

**WHAT HAPPENS TO THE CHILDREN
AFTER SEPARATION?:
CUSTODY, ACCESS & CHILD SUPPORT**

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There can be no keener revelation
of a society's soul than the way
in which it treats its children"

- Nelson Mandela

"If you just learn a single trick...you'll get
along a lot better with all kinds of folks.
You never really understand a person until
you consider things from his point of
view...until you climb inside of his skin and
walk around in it."

- Harper Lee
To Kill A Mockingbird

I Am Still Here

*It is very hard to get back on track
Because the abuse is not only about your body
It is about your mind
It is about your soul
It is about your heart
It is about your head*

*It is about the aftermath
It is forefront; it is always there
It is like a gas burn or a bad bruise
But I am still here
I went to court, the experience was terrible
But I am still here*

*I can talk about the aftermath
And the impacts on my life
Because I am still here*

*I can draw strength from my friends
my church and others
I am still here*

*I can move on
Not like a victim
But like a survivor
I am still here*

*My other survivors
Stop beating yourselves
Stop saying you cannot do things
You can do anything you want to
You are still here
We are still here*

Custody and access decisions are pre-eminently exercises in discretion. Case by case consideration of the unique circumstances of each child is the hallmark of this process. This Court recognized in *Moge v. Moge, supra*, in the context of spousal support decisions, that the discretion vested in the trial judge is essential to effect the very purposes outlined in the Act. The wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. Such discretion also permits the judge to focus negatively affect a child. Such discretion also permits the judge to focus on the needs of the particular child before him or her, recognizing that what may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

- Justice L'Heureux-Dubé, *Young v. Young*

A child is like a precious stone, but also a heavy burden.

- *Swahili proverb*

The heavy burden referred to in the Swahili proverb quoted above is, of course, not the child so much as the responsibility for a child. We believe and hope a person undertaking the important role of caring for a child will ensure the precious nature of each child is recognized and fostered. It is hoped that in this way the child will be safely and successfully guided to the ultimate destination of adulthood.

Initially, at least, children are the most vulnerable and dependent members of any society. To ensure they grow into healthy, happy, productive adults, they always require one or many people to help them with their physical and emotional needs. However, just as each society may have its own definition of what constitutes a *healthy, happy, productive adult*, there may also be differences between (and within) societies as to how best to raise children in order to accomplish that goal. From time to time,

there may even be disagreements within the society as to which groups and individuals are capable of raising a child and/or even having the opportunity of attempting that goal.

Traditionally, in our society, with its British legal history, the child's biological parents were seen as being the ones best able to undertake the "heavy burden" of raising the child. It was expected that a biological child would, more often than not, be born into and subsequently parented by and within a "traditional family unit." The traditional family unit was expected to comprise a man and woman married to each other in a ceremony recognized legally binding on both parties. By being born to a married couple, the child would have certain legal and social rights, such as the right to inherit property from his or her parents. If children were born "out of wedlock", they had no rights to their parent's property.

Today, the distinction between biological children born to a married couple and other children has disappeared: now, every child has rights as a child whether they were born within or outside of a traditional marriage.

Similarly, the unit that we call the "family" has changed. Our legal recognition of various relationships has been broadened along with the laws we use to label and recognize the importance of the relationships. It is important to always remember that the change to our concepts of family and marriage is a fairly recent development in society and in law. For much of our legal history, traditional marriage was the mainstay of the "family unit," socially and legally, and it was a complicated matter to break up this cornerstone of society.

Not very long ago, one had to apply all the way to the Canadian Senate for a divorce; Canadian courts initially were not given the authority to deal with something as important as the breakdown of a marriage. It was not until 1930 that the Parliament of Canada conferred jurisdiction for divorces in Ontario on the Supreme Court of Ontario. Even then, Quebec and Newfoundland courts had no jurisdiction over divorces: the Senate continued to have the sole legal authority in this area for these two Provinces until a new *Divorce Act* came into being in 1968. The changes to divorce in 1968 gave authority for granting divorces to the courts in all provinces and territories. The Senate handled its last divorce case on November 26, 1969. Under the new *Divorce Act*, it became significantly easier to get a divorce, the social impact of which should not be underestimated.

Today, matters have changed significantly. The “family unit” can be found in its “traditional” form but it also exists in a number of different forms and titles. Given the recent recognition of same-sex marriage, it is unclear how far recognizing inter-personal relationships will go as our legal and societal recognition of significant relationships continues to change.

The court has had to address, and define, many new and varied relationships that have evolved.

Similarly, the issue of who is a parent has become an issue. For quite some time, the issue of paternity has been considered by the courts. More recently, issues of maternity have also joined the debate. For example, when considering a same-sex relationship recently, the Ontario Court of Appeal found it in a child’s best interests for a child to

have two mothers. The non-biological was declared to be a mother equal as a parent in law to the birth mother. The reverse was found in a subsequent Superior Court case involving a surrogate mother. There the Court found it in the child's best interests for the biological mother not to be recognized and declared she was not a parent of the child. Two opposite results and determinations of what a "parent" is because the court recognized and considered new forms of relationships that only a few years ago would have been considered too taboo to mention in mainstream society, let alone place as an issue before the court.

