference that another change in custody would be harmful to the child.

In Wiltshire v. Wiltshire,[77] in giving custody of the infant boy to the maternal grandmother in preference to the natural father, O'leary J. stated at page 56-57:

> "I think perhaps I should make it clear that I do not interpret Re Moores, 12 R.F.L. 273, [1973] 2 O.R. 497, 34 D.L.R. (3d) 449, reversed 12 R.F.L. at 280, [1973] 3 O.R. 921, 38 D.L.R. (3d) 641 (Ont. C.A.), to mean that in all cases in a contest for custody between a parent and a non-parent the sole question is what is in the best interest of the child. In this case the child was separated from its father through the misconduct of the mother, who deserted the father to begin with and then three months later, while the matter of custody was before the Court, broke the arrangement she had made in regard to access and took the child from the father. Just because on a nice balancing of all those considerations that relate to the welfare of the child it can be said that the child would be better off with its maternal grandmother, would not be sufficient reason to deny custody to the child's father. Parents do not stand the risk of losing custody of their children just because a non-parent can establish that it would be in the best interest of those children that the non-parent have custody."
>
> "If the respondent (father) had been able to establish that he could properly look after his son I would have awarded custody to him even though on a weighing of all factors it appeared the child could have been better off with the grandmother. On the other hand, in such a contest a parent will be denied custody when to give him custody is likely to endanger the child's welfare--such as by separating him from those he has come to know as his parents for four years without good reason to believe others could fill that void as in Re Moores, or by taking him from an orderly household where he is being

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[77] Wiltshire v. Wiltshire, [1976] 20 R.F.L. 50 (Ont. S.C.).

> properly looked after and where he is happy and "at home," and placing him on a shift basis with his father and with his father's friends as would be the case here."

The view expressed by O'leary J. appears to be the middle-ground between the two views of authority (on the rights of natural parents versus strangers) as were expressed in Hepton v. Maat[78] and Re Moores and Feldstein.[79]

The case of McGee v. Waldern,[80] an Alberta Supreme Court decision, tends to support the view expressed in Re Moores and Feldstein. Upon denying custody to the natural mother, Milvain C.J.T.D. stated:[81]

> I am certain, although the claim of a natural parent to the custody and upbringing of a child is obviously a most weighty factor to be considered, it cannot always be the determining factor whether the parent be unimpeachable or not. I cannot believe that any parent has a right to the custody and care of a child, as he would of a chattel. In my view a parent is privileged in having a right to be considered to the extent that such consideration is in the best interest of the child from the point of view of its welfare and happiness.

This is hard to reconcile with the views of Johnson J.A. in Meikle v. Authenac,[82] a decision of the Alberta Supreme Court reported one year earlier where at page 85, his lordship stated that "There can be no doubt that the parent of a child has prior right to custody over all others." Johnson J.A. concluded, in approving the decision in Regina v. Gyngall,[83] by stating that

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[78] Supra. note 60.

[79] Supra. note 62.

[80] McGee v. Waldern, [1972] 4 R.F.L. 17 (Alta. S.C.)

[81] Ibid., p. 25.

[82] Meikle v. Authenac, [1971] 3 R.F.L. 84 (Alta. S.C.)

the fact that the child's stepfather has more material wealth is irrelevant if the real father could provide a reasonably happy home for the child.

A recent decision supporting the view expressed in Re Moores and Feldstein is found in the Alberta Supreme Court decision in Nelson v. Findlay[84] before McDonald J. An application by an illegitimate father was made for the guardianship and custody of the infant. The mother was deceased and the respondents were the maternal grandparents who had 'custody' of the infant since the mother's death. After concluding that both the father and maternal grandparents were fit to have custody of the child, McDonald J. decided to leave the child with the grandparents. In deciding not to uproot the infant from a stable environment in which the child had been since the mother's death, little weight was attributed to the fact that the illegitimate father could provide more material comforts than the grandparents. Furthermore the fact that the ages of the grandparents were 69 and 53 was not considered as a detriment in awarding custody to the grandparents although the reasoning of the judge that there was no reason to assume that the grandfather would die or become infirm in the immediate future suggests that had the grandparents been older, the illegitimate father may have gotten custody.

In Kachmarski v. Kachmarski,[85] a very recent decision of the Alberta District Court, Miller J.D.C. expressed his view by stating his support for the decision in Hepton v. Maat.

Notwithstanding the confusion in these recent Alberta decisions, a decision by the 1941 Alberta Supreme Court in S. v. S

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[84] Nelson v. Findlay, [1974] 15 R.F.L. 181 (Alta. S.C.).

[85] Kachmarski v. Kachmarski, [March 1976] W.W.D. (Alta. Dist.

[86] S. v. S., [1941] 1 W.W.R. 205 (Alta. S.C.)

awarded custody of the child to the paternal grandparents. The judge, in reaching his decision, considered the best interests of the child in relation to his physical, mental, moral and material welfare without forgetting the mother's natural feelings and wishes. It must also be noted that the mother was not materially well-to-do while the grandparents, in their sixties, were in good health, in good financial position, and attached to the child. Furthermore, a stuttering problem which the child had had appeared to be under control while he was with the grandparents.

It appears therefore that the law is not settled in this area. The dichotomy that has evolved in this area has found support for both viewpoints. It is suggested that the better view is that of Danckwerts L.J. in Re Adoption Application No. 41/61[87] or that of Manson J. in G. v. C.[88] where at page 282 of the W.W.R., he stated:

> "We, in this province, while not disregarding parental affection, where we are satisfied it exists, have always put the welfare of the child first. Biological parenthood is one thing--fitness as a father or mother to rear a child is quite another thing, and the latter is the important thing for the consideration of the court."

C. Religious considerations

Robinson, in his article on custody and access,[89] states that religious disputes arise when (a) parents are of different faiths or (b) parents are of the same faith but have different views as to the time to be spent on religious training.

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[87] Supra. note 58.

[88] G. v. C., [1951] 3 D.L.R. 138; 2 W.W.R. (N.S.) 271 (B.C.)

[89] Supra. note 44 at 577.

It is clear that at common law, the father had the right to dictate the religious faith in which his children were to be educated, (see Hawksworth v. Hawksworth).[90] However, in light of current emphasis on the best interests of the child doctrine, it is clear that the father's right to direct religious training no longer exists. In Bateman v. Bateman,[91] the court was emphatic in its remarks to the effect that the Domestic Relations Act of Alberta makes it clear that the welfare of the child is the predominant consideration in custody disputes.[92] In the facts of the case, the father, a Jehovah Witness, wanted the children to be brought up in his faith. The mother, a Roman Catholic wanted the children to be brought up in the Catholic faith. The son wished to become a Jehovah Witness. The court stated that the wishes of the children
may be considered but that the trial judge has a discretion, in view of their ages, as to whether they (children) ought to be invited to express an opinion. Since the boy was old enough, the court accepted his evidence as to his religious preference and, as a result a split custody order was made with the boy remaining with the father and the two young girls remaining with the mother.

It is clear that the courts are not bound by any agreements between the father and mother as to religious training if such agreement is not in the best interests of the child. (see W. v. W.).[93]

Farthing J. in Bateman v. Bateman[94] also wished to point out that where the parents are living together, the courts will usually not direct in which faith the children should be brought up--only when the parents are separated and the religious issue is in dispute will the court intervene.

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[90] Hawksworth v. Hawksworth (1871), 6 Ch. App. 539.

[91] Supra. note 54.

[92] Supra. note 55.

[93] W. v. W., [1943] 1 W.W.R. 502 (Alta. S.C.)

The best interests of the child principle was applied by McIntyre J. in Hayre v. Hayre[95] where a dispute arose as to custody between the Sikh father and the Protestant mother. In awarding custody of the boy to the father, McIntyre J. said at page 191:

> "In my view, the boy's interests require that the father have custody. This boy is a Sikh; he will always be regarded as Sikh in this country. It will be well for him to be brought up as a Sikh, to preserve his existing knowledge of the Punjabi language, to be schooled in the religion and traditions of the people with whom he will always be associated. It will, in my view, be possible for him to find a secure personal identity only in the Sikh community."

Anne Russell, dealing with the question of religion, stated at page 110 of her paper:[96]

> "Section 50 of the Act (Domestic Relations Act of Alberta) dealing with the question of religion of the child who is left in the custody of some third party was an issue of grave importance at the time of the enactment of the Custody of Infants Act of 1891 and was the basis of decision such as Re Agar-Ellis and was recently considered by the House of Lords in the case of J. v. C. The section is a recognition of the principle that notwithstanding that the parent may not be entitled to exercise its right to custody of the child nevertheless the parent retains the right to control the upbringing of the child to the extent that the parent's wishes regarding the religion of the child will be respected. This provision in the statute may have been enacted in order to satisfy those parents who had proceeded with custody applications for the sole reason that their infant child was being brought up in a different faith than their own and as Lord Upjohn stated in J. v. C:

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[95] Hayre v. Hayre, [1973] 11 R.F.L. 188 (B.C.S.C.).

[96] Anne Russell, Guardianship, prepared for Alberta Institute of Law Research and Reform, February 26, 1973.

> It is a sad commentary on the attitude of some members of the Protestant and Roman Catholic faiths that in so many other reported cases over the last hundred years the real contest has been left to the religious upbringing of the infant and orders have been made with scant regard to the true welfare of the infant.

> The question in the case of J. v. C. which the court had to determine regarding the religious faith of the infant was not based on any doctrinal bias in favour of one faith over the other but on the practical matter of obtaining suitable general education as well as religious instruction and it was solely for the benefit of its general education that the change was proposed to be made."

A good perusal of the law in this area is found in the case of Strum v. Strum.[97] In this case, the Jewish father had custody of the oldest girl while the Roman Catholic mother had custody of the two younger children. On an application by the father to restrict his wife from interfering with the two younger children (who were receiving instruction in the Jewish faith), it was held that said application must be denied. In the words of Jenkyn J.:

> While at common law the father, generally speaking, had an absolute right to dictate the religious faith of his children, that situation no longer exists. The paramount consideration is the interest and welfare of the child. The wishes of both parents are to be considered, but only in conjunction with all other matters relevant to the interest and welfare of the child. The father's common-law superiority over the mother no longer exists. The courts will not attempt to differentiate between the merits of different Christian faiths or denominations or between the Christian and non-Christian faiths. It is preferable, other things being equal, that the religious upbringing of a child should be in the hands of the parent having the legal custody.

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[97] Strum v. Strum, [1973] 8 R.F.L. 140 (N.S.W. S.C.).

In Penner v. Penner and Godfrey,[98] Whittaker J. in awarding custody of the three children to the father stated at page 376:

> I suggest, however, that these children should have more religious instruction than the present Mrs. Penner has given her own child. A parent has not the right to deprive a child of the opportunity of acquiring a knowledge of Christian ideals and of living according to these ideals.

Of the above, Robinson suggests:[99]

> It is submitted that just as the courts will not attempt to differentiate between different denominations of Christian faiths or between Christian and non-Christian faiths, similarly, the courts should not attempt to differentiate between parents on the basis that one is a member of a religious faith and the other is an agnostic or an atheist.

D. Considerations involving parents

Robert E. Shepherd Jr., in an article[100] on custody states that parental neglect, as based on the facts of each case, may encompass not only a failure to provide for the physical needs of a child commensurate with the material ability of the custodian but may also involve a denial of affection, guidance, or consideration.

1. Conduct and morality of the parents

Section 46(2) of the Domestic Relations Act directs that in making a custody order under s.46(1) the court shall have regard to the welfare of the infant, the conduct of the parents and the wishes as well of the mother as of the father.

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[98] Penner v. Penner and Godfrey (1962), 40 W.W.R. 375 (B.C.S.C

[99] Supra. note 44 at 582.

[100] Robert E. Shepherd Jr., Solomon's Sword: Adjudication of Child Custody Questions (1973-74), 8 U. Richmond L. Rev. 151.

A fitness test is applied by the court where there is a question about the conduct or morality of a parent applying for custody. Misconduct covers a wide variety of activities. Robinson, after stating that a spouse leaving the home irresponsibly and not returning is one type of conduct which the court may consider, then continues:[101]

> Other types of conduct on the part of one of the parents which the courts have taken into consideration are: (a) failure to take any interest in the child over a considerable period of time, (b) agreeing either verbally or in writing that the other parent should have custody of the child, (c) failure to make adequate payments for the maintenance of the child, (d) failure to properly discipline the child, (e) heavy participation in extra-domestic activities which resulted in neglect of parental duties, (f) failure to comply with previous court orders concerning custody and access, (g) removing the child from the de facto custody of the other parent without the latter's consent and (h) living in an environment which accepts the use of and the trafficking in illicit drugs and which does not conform with the mores which are adhered to by the vast majority of the population.

In Re Moilliet,[102] the wife left the home without any explanation and refused to return. In dismissing an appeal from the judgment of Branca J. of the Supreme Court, Norris J.A. stated that considerations (wife breaking up the consortium) of marital misconduct are irrelevant to the extent that the welfare of the child is not endangered nor will be endangered in the future. However, there are cases[103] where a spouse was denied custody for having left the matrimonial home without justification.

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[101] Supra. note 44 at 585.

[102] Re Moilliet (1966), 58 D.L.R. (2d) 152; 56 W.W.R. 458 (B.C.C.A.).

[103] see Rennie v. Rennie, [1973], 11 R.F.L. 278 (P.E.I.S.C.); Re Lessard, [1971] 3 R.F.L. 107 (Ont. Surrogate Crt); Talsky v. Talsky, [1973] 11 R.F.L. 226 (Ont. C.A.); Schulz v. Schulz, [1974] 14 R.F.L. 237 (Man. County Crt.)

In an article on child custody, Doris Jones and Henry Foster[104] suggest the following:

> (1) drinking should have a bearing if and only if it symtomatic of some underlying problem or constitutes a hindrance to the proper care of the children.
>
> (2) for criminal convictions, it is important to determine how the conviction relates to parental responsibility and the psychological welfare of the child

They also point out that the courts have applied a double standard as regard cases of adultery whereby it is more of a serious consideration where women are the guilty party.

Immorality, in the area of sexual behaviour, may be an important factor to consider as to whether or not the morals of the child would be endangered or whether the home would be rendered unfit.

A very controversial area at present is that of homosexuals applying for custody of their children. In an article on the lesbian mother's right to custody,[105] Benna Armanno states that because judges have broad discretion, moral biases often enter the picture. She states that although custody proceedings shouldn't discipline a party, this is often not the case. As a result, a parent's personal conduct is given weight along with the "best interests" test. Because of a presumption in favour of the mother, there is a generally accepted rule that evidence of a mother's immorality is relevant to a determination of custody. The author then cites the case of Nadler v. Superior Court in and for the

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[104]Doris Jones & Henry H. Foster, Child Custody (1964), 39 N.Y.U.L. Rev. 423.

[105]Benna F. Armanno, The Lesbian Mother: Her Right to Child Custody (1973-74), 4 Golden Gate L. Rev. 1.

County of Sacramento[106] wherein the court held that the trial court failed in its duty to exercise discretion in determining the best interests of the child where it had held that as a matter of law, the mother was unfit and not entitled to custody because she was allegedly a homosexual.

In concluding that the real issue is not the parent's fitness in terms of public morals but rather his or her fitness in terms of ability to love, care and provide for the child, Armanno concludes by stating that:

(1) the sickness theory of homosexuality is no longer valid

(2) there can be on-site inspection by the judge of the mother and kids

(3) can award joint custody

In Case v. Case,[107] the court held that homosexuality on the part of a parent should not be considered a bar in itself to a parent's right to custody. In K. v. K.,[108] a recent decision of the Alberta Provincial Court, Rowe J. awarded custody of the six year old child to the lesbian mother. His Honour felt that the paramount welfare of the child would best be served by leaving the child with the mother although the father was also found to be capable of caring for the child. The judge felt that the mother would be discreet and not flaunt her relationship to the child or the community.

Quaere though what effects will occur in a child's sexual development should the child remain in the custody of a homosexual parent for a significant period of time.

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[106] Nadler v. Superior Court in and for the County of Sacramento (1967), 255 Cal. App. 2d 523; 63 Cal. Rptr. 352.

[107] Case v. Case, [1974] 18 R.F.L. 132 (Sask. Q.B.).

[108] K. v. K., [1976] 2 W.W.R. 462 (Alta. Prov. Crt.).

At one time, adultery by one party was grounds for denying that parent custody (see Nicholson v. Nicholson and Major[109] wherein it was held that a parent who had committed adultery must rehabilitate himself (herself) before the court will award custody to such a parent). In the recent case of Friday v. Friday,[110] the father who had de facto custody of his children was living with his common-law wife. In granting custody of the children to the mother, Johnson J. at p. 204 stated:

> Without any desire or attempt to establish myself as arbiter of the morals of Mr. Friday and Mrs. Forsyth and being fully cognizant of today's changing mores, I am of the opinion that the long-range welfare of the three boys presently with their father would best be served by their being given an opportunity to grow up in a house where such irregular behaviour and conduct did not prevail.

The view of Johnson J. is hard to rationalize in view of an earlier decision by the same court in Richardson v. Richardson and Smith.[111] The father argued that because the mother was living in a common-law relationship and openly committing adultery, he should get custody. In awarding custody to the mother, Disbery J. said at p. 154:

> ...in arriving at the decision as to where the welfare and happiness of the infant is most likely to be realized, the existence of an adulterous situation and its effect upon the morals of the infant are proper factors to be considered, but such always remain subsidiary considerations to the paramount consideration of the infant's welfare and

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[109] Nicholson v. Nicholson and Major, [1952] O.W.N. 507 (H.C.) see also decision in McDonald v. McDonald, [1946] 3 W.W.R. 211 (Alta S.C.) wherein O'Connor J. awarded custody to the father because the mother had committed adultery and there was a possibility of the mother's infidelity affecting the moral atmosphere of the home, and decision in T. v. T., [1920] 3 W.W.R. 863 (Alta. S.C.) where Simmons awarded custody to the mother because the husband's public allegation as to the unfaithfulness of his wife and the legitimacy of the two children was not proved.

[110] Friday v. Friday, [1975] 20 R.F.L. 202 (Sask. Q.B.).

[111] Richardson v. Richardson and Smith, [1972] 4 R.F.L. 150 (Sask. Q.B.)

> happiness. An order for custody is made for the benefit of the infant involved and such being the purpose of the order, the decision upon which the order issues is not to be determined by weighing the conduct of the wife vis-a-vis the husband and on that basis awarding custody to the wronged spouse.

The judge found that the mother was a good mother, that the relationship had no effect on the child, and that the mother and co-respondent had indicated their willingness to marry as soon as possible.

In Torresan v. Torresan,[112] MacDonald J. at page 17 stated:

> The fact that the respondent is living in adultery with another man is not necessarily a ground for depriving her of custody of the children, provided that the home in which she lives is suitable, her relationship with the man a stable one, and she is not shown to be promiscuous or otherwise unfit for custody.

In Currie v. Currie,[113] the father had custody of his three children. The father's conduct in the presence of their mother made it clear that he disapproved of them seeing their mother. In taking custody of the daughter away from the father and awarding her to the mother, MacDonald J. felt that the conduct of the father was such as to evidence his lack of overall concern for the welfare of his children. Although he left the two boys with the father, MacDonald J. felt that the daughter needed a mother figure.

In Laberge v. Laberge,[114] the mother left the husband who had obtained custody of the children through the signing of an agreement. Through a denial by the husband to allow the wife access to the kids, the wife petitioned for the children. The

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[112] Torresan v. Torresan, [1972] 6 R.F.L. 16 (B.C.S.C.).

[113] Currie v. Currie, [1975] 18 R.F.L. 47 (Alta. S.C.).

[114] Laberge v. Laberge, [1975] 16 R.F.L. 60 (B.C.S.C.).

judge in awarding custody to the wife found that:

> (a) the wife had originally left the home leaving the kids with the husband because she had no money and she thought it was for the child's welfare to leave them with the father at the time
>
> (b) the fact that the wife was now living common-law with another man was to her advantage because she had become a better mother as a result.

Summarily, the area may be seen to include the following principles as founded from case law:[115]

> Children have a natural right to be brought up in a two parent family home. Where a parent breaks up the family home by wilful misconduct he or she is in breach of an important part of parenthood. Such conduct may well indicate that the actor puts gratification of his or her own desires or passions before the welfare of the children. Much, however, will depend upon whether the family home was a happy one in which the children thrived, upon whether the person who broke up the home took the children with him or her or abandoned them, and upon the reason for breaking up the home.
>
> The welfare of the child includes moral welfare and therefore the fact that one spouse had committed adultery is a relevant factor. Again, however, much will depend upon the circumstances of the case, such as (i) whether the adultery caused the marriage to founder, (ii) whether that spouse has shown himself or herself to be promiscuous, (iii) whether the adultery was committed in the presence of the child and (iv) whether the adultery is continuing.
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> Abduction is generally an unsettling and disturbing experience for a child, and thus one who kidnaps or abducts a child might well indicate by such conduct that he does not have the child's welfare at heart. Further, even if a united home is an impossibility, it is generally considered in the child's interest to maintain a close link with both parents. Therefore, a person who wilfully denies a child access to his other parent or who attempts to alienate the child from his other parent is guilty of grave misconduct, conduct which runs counter to the child's best interests.

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[115] Supra. note 51 at 233-235.

> The fact that one parent has agreed that the other should have custody, whether in a separation agreement or otherwise is a relevant factor to be considered, but the court should examine all the circumstances surrounding the agreement in determining what weight should be attached to it.
>
> All conduct of a person which indicates his or her character and temperament is relevant in assessing the issue of custody. Yet, the court is concerned with the child's life now, and the past conduct of a potential custodian may be of little relevance if it appears that such conduct is unlikely to be repeated or is not indicative of the actor's present character.
>
> Conduct of the parties is, however, but one factor to be looked at by the court in determining what is in the child's best interests. It may well be that the child's welfare requires that custody be awarded to an erring parent, albeit that the conduct of the other parent has been irreproachable. It may even be the case that custody is awarded to one parent when that parent has deliberately and wrongfully caused the situation to be such that the child's interests militate against his being put into the care of the other.

2. Mental and physical fitness of the parents

The issue of mental illness arises when one parent has a history of mental illness but is not suffering from any effects of the illness at the time of the custody hearing. According to Robinson,[116] "the mental normalcy of the parent may be a more important factor than the physical condition of the parent unless the physical condition is of such a nature that it incapacitates the parent or is likely to produce harmful effects on the child as in the case of a parent who is afflicted with a communicable disease."

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[116] Supra. note 44 at 589.

In an article for the Journal of Family Law,[117] Harold Thomas discusses low intelligence of the parent as a means by which the court may deny said parent custody. He cites two decisions (In Re Paul, 170 S.0. 2d 549 (La. Ct. App. 1965); In Re McDonald, 201 N.W. 2d 447 (Iowa 1972)) where it was held that a parent's low intelligence was sufficient to justify a denial (or involuntary termination) of the parent-child relationship. Mental incompetency, says Thomas, often includes anyone who suffers from an organic disorder, a brain injury, senility, psychosis, or a mental deficiency. However, there is a need to consider, out of the various mental disorders encompassed by the term mental incompetency, those which are considered curable.

The court which is determining whether to interfere with the parent-child relationship because of the parent's low intelligence must examine the possible ill effect upon the child. They include, says Thomas:

(a) the possibility that the child will suffer physical harm as the result of inattention or neglect and

(b) child will be harmed emotionally or mentally.

The various factors which the court should consider as indicating whether the parent could care for the physical needs of the child are:

(a) children become less adoptable when they get older

(b) intelligence rarely improves during adulthood

(c) in addition to an intelligence test, the parent should be tested in order to determine whether he (or she) can distinguish hot from cold,

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[117] Harold W. Thomas, Low Intelligence of the Parent: A New Ground for State Interference with the Parent-Child Relationship (1973-74), 13 J. Family L. 379.

tell the time of day, communicate orally, prepare meals, change diapers or bathe and nurse children

(d) the availability of other people to assist the parent

(e) if the child has lived with the parent for a long period of time, then evaluate the parent's past performance.

The modern view, continues Thomas is that children are born with a capacity for the development of intelligence rather than being born with an I.Q. which never changes. Because the new view considers I.Q. to be a function of a stimulating environment as well as a stable environment (in that a child's goals in life and his emotions are pre-determined at this early age), Thomas states that the court must consider these additional factors:

a) parental devotion

b) condition of older brothers and sisters and the condition of the child itself

c) condition of the home as a whole

The Domestic Relations Act of Alberta has no express provision directing the court to take into account the mental and physical fitness of the parents.

In Wallis v. Wallis,[118] the father who was afflicted with tuberculosis still received custody of the child notwithstanding evidence to the effect that the father may have to be readmitted to the sanitarium should his health not improve. Furthermore, the trial judge found evidence to the effect that the child's health was menaced and that the mother could provide better care.

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[118] Wallis v. Wallis, [1929] 2 D.L.R. 253 (Sask. C.A.).

(Basis of the court's reasoning was that the issue of the father's tuberculosis was res judicata--the mother should have brought this forth at trial).

In Re Hall,[119] the mother was involved in a traffic accident and suffered severe brain damage affecting her sight and power of locomotion. At the time of the accident, she and her child had been living with her grandparents. On an application by the father, who had since remarried, for custody of the child, held that the application must be denied. Considering the welfare of the child, it would be better if the child remained with the grandparents and the mother. It is to be noted that the child, now six years of age, had been with the mother and grandparents all of her life. Furthermore, the judge found that (a) the financial standing of the father was less certain than the grandparents and (b) the father had originally left the wife because of her adultery and had disclaimed custody up to the date of the divorce decree.

In Ward v. Ward,[120] the father was awarded custody of the infant when it was shown that the mother was unstable, had indefinite plans, and was unemployed at the time of the dispute.

In Re Chalifoux,[121] the mother was found to be immature and emotionally unstable as well as being financially and physically incapable of assuming a parental role. In denying the mother's application, Kerans D.C.J. stated that the fact the mother needs something to give her a reason to live is not sufficient to justify awarding the child to the mother. At page 148, he stated:

> A child is a person that needs help. A little baby cannot help the parents, the parents are there to help the baby....I have to think of this baby as being something more than a crutch for its mother or some strange kind of therapy project.

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[119] In Re Hall (1957), 7 D.L.R. (2d) 563 (N.S.S.C.)

[120] Ward v. Ward (1975), 12 N.B.R. (2d) 163.

[121] Re Chalifoux, [1974] 14 R.F.L. 148 (Alta. District Court).

A strange decision was reached in Barca v. Barca[122] before Cullen J. On the facts, it was found that the father and commonlaw wife would probably be better parents. The mother had indifferent health, kidney disease, and was a chronic schizophrenic with excessive suspiciousness. Notwithstanding the above, the judge awarded custody to the mother and in doing so, stated at page 85:

> While one might wish for a happier life for Bonnie Mae than what she may have if continued in the custody of her mother, I must reject the hedonistic philosophy that happiness is of primary importance. I rather feel that the question of the welfare of the child is linked more to the child's development, and the engendered sense of creativity and fulfillment.

Evidently, Cullen J. felt that Bonnie Mae should not be put among strangers from her present surroundings with her mother.

Age may be an important factor to consider whether the applicant be a young mother in her early teens or grandparents in the late fifties and on. Indications of the parent's maturity and ability to discipline the child and provide guidance are the major factors to be considered when a young parent applies for custody. As such, the decision of the court may vary even though the ages of the applicants may be virtually the same.[123] Given that the applicant is mature enough to care for an infant and given that the welfare of the child would best be served by leaving the infant with the young mother, it is suggested that the age of the applicant should have little relevance in the decision of the court.

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[122] Barca v. Barca, [1973] 9 R.F.L. 78 (Alta. S.C.)

[123] Re Protection of Children Act, Re Jepson and Maw (an Infant) (1960), 32 W.W.R. 93 (B.C.S.C.) wherein it was held that a girl who was 14 years and six months was not capable of exercising proper parental control; see contra in Re Protection of Children Act, Re S.V.'s Infant (1963, 43 W.W.R. 374 (B.C.Co. Ct.) wherein a girl of 14 years and ten months was found capable of being a fit parent.

There are many cases reported wherein grandparents have received the custody of a child. Consideration by the court in cases of 'elderly' applicants centre around a) the possibility of the grandparents becoming infirm or dying (see Nelson v. Findlay)[124] or b) of contests between the grandparents as strangers versus the natural parent which have been discussed earlier (see also decision in Howland v. Howland).[125]

It has been suggested[126] that where one of the parents can provide adequate support and is interested in the child, then he/she should receive preference over the grandparents. This has been justified on the basis that it would be in the child's best interests to minimize the generation gap in an era of rapid changes in moral standards and acceptable child behaviour.

3. Mother versus father and the "tender years" doctrine

Section 46(2) provides that the wishes of the mother as well as of the father must be considered. Neither parent is to be given preference over the other. What is at issue is which parent can best provide for the welfare of the children.

It has generally been accepted that the mother can more properly care for young children under normal circumstances. In Re Orr,[127] Mulock J. put it this way:

> In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that

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[124] Supra. note 84.

[125] Supra. note 60.

[126] Supra. note 44 at 592.

[127] Re Orr, [1933] O.R. 212; [1933] 2 D.L.R. 77 (Ont. C.A.)

of the father.[128]

Timothy B. Walker[129] states that because the mother has been traditionally favoured as the parent that can best provide an atmosphere conducive to healthy child development, the fault concept has arisen whereby the mother is denied custody if she doesn't conform to the notion of 'motherhood.'

In an article written for the Louisiana Law Review, Lila Tritico[130] criticizes section 146 of the Louisiana Civil Code which provides that the mother will have preference in a custody dispute unless she is shown to have forfeited her right to custody. Although the paramount consideration is the welfare of the child, it is presumed that the welfare will be better served by awarding custody to the mother with a proviso that if the mother is found to be morally unfit or unstable, the father will get custody. Tritico states that the reasons given for justifying this procedure, those being (a) administrative convenience and (b) a genuine belief that the mother will be the better parent, are not sufficient to justify this preference. She states that this presumption denies the father an interest in his kids and places a burden of rebutting the presumption on him. The presumption may also prevent a thorough examination of the facts of each case.

Tritico states that the physiological and sociological foundation upon which this preference to the mother was originally based is no longer valid. Physiologically, fewer mothers are nursing their infants, and after this period, for those who do, there is no reason why a mother is better suited to rear children. Sociologically, says Tritico, with the employment of more than 40% (at the time the article was written) of all married women and the

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[128] Ibid. p. 217.

[129] Timothy B. Walker, Measuring the Child's Best Interests--A Study of Incomplete Considerations (1967), 44 Denver L.J. 132.

[130] Lila Tritico, Child Custody: Preference to the mother (1973-74), 34 L. L. Rev. 881.

increasing number of men who are experiencing domestic duties, an automatic preference to the mother eliminates recognition of the fact that the child's welfare may be best served by awarding custody to the father. The author suggests that child custody should be awarded according to an individual parent's capabilities and situation in relation to the welfare of the child, the welfare being established by guidelines based on the economic, educational and emotional stability of the child.

In another article on parental preference, Peter S. Title[131] gives reasons for his dislike of the maternal preference rule:

(a) maternal preference rule emerged because of the fact that earlier, a woman's occupation was chiefly homemaking. Today, more women are joining the labour force

(b) lack of scientific basis for maternal preference[132]

(c) even though custody proceedings go faster when one contestant is eliminated on the basis of sex, such a method inhibits judicial inquiry and thought, promotes bitterness between the parties, and places a stigma on the mother if she loses. Furthermore, Title suggests that the preference rule impedes appellate review since a decision may be based on the rule without stating other reasons.

In the way of suggestions for improvement, Title states:

(a) have an attorney represent the child in the dispute

(b) have legislative clarification of the best interests principle

(c) have increased consideration for the child's preference

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[131] Peter S. Title, The Father's Right to Custody in Inter-Parental Disputes (1974-75), 49 Tul. L. Rev. 189.

[132] from Bradbrook, The Relevance of Psychological and Psychiatric Studies to the Future Development of the Law Governing the Settlement of Interparental Custody Disputes (1971), 11 J. Farm. Law, 557, 579-85.

(d) have a system of family courts staffed with ample social workers and qualified people.

A good rationalization of the law is found in the case of Peter v. Peter[133] wherein McMorran L.J.S.C. states that although as a general rule the mother has the greater entitlement where both parents are equally capable and although there are numerous authorities stating that a child of tender years belongs with the mother, the courts must still consider as having priority the best interests of the child. As such, he awarded custody of the two children to the father.

The remarks of Muloch C.J.O. in Re Orr[134] must be put in their proper context according to Matas J. in Farkasch v. Farkasch.[135] He states:[136]

> I do not take the remarks of the learned Chief Justice as setting any ironclad rule or sterile formula for determination of custody. It is not in all cases of a child up to the age of seven that a mother would automatically have preference, nor in all cases of a child over seven years of age that a father would have preference. Each case must be decided on its own merits.

In Talsky v. Talsky,[137] Jessup J.A. stated at p. 229 (in the R.F.L.):

> In my view, the rule that children of tender years belong with their mother is a rule of human sense rather than a rule of law as it is eroneously treated by the learned trial judge.

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[133] Peter v. Peter, [1975] 17 R.F.L. 80 (B.C.S.C.)

[134] Supra. note 127.

[135] Farkasch v. Farkasch, [1972] 4 R.F.L. 339; (1971), 22 D.I (3d) 345; [1972] 1 W.W.R. 429 (Man. Q.B.)

[136] Ibid. p. 344.

[137] Talsky v. Talsky, [1973] 11 R.F.L. 226; (1973), 38 D.L.R. (3d) 343; [1973] 3 O.R. 827 (Ont. C.A.).

Matas J.A. in Re Desilets and Desilets[138] expressed his views on parental preference in this manner:[139]

> It is now well established that there is equality in the claims of the father and mother as to the custody of their infants; there is no principle of law that the mother is prima facie entitled to the custody of children of tender years. This is particularly so in the case where both parents work. The rule that children of tender years belong with their mother is a rule of human sense rather than a rule of law. It is only one factor to be considered with all the circumstances.

There are decisions to the contrary. Roach J.A. in Bell V. Bell[140] stated at page 344:

> No father, no matter how well-intentioned or how solicitous for the welfare of such a child, can take the full place of the mother....This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of our Courts.

See also the words of Macdonald J. in Torresan v. Torresan where at page 17, he stated:

> Young children are generally better off in the custody of a loving mother who rates only fair in all the attributes that go to make up a good parent, than in the custody of their father who is away at work through the day, and has the assistance of an excellent paid housekeeper.[141]

It is submitted that judges that adhere to the above philosophy are by necessity forcing themselves into making decision which may not be in the best interests of the child. Furthermore, even if the mother is the better suited party to have custody, it must still be remembered that this is but one factor only to

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[138] Re Desilets and Desilets (1975), 60 D.L.R. (3d) 546 (Man. C.A.)

[139] Ibid., p. 554.

[140] Bell v. Bell, [1955] O.W.N. 341 (Ont. C.A.)

[141] Supra, note 112.

be considered by the judge. Robinson[142] argues that until empirical studies indicate that children of tender years do not develop as well under the father's care as under the care of the 'working' mother, the presumption of the tender years doctrine should be rejected.

Only the Infants Act[143] of Saskatchewan gives any preference as to parental control. Section 22(3) of the Act states:

> 22(3) Where the parents are not living together or where they are divorced or judicially separated, then, in the absence of a written agreement and of an order to the contrary, the mother shall have the custody of her infant children until they attain the age of fourteen. On the death of the mother or on a child attaining the age of fourteen, the custody of the child shall belong to the father, if living.

In New Brunswick, parental preference is still given to the father notwithstanding that the 'rules of equity'[144] are to prevail in custody disputes. In Bolster v. Bolster[145] and in Re Hudson and Hudson[146] Harrison J. and Bridges C.J.N.B. respectively indicated their preference of the father's common law right, all other things being equal. So also in Nova Scotia

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[142] Supra. note44 at 598.

[143] R.S.S. 1965, c. 342, s. 22(3); statute followed in Re Infants Act, Warren v. Warren (1958), 25 W.W.R. 391 (Sask. Q.B.) but not in Zaremba v. Zaremba (1968), 66 W.W.R. 372 (Sask. C.A.).

[144] Judicature Act, R.S.N.B. 1952, c. 120, s. 37. See also Habeas Corpus Act, R.S.N.B. 1952, c. 101, s. 13(1) and Rules of Court, New Brunswick Supreme Court Rules, Rule 11, Order 56 which state that in custody adjuciations, the child's best interests must be considered.

[145] Bolster v. Bolster (1953), 32 M.P.R. 143 (N.B.C.A.)

[146] Re Hudson and Hudson (1968), 68 D.L.R. (2d) 191 (N.B.S.C. App. Div.)

where the Infants' Custody Act[147] was interpreted in Re MacNeil[148] so as to maintain the common law preference in favour of the father.

Other provincial statutes, including Alberta,[149] merely direct the court to consider the welfare of the infant, the conduct of the parents and the wishes of the parents, with that of Newfoundland[150] being the most specific in directing the courts to consider as the paramount consideration the welfare of the child.

Hughes C.J.N.B., in Oakes v. Oakes[151] defined a child of tender age as one under seven years.

As regard any preference that the father may have under the Divorce Act, Laskin J.A. (as he then was) in Dyment v. Dyment[152] stated on page 750:

> In this connection, I cannot accept the suggestion of counsel for the husband that the common law rule of a father's prior claim to custody, all else being relatively equal, should prevail under the Divorce Act, in line with such cases as Re Scarth (1916), 35 O.L.R. 312;26 D.L.R. 428(C.A.)....The relative qualifications of competing spouses or others for the custody of children must be assessed from the standpoint of what will best serve the interests of the children rather than from the standpoint of a quasi-proprietary claim to the children regardless of or in subordination of their best interests.

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[147] R.S.N.S. 1967, c. 145.

[148] Re MacNeil (1964), 46 D.L.R. (2d) 185 (N.S.S.C.) as reaffirmed in Pennie v. Pennie (1966), 52 M.P.R. 68 (N. S. Ct. for Div. & Mat. Causes).

[149] The Domestic Relations Act, R.S.A. 1970, c. 113, s. 46.

[150] The Child Welfare Act, Stat. Nfld. 1964, c. 45, s. 47.

[151] Oakes v. Oakes (1975), 11 N.B.R. (2d) 170 (C.A.)

[152] Dyment v. Dyment, [1969], 2 O.R. 748 (C.A.)

4. Financial standing of the parents

Financial standing has not been considered by the court to be a major factor in custody disputes. In the case of Nelson v. Findlay,[153] the dispute as to custody was between the father and the maternal grandparents. The father had an income of $1100.00/month and had sound prospects for continued employment. The grandparents lived in a two-room log cabin which was 400 square feet in area with no plumbing. The accommodation was cramped and simple. In awarding custody of the child to the grandparents, McDonald J. acknowledged the fact that the child would be materially better off with her father. However, he found sufficient cause to leave the child with the grandparents, basing his decision on what he thought would be better for the ch

The trial judge in McKee v. McKee[154] seemed to think that financial standing was of a greater import than was commonly acknowledged. At page 591, he stated:

> "If Terry is handed over to the custody of his mother, there will be a breach of that association which in later years may rebound very markedly in his favour in a financial way and in the way of the opening of proper business opportunities to him when he is through his education."

Support for greater consideration of this factor, says Robinson,[155] is found in a study[156] wherein "it was concluded that variations in child behaviour were directly related to the

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[153] Supra. note 84.

[154] McKee v. McKee, [1947] 4 D.L.R. 579 (Ont. H.C.).

[155] Supra. note 44 at 594.

[156] Mary M. Thornes, Children with Absent Fathers (1968), 30 J. of Marr. and Fam. 89.

social economic environment in which the child was living rather than whether or not a father was present in the home."[157] The study suggested that, other factors being equal, the best interests of the child will be served by placing the child in a home which is materially better off.

In Meikle v. Authenac,[158] a decision of the Alberta Supreme Court, Johnson J.A., in approving the decision in Regina v. Gyngill, [1893] 2 Q.B. 232, concluded that the welfare of a child is not to be measured by physical confort or money only. The fact that the step-father was materially better off was considered irrelevant if the real father could provide a reasonably happy home for the child.

In Re Allan and Allan,[159] Sheppard J.A., in reversing the trial judge and awarding custody to the father over the mother stated at page 177:

> In his custody there is every prospect of his providing for the children's financial security throughout the growing period and of his assisting them in becoming established either in his own or some other business.

Where the father's income was so low as to be insufficient to pay the rent, the court denied the father's application for custody (see Re Bennett Infants)[160]

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[157] Supra. note 154.

[158] Supra. note 82; an earlier decision of the court in Re Crux (1916, 33 W.L.R. 932 (Alta.) placed more emphasis on financial matters. The father had custody and provided the children with food, clothing, and shelter. However, he did not provide for his ex-wife and made her access to the children difficul The court would have given custody to the mother if she had had a full time job. If she did get custody, it was unlikely that the father would make any payments to her.

[159] Re Allan and Allan (1958), 16 D.L.R. (2d) 172 (B.C.C.A.)

[160] Re Bennett Infants, ¶1952] 3 D.L.R. 699 (Ont. C.A.).

The mother's claim to custody was denied in Re Baggio,[161] Pennell J. noting that the mother would have to rely largely on social assistance for the maintenance of her children.

In Deptuck v. Deptuck,[162] Tucker J. at page 650 stated:

> "It might be that the foster parents would furnish to the children here a home of easier circumstances and better fortune than that of the respondents: but who can say that the difference is for the ultimate welfare of the child? It might, in fact, prove to be the reverse."

5. Parents wishes and plans

Section 46(2) of the Domestic Relations Act[163] also directs t court to consider the wishes of the parents.

It is submitted that aside from determining what motivates a parent to apply for custody (Re Sharp),[164] possibly so as to hurt the other applicant or possibly to use the child as a psychological crutch (Re Chalifoux),[165] this factor should have little importance. The 'best interests' rule will normally take into account factors (maintenance and education of the child, social station in life, economic security) which would supersede the wishes and plans of either parent.

In McCahill v. Robertson,[166] the mother had custody of the child. The father was moving to another province and desired that he should have sole custody of the child for a quarter of the

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[161] Re Baggio, [1971] 3 R.F.L. 74 (N.S. Co. Ct.)

[162] Deptuck v. Deptuck (1966), 56 D.L.R. (2d) 634 (Sask. Q.B.) as cited from Hepton v. Maat, [1957] S.C.R. 606 at 608.

[163] Supra. note 149.

[164] Re Sharp; Sharp v. Sharp (1962), 40 W.W.R. 521 (B.C.C.A.)

[165] Supra. note 121.

[166] McCahill v. Robertson, [1975] 17 R.F.L. (Ont. S. C.).

year. In denying the father's application, Weatherston J. felt that divided custody was inherently a bad thing. He stated that the person with custody must have the opportunity of exercising cont: and guidance over the child without any feeling by the infant that it can look elsewhere.

In J. v. C.,[167] Ungold-Thomas J. denied an attempt by the infant's real parents to have the infant return to Spain from England. Notwithstanding the factor that the parents were living in a modern home, were healthy and had a steady income, the court found that if the child returned to Spain, he would have difficulties in readjusting to a new life style.

In Re Maloney and LeBlanc,[168] the mother had given up custody on two previous occasions, this being motivated by her concern for the well being of the infants when she was suffering from nervous depression. Notwithstanding the fact that the mother now desired the infants and was emotionally and materially secure enough to do so, her application was refused. Kirby J. felt that the infants were in an environment of security and stability and should remain with their father.

In Nielson v. Nielson,[169] Galligan J. examined the aptitude, station and prospects in life of the parents in order to see that the children were properly motivated towards a good education.[170]

The ability of the parent to discipline and guide the child (Neilson v. Neilson),[171] the manner of disciplining (Torresan v.

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[167]Supra. note 64.

[168]Re Maloney and Leblanc, ¶1974] 41 D.L.R. (3d) 463. (Alta. S.C.)

[169]Neilson v. Neilson, [1971] 1 O.R. 541 (H.C.)

[170]Supra. note 51 at 236.

[171]Supra. note 169.

Torresan),[172] the love and affection for the child (Neilson v. Neilson)[173] are some factors[174] which judges must evaluate when considering the parent's wishes and desires.

It can therefore be seen that parent's wishes and desires is more properly a function of their condition and station in life. Judges, in assessing the child's best interests do so with a view of placing the child with the parent whose wishes and desires most closely match the paramount consideration. As a factor in itself, the parent's rights and wishes should carry little weight.

E. Considerations Involving the Child

1. Child's Preference (or choice)

In an article for the Marquette Law Review,[175] the authors state that consideration given a child's preference depends upon several factors: (a) the age and maturity of the child (b) the strength of the preference and (c) whether or not all of the children in the family express the same preference.

They cite to an American annotation[176] wherein it states:

> "It seems to be generally recognized by the courts that the initial factor to be examined by the court in determining what weight, if any, to give to the custodial preference of the child involved is the child's capacity to make an informed and intelligent

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[172] Supra. note 112.

[173] Supra. note 169.

[174] Supra. note 170; for a more complete list of factors considered, please see pages 236-241.

[175] Ralph Podell, Harry Peck, Curry First, Custody--To Which Parent? (1972-73), Marq. L. Rev. 51.

[176] Annot., 4 A.L.R. 3d 66 (1964).

> judgment. The courts have frequently taken the position, in the absence of a specific statute, that the law does not set a specific age at which it will be presumed that the child has such capacity, but rather, the capacity of each child will be evaluated individually on the basis of the child's mental development, maturity, and the extent to which the child exhibits intellectual discretion.

In ascertaining the preference of the child, the practice has varied. Robinson[177] lists some of these practices:

(a) judge interviews the child in his chambers with both counsels present, but not the applicant or respondent (In re Carlson)[178]

(b) judge interviews the child in his chambers either privately or with only the registrar or court clerk present (Kramer v. Kramer and Merkelbag)[179] --this method allows the child to express views free of parental influence in the court room.

The propriety of a judge interviewing children in chambers was discussed by Bouck J. in Saxon v. Saxon.[180] At page 262, he states:

> While it is true that children may express to the judge during a private interview their preference towards one or other of the parents, this is a factor which may have little or no weight as it applies to a child of seven years or eight years of age, but have significant weight in circumstances where the child is more mature. With this in mind I am of the view that it is not improper for a trial court judge to see infant children in a custody matter in his private

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[177] Supra. note 44 at 602.

[178] In re Carlson, [1943] 3 W.W.R. 104 (B.C.S.C.)

[179] Kramer v. Kramer and Merkelbag (1966), 56 W.W.R. 303 (B.C.S.C.)

[180] Saxon v. Saxon, [1975] 17 R.F.L. 257 (B.C.S.C.); see also similar views of Smith C.J.A. in Bateman v. Bateman (1965), 51 W.W.R. 633 affirming 47 W.W.R. 641 (Alta. C.A.).

> chambers, if both parties through their counsel consent and so long as he does not allow the comments of the children to be the sole basis upon which he writes his judgment disregarding what is in their best interests.

In Re Allan and Allan,[181] Sheppard J.A. criticized the trial judge for not disclosing information that he obtained in an interview with the children and on which he had relied partly in his decision. Sheppard J.A. felt that such information must be disclosed so that the parties may have an opportunity of controverting it.

In listening to a child's preference, it must be remembered that the wishes or will of the infants should not be confused with their welfare (Stevenson v. Florant).[182]

It is better if the child is encouraged to speak freely to the judge while in the judge's chambers. However, the judge should not give an unequivocal promise to the child that he will not disclose what the child will tell him (H.v. H.[183]). This though does not imply that the judge must necessarily disclose to the parties the details of the discussion (H. v. H.[184]).

Another view as to disclosure was expressed in the dissenting opinion of Herrying C.J. in Priest v. Priest[185] where at page 392, he stated:

> There may be cases in fact where it is the judge's duty to interview the infant, and there can be no question that the judge may act upon what he learns from the infant and that he should not disclose what the infant tells him, if he considers that to do so would in any way be harmful to the infant.

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[181] Supra. note 159.

[182] Stevenson v. Florant, [1925] S.C.R. 532; [1925] 4 D.L.R. 5 affirmed [1927] A.C. 111; 46 C.C.C. 362; [1926] 4 D.L.R. 897.

[183] H. v. H., [1974] 1 All E.R. 1145 (C.A.)

[184] Ibid., p. 1148

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Selby J. in Sargeant v. Watkins,[186] at page 302, had this to say:

> This means that a decision may be influenced to a considerable extent by what the judge hears in his chambers. What he hears is not in the nature of evidence. It is not subject to cross-examination, and neither counsel in his address is aware of what is in the judge's mind or able to address him on what might be a compelling and decisive factor. It may be that the unsuccessful party wishes to take the matter further on appeal, and the appellate court is in no better position to deal with the matter than counsel. As I see it these disadvantages are inherent and must be recognized. Where both counsel ask the judge to see the child in his chambers this is a disadvantage which they must be taken to have accepted.

The practice of judges interviewing a child in his chambers has been recognized for quite some time in Alberta. (see decision of O'Connor J. in W. v. W.).[187]

It is suggested that if disclosure will not harm the infant, then disclosure should be made by the judge. This will help counsel for the parties in deciding whether to appeal the decision and if so, on what grounds. The more reasons that are given by the judge in rendering his decision, the easier it is to analyze the judge's pronouncement in relation to the best interests of the child.

