I. INTRODUCTION

Since the passing of the Divorce Act in 1968 there has been growing confusion concerning its corollary relief provisions in respect to children. Factors considered in awarding custody to a particular parent are not the concern since they have been established over time. The nature of the problem with the operation of the Divorce Act is jurisdictional. There are a number of methods by which a court can make a custody order in addition to the procedure established by sections 10 and 11 of the Divorce Act. Application may be brought under a variety of provincial statutes. In Alberta the provincial statutes are the Family Court Act or the Domestic Relations Act. Alternatively habeas corpus proceedings may be initiated or the traditional power of the Supreme Court under its parens partriae power may be invoked. This has led to conflicting decisions as well as several subsisting custody orders from different jurisdictions. Besides the actual question in making orders there is the issue of variation of orders already made under the Divorce Act. The purpose of this paper is to investigate the interpretation of the Divorce Act by Canada's courts and to recommend changes in order to give some certainty to this area of the law.

II. THE DIVORCE ACT

The Divorce Act[1] provides for the making of orders in relation to maintenance of and the custody, care and upbringing of the children of the marriage. Section 10(b) covers authority for interim orders pending the determination of the petition and section 11(c) applies to orders made after granting a petition of divorce. Section 11(2) directly applies to these orders as it is concerned with possible future variation. This

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1. R.S.C., 1970, c. D-8.

section provides that an order may be varied or rescinded by the court that made the order. It is the inconsistent way the courts have interpreted this section which has led to jurisdictional non-uniformity.

Further to 11(2), the courts, depending on the province, have either given recognition to or over-looked, by some legal doctrine, sections 14 and 15 of the Divorce Act. Section 14 stipulates that an order under section 10 or 11 has legal effect throughout Canada. The force of the Divorce Act orders are again clarified by section 15 of the Act whereby registering an order it may be enforced by the Court in a like manner as the Court that made it. The words refer back to the Court that made the order as well as allowing only enforcement not variation.

The judicial application of these have varied when the courts are dealing with custody orders. There is a clear distinction made between custody orders and those pertaining to the maintenance for spouses. The sections of the Act are concerned with both. It is well established in respect to maintenance for spouses that only the court that granted the decree nisi may vary the maintenance orders. The Ontario Court of Appeal in Richards v. Richards[2] refused jurisdiction since the issue was the rights of the wife to maintenance and stated only that the court which granted the decree nisi could vary the maintenance order. This case was distinguished and jurisdiction assumed in EMERSON v. EMERSON[3] and ECCLES v. VAN DUIN[4] since the issue was with respect to spouses and not children. The court explained that future rights of the husband and wife must be established by those capacities and

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2. (1972), 26 D.L.R. (3d) 264.

3. 8 R.F.L. 30.

4. UNREPORTED FEB. 3/78 (ONT. S.C.).

therefore subject to the federal legislation under which they were divorced. This strict interpretation however has not been followed when variation of child custody orders has been the issue. The constitutional doctrines of interpretation and related arguments to federal and provincial jurisdiction have been somewhat ignored.

III. B.N.A. ACT

The above mentioned sections of the Divorce Act and related problems are a result of Canada's federal state. The legislative power of the Parliament of Canada and the provincial legislatures are found in the enumerations of section 91 and section 92 of the North American Act.[5] There are many areas of Canadian society which have not been specifically categorized under the two heads of power.

The legislative authority for marriage and divorce falls to the federal government by section 91(26). The provinces in turn claim jurisdiction in family matters by ss. 92(13) which is property and civil rights abd 92(16) which is all matters of a merely local or private nature in the province. Section 92(14) may also be applicable since the area may be viewed as a matter for the administration of justice in the province. The provinces have authority also by section 92(12) solemnization of marriage. The issue of custody and maintenance orders have, as corollary matters related to marriage and divorce, been judicially considered. The courts have been faced with a constitutional dilemma since such domestic matters are subject to both levels of government.