Not only have our concepts of marriage and family (and their various forms) changed, the forms and frequency of the breakdown of these new and varied relationships have changed as well. The relationship may end through a formal divorce; a formal separation agreement; a physical separation; or, in some cases, simply forming the intention to separate with no reasonable prospect of reconciling. Various formulas, processes and language have developed for each of these situations in various jurisdictions.

No matter what the ending of the relationship is called, or how it is arrived at, it would seem the ending of marriages and relationships has become less complicated legally and more socially acceptable generally.

However, one thing has not changed. As we have seen in cases such as the contrasting decisions regarding the mothers noted above, relationships, regardless of their nature or what they are called often involve children. Children are affected by the break-up of their family relationships no matter how that family was constructed.

Children are greatly affected by the changes that happen in their lives when their parents separate.

As we all know all too well, there is a possibility that almost every aspect of a child's world will change after a divorce or other break-up.

As a society, we turn to the adults involved to ensure that the children's needs are met throughout this often difficult time. The break-up of the family unit, whether traditional or not, invariably requires the adults involved to take steps to ensure the children's needs are met and the heavy burden of raising the child of the family is ensured. In a perfect world, the adults who are involved in a break-up (and who ostensibly love the children) would, upon family breakdown, discuss and agree on: how the child should be raised; how the responsibilities for child-rearing are going to be divided; and then simply how to proceed to carry out their agreement. In some cases, this kind of accord actually does occur. In those cases, teachers, daycare providers and others involved in day-to-day interactions with the child will not necessarily note any issues with the child during this transition period. Those same teachers, daycare providers, etc., will avoid becoming involved in any litigation that may occur between the parents and/or other family members.

Unfortunately, in many, many other cases, the break-up of the family results in a lack of agreement among the adults about the children. For both legitimate and less than legitimate reasons, the adults involved in the break-up of the relationship are unable or unwilling to agree on how the children's needs should best be met. In these situations, a court may have to decide what is best for the children. As teachers, daycare workers

and others, you may become involved in the court process as a witness (or in some other fashion) as a court attempts to determine what is best for this child under the particular circumstances that he or she faces.

This chapter provides a brief overview of the court processes that occur when adults separate and the family unit breaks down, with a particular focus on the rights and determinations affecting children.

The person who has the right to make decisions about the child is the person that we say has “custody.” A person who has a right to know about the child and possibly visit with the child is the person we say has “access.” These roles may evolve through the mutual consent and agreement of the parents and other adults involved with the children or the roles, rights and obligations may be imposed by court order.

If the court becomes involved, the test used to determine custody and access will be the “best interests of the child.” The test is a global examination of the child and his or her family and what is best for that child given the family dynamic. Given that the matter involves the family as a whole, it is often referred to globally as “family law.”

TYPES OF CUSTODY ORDERS

Sole Custody

One parent is awarded sole authority in respect of decision-making and sole care and control of the child.

If the other parent is granted access, he/she has the right to visit and be kept informed about the child’s health,

educational and social issues. The right to be kept informed does not include the right to interfere with a custodial parent's responsible decisions.

Joint Custody

There is no statutory definition for "joint custody."

Joint custody does not focus on the amount of time a child resides with each parent. It relates to who has the right to make the major decisions with respect to a child. Therefore, joint custody may include arrangements where children live primarily with one parent.

Parallel Parenting

This is a type of joint custody that has been applied to situations in which the parents are found, individually, to be good parents but they cannot co-operate with one another in relation to the child.

The court might well determine that one parent should be responsible for making the education decisions and the other responsible for non-emergency medical decisions. Courts have also left certain decisions – about which the parties cannot agree – up to the professional involved with the child.

Shared Parenting Generally, this means that the parties not only have an equal say in major decisions, but that the child spends equal time with each parent.

Federal and provincial Child Support Guidelines define “shared custody” for child-support purposes as a situation where the time the child spends with each parent is somewhere between 40/60 and 50/50.

Meaning of Custody The expression “custody” denotes the various aspects of care or decision-making. Generally, it involves contentious issues around choice of school, place of residence, religious education, health issues and perhaps extra-curricular activities and lessons.

Examples of limits that have been placed on custody/access

Courts have placed limits or ordered terms of custody arrangements such as:

- supervision of custody or access arrangements
- requiring a custodial parent to notify the non-custodial parent of his/her intention to relocate the child’s residence
- preventing the relocation of a child’s residence without written agreement of the parties or court order
- providing for who will direct the child’s religion

- providing for who will determine the child's extracurricular activities and, often, who will be entitled to take the child to and/or attend lessons, sports, recitals and competitions.

“BEST INTERESTS” TEST

The test for determining an application for interim or permanent custody or access is always: What is in the best interests of the child?

The court is required to take into consideration only the best interests of the child as determined by reference to the “condition, means, needs and other circumstances of the child.”

Ontario courts determining custody and access matters under the *Divorce Act* often refer to the criteria in the *Children's Law Reform Act (CLRA)*, subsection 24(2), when making their decision. That list of criteria is not exhaustive. On February 23, 2006, subsections (3), (4), & (5) were added for consideration.