As regards older children, it is to be noted that their preference will usually be the decisive factor in a custody dispute. It must be recognized that "it would be difficult to enforce a custody order, short of incarcerating the child, if the order was against the strongly expressed wishes of the child."[188] (see decision in Re Bennett Infants).[189]

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[186] Sargeant v. Watkins (1965), 6 F.L.R. 302.

[187] W. v. W., [1943] 1 W.W.R. 502 (Alta. S.C.).

[188] Supra. note 44 at 601.

[189] Supra. note 160.

As regards the weight to be attached to the child's preference, it has been stated earlier in this section that the weight is a function of the age and maturity of the child (along with other aforementioned factors). In K. v. K.,[190] the court did not attach much weight to the opinion of a ten year old boy. However, in Miller v. Miller,[191] the judge had followed the wishes of the children whom he interviewed apart from the fighting parents. On appeal based on the contention that the trial judge had erred when he awarded joint custody to both parents and physical custody to the father (which was contra to the recommendation of the social worker), held that the appeal must be dismissed. There was no error involved in following the wishes of the children.

When considering a child's views, it should be noted that a child may be biased towards the person with whom he/she is living (Stevenson v. Florant[192])

According to Littner,[193] little importance should be attached to a child's wishes because of two reasons:

(1) the child may be afraid to say how he/she really feels

(2) the child is asked to make a choice which may only intensify his emotional problems.

For information on the representation of children by their own counsel in custody disputes, please see a report

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[190] K. v. K. (1956), 7 D.L.R. (2d) 16 (Man. C.A.)

[191] Miller v. Miller, [1975] 17 R.F.L. 92 (Man. C.A.)

[192] Supra. note 140.

[193] Ner Littner, The Effects on a Child of Family Disruption and Separation from One or Both Parents (1973), 11 R.F.L. 1

prepared by Susan McKeown[194] for the Alberta Institute of Law Research and Reform.

2. Child's Age, Sex, Health and Race

The child's age has been previously referred to in this paper concerning both (a) the tender years doctrine and (b) weight to be attached to the preference of the child.

Robinson[195] states that as regard the child's sex, a rule of thumb has developed whereby, other things being equal, the custody of girls (particularly young girls) should go to the mother (In re Carlson)[196] and the custody of boys (especially older boys) should go to the father (Hind v. Hind and Wilson).[197] He concludes by stating that little research has been done in this area to confirm or deny this practice and that more studies are needed.

According to Littner,[198] pre-adolescent children of both sexes should stay with their mothers. However, once the child has reached adolescence, the child is better off with the parent of the same sex.

The child's health is probably a weightier factor when considering the welfare of the child. A child's health may partly be a function of a stable and healthy environment (see case of

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[194]Susan McKeown, Representation of the Infant in Legal Proceedings--Who Speaks for the Child? prepared for the Alberta Institute of Law Research and Reform, June 1976.

[195]Supra. note 44 at 598.

[196]Supra. note 178; see also Bell v. Bell, [1955] O.W.N. 341 at 344 (C.A.) and Gauci v. Gauci, [1973] 3 O.R. 393 (Ont. C.A.).

[197]Hind v. Hind and Wilson (1962), 31 D.L.R. (2d) 622. (B.C.S.C.)

[198]Supra. note 193 at 13.

J. v. C.)[199] wherein it has a chance to grow up and develop healthy emotions. Thus, we see tendencies of some judges to leave infants in the custody of people with whom they have stayed for a considerable period of time prior to the custody dispute (see Nelson v. Findlay).[200]

Should a child have emotional or physical problems, judges will look at the facts of each case and award custody to the parent who can best care for the child. In Kaye v. Kaye,[201] Osler J. decided to split up the siblings in a family although he was reluctant to do so. The boy had been diagnosed as being hyperkinetic, having a short attention span, and as having difficult with motor control. Osler J. felt that the boy should be left with the father because it would increase his difficulties to have him moved to a new environment and to a new school. In Davis v. Davis,[202] custody of a child with a schizophrenic personality was awarded to the father based upon medical evidence that the child needed an unemotional environment (which could be provided by the father).

Race of the child has sometimes also been a factor which judges have considered. In Hayre v. Hayre,[203] McIntyre J. awarded custody of the boy to the Sikh father over the Protestant mother stating that the boy will always be regarded as Sikh and would therefore be raised in that fashion. Egbert J. in Ross v. Ross[204] briefly alluded to social difficulties which had arisen as a result of the mother's marriage to a husband of Jewish extraction. It is submitted that race should be but one factor to be con-

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[199] Supra. note 64.

[200] Supra. note 84.

[201] Kaye v. Kaye, [1975] 6 O.R. 65 (Ont.)

[202] Davis v. Davis (1963), 42 W.W.R. 259 (Sask. Q.B.)

[203] Supra. note 95.

[204] Ross v. Ross (1952), 6 W.W.R. (N.S.) 335 (Alta. S.C.)

sidered in determining the best interests of the child. No preference whatsoever should be given to one religion over another, nor of a religion versus agnosticism, nor of one race over another unless it is determined that there may be a possibility of detriment to the infant vis-a-vis social and religious strains if one course of action should be chosen.

3. Separation of siblings (Note that in this section "divided custody" is used to refer to the separation of siblings).

The predominent view expressed by the courts is that divided custody is inherently a bad thing. In Re Richardson,[205] Beck J.A. expressed his disapproval of divided custody and in bringing up two infants as strangers. In the belief that 'companionship' between siblings will benefit the infants, courts have usually awarded custody to one parent only. Nevertheless, there are many reported cases wherein the judge has split the children up, such action being necessitated in order to best serve the interests of the child. In Kaye v. Kaye,[206] the boy remained with the father for medical reasons. In Hayre v. Hayre,[207] the boy was separated from his sisters because of a belief that the child could only be raised as a Sikh. In Currie v. Currie,[208] the custody of the daughter was given to the mother and the two sons to the father, the reason being given that the daughter needed a mother figure (although greater neglect by the father towards the daughter was also cited as a reason). In Kramer v. Kramer and Merkelbag,[209] the court denied the father's application for custody of the daughter feeling that the father would use the

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[205] Re Richardson, [1924] 2 D.L.R. 593 (Alta. C.A.)

[206] Supra. note 201.

[207] Supra. note 95.

[208] Supra. note 113.

[209] Supra. note 179.

the daughter to seek revenge upon the mother for her marital misconduct. In Bateman v. Bateman,[210] the children were separated when the son wished to be brought up in the religion of his father.

It is submitted that this factor should be considered in light of the view expressed by Mackeigan C.J.N.S. in Zinck v. Zinck[211] where at page 109 he stated:

> It is undoubtedly desirable, if it can be accomplished, to keep children of a family together, so that they may share the affection and support of each other and grow up with a sense of family solidarity. This, however, is only one factor of the many that must be balanced and considered in determining what is in the best interest of the individual children respectively.

F. Other considerations

1. "Justice" and Custody Disputes

In F. v. F and C (1966),[212] the court indicated that justice was a relevant consideration. Lord Denning in Re L[213] at page 4 stated:

> "It seems to me that a mother must realize that if she leaves and breaks up her home in this way, she cannot as of right demand to take the children from the father. If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them, for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes is for her to return. It is a matter of

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[210] Supra. note 54.

[211] Zinck v. Zinck, [1973] 14 R.F.L. 106; 6 N.S.R. (2d) 622; 43 D.L.R. (3d) 157 (C.A.).

[212] F. v. F. and C. (1966), 56 W.W.R. 368 (B.C.S.C.)

[213] Re L, [1962] 3 All E.R. (C.A.)

> simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration, the claim of justice cannot be overlooked.

Re L has been cited with approval in Canada.[214] However, other Canadian judges have shown disapproval. In Re Moillet,[215] Morris J.A. at page 463 stated:

> "In my respectful opinion these considerations (the conduct of the wife in leaving the husband), save to the extent that the conduct of either party may affect the welfare of the children, are irrelevant."

Hutley J.A. in Barnett v. Barnett,[216] at page 343 stated:

> "the issue is not what is justice to the parents, but what is for the welfare of the child and the welfare of the child can best be weighed by disregarding entirely any concept of claim, just or unjust, on the part of the parents."

C. Davies[217] suggests that the view of Hutley J.A. in Barnett v. Barnett[218] are to be preferred but that if justice is a factor to be considered, it would only be relevant in cases where the best interests of the children would be served equally by giving custody to either parent; only in the clearest cases would it have any weight.

2. Significance of Custody Agreements

It has been stated on numerous occasions that although courts are never bound by an agreement between the parents of a child concerning custody (W. v. W.[219]

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[214] see Sinclair v. Sinclair, [1974] 17 R.F.L. 202 (Ont. H.C.)

[215] Supra. note 102.

[216] Barnett v. Barnett (1973), 21 F.L.R. 335 (N.S.W.C.A.)

[217] Supra. note 51 at 231.

[218] Supra. note 216.

[219] Supra. note 187.

> Re Allan and Allan[220]), nevertheless a court will follow the terms of an agreement if, in the court's opinion, it accords with the best interests of the child (Kruger v. Booker)221, 222

3. Decision-Making in Custody Disputes

It cannot be overemphasized that custody disputes should be adjudicated on as soon as possible. This is not to say that a judge should act without the necessary information needed to make a decision in the child's best interests. Perhaps, the words of Kelly J.A. in Burke v. Burke[223] best express this view where at page 95 he states:

> At best the time consumed in custody proceedings is lengthy--it can never be in the best interests of any child conerned that there be unnecessary delay in bringing custody proceedings to an early termination. The court is abjured to act for the welfare of the child, and the parties and their counsel are under an equal duty to the child.

Noteworthy also at this time is the fact that circumstances do change. Although it is probably in the best interests of the child that a custody order be made final, yet, allowances must be made for unforseen circumstances. Again, this idea can best be expressed by citing the words of Harvey C.J.A. in Cairns v. Cairns[224] where at page 366 he states.

> It has been held more than once by our Court that an order for custody of an infant is never final in the sense that it cannot be changed and while certainly it is better for an infant generally that its custody should not be changed back and forth, yet it is much more desirable that it should change than that it should remain where it is not in the best interest of the child that it should be.

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[220]Supra. note 159.

[221]Kruger v. Booker (1961), 26 C.L.R. (2d) 709 (S.C.C.).

[222]Supra. note 44 at 604.

[223]Burke v. Burke, [1975] 17 R.F.L. 95 (Ont. C.A.)

[224]Cairns v. Cairns, [1932] 1 W.W.R. 364; 26 Alta. L.R. 145;

Today, most child psychiatrists would agree that to remove a child from an established home where he is happy and secure may well lead to emotional disturbance. The judiciary are now becoming more aware of these dangers as a result of the widespread use of expert witnesses and because of the extensive literature on the subject. Thus, although Eve J.'s dictum has been cited with approval by Canadian judges as recently as 1973, other judges seem keenly aware of the dangers inherent in effecting a change of custodianship. Clearly the risk of emotional disturbance will depend on various factors such as (i) the age of the child, (ii) his or her emotional and mental make-up, (iii) whether the child has been exposed to other unsettling changes, (iv) the ability of the other parent to cope with the child's disturbance, (v) the length of time that the child has been in the custody of the one parent, and the contact he has had with the other during that period; and many other factors besides.

Even if the parents have not been separated a sufficient time for the child to have become accustomed to only having one of them as his custodian, the court may be disinclined to give the child into the custody of a parent who intends to set up a home far from the surroundings with which the child is familiar. In such a case the court may consider the undesirability of uprooting a child from a home, church, school, friends and possibly a baby-sitter that the child knows when he is likely already to be suffering from the disruption of his parents' marriage. Such a change may be even less desirable, if it involves moving to an area where the principle language spoken is one in which the child is not conversant.[225]

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[225] Supra. note 51 at pp. 249, 250.

VII

*ACCESS--AS A PART OF CUSTODY

A. Generally

> In an old English case, Kay J. said: Access is a thing which can only be dealt with after the question of custody is determined (Eversheds v. Eversheds (1882), 46 L.T. 690 at 691 (Ch). Therefore, access implies that legal custody of the child has been awarded to another person. A parent who has been denied custody is usually granted access unless the court apprehends that the child's upbringing may be endangered in some manner by allowing access.226

Access means more than merely seeing the child in the custodial parent's home as was suggested in Brooking v. Brooking[227] but rather allows the parent to remove the child from the custodial parent's home for a specified period of time (see Re Campbell).[228] Robinson[229] suggests that the latter is a better alternative due to the fact that there may be tension between the estranged spouses which is not healthy for the children.

Access does not entitle the parent to interfere with the child's upbringing. Such a right is reserved to the custodial parent. The parent having access only has sufficient control

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*Much of the material in this section comes from

(a) L.R. Robinson, Custody and Access, in Mendes da Costa, Studies in Canadian Family Law, Vol. 2 (1972) 543.

(b) C. Davies, Power on Divorce and Other Matrimonial Causes Vol. 1 (3rd Ed. 1976) 221.

[226] L.R. Robinson, Custody and Access, in Mendes de Costa, Studies in Canadian Family Law, Vol. 2 (1972) 543 at 616.

[227] Brooking v. Brooking, [1953] 1 D.L.R. 648 (N.S.S.C.).

[228] Re Campbell (1968), 2 D.L.R. (3d) 159 (N.S.S.C., App. Div.)

[229] Supra. note 226 at 616.

to ensure the child's care during access (Gubody v. Gubody).[230] Furthermore, the parent having access should keep the custodial parent informed where the child is during the access period if such period is to be for an extended time and he/she should permit communication between the child and the custodial parent if so desired by the child (Robinson v. Robinson and Oliver).[231]

Under the Divorce Act, neither section 10(b) nor 11(1)(c) specifically enpower the court to make an order in respect of access but it appears that the court is so capable (as based on a decision in Australia on corresponding legislation; Gilmore v. Gilmore).[232]

As to the duty of counsel in access matters, Selby J. by way of obiter in Clarkson v. Clarkson[233] had this to say at page 315

> The task of counsel is a difficult one for, whilst owing a duty to his client--a duty which may be discharged by bringing out the points which indicate that to grant custody or access to his client would be in the best interests of the child whilst granting them to his opponent's client would be inimical to those interests--he must always remain aware that the child's interests come before those of his client. It is therefore necessary to adduce all available evidence which might have a bearing on the matter.

Disfavour is usually found by the court when a parent having access tries to influence his children in a religion different from that of the custodial parent. In Sudeyko v.

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[230] Gubody v. Gubody, [1955] O.W.N. 548; [1955] 4 D.L.R. 693 (H.C.).

[231] Robinson v. Robinson and Oliver (1967), 62 W.W.R. 763 (B.C.S.C.).

[232] Gilmore v. Gilmore (1972), 19 F.L.R. 461 (N.S.W. Cup. Ct.)

[233] Clarkson v. Clarkson, [1974] 14 R.F.L. 313 (N.S.W.S.C.).

Sudeyko,[234] Toy J., in admonishing the mother for her having influenced the son in her faith during access visits stated at page 279:

> I make that recommendation to Mrs. Sudeyko because, having granted custody to the father, one of the responsibilities that he is assuming is that of the spiritual or religious upbringing of the boy. As it is his wish that the boy not be exposed to the Jehovah's Witness philosophy, so long as the father is a fit and proper parent, his wishes in this regard must be respected.

However, in Benoit v. Benoit,[235] the Court of Appeal expressed a different view. Both parents were originally Roman Catholics but the husband became a Jehovah Witness and discussed his religion with the children on access visits. The mother objected and the Family Court Judge added a term to the custody agreement prohibiting discussion by the husband about religious matters with the children. The County Court Judge removed the restriction. On appeal to the Court of Appeal, the appeal was dismissed. The court felt that it had no right to decide whether one form of religious instruction was the true religion or better religion.

B. Basic Criteria in Access Decisions

The same criteria as used in custody disputes are also used in access disputes. However, the same weight is not necessarily given to these factors e.g. adultery is less important in access than for custody (Sutherland v. Sutherland)[236]; child's happiness is less important in access (Neill v. Neill).[237]

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[234] Sudeyko v. Sudeyko, [1975] 18 R.F.L. 273 (B.C.S.C.); see similar decision in Bateman v. Bateman (1964), 47 W.W.R. 641 at 659, 660 (Alta. S.C.).

[235] Benoit v. Benoit, [1973] 10 R.F.L. 282 (Ont. C.A.).

[236] Sutherland v. Sutherland, [1971] 3 R.F.L. 118 (B.C.S.C.).

[237] Neill v. Neill (1966), 8 F.L.R. 461 (N.S.W.S. C.).

The welfare and happiness of the infant is paramount (see Equal Guardianship of Infants Act,[238] The Infants Act,[239] and the Family Court Act[240]). This principle, as well as being mentioned statutorily is also set down in case law (see Ader v. McLaughlin,[241] Re Stroud and Stroud[242]).

In England, the decision in M. v. M.[243] made it clear the overriding consideration was the child's best interests. The case also stated that access cannot be regarded as a proprietal right in the parent. Any right of a parent to access must take second place to the child's interests.

According to Maidment,[244]

> Separation from either parent with whom an attachment bond has developed will have different effects depending on various factors, e.g., the age or developmental stage of the child, the quality of the pre-separation parent-child relationship, and possibly also temperamental or sex differences in response to stress. All of these factors could have crucial consequences for custody and access decisions, i.e., which parent is more needed by the child

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[238] Equal Guardianship of Infants Act, R.S.B.C. 1960, c. 130, s. 13.

[239] The Infants Act, R.S.O. 1970, c. 222.

[240] Family Court Act, R.S.A. 1970, c. 133, s. 10(1).

[241] Ader v. McLaughlin (1964), 46 D.L.R. (2d) 12 (Ont. H.C.).

[242] Re Stroud and Stroud (1974), O.R. (2d) 567 (H.C.).

[243] M. v. M., [1973] 2 All E.R. 81 (Family Division).

[244] Susan Maidment, Access Conditions in Custody Orders (Winter 1975, Vol. 2, No. 2), Brit. J.L. & Soc. 181.

at a particular stage in its life.[245]

She states that access is of less importance if there is no attachment bond, or if only a weak one exists with the non-custodial parent, or if the child is too young to maintain bonds during the non-custodial parent's absence.

According to Ner Littner,[246] access and visitation privileges are important if the parent with whom the child is living has not remarried. If the parent remarries and if the child is able to develop a good, positive relationship with the step-parent, then visitation becomes of less importance to the child. Conversely, if the child has a poor relationship with the step-parent, visitation may be important. The author further recommends that if there is not much contact between the child and other parent, replacements for the absent parent should be found. They may include an uncle, favourite teacher, big brother or aunt.

In a later section in this paper, a different perspective on access will be explained -- that of denying access entirely or leaving access totally up to the discretion of the custodial parent.

C. Possible Benefits from Access

The following is a list of possible benefits to be derived from allowing access to the children

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[245] Ibid. p. 190.

[246] Ner Littner, The Effects on a Child of Family Disruption and Separation from One or Both Parents (1973), 11 R.F.L. 1.

- from Robinson[247] and Davies[248]

(1) it is desirable that every child should know of both parents;

(2) a child should not be allowed to think that the parent without custody has no interest in his child (see Ader v. McLaughlin);[249]

(3) should preserve the relationship between the child and the 'wealthy' parent so that the child may be a recipient of that wealth;

(4) should have more than one parent to influence the child's development. In the words of Cullen J. in Csicsiri v. Csicsiri[250] at page 32:

> Children are part of a family. They have two parents and have a right to be influenced in their upbringing by each of the two parents . . . and while divorce may dissove the marriage it does not dissolve the parenthood. . . .

(5) should have more than one parent to give affection, comfort and companionship (Csicsiri v. Csicsiri[251]);

(6) even if a child is not fond or proud of his parent, it may build character to have him/her spend time with that parent (Gallaghan v. Gallaghan[252]);

(7) access may ensure that the child is being properly

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[247] Supra, note 226, pp. 617-621.

[248] C. Davies, Power on Divorce and Other Matrimonial Causes --Vol. 1 (3rd Ed. 1976) 221.

[249] Supra, note 241.

[250] Csicsiri v. Csicsiri, [1974] 17 R.F.L. 31 (Alta. S.C.).

[251] Ibid.

[252] Re Sharp (1962), 40 W.W.R. 521; 36 D.L.R. (2d) 328 (B.C.C.A.).

maintained and cared for by the custodial parent (Re Sharp[253]);

(8) it enables the infant to maintain contact with the parent who may eventually care for him in the event of the custodial parent's premature death or incapacitating illness (Sutherland v. Sutherland[254]);

(9) acess enables a parent to adequately discharge his remaining duties as guardian of the person and estate of the infant;

- from Littner[255]

(10) access helps the child deal with his unconscious fantasies about the absent parent;

(11) access helps to decrease the child's feeling of rejection or abandonment;

(12) access decreases his feelings that the divorce happened because he/she is a bad child;

(13) access minimizes the fear that the child may never see the other parent again;

(14) a child needs to have living experiences with both a mother and a father if he/she is to grow up emotionally normal;

- from Maidment[256]

(15) it seems important that a child have adult figures with whom he/she can identify with sexually;

(16) if there is a strong bond of attachment between the child and parent, no access may lead to deleterious effects on the child.

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[253] Re Sharp (1962), 40 W.W.R. 521; 36 D.L.R. (2d) 328. (B.C.C.A.).

[254] Supra, note 236.

[255] Supra, note 246.

[256] Supra, note 244.

D. Denial of Access

Access may be denied even if the parent is not at fault. In the words of Stewart J. in Re Tuohimaki[257] at page 338:

> I cannot agree that as a rule of general application access may not be refused except in cases where danger to the child is apprehended. I think the overall welfare, which of course includes not only the physical surroundings but the mental, moral and spiritual, are to be considered as a whole whenever possible, and the decision based on how the scales fall according to the interests of the child and not either parent.

The mere failure to exercise a right of access does not usually disentitle a parent to further access (Ader v. McLaughlin[258]).

Access visits often have an emotionally unsettling effect on a child and may possibly make the child harder to discipline. Some courts have accepted this argument in denying access (Re Sharp, Sharp v. Sharp[259] while other courts have not accepted it (Ader v. McLaughlin[260]).

Other reasons often used to deny a parent access include:

(1) access parent may use the child as a weapon to seek revenge on the other parent,
(2) it is natural for the parent having access to spoil the child during visits,
(3) child may become cranky due to excitement and loss of normal rest,

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[257] Re Tuohimaki, [1971] 1 O.R. 333 (H.C.).

[258] Supra, note 241.

[259] Supra, note 253.

[260] Supra, note 241.

(4) custodial parent may be jealous of the child's affections to the other parent with such emotion possibly harming the child.

The tendency of the court, however, is to grant access whenever possible. Indeed, in Cantrell (Whatman) v. Whatman[261] access was not denied to the father who had a history of convictions and sexual irregularities. The court felt that the child should experience the love and affection that the father had for the child. In Re Alderman,[262] the father had spent time in hospital due to alcoholism. However, access was still permitted provided that he be in a sober condition when he visists the child. In Kash v. Kash[263] the father was considered in an unsuitable mental condition. Access was granted but limited in that during visits, the mother or some other adult had to accompany the child. In Sutherland v. Sutherland,[264] the mother had a history of mental illness and her common-law husband had a previous criminal record. There was testimony to the effect that the children seemed unhappy with the mother's visits. However, access was still allowed.

The mere fact that a parent is living in an adulterous situation is no grounds for denying access (Re Bickley et al, Bickley v. Blatchley[265]). In Sinclair v. Sinclair,[266] a father was permitted to take his children on a holiday with the lady with whom he was co-habiting.

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[261] Cantrell) Whatman v. Whatman (1970), 15 F.L.R. 10 (N.S.W.S.C.C.A.).

[262] Re Alderman (1961), 32 D.L.R. (2d) 71 (Sask. Q.B.).

[263] Kash v. Kash, [1971] 1 R.F.L. 292 (Sask. Q.B.).

[264] Supra. note 236.

[265] Re Bickley et al., Bickley v. Blatchley (1957), 7 D.L.R. (2d) 465 (S.C.C.).

[266] Sinclair v. Sinclair, [1973] 8 R.F.L. 286 (Ont. C.A.).

It has been said that the court should not deny access as a means of forcing payment of alimony (or arrears) (see Homuth v. Homuth[267]). Indeed, in Hill v. Humphreym[268] the court held that the trial judge was in error when he refused the father access rights until he paid all arrears owing under the separation agreement. The order below was varied such that as long as the father paid maintenance, he would be entitled to access. However, other cases have made payment of maintenance a condition precedent to a right of access (Re Alderman;[269] Robinson v. Robinson and Oliver[270]). In Parkinson v. Parkinson,[271] the court adjourned sine die and refused to hear the father's appeal until all arrears in maintenance were paid or until the court was satisfied that the father could not pay.

In Penny v. Penny and Klinger,[272] the mother remarried and sought to cut down on the ex-husband's right to access in order that the kids could get closer to the new father. In dismissing the mother's application, Disbery J. at page 251 stated:

> To accept the applicant's views would necessitate holding that when a divorced parent having custody of a child of the former marriage enters into a second marriage, the other parent's rights of access should be restricted and the child should be encouraged to accept the new stepparent in lieu of the parent.

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[267] Homuth v. Homuth, [1944] 4 D.L.R. 260 (Ont. H.C.).

[268] Hill v. Humphrey, [1972] 7 R.F.L. 171 (Ont. C.A.).

[269] Supra, note 262

[270] Supra. note 231.

[271] Parkinson v. Parkinson, [1973] 11 R.F.L. 128 (Ont. C.A.).

[272] Penny v. Penny and Klinger, [1973 8 R.F.L. 247 (Sask. Q.B.

Access may be denied in situations where the child is suffering from mental illness and access would aggravate the condition (Davis v. Davis[273]).

In Wentzell v. Wentzell,[274] the father's access rights were suspended when it was found that he was unduly interfering with the ability of the custodial wife to exercise her custodial rights.

In Csicsiri v. Csicsiri,[275] the father got custody because the mother was found to be mentally ill. Access rights were also denied to the mother because of a fear that she would disturb the children or possible injure them while in her emotional distress.

In Re Milsom,[276] the custodial father openly consorted with another woman. The former wife continually admonished the daughter in regard to her father's way of life. The mother's access was terminated because it caused emotional stress to the child.

In Currie v. Currie,[277] the father had made the mother's access difficult by discouraging the three kinds from visiting her. In the words of D. C. McDonald J. at page 51:

> Placing the children in such a dilemma is inexcusable, and there are circumstances in which the courts have been motivated to take away from a parent who has behaved towards a child in that fashion in relation to the other parent's right of access. Such conduct is the mark of a parent who is not concerned with the overall welfare of his children.

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[273] Davis v. Davis (1968), 42 W.W.R. 257 (Sask. Q.B.).

[274] Wentzell v. Wentzell, [1971] 3 R.F.L. 118 (B.C.S.C.).

[275] Supra. note 250.

[276] Re Milsom, [1973] 11 R.F.L. 250 (B.C.S.C.).

[277] Currie v. Currie, [1975] 18 R.F.L. 47 (Alta. S.C.).

In Singer v. Singer,[278] a mother was held not to be in contempt for not forcing the son to see his father. The mother had packed the son's bags but the child did not want to go.

E. Frequency and Duration

Frequency and duration of access visits varies depending upon various factors:

(1) age of the child;

(2) mental state of the child and parent.

The most common form is "reasonable access" whereby parents mutually agree upon times and places. The advantage lies in the fact that the parents can vary to meet changing circumstances without the necessity of a court application.

The court may also specifically fix the frequency and duration and may also order the parent to give notice of his/her intention to exercise rights of access. Other conditions may be imposed including:

(1) parent must be sober (Re Alderman[279])
(2) access shall take place only when the child wants it (McCann v. McCann[280])
(3) special case as in Gubody v. Gubody[281] where because there was a history of physical conflict between the parents, the Children's Aid Society was used as a pick-up and depository for the infant.

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[278] Singer v. Singer, [1974] 17 R.F.L. 18 (Ont. S.C.).

[279] Supra. note 262.

[280] McCann v. McCann (1974), 52 D.L.R. (3d) 318 (N.S.C.A.).

[281] Supra. note 230.

A unique decision was reached in Korol v. Korol.[282] Because the mother had extensive access rights, Bence C.J.Q.B. ordered that the father make payments to defray the mother's expenses of keeping the children during access periods.

In Whitehouse v. Whitehouse,[283] the court felt that the trial judge's view that access could be left to the mother's discretion was unsatisfactory and that visitation rights should be formalized.

An excellent summary on this area is that of Littner[284] where at page 16 it is stated:

> When the child does not wish to visit with the absent parent or when he seems to be on bad terms with that parent, it is still crucial to find some way of maintaining the visits.
>
> Even with the parent who is overtly psychotic or overtly brutal, it is often possible to organize the visits so that they maintain the positives of the relationship for the child while minimizing the negatives of this relationship.
>
> The most comfortable way for a very insecure or frightened child to visit with the other parent is in the child's own home. Even with the most difficult type of absent parent, it is frequently possible to have a supervised visit of one or two hours in length at least once monthly in the child's own home. This will allow the child to still maintain some kind of contact and living experience with this parent. The question of who should do the supervision also needs to be considered. It usually is not a good idea to have the parent with whom the child is living do the supervision because of the possibility of open animosity between the two parents. In the most serious kind of situation, a court representative or a social worker from a protective agency or a state agency may be available for the supervision of the visit.
>
> For most visitations, of course, it is not necessary to confine the visits to the child's own home, nor to supervise them, nor limit them to one or two hours a month. In most situations it is practical to allow the child to be alone with the other parent for frequent, regular periods of time.

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[282] Korol v. Korol, [1975] 18 R.F.L. 294 (Sask. Q.B.).

[283] Whitehouse v. Whitehouse, [1971] 1 R.F.L. 294 (Ont. C.A.).

[284] Supra. note 246.

It is extremely crucial that the other parent be helped to maintain the visits on a regular predictable schedule with previously decided on predictable times for picking up and returning the chid. It is always easiest for a child when he knows in advance exactly what to expect.

Another issue that frequently comes up is how often and for how long visits should occur. I recognize that there may be many legal as well as psychological issues to be considered. Also one always needs to match the frequency and duration of the visitations to the individual circumstances of the child and his parents. However, within these limits there are certain generalizations to be considered, based on the age of the child.

The child who is under six years is usually able to manage a period of several hours on Saturdays and/or Sundays and possibly one evening during the week. It is important that the visitations not interfere with the child's regular schedule for eating or sleeping, if this can possibly be avoided. For most children under six, regular overnight visits with the other parent usually are not a good idea because they tend to threaten the child's feeling of security with the parent with whom he is living. The exception to this could be for a vacation period or during the summer when the child might spend a maximum of two or three weeks with the other parent.

For the child between six years of age and adolescence the same type of visitation is usually indicated except for the possible addition of overnight visits. The mature child can usually at this age manage overnight visits, particularly over the weekend. Overnight visits during the week tend to be more disruptive. For the insecure, immature child, one would consider keeping to the same visitation schedule as for the younger child.

For the adolescent child one usually can be much more flexible and include the specific wishes of the child when making the final decision about visitation periods. Because the adolescent is mobile and able to initiate his own visits when he wishes to, one can be fairly flexible about overnight visits. The basic framework of visitation of a period during the weekend and one or two evenings a week is still a suitable model plus whatever overnight visiting seems appropriate.

F. Access--Which Approach to Take?

1. Criticism of the Current Approach

Some of the criticism which has been levelled against the form of custody-access used today by the courts include:

(1) conflict and tension which occurs when there is access on a regular basis--this may lead to arguments between the parents and may cause the non-custodial parent to lose interest in the child;
(2) custodial parent uses acess as a weapon and may even try to dissuade the child from seeing the parent;
(3) current approach precludes the non-custodial parent from having any control whatsoever in bringing up the child;
(4) may be too much emotional strain on the child.

In a book written by Goode,[285] it is suggested that the divorced mother dislikes visits by the father because:

(1) mother sees her relationship with the child as more important than the father's;
(2) mother feels that the father may have forfeited some of his parental rights by his marital misconduct;
(3) ex-spouses tend to have less positive attitudes toward each other and are less willing to make concessions;
(4) his visits cannot ordinarily be fitted into her life or the children's without much time and energy.

Because of the stress created through visitation, Goode[286] suggests that visits become less frequent and regular. Factors causing the stress include:

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[285] W.J. Goode, After Divorce, 1956 Free Press, New York, as cited in Access Conditions in Custody Orders, supra. note 244.

[286] Ibid.

(1) expense of entertaining the children;
(2) time spent in travelling and consequent loss of his/her own social activities;
(3) tension between ex-spouses at every visit;
(4) each spouse may create new lives for themselves;
(5) children lose interest in the visits due to tension and a desire to carry on a normal life (playing with friends);
(6) if the non-custodial parent misses a visit, the children become disappointed and withdrawn emotionally;
(7) daily activities of the child become less familiar to the visiting parent.

It must be remembered that although access may be of lesser importance at divorce, it becomes a greater problem since it involves a continuous relationship between the child and estranged parents.

In their criticism of the current thinking on access, Goldstein, Freud, and Solnit[287] state:

> Unlike adults, who are generally capable of maintaining positive emotional ties with a number of different individuals, unrelated or even hostile to each other, children lack the capacity to do so. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children become prey to severe and crippling loyalty conflicts.[288]

They then continue by saying:[289]

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[287] J. Goldstein, A. Freud, A. Solnit, Beyond the Best Interests of the Child (1st Ed. 1973).

[288] Ibid., p. 12.

[289] Ibid., p. 37.

> In addition, certain conditions such as visitations may themselves be a source of discontinuity.[8] Children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other. Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents. A "visiting" or "visited" parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.
>
> Once it is determined who will be the custodial parent,* it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.[9] What we have said is designed to protect the security of an ongoing relationship—that between the child and the custodial parent. At the same time the state neither makes nor breaks the psychological relationship between the child and the noncustodial parent, which the adults involved may have jeopardized. It leaves to them what only they can ultimately resolve.

2. A New Approach

It has been suggested immediately above that the custodial parent should decide under what conditions access should be allowed. These authors believe that the court should have no part in establishing or enforcing visitation rights.

In this new approach, the only relationship that matters to a child is that with a psychological parent--an absent parent cannot be a psychological parent.* Visits by an absent parent can only cause loyalty conflicts.

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*That parent to whom the child looks to for security, love and protection, affection and stimulation.

In Whitehouse v. Whitehouse,[290] the court mentioned that access should be left to the discretion of the custodial parent.

A reformulation of the law relating to access as suggested by Goldstein, Freud, and Solnit was done by Maidment[291] where she states:[292]

> It is submitted that certain conclusions can be drawn from the foregoing discussion which ought to be taken into account in any reformulation of the law relating to access.[71]
>
> 1. In no way should access be seen as a right of a parent. It is a "right of the child" only insofar as access when accompanied by a good relationship between custodian and non-custodian is generally believed to be in the best interests of the child.
>
> 2. It will have to be decided whether access can be achieved in suitable psychological circumstances. The present practice of awarding access as a routine matter, save in the most exceptional cases, is not satisfactory. Whether it is possible to construct a suitable setting in which access can operate may well depend on a far more serious concern for professional counselling to the adults both during the dispute itself when access terms are agreed or ordered, and after the access arrangement has been made when it is in operation, so as to ensure that the adults themselves in no way exacerbate an already delicate situation.[72] Such counselling would be primarily aimed at making the adults realise that for the sake of the child's mental health their co-operation and understanding is required. Thus Despert warns that the courts cannot solve divorced parents' problems with their children, but any custody or access arrangement can work if the parents want it to.

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[290] Supra. note 283.

[291] Supra. note 244.

[292] Ibid., pp. 195-198.

3. It will have to be decided whether access will contribute to the child's psychological health. This may depend on many factors, e.g. the existence or strength of an attachment bond with the non-custodian, or whether there is another adult of the same sex in the child's life. The decision can only be taken after a detailed study of the relationship between the child and the non-custodian. Thus Watson argues that a good decision can be taken only if "all relevant parties to the . . . action are adequately evaluated psychologically".

4. The difficulty with decision-making in this area is that present solutions will not necessarily be future answers. It has been shown that the intensity and object of attachment bonds can vary depending on the age of the child. A further fact worth considering is that as already noted in practice visits tend to lessen over time, either because of inconvenience or perhaps because the relationship which it is attempted to maintain loses its intensity and thus attraction. One possible solution is to accept Goldstein, Freud and Solnit's argument that the law is unable to make long-term predictions.

> In the long run, the child's chances will be better if the law is less pretentious and ambitious in its aim, that is, if it confines itself to the avoidance of harm and acts in accord with a few, even if modest, generally applicable short-time predictions.

In the context of access this view leads them to the conclusion that the law does not:

> have the capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning for example . . . visitation.

Their view is that access should never be ordered by the court, but should always be subject to voluntary arrangement. In many cases however it may be surmised, they would not regard access as a particularly valuable experience for the child, since they deny that a psychological relationship can exist with an absent person.

5. A more acceptable solution, in terms of public expectation of the legal process (in particular the fact that the non-custodial parent is very often the father who will continue to be ordered to pay maintenance for his absent child) is to insist that access conditions are far more carefully considered. In other words, if a long-term prediction cannot be made, then at least the initial decision should be the best that can be devised in the circumstances. The chances then will be less of an attempt to change the arrangement through variation of the order. This importance of continuity of relationships for the child is the particular reason why Goldstein, Freud, Solnit recommend that all child placements should be final and unconditional. Similarly Andrew Watson says that "visitation should not be the subject of continuing litigation." Furthermore there must be some formal incentive and help in complying with the order once more. It is totally inadequate to leave the working out of an access order to the parties. An order for "reasonable access" is on the part of the court a denial of its responsibility. It may be wondered however whether a court could effectively make more specific orders. One of the discoveries made by J.C. Hall in his paper for the Law Commission of the working of arrangements made by divorce courts for the care and upbringing of children, was that in many cases approved arrangements were not being observed. Further, currently "there is no machinery to safeguard the child against subsequent disadvantageous changes in the arrangements" apart from the supervison order. "In exceptional circumstances"only, the court can order a child in custody to be put under the supervision of a welfare officer or local authority. In general these orders are very rare, though in Hall's study welfare officers thought they were very beneficial when made. The report suggested that greater use should be made of supervision orders, and that the "exceptional" condition be removed. A further suggestion mooted was that a lesser order

should be possible, for example requiring a welfare officer to visit annually or twice yearly with a duty to report if a change in the arrangements appeared desirable. The idea that the parties themselves should be bound to report to the court a material change in the arrangements was rejected as impractical since the court was powerless to enforce such a rule. The somewhat optimistic conclusion was:

> If there is reason for anxiety a supervision order can be made. Otherwise the parent will simply have to be trusted; and fortunately it is the case, no doubt, that the great majority of parents can be relied on to do their best for their children anyway.[8]

A further suggestion has been made that:

> in all divorce cases where there are children involved the court should be given the power to make an order allowing welfare officers to visit children as often as they think necessary .... The emphasis should be on helping people rather than on keeping a check on them.[9]

This proposal would be supported here for two reasons. Firstly this would satisfy the need for post-divorce professional counselling to help the adults make the access arrangements work. Secondly if it is to be accepted that the court can make access orders, it is essential that they are supervised, so that if the arrangements are no longer suitable, the welfare officer can report back to the court on the need for variation or termination of the order. One possibility might be a requirement that access orders be reviewed at regular intervals. This would overcome the present position where variation of access orders is not very common, and certainly not as common as it ought to be. However, it would be argued here that a supervision order should not be in the court's discretion. It should be automatic in every case where access is ordered. No discussion in this area can be concluded without reference to two other matters. Firstly, it is quite clear that the adversary process still operating in the English courts is totally unsuited to decisions relating to the welfare of the child. Even the judges have expressed their dissatisfaction. Thus Willmer L.J. in *S.* v. *S.* said:

> I do venture to press that it is really much more valuable to obtain the opinion of the court welfare officer (who exists for this very purpose) rather than to proceed byway of acrimonious cross-examination of this or that parent, and his or her relations. That always seems to me to be a course of action much more likely further to embitter relations between the parties, and ultimately to cause detriment to the children.[10]

The answer to this problem obviously lies in the creation of family courts with a therapeutic approach to family problems and a specialised staff to aid the judge. The arguments in favour of such a system have been well rehearsed and will not be repeated here.[11] The second area for improvement is in separate representation for the child. The courts, at least in divorce proceedings, do already have this power whenever "it appears to the court that any child ought to be separately represented".[12] It is submitted that any issue of custody or access, even where the parties apparently agree, is so vital a decision for the psychological well-being of the child that a separate representative ought in every case to be appointed. Whether the representative is to be a social worker or a lawyer will depend on the willingness of the lawyers to take seriously their role as counsellors and experts on child care.

3. Divided Custody

Another alternative suggested is that of divided custody. In appropriate cases, the child would be under the care and control of one parent for a portion of the year and the same for the other parent. Although a disruption in the daily routine would occur, the approach may enable the child to develop a meaningful relationship with both parents. Support for this approach is found in the Family Law Project to the Ontario Law Reform Commission, Vol. IX, Children (1968).

Divided custody could take these possible forms:

(1) granting custody to one parent and allowing substantial access to the other parent (Long v. Long[293]);
(2) granting custody to one parent and awarding care and control of the child to the other parent for a substantial portion of the year (In Re W (An Infant)[294]);
(3) granting custody to both parents;
(4) granting no order as to custody and leaving the parents to exercise what rights they may have (refer to section on custody and guardianship for a more complete discussion).

Dissatisfaction of divided custody was expressed by Weatherston J. in McCahill v. Robertson[295] where at page 23 he stated:

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[293] Long v. Long (1968), 12 F.L.R. 456 (N.S.W.S.C.).

[294] In Re W. (An Infant), [1963] Ch. 202 (C.A.).

[295] McCahill v. Robertson, [1975] 17 R.F.L. 23 (Ont. S.C.).

> My judgment here is based on the very strong feeling that divided custody is inherently a bad thing. A child must know where its home is and to whom it must look for guidance and admonition and the person having custody and having that responsibility must have the opportunity to exercise it without any feeling by the infant that it can look elsewhere.

As such, the father who was moving to another province and wanted sole custody of the child for a quarter of the year did not succeed in his application.

G. Conclusion

The answers are still not certain. There is still no consens still rages as to whether or not access privileges should be extended to the non-custodial parent. Littner[296] feels that access rights must be granted and maintained even though there may be detrimental effects. On page 16 of the article, it is stated by the author that:

> It is usually an ostrich attitude to try to avoid the upset by abolishing the visits. If the child is holding in many upset feelings about the absent parent, it is far better for him if some of these feelings come to the surface so that they can be faced and dealt with. Stopping the visits only aids the child in holding in his feelings, which contributes to the development of more emotional difficulties.

and again at page 18:

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[296] Supra. note 246.

> Some children strongly resist visits with the other parent. They may present all sorts of rationalizations for their refusal or reluctance — it interferes with their routines, or it is boring and a waste of time, or the other parent is cruel to them, etc. One should take these explanations with a large quantity of salt. In many situations the basic reluctance of the child is due to his inner feelings that he has been abandoned by the parent who has moved out of the home, his fear of future rejection by the parent, his anger at the parent and his wish to reject the parent first. His reluctance to see the other parent may hide all of these feelings. He usually is unaware of these conflictual feelings.
>
> Therefore it is important to urge the child to maintain the visits even though he may be overtly opposed to them. This is particularly important for children who have not reached adolescence. For the adolescent, forcing a visit is often physically impossible so that one is more likely to go along with what the adolescent says he wishes. In these situations, there is a built-in safety valve, since the adolescent has the mobility to initiate a visit or at least to telephone the other parent in case his inner anxiety about him should mount excessively.

It is abundantly clear that cooperation is needed between lawyers, social workers, and other experts in child care.

Susan Maidment[297] best summarizes this view where at page 199 she states:

> Nevertheless the final point that needs to be made is that there appears to be an almost total lack of information about access practice. There is a need for extensive empirical data, on the basis of which reformulation of the law could being. . . . One needs to know how many orders are varied, when, how often, and why. What actually happens to access orders once they are made? Are they complied with? Do visits lessen in frequency or come to an end, and if so, why? . . . What type of relationship exists between the child and visiting parent? What advantages do the children see in access, both during childhood and in later life? . . . Yet while custody is a more important decision, at least once it is decided, the issue is normally settled. Access on the other hand involves continuing relationship, and the problem raised by this need to be explored more seriously.

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[297] Supra. note 244.

VIII. OUTLINE OF ISSUES AND RECOMMENDATIONS ON CONSIDERATIONS IN CUSTODY AND ACCESS ORDERS

The following issues and recommendations are mentioned herein as matters for discussion by the Board. Some of these recommendations are the view of the author of this paper. Other views are those of other writers or of the courts themselves.

A. Custody

I. Considerations in Custody Determinations (parent herein refers to any custodial applicant)

1. Should the standards used by judges be codified or should judges be free to use their own discretion?

PRO (a) Supreme Court judges are no more qualified than the average layman to work out what is best for the child.

(b) It is undesirable to leave a system of adjudication whereby different judges would make different custody orders in the same fact situation--there is a need for conformity.

CON (a) Courts tend to look at the evidence as a whole rather than proceeding through a check list of factors.

(b) What is best for the infant is by its very nature subjective--the weights to be attached to the factors used in custody determination must vary according to the circumstances so as to make objectivity and codification redundant.

RECOMMENDATION: (a) Create a number of rebuttable presumptions that could be applied in custody litigations--problem of what presumptions should be establish

(b) Use trained workers to make the reports and have the judges interview the children as well.

(c) Train judges in the use of reports provided by social workers and other child guidance experts.

(d) Use independent social workers (free from party loyalty) as witness in court. Have the child represented by his/her own counsel. The use of trained social workers and judges who are trained to handle custody disputes necessitates a program which not only provides a continuous and abundant source of trained experts experts which are informed of current psychological and sociological thinking as regard the infant's welfa

2. Is the paramount consideration separate and apart from the other considerations or merely a unified statement of all the considerations included in it? If the paramount consideration is separate, should all other considerations yield?

RECOMMENDATION — The other factors listed and discusse are merely a 'part of the whole.' Each factor may/may not be considered depending upon the area of conflict involved in the custody dispute. However, the sum of these factors should represent, when carefully considered, a decision which reflects the best interests of the child.

3. Should the biological parents have any preference over strangers in custody disputes?

RECOMMENDATION (a) In light of current thinking, it is suggested that biological parents should not have a preference in custody disputes. As such, the approach adopted by the Ontario Court of Appeal in Re Moores and Feldstein is to be preferred and that the decision of Rand J. in Hepton v. Maat as regard biological preference should be disregarded. It is the 'psychological' parent and not the 'biological' parent which promotes normal childhood development.

(b) Long range prediction is impossible--however, decisions should be rendered with a view towards finality--it is suggested that once a child is placed in a home

then the child should not be removed from its surroundings unless there is a possibility of harm to the child. It therefore follows that a stable environment is to be preferred over an unstable home life.

4. How much consideration, if any, should be attributed to religious problems?

RECOMMENDATION (a) Any argument to the effect that the father's right to direct the religious training of the child still exists should be disregarded.

(b) The custodial parent should be free to direct the religious training of the child.

(c) If any sibling is old enough, his/her wishes should be respected as regard his/her preference of religion (see Bateman v. Bateman).

(d) Any agreements made by the parties as to the religious upgringing of the child should be considered binding if and only if it is in the best interes of the child. Furthermore, parent's wishes should be respected but not necessarily adhered to unless they are in the child's best interests.

(e) No preference should be shown by the court as between agnosticism versus a religion. Furthermore, no preference should be shown by the court for any religion among several religions. However, in certain situations, the child's best interests may dictate that the child be raised in a certain religion (see Hayre v. Hayre).

5. Should conduct and morality of the parents be a factor? To what extent should a parent's conduct be a factor?

RECOMMENDATIONS (a) Desertion, in itself, should not be a ground for denying custody. Detail underlying the desertion should be evaluated. Furthermore, the guilty

spouse should not be 'punished' because of his/her desertion vis-à-vis denying custody.

(b) Marital misconduct of any form should be relevant if and only if the welfare of the child is endangered.

(c) In particular, adultery or homosexuality should have little bearing unless there is a possibility of the infant's morals being endangered. So also with a 'drinking' problem--unless it constitutes a hindrance to the proper care of the child, it should be irrelevant. For criminal convictions, it is important to determine how the conviction relates to parental responsibility and the psychological welfare of the child

- Quaere what effects will occur in a child's sexual development should the child remain in the custody of a homosexual parent for a significant period of time.

(d) Actions by a custodial parent in making access difficult for the other parent should be considered by the court in two ways:

(i) the custodial parent may be at fault but yet it is better to deny access and leave the child where it is

(ii) the custodial parent shows little concern for the welfare of the child, perhaps indicating that a change of custody is in order.

(e) Past conduct of a parent is of little relevance unless it appears that such conduct is likely to be repeated.

(f) Abduction by a parent of a child (legal kidnapping) should not be in itself a ground for denying custody. Factors behind the spouse's action should be examined.

6. Should mental fitness of the parent be a factor? If so, to what extent?

RECOMMENDATIONS (a) In cases where the mental normalcy of a parent is suspect, a psychiatric evaluation of the parent should be a condition precedent to said parent receiving custody. Mental normalcy includes low intelligence (to the extent of being incapable of caring for the child), any organic disorder, brain injury, senility, psychosis. Quaere as to who should make this request for an examination?

NOTE (a) Intelligence rarely improves during adulthood

(b) Children become less adoptable as they get older

(c) Court should check the availability other people to assist the parent

(d) Evaluate past performance of the parent if at all possible

(e) Also to be considered are these factors: parental devotion, condition of older brothers and sisters and the condition of the child itself, condition of the home as a whole.

7. Should the physical fitness of the parent be a factor? If so, to what extent?

RECOMMENDATIONS (a) There are reported cases today where paraplegics and quadraplegics are getting custody of their child. It is suggested that the court examine situation in light of how will the child fare--if the child will not suffer, then custody could be grant Other factors such as availability of extra help should be considered.

(b) Should the generation gap be minimi as much as possible? i.e. award custody to younger parents over older parents.

8. What role does the "tender years" doctrine still play?

RECOMMENDATIONS (a) This area is perhaps the most confusing of all. There is much

evidence, both pro and con this doctrine. It is suggested that this doctrine should not carry the force of a rebuttable presumption. Rathe each case should be evaluated individually having regard to such factors as:

(i) whether or not the mother will be working
(ii) is the man an 'experienced' housekeeper

(b) Justification for retaining the tender years doctrine which center around the arguments of administrativ convenience and a genuine belief that mother will be the better parent mere cloud the issue.

9. What weight should be attached to the financial standing of the parent?

RECOMMENDATION (a) Materialism and happiness are not necessarily synonymous. Although there is evidence to the effect that variations in child behaviour are directly related to the social economic environment in which the child is living, it is suggested that financial standing has little weight except in cases where there is a real and apparent danger to the child vis-à-vis its health (malnutrit poor sheltering, etc.)

10. How much weight should be given to the parents' wishes and plans?

RECOMMENDATION (a) It is suggested that parent's wishes should have little weight attached to it unless they are synomymous with the child's best interests. The conduct and morality of the parents is a better guideline by which to evaluate the sincerity of the parent.

11. Should the child's preference be respected?

RECOMMENDATION (a) There is much dispute over whether a child's wishes should be respected. Most judges today will listen to an infant, the weight attached to the infant's preference being a function of their maturity. Regardless of whe or not any weight should be attached the infant's preference, it may be desirable to encourage the infant to talk freely.

(b) A judge should be allowed to intervie a child in his chambers. Disclosure should be made unless there is a possibility of harm to the child-- both parents and their counsel should know of the substance of the intervie so that they may contest and rebut ar beliefs that the judge may have forme

12. How much weight should be given to these factors: child's age, sex, health, and race?

RECOMMENDATION. (a) The tender years doctrine and maternal preference rule arise when one considers the child's sex or age. Robinson states that little research has been done in this area. Littner argues that pre-adolescent children should stay with their mother. It is suggested that no rebuttable presumption should be created here and that if the child's interests are to be served, other factors must be considered also.

(b) Child's health is a function of a stable and healthy environment. It is suggested that judges place the child with the parent who can best meet the emotional and physical problems of the child.

(c) As to race, it is suggested that no one race should be preferred over another unless there is a possibility of a social stigma being attached to the infant which may cause him/her ha

13. Should siblings be split up? What factors should the court consider here?

RECOMMENDATION (a) Siblings should not be split up unless it is found to be in the best interests of the infant to do so.

14. Should justice be a relevant consideration?

RECOMMENDATION (a) Justice should play no part whatsoever in custody disputes.

15. Should custody orders be made final?

RECOMMENDATION (a) Custody disputes should be resolved as quickly as possible so as not to prolong the period of uncertainty for the child.

(b) Custody proceedings should not be final but the courts should be reluctant to remove an infant from a stable and secure environment.

B. Access

(1) Should the current method of deciding access disputes be maintained? (i.e. should we keep access alive)

(2) What benefits does the new approach have over the old approach?

(3) If the current view as to access is accepted, then should the non-custodial parent be granted any powers over the child aside from the power of care and control over the child during visits?

(4) When should access be denied under the current approach?

(5) As regard frequency and duration, should the court fix the period of access or should the parties be free to work out the arrangements amongst themselves?

(6) Is divided custody a viable alternative?

(7) Can access rights be granted to people other than family members? If so, who and when?

C. Suggested Draft Revision of Section 46(2) - Domestic Relations Act

If the statute is to be of any use whatsoever, then it is abundantly clear that s. 46(2) is of little help to the Courts as it presently exists.

Section 46(2) merely provides that in making an order as to custody, the Court shall have regard to the welfare of the infant, the conduct of the parents, and the wishes of the father and mother.

A suggested revision may read as follows:

Considerations in Custody Disputes

(1) In this section, party means a parent or other person seeking an order for custody of a child.

(2) When making an order as to custody, the Court MUST give paramount consideration to the best interests of the child.

(3) 'Best interests' of the child means the sum total of factors to be considered, evaluated, and determined by the Court.

(4) Included, but not necessarily exclusive of all factors to be considered by the Court are the following:

(a) the mental, emotional and physical health needs of the child including any special needs for care and treatment.

(b) the views of the child, the weight of which is to be determined by the Court having regard to the maturity of the infant.

(c) the love, affection and other emotional ties which exist between the child and
(i) the competing parties
(ii) each sibling of the child

(d) the capacity of a party to give the child love, affection and guidance

(e) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(f) the mental and physical fitness of the parties insofar as the welfare of the child may be endangered

(h) the conduct of the parties insofar as
  (i) the welfare of the child may be endangered
  (ii) such past conduct may be indicative of such future conduct by the parents as would endanger the welfare of the child

(i) the ability of either party to provide the child with material needs, food, clothing, medical and remedial care

(5) In custody disputes between parents the parent awarded custody shall prima facie be entitled to determine the religion of the child subject to
  (a) section 4(b)
or (b) such a decision endangering the health and welfare of the child

(6) No preference shall be given to the biological parent over a stranger in any custody dispute.

(7) Insofar as possible, the Court shall make an attempt to keep the siblings of a marriage together having regard to

(a) section 4(b)
or (b) noting that such a decision may/may not be possible having regard to the best interests of the child

(8) Excepting those provisions above which provide for a presumption in favour of either party, there shall be no rebuttable presumptions placed upon any party to the action

(9) In addition to the factors mentioned above, the Court shall consider any other factor considered to be relevant to a particular custody dispute.

Considerations in Access Orders

(1) In this section, party means a parent or other person seeking an order for access to a child

(2) In any dispute as to access, the Court MUST give paramount consideration to the best interests of the child

(3) The factors to be considered by the Court are those as found in the redraft of s. 46 as are appropriate to consider. In addition, the court shall consider

(a) the unsettling effect that visits have on the child and its seriousness

(b) the frequency and duration of visits having regard to the age and maturity of the child

The above two sections are inclusive of all factors considered in the custody report. The provisions contained within the section are suggesions only and cover as many as possible of the circumstances that may arise in a dispute. As such, it is obvious that a final draft of the section may be much shorter in form.

Secondly, the section on access was drafted with a view towards maintaining access in its present form. Depending upon the discussion of the Board, as based on the custody paper and their own respective views, such a section may or may not have any applicability.

IX. Appeals

Every custody decision, though necessarily aimed at securing the welfare of a child, is at best a decision as to which course of judicial action is the least wrong to adopt. Such a decision necessitates the exercise of a judicial discretion and, since the "mere idea of discretion involves room for choice and for differences of opinion,"[298] the task of an appellate court called upon to determine whether the court below has correctly exercised the discretion vested in it is an unenviable and difficult one. This is particularly so in custody disputes because what will best secure a child's future is susceptible of neither an easy nor, in many cases, an incontestable answer.

An award of custody which depends upon an assessment of the various characteristics of the applicants and of the child is likely to be substantially influenced by the trial judge's observation of the demeanor of the contestants

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298 Osten & Co. v. Johnson, [1941] 2 All E.R. 245 per Lord Wright at p. 256

during the course of the hearing. Such evidence is not available to an appellate court and consequently, appeal courts are reluctant to interfere with the discretion of the trial judge. This principle is of course the traditional view with respect to the province of an appeal court on questions of fact. The question of custody is essentially a question of fact and should therefore fall within this general proposition. Indeed the argument for the discretion of the trial judge is much stronger in the case of custody disputes because so much depends upon the assessment of the character of the applicants.

The principles upon which an appellate court will act were expressed by Cartwright J. in Re Bickley:[299]

> On reading and rereading the reasons of the learned trial judge in the light of all the evidence in the record we find it impossible to say that he did not make full judicial use of the opportunity given to him, and denied to the appellate courts, of seeing and hearing the parties; the advantage thus afforded to the trial judge is always great but peculiarly so in a case of this sort where so much depends upon the character of the parents whose claims are in conflict. It is not suggested that the learned judge misdirected himself on any question of law; and, in our respectful opinion, the Court of Appeal were not warranted in setting aside his decision that it was in the best interest of the children that they should be given into the custody of their father.

The same principle was expressed by the Judicial Committee of the Privy Council in McKee v. McKee:[300]

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299 [1957] S.C.R. 329, at p. 333

300 [1951] 1 All E.R. 942 per Lord Simonds at p. 945

> . . . the question of custody of an infant is a matter which peculiarly lies within the discretion of the judge who first hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and . . . his decision should not be disturbed unless he has clearly acted on some wrong principle or disregarded material evidence.

That these principles express the law in Canada is clear. They have been cited and applied in numerous cases[301] throughout Canada and have recently been affirmed in the Supreme Court. In three recent cases before the Supreme Court, Retzer v. Retzer,[302] Talsky v. Talsky,[303] and MacDonald v. MacDonald[304], the Supreme Court in each case upheld the ruling of the trial judge, twice overruling the provincial courts of appeal to restore a trial judgment.

In Retzer v. Retzer the Alberta Court of Appeal reversed the decision of Cavanagh J. who had awarded custody to the father in a divorce action. The husband obtained a decree on the basis of mental cruelty in that the wife had returned to her former religious faith with vehemence and had insisted upon instilling her faith upon the children. This had disrupted a marriage which had been tranquil for twelve years until the wife's conversion. There had been several incidents of name calling and several physical confrontations in which the husband had slapped the wife.

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301 Genest v. Genest (1971) 3 R.F.L. 97 (B.C.C.A.); Tew v. T (1972) 5 R.F.L. 10 (Sask. C.A.); Farden v. Farden (1973) 8 R.F.L. 183 (Sask. C.A.); Rennie v. Rennie (1973) 11 R 278 (P.E.I. C.A.).

302 (1975) 19 R.F.L. 365 (S.C.C.)

303 (1976) 21 R.F.L. 27 (S.C.C.)

304 (1976) 21 R.F.L. 42 (S.C.C.)

On this basis the wife had counterclaimed upon the basis of physical and mental cruelty. Without reasons, the Court of Appeal allowed the wife's counterclaim and awarded her custody. The husband appealed to the Supreme Court. The Court allowed the appeal and restored Cavanagh J.'s judgment. Speaking for the Court, Laskin C.J.C. found that the trial judge's findings of fact on contested issues were amply supported by the evidence. He emphasized the considerable advantage gained by being able to observe the spouses in the witness box and stated that the issues required careful assessment which the trial judge was in the best position to make. He stated[305]

> I am unable to say that his conclusions showed disregard of the evidence or were based on a clearly wrongful evaluation of the conflicts in evidence which the record of the case indicates.

Judgments delivered contemporaneously in Talsky v. Talsky and MacDonald v. MacDonald show the extreme reliance placed upon the trial judge. In Talsky the trial judge had found the wife to be "well nigh impossible" as a wife but still awarded her custody. The Court of Appeal overruled this decision feeling that the trial judge had mistakenly regarded the tender years doctrine as a rule of law and that he had mistakenly regarded the welfare of the infants as the sole consideration rather than as the paramount consideration.

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[305] (1975) 19 R.F.L. 356 at 367

The mother appealed to the Supreme Court which allowed her appeal in a 3 to 2 decision. The Supreme Court judges all disagreed that the trial judge had regarded the tender years doctrine as a rule of law and felt that he had correctly regarded the welfare of the infants as the paramount rather than sole consideration. However, Spence J. for the minority felt that the trial judge had placed too little emphasis on the instability of the mother, her action in breaking the matrimonial home and her lack of plans for the children as compared to the father's careful planning. However, de Grandpere speaking for the majority stated[306]

> These two errors of the Court of Appeal committed in a case where facts only are under consideration (in the absence of a manifest error by the trial judge which I cannot find here) should bring this court to the conclusion that the trial judgment must be restored; obviously our function is not to retry the case. This is in accordance with a very long-established jurisprudence and, in my view, ends the matter.

In MacDonald the facts were quite similar although somewhat less unfavourable to the wife. In this case, the trial judge chose to award custody to the father. This was affirmed by the Court of Appeal and by the Supreme Court which cited Bickley and McKee in declining to reverse the decision.

That two apparently conflicting decisions made upon similar evidence were both upheld by the Supreme Court shows the degree to which the court is willing to rely upon the trial judge's discretion. This might be criticized on the ground that custody cases will depend upon the whim of an individual judge and that it is inequitable to have different judges arriving at different decisions upon similar facts. However, it is submitted that this criticism overlooks the fact that no two custody cases are the same. The importance of

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306 (1976) 21 R.F.L. 27 at 29

given factors may vary with the personalities involved so that two cases which appea similar in their facts may, for reaons not readily apparent in a written judgment, require exactly opposite decisions to safeguard the welfare of the children involved.

This is not meant to imply that an appeal court should never interfere with a trial judge's decision. The grounds upon which a court of appeal will interfere with the exercise of a trial judge's discretion have been concisely stated by Sidney Smith J.A., in Beck v. Beck[307] in the following terms:

> This court is always loath to interfere with the discretion of a learned judge, and will only do so for compelling reasons and on principles that need only the briefest re-statement: namely, has the learned judge applied any erroneous principles of law, has he taken into account any irrelevant factor, or failed to take into account any material one? If there has been no error in these respects, the assessment of the evidence is for him.

In addition to failure to consider a material factor, the failure of a trial judge to give sufficient weight to a material factor or conversely his giving too much weight to a material factor will be grounds for overturning the decision.[308]

The principles so far expressed represent the law in Canada. But these principles are expressed in general terms which beyond emphasizing the reluctance of the appellate court to intervene in custody disputes do little to show what the attitude of the appellate court will be in specific situations. For this it is necessary to examine cases in which appellate courts have intervened and to contrast them with cases in which they have refused to intervene. It is unlikely that any definite conclusion can be reached because each case turns

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307 [1949] 2 W.W.R. 1171 (B.C.C.A.) at p. 1179

308 Fry v. Fry [1947] 2 W.W.R. 34 (B.C.C.A.); Meikle v. Autl

upon its own particular facts.

Appellate courts are least reluctant to intervene when they feel that a trial judge has erred in his application of some principle of law to the dispute. In Re Ross[309] the trial judge believed that he was compelled to award custody of the children to the father since he could not find that the father had rendered himself unfit to be awarded custody. The trial judge indicated that he would have preferred to award custody to the mother had he not felt himself bound to award it to the father. The Saskatchewan Court of Appeal held that the judge was in error in considering himself bound to award custody to the father and instead awarded custody to the mother.

The same court in the next year in Wallis v. Wallis[310] overruled a judge who had varied a custody order on the basis that the children's health was endangered by a father who had tuberculosis returning custody of them. The Court of Appeal held that the wife could have raised the issue of the husband's health at the original hearing and that having failed to do so she was now prevented by the doctrine of res judicata from raising it at the present hearing. The decision has been subsequently doubted insofar as it refers to the application of res judicata to custody disputes.[311]

The New Brunswick Court of Appeal in Re Dube[312] allowed an appeal by a mother from the dismissal of her application for custody on the ground that she would take the child out of the jurisdiction which would prejudice the father's right of access. The Court of Appeal felt that if the wife had legal

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309 [1928] 2 W.W.R. 161 (Sask. C.A.)

310 [1929] 1 W.W.R. 631 (Sask. C.A.)

311 Turner v. Turner (1967) 58 W.W.R. 27 (B.C.S.C.). This topic is discussed in greater detail under the section on variation

312 (1956) 3 D.L.R. (2d) (Alta. C.A.)

custody, which they felt she deserved, then she had the right to remove the child to Quebec. It should be noted that in this case the father had forcibly removed the infant from the mother's residence in Quebec.

It was made clear in Talsky that had the trial judge made the mistake of applying the tender years doctrine as a rule of law or if he had considered the welfare of the child as the sole rather than paramount consideration, his decision would have been overturned. Such an error would have been a mistake of law sufficient to enable the Supreme Court to either remit the matter back for a retrial or to substitute its judgment for his. This would have been necessary because the application of a wrong principle may not always produce a result which when viewed without the error is wrong. In some cases the result may be correct; in others it will be wrong. If the result is correct it would be unjust to reverse the result merely because a principle was wrongly applied. Also an appellate court will not reverse a decision unless the error in principle has had some effect upon the determination of custody. In Heikel v. Heikel[313] Milvain C.J.T.D. had awarded custody to one party in a divorce action and ordered that no application to vary the order should be made for a period of one year. The Alberta Court of Appeal held that there is no power under s. 11(2) of the Divorce Act to restrict an application to vary a custody order. But the custody award was left undisturbed:[314]

> . . . We are of the view that there was evidence upon which he was entitled to find as he did, that under these circumstances we should not interfere with his findings and conclusions when he has seen the witnesses in a case where an impression formed from the demeanour of a parent may not be clearly translatable into the words of a typewritten appeal book.

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313 (1971) 1 R.F.L. 326 (Alta. C.A.)

314 Id. at p. 328

In a number of cases the appellate courts have overturned custody awards on the basis of a lack of jurisdiction upon the part of the trial judge to make the order he has. In Leitch v. Leitch[315] it was held that where a petition for divorce did not claim custody and so custody was not in issue the trial judge had no right to make an ex parte order awarding custody to the father without any notice being served upon the mother. In Re Chartrand[316] a judge of the Ontario Surrogate Court held that he was not bound by a previous order of the Juvenile and Family Court since that court had made an award of custody while refusing an award for maintenance and this was beyond its powers under the Ontario Deserted Wives and Children's Maintenance Act which tied an award of custody to a maintenance order.

In Munz v. Munz[317] the Alberta Court of Appeal quashed an order committing the husband for contempt in refusing to deliver the child to the wife pursuant to an interim custody order. The Court held that the custody order should never have been made since the trial judge should have refused jurisdiction. The child had only been present in Alberta due to the mother's surreptitious removal from the lawful custody of the father in Alberta. The father was present in Alberta involuntarily after being detained in Vancouver under a charge under the Criminal Code which was later withdrawn. In the circumstances the Court of Appeal felt that the links with Alberta were tenous and uncertain and that if the mother wished to obtain custody she could apply in Austria where all the parties had lived.

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315 (1975) 17 R.F.L. 248 (Ont. C.A.)

316 (1965) 49 D.L.R. (2d) 203 (Ont. Surr. Ct.)

317 (1974) 15 R.F.L. 123 (Alta. C.A.)

Appellate courts are not reluctant to interfere when the trial judge errs in law. But since the general principles to be applied are clear it is very seldom that a judge applies a wrong principle of law. Most of the appeals on a question of law concern procedural matters which may deny a particular court jurisdiction but are unlikely to result in an award of custody to the appellant. Generally the main grounds upon which decisions are appealed is that the trial judge erred in either considering an irrelevant factor, ignoring or placing insufficient weight upon a material factor, or placing too much weight upon some factor. A judgment by an appellate court on this basis is likely to be more subjective than a decision that a wrong principle of law has been applied. This is because there is general agreement upon the principle of law to be applied in custody cases, i.e., that the welfare of the child is the paramount but not sole consideration. However, there is no such consensus upon what factors should be considered and what weight should be accorded to them in assessing the infant's welfare. In effect, the appellate court is substituting its opinion for that of the trial judge as to what is best for the child.

In Cairns v. Cairns[318] the Alberta Court of Appeal allowed an appeal by the mother of an infant from the refusal of the trial judge to order a variation in an award of custody which he had granted to the father. At trial the judge had indicated that the only reason that he did not award the mother custody of the infant was that he was not satisfied that her relations with the co-respondent had ceased. The mother's uncontradicted evidence was that these relations had now ceased but the trial judge held that there was no foundation for reversing the original order. The Court of Appeal held that he was in error because in view of his

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[318] [1932] 1 W.W.R. 364 (Alta. C.A.)

clear reason for depriving the mother of custody now having been removed he should have awarded custody to the mother. They also felt that not enough emphasis had been placed upon the father's lack of affection for the infant.

The trial judge in Fry v. Fry[319] transferred custody of the children, originally granted to the mother under a divorce decree, to the father without giving reasons. The British Columbia Court of Appeal overturned the order. They felt that the trial judge had overlooked the conduct of the father in "trafficking with the welfare of the children for his own advantage." The "trafficking" referred to was the earlier willingness of the father to renounce all claims to custody in return for a release of an obligation to maintain either his former wife or the children. The Court of Appeal quoted Viscount Simon L.C. in Blunt v. Blunt[320]

> . . . appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it been attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations . . . Then the reversal of the order on appeal may be justified.

Three years later in Beck v. Beck[321] the same court overruled a trial judge who awarded physical custody to the maternal grandmother while leaving the legal custody in the father. The court felt that the effect of this decision was to give actual custody to the mother of the child who lived with the grandmother. They felt that such an award ignored the moral welfare of the child who should not be living with a woman who had been divorced three times for adultery (twice from the father of the infant).

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319 [1947] 2 W.W.R. 34 (B.C.C.A.)

320 [1943] A.C. 517 at p. 526-7

321 [1949] 2 W.W.R. 1171 (B.C.C.A.)

In Weeks v. Weeks[322] the Court of Appeal while not according the tender years doctrine the status of a rule of law felt that too little emphasis had been placed upon it by the trial judge. Custody was awarded to the mother. A recent Alberta case, Meikle v. Authenac[323] had the Court of Appeal reverse the trial judge on a number of grounds. The Court of Appeal felt that too little emphasis was placed upon a father's right to the legal custody of his child in a contest with the stepfather of the infant. They felt that too much emphasis was placed upon the failure of the father to pay maintenance payments promptly, the better home that the step-father's parents could provide and the emotional trauma of disrupting a home to which the infant had adjusted. A major consideration for the court of appeal was the prima facie right of a parent to custody of their child as against a stranger. It is interesting to contrast this case with the case of Re Moores and Feldstein[324] an Ontario Court of Appeal decision later affirmed by the Supreme Court without reasons. The Court of Appeal overruled a trial judge's award of custody of an infant to the mother of the child. The trial judge had felt that he was bound to do so because he could not find that the mother was an unfit mother or that she had abandoned the infant. The Court of Appeal held that the trial judge was in error in that no rule of law compelled him to disregard the welfare of the inant in favour of the rights of a natural parent and in that he had not placed enough emphasis upon the effect of disrupting the only hoem that the four year old infant had known to place her in a less stable home environment with a parent who was a complete stranger.

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322 [1955] 3 D.L.R. 704 (B.C.C.A.)

323 (1971) 3 R.F.L. 84 (Alta. C.A.)

324 (1974) 12 R.F.L. 273 (Ont. C.A.)

These cases, particularly the last two, illustrate the very real problem in custody cases that, since any decision as to the future upbringing of the child is bound to be speculative, this allows wide scope for genuine differences of opinion. This raises the question of whether an appellate court should intervene if their opinion as to what is in the best interests of the child differs from that of the trial judge. In the preceding cases they have done so but it is important to note upon what basis they did so. In no case did they dispute the findings of fact made by the trial judge but they did disagree with, and overrule, the inferences he had drawn from these facts as to what would best protect the interests of the children involved.

Appellate courts are reluctant to interfere even with the inferences drawn by a trial judge unless they feel that those inferences lead to a result which is clearly wrong. This was shown clearly in Talsky v. Talsky discussed supra, p. 208 when the Supreme Court refused to disturb an award of custody to the mother despite a great deal of evidence from which they could have drawn unfavourable inferences. Conversely in MacDonald v. MacDonald (supra p. 209) they again refused to alter a custody order this time made to the father with far less unfavourable evidence against the mother. In Tew v. Tew[325] the Court felt that an appellate court should not in the absence of"impelling reasons" interfere with the judgment of a trial judge in custody cases. Similar feelings were expressed in Genest v. Genest[326] and Farden v. Farden[327]. In Francis v. Francis[328] the Saskatchewan Court of Appeal had this comment:

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325 (1972) 5 R.F.L. 10 (Sask. C.A.)

326 (1971) 3 R.F.L. 97 (B.C.C.A.)

327 (1973) 8 R.F.L. 183 (Sask. C.A.)

328 (1973) 8 R.F.L. 209 (Sask. C.A.) at p. 219

> Learned counsel for the appellant argued that, as there was no conflict of evidence, this Court was in as good a position as the trial judge to draw the necessary inferences, and that it should not hesitate to do so, even if such inferences were contrary to those drawn by the trial judge. In general, such an argument is a sound one. In custody cases, however, it is subject to some reservation. When there are conflicting claims by the parents, the determination of the sincerity and honesty of purpose of the claimants is of particular importance. In the determination of these matters, the advantage which the trial judge has in hearing and seeing the parties, and judging their temperament, is of significant importance, and one which must be recognized by the appellate tribunal.

In Rennie v. Rennie[329] the wife appealed an award of custody to her husband. The majority opinion had little difficulty in upholding the trial judge's decision. They expressed their understanding of the duty of an appellate court as follows:[330]

> In the adversary system under which we practice, a trial in the first instance is carried on before a single judge whose responsibility it is inter alia to hear the evidence, to weigh the evidence and to examine the demeanour of the witnesses produced before him. In my opinion, it is not the perogative of the Appeal Court to interfere with or to substitute its opinion for that of the trial judge unless, of course, it can be said that he did not make full judicial use of the opportunity given to him - but not to this Court - of seeing and hearing the parties - an opportunity denied to an appellate court.

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329 (1973) 11 R.F.L. 278 (P.E.I. C.A.)

330 Id. at p. 281

Bell J. had more difficulty in upholding the decision of the trail judge. He reviewed the evidence and stated "Now in reference to claim made for the infant child, I may say if I had tried the case, I would have awarded the child to the respondent, the mother" but he quoted Lord Thankerton in the case of Watt (Thomas) v. Thomas[331] on the duty of an appellate court:

> In my opinion, the duty of an appellate court in those circumstances is for each judge to put it to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Bell J. felt that in the circumstances of the case he could not say that the trial judge was "clearly wrong" and he felt it to be his duty to defer to the trail judge's judgment.

Canadian courts have generally resisted a line of authority which advocates a more aggressive role for appellate courts. The casis of this reasoning involves the case of Hvalfangerselskapet Polaris A/S v. Unilever Ltd. (1933), 46 Ll.L. Rep. 29 a decision of the House of Lords. The trial judge had disbelieved certain material witness and the Court of Appeal felt that since the trial judge had seen the witnesses and heard the conflicting testimony it was impossible to interfere with his finding. But the House of Lords felt that the evidence ought to be accepted as truthful because it was "entirely consistent with the probabilities and the business conditions proved to be in

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[331] [1947] A.C. 484 at 489

existence at the time". This decision was cited by the Court of Appeal in Yuill v. Yuill (1945) p. 15 as showing how important it was that the trial judge's impressions should be carefully checked by a critical examination of the whole of the evidence. Both these cases were cited by O'Halloran J.A. in Brethour v. Law Society of British Columbia[332] in which he stated:

> . . . The real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and under those conditions. A Court of Appeal must be satisfied that the finding of credibility in the tribunal of first instance is based, not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

None of the above cases were custody cases but in Weeks v. Weeks[333] O'Halloran sought to apply them in a custody dispute. The majority of the court relied upon the failure of the trial judge to consider vital medical and other evidence relatin to the mother's fitness and his failure to consider the need of young children for their mother. O'Halloran attacked the actual findings of the judge and used this as his basis for overturning the decision. He felt:[334]

> . . . a Court must look for the balanced truth in the corroborative evidence if such exists and in any event measure all the evidence perspectively by the test of its consistency with the preponderance of probabilities in the surrounding circumstances . . . It remains to apply these principles to the incidents in this case. If it is found that

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332 [1951] 2 D.L.R. 138 at p. 141-2 (B.C.C.A.)

333 [1955] 3 D.L.R. 704 (B.C.C.A.)

334 Id. at p. 281

> they have been adhered to, it is open to the Court of Appeal itself to make appropriate finding of fact, once it is established that the credence a trial judge has given to a witness conflicts with these principles.

It is perhaps merely a question of degree between overruling a trial judge because he has not placed the proper weight upon some material factor and overruling him by attacking his findings of fact because they do not conform to the Appeal Court's view of what the evidence shows to be probable. However, Canadian courts have been unwilling to adopt the attitude advocated by O'Halloran J.A. In Genest v. Genest[335] McFarlane J.A. referred to Weeks v. Weeks pointing out that O'Halloran's judgment was not the judgment of the courts; that appellate courts should interfere only for the most impelling reasons; and finally accepting Weeks v. Weeks only as authority for the proposition that a court of appeal should be reluctant without good reason to interfere with a trial judge. These statements were cited with approval by Tweedy J. in Rennie v. Rennie. Commenting upon the trial Judge's findings that the wife's conduct was improper and not reasonably explained he stated:[336]

> In my opinion, no appeal Court is in a position to make such findings as these unless it was in the position of the trial judge, and it is my understanding of the law that an appeal court has no right to disregard these findings.

Canadian appellate courts may overrule a trial judge's inferences drawn from the evidence but they have not chosen to overrule his findings of fact in regard to demeanour and credibility of witnesses.

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335 (1971) 3 R.F.L. 97 (B.C.C.A.)

336 (1973) 11 F.R.L. 278 at p. 283 (P.E.I. C.A.)

In two recent British Columbia cases it has been suggested that the function of an appellate court has been changed by the Divorce Act. S. 17(1) of the Divorce Act provides that an appeal lies to the court of appeal from any order other than a decree absolute pronounced by a court under the Act. S. 17(2) says that

> (2) The court of appeal may
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal and
>
> (i) pronounce the judgment that ought to be pronounced including such order or such further or other order as it deems just; or
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> (ii) order a new trial where it deems it necessary to do so to correct a substantial wrong or miscarriage of justice.

Speaking in Nash v. Nash[337] Laskin C.J.C. answered an argument by counsel that the Court of Appeal ought not to have interfered with the discretion of the trial judge in ordering periodi payments by stating that "s. 17 of the Divorce Act gives the widest powers to the Court of Appeal". This passage was cited in Pillar v. Pillar[338] in the British Columbia Court of Appeal as indicating that the function of an appeal court had been altered by s. 17. Therefore:

> I therefore approach this case on the basis of having a discretion as to what is fit and just under these particular circumstances. In exercising this discretion I must give due consideration to the views of the trial judge. That he had the advantage of seeing and hearing the witnesses does not weigh too heavily in the present case because there is no dispute on the facts.

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337 (1975) 16 R.F.L. 295 at p. 301 (S.C.C.)

338 (1975) 17 R.F.L. 252 at p. 256 (B.C.C.A.)

Both Nash and Pillar were cited in Lazenby v. Lazenby[339] in which the judge discussed s. 17 and stated:

> In my opinion this makes it necessary for the Court of Appeal to consider all of the circumstances and make a decision which it deems to be just.

It is important to note that all three of these cases concerned maintenance payments rather than custody awards. Although s. 17 also governs appeals of custody awards under the Divorce Act no reported case has sought to extend this reasoning to a review of custody decisions. It is submitted that it is unlikely that the courts would be willing to make this extension. Appellate courts seem to feel qualified to assess what is necessary for maintenance but they are more reluctant to disturb a trial judge's evaluation of what is best for the children in a custody dispute.

It is apparent that there are two basic grounds upon which Canadian appellate courts will intervene to overrule a trial judge in a custody dispute: they will overrule a decision based upon a wrong application of legal principles or where the trial court lacked jurisdiction to hear the case; and they will intervene if they consider that the trial judge's decision was clearly not in the best interests of the infants involved. A mistake by a trial judge in applying a principle of law will only result in his decision being overruled if the appeal court believes that it led him to a decision not in the best interests of the children. Therefore, unless the appellate court determines that the trial court lacked jurisdiction to hear the case at all the only real ground upon which a trial judge's decision will be overturned is that the appeal court considers that he was wrong in his assessment of what was best for the infants. Attempts to

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339 (1975) 18 R.F.L. 393 at p. 394 (B.C.C.A.)

argue that the trial judge placed too much, or too little, weight on some factor are merely another way of saying that he came to the wrong decision.

Canadian appellate courts have been extremely relucant to intervene unless they feel that the trial judge as clearly wr in his decision. Mere doubts as Bell J. felt in Rennie v. Rennie are not sufficient; the appeal court is aware of the advantages possessed by the trial judge and will intervene only if they feel that he was clearly wrong. Furthermore, despite the efforts of O'Halloran J.A., Canadian courts have not chosen to attack the findings of fact upon which the trial judge basis his decision. They may draw different inferences from the evidence found by the trial judge but they seldom question the evidence itself. This is not to say that an appellate court would not intervene if it considered that some finding of fact was flagrantly wrong but they decline in th words of Tweedy J. to "retry the case".

It is submitted that the present system of appeals to the Court of Appeal is satisfactory. Appeals by way of stated case on a point of law are of little use in a vast majority of custody cases because the legal principles are well understood; it is their application to the particular facts of the case which is in issue. An appeal by trial de novc would be a misuse of the appellate court. It would be far too time-consuming and would accomplish no purpose. If the judges in the District and Supreme Courts cannot be trusted to make valid determinations of facts in issue then it is they who are the problem rather than the appeal system. It is submitted that there is a need for an appellate court to act in a general supervisory capacity in ensuring that clearly wrong decisions are overruled and that there is some measure of uniformity of approach among the various judges of first instance who hear custody cases. However, litigation

ought not to be encouraged in custody cases because protracted litigation is detrimental to the welfare of the infants in that it prolongs the period of uncertainty before a final decision is reached. Therefore it is submitted that the present reluctance of the appellate courts to intervene is justified in that it discourages litigants from appealing custody decisions unless there are very sold reasons for such an appeal.

It should be noted that the premise of this section on appeals was that the present adversary system in custody disputes would continue. It is beyond the scope of this paper to discuss whether the adversary system should be retained. Also there is no discussion of what effect a Unified Family Court would have since it is not known how such a court would be structured. The present system of appeals from family court decisions is discussed under the jurisdiction section.

X. Variation

It is generally recognized that a custody order is never final.[340] In the words of Beck J.A. "Orders for the custody of children are always subject to further applications and are to be treated as if expressed to be made - 'until further order' ".[341] The justification for this attitude is that the courts are primarily concerned with the welfare of the infants rather than the rights of the parties involved in the original hearing. This philosophy was expressed by the Alberta Court of Appeal in Cairns v. Cairns in the following terms:[342]

> It has been held more than once by our Court that an order for custody of an infant is never final in the sense that it cannot be changed and while it is certainly better for an infant generally that its custody should not be changed back and forth yet it is much more desirable that it should be changed than that it should remain where it is not in the best interest of the child that it should be.

Similar reasons were advanced by the Ontario Court of Appeal in Youngs v. Youngs.[343]

The principle has also received statutory recognition. Section 11(2) of the Divorce Act[344] provides that:

> An order made pursuant to this section may be caried from time to time or rescinded by the court that made the order, if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

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340 Wood v. Wood [1946] 2 D.L.R. 54 (Ont. C.A.); O'Lear O'Leary [1923] 1 W.W.R. 501 (Alta. C.A.)

341 Re P (Pipke) [1922] 1 W.W.R. 853 at 858 per Beck J. (Alta. C.A.)

342 [1923] 1 W.W.R. 364 at 366

343 [1949] O.W.N. 96 at 98 (Ont. C.A.)

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Similar provisions are contained in s. 46(3) of the Domestic Relations Act[345] and s. 10(7) of the Family Court Act[346] except that these sections do not set out the grounds upon which a judge should vary the original order.

In Heikel v. Heikel[347] Milvain, C.J.T.D. prohibited one of the parties to a divorce action from making any application to vary the access rights contained in the decree nisi for a period of one year. The Court of Appeal unanimously held that such a provision was contrary to the express words of s. 11(2) and ordered that the direction be struck out of the decree nisi. There has been no reported judicial comment upon the variation provisions in the Domestic Relations Act or the Family Court Act but it is submitted that a similar interpretation would be applied.

The concept that a custody order is always open to review has been challenged as not being in the best interest of the child:

> Child placement in divorce and separation proceedings are never final and often are conditional. The lack of finality which stems from the court's retention of jurisdiction over its custody decision, invites challenges by a disappointed party claiming changed circumstances. This absence of finality coupled with the concomitant increase in opportunities for appeal are in conflict with the child's need for continuity. As in adoption, a custody decree should be final, that is, not subject to modification.[348]

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345 R.S.A. 1970, c. 113

346 R.S.A. 1970, c. 133

347 (1971) 1 R.F.L. 326 (Alta. C.A.)

348 Goldstein, Freud and Solnit, Beyond the Best Interes of the Child, (The Free Press: New York) 1973, p. 3

This suggestion is a radical departure from the traditional concept of custody but it raises a major issue, should custody orders be final? The suggestion is based upon the need of the child for continuity and the authors' belief that the present system allows too much disruption of this continuity by encouraging protracted litigation. In order to determine if this criticism is valid it is necessary to examine the principles upon which the courts currently allow variations.

An application to vary a custody order is not an appeal of the original order; such an application cannot question the validity of the original order but merely submits that there has been a change in circumstances which would now warrant a variation of the original order.[349] The effect of this was described by Shepherd J.A. in Sims v. Sims[350]

> Under the order of November 27, 1953, custody was awarded to the father and no appeal was taken from that order. Hence that order must be taken to have determined that on the facts of that time the welfare of the child, although of tender years, required the custody to be given not to the mother but to the father. Accordingly, in the present application to review that order the mother must assume the onus of proving that those facts, which then required that custody be given to the father, have ceased to operate, and, further, that the circumstances have so changed that the welfare of the child will now best be served by taking the custody from the father and giving it to the mother.

The applicant must therefore show a change in circumstances sufficient to require a variation in the original order since the court will refuse to review the original order and will assume that it was valid.

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[349] Breau v. Breau (1973) 10 R.F.L. 391 (Ont. H.C.)

[350] (1956) 4 D.L.R. (2d) 259 at 262 (B.C.C.A.)

It has been stated on several occasions that the correct procedure, upon an application to vary an existing custody order, is by way of notice of motion in the original cause of action in which custody was determined and that whenever possible the application should be made to the judge who made the existing order. Section 11(2) of the Divorce Act gives statutory recognition to the latter principle, but cases like Re Bloom Infants,[351] Hampson v. Snider, Jones and Snider[352] and Warren v. Warren[353] illustrate that this was the established practice prior to the Divorce Act. However, the incorporation of this provision in the Divorce Act has caused jurisdictional problems which will be discussed in the section on the Divorce Act. If the original judge is available to hear the application another judge before whom the application is brought will adjourn the matter until it can be considered by the original trial judge.[354] The reasoning behind this would appear to be that the original judge is in the best position to determine whether the circumstances upon which he based his award have become so altered that the welfare of the children requires that the order be varied. However, where, as in Warren v. Warren or O'Leary v. O'Leary[355] the original judge is unavailable the application will be heard by another judge of the same court.

Failure to follow the correct procedure in initiating an application to vary a custody order will not necessarily result in the application being dismissed. In Re Balaski and Patterson[356] the wife sought to obtain custody of her

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351 (1958) 27 W.W.R. 285 (B.C.S.C.)

352 (1960) 33 W.W.R. 574 (Sask. Q.B.)

353 (1960) 33 W.W.R. 33 (Sask. C.A.)

354 supra, note 352

355 supra, note 340

356 (1960) 23 D.L.R. (2d) 275 (Man. C.A.)

children who had been awarded to the husband in the divorce proceedings. She had proceeded by way of notice of motion under the Infants Act and the husband objected that the proceedings should have been brought by originating notice since she was commencing a new proceeding. The Saskatchewan Court of Appeal held that procedure by notice of motion was correct but that it should have been styled in the original divorce action rather than under the Infants Act. However, they allowed the proceedings to continue and awarded custody to the mother. In Donald v. Donald[357] the New Brunswick Supreme Court treated a petition for custody as a motion to vary the order. In Course v. Course[358] the wife had obtained a decree nisi with custody of both children without access to the husband. In his answer to the wife's petition requesting a divorce and custody of the children the husband failed to raise the issue of custody. He now desired to reopen the proceedings on the question of custody and access. The court allowed him to intervene on the question of custody. It emphasized that the rules of pleading should not have been ignored but noted that the courts are most reluctant, in matters of custody and divorce, to enforce the rules strictly in the face of a party with a genuine desire to be heard at trial. However, the husband was demanding a privilege and so he was ordered to pay the wife's costs in opposing his motion to intervene. A rehearing on the custody issue was made conditional upon his paying those costs. The courts are reluctant to deny parties to a custody action the opportunity to be heard because technical procedural rules may interfere with the determination of what is best for the infant.

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357 (1973) 6 N.B.R. (2d) 668 (N.B.S.C.) aff'd in part 6 N.B.R. (2d) 665 (C.A.)

358 (1975) 51 D.L.R. (3d) 371 (Ont. H.C.)

For this reason there has been considerable discussion as to whether a custody order is res judicata as to all points which were raised at the previous hearing and all the points which the parties could, with reasonable diligence, have raised at any previous hearing. This principle was laid down by the Saskatchewan Court of Appeal in Wallis v. Wallis[359]. The mother of the infants had applied to vary the original order granting custody of the infants to their father. She argued that the health of the children was endangered because the father had tuberculosis. The trial judge varied the original order awarding custody to the mother and the father appealed. The appeal was allowed. Martin J.A. stated:[360]

> A careful perusal of the evidence convinces me that the plaintiff is in the same condition of health today as he was at the time of the granting of the divorce and of the order with respect to the custody of the children. There is no evidence that his condition has changed for the worse. This being so, the defendant could have adduced at the trial, on the question of custody, all the evidence as to the health of the plaintiff which she has brought forward on this application; she had the opportunity of putting forward the evidence in the former proceedings, but she either omitted, or chose not to put it forward at that time. The matter is therefore res judicata . . . I can find no authority to the effect that the doctrine of res judicata does not apply to applications for custody in the same manner as it applies to other matters before the courts.

This decision was applied in Rural Municipality of Lawrence v. Children's Aid Society of Winnipeg.[361] This case involved neglect proceedings but the court would presumably have applied Wallis if the proceeding had been a custody proceeding. Wallis has recently been cited by the

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359 [1929] 1 W.W.R. 631 (Sask. C.A.)

360 id. at 634-65

361 (1954) 13 W.W.R. (N.S.) 83 (Man. C.A.)

Saskatchewan Queen's Bench in Wentzel v. Wentzel.[362] The same principle was expressed by the Ontario High Court in Ginter v. Ginter[363] without reference to Wallis. This case was affirmed by the Ontario Court of Appeal although without reference to the views of the trial judge on res judicata.

However, in Slater v. Slater and Till[364] the British Columbia Court of Appeal ordered a rehearing upon the issue of custody in a divorce action. The appeal of the order awarding custody to the father had been based upon the inadvertent failure of the mother's counsel to lead evidence relevant to the question of custody. The court stated that generally it would view with disfavour any application for a rehearing based solely upon the mother's reason but in this case the situation involved the welfare of the children and

> . . . their welfare is paramount and all other principles must give way thereto so that justice may be done to them according to the special and differing circumstances that exist in every case wherein custody and access is to be decided.

In Turner v. Turner[365], Smith L.J.S.C. referred to the Wallis and Lawrence decisions but declined to follow them preferring to follow the views expressed in the Slater case. He commented upon res judicata in the following terms:[366]

> I venture to express, however, my respectful doubt as to the wisdom, in matters of custody where the situations of both custodian and child can and do alter radically in a short

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362 (1971) 3 R.F.L. 122 (Sask. Q.B.)

363 [1953] O.R. 688 (H.C.) aff'd [1953] O.W.N. 917 (C.A

364 [1945] 2 W.W.R. 612 (B.C.C.A.)

365 (1967) 58 W.W.R. 27 (B.C.S.C.)

> period of time, and where the mere growing process of the child itself creates new problems from year to year, of applying any principle which precludes a judge confronted with the unenviable task of deciding such a matter from fully exploring all relevant factors, including the complete history and background of the parties and the child or children concerned.

In Millett v. Millett[367] the Nova Scotia Court of Appeal expressly preferred the reasoning of Turner v. Turner to that of Wallis v. Wallis.

It is submitted that the reasoning of Smith, L.J.S.C. is to be preferred over that of Wallis v. Wallis. Generally all material evidence will have been raised at the original hearing. Any such matters considered by the trial judge cannot be reargued at the new hearing since this would merely be a review of the previous hearing. Consideration of earlier matters, raised at trial will therefore be confined to the extent that such consideration is necessary to assess later events[368] or to determine the credibility of witnesses.[369] There is no dispute with the contention that the court should prevent an abuse of process by refusing to allow the parties to reargue circumstances considered at the previous hearing. However, the decision in Wallis and Ginter go further than this and suggest that even evidence not before the trial judge should not be considered by a court hearing a variation

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367 (1974) 16 R.F.L. 180 (N.S.C.A.)

368 B(B) v. B(M) (1969) 1 All E.R. 591 at 902 (P.D.A.)

369 Wesson v. Wesson (1973) 10 R.F.L. 193 at 194-5

application if it could with reasonable diligence have been raised at the original hearing. This places a technical rule above the welfare of the children in that it denies the court the opportunity to assess evidence which may be extremely relevant in determining what is in the best interest of the children. It can be argued that the proper procedure would have been to appeal the original order but if the period of appeal is past then it is submitted that such evidence may form a valid ground upon which to vary the original order. By penalizing one of the parties for their failure the court may also penalize the children whose interests they are supposedly considering.

It is clear that the courts will not vary a custody or access order unless there has been a change in circumstances sufficient to warrant the change for the welfare of the children. However, this general principle does little to indicate what type of change in circumstances the courts will consider sufficient to warrant a change in custody. In order to determine this it is necessary to examine some cases in which a variation was applied for.

In Cairns v. Cairns[370] the Alberta Court of Appeal overruled the trial judge and held that there had been a change in circumstances sufficient to warrant a variation in the custody order made at the original hearing. The change in circumstances referred to was that the applicant wife had ceased all relations with the co-respondent in the divorce action. At trial the judge had stated that he would have awarded custody to the wife except that he was not satisfied that she had ceased all relations with the co-respondent. On the application to vary, the wife's unchallenged

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[370] supra, note 342

testimony was that these relations had ceased and the Court of Appeal felt that this merited a change in custody. A further factor noted by the Court was that the infants had always remained with the mother except for an interval of a few months between the hearings during which they resided with the father. In a similar case in Saskatchewan[371] the trial judge again stated that he would have awarded custody to the mother except for a number of factors, including her continued relations with the co-respondent, which led him to doubt her ability to properly care for the infant at that time. The mother later ceased relations with the co-respondent and applied to vary the custody order. The trial judge did so and his decision was affirmed by the Court of Appeal.

The conduct of a mother who had obtained custody of a young daughter was sufficient to supply grounds for a variation in Ducharme v. Ducharme.[372] Since the divorce the mother had engaged in sexual relations with several men, sometimes in the same apartment where the infant was asleep. The judge felt that such conduct, particularly in view of the fact that the mother saw nothing wrong with it, endangered the moral welfare of the child. In judgment, tinged with outraged morality he varied the order, awarding custody to the father. Even the undertaking of the mother to forbare from sexual activity when the infant was asleep in the apartment and the judge's express finding that in other respects the mother was a good mother were not sufficient to sway the judge. He concluded by hoping that the mother's "wide sweeping and modern philosophy of life will change before it does her irreparable harm." Fortunately such judgements are rare but parents who engage in conduct which offends the morality of the judge do run the risk of losing custody.

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371 Francis v. Francis (1973) 8 R.F.L. 209 (Sask. C.A.)

372 (1972) 7 N.S.R. (2d) 326 (N.S.S.C.)

Failure of a husband to pay maintenance owed is not sufficient to deprive him of his right to apply for a variation of the custody order.[373] However, it will be considered when the order is reviewed and combined with conduct such as failure to take an interest in the children may be sufficient to cause the court to deny the defaulting parent access.[374] In Donald v. Donald[375] the father had refused to pay maintenance as a means of enforcing his access rights. The trial judge criticized this conduct severely and considered it along with the dislike of the infant for the father's new wife as grounds for denying the father access. This was overruled by the Court of Appeal who did not feel that this was sufficient to deny access. The Court also mentioned that if it had come to the conclusion that the mother was influencing the infant in an attempt to deny the father access, then they would have considered awarding custody to the father. Other courts have also emphasized that conduct by custodial parents in attempting to deny the other parent access places their right to custody in jeopardy.[376] The conduct of the mother in taking an infant out of the court's jurisdiction to Portugal was one factor considered in Lebre v. Lebre[377] although the judge seemed to place more emphasis upon the mother's emotional instability and its effect on the infant. Although the courts warn parents about losing their right to custody by denying the other parent access there does not seem to be any reported case in which a court has varied a custody order for this reason. In Re Milsom[378] a mother lost her access rights because her continual

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373 Whitehead v. Zeigler (1975) 18 R.F.L. 357 (Ont. H.C

374 Youngs v. Youngs, supra, note 4

375 supra, note 357

376 Currie v. Currie (1975) 18 R.F.L. 47 (Alta. S.C.); Jones v. Jones (1971) 1 R.F.L. 295 (Ont. H.C.)

377 (1974) 13 R.F.L. 174 (Ont. H.C.)

378 (1973) 11 R.F.L. 250 (B.C.S.C.)

criticism of other members of the family disturbed the infant to whom she had access. However, in the absence of misconduct on the part of the parent exercising the access rights the mere wish of the custodial parents to terminate these rights is not sufficient to do so.[379]

The courts place great emphasis upon any change in the ability of either parent to care for the child. In Re P.[380] the Alberta Court of Appeal rejected an appeal from a trial judge who refused an application by an illegitimate mother to regain custody of her child whom she had left with a third party to care for the infant. The court was uncertain that the mother could economically support her child or provide a stable environment for it and so left the child with the third party for the time being although they made it clear that the mother could reapply if her circumstances changed. In Wesson v. Wesson[381] the court considered the improved emotional and educational status of the mother in refusing the father's application to vary the order. In Lebre v. Lebre[382] the emotional instability of the mother influenced the judge in awarding custody to the father. Both parents were working in Millett v. Millett[383] but because the mother would be able to be at home more than the father the court considered her home to be more suitable for the infant. In Francis v. Francis[384] the mother received a variation in the custody order granting her custody. Among the factors most heavily emphasized by both the trial judge and the Court of Appeal were the improved emotional maturity of the mother as evidenced by her conduct since the divorce. The efforts of the mother in improving her university education and securing a job which would allow her to support the infants, and the stable home environment the mother

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379 Penny v. Penny (1972) 8 R.F.L. 247 (Sask. Q.B.); Hefler v. Hefler (1973) 14 R.F.L. 274 (N.S.S.C.)

380 supra, note 341

381 (1973) 10 R.F.L. 193 (N.S.S.C.)

382 supra, note 379

383 supra, note 367

384 supra, note 371

could provide by having the children remain with her parents to whom they were close while she was at work were mentioned as evidence of this change. Conversely in Re Wassink[385] the mother's loss of her job raised doubts as to her ability to care for the children and was a factor cited by the court in ordering a rehearing of the custody issue. In Korol v. Korol[386] the improvement in the mother's health was not considered sufficient by the judge to warrant varying the custody order. The judge noted that the child was well adjusted to living with the father and that the father was still the more stable of the two parents.

Courts are reluctant to force children to remain with one parent when they prefer the other. In Dominix v. Dominix[387] the husband had obtained a divorce on the basis of his wife's adultery and had received custody of the two children. Some years later the wife persuaded the children, now thirteen and twelve, to leave the husband to live with her. She enrolled the children in school and they appeared to be doing well in their new environment. The husband applied to regain the children. The Court criticized the mother's conduct in enticing the children away and expressed serious reservations concerning the stability of the mother's new household. However, in view of how well the children appeared to be doing, the court chose to respect the wishes of the infants and awarded custody to the mother. In Currie v. Currie[388] MacDonald J. of the Alberta Supreme Court varied a custody order to award custody of an eleven year old girl to her mother. One factor considered by MacDonald J. was the wish of the girl to be with her mother although she expressed no dislike for her

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385 (1973) 11 R.F.L. 98 (ont. H.C.)

386 (1974) 19 R.F.L. 295 (Sask. Q.B.)

387 (1972) 7 N.S.R. (2d) 270 (S.C.)

388 supra, note 376

father. In Shapiro v. Shapiro[389] a father sought to vary a custody order contained in a divorce decree. A fifteen year old girl and a twelve year old boy expressed a strong desire to live with their father in preference to their mother. The trial judge refused to vary the custody order finding that the father had turned the children against the mother by "manipulation and maneuveuring". The Court of Appeal overruled the trial judge and awarded custody to the father. While deploring the father's conduct the Court recognized that the children's feelings, however induced, were present and real and should not be ignored. These feelings were particularly strong in the case of the fifteen year old girl but the Court felt that the children should be kept together.

It could be argued that the willingness of the courts to recognize a situation created by one parent in defiance of a previous order encourages the use of "self-help" techniques by parents deprived of custody. This may be so, but it should be remembered that custody disputes should place the welfare of the child above the desire to punish or reward the parties contesting for the custody of the child. If the welfare of the child requires a certain action then that action should be taken no matter how the situation was created. It should also be remembered that a parent using his access rights to interfere with the control of the custodial parent runs the risk of losing those access rights as not being in the best welfare of the children.[390]

The most common change in circumstances cited by parties applying for a variation in custody is the remarriage of one of the parties. The effect of either party remarrying depends upon the circumstances of the

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389 (1973) 33 D.L.R. (3d) 764 (B.C.C.A)

390 Wentzell v. Wentzell, supra note 362

particular case. In Sims v. Sims[391] and Wentzell v. Wentzell[392] the fact that the applying parent had remarried and could supply a stable home was not considered sufficient to break up a stable environment to which the children had adjusted. However, in Kershaw v. Kershaw[393] the mother's remarriage to a man with a criminal record for violent assault and evidence which disclosed that she placed her duty to him above the welfare of the children was held to warrant a variation in custody. The court felt that the children had been placed in jeopardy by the marriage and the mother's subsequent conduct. The breakup of the father's second marriage was stressed in Currie v. Currie[394] because it deprived an eleven year old girl of a mother figure in the home and that along with her wishes warranted a variation in the custody order giving custody to the girl's mother. In Ploughman v. Ploughman[395] the remarriage of the mother gave her a stable and secure home to offer the children, however, the father's remarriage brought the possibility of friction between his and his new wife's children plus the difficulty of maintaining a larger family. The court varied the custody order by awarding custody of the three youngest children to the mother. One reason that the father lost custody of his infants in Francis v. Francis was that he had remarried a woman who had several children about the same age as his own. Although the father had done an excellent job of caring for the children the court was concerned about medical evidence which showed the greater possibility of friction when two groups of children of about the same age were combined into one family. Also the court pointed out

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391 supra, note 350

392 supra, note 362

393 (1971) 3 R.F.L. 90

394 supra, note 34

395 (1974) 5 Nfld. & P.E.I. R. 431 (Nfld. S.C.)

that the children had been insulated from the effects of the divorce because of the close co-operation between the parents and almost unlimited access by the mother. The husband's remarriage had ended this possibility and it was now necessary to choose between the two parents.

Courts have been reluctant to vary custody orders unless they feel that the situation is so altered that a change is necessary for the infants. A parent who has obtained custody and who provides a stable home for the infants is unlikely to lose that custody. This is so particular the longer the arrangement continues. Some questionable decisions which injure the children by disrupting a home to which they have adjusted may occur but these seem to have been rare. To make a custody order final would make the law inflexible and unable to respond to a situation such as that in the Kershaw case where the welfare of the children clearly required a variation in the custody order. So long as the decision as to who receives custody remains with the trial judge, the power to vary such an order when the circumstances require it should also remain with the judge.

XI. Jurisdiction

The issue with respect to jurisdiction in a custody case is twofold: does the court have jurisdiction? and if so, should it exercise this jurisdiction? The situation is complicated by the Divorce Act which poses separate jurisdictional problems. These problems are outlined in a separate section and will not be dealt with here. Jurisdiction of a court acting under the Divorce Act seems clear; if the court has jurisdiction to hear the divorce petition it has jurisdiction to make custody orders under ss. 10 and 11 as incidental to the question of divorce. This jurisdiction is not affected by previous custody orders made in other provinces[396] or by the fact that the children involved are not present within the jurisdiction of the superior court making the divorce order.[397]

A. Basis of Jurisdiction

Aside from the Divorce Act, the principal basis of jurisdiction appears to be the physical presence of the infants within the court's jurisdiction. The modern trend seems to be away from domicile as a test for jurisdiction in custody matters. The Saskatchewan Court of Appeal rejected an exclusive test of domicile in the case of Masterton v. Masterton[398] and I have found no case since Masterton which relies entirely upon domicile as a basis for jurisdiction. The physical presence of an infant within the court's jurisdiction is sufficient to found jurisdiction because the parens patriae power of the superior courts makes them responsible for the welfare of all infants within their jurisdiction. The prime consideration is the welfare of the infants involved and this overrides the normal conflict of law rules. Consequently the courts will assume jurisdiction even

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[396] Gillespie v. Gillespie (1973), 13 R.F.L. 344 (N.B.C.A.)

[397] Gillespie v. Gillespie, supra. n. 396; Hudson v. Hall (1974 19 R.F.L. 351 (Que. Sup. Ct.); Adams v. Adams, (1972) 7 R.F.L. 203 (N.B.S.C.).

[398] [1948] 2 D.L.R. 696 (Sask. C.A.).

though the infants may be domiciled or ordinarily resident in another jurisdiction,[399] foreign nationals,[400] or subject to custody orders in other jurisdictions.[401] The general attitude of the courts toward foreign custody orders is that they are entitled to consideration but that the paramount consideration is the welfare of the infants and so the court may disregard the foreign order if it feels the welfare of the infants so requires. This principle has been clearly established since McKee v. McKee[402] and for its purposes the orders of other provinces are considered foreign orders. The only area of doubt is as to the power of a court to amend a custody order made under the Divorce Act. There is conflicting authority on this point, which is discussed in greater detail in the section on the Divorce Act.

In certain circumstances the courts will make custody orders even though the infants concerned are not within the court's jurisdiction. This may be done where the person in whose care or control the infants are, is within the jurisdiction.[403] Such an order can be enforced against that person by contempt proceedings

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[399] Masteron v. Masterton, supra n. 398; Stolder v. Wood (1976), 20 R.E.L. 213 (Man. C.A.).

[400] J. v. C., [1969] 1 All E.R. 788 (H.L.).

[401] McKee v. McKee, [1951] A.C. 352 (P.C.); Re Walker (1975) 16 R.F.L. 98 (B.C.S.C.); Maloney v. LeBlanc (1973), 12 R.F.L. 368 (Alta. S.C.).

[402] McKee v. McKee, supra. n. 401.

[403] Goforth v. Goforth, [1928] 3 W.W.R. 483 (Alta. S.C.); Hannon v. Eisler (1954), 13 W.W.R. 565 (Man. C.A.); Warren v. Warren (1958), 25 W.W.R. 391 (Sask. Q.B.).

[404] Id.; Elash v. Elash (1964), 47 W.W.R. 21 (Sask. Q.B.).

Sometimes the court will make a custody order even though both the infants and the person in whose care and control they are, are not within the jurisdiction.[405] These orders are generally made in situations in which the controlling person has removed the infants to avoid the jurisdiction of the court and are usually based upon the fact that the infants are domiciled or ordinarily resident within the court's jurisdiction. Such cases have held that one parent may not by removing the children, unilaterally change their domicile and ordinary residence.[406] These orders are not common since there is no real means of enforcing such an order except by action in the jurisdiction to which the children have been removed. It has been held that such orders are to be made only in exceptional cases.[406a] It must be emphasized that this discussion does not include orders made under the Divorce Act for which s. 15 provides a means of enforcement and which are based upon the federal jurisdiction over marriage and divorce. Therefore cases in which courts have made orders under the Divorce Act, despite the absence of the infants and the controlling party are made on a different basis than non-divorce custody orders, at least while the subjects of the order are within Canada.

B. Exercise of Jurisdiction

Once a court has determined that it has the jurisdiction to hear a custody dispute the issue still remains as to whether it should exercise that jurisdiction. The willingness of the courts to assert jurisdiction merely upon the presence of an infant within the jurisdiction has encouraged the practice of "forum shopping." A parent who is dissatisfied with the judgment

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[405] Walker v. Walker (1971), 3 R.F.L. 78 (Ont. S.C.); Johnson V. Johnson (1972), 6 R.F.L. 143 (Ont. C.A.); Lebre v. Lebre (1973) 13 R.F.L. 174 (Ont. S.C.).

[406] Walker v. Walker, supra n. 405; Nielson v. Nielson and Langille (1972), 5 R.F.L. 313 (Ont. S.C.).

[406a] Nordwall v. Nordwall (1959), 28 W.W.R. (N.S.) 260 (B.C.S Bedrin v. Bedrin (1962), 39 W.W.R. (N.S.) 639 (B.C.S.C.); Elash v. Elash, supra. n. 404.

of a particular court may remove the infants from that jurisdiction, move them to another jurisdiction, and apply for custody in that new jurisdiction. This process can continue almost indefinitely.

One reaction by the courts has been to refuse to exercise their jurisdiction despite the physical presence of the infants in cases in which the infants' connection with the jurisdiction is tenuous. In such cases the courts consider that some other jurisdiction is the "proper forum" in that the parties have a greater connection with it and more of the evidence necessary for a proper determination of the custody issue is available there. The proper forum rule seems to be widely accepted in Canada,[407] particularly where an infant has been brought to the jurisdiction to avoid a foreign custody order.[408]

Such a judicial rule while not preventing forum shopping does, if generally applied, discourage it. However, in some cases[409] the courts do not examine this question and make a decision on the merits. Other courts acknowledge a substantial connection with another jurisdiction but feel that they are able to determine what is in the best interests of the child without referring to the other jurisdiction. There does not seem to be any uniform approach by the courts to the question of when to exercise jurisdiction although the general trend in recently reported decisions of the various appellate courts has been to examine what is the proper forum.

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[407] Cochrane v. Cochrane (1976), 20 R.F.L. 265 (Ont. C.A.); Munz v. Munz (1974), 15 R.F.L. 123 (Alta. A.D.); Dalshaug v. Dalshaug (1973), 14 R.F.L. 271 (Alta. A.D.); Re Lyon Infants (1972), 3 R.F.L. 71 (B.C.S.C.); Re Knowles (1973), 13 R.F.L. 76 (B.C.S.C.)

[408] Ridderstrom v. Ridderstrom (1972), 6 R.F.L. 18 (Ont. C.A.) Prosser-Jones v. Prosser-Jones (1972) 7 R.F.L. 150 (Man. Q.B.); Rioux v. Rioux (1962), 40 W.W.R. (N.S.) 251 (Man. C.A.); Leatherdale v. Ferguson (1965), 50 W.W.R. (N.S.) 700 (Man. C.A.)

[409] Stolder v. Wood, supra. n. 399.

There have been proposals that legislation be enacted to deal with the problem of forum shopping and to develop some means for the enforcement of custody orders between jurisdictions. Due to time limitations, it is not possible to discuss this area in detail. There is a need for such legislation but whether it should be based upon reciprocity as the current Reciprocal Enforcement of Maintenance Orders Act R.S.A. 1970, c. 313 is or be similar to the proposal of Manitoba Commissioners to the Uniformity Conference (see Appendix A) is beyond the scope of this paper. A major problem with respect to any attempt to develop provincial legislation of this nature is that so many custody orders are made under the Divorce Act. Some of the problems caused by the Divorce Act are discussed in the next section.

XII. Problems raised by the Divorce Act

Most custody cases are decided under the Divorce Act which is a federal statute but each province also has legislation relating to custody; Alberta's has already been discussed in detail. Problems are created by this overlap of provincial and federal legislation. Most of these problems cannot be resolved by the Alberta legislature since they would involve amendment of the federal act. However, in this section it is proposed to briefly discuss some of the problems raised by the Divorce Act in relation to Alberta legislation.

A. Is the federal legislation constitutional?

Section 91(26) of the British North America Act[410] confers exclusive jurisdiction upon the federal government in matters concerning marriage and divorce. However s. 91(12) and (13) give the Provincial Legislatures exclusive legislative jurisdiction over matters coming within the classes of subjects described as "the Solemnization of Marriage in the Province" and "Property and Civil Rights in the Province." Prior to 1968 the Federal Government had not legislated with respect to custody. However, the 1968 Divorce Act in s. 11 and 12 permitted a court considering a petition for divorce to make orders for the "custody, care and upbringing of the children of the marriage." Before 1968 custody had been dealt with as coming within the provincial jurisdiction over property and civil rights. It was clear that the federal government could legislate with respect to marriage and divorce but there was some doubt as to the constitutional validity of sections 10-12 which provided authority for the court to deal with maintenance and custody as matters corollary to the divorce proceeding.

Doubt as to the validity of these provisions was resolved

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[410] 1867, 30 and 31 Vict., c. 3.

by the Supreme Court of Canada in Jackson v. Jackson[411] and Zacks v. Zacks,[412] although in each case the court was dealing with maintenance, not custody, claims. Counsel in Jackson v. Jackson had agreed to proceed on the basis that the corollary relief provisions had valid application to their case but Ritchie J., who delivered the judgment of the Supreme Court, was not prepared to proceed on that assumption, pointing out that the court would have no jurisdiction to consider the issues unless the relevant provisions had valid application and that such jurisdiction could not be conferred by consent of the parties. Ritchie J. dealt with the constitutional issue in these terms:

> ...and I am satisfied that the power to grant an order for the maintenance of the children of the marriage is necessarily ancillary to jurisdiction in divorce and that the Parliament of Canada was therefore acting within the legislative competency conferred upon it by the B.N.A. Act, s. 91(26), in legislating to this end.

Nothing more was said upon this point and no authorities were given for the statement.

The constitutional issue was argued fully before the Supreme Court in Zacks v. Zacks, Sections 10, 11 and 12 were held to be constitutionally valid. Martland J. who gave the court's reasons, quoted the statement of Ritchie J. set out above and commented at p. 296:

> While this statement deals with the matter of maintenance under s. 11 of the Divorce Act, hereinafter referred to as "the Act," the principle stated applies equally to the matters of custody, care and upbringing of children of the marriage, under s. 11(c), to the provisions of s. 10, dealing with interim orders, and to those of s. 12, which authorize the ordering of payments directed under s. 10 or s. 11; to be made to a trustee or an administrator, and the imposition of terms, conditions and restrictions in an order made under either of those sections.

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[411] [1972] 6 W.W.R. 419 (S.C.C.).

[412] [1973] 5 W.W.R. 289 (S.C.C.).

The court has therefore declared that these sections are valid for custody, as well as maintenance, purposes. Martland J. expressed himself as in agreement with the Manitoba, Ontario and Alberta appellate courts which had previously decided in Whyte v. Whyte,[413] Papp v. Papp,[414] and Heikel v. Heikel[415] respectively that the corollary provisions were not ultra vires of the Parliament of Canada.

B. Effect upon provincial custody legislation

The effect of Zacks v. Zacks on provincial custody legislation would seem to be that insofar as sections 10 and 11 deal with custody in divorce proceedings, provincial legislation could no longer be regarded as being operative. Where the provincial legislation specifically creates a power to make custody orders on divorce that legislation would now be invalid. Where the provincial legislation confers jurisdiction in custody in general terms, the legislation would be confined by judical interpretation to custody in matters other than divorce. The divorce legislation has no effect upon the jurisdiction of the Family Court because the Family Court Act does not confer jurisdiction to act in divorce proceedings.

Only two sections, s. 44 and s. 45 of Part 7 of the Domestic Relations Act specifically apply to divorce situations. S. 44 deals with the ability of the court to declare a parent by reason of whose misconduct a decree of judicial separation or divorce is made, a person unfit to have the custody of the children of the marriage. It is open to question, whether in view of the provisions of the Divorce Act the portion of this section which deals with divorce is intra vires the Alberta legislature. However, if, as recommended, s. 44 is repealed the problem does not arise.

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[413] (1969), 69 W.W.R. 536 (Man. C.A.)

[414] (1970), 1 O.R. 331 (Ont. C.A.)

[415] (1970, 73 W.W.R. 84 (Alta. A.D.)

Section 45, which concerns agreements between parents regarding the custody of their children, refers to parents who are not living together or who are divorced or judically separated. It is submitted, however, that this section is not in conflict with the Divorce Act because it confers no power upon the Court to act during a divorce proceeding. This section would only apply to divorced parents where the decree of divorce made no reference to the custody of the children. However, to avoid any possible confusion, it is recommended that the section be amended to make it clear that it does not apply if a custody order has been made in a divorce proceeding. This would avoid any possible conflict.

C. Have the criteria for determing custody been changed by the Divorce Act?

Section 11 of the Divorce Act sets out the basis on which custody should be awarded. It states that the court granting a decree nisi of divorce may make an order providing for the "custody, care, and upbringing of the children of the marriage if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them." No mention is made of the welfare or happiness of the child as a criteria. However, in deciding custody disputes under the Divorce Act judges have continued to apply the jurisprudence developed before the Divorce Act. It has never been suggested that the welfare of the children as the paramount consideration should be overlooked or that its omission was an attempt to set up a new standard for the disposition of custody in divorce proceedings.[416] Commenting upon the submission that all other things being equal the father's common law right to custody should prevail. Laskin J.A. stated:[417]

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[416] See for example Professor Robinson's article at p. 569.

[417] Dyment v. Dyment, [1969] 2 O.R. 748, at p. 750 (Ont. C.A.

> I do not propose to resurrect a doctrine that has expired for want of social nourishment and that is alien to policies embedded in infants and child welfare legislation; and alien as well to a consistent and well-established line of judicial decision that puts primacy where it should be, that is, on the welfare of the children.

Just as the varying statutory guidelines in the various provinces have not prevented a general consensus upon the bases on which custody should be awarded, the provisions of the Divorce Act have not altered the principles upon which the courts award custody.

D. What if the divorce petition is refused?

The federal power to legislate with regard to custody has been upheld on the basis that it is ancillary to the questions of marriage and divorce. Therefore what is the position of the court when it refuses a petition for divorce in which custody is claimed? In Zacks v. Zacks Martland J. had the following comment:[418]

> The power of Parliament to legislate in respect of the dissolution of marriage is, of course, unquestioned. The provisions of the Act, under attack, appear under the heading of "Corollary Relief." Section 10 becomes operative where a petition for divorce has been presented and provides for interim orders. If the petition for divorce fails, there is no power to make any order as to alimony, maintenance or custody under s. 11, and any interim order under s. 10 would thereupon cease to be operative. The Act only contemplates orders as do these matters as a necessary incident to the dissolution of a marriage.

Similar comments were made in Papp v. Papp[419] and in Evans v. Evans.[420] However, dismissal of a divorce petition does not

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[418] Supra, n. 398.

[419] Supra. n. 400.

[420] (1969), 7 D.L.R. (3d) 651 (B.C.S.C.).

necessarily mean that the court is without jurisdiction. In Jani v. Jani[421] it was held that the court had jurisdiction to deal with access despite the wife's petition being dismissed because the husband had counter-claimed and one of his claims was for access rights. The court followed Marsellus v. Marsellus[422] in holding that the counter-claim was the equivalent of a separate proceeding and that he could therefore deal with access. In Lalonde v. Lalonde & Shock[423] the petition was dismissed but the court with the consent of both parties treated the petition as an application under the provincial statute. Also it was suggested in Pawelko v. Pawelko[424] that the court could make an order for custody based upon its inherent jurisdiction to protect the welfare of infant children acting not under the Divorce Act but as parens patriae. This case relied upon the pre-Divorce Act case of Chantry v. Chantry and Taylor.[425] It is submitted that the approach of Lalonde or Pawelko is to be preferred to that of the court simply refusing to act. A failure to deal with the custody issue makes it necessary for one of the parents to commence separate proceedings under the relevant provincial legislation and for a judge to hear all the evidence over again at additional expense to the parties.

E. Effect of a custody order under the Divorce Act

As the preceding discussion has shown the courts have held that the Divorce Act sections dealing with custody are valid. It

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[421] (1976) 20 R.F.L. 361 (Ont. H. Ct.)

[422] (1970) 3 R.F.L. 165 (Ont. H. Ct.)

[423] (1973) 15 R.F.L. 133 (Sask. Q.B.)

[424] (1970), 12 D.L.R. (3d) 279 (Sask. Q.B.)

[425] (1968), (2d) 701 (Sask. Q.B.)

is clear that on custody award made as corollary relief in a divorce proceeding must be governed by the Divorce Act since the federal power is paramount upon questions of marriage and divorce. But what is the effect of a custody order made under the Divorce Act upon the established provincial authority in regard to custody?

The relevent sections of the Divorce Act are:

> 11(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks fit and just to do so having regard to the conduct of the parties since the making of the order or of any change in the condition, means or other circumstances of either of them.
>
> 14. A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.
>
> 15. An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19.

S. 14 provides that a decree of divorce granted under the Act or an order under section 10 or 11 has legal effect throughout Canada.but the situation is less clear with regard to custody orders made under the corollary relief provisions in ss.10 and 11. S. 15 of the Divorce Act makes it clear that an order made under s. 10 or 11 can be registered in any other superior court in Canada and may then be enforced in like manner as an order of

that court. However, the wording of this section is permissive and it does not make it clear whether, once the order is registered in a superior court of a province, that court is bound by the order. S. 14 states that such an order has legal effect throughout Canada but it does not clearly indicate that once an order is made under these sections, provincial courts can no longer deal with custody. There is considerable judicial disagreement concerning the effect of these sections upon the jurisdiction of provincial courts aside from the Divorce Act.

In Bray v. Bray (1971), 2 R.F.L. 282 (Ont. H. Ct.) a wife sought custody of her infant in an undefended divorce action begun in Ontario. The infant in question was resident in Quebec and was the subject of a custody order by a Quebec Court. Although agreeing that they were valid Wright J. severely limited the extent of the corollary federal jurisdiction:

> But faced as I have been with the precise questions of whether they are paramount over other legislation, over the exercise of the perogative and over judicial decisions in another province where the child is, I have refused to exercise the discretion that I may have in the undefended divorce proceeding to make an order providing for the custody of a child in Quebec already subject to a custody order in that province.
>
> I venture to doubt if the Divorce Act gives me that power or if either in law or practice its custody provisions are overriding, I prefer to regard them as supplementary to the existing provincial jurisdiction with regard to children...

In so far as Wright J.'s decision may have been based upon the belief that in the circumstances of the case a custody order would not be in the child's interest, the case may be acceptable. However, the weight of judicial authority seems to disagree with Wright J.'s belief that the Divorce Act did not give him the power to make an order because of the previous Quebec order.

In Whyte v. Whyte (1969), 7 D.L.R. (3d) 7 (Man. C.A.) the Manitoba Court of Appeal affirmed a decision of the trial judge in which pursuant to a divorce decree nisi be made a custody order awarding custody of children of the marriage despite the fact that the children were not within Manitoba and that there were two prior conflicting custody orders. In O'Neill v. O'Neill (1972) 5 R.F.L. 98 the Nova Scotia Supreme Court referred to the Bray case and stated that it considered that when granting a decree nisi under the Divorce Act it had jurisdiction to deal with custody whether or not the children involved were subject to previous orders in other provinces. The strongest decision counter to the Bray case was that of Gillespie v. Gillespie (1973) 13 R.F.L. 344 (N.B.C.A.). In that case the issue was whether a New Brunswick court having divorce jurisdiction had power to make an award under s. 11 in respect to a child of the marriage who resided in Ontario and was already the subject of an Ontario custody order under the provincial law. The trial judge had felt that he lacked jurisdiction but the Court of Appeal disagreed. Hughes C.J.N.B. in delivering the judgment of the court stated:

> In my view when Parliament enacted the corollary provisions respecting custody of children of a marriage contained in ss. 10(b), 11(1)(c), 11(2) and 15, it carved out of the general jurisdiction in custody matters theretofore administered solely by courts deriving their powers through provincial legislation a segment of that jurisdiction limited to the children of a marriage sought to be dissolved and empowered the courts exercising divorce jurisdiction to make orders applicable to any children of such marriage. Since in the circumstances of the present case provincial legislation and federal legislation cover the same subject matter, the federal legislation must prevail and supersede that enacted by the province. It follows, I think, that only custody order made by a divorce court under ss.10 or 11 of the Divorce Act supersedes any previous order made under provincial legislation with respect to the same child.

The case is particularly strong because both the Attorney-General of New Brunswick and the Attorney-General of Canada appeared as amicus curiae to argue in favor of the validity of the federal law. Gillespie v. Gillespie was recently followed in the Quebec case of Hudson v. Hall (1976), 19 R.F.L. 381 in which an award of custody was made even though the child was out of the province.

However, in Craddock v. Craddock (1976), 20 R.F.L. 61 (Ont. S.C.) the Bray case was referred to and in an obiter comment Davidson, Master felt that "the primary jurisdiction relating to custody remains in the province and that any jurisdiction which does exist under the Divorce Act, R.S.C. 1970, c. D-8, may be exercised with discretion." In Re Bourque (1976), 20 R.F.L. 257 (B.C.S.C.), Hutcheon J. held that "notwithstanding the institution of divorce proceedings in another province, there is power under the Equal Guardianship of Infants Act to make an order concerning custody if the child is present, physically or nationally in this province." Hutcheon J. pointed out that the difficult problem created by the enforcement of two inconsistent orders (i.e. a provincial custody order and an order under the Divorce Act registered in the province) ought not to displace the primary principle of what was best for the child.

Re Bourque was cited by Rae J. in another B.C. decision Re Hall (1976) 20 R.F.L. 142 (B.C.S.C.). In the Hall case a consent order had been made under the Equal Guardianship of Infants Act awarding custody of the infant to the father in 1973. In 1974 the mother commenced divorce proceedings in Quebec and received an interim order for custody under s. 10. Pursuant to s. 15 this order was registered in B.C. The mother applied to have the B.C. order varied to award custody to her. Her position was that as a matter of law, the Quebec order having been made, the B.C. order became invalid and should be formally revoked. Gillespie v. Gillespie was cited in support of this proposition. Rae J. pointed out that the comments in Gillespie were dicta since

the Appeal Court had dismissed the appeal on the basis that on the merits of the case the trial judge was justified in dismissing the application. He stated:

> I am not, with respect, prepared to follow the dicta there in the proceedings before me if by that is meant that the order in question here [i.e. the B.C. order] must, at all events, be revoked as is submitted by the applicant.

He continued:

> There is another aspect of the matter. It is correct to say that the court entertaining divorce proceedings may as ancillary to exercising divorce jurisdiction, grant a custody order as already indicated. It does not follow, however, that because generally speaking it has the jurisdiction so to do it should necessarily or properly do so in all cases. In my view the Divorce Act (Canada) has not made the matter absolute.

The court pointed out that the paramount consideration of the child's welfare is "never to be lost sight of in the course of becoming involved in the intricacies of the problems of jurisdiction, constitutional conflict, comity and a contest between parents as to what they regard as their rights." The wife's application was dismissed but without prejudice to the right of anyone with status to apply to have the matter heard on the merits.

Although the authorities are not in total agreement, it would seem that a court hearing a divorce proceeding has jurisdiction to make a custody order regarding a child of the marriage even if the child is resident in another province and is subject to a custody order in that province. However, it is less clear whether the courts of the province the child is resident in, will enforce the corollary order for the custody even if it is registered under s. 15. The divorce court may have jurisdiction to make an order but the effect of this order upon courts in other provinces is unclear.

It may be that as suggested in Gillespie the federal legislation is paramount and that once a custody order has been made under s. 10 or 11 no other Canadian Court has jurisdiction to deal with the matter. This is the view taken by D. Mendes da Costa in his article "Enforcement of Judgments and Orders Across Canada":

> There can be no doubt that there should always be a court with power to protect and to further the welfare of children. In matters governed by provincial law, this court is a provincial court administering provincial law. But the Divorce Act is a federal statute. One of its primary purposes is to confer uniformity of law across Canada. The law of divorce is now national, not provincial. The jurisdiction is Canadian, not provincial. In relation to matters covered by the Divorce Act, there always is a court with power to protect and to further the welfare of children. An order for corollary relief made under s. 11(1) may, by s. 11(2), be varied from time to time or rescinded by "the court that made the order". This court is a Canadian court, administering Canadian law within the jurisdiction of Canada. The limitation imposed by s. 11(2) is, it is considered, unfortunate. It is considered that it would have been both more practical and more sensible to confer power of variation or rescission upon *any* court in Canada vested by the Divorce Act with jurisdiction to administer the provisions of this federal statute. But this is not what this Act provides. And unless and until amendment is made, the view is expressed that, after decree absolute, in relation to the same subject matter as that covered by an order for corollary relief, proceedings cannot be instituted under provincial law, but only pursuant to s. 11(2).

This position is strengthened by the words of the statute which provide in s. 14 that such an order is to have "legal effect" throughout Canada. However, the courts do not appear to have accepted that only the court which has made the order has jurisdiction with respect to custody from that point onward.

In Cochrane v. Cochrane (1976), 20 R.F.L. 265 the Ontario Court of Appeal felt that despite the existence of a custody order under a Manitoba divorce decree, the Ontario courts clearly had the jurisdiction to vary the effect of this order since the children were present in Ontario. However, the court also agreed

that only an interim order should be made and that the case should be remitted back to the Manitoba courts. This decision was not made on the basis of the paramountcy of the corollary order for custody, but rather because Manitoba was considered to be the more convenient forum for the final determination of the issue. In Skjonsby v. Skjonsby (1971), 15 R.F.L. 251 a Saskatchewan court refused to enforce an Alberta custody order made under the Divorce Act. The order had granted custody of the infants to their mother but had been made conditional upon the mother not living with a particular man. She was now doing so and the father of the infants registered the decree in Saskatchewan under s. 15 of the Divorce Act and attempted to obtain custody on the basis that the mother had violated the conditions in the decree. The Saskatchewan court refused to enforce the order because it disagreed with the condition being placed upon it. The court was unwilling to order a change in custody without a full hearing on all the facts regarding the welfare of the infant. In Emerson v. Emerson (1972), 8 R.F.L. 30 (Ont. H. Ct.) Wright J. stated that a divorce decree giving a corollary custody order does not inhibit the normal parens patriae jurisdiction of a provincial superior court. In his view, jurisdiction under the Divorce Act does not destroy the provincial jurisdiction; both exist with the primary jurisdiction being in the province in which the child is physically present. However, when another province has made a custody order the court in the province in which the child now is should not lightly exercise its discretion to change the order. Such a change must be required for the welfare of the infant. In Hegg v. Hegg (1973), 12 R.F.L. 385 a custody order was made under a divorce decree in Saskatchewan. An application for custody was subsequently made in British Columbia where all the parties were now resident. It was argued that the Saskatchewan decree, which was registered in B.C. under s. 15 meant that the B.C. court could not vary the order but could only "enforce" it. The court held that its inherent power to vary and rescind all orders dealing with

custody extended to "original" judgments made in other provinces but registered and enforceable in B.C. All the parties were resident in B.C. and a major change in circumstances had occurred which warranted a change in custody. The court did not wish to be taken as saying that the registration of the divorce decree was what gave it the power to alter the order. This power was inherent in the parens patriae jurisdiction which arose because the infants were present. The registration of the order neither added nor subtracted from this jurisdiction.

The attitude of the Alberta courts seems to be that their jurisdiction in regard to infants present in the province is not affected by the fact that such infants are subject to a custody order contained in a divorce decree granted by another province. In Maloney v. LeBlanc (1973), 12 R.F.L. 368 Kirby J. held that he had jurisdiction to deal with an application for custody by the father of an infant already subject to a divorce decree in Nova Scotia which granted the mother custody. Kirby J. cited Hegg v. Hegg in support of this view. He accepted jurisdiction and awarded the father custody because he felt that to do otherwise would disrupt the happy and stable home environment in which the infant lived. In Dalshaug v. Dalshaug (1974), 41 D.L.R. (3d) 475 the Alberta Appellate Division considered a case in which a father applied to vary a decree nisi granted in Saskatchewan which had granted custody to the mother. The father had moved to Alberta and while his children were visiting him he made the application. The trial judge dismissed the application on the grounds that he did not have any jurisdiction to vary the Saskatchewan order. The Appellate Division agreed that the order could not be varied since it had not been registered in Alberta. However, they continued at p. 477:

> However, we do not wish to place our judgment on the grounds that proper proceedings were not taken in this case. As the children are physically present in Alberta there is no doubt that the Courts of Alberta have their own inherent jurisdiction in proper proceedings.

The court clearly did not consider their jurisdiction displaced because of the custody order in the divorce decree and in the proper circumstances would apparently have made a custody order. However, in the circumstances of the case, the court determined that Saskatchewan was the proper forum for the case to be heard in. Accordingly the appeal was dismissed.

It would appear from examining the authorities that the courts do not consider themselves bound by a custody order made as a part of divorce proceedings in another province if the children are now present in the province in which the application is made. Custody orders under the Divorce Act seem to be treated in the same manner as any other foreign custody order, so long as the children involved are now physically present within the court's jurisdiction. The courts continue to regard the welfare of the children as the paramount consideration. However, this point has yet to be decided by the Supreme Court and Gillespie v. Gillespie, discussed earlier, is a strong authority to the contrary.

XIII. The Family Court Act

The Family Court has not been dealt with in much detail in this paper. Some recommendations have been made as to amendments which might be made in the portion of the Family Court Act which deals with custody but a detailed discussion of the purposes of a family court, its procedure and its relation to other courts is beyond the scope of the present paper. The principle concentration has therefore been upon the Alberta Domestic Relations Act. For reference, the sections of the Family Court Act R.S.A. 1970, c. 133 dealing with custody are reprinted below:

> **10.** (1) Where
>
> (*a*) the parents of a child are in fact living apart from one another, and
>
> (*b*) there is a dispute as to the custody of or access to the child,
>
> a judge may, on an application therefor, make such order as he sees fit regarding

(*c*) the custody of the child, and

(*d*) the right of access to the child,

by either parent or any other person, having regard to the best interests of the child.

(2) The application for an order may be made

(*a*) by either parent of the child, or

(*b*) by the child, who may apply with or without any person interested on his behalf.

(3) An applicant for an order shall

(*a*) apply in person to the clerk of the Family Court, and

(*b*) file with the clerk a supporting affidavit setting out the material facts,

and upon being satisfied there may be reasonable grounds for the making of an order, the clerk shall give written notice to all interested parties to the application to appear at the hearing of the application before the Family Court.

(4) Where a parent or other interested party

(*a*) has been served with a copy of the written notice, and

(*b*) fails to attend as required by the written notice,

an order may be made in his absence.

(5) Pending the hearing of an application under this section, the judge may issue an interim order setting out the right of access to the child and the terms thereof.

(6) The applicant and all persons whom the judge thinks proper may be examined on oath touching the matters in issue.

(7) A judge

(*a*) upon application therefor, and

(*b*) upon reasonable notice to the interested parties,

may review an order made under this section and may confirm, vary or discharge the order.

(8) Any person who contravenes any provision as to custody or right of access in an order made under this section is guilty of an offence and liable on summary conviction to a fine of not more than $100 or to imprisonment for a term not exceeding four months, or to both fine and imprisonment.

(9) To the extent that an order made under this section is in variance with an order of the Supreme Court or a district court, the order under this section is void.

[1967, c. 19, s. 2; 1969, c. 32, s. 4]

11. Any case arising under this Act may, in the discretion of the judge, be heard in private. [1967, c. 19, s. 2]

12. A party to proceedings under this Act who is dissatisfied with an order or refusal to make an order may appeal to the district court and the provisions of section 27 of *The Domestic Relations Act* relating to appeals applies *mutatis mutandis* thereto. [1967, c. 19, s. 2]

Appendix A

May 1973

C.

Report of Manitoba Commissioners on Enforcement of Custody Orders

At the 1971 meeting of the Commissioners, the item of Reciprocal Enforcement of Custody Orders Act was on the Agenda. The matter was not considered but the Manitoba Commissioners undertook to prepare a report with a draft Act. The draft Act is attached hereto.

Previously, the Manitoba subsection of the Canadian Bar Association had proposed a Reciprocal Enforcement of Custody Orders Act. Our discussions began with a study of that proposal. The draft Act, however, bears no resemblance to the proposal of the Manitoba section of the Canadian Bar.

To begin with, the Canadian Bar proposal was based on reciprocity. The Manitoba Commissioners assumed that for jurisdictions in Canada the prime concern would be the welfare of the particular child affected. We could not see how the welfare of a particular child who was the subject of a custody order being considered by a court in a Canadian province could be related to the question of whether or not the law of the jurisdiction from which the child came provided for reciprocal enforcement of custody orders. We therefore eliminated the necessity of any reciprocity for the purposes of enforcement of custody orders.

We assumed, that throughout the world the concern of the lawmakers would be primarily directed towards the welfare of a child. We realize that the basis of custody orders might vary

from state to state and in some instances might, to our w thinking, be considered not to be in the best interests of child. Nevertheless, we feel the assumption should be mai as the basis for enforcement of out of province custody or

It is to be noted that the draft Act makes no re to custody agreements. It is concerned only with orders pr nounced by an extra-provincial tribunal and not with merely private arrangements. We thought that the potential variet complexity of private arrangements would make it impractica to enforce them; and further, that so long as the provision such private arrangements be not certified or declared by a duly established extra-provincial tribunal, it would be inap propriate to invoke the judicial and enforcement processes o the state to attempt to enforce them. Indeed, it may be dif enough to ascertain that the order sought to be enforced is i fact the last order or variation pronounced in regard to the particular custody matter, without introducing the further uncertainty of private agreements.

The draft Act is based on the presumption that the extra-provincial tribunal had jurisdiction to grant the custod order. The presumption may be rebutted by proof that the chil did not have a real and substantial connection with jurisdicti of the extra-provincial tribunal granting the custody order. This standard of jurisdiction stems from the language of Lord Morris in *Indyka v. Indyka*, (1967) 2 All E.R. 689 at p. 708. That case related to divorce jurisdiction but we feel the langu is suitable for application to custody orders as well. It is

left to the courts to determine what constitutes a "real and substantial connection".

We considered providing that the presumption might be rebutted by satisfying the court that the extra-provincial tribunal had not the authority under the law of its province, state or country to grant a custody order, but we feel that the definition of "extra-provincial tribunal" is sufficient to deal with this problem.

Section 5 of the draft Act provides authority to vary extra-provincial custody orders. The basis of the authority is set out in section 6 of the draft Act. In providing that the courts of the enacting province may vary extra-provincial custody orders, one must assume that custody orders made within the province may undergo variation by the tribunals of another jurisdict However the court orders of the enacting province will not likely be varied by those tribunals when the child and the adults having or claiming custody of the child are out of the other jurisdictio territory and have not attorned to its jurisdiction.

Legislation enacted by a province cannot confer upon its own courts extra-territorial jurisdiction. In this field jurisdiction must be exercised only "in the province". One must avoid the anomaly of a court purporting to vary a custody order relating to a child no longer within that court's reach.

By the *Indyka* principle a province in which the child and the custodian no longer reside might be the one to which the

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[1] *McKee vs. McKee* [1951] A.C. 352; 2 W.W.R. 181; [1951] 2 D.L.R. 657; [1951] 1 A.E.R. 942.

child is declared to have "a real and substantial connection". Hopefully, courts will not lightly declare a child to have a real and substantial connection with another province, territory or foreign state when the child is manifestly out of the jurisdiction of such province, territory or foreign state. It may happen, but, as indicated above, it is left to the courts to determine what constitutes "a real and substantial connection".

It is, of course, precisely contemplated that if a child be wrongfully brought into the territory of the enacting province, the court may order the child apprehended and restored to the person to whom custody was awarded by an extra-provincial tribunal, so long as the child still has a real and substantial connection with that other jurisdiction. It is to be noted that in enforcing and giving effect to a custody order made by an extra-provincial tribunal (section 3) the court of the enacting province does not necessarily restore the child to a distant territory, but rather to a person who has been awarded the custody of the child. The authority is somewhat flexible in order to permit the court to make a sensible disposition without unwarranted fetters.

If the child no longer has a real and substantial connection with the other jurisdiction in which the order was made, and no other appropriate order is extant, then the court is almost obliged (sections 5 and 6(b) of the draft Act) to arrogate jurisdiction to itself lest the child slip through a

metaphysical fissure in the law. Experience alone will poi whether the Act might itself become the subject of future r in this regard.

We draw your attention to section 7 of the draft which touches on questions of social policy which might give rise to discussion.

Given the thrust of the draft Act, section 8 may be recidivistic. The Manitoba Commissioners thought that if provision of this sort were made, superior courts would be te in aggravated circumstances, to invoke their inherent jurisdi in regard to children alleged to be in moral, mental or physi jeopardy. They would do so precisely because, it would be sa the Legislature had made no provision for such cases. We thir therefore, that it is advisable to express such a provision in language which will foreclose variation of orders for trifling speculative or barely supported allegations. Hence, employmen of the terms: 'beyond a reasonable doubt' and 'serious harm'.

This is not to say that the Court or any particular judge cannot be trusted to promote the welfare of the child. N such imputation is made or intended. The problem is, however, that in our geographically vast and jurisdictionally compartmen country, the cumulative effect of the invocation of inherent jurisdiction here and there, without strong guidelines, makes it possible for unscrupulous persons to spirit a child about the

country with some prospect of 'getting away with it'. We off for consideration what was said by Mr. Justice Galligan of th Supreme Court of Ontario in *Neilson vs. Neilson & Langille* (1 5 Reports of Family Law, where he cited with approval the fol expression:

> . . . a judge should, as I see it, pay regard to the orders of the proper foreign court, unless he is satisfied beyond a reasonable doubt that to do so would inflict serious harm on the child.

We think the last few lines of section 9 deserve careful consideration as they might make it too easy to mislea a court. The concept appears in various pieces of legislation. However, to a large extent the other legislation deals with property rights rather than matters as closely relative to life as custody orders.

The one question which remains at large is: "How effectively are custody orders enforced in any province or territory whose Legislature enacts this measure?" Enforcement of custody orders generally may be flabby or haphazard in one jurisdiction and vigorous and effective in another. Such disparity is a product of differing enforcement agencies, procedures and remedies, from jurisdiction to jurisdiction or even from place to place within a jurisdiction. Therefore, attempting to spell out the actual modalities of enforcement in the draft Act seemed to be a futile activity. We decided not to become involved in trying to formulate modes of enforcemen for disparate jurisdictions. In the result, the person attemptin

to enforce a foreign custody order in any particular provi territory will be obliged to accept the local standard of e ment of custody. The efficacy of enforcement also depends willingness of the judiciary, sheriffs and law enforcement agencies of the province in which application is made. Eve relatively straightforward and apparently competent statuto provisions like Sections 14 and 15 of the *Divorce Act*, chap. R.S.C. 1970 do not bring about an "automatic" enforcement of custody provisions outside the province in which they were pronounced.[2]

As stated the draft Act makes no requirement of reciprocity. That might well emasculate it. By enacting it, each Legislature would, in effect, be declaring that its terr is no haven for "civil kidnappers" even if such havens exist elsewhere.

Manitoba Commissioners:

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[2] *Hegg vs. Hegg & Plautz*, [1973] 3 W.W.R. 309, B.C. S.C.

1 In this Act

(a) "child" means a person under the age of eighteen year

(b) "court" means a court established in (Manitoba) with authority to make an order granting custody of a chil any person;

(c) "custody order" means

(i) an order of an extra-provincial tribunal grant custody of a child to any person whether or no the order includes provisions granting to anot person a right of access or visitation to the c or

(ii) that part of an order of an extra-provincial tr that grants custody of a child to any person in provision, if any, granting to another person a of access or visitation to the child;

(d) "extra-provincial tribunal" means a court or tribunal established in a province, state or country outside (Man with authority under the laws of that province, state or country to make an order granting custody of a child to a person.

2 A person shall be deemed not to be resident in (Manit if he is within (Manitoba) solely for the purposes of making or opposing an application under this Act.

3 Subject as herein otherwise provided, a court, on application, shall enforce, and may make such orders as it deem necessary to give effect to, a custody order made by an extra-p: tribunal as though the custody order has been made by a court i (Manitoba).

4 The court shall not enforce, or make an order under section 3 to give effect to, a custody order made by an extra-pr tribunal if it is satisfied on evidence adduced that the child a: by the custody order did not, at the time the custody order was m have a real and substantial connection with the province, state c country in which the extra-provincial tribunal had jurisdiction.

5 Subject to section 6, a court, on application, may v custody order made by an extra-provincial tribunal as though the order has been made by a court in (Manitoba).

6 The court shall not vary under section 5 a custody or made by an extra-provincial tribunal unless it is satisfied, on ev adduced,

(a) that the child affected by the custody order does not, at the time the application for the variation is made, have a real and substantial connection with the province, state or country in which the extra-provincial tribunal had jurisdic and

(b) that the child affected by the custody order has a real and substantial connection with (Manitoba), or all the parties affected by the custody order are resident in (Manitoba).

7 In varying a custody order under section 5, the court shall

(a) give first consideration to the welfare of the child and not to the welfare of any person seeking or opposing the variation; and

(b) treat the question of custody as of paramount importance an the question of access or visitation of a parent or other person to the child as of secondary importance.

8 Where a court is satisfied beyond a reasonable doubt that a child in respect of whom a custody order has been made would suffer serious harm if he remained in or was restored to the custod of the person to whom custody of the child was granted by the custo order, the court may, notwithstanding any other provision of this Act, vary the custody order or make such other order respecting custody of the child as it deems necessary or advisable in the circumstances.

9 An application made under this Act shall be accompanied by a copy of the custody order of the extra-provincial tribunal to which the application refers certified as a true copy of the custod order by a judge or other presiding officer of the extra-provincial tribunal or by the registrar or other official of the extra-provinc tribunal charged with the keeping of records and orders of the extra provincial tribunal; and no proof is required of the signature or official position of any judge, presiding officer, registrar or othe official or an extra-provincial tribunal in respect of any certifica produced as evidence under this section.