The decisions demonstrate adherence to the "matter" doctrine of constitutional interpretation. The court will decide

5. 1867, 30 & 31 Vict. c. 3 as am. (U.K.).

what is the dominant feature or matter of the law to determine its constitutional validity and whether any other feature is merely incidental and ancillary to the main concern. This is the test applied by Laskin, J.A. in Papp v. Papp[6] where he pronounced that the corollary relief orders were valid since there was a "rational functional connection" between them and divorce. This judicial reasoning was applied in the Supreme Court of Canada's decision in Zachs v. Zachs.[7] It was decided that the corollary relief provisions were ancillary to the dissolution of marriage and inseparable from Parliament's power to legislate in matters of divorce. It would seem, therefore, by judicial interpretation that the Parliament of Canada has the legislative competence to enact the corollary provisions of maintenance and custody of children as incident and ancillary to pronouncing a divorce.

A main area of concern is when an order exists and a question arises to it's variation. Section 11(2) of the Divorce Act stipulates that an order may be varied or rescinded by the court that made the order. It is in this area that the doctrine of federal paramountcy plays a role. The rule of federal legislative paramountcy will make in-operative any provincial law which, although validly enacted, is inconsistent with a validly enacted federal law. Therefore, it may seem that an order for the custody of the child under divorce proceedings will extinguish a provincially made order or prevent a court other than the divorce court to vary or rescind the original order. Cases from British Columbia and Ontario demonstrate two entirely different views of this issue. The

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[6] [1970] 1 O.R. 331.

[7] [1973] S.C.R. 891.

British Columbia Court of Appeal has followed the paramountcy doctrine strictly,[8] whereas the Ontario Court of Appeal has maintained that its power to make an operative custody order is not subject to an existing order made by divorce proceedings.[9] It has been the interpretation of the constitution in this regard which has led to many uncertainties concerning the state of law.

IV. CUSTODY AND MAINTENANCE OF CHILDREN

The Divorce Act provides by 11 (c) power to make orders for the custody, care and upbringing of children when a divorce nisi is granted. Section 11(2) provides for the variation of the order when there has been a change in circumstances of the parties. A custody order, by its very nature is not final and there are conflicting decisions regarding whether a court, other than the Divorce Court, may take jurisdiction. In addition to the conflicting decisions regarding jurisdiction or lack of it, courts, having taken jurisdiction, claim authority for a variety of reasons. This leads to a clear lack of standardization across Canada.

There are two popular methods utilized by a court to obtain jurisdiction. The Court may claim authority under the parens patria doctrine or under provincial statutes. The parens patria doctrine has grown from the Courts of Chancery and is now a vested power in the Supreme Courts of the provinces. It involves a special protection for all children within the Queen's allegiance. There also exists legislation in each of the provinces which provides for custody and maintenance orders between competing parents. It is these two

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8 Re Hall v. Hall (1976), 70 D.L.R. (3d) 493.

9 Re D.J.C. and W.C. et al. 8 O.R. (2d) 310.

areas which courts have utilized to invoke jurisdiction when the decree nisi has been granted by a different court. It is often unclear under which method a court claims jurisdiction. Boland J. in Eccles v. Van Duin pointed out that in Emerson v. Emerson [10] "it was difficult to say whether jurisdiction was under the Divorce Act, The Infants Act or the inherent power of the Court."[11]

The decisions of Canada's provincial Supreme Court have fluctuated since 1968. It would seem that the overriding concern has been the welfare of the child when courts have taken jurisdiction. This subjective evaluation by a court gives an almost blanket discretion. Eric Colvin in his article "Custody Orders Under the Constitution"[12] has maintained that an order under the Divorce Act will supersede any existing provincial order which is between the parties to the divorce. This statement is somewhat misleading, since as late as 1971 an Ontario High Court would not take jurisdiction under the Divorce Act when a child was resident in Quebec and already subject to a provincial custody order there. The court refused jurisdiction stating that the provisions of the Divorce Act are not paramount over provincial legislation. "There was no need to change them (the provincial laws) but only to relate them to the divorce proceedings, if need be."[13]

A Nova Scotia Supreme Court decision made an adverse ruling to the Ontario decision. The decisions were not in direct opposition but provided for discretion in future

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[10] Supra, Footnote 3.

[11] Supra, Footnote 4

[12] Colvin, "Custody Orders Under the Constitution" (1968), 51 Canadian Bar Review, 1.

[13] Bray v. Bray, [1971] 1 O.R. 232 at 237.

decisions. In O'Neill v. O'Neill,[14] the issue was again a custody order of a child resident in Nova Scotia but who was subject to a custody order pursuant to a decree nisi in Ontario. The court's decision was that only the court which made the original order has jurisdiction to vary that order. There was one notable exception which is the Court of the province where the child resides. This decision could be merely circumvented by establishing a new residence for the child.

In the wake of these two decisions Wright, J. who ruled in Bray v. Bray[15] made a ruling on a similar issue in Emerson v. Emerson.[16] The application was for a variation of a maintenance order made under a New Brunswick decree nisi. The variation was being sought under The Ontario Infants Act. The judgment clearly demonstrates that the Ontario court, assumes a position of wide discretion when matters relating to the child are the concern.

The Ontario courts have assumed jurisdiction primarily by invoking its parens patriae power. This power was discussed in obiter dicta by the Ontario Court of Appeal in 1976.[17]

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14 (1971), 19 D.L.R. (3d) 731.

15 Supra, footnote 13.

16 Supra, Footnote 3 at p. 36 Wright J. clarifies his earlier position pronounced in Bray v. Bray. "It is the rule of common sense that I should rehear this application. There is no clear established rule that this court is powerless to aid this child, if his welfare needs the exercise of its jurisdiction. I do not consider that the one jurisdiction necessarily destroys the other, as I sought to say in Bray v. Bray ...nor do I see why one beneficient jurisdiction need as a matter of law suppress the other. Both, in the matter of the welfare of children, can stand together and the ultimate responsibility, at any particular time, should be on the courts where the child is.

17 Ramsay v. Ramsay (1976), 23 R.F.L. 147.

The case was concerned with the maintenance for spouses but arguments were also made to the effect that s. 11(2) of the Divorce Act eliminated the parens patriae power of the province's Supreme Court. The court decided that the parens patriae doctrine was well entrenched in our law and that if Parliament desired to change it it could only be accomplished by clear and precise language and not by inference.

The Ontario courts, however, have extended their power when children are the concern. A recent decision illustrates that an order respecting children from a decree nisi will be varied for either inherent power or by provincial statute. Boland J. in Eccles v. Van Duin[18] did not accept the respondent's argument that jurisdiction, with respect to infants under provincial statutes, is ousted by the Divorce Act. The court did not accept that relief from the Infants Act would constitute an abusive process but rather it accepted that the federal and provincial statutes were complimentary. The important issue again was the welfare of the children and the cases cited for the respondent dealt with maintenance for spouses not children. The court directed itself to the constitutional issue and found both the Divorce Act and the Infants Act could safely co-exist. The court went on further to discuss inherent jurisdiction and found that the parens patriae jurisdiction could also be invoked to justify jurisdiction to entertain an application for variation of a divorce maintenance and custody order.

The Ontario Courts have now decided that jurisdiction may be taken by provincial statute or by the inherent power of the court, despite a subsisting divorce order. Criticism may be levied that this is too simplictic a conclusion. It is obvious, however, that the Ontario courts will consistently take jurisdiction because of the welfare of the child.

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[18] Supra, footnote 4.

There is another line of decisions and these are in direct conflict with the Ontario view of the law. An early British Columbia case, however, applies a similar line of reasoning as in Ontario. In Hegg v. Hegg v. Plautz[19] the application was for maintenance but the decision of the court was extended to include custody orders as well. It was decided that the custody and maintenance provisions of the Divorce Act were only precautionary and that Parliament did not intend to alter or restrict the inherent powers of the court. Despite this early beginning, the courts have steered away and decided that the Divorce Act orders are paramount. In respect to the maintenance issue Hegg v. Hegg and Plautz was overruled by the 1976 Rodness v. Rodness[20] decision.

In the aftermath of its two previous decisions the British Columbia Court of Appeal reaffirmed its position in Re Hall and Hall[21] and declined the reasoning of the Ontario Courts. The British Columbia court followed the view expressed in the New Brunswick Supreme Court in Gillespie v. Gillespie. The New Brunswick court decided "...that any 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.[22] Robertson J. in Re Hall and Hall[23] took the New Brunswick decision one step further and concluded "that a custody order made under s. 10 is paramount to any custody order theretofore or thereafter made otherwise than under the Act."

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[19] [1973] 3 W.W.R. 307.