The following are many of the factors that have been held to be relevant “aids” in determining the best interests of a child under the *Divorce Act*:

- the status quo
- the child's wishes – depending on his/her age
- the blood ties of the child vs. his psychological ties to an applicant
- any custody/access agreements that are in place

- the health of the parent
- the preference to keep siblings together, where possible.
- the conduct of a parent that impacts on the child
- the willingness of a parent to facilitate the child's relationship with the other parent and/or other persons (grandparents, for example)
- anticipated changes in a parent's home life (e.g., new partner)
- domestic violence toward a child or that a child witnesses
- the physical well-being of the child
- the emotional well-being and security of the child
- the plans for the education and maintenance of the child as presented by the parents making the application
- the financial position of the parents or those making the application – not to award custody to the wealthiest, but to help in the apportionment of payment for the support of the child
- the fulfilment of the religious or ethical upbringing of the child
- the moral and ethical position and situation of the parties viewed in accordance with community norms
- the sensitivity of the parents or applicant as to their role as parents and, in particular, their understanding and appreciation of the needs of the particular child, including the need of the child to continue his relationship with the other parent.

“Best Interests” of child under the *Children’s Law Reform Act (CLRA)*, subsection 24(2), as amended

The court must consider all the needs and circumstances of the child, including:

- (a) the love, affection and emotional ties between the child and,
 - (i) each person entitled to or claiming custody of or access to the child,
 - (ii) other members of the child’s family who reside with the child, and
 - (iii) persons involved in the care and upbringing of the child;
- (b) the child’s views and preferences, if they can be reasonably ascertained;
- (c) the length of time the child has lived in a stable home environment;
- (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
- (e) any plans proposed for the child’s care and upbringing;
- (f) the permanence and stability of the family unit with which it is proposed that the child will live;
- (g) the ability of each person applying for custody of or access to the child to act as a parent; and
- (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Past conduct

- (3) A person’s past conduct shall be considered only,
 - (a) in accordance with subsection (4); or

(b) if the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

Violence and abuse

(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

- (a) his or her spouse;
- (b) a parent of the child to whom the application relates;
- (c) a member of the person's household; or
- (d) any child.

Same

(5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse. (2006, c.1, s.3(i); 2009, C.11, s.10)

Case law reveals that the weight to be allotted to the child's wishes, although only one factor, is often contingent on age, (in one case 16), and level of maturity. As a general rule, the wishes of a young child under 10 years of age will not be given significant weight in an access case. The strongly held views of a teenaged child are often determinative. However, if a court is satisfied that it is not in a child's best interests to give effect to an older child's wishes, a court may refuse to give effect to the child's wishes. However, a child should not be forced to choose between parents in a dispute. In evaluating the weight to be accorded a child's wishes, a judge should consider whether: the wishes are firmly held; a child is mature enough to form a reasoned

opinion about access; a parent has influenced the child's decision; one parent is trying to undermine the child's relationship with the other parent; and a child is trying to play off one parent against the other.

Access and the "Best Interests" test

In addition to factors such as those above (relating to custody cases) which a court will consider in determining the access issues, there are factors that are fairly specific to access as opposed to custody.

General Legal Principles

- The child should have maximum contact with both parents if it is consistent with the child's best interests.
- The best interests of the child have been held to be met by having a loving relationship with both parents and that such a relationship should be interfered with only in demonstrated circumstances of danger to the child's physical or mental well-being.
- An access parent is entitled to share their ordinary lifestyle, including religion with a child. The other parent cannot interfere with how the other parent spends their time with the child, unless the activity poses a risk to the child, or otherwise is not in the child's best interests.

- Absent concern about such issues as abuse, each parent should be expected to support the children's relationship with the other parent, and to take steps to ensure that the children have a positive attitude about that relationship.
- The court should not delegate what access is to be provided to a third party.
- The best interests of a child take precedence to privacy rights. Should the mother have mental health issues, regular medical updates may be required.
- An access parent has the right to visit and be visited by a child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

The following is a list that the Court must consider in determining access. It is not exhaustive:

- **The access parent's prior attitude toward the child.**
- **Non-payment of child support by the access parent.**

As a general rule, a court will not link access and child support. However, in the rare case, it has happened.

- **The custodial parent's disapproval of the other parent's lifestyle.**

The custodial parent is not entitled to restrict an access parent's activities with a child simply because he/she disapproves of the access parent's lifestyle. Rather, a custodial parent must prove that a child cannot deal with the disparate values presented or that the parenting conflict threatens to undermine the custodial parent's relationship with a child: see *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.).

- **Different views of the parents about nature of access.**

Separated parents sometimes disagree on issues such as how much time a child should spend with an access parent, how the time should be spent, whether an access parent can take the child on a vacation out of the jurisdiction, or whether a young child should be permitted to fly alone to visit the other parent in another jurisdiction.

- **Parental alienation.**

If the court finds conduct of this nature, and is of the view that the child will benefit from a relationship with the parent from whom the child is being alienated, then the court will consider the alienation very seriously when determining the nature of the access order it will make. The court must look at a child's long-term interests; even if the child is upset by being moved, it is best for that child NOT to be with the alienator. Sometimes, interestingly, court makes orders of joint custody just to prevent alienation (e.g., failure to provide access).

- **The parties' prior agreement(s).**

Although a court is not bound by an access agreement, parties are encouraged to settle their disputes and, where they have reached an agreement, a court should respect the agreement. However, if a child is being alienated, the court will consider the alienation very seriously when determining the nature of the access order it will make.

- **Health of the access parent.**

Courts are reluctant to restrict or cancel access because a parent has health problems, in the absence of evidence that the parent is unable to care for a child or poses a risk to the child (e.g., issues of mental health).

- **Age of child.**

Children's needs change over time and a parent's role in a child's life may also, naturally, change.

- **The child's welfare.**

As a general rule, it is in the best interests of a child to develop and maintain a relationship with both parents: see *Gordon v. Goertz* (1996), 19 R.F.L. (4th) 177 (S.C.C.). In most access disputes, the focus of the litigation is on why a court should not maximize contact between a child and a non-custodial parent. The courts are inclined to accept that it is virtually always in a child's best interests to have meaningful contact with both parents in the absence of a reason to the contrary.

Our courts have traditionally given a great deal of weight to the actual arrangements that are in place at the time of the court's determination of the issue (the "status quo"), be it at the interim stage or the final stage.

The "best interests" of the child is the legal test, albeit a flexible one, and is to be applied according to the evidence of the case, viewed objectively. There is no room for the judge's personal predilections and prejudices.

The most difficult decisions made by courts is deciding who is going to have custody of a child, where that child is going to live, and what type of contact the child is going to have with the non-custodial parent. Parents are in such conflict that they have come to the point where they cannot resolve these issues themselves and must rely upon a third party, someone who may never hear from the children or know anything about them, except what has been filed in the courts through each of the parents in support of his or her position. The decisions made in relation to custody and access may fundamentally alter a child's life and therefore ought to be the most thoughtful, reasoned, and difficult cases faced by judges.

The relevant legislation in any given situation depends on whether the parents are married and, if so, whether the application is brought pursuant to the *Divorce Act*, or, unmarried, and therefore brought pursuant to the province's legislation in which the child resides. (For example, in Ontario - the *Children's Law Reform Act* provides legislation that deals with custody and access .) One might question whether there is any difference in the approach to be taken with respect to custody issues based upon the applicable legislation; after all, what matters is determining what is best for the child in question.

There appears to be a difference in the starting custodial presumption depending on whether the application is pursuant to the *Divorce Act* or provincial legislation.

Divorce Act [R.S.C.], 1985, c. 3

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

...

(4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

...

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

A “plain English” read of **s. 16(10)** of the *Divorce Act*, and the application of some basic math, could lead one to conclude that the starting point for courts in determining the physical custody of a child of married parents after separation would be that the child would be in the physical custody of each parent on an equal basis. This would, of course, be subject to the ability of either parent to lead evidence in an attempt to convince the court that some arrangement other than an equal custodial situation is in the child’s best interests. If this were accepted, it would mean that there is a rebuttable presumption that a child of separating married parents would be in the care of each parent on an equal basis.

It is interesting to compare the wording of the *Divorce Act* with the various common law provinces' and territories' legislation.

Ontario – *Children's Law Reform Act*, R.S.O. 1990, c. C.12 as amended.

20 (1) Except as otherwise provided in this Part, **the father and the mother of a child are equally entitled to custody of the child.** [emphasis added]

In his annotation to the case of *Young v. Young*, Professor J.G. McLeod points out what may still be thought of as the starting point in presenting a case dealing with custody issues:

The trend in custody and access cases is to deal with incidents of custody. Based on social biases and past parenting practices, mothers usually receive custody. Most fathers are content to be involved in making major decisions. J.G. McLeod, Annotation to *Young v. Young* (1994), 49 R.F.L. (3d) 129 at p. 133.

EQUAL CUSTODY PRESUMPTION?

An equal parenting presumption would also reinforce societal ideals of both parents being equal, involved, interested, and important in the lives of their children. In an age where more and more homes have two working parents and where children's lives are so busy that often simply the weekly school/sports/extracurricular commitments of children require both parents to be involved, why shouldn't the legislated presumptions be keeping pace with this reality?

DISADVANTAGE OF EQUAL CUSTODY PRESUMPTION

For example, if there was a great power imbalance in the parents' relationship or if there had been domestic violence inflicted on one spouse by the other, equal parenting would likely be difficult. Similarly, if one spouse has been out of the workforce or otherwise is financially disadvantaged vis-à-vis the other spouse, the disadvantaged spouse may not have the financial means available to try to challenge the equal custody presumption, even if that spouse may be in a very good position to be successful in the challenge.

ASSUMPTIONS THAT PRESENT IN EQUAL PARENTING ARRANGEMENTS

Would there be more frequent contact required between parents who share care of their children on an alternating weekly basis than in situations where there is a primary care parent and the other parent has access every other weekend and one night during the work week? Is it more difficult to co-ordinate responsibility for ensuring the child's homework for the week is done if one parent is responsible for the child from Sunday night to the following Sunday night or if the access parent has the child from Wednesday after school until Friday morning when they drop the child off at school? Is it more or less likely that a child will miss their re-scheduled Wednesday afternoon soccer practice when the message is left on Wednesday morning on the primary care parent's home phone and the access parent picks the child up from school that day?

What questions help determine whether sole or joint custody would be appropriate?

(A) Has each parent maintained a meaningful relationship with their children?

Does each possess parenting capabilities that are adequate to meet their children's needs?

- (B) Will the parents be able to make decisions together about their children? Are they able to co-parent despite any conflict on a personal level between themselves? Can they separate feelings for each other to focus upon the children's need for a relationship with both parents? Can they separate their personal relationships from the parent/child relationship? (Not too often in our Courts.)
- (C) Will the children be involved in the conflict between the parents in a detrimental manner?
- (D) Will the proposed joint custody arrangement cause disruption and discontinuity to the children's developmental needs?

Historically, it is interesting to look at Children's Rights in the Practice of Family Law, (Carswell (1986)):

...Canadian courts seem to assume that because the parties do not voluntarily agree on joint custody, they cannot or will not cooperate if this option is imposed on them by the court. Underlying this assumption may be the common but unfounded belief that people who divorce are necessarily hostile and unable to cooperate about anything, including their parenting. While this may be true of some marriages, it is not true of all. In fact, the research indicates that there are substantial numbers of divorced persons who can continue to parent cooperatively even though they remain hostile to one another. Courts should not assume that the hostility which they observe at the time of litigation continues thereafter at the same intensity. There is empirical evidence that the anger

between most divorcing spouses diminishes within the first year of separation (and after litigation) and that only a small percentage remain intensely or pathologically angry after two years. Judges must bear in mind that they see people at their worst and they should assess divorcing parents as having the potential to cooperate. Otherwise, unwarranted pessimism may preclude a cooperative parenting option in cases where it is viable.

When determining what parenting arrangements are best, do courts approach the problem with pre-conceived assumptions? We all bring our own experiences to bear each time we are faced with a situation. What judges must do, however, is put aside their own experiences and avoid comparing the situation before them to others that may appear to be similar or pigeon-holing the family situation into either the 'traditional' or 'non-traditional' category and simply letting their assumptions take over. The court must focus on the children and the parents in each particular case and ask some questions: What role did each parent play with respect to the children prior to separation? Why did each parent play the role he or she did? What is each parent now suggesting would be their roles and does this appear to be best for the children?

Everyone has an opinion about parenting. And almost everyone has an opinion about parenting after separation and divorce. Many people believe that "joint custody" or "shared parenting" is the best arrangement for children following marriage breakdown. This preference for joint custody may be based on personal experience of separation and divorce.

Research suggests that children do not necessarily benefit from greater contact with their non-custodial parent. It is the type of parenting the non-custodial parent engages in, not the amount of time that parent spends with the children, that is most significant. Of most direct significance for the joint custody debate is that children do not fare better post-divorce in joint custody arrangements than they do in sole custody, and some children, including those in high conflict families, may fare worse.

Recent studies of high conflict families also challenge the commonly held perceptions on the impact of divorce. These studies suggest that, in high conflict situations, children whose parents remain married are at *higher* risk of behavioural problems than children whose parents divorce.

How often fathers see their children is less important than what fathers do when they are with their children.

To maintain high quality relationships with their children, parents need to have sufficiently extensive and regular interaction with them, but the amount of time involved is usually less important than the quality of the interaction that it fosters. Time distribution arrangements should ensure the involvement of both parents in important aspects of their children's everyday lives and routines – including bedtime and waking rituals.

There is no clear evidence that the *form* of a custody arrangement, as between *sole* or *joint* custody has an impact on children's post-divorce well-being, at least for the vast majority of children.

People engaged in equal time arrangements tend to have high income levels, since they need sufficient income to have two residences capable of accommodating their children. The parents also tend to be able to communicate well with each other and to be able to cooperate with each other. Good co-operation and communication are important to the success of these arrangements, which are logistically more complex than other parenting arrangements and generally require more coordination and interaction between the parents. In Canada and Australia, studies on equal time arrangements have also yielded what may be a very significant finding: overwhelmingly, parents who have established successful equal time arrangements have created them consensually, without the involvement of legal professionals. Finally, both parents in equal time parenting arrangements – fathers as well as mothers – have tended to structure their lives to enable them to take on active childcare roles.

In divorced families where there is on-going conflict between parents, frequent visitation arrangements and joint custody schedules were likely to result in increased levels of verbal and physical aggression between parents, compared to similar families who had sole custody arrangements, especially at times of transitions when children moved between their parents' homes. More frequent transitions and more shared access between high-conflict parents were associated with more emotional and behavioural

disturbance among children, especially girls. These children are likely to be depressed, withdrawn, aggressive, and to suffer from physical symptoms of stress (such as stomach aches, headaches, etc.); they were also likely to have more problems getting along with their peers, compared to children with fewer transitions and typical sole custody access plans.

For children in high conflict situations, frequent contact with their non-resident parent and joint custody arrangements with frequent transitions between parents *increase* the risk of poor post-divorce adjustment.

Risk Factors for Separated and Divorced Children and Adolescents

- Stress of separation
- Psychiatric illness and personality disorders in residential parent
- Diminished parenting
- Loss of important relationships
- High conflict using child
- Re-partnering and remarriage
- Moves to new locations
- Reduced or unstable economic resources

Amato, 2000; Clarke-Stewart & Brentano, 2006; Emery, 1999; Hetherington & Kelly, 2002; Kelly, 2000; Kelly & Emery, 2003.

Effective Parenting: Mothers

- Warmth
- Authoritative discipline
- Hold appropriate expectations for children
- Academic skill encouragement
- Monitoring of activities

Amato, 2000; Amato & Fowler, 2002; Buchanan, 1996; Hetherington & Kelly, 2002; Martinez & Forgatch, 2002; Simons et al, 1999

Effective Parenting: Fathers

- Aspects of father involvement linked to more positive adjustment after divorce:
 - Active involvement
 - Authoritative parenting
 - Monitoring of child/adolescent

Amato & Gilbreth, 1999; Maccoby & Mnookin, 1992; Hetherington, 1999; Finley & Schwartz, 2007; Simons et al, 1999; Stewart et al, 1997

Children's Adjustment in Sole vs. Joint Physical and Legal Custody

- Joint physical custody parents had less conflict before separation than sole custody but this did not account for the differences in adjustment
- Joint custody beneficial regardless of conflict level
- Joint legal custody linked to higher rates of father-child visits and fewer adjustment problems (controlling for 28 pre-divorce factors)
- No more conflict in joint legal custody than sole legal custody

Bauserman, 2002; Braver, 1998; Cunnoe & Braver, 2000; Selzer, 1998

Issues in Reconnecting Children with Absent Parents

- How long has parent been absent?
.....Reasons for absence
.....Is parent a stranger to child?
- Motivation for reconnecting to child
.....Likelihood of staying involved
.....Willingness to proceed at child's pace
- How old is child?
.....Views of child toward re-establishing relationship
- Extent of opposition of custodial parent

What Reduces High Parental Conflict?

- Provision of divorce education programs, mandatory custody mediation, and specialized conflict reduction programs post-divorce
- Lawyers who are settlement oriented
- Judicial interventions and attitudes
 -Early judicial case management
 -Effective judicial settlement conferences
- Orders for co-parenting counselling and Parenting Co-ordinators

Considerations for Parenting Plans – Parent Detrimental to Child

- Limited contact
 -Mental illness and personality disorders that affect parenting abilities
 -Poor parenting – rigid, inflexible, angry style, coercive
- Supervised visitation
 -Abusive or neglectful parenting
 -History of intimate partner violence
 -Drug and alcohol abuse
- Orders for intervention programs, random testing, and reports of compliance/attendance before adjusting orders

Assessments

Assessments are not a panacea and should not be ordered by the court in every case. There must be a benefit to the judge of expertise otherwise not available to the court to justify the cost, delay and intrusion.

It is not to be used as a fishing expedition. The court needs to be careful ordering it as it is not a scientific inquiry, it will often be based on hearsay evidence, and can have a disproportionate affect on the final result.

A distinction can also be drawn between the factual findings of the assessor based on direct observations and the assessor's recommendations.

Cultural perspectives

Each step of child custody-access evaluations is influenced by the cultural values of the evaluator and the family. This fact is true for families from mainstream (dominant) as well as non-dominant cultures.

In the Victorian era, literature describes how orphans were placed either with wealthy, unsympathetic relatives, or else subjected to neglect and child labour in workhouses. Children of affluent families in that era faced early separation from their parents. Often, this separation occurred when children were sent to boarding schools. Unintended emotional and physical distance between parents and children followed popular ideologies of the times such as "spare the rod and spoil the child."

The paradigm shift of custody allocation from parental rights to the best interests of children is universally accepted. This has created a uniform expectation of a 'gold standard' in evaluations and custody-access reports. With changed family dynamics, the once clear-cut distinction between nuclear and extended families is now blurred. Families have acquired additional descriptors, such as 'blended', 'single parent', or 'same-sex parents'. These descriptors are important when child placement decisions are made. With increased global mobility, the ecological and social milieu around family units is also altered. The multicultural environment of cities now provides a myriad of possibilities for family living arrangements and cultural mixes in daily living.

Children do not live in a vacuum, and they do not have the luxury of choosing their parents. Usually, children are consumed by the cultural and ethnic identities of their family of origin, with the exception of cases involving trans-racial and trans-cultural adoptions. Trans-racial adoptions pose a complicated dilemma. Many observations of children placed in parental homes with different racial and cultural orientation point toward a good fit.

Thirty years ago, in the face of the dominant "sole custody" paradigm, Madame Justice Wilson's dissent in *Kruger v. Kruger* foreshadowed the relatively recent shift, both judicial and statutory, towards awards of joint custody:

It is perhaps timely for Courts in Canada to shed their healthy cynicism and reflect in their orders a greater appreciation of the hurt inflicted upon a child by the severance of a relationship with one of its parents. Our Courts have tended,

while purporting to award custody on the basis of the child's best interests, to overlook that in some circumstances it may be in a child's best interests not to choose between parents but to do everything possible to maintain a child's relationship with both parents. We accept now, I believe, that men and women who fall short as spouses may nevertheless excel as parents. *Kruger v. Kruger*, (1979) 25 O.R. (2d) 673, cited to QL.

Confirming findings below that the parties had cooperated in making interim custody arrangements work, and buoyed by an assessor's report that the parents had "demonstrated mature and unselfish capacity to work together for the best interests of the children," Wilson J.A. would have awarded joint custody despite the mother's position in favour of sole custody. The majority held that while joint custody would on occasion be appropriate, the facts here did not warrant this disposition. The judgement of Thorson J.A., which affirmed the decision of the same court in *Baker v. Baker* of only a few months earlier, cemented the prevailing preference for sole, usually maternal custody, for at least the next decade. While Thorson J.A. expressly declined to characterize the award of joint custody as "exceptional" as had his colleague Lacourcière J.A. in *Baker*, that was in fact the practical effect.

CHILD'S COUNSEL

Children should have their voices heard in Court, if possible. Decisions are made about children's lives during custody and access hearings and it is important that a child's wishes and perspectives are heard during the proceeding. In Ontario, we are fortunate to have a Children's Lawyer. The Children's Lawyer is an independent crown law officer, appointed by the Lieutenant Governor-in-Council on the recommendation of the Attorney General, to represent children within the administration of justice.

Jurisdiction

By order under section 38 of the *Child and Family Services Act* (CFSA) ("child protection") and section 89(3.1) of the *Courts of Justice Act* (CJA) ("custody/access"), a court has jurisdiction to obtain the appointment of counsel for the child to represent the child's interests.

Guidelines and Criteria

For "custody/access" cases, if the facts of the case meet the published guidelines and criteria of the Children's Lawyer about the appointment of counsel, the case will be assigned to child's counsel upon receipt of the court order.

Duty and Status of Child's Counsel

Upon receiving a case from the Children's Lawyer, child's counsel reviews information and advocates for a child client so that the child's interests are understood and communicated to the parties and to the court or tribunal.

In addition:

- (a) Child's counsel receives authority to act under the court order requesting legal representation;

- (b) Child's counsel obtains the child's views and preferences or wishes, if any, the child is able to express;
- (c) Child's counsel does not represent the "best interests" of the child, it being the issue to be decided by the court;
- (d) Child's counsel is the "legal representative" of the child and is not a "litigation guardian" or "amicus curiae"; and
- (e) The relationship between child's counsel and the child is a "solicitor-client" relationship.

SPECIFICALLY

Preliminary Review

Upon receipt of a case, child's counsel conducts a preliminary review by reading all relevant documents filed in the proceeding and speaks with counsel for the parties to determine whether legal representation is still necessary and, if so, to narrow the issues.

Gathering information

As defined by the issues, child's counsel gathers the relevant information by making inquiries about the child from significant persons in the child's life and obtains the parties' views and plans for the child. In doing so, child's counsel will need a Direction or Release from the parties, authorizing counsel to obtain information not available through the normal disclosure rules.

Meeting with the child

Child's counsel will always meet with the child. Child's counsel will obtain the views and preferences or wishes, if any, of the child.

Resolution

At all stages of the proceedings, efforts will be made by child's counsel to resolve the disputed issues by communicating with the parties and their counsel, and by attending at settlement meetings and pre-trials.

Position on behalf of the child

- (a) After gathering information, meeting with the child, and obtaining the child's views and preferences, child's counsel will determine the child's position by reviewing all of the relevant evidence as to the child's interests and views. Where the information about the child's interests differ from the child's views and preferences, counsel will advance a position on behalf of the child consistent with the child's views and preferences provided the child's views are independent, consistent, and the child is of sufficient maturity to appreciate the consequences of a decision which is in accordance with his/her views and preferences.
- (b) In a child protection proceeding, child's counsel may take a different position than the other parties, even where the parties all agree upon another position. However, in custody/access proceedings, child's counsel will not interfere with a settlement reached by the parties.

Keeping the child client informed

Subject to the child's approval, child's counsel will keep the child informed about the status and progress of the proceedings.

Contested hearing

If it is necessary for the court or a tribunal to determine the outstanding disputed issues, counsel will advocate a position on behalf of the child, ensure that evidence of the child's views and preferences, the circumstances surrounding those views and preferences and all other relevant evidence about the child's interests are before the court or tribunal.

Withdrawal of child's counsel

At any stage of the proceedings, child's counsel may determine in conjunction with the Children's Lawyer to seek an order of the court or tribunal to withdraw from the case and cease to act as the child's legal representative. Once such an order or a final order in the proceedings is issued, child's counsel ceases to act for the child.

Generally

Where any concern arises about the role of the child's counsel, the Children's Lawyer should be consulted to clarify the role in accordance with the text and intent of this Policy Statement.

Child Support

As you have seen from the Custody and Access section, parents have both moral and legal obligations to their children. This legal obligation includes child support. When a relationship ends and a child is involved, it is the child's right to receive support and it is non-custodial parent's duty to pay child support. Both biological and adoptive parents have this obligation as do "persons who stand in the place of parents" (for example, step-parents). As well, a biological father has a legal duty to support his child financially even if he has never had an on-going relationship with the child's mother.

The parent who has custody of the children receives the child support payment by the parent with access. The Courts have determined that, as much as possible, children should maintain the same standard of living that they had before the relationship ended as they have after the relationship has ended. Child support is intended to assist with the maintenance of the children's life style.

When does child support begin?

Child support begins from the 'effective date' of claim that support is being sought, even if the custodial parent has not filed an application in court for the support. In other words, children are entitled to support and this entitlement exists even after separation. If a parent has not applied to the court for child support, the child is still due the support. Often, this means the Court will order "retroactive support" to the date of when the custodial parent gave notice to the non-custodial parent that child support should be paid. In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada stated that the retroactive payments should be no more than three years in the past.

How long does child support last?

The non-custodial parent is expected to continue to pay child support as long as the child remains dependent. A dependent child is any child under the age of 18 unless the child has married or the child is 16 years of age or older and has voluntarily withdrawn from parental control. But, even if the child is over 18 years of age, the child support

may continue if the child has an illness or disability or the child is going to school full-time. Case law indicates that the support is typically payable if a child is in post-secondary education until the child has completed one post-secondary degree or diploma or if the child turns 22. If the child earns an income, the Court will take any earnings into account when determining the amount of child support to be paid.

