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CUSTODY ORDERS UNDER THE CONSTITUTION

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I. Introduction.

Complex problems are involved in determining the relationship between orders for the custody of children of a marriage which are made under sections 10 and 11 of the Divorce Act¹ and custody orders which are made under provincial jurisdiction. It now seems established that, by virtue of the rule of federal legislative paramountcy, an order for the custody of a child which is validly made in divorce proceedings will at least supersede an *existing* provincial custody order relating to the child *if that existing order determines custodial rights as between the husband and wife*.² It is not clear, however, that an order made in divorce proceedings will supersede an existing order which has extinguished parental rights in favour of a third party. And it is open to question whether any *subsequent* custody order from another court acting in pursuance of provincial jurisdiction is made inoperative by the provision under section 11(2) of the Divorce Act for variation of an order for corollary relief by the court which made the original order. I shall examine these issues and some additional constitutional aspects of the law concerning custody orders in the light of several recent decisions of appellate courts.³

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¹ R.S.C., 1970, c. D-8.

² *Gillespie v. Gillespie* (1973), 36 D.L.R. (3d) 421; *Re Hall and Hall* (1976), 70 D.L.R. (3d) 493.

³ The issues have also been discussed in several earlier decisions at trial level. However, I shall not comment upon these decisions, since the relevant arguments have now been considered in the decisions at appellate level.

In *Re Clarke and Hutchings*,⁴ the Newfoundland Court of Appeal took the view that a custody order under the Divorce Act constitutes only a determination of rights as between the parties to the divorce. It therefore held that the making of a custody order upon divorce cannot prevent another court subsequently awarding custody to a *third party*, acting under its provincial jurisdiction as *parens patriae*. The direction of the court's reasoning might also seem to cast doubt on the paramount effect of a divorce order over an *existing* order in favour of a third party.

Furthermore, the Ontario Court of Appeal, in *Re D.J.C. and W.C.*⁵ and in *Ramsay v. Ramsay*,⁶ has argued that, *even as between the parents of a child*, a court's power to make an operative custody order under its provincial jurisdiction is not affected by the existence of a previous order made by another court in divorce proceedings. Although the court decided that the effect of section 11(2) of the Divorce Act is that an order for *maintenance* as between the parties to the divorce can only be varied or rescinded by the court which made the order, it denied that there is exclusive jurisdiction in matters of custody.

In contrast, the British Columbia Court of Appeal, in *Re Hall and Hall*,⁷ took the view that a custody order under the Divorce Act is paramount over *any antecedent or subsequent* order made under provincial jurisdiction, at least if the provincial order is permanent in nature. Detailed consideration was not given to orders in favour of third parties, but language was used which suggested that these are not exceptions. However, the question was expressly left open whether a *temporary order of protective custody* might be made for sufficient time to permit application for variation of the divorce order by the court which had made it.

These cases focus upon the operation of federal paramountcy in the field of custody orders. This is dependent on how the principles governing the paramountcy doctrine apply to the particular provisions of the Divorce Act. In addition, paramountcy can only apply to enactments and orders which are within federal power under the British North America Act.⁸ At issue in the debate concerning orders which award custody to third parties is whether these can fall within the scope of federal jurisdiction over divorce. The cases therefore raise problems concerning the interpretation of the Divorce Act and the scope of federal ancillary powers as well as the operation of the paramountcy doctrine. I shall analyze their reasoning and implica-

⁴ (1976), 71 D.L.R. (3d) 356.

⁵ (1975), 57 D.L.R. (3d) 694.

⁶ (1976), 70 D.L.R. (3d) 415.

⁷ *Supra*, footnote 2.

⁸ 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

tions against the background of a general review of constitutional authority in relation to the making of custody orders.

II. *The Constitutional Foundation of Custody Orders.*

It is well established that jurisdiction over the custody of children lies primarily with the provinces. From the standpoint of the rights of those who hold or are awarded custody, this may be viewed as a matter of "property and civil rights in the province" under section 92(13) of the British North America Act.⁹ Alternatively, from the standpoint of the protection and welfare of a child, it may be viewed as a matter of "the administration of justice in the province" under section 92(14).¹⁰ For present purposes, nothing turns on the precise location of provincial jurisdiction. All that matters is that it falls squarely within the provincial sphere under section 92. The provinces have thus inherited the traditional power of Courts of Chancery, acting as *parens patriae*, to make orders for the custody of children with the effect of denying the rights of one or both of the parents. This jurisdiction is now vested in the superior courts of each of the provinces. In addition, the lower courts may sometimes make custody orders, most importantly under legislation relating to child welfare and to the maintenance of deserted wives and children.¹¹ Traditionally, provincial orders have been effective only within the province in which they are made. And it has been held that, in making an order, no more than "grave consideration" should be given to a prior order of a "foreign" court.¹² However, many provinces have recently passed legislation providing for the enforcement on application of custody orders made in other jurisdictions.

The federal Parliament has very restricted legislative power over the custody of children. It has no power to legislate generally in relation to custody, despite its power to legislate in relation to "marriage and divorce" under section 91(26) of the British North America Act. Parliament has only attempted to exercise jurisdiction over "marriage" with respect to the creation of marriage, and matters relating to the consequences of marriage have traditionally been regarded as within exclusive provincial jurisdiction. Parliament

⁹ *Zacks v. Zacks*, [1973] S.C.R. 891, at p. 900; *Gillespie v. Gillespie*, *supra*, footnote 2, at p. 430.

¹⁰ In *The Queen v. Gyngall*, [1893] 2 Q.B. 232, at p. 239, Lord Esher described jurisdiction to make a custody order as "a judicially administrative jurisdiction" rather than "a jurisdiction to determine rights" as between persons. On the administrative nature of the proceedings, see also Bromley, *Family Law* (5th ed., 1976), pp. 313-314.

¹¹ On provincial jurisdiction over custody, see Robinson, *Custody and Access in Mendes da Costa*, *Studies in Canadian Family Law*, vol. 2 (1972), pp. 551-560.

¹² *McKee v. McKee*, [1951] 2 D.L.R. 657, at p. 666.

has some legislative power over custody, but this is confined to custody in relation to divorce, and perhaps also in relation to the nullity of marriage on certain grounds.¹³ It has only exercised its powers over custody in relation to divorce.

In *Zacks v. Zacks*,¹⁴ the Supreme Court of Canada declared the provisions for corollary relief in the Divorce Act to be valid on the basis of powers *ancillary or necessarily incidental* to those given to Parliament in relation to the dissolution of marriage. The Act provides for the making of custody orders with national legal effect by the superior courts of each of the provinces. Paragraph (c) of section 11(1) empowers a court, upon granting a decree *nisi*, to make "an order providing for the custody, care and upbringing of the children of the marriage". Under section 11(2), such an order may be varied or rescinded by the court that made it. The making of an interim order upon the presentation of a petition for divorce is permitted by paragraph (b) of section 10. Section 14 provides that orders for corollary relief will have legal effect throughout Canada, and section 15 provides that they may be registered in any other superior court in Canada and enforced in like manner as an order of that court.

Under the rule of federal legislative paramountcy, federal provisions will prevail in cases of conflict between valid federal and provincial legislation, and regulations and orders made thereunder. This rule applies even where the validity of the federal enactment or order rests upon an ancillary constitutional power. However, it does not automatically follow that an order made in divorce proceedings which grants custody of a child to one person will render inoperative another order made in pursuance of provincial jurisdiction which grants custody to a different person. The notion of "conflict" requires not just that the two orders should say different things but that they should make different determinations of the same issue. There are two kinds of situation in which it may be questioned whether apparently competing custody orders do make different determinations of the same issue.

The first situation involves provincial orders in favour of strangers to the marriage. If it is argued that an award of custody under the Divorce Act is simply a determination of custodial rights as between the parties to the divorce, then there may not be any conflict between a divorce order which grants custody to one of the parties and a provincial order which disentitles both parties and grants custody to a stranger. An argument for this restricted jurisdiction

¹³ The power of the federal Parliament over the creation of marriage is restricted by the provinces' power over "the solemnization of marriage in the province" under section 92(12) of the British North America Act.

¹⁴ *Supra*, footnote 9, at pp. 901-902.

under the Divorce Act may be based either on the interpretation of the Act itself or on the scope of federal legislative power in relation to divorce. This line of argument denies the existence of conflict by denying a court in divorce proceedings the power to make orders which would create conflict with a provincial order in favour of a third party.

The second situation involves provincial orders which are made subsequent to an order under the Divorce Act, including subsequent orders which re-allocate rights as between the parties to the divorce. Custody orders pose special problems for the operation of federal paramountcy because the courts have traditionally approached such orders on the basis that they are made merely with reference to a particular set of circumstances pertaining at a given time, and can never be final. They can only be "permanent" in the sense of being indefinite. Thus a court will always be justified in re-examining the issue in the light of new circumstances, including the increased age of a child with the passage of time.¹⁵ As Fauteux J. said in *Kredl v. Attorney-General of Quebec*: "The unalterable consequences of *res judicata* do not attach to a judgment of this nature."¹⁶ If, therefore, custody orders under the Divorce Act are made with reference to circumstances pertaining at the time of divorce, there need not necessarily be any conflict with subsequent orders made under provincial jurisdiction when circumstances have changed. Within any province in which the subsequent provincial order is made or enforced it may supersede the order under the Divorce Act. Federal paramountcy will only apply to subsequent provincial orders which have been made in the light of new circumstances if it is accepted that the provision for variation of the divorce order under section 11(2) of the Divorce Act is intended to create an exclusive jurisdiction thereafter. And it is open to dispute whether this provision does embody this intention.

In this article I am principally concerned with an examination and an assessment of these two kinds of argument. In order to simplify matters, I shall first examine the application of the paramountcy rule to apparently competing orders for custody as between the parties to a divorce. The custodial rights of the parties are clearly within the scope of federal ancillary power in relation to divorce. I shall turn later to the problem of orders in favour of third parties. These also raise difficulties with respect to ancillary powers.

III. *Custody Orders and the Paramountcy Rule.*

It has been said that a custody order under the Divorce Act will supersede any existing order as between the parties to the divorce.

¹⁵ *McKee v. McKee*, *supra*, footnote 12, at pp. 665-666.

¹⁶ [1966] S.C.R. 320, at pp. 326-327.

However, the Ontario Court of Appeal, in two recent unanimous decisions, has denied that an order under the Divorce Act will prevent a subsequent re-determination of custodial rights by a court in another province.

In *Re D.J.C. and W.C.*¹⁷ a divorce decree was granted in Manitoba, with custody of the children given to the father. The mother, however, brought the children to Ontario, where she registered the decree and sought orders for interim and permanent custody. The trial judge granted her interim custody until an appeal or application for variation of the original order could be heard in Manitoba. The Ontario Court of Appeal varied the disposition in some particulars, but basically affirmed the interim order. It was also suggested that an Ontario court could make a permanent order to vary the effect of the Manitoba order, acting under provincial jurisdiction.¹⁸

This argument was pursued further in *Ramsay v. Ramsay*.¹⁹ There, the husband had sought variation in Ontario of an order for the maintenance of his wife, which again had been made under the Divorce Act in Manitoba and registered for enforcement in Ontario. The corollary relief order had also provided for the maintenance of a child and granted custody to the wife. However, no variation was sought of these parts of the order. The maintenance award for the wife was varied by the trial judge, but on appeal it was held that by virtue of section 11(2) of the Divorce Act, only the court which made an order for maintenance of a wife had the power to vary the order. Counsel for the Attorney General of Canada, who had intervened in the appeal, argued that section 11(2) also had this effect in relation to custody, so that it eliminated the *parens patriae* power of the superior courts of a province where a custody order had been made in divorce proceedings in another province. This argument was rejected primarily on the ground that only an express enactment could remove so important a power of the court as that of *parens patriae*. It should not be inferred simply from the establishment of a procedure for variation of the divorce order.²⁰

It was also reaffirmed that an order for custody cannot by its nature be final, and it was even doubted whether the elimination of

¹⁷ *Supra*, footnote 5.

¹⁸ *Ibid.*, at pp. 697-698. It was also suggested that an Ontario court might be able to vary the effect of the Manitoba order acting under the Divorce Act itself. However, since no reasons were given for claiming jurisdiction under the Divorce Act, and since no further claim for such jurisdiction was made in the decision in *Ramsay v. Ramsay*, *supra*, footnote 6, I shall confine my analysis to the issue of provincial jurisdiction.

¹⁹ *Supra*, footnote 6.

²⁰ *Ibid.*, at p. 427.

parens patriae jurisdiction could be regarded as a necessary incident of divorce.²¹ I shall refer again to this last point when I discuss ancillary powