

AN EMPIRICAL STUDY OF THE ATTITUDES OF THE JUDGES OF THE SUPREME COURT OF ONTARIO REGARDING THE WORKINGS OF THE PRESENT CHILD CUSTODY ADJUDICATION LAWS

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There is no area of law over which the judge has a wider discretion than child custody adjudication. The only assistance given to the judge by the legislature is that the interests of the child are paramount. This principle is laid down in England by the Guardianship of Infants Act,¹ section 1, commonly referred to as the "infant's charter":

Where in any proceeding before any court, the custody or upbringing of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration. . . .

This English principle is equally applicable over the whole of Canada, as legislation and case law has produced the same result.² Apart from this provision, the judicial discretion is unlimited. Thus, no realistic survey of the workings of the present laws in this field can be made without an attempt to discover the judicial attitudes at first hand.

Letters were sent by the author to all the available members of the Trial Division of the Supreme Court of Ontario requesting a personal interview to discuss the laws relating to child custody. Twelve such interviews were conducted at Osgoode Hall during January and February 1970, eleven with members of the Trial Division and one with a member of the Court of Appeal. These twelve interviewees were: Lieff J., Wright J., Moorhouse J., Parker J., Henderson J., Morand J., Hartt J., King J., Fraser J.,

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¹ 1925, 15 & 16 Geo. 5, c. 45.

² Domestic Relations Act, R.S.A., 1955, c. 89, s. 49; Equal Guardianship of Infants Act, R.S.B.C., 1960, c. 130, ss 5, 22; Child Welfare Act, R.S.M., 1970, c. C80, s. 100(1); Infants' Custody Act, R.S.N.S., 1967, c. 145, s. 2; Infants Act, R.S.O., 1970, c. 222, s. 1.

The Canadian courts have consistently construed the statutes as meaning that the child's welfare is the paramount consideration.

Donohue J., Haines J., and Brooke J.A. In addition, a lengthy letter on this topic was received from Stewart J. It is on the basis of these twelve interviews and letter that the ensuing information was obtained. In accordance with the wishes of a number of judges, no names will be disclosed in those areas where some controversy might be provoked.

As far as the author has been able to ascertain, only one previous investigation has been made in this field in North America. This was conducted in 1943 by a graduate student³ at the Pennsylvania State College. The following observation was used by Mr. Kingsley Davis to summarize the findings of this study:⁴

The welfare of the child rather than the claims of the parents is supposed to be the goal, but what is "welfare" to one judge is apt to differ from what is "welfare" to another.

The graduate student commented that in Pennsylvania there was an almost complete lack of crystallized opinion regarding custody. The judges tended to use rough and vague rules of thumb in making their decisions and believed that general principles were inapplicable because of the different fact-situation in each case. Although the majority of the judges relied to some extent on the advice of social work agencies, only twenty-five per cent admitted that they were influenced by changing customs and social values when formulating their judgments. One of the aims of the present study is to see if this holds true twenty-seven years later in Ontario.

All the judges interviewed agreed that custody is an extremely difficult area to try and admitted that they disliked hearing cases of this nature. One judge referred to the Introduction to the *Symposium on the Child and the Law*⁵ as accurately summing up the problem:

The law is very difficult to apply to the cases which come before the bench. In every dispute for custody of a child the surrounding atmosphere is packed with emotion. Each litigant can only see the strong points on his or her side, and the weaknesses of the opposition. Also there are many cases where the attorneys do not have the courage to tell their client that they will not urge anything before the court that they do not believe to be in the best interests of the child.

Another judge referred to a dictum of the Texas Court of Civil Appeals in *In re Honeycutt*:⁶

A view of the record impresses this court with the tremendous burden of responsibility and the travail of mind and emotions thrust upon the trial judge in litigation of this nature, and the apparent inadequacies

³ Mrs. Mary Rice Morrow.

⁴ See Kingsley Davis, *A Sociological and Statistical Analysis* (1943-44), 10 *Law and Contemp. Prob.* 700, at p. 706, footnote 7.

⁵ (1961-62), 10 *U. Kansas L. Rev.* 555.

⁶ (1960), 337 *S.W.* 2d 631.

of the adversary system in reproducing the factual circumstances and environment surrounding the children and those who seek to give them care.⁷

Mr. Justice Moorhouse stated that the real problem for the judiciary is that they never get a true, unbiased picture. Usually each party is too keen on hurting the other party to consider the child's welfare from an objective standpoint. Mr. Justice Wright added that the case becomes even more difficult to try when there is a question of remarriage and two sets of children are involved.⁸

The judges were unanimous in their opinion of the importance of observing the demeanor of each of the parties in a disputed custody case. It was generally agreed that the problem of custody is a human, not a legal one; no rules of thumb are applicable. Each judge seems to have a strong belief that he can choose the better custodian from the standpoint of the welfare of the child by observing each claimant and relying on intuition. Stewart J. wrote:⁹

The problem is really one of slight differences between factual situations. There is almost an intuitive aspect in the art (and indeed it is an art) of what my younger daughter once said (rather obscenely I thought) "judgery".

There was less agreement amongst the judges as to whether the child should be consulted as to his personal preference for a custodian, and at what age this should be done, if at all. In Canada, this consultation nearly always consists of an interview by the judge with the child in chambers without the presence of counsel.¹⁰ One of the elder judges emphasized that he never interviews the children at any age because of the danger of them being influenced by the parent with possession before the trial. According to him a parent could easily bribe the child with presents if he or she expresses a preference to the judge for that particular parent: the more indulgent parent is not necessarily the better custodian. The opposing stand was taken by three of the other judges, who believe that every child over the age of nurture¹¹ should be consulted. They believe that they can detect when the child is saying what he has been told to say as opposed to when

⁷ In another American case, *Allen v. Allen* (1940), 239 Ala. 116, 194 So. 153, Lucien D. Gardner C.J. stated: "Always the question of the custody of the child is a delicate one, and the courts feel keenly the responsibility."

⁸ In connection with possible psychological problems to the child resulting from the remarriage of the parent awarded custody, see P. C. Ellsworth and R. J. Levy, *Legislative Reform of Child Custody Adjudication* (1969), 4 Law and Society Rev. 167, for a summary of the relevant empirical data.

⁹ Letter to A. J. Bradbrook, Feb. 5th, 1970.

¹⁰ According to the majority of the judges interviewed.

¹¹ Generally agreed to be the age of seven years.

he is speaking his own mind. The remaining judges took an intermediate stand, stating that the older the child the more likely they are to consult it, but that they do not make a habit of this practice in every case. The majority took the line that the opinion of a child over the age of ten years carried great weight in every case, but that under the age of ten years the weight attached to the opinion depends on the circumstances; in the latter cases the child's opinion usually only settled the case in border-line situations, whilst in the former cases, the opinion over-rides all but exceptional evidence suggesting a contrary judgment.

In this context, an interesting observation was made by Stewart J., in his letter:

Very frequently the decision will be that of the child. On a number of occasions I have found that children from ten to fifteen will be extraordinarily percipient in deciding where they would wish to stay. I can recall one occasion where a girl said that she wished to live with her mother and at the end of ten minutes asked if she could change her mind. I said of course that she could, and she told me that she really felt that she should live with her father so that she could receive a much firmer discipline than she would were she to live with her mother. She also, however, asked if a provision could be made that she could see her mother at any time that she felt like it . . . This is an example of the very sensible child working out an arrangement which is quite obviously not only in her best interests but in the best interests of the parents.

Although custody cases are difficult to try, the vast majority of cases filed never reach the point of decision.¹² The main reason for this is that all but one of the judges interviewed stated that they make serious attempts to make the parties settle their dispute out of court. One judge admitted that he even goes so far as to see the disputing parents in his rooms and to browbeat them into making a settlement. The majority explore with counsel the possibility of a settlement as they feel that it is in the child's interests to keep the case out of court if at all possible. Counsel are usually equally anxious to avoid litigation in this field, and bring pressure to bear on their clients to settle, wherever possible.¹³ This formidable combination of judge and counsel insisting on a settlement usually produces the desired result.

Sometimes cases are settled after they have started in court but before their conclusion. One judge stated that he attempts to force the parties to settle by using what, according to some of the others, amounts to little more than delaying tactics. The procedure he adopts is that provided for in Rule 267 of the Judges Rules.¹⁴ Rule 267(1) states:

¹² This was the unanimous opinion of the judges interviewed.

¹³ This fact was confirmed by J. C. MacDonald and L. K. Ferrier, of the Bar of Ontario, in their interview with the author, Nov. 10th, 1969.

¹⁴ R.R.O., 1960.

The court may obtain the assistance of . . . scientific persons, in such ways as it thinks fit, the better to enable it to determine any matter of fact in question in any cause of proceeding, and may act on the certificate of such persons.

Using this rule, the judge makes an order in the presence of the parties for a psychiatric examination to be made of each of the disputants and a psychiatric appreciation of the personality and needs of the child involved. According to the judge adopting this procedure, the result is that eight out of ten litigants never come back to the court—they realize the best course for the child, drop their hostility, and reach a settlement out of court.

A large number of the few cases in which a decision is required do not present problems for the judge because only one realistic proposal is put forward. This situation usually arises where one of the parties stubbornly refuses to settle or where the real point of dispute is over another matter (for example, whether or not the father should pay the mother any maintenance) and the question of custody arises as a collateral issue. Thus, it is only in a very small percentage of the litigation initiated that the judge has to make a decision at all, and in an even smaller percentage where the choice between the disputants is difficult to make. Mr. Justice Fraser stated that he has only had to hear six "all-out battles" over custody in his eight years on the bench.

Remarkably diverse statements were made by the judges as to the value of the Official Guardian's report when determining custody litigation.¹⁵ Two of them commented that the report is always helpful in that it gives an objective view of the type of home involved. They feel that it is especially useful in view of the enormous number of cases to be tried and the limited amount of time that can be spent on each one. The remaining eleven judges, however, are of the opinion that although the report is potentially useful, in that it is the only impartial piece of evidence presented before the court, its present value is not great because of a number of failures in the present procedure. The main objection was that, contrary to the opinion of their other two colleagues, the social workers lack objectivity. Apparently too many of them are biased in favour of one of the parties and try to act as advocates for this party without having any real grounds for their views. According to one judge, between ten per cent and twenty-five per cent of the reports are made on the strength of an interview with only one of the parties; in these cases, objectivity is, of course, impossible. Other objections to the present system of Official Guardian's reports are that the social workers

¹⁵ Under the authority of s. 6(3) of the Matrimonial Causes Act, R.S.O., 1970, c. 265, the Official Guardian has delegated the duty of making the reports to the Children's Aid Society.

are not practical and engage in too much "formalised double-talk". All the judges seem resentful of those workers who attempt to dictate to the judge what conclusions he should draw from the facts presented; this is regarded as an intrusion into the judge's right to adjudicate.

The majority of the judges interviewed are against the proposal to make an Official Guardian's report mandatory in all family law cases involving children, and believe that the right to order a report should be left to the judicial discretion. The major reason advanced for this is the high cost involved (each report currently costing the litigants around \$80.00 to \$90.00). According to one of the most recently appointed judges, at least twenty-five per cent of the reports presented today are of no use whatever and constitute an unjustifiable expenditure: very frequently there is no need for a report as there is no realistic choice for the judge to make as to the child's custodian, as for example where the husband deserts the family and the wife claims custody. It is arguable that there might be an occasional case where the child might be better off in an institution as a ward of court than in the only available home, a fact which would probably never be discovered were it not for the Official Guardian's report, but according to this particular judge the expense involved in every case is too great to justify the discovery of this very rare situation. It is interesting that on the question of mandatory reports the opinions of the judiciary and the practitioners diverge, as at the November 1969 meeting of the Ontario Sub-section on Family Law of the Canadian Bar Association the members voted by a majority of four to one in favour of compulsory reports in all cases involving children.¹⁶

Two other points regarding the Official Guardian's report should be made in this context. One of the judges believes that the most satisfactory approach is to give instructions to the social workers in advance as to what to look for when conducting the field studies preparatory to the making of the report. He finds that by adopting this procedure the deficiencies in the *pro forma* reports do not arise. Another judge states that the judges possess the power to move to dispense with the necessity for a report, but that this procedure is only seldom adopted because of the possibility of the press and the public misinterpreting this as being against the interests of the child.

The two other general policy issues regarding child custody discussed by the judges were the value attached to psychiatric evidence and the need for a statistical analysis of the effects of the various types of orders by means of follow-up studies. Regarding the former issue, the judges are almost evenly divided;

¹⁶ According to the Chairman, Mr. L. K. Ferrier.

one half seems enthusiastic about the value of this type of scientific study, whilst the other half are of a more sceptical frame of mind and admit that they attach little weight to evidence of this nature in all but exceptional cases. It was admitted by all but two of the latter half, however, that psychiatric evidence can occasionally be extremely important in discovering vital information which would otherwise be hidden from the court. An example of this is the case of a mother who is prone to nervous breakdowns. The majority of the judges interviewed stated their concern in that they are completely unaware of the long-term effects of certain types of custody order. For this reason they would welcome a statistical analysis in this field and a more scientific approach to the matter, although they were all quick to remark that they should not be construed as advocating the determination of custody decisions by computer.

Following these general policy issues, the judges were asked the degree of weight that they give to a number of factors commonly occurring in custody trials. Again, the judicial opinions expressed ranged from one end of the spectrum to the other with regard to the majority of these factors. Firstly, the author put forward the subject of child kidnapping before the trial by the parent without possession as a topic for discussion. Although one judge stated that kidnapping is a very bad factor in all cases and would weigh heavily against a parent employing this tactic, the remainder expressed only qualified disapproval. There is, of course, a natural repugnance, amongst judges against anyone taking the law into his own hands, but in child custody cases everything depends on the reason for the kidnapping. Usually the reason for kidnapping falls into one of two categories. If the judges believe that the kidnapping parent took the child as a weapon to use against the other, then this is classed as an extremely adverse factor, but that if he or she took the child out of love or *bona fide* concern for the child's welfare then this not only counteracts the adverse factor but can even count in favour of this party. This generalization was qualified by two judges, however, who believe that the correct test here is to visualize the trauma caused to the child by the incident. If the child is unsettled, then the kidnapping will be classed as an adverse factor even though the parent employing this remedy took the child out of a *bona fide* concern for its welfare. Although this seems at first sight to be an eminently reasonable method of determining the weight to be given in cases where self-help is used it does have the unfortunate effect of encouraging litigants to take the law into their own hands. Messrs J. C. MacDonald and L. K. Ferrier (Barristers), specialists in family law, are particularly concerned about the judicial attitude to kidnapping in that they are con-

vinced that at present an aggressive parent with a skillful lawyer is at a great advantage compared to his or her more submissive partner who is not prepared to use self-help. When confronted with this viewpoint a number of the judges admitted that this was the inevitable result of their viewpoint in a number of cases, although they felt that this was an insoluble dilemma. It should be noted in passing that only one of the judges admitted to having any difficulty in determining the motive of the kidnapper in any cases, though this would seem to be one area where an unscrupulous parent might seek deliberately to give the judge a false impression.

There was general agreement about the weight to be attached to a situation where one party, after previously giving up the possession of the child to the other spouse voluntarily, later changes his (or her) mind and makes a claim for custody in court. All the judges commented that they regard the act of voluntarily giving up possession as *prima facie* evidence that the person responsible for this does not care much for the child. Thus, in the absence of any evidence to the contrary, such an occurrence carries great weight; three judges went so far as to state that in all probability it would be decisive and counteract all evidence suggesting a contrary judgment.

The subject of adultery produced conflicting responses. On the one hand, two of the more elderly judges stated that they are members of the "old school" which attaches considerable importance to adultery in all cases; they consider that this is a sign of instability of character. Thus, the circumstances would have to be exceptional before they would award custody to an adulterer of either sex. The vast majority of the judges, however, said that they attached little importance to adultery provided that it was not done in the child's presence and with the child's knowledge. They harked back to the case law on this point¹⁷ and pointed out that their main consideration is that of the welfare of the child, and adultery does not necessarily have any bearing on the quality of a parent as a custodian. Five of the judges qualified this statement by admitting that continuing adultery is an adverse factor, although one took the opposite standpoint and stated that the longer the adulterous relationship the better, as this reveals permanency and a good chance of remarriage at a later date. The remainder of the judges commented that adultery is only of minor

¹⁷ *Stark v. Stark and Hitchins*, [1910] P. 190 (C.A.); *Willoughby v. Willoughby*, [1951] P. 185 (C.A.); *Re L.*, [1962] 3 All E.R. 1 (C.A.); *Decock v. Decock* (1953), 10 W.W.R. (N.S.) 369 (B.C.C.A.); *Voghell v. Voghell and Pratt* (1961), 27 D.L.R. (2d) 216 (N.W.T. C.A.); *Hind v. Hind and Wilson* (1962), 31 D.L.R. (2d) 622 (B.C.); *Re Cyr Infants* (1969), 68 W.W.R. 273 (B.C.).

significance, but that it might weigh, everything else being equal; this situation very seldom arises in practice, however.

One of the reasons most commonly advanced by those who are in favour of establishing a presumption in favour of the wife as custodian in all cases is that the husband is not able to give the child the full-time care and devotion that it needs because of the demands of work. The author asked the judges whether the fact that a mother would have to take a full-time job if given custody of her child because of lack of money would counteract any initial preference in her favour in custody litigation. All the judges were quick to point out that they have the power to force the husband to pay a reasonable sum for maintenance of his children, regardless of which spouse is at fault for the breakdown of the marriage, and that this additional money might allow the mother to remain at home. However, if the mother would still have to go out to work, six of the judges stated that any instinctive preference that they might feel for the mother would disappear; the remainder feel that this is only a slight adverse factor of relatively little weight and not enough to counteract any other evidence suggesting the mother to be the more suitable custodian.

The final factor examined was the judges' reluctance or willingness to change the *de facto* possession of the child at the time of the trial. The reason for examining this point was to discover the truth or otherwise of the observation of Messrs J. C. MacDonald and L. K. Ferrier that the real battle often takes place before the trial as to who is to have interim custody, since at the trial, except in the light of exceptional evidence suggesting possible harm to the child, the judge will usually authorize the continuance of the pre-trial arrangement, being reluctant to disturb the child for fear of acting contrary to his best interests. All but one of the judges admitted that they seldom upset the status quo before the trial, although the majority emphasized that everything depends on the length of time that the pre-trial arrangement has been in operation. The majority opinion is that once one party has had possession of the child for six months or longer a presumption of continuance arises, but that possession for a shorter time carries little weight. However, three judges remarked that they would be reluctant to change possession even where the parent with the child had only had possession for two months before the trial. In sharp contrast to his brothers, one judge has no qualms at all about changing possession of the child, since the trial is intended to be a determination of the issue, not necessarily the maintenance of the status quo: his only proviso is that the parent without possession before the trial must have kept in regular contact with the child at all stages or else he or she will become a stranger and be unlikely to win custody. The only other observation worthy

of note in this context is that two judges are of the opinion that the time of year of the trial rather than the length of the pre-trial arrangement is of importance: if the child is in the middle of the school year and would have to be uprooted if the party without possession were to gain custody then this would be a very weighty factor in favour of the status quo. The same judges commented that if the case were to be heard during the summer vacation they would be far more likely to reverse the status quo. Although this viewpoint is undoubtedly in the best interests of the child, it is submitted that for a case to be determined on such an arbitrary factor is not only rough justice on the litigant but also brings the law into contempt in the eyes of the public.

Hypothetical Case Analysis

(a) *Methods*

It was decided to ask the judges interviewed to indicate their preference for the mother or father in a number of hypothetical cases devised by the author. The cases were discussed during each of the personal interviews; in addition, three written replies to the hypothetical cases were received by mail from Keith J., MacKay J.A., and Jessup J.A. Thus a total of fifteen sets of answers were received and tabulated.¹⁸

The cases, as presented to the judges, are laid out in the Appendix. Three of the commonly occurring factors in custody disputes were chosen in order to test the judicial reaction to each of them when occurring singly or in combination in practical application. The first factor chosen was adultery by the wife. The reason for this choice is that although the case law in Canada indicates that adultery should carry little weight, there is much recent literature suggesting that judges in practice attach greater significance than they are prepared to admit. For example, the United States Divorce Reform has on occasion kept a watch on the wives of its members in order to prove adultery. The assumption is that this evidence will usually counteract the *de facto* presumption in favour of awarding custody to the wife.¹⁹ Also, Mr. Clark²⁰ comments:

The morals of the parties are a relevant subject of inquiry in custody disputes and often have a sharp effect on the outcome.

The other two factors, interim possession and the effect of the mother having to take full-time employment, were selected at random.

¹⁸ See Table 2.

¹⁹ *Op. cit.*, footnote 8, at p. 219, footnote 31.

²⁰ H. H. Clark, *The Law of Domestic Relations in the United States* (1968).

Eight cases were devised in order to obtain every combination of the absence and presence of the three factors to be tested. The other factors included in each case were added so as to give the judge sufficient data on which to base his opinion and were intended to "balance" the case as far as possible so that neither parent would be the obvious choice as custodian. The subject-matter in each imaginary trial was a nine-year-old boy. This choice was made for two reasons: firstly, to avoid the "principle" evolved by case law that a young child under the age of seven should normally be with its mother, and secondly, to minimize the "principle" that an older boy should go with its father.²¹ The case centered around an only child so as not to complicate the issue unnecessarily; to introduce another child would involve a consideration of the "principle" that brothers and sisters should normally be kept together. It will be observed that although all the other information, with the exception of the three factors to be tested, occurs in all eight cases, each case has been rephrased so as to create the impression as far as possible that each records a different incident. By this method each of the three factors was isolated in turn, although the varying phraseology acted as a form of "camouflage".

Table 1 shows the combinations of the three factors in detail.

Table 1

Actual order of cases	Logical order of cases	Adultery by wife (✓)	Wife will have to work (✓)	Wife has interim custody (x) Husband has interim custody (✓)
4	1	✓	✓	✓
1	2	✓	✓	x
7	3	✓	x	✓
3	4	x	✓	✓
5	5	✓	x	x
8	6	x	✓	x
2	7	x	x	✓
6	8	x	x	x

Thus, No. 1 in the logical order contains all three factors favourable to the father of the child dispute, whilst No. 8 in the logical order contains all three factors favourable to the mother; numbers 2 through 7 contain a combination of favourable and unfavourable factors for each spouse. It should be noted that the cases were not presented to the judges in their logical order but were deliberately shuffled at random so as not to give the impression that there was a logical order running through them. Although in the Appendix each case has its logical number recorded on it, this is

²¹ See, for example, *Bell v. Bell*, [1955] O.W.N. 341 (C.A.); *Kruger v. Booker* (1961), 26 D.L.R. 709 (S.C.C.); *Re O.*, [1962] 2 All E.R. 10 (C.A.).

only included for purposes of clarification; the copies of the cases given to the judges had only the actual numbers inscribed.

In addition to the information given, the judges were asked to assume in each case that the nine-year-old boy voiced no particular preference for one parent over the other as his custodian.

(b) *Results*

The opinions given by each judge are set out in detail in Table 2. One word of warning must be added before the results are analysed. Six of the judges interviewed stated that in the cases such as the ones devised they would in practice place considerable weight on their own personal impression of each litigant when appearing in the court. Thus the opinions of these six judges are accurate only on the assumption that neither one of the spouses makes an unexpectedly good or bad "showing" in court.

Table 2 shows that eleven of the fifteen judges consider that none of the three factors, in isolation or combination, have enough significance to swing any case in favour of either spouse. Judges numbers 1 through 6 felt that the mother should be awarded custody in each case. Five of these six judges admitted that they have an instinctive preference for the mother over the father: three said they would have awarded the boy to the father if he had been a year or two older, but they feel that at the age of nine years a boy still needs his mother; the remaining two, however, stated that the boy would have to be much older (fourteen or fifteen) before they would award custody to the father in any of the hypothetical cases devised by the author. The sixth judge based his opinions on the desirability of the child having family roots: he was influenced by the fact that the mother had gone back to live with her mother, and consequently the boy would have the benefit of growing up with the love and affection of two generations of ancestors, whereas the father was living on his own. On being questioned further, the judge said that if the child's father had gone back to live with either of his own parents he would have awarded custody to the father on the basis that a nine-year-old boy should not be brought up in an exclusively female environment.

This objection to an exclusively female environment was also emphasized by Judges 12 and 13, who were of the opinion that the father should have custody in every case. Judge 12, one of those who mailed his reply, commented:

In my view, the prime responsibility of parents is to bring that child to adulthood in a responsible way. In the cases described, this child should become a man, and all other factors being reasonably equal, the father is obviously the best equipped to achieve this result.²²

²² Letter to A. J. Bradbrook, Jan. 28th, 1970. Name of judge withheld.

Judge 13 felt that a nine-year-old boy would be better off with his father, especially in those cases where the mother had committed adultery, although he added that he would attempt to persuade the father to send the boy to a private boarding school. Judge 7 also commented on the desirability of sending the child to boarding school, although the order he would make would be a divided one, each parent having custody for half the holidays. In view of the fact that there is no reported case in Canada of a divided order being made, although there are a number of examples in the United States,²³ this opinion would seem to indicate innovative thinking.

The opinions of Judges 8 through 11 require a more detailed analysis as the factors to be tested are, in their opinion, of sufficient weight to tip the balance in favour of one spouse. Judge 8 would award case 1 (logical order 2) to the father, whereas he would award the remainder to the mother. Case 1 consists of two of the three factors favourable to the father's case—adultery by the wife and the fact that the wife will have to go out to work. We would be entitled to assume that the existence of these two factors in combination carry considerable weight in the mind of this judge were it not for the fact that the same judge would apparently award the mother custody where all three factors are adverse to her, as in case 4 (logical order 1). This would seem to be logical *non sequitur*. Unfortunately, Judge 8 was one of those who provided a written answer, so the author had no chance to question him on this point. It would seem that although Judge 8 feels that adultery plus the fact that the wife will have to work are of some significance when occurring in combination, the existence of one without the other is not sufficient to subvert the order in favour of the mother, or else he would presumably have awarded custody to the father in case 5 (logical order 5) or case 8 (logical order 6) or both in which these two factors are isolated.

A detailed analysis of the "judgments" of Judge 9 shows that the existence of all three factors adverse to the mother will be enough to tilt the balance in favour of the father, (case 4; logical order 1), as will the presence of any combination of two factors adverse to the mother one of which is adultery (cases 1 and 7; logical order 2 and 3). The judge's hesitance in case 3 (logical order 4) shows that a combination of the mother's work and the father's interim custody is also weighty, but not as influential as a combination where adultery is included. This set of replies would thus indicate that all three factors have some weight, the most weighty being adultery, but that none of these three factors in

²³ For example, *Clarke v. Clarke* (1950), 35 Cal. 2d 259, 217 P. 2d 401. However, in the United States such orders are now frowned upon: See *Beasley v. Beasley* (1957), 304 S.W. 2d 158; *Davis v. Davis* (1951), 255 Ala. 488.

isolation is enough to tilt the case in favour of the father.

Table 2

JUDGES

	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	(Actual Order)	Cases
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15		
1	M	M	M	M	M	M	D	F	F	F	F	F	F	X	X		
2	M	M	M	M	M	M	D	M	M	M	M	F	F	X	X		
3	M	M	M	M	M	M	D	M	X	X	F	F	F	X	X		
4	M	M	M	M	M	M	D	M	F	F	F	F	F	X	X		
5	M	M	M	M	M	M	D	M	M	F	M	F	F	X	X		
6	M	M	M	M	M	M	D	M	M	M	M	F	F	X	X		
7	M	M	M	M	M	M	D	M	F	F	F	F	F	X	X		
8	M	M	M	M	M	M	D	M	M	M	F	F	F	X	X		

Key:

F = Custody awarded to the father.

M = Custody awarded to the mother.

D = An order for divided custody would be made.

X = Borderline case. No order could be made without seeing the parties and/or obtaining further information.

The answers of Judge 10 would seem to indicate that he is roughly of the same opinions as Judge 9, with the exception that he attaches more significance to adultery, since he would award case 5 (logical order 5), where adultery is the only one of the three factors adverse to the mother, to the father. This is especially interesting in view of the fact that Judge 10 was one of those who stated earlier that he attaches no significance at all to adultery provided that it is not done in the presence of the child.

Finally, the conclusions that can be drawn from the opinions of Judge 11 are that, in the setting of the basic fact-situation given, the existence of all three adverse factors or a combination of any two is sufficient for the father to win the case. In addition, the fact that the mother will have to work will lead to the father being awarded custody, despite the existence of the two factors in favour of the mother, although any other combination of two factors in her favour will lead to the opposite result. This indicates that Judge 11 considers the fact that the wife will go out to work as more important than the other two factors.

The only other aspect of the survey worthy of discussion is the varying response given to the significance of the grandmother and the housekeeper, two factors that are constant throughout the eight cases. All the judges who would award custody to the mother in every case (Judges 1 through 6) commented that the existence of the grandmother carries significantly more weight in the mother's favour than the presence of a housekeeper could help the father. Judge 6 qualified this general statement with three provisos: the character of the grandmother must be good, she must be of reasonable age and health, and the previous relationship be-

tween the mother and the grandmother must have been harmonious. In his mind, if either of the first two provisos were unsatisfactory or there was evidence of feuding between the mother and grandmother, the fact that the mother would be living in the grandmother's home would be a factor in favour of the father. The remaining seven of the judges interviewed expressed all the other possible shades of opinion, ranging from Judge 10, who believes that it ruins a child to live with its grandmother and that a housekeeper would help the father's case considerably, to two other judges who attach only minimal significance to a grandmother or housekeeper. Perhaps the most reasoned statement in this context was voiced by Judge 5, who said that he always prefers a grandmother to a housekeeper; a housekeeper will not look after the child twenty-four hours a day, whereas the grandmother is not only capable of acting as housekeeper but will also look after the interests of the child and give it the love and affection that is vital to its self-development.

Summary

In view of the disparity of opinions expressed by the judges in almost every topic discussed in the study, it would seem that the findings of the 1943 Pennsylvania Study, that there are no universally applicable principles in custody disputes, still apply today.

In one sense, the absence of binding precedent or statute is desirable in a human situation as delicate as that relating to child custody. Stewart J. wisely comments:

... it is a great deal better to have law practical than pretty, and the formulation of precise principles in matters dealing with human problems and emotional situations is probably impractical, frequently undesirable, and rarely of any great use in any one case.²⁴

However, it is submitted that although there is a place for subjectivity when the judge makes his personal evaluation of the parents seeking custody and the child concerned, the standards he applies should be similar in all cases. Besides the desirability of some degree of certainty in relation to the existing law, it must not be forgotten that the law in this area must appear very arbitrary, looking at the problem from the standpoint of the litigants. What appears to be "welfare" to one judge might well appear to be quite the contrary to his brothers, as this study reveals. Inevitably, lawyers and litigants must feel that the outcome of their cases in this field will depend largely on the "luck of the draw" as to which judge is assigned to hear the case.

The primary need, it is suggested, is for the custody adjudication laws to be modified in order to give some degree of objectivity

²⁴ *Supra*, footnote 9.

and sense of justice to the parties without introducing inflexible, dogmatic rules which fail to take into account the particular needs or circumstances of each individual case. Thus some degree of judicial discretion must be maintained.

Various proposals for change have been advanced in recent years with a view to rectifying the alleged injustices in the custody adjudication laws. The most drastic of these is that of Dr. L. Kubie, a psychiatrist, who advocates the placing of the issue of custody to a group of non-legal "experts" and the removal of the issue from the judicial realm altogether.²⁵ On the breakdown of the marriage, the parents should agree to joint legal custody of their children and choose a committee to settle any future disagreements between them over the children that they are unable to settle. The parents would promise to send all such disputes to the committee and be bound by its decision. The committee would consist of "a pediatrician, a child psychiatrist or child analyst, an educator and/or an impartial lawyer or clergyman" who would be assisted by a "trusted adult-ally outside the family circle with whom the child can talk in confidence".²⁶ The function of the latter would be to inform the committee of the child's feelings and opinions, thus assisting it in making decisions in the best interests of the child. Dr. Kubie argues that the merits of this system would be three-fold: the committee is better qualified than the judge to try the issue, it is in a better position to ensure that all decisions are consistent and related to the child's particular needs, and finally, it would foster a spirit of compromise in the parent. However, the scheme can be attacked on several grounds: the joint-custody proposed by Dr. Kubie has the effect of perpetuating an unsuccessful relationship between the parents, there is the danger that the parents will overburden the committee by referring matters as they will have easy access to it, and there is the objection that there is no provision in the scheme for the committee to come into contact with and understand the problems affecting the family concerned.

Another possibility is that the custody issue should be left to the jury to consider, as in Texas.²⁷ According to Rep. Ben E. Lewis, Dallas, who drafted and introduced the relevant bill into the Texas House of Representatives, the major reasons²⁸ for this

²⁵ See generally L. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument* (1964), 73 Yale L.J. 1197.

²⁶ *Ibid.*, at p. 1198.

²⁷ See generally Notes: Binding Jury Verdict in Child Custody Proceedings (1962), 16 Northwestern L.J. 507; Note: Child Custody—Right of the Jury to Determine Custody (1963), 15 Baylor L. Rev. 111.

²⁸ Notes: Committee Decision of Child Custody Disputes and the Judicial Test of Best Interests (1964), 73 Yale L.J. 1201, footnote 1, referring to the American Arbitration Association: Marital Disputes Arbitration. (Memorandum, Nov. 1963).

reform are that custody is an issue of fact, and so in the sphere of the jury, and the desirability of eliminating the *de facto* presumption in favour of the mother. However, it is submitted that such a reform in Canada is highly undesirable: the jury is inherently subjective and emotional, and such a system would increase the length and costs of the proceedings and heighten the adversary procedure. Finally, it can be argued that it is a false assumption that the jury will not be biased in the mother's favour—the bias is held by the public at large.

Thus, both the above suggestions seem to be far from satisfactory. It is submitted that the best approach to reforming the laws would be the initiation of a Model Custody Act giving statutory recognitions to a number of standards, along the lines of the Act proposed by the Family Law Section of the American Bar Association.²⁹

- (1) Custody shall be awarded to either parent according to the best interests of the child.
- (2) Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who has a *de facto* custody of the child in a stable and wholesome home and is a fit and proper person shall *prima facie* be entitled to an award of custody.
- (3) If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, his wishes as to custody shall be considered and be given due weight by the court.
- (4) Whenever good cause appears, the court may require an investigation and report concerning the care, welfare, and custody of the minor children of the parties. When so directed by the court, investigators or professional personnel attached to or assisting the court shall make investigations and reports which shall be made available to all interested parties and counsel at least ten days before hearing, and such reports may be received in evidence if no objection is made, and, if objection is made, may be received in evidence provided the person or persons responsible for such report are available for cross-examination as to any matter which has been investigated.
- (5) The court may hear the testimony of any person or expert, produced by any party or upon the court's own motion, whose skill, insight, knowledge, or experience is

²⁹ H. H. Foster and D. J. Freed, *Child Custody (Part II)* (1964), 39 N.Y.U.L. Rev. 615, at pp. 628-629.

such that his testimony is relevant to a just and reasonable determination of what is to the best physical, mental, moral, and spiritual well-being of the child whose custody is at issue.

- (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify such modification or change, and wherever practicable, the same judge who made the original order shall hear the motion or petition for modification of the prior award.
- (7) Reasonable visitation rights shall be awarded to parents and to any person interested in the welfare of the child in the discretion of the court, unless it is shown that such rights of visitation are detrimental to the best interests of the child.

The introduction of such an Act would have the double advantage of still largely retaining the judicial discretion, in individual cases, whilst at the same time providing objective standards applicable to each case. The effect would be to gain a greater degree of uniformity as to what is "welfare" in each case and thus provide the lawyer with greater "ammunition" in the event of an appeal and leave the litigants without a sense of injustice. The reputation of the courts in the eyes of the public would be enhanced accordingly.

APPENDIX

CASE 1

(*Logical order 2*)

The parents of a nine-year-old boy separated two months ago, with the wife taking the child with her and going back to live with her mother, now aged fifty and in good health. The mother is now bringing a claim for custody of her child under section 1(1) of the Infants Act, but the father also claims custody. The father, a Sales Clerk earning \$6,000.00 per annum is living in his house on his own at present, but if given custody, he would be prepared to employ a housekeeper. The mother, if given custody, would have to go out to work during the daytime, as her total resources, including some money that the husband is paying her, is not sufficient to maintain herself and her child; she is a trained Stenographer, capable of earning \$5,000.00 per annum. Adultery has been admitted on a number of occasions by the wife, and there is evidence to suggest that she is continuing to see her lover occasionally, although they do not cohabit. There is no other evidence of bad character against the wife, and none against the husband.

CASE 2

(*Logical order 7*)

This custody dispute involves a nine-year-old boy and two well-respected parents of good character. Separation occurred two months ago because of incompatibility. The father has had possession of the child for these past two months at his house. The mother is claiming custody under section 1(1) of the Infants Act, but the father objects to this and asks the court for custody himself. The father, a \$6,000.00 per annum Sales Clerk, has been living in his house with his son and is planning to employ a housekeeper if he obtains custody. The mother is planning to continue to live with her mother, a healthy fifty-year-old, as she has been doing ever since the

separation. She stated that she will not go out to work, as she has enough money to afford to stay at home and look after herself and her son.

CASE 3

(Logical order 4)

Litigation has arisen between parents over the custody of their nine-year-old son. The spouses separated two months ago because of incompatibility. The father kept the child and has it in his possession now. The mother has initiated an action for custody under section 1(1) of the Infants Act, but the father is counter-claiming for custody. Both parents are respectable citizens, and their characters are unquestionably good. The mother, if given custody, is planning to take up her former occupation as a Stenographer, earning \$5,000.00 per annum, and will continue to live in her mother's house as she has done ever since the separation. The child's grandmother is aged fifty and in good health. The father is earning \$6,000.00 per annum as a Sales Clerk, and is planning to hire a housekeeper if the court allows him to keep possession of his son.

CASE 4

(Logical order 1)

A married couple have separated two months ago following the husband's discovery that the wife has committed adultery on a number of occasions. The mother has gone back to live with her mother, a healthy fifty-year-old, but the father is keeping their only child, a nine-year-old boy, at his house. The mother is now bringing an action under section 1(1) of the Infants Act for custody of the child, and the father opposes this with a similar claim for custody himself. Counsel for the father produces evidence of the adultery and also evidence suggesting that the wife is still seeing her lover on occasions, although there is no evidence that they are cohabiting. The father is a Sales Clerk earning \$6,000.00 per annum; if given custody he will need help, and promises to hire a housekeeper. The mother will have to start work again as a Stenographer if she gets custody as she has not got enough money to look after herself and her boy; she should be able to earn around \$5,000.00 per annum. The character of both parents is unimpeachable, apart from the wife's adultery.

CASE 5

(Logical order 5)

A wife, whose husband has left her because of her having admitted adultery on a number of occasions, is bringing an action under section 1(1) of the Infants Act for custody of her nine-year-old son which she has in her possession. The father is counter-claiming for custody of the child. The information presented in court shows that the mother is living with her mother, a woman aged fifty and in good health, and that the father is living on his own in his house, although he is planning to hire a housekeeper if given custody. The father is earning \$6,000.00 per annum, as a Sales Clerk. The mother is not working at present, and has enough money to afford to look after herself and her child without going out to work; she claims that a child aged nine should have the full-time care of its mother. The father is unable to produce any evidence to suggest that the wife and her lover are living together, although it is admitted by the wife that they still meet together sometimes. Apart from the wife's adultery, there is no question of bad character in relation to either spouse.

CASE 6

(Logical order 8)

Two months ago the parents of a nine-year-old boy separated because of incompatibility. The mother has possession of her son and is living with her mother, a healthy fifty-year-old. The father remained in his house on his own. The mother is now applying under section 1(1) of the Infants Act for custody of her son, but this is objected to by the father who is counter-claiming for custody. The information before the court is that both parents are of good character. The father is a \$6,000.00 per annum Sales Clerk and will hire a housekeeper if he obtains custody. The wife is planning to

stay at home with her son, if she is successful in gaining custody, as she can afford to look after him and herself without any regular earnings.

CASE 7

(Logical order 3)

An action for custody is brought by the mother of a nine-year-old boy under section 1(1) of the Infants Act. The spouses separated two months ago following the husband's discovery of adultery by the wife, the husband keeping the child. In court this adultery on a number of occasions is admitted by the wife, and there is evidence to suggest that she is continuing to see her lover occasionally but no evidence suggesting that they are cohabiting. There is no other evidence of bad character against the wife, and none at all against the husband. The father states that he is a Sales Clerk earning \$6,000.00 per annum. He owns a house which he is occupying on his own at present; if he is given custody of his son he is going to employ a housekeeper. The mother states that she is living with her fifty-year-old mother (in good health); she is not planning to go out to work as she can afford to look after herself and her son without any extra money.

CASE 8

(Logical order 6)

In this case, the mother is claiming under section 1(1) of the Infants Act custody of her nine-year-old son that she already has in her possession. The father is counter-claiming for custody. The evidence shows that the parties split up by mutual consent because of incompatibility about two months ago. The father is a Sales Clerk earning \$6,000.00 per annum, while the wife is a Stenographer, with a probable wage of \$5,000.00 per annum; she has not enough money to afford to keep herself and her child without a job. The father has a house which he is presently occupying by himself, but he has promised to employ a housekeeper if he gets custody. The mother is living with her mother; the child's grandmother is fifty and in good health. There is no evidence of bad character against either parent.