Can a custodial parent deny access to the non-custodial parent for not paying child support?

The Courts often see parents denying access to children because the non-custodial parent has not paid the child support. However, the law does not connect (and nor should it) child support and child access. The law assumes that children need to have a relationship with both parents. As a result, the child would be unfairly punished if access is denied because the non-custodial parent has refused to pay child support.

How are child support payments enforced?

In order to enforce child support orders, the Ontario government set up the Family Responsibility Office (FRO). This office is responsible for enforcing support orders. After a judge has ordered support, the support order is filed with FRO. Parents who must pay support are told to pay the support to FRO who then pays the custodial parent. If a support payment is missed, the FRO can have payments automatically deducted from the parent's wages, register a lien against the parent's personal property, garnish the bank account or suspend the payor's driver's license.

Child Support Guidelines

It used to be that Courts would determine how much child support should be paid by a "needs, means, and circumstances" test. This was an individual assessment of each family and resulted in inconsistent orders across the country. For example, different parents were being ordered to pay different amounts despite having a similar income. In 1997, the federal government introduced the Child Support Guidelines. The Guidelines determine the amount of support based on the payor's income and the

number of children in the family. Although they are called Guidelines, they are mandatory – the Courts must follow the Guidelines.

Parents are obliged to increase the amount of child support if the parent's income increases. The payor parent is expected to inform the custodial parent when he or she has received an increase in pay.

An example of the Guidelines is provided below. If the payor makes \$61,100 per year and there are 2 children, the amount of child support paid is \$903 per month.

Monthly Award - (\$)						
	No. of Children					
Income (\$)	1	2	3	4	5	6+
60,100	558	903	1179	1405	1584	1729
60,200	559	905	1181	1407	1587	1732
60,300	560	906	1183	1409	1589	1735
60,400	561	908	1185	1412	1592	1738
60,500	562	909	1187	1414	1595	1741
60,600	563	910	1188	1416	1597	1744

How is Income determined under the Child Support Guidelines?

Income is determined by rules in the Child Support Guidelines. The most current income information available is used to determine income under the Guidelines. In most cases, the gross income on the most recent tax return (line 150 of the Income Tax Return) is the income used to determine child support. This is gross income, before deductions and includes RRSP withdrawals and bonuses. Adjustments can be made to this number. For example, if a parent is receiving social assistance, the amount of assistance that can be attributed to the care of the child is deducted from the gross income.

If the Court believes that the gross amount of income on the latest income tax return is not truly reflective of the amount of the parent's income, the Court may consider the parent's income for the last three years to determine a "fair and reasonable" amount.

The parent who is paying the child support must prove the amount of income that he or she is claiming. Courts require parents to produce documentation to prove their income.

But what happens if a spouse is purposely unemployed or under-employed? If, for example, a payor is intentionally working as a waiter even though he is a lawyer, the Court can impute or deem income. A Court may also impute income for a number of different reasons other than unemployment, including failing to provide income information when the parent is under a legal obligation to do so or if the payor quits a job to return to school.

There are four exceptions for justification of unemployment:

- a) required for by the needs of the child of the marriage;
- b) the needs of any child under the age of majority;
- c) the reasonable educational needs of a payor; and
- d) the reasonable health needs of the payor

What happens if the parents share custody?

The amount of support paid to the parent who has the child most of the time is determined by the Guidelines. However, if each parent has a child significant amount of time, the amount of child support paid to the custodial parent may be less than the Guidelines amount. When a parent has a child more than 40% of the time, it is considered shared custody. This is because the more time that the non-custodial parent spends with the child, the more of the ordinary expenses of raising the child they are assumed to be paying.

Please note that shared parenting is not joint custody. Joint custody is about the authority to make decisions about the child; shared custody is about the amount of time spent with the child.

It is up to the parent who claims that they have the child at least 40% of the time to prove to the Court that this is the case. The case law is not consistent on how the Courts should count the time spent with the child.

What happens if there are special or extraordinary expenses?

Special or extraordinary expenses are referred to as section 7 expenses. This is in addition to the table amount as set out by the Guidelines and includes daycare, certain health-related expenses, extraordinary expenses for primary or secondary education or for any other educational programs that meet a child's particular needs, post-secondary education; and extraordinary expenses for extracurricular activities. Once the Court determines that parents should share an extraordinary expense, it determines the amount of the expense that the non-custodial parent must pay.

Undue Hardship

The Court is allowed to change the amount of child support if following the Guidelines would cause "undue hardship" to one of the parents or to the child. This rarely happens, however. Some of the circumstances that may cause undue hardship include high debts incurred to support the family, high costs of exercising access to the child, a legal duty to support another child, or a legal duty to support another person who is unable to care for him/herself. However, just because a parent experiences undue hardship, he/she is not necessarily entitled to pay less than the table amount of child support. The judge must also be satisfied that paying the table amount would cause the payor parent to have a lower standard of living, compared to the other parent.

What happens if the payor parents earn more than \$150,000 per year?

If a parent earns more than \$150,000, the Court will order the table amount for the first \$150,000. Typically, the additional income will also be ordered according to the tables.

In some situations, the judge may order a lower amount based on the financial ability of each parent and the “means, needs and circumstances” of the children.