[20] 23 R.F.L. 266.

[21] Supra, footnote 8.

[22] (1973), 36 D.L.R. (3d) 421 at 430.

[23] Supra, footnote 8, at p. 498.

The decision of the British Columbia courts, therefore, follow statute law strictly and give superiority to the federal Parliament. However, the court has left open the question of protective custody. The court may grant such interim custody if necessary to permit application under the Divorce Act.

A recent British Columbia decision, however, demonstrates a departure from its thinking. In Re Abramsen et al[24] interim custody of the children was given to the father pursuant to an Ontario court order under the Divorce Act. The children had been brought to British Columbia and application by the mother for their custody had been successful under The Equal Guardianship of Infants Act. Consequently, there existed two outstanding orders from different provinces. The father asked for a declaration that the B.C. court had no jurisdiction. After a careful perusal of former B.C. court decisions Trainor L.J.S.C. decided that a s. 10 Divorce order generally supersedes a previous order made under provincial legislation. The conclusion, however, was that the provincial order of British Columbia"would be limited to a supplementary role as long as it did not interfere with the general tenor or purpose of the Ontario order."[25] The father's declaratory application was dismissed and both orders continued to exist. It is very difficult to determine how two custody orders in direct opposition can be explained away as supplementary to each other.

Alberta courts have not waivered concerning their position when jurisdiction is in question. The Alberta judiciary will not take jurisdiction if there is an outstanding order under the Divorce Act. The Alberta Supreme Court follows the

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24 [1977] 3 W.W.R. 764.

25 Re Abransen et al [1977], 3 W.W.R. 764 at 768.

view that it has an inherent power to assume jurisdiction if a child's safety is in question. The exercise of this power will not be exercised lightly and there must be evidence before the court if the doctrine is to be invoked.[26] This decision was re-affirmed in Hilborn v. Hilborn.[27] An order for custody of the children was made to the mother in 1975 either by provincial statute or the inherent power of the court. In the meantime, the father was granted permanent custody pursuant to a decree nisi from the Supreme Court of Nova Scotia. The father did not pursue its enforcement until 18 months had passed. The Alberta court adjudicated that the provincial order must be set aside in face of the Nova Scotia divorce order. The divorce order pervailed, since the federal statute is paramount. Miller J. concluded that any variation must be sought in the Nova Scotia court. This case clearly demonstrates a firm adherence to the paramountcy doctrine and the reluctance of Alberta courts to interfere with orders made under the Divorce Act.

V. DISCUSSION

It would seem that the present state of affairs concerning jurisdiction and enforcement of custody orders needs clarification. There is no doubt that the area is confused because of the subjective evaluation of the child's welfare. The operation of constitutional doctrines in this area of the law is simply an academic question and not practical in operation. There is no doubt that both the federal and provincial governments have the constitutional authority to enact statutes related to child custody. The federal government has authority by the ancillary or necessarily incidental doctrine in relation to the power given it by s. 91(26) over marriage

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[26] Dalshaug v. Dalshaug (1973), 14 R.F.L. 271.

[27] Hilborn v. Hilborn (1977), 4 Alta. L.R. (2d) 52.

and divorce.[28] The provincial legislature declares its authority by a number of enumerations under s. 92 of the B.N.A. Act, as discussed previously. This, therefore, leads to the inescapable conclusion that statutes passed by either level of government are valid.

The possibility of two valid statutes in conflict requires the application of the federal paramountcy doctrine. This judicial instrument of interpretation allows federal provisions to prevail in cases of conflict between federal and provincial legislation. The problem of this rule, however, is in its application and in its effect. Eric Colvin in "Custody Orders under the Constitution"[29] discusses how the courts may apply the rule either narrowly or in a much wider manner. Colvin points out that Ontario courts have utilized the former approach, whereas the B.C. Court of Appeal has preferred the wider effect when construing section 11(2) of the Divorce Act. Consequently, the decisions lack uniformity. Ontario courts will take jurisdiction despite an outstanding order under the Divorce Act made by a different court and British Columbia courts usually decline jurisdiction.

The doctrines of constitutional interpretation have served to further confuse the law. The rule of federal paramountcy will not itself strike down a valid provincial law but rather it makes it inoperative.[30] This area of constitutional interpretation has been fully applied in various motor vehicle cases.[31] The issue in those cases is essentially the provincial and federal penalties imposed for impaired driving.

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[28] Supra, footnote 7.

[29] Supra, footnote 12.

[30] P.W. Hogg, Constitutional Law of Canada (Toronto: The Carswell Company Limited, 1977) p. 113.

[31] P.E.I. v. Egan, [1941] S.C.R. 396; Ross v. Registrar of Motor Vehicles, [1975] 1 S.C.R. 5; Bell v. A.-G. P.E.I. [1975] 1 S.C.R. 25.

Provincial legislation requires an automatic suspension when an individual is convicted. Federal law, however, allows for an order to prohibit driving only at certain times and places. The Supreme Court has said orders made under both enactments may co-exist and are not in conflict.[32] This essentially is on application the narrow conflict rule of the federal paramountcy doctrine.[33]

On the other hand, the courts may take a wider view of the paramountcy doctrine. The occupied field rule has not enjoyed the usage which the conflict rule has in the interpretation of statutes. The occupied field is concerned with a conflict of policy. This has been the rule utilized by some Canadian courts, Alberta and British COlumbia courts included, to deny jurisdiction and seems to somewhat clarify the situation. Its application will not entertain the subsisting of two orders because, by their very nature, they are deemed to be contradictory.

The outcome of the different rules utilized by a court in applying the paramountcy doctrine still leaves the area confused. The paramountcy doctrine does not assist in clarifying an already confusing area of the law. In child custody matters this is evident by the B.C. Court of Appeal's

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32 Ross v. The Registrar of Motor Vehicles [1975] 1 S.C.R. 5 This thinking has been applied in family related matters, Hughes v. Hughes [1977] 1 W.W.R. 579, at p. 584 'the concept that provincial legislation might be operative while an order under it is invalidated by an order under the Federal Act is not entirely new.'

33 Peter Hogg in his book at page 108 Constitutional Law of Canada suggests the motor vehicle cases demonstrate a refusal to apply the paramountcy doctrine. He further states the decisions seem to lack common sense and doubts are raised as to the present state of the law.

decision in Re Abramsen et al.[34] The B.C court had been following the occupied field rule when applying the paramountcy doctrine. The Re Abramsen decision is an application of the conflict rule and allows for the co-existence of what seems to be two contradictory orders. It is perhaps arguable that this is only one small departure by the B.C. judiciary. The point is, however, that Canadian provinces lack any consistency and there is no certainty to the law. Perhaps the application of constitutional rules of interpretation is not a solution in this area of the law.

There is a need to find an answer to this perplexing problem of jurisdiction. The main concern of this paper has been custody orders under the Divorce Act. There are additional problems in the enforcement of provincial custody orders made under provincial statutes. At least an order under the Divorce Act potentially has effect throughout Canada and may be enforced by registering it in a province's Supreme Court.[35] There must be a careful examination of the law so that a more workable solution is incorporated. A workable formula must be reached so that provincial custody orders and the corollary orders under the Divorce Act will be mutually respected throughout Canada. At the same time, attention must also be paid to the welfare of the child.

A compromise has been somewhat reached between the welfare of the child and some certainty in the law by the recent passing in Alberta of The Extra Provincial Enforcement of Custody Orders Act.[36] The Act provides for the enforcement of another province's child custody orders. An order will be enforced only if it was made by a court where the child had a real and substantial connection.[37] The Act further

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[34] Supra, footnote

[35] Supra, footnote 1, s. 15.

[36] S.A. 1977, c. 20.

[37] Ibid., s. 2(1).

allows the Alberta court authority to make
an order for the child's protective custody. This is therefore a start in recognizing the custody orders made by another province under its provincial statutes.

The Act may seem to be too compromising as it still empowers the Alberta court to make changes in another court's order. There are however important restrictions in that to vary a child must have a real and substantial connection with Alberta or all parties affected by the custody order are resident in Alberta.[38] This is further clarified by s. 3(2) of the Act in that a person is not a resident of Alberta simply because they are in Alberta to make or oppose an application under the Act. The Act provides a mechanism whereby a sister province's order will be recognized and variation of the order will only be made under specific conditions.

The Extra-Provincial Enforcement of Custody Orders Act gives recognition to the custody orders made by other Canadian provinces. The Divorce Act provides a mechanism for custody order enforcement but a confused area is the variation of Divorce Act custody orders. It seems a bit inflexible that only the court that made the original order may change it. On the other hand, the law cannot be so laissez-faire to allow 'forum shopping or kidnapping' in order for one parent to obtain custody.

It is recommended that changes take place in the Divorce Act. One of the main concerns besides the welfare of the child in making custody orders is the proper administration of justice. The often quoted words of Guy, J.A. in Leatherdale v.

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[38] Ibid. s.3(1)(b).

Ferguson[39] shows that the best evidence is available where the child is ordinarily resident and not where he has been recently moved. In this regard, the strict residency requirements of the Divorce Act would give the necessary requirements to make a sound determination for a child's welfare at the dissolution of a marriage.

The main problem has recurred when considering the variation of Divorce Act corollary orders. This is clearly evident by the Prince Edward Island Supreme Court decision of Bolton and Moringston v. Bolton and Terry.[40] At the time of the divorce, the custody of the children was granted to the husband. The circumstances of the parties changed and by mutual agreement it was decided that the mother would have custody. The father and mother were living in Calgary and Winnipeg respectively and applied to the P.E.I. court for variation. The problem arose because part of the agreement included having the jurisdiction over the children transferred to the Manitoba Queen's Bench. McQuaid J. decided he had no authority under the Divorce Act to transfer the jurisdiction. He pointed out that even though the parties had no relationship to P.E.I., only the P.E.I. court had jurisdiction. It was obvious to him that a legal entanglement had been created and there was no practical solution.

There should be some flexibility built into the Divorce Act to avoid hardships such as the Bolton and Moringstar issue. A court, other than the one granting the original order,

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3 (1965) 50 D.L.R. (2d) 182 at 185 -"But the most important aspect of this case, to my mind, is that a consideration of what is in the best interests of the children themselves must be gleaned from evidence available in Alberta, where the children grew up from birth. That is where their little friends, their teachers are, their neighbours are and the family doctor and minister would be living. Winnipeg is a strange new city to them.

Bolton and Moringston v. Bolton and Terry 29 R.F.L. 359.

should be given a justified opportunity to take jurisdiction. This could be accomplished by allowing a transfer of the Divorce Act orders into another province and allowing for a variation in the other court. The important element is the recognition of the original order. The order would be scrutinized and changed subject to the requirements of s. 11(2) of the Divorce Act which requires a change or new circumstances between the parties. In addition, because there have been abuses of similar provisions, for such transfer of orders, the parties or child must meet a residency requirement. This could be similar to the real and substantial connection as discussed in relation of the Extra-Provincial Enforcement of Custody Orders Act. Courts will not be faced with extra-statutory remedies to claim jurisdiction. A court will have authority as defined by the Divorce Act. This will lead to a uniformity in the law across Canada as a court is required to meet a statutory requirement in order to be competent to take jurisdiction.

VI. CONCLUSIONS

There is no doubt the welfare of the child has always been the concern of Canadian courts when dealing with custody matters. The lack of clarity in the law is, however, regrettable. The proper administration of justice in determining a child's welfare is questionable. Certainty and uniformity are important aspects of the law and are overlooked somewhat more than is necessary in child custody matters.

The nature of Canada's federal state has caused a split jurisdiction between the federal and provincial governments. The lack of clarity in the Divorce Act combined with an incompetent use of the paramountcy doctrine further confuses the situation. The method a court employs to exercise the

doctrine dictates its effect. Several provinces will adhere to the strict interpretation and decline jurisdiction whereas other courts will require a direct contradiction before the doctrine is invoked. This whole issue of jurisdiction besides, the variation of Divorce Act custody orders is relevant to custody orders made under provincial statutes which conflict with Divorce custody orders.

There is no wrong interpretation of the law in custody matters. The area is so sufficiently confused any interpretation seems plausible. The best solution seems to be to clarify the Divorce Act by allowing a court to have jurisdiction. This jurisdiction must only be exercised when certain statutory requirements are met. In essence, the child must have a real and substantial connection with the province. This would avoid 'forum shopping' and give some certainty in child custody matters. The eventual result will be an administration of justice which better meets the welfare of the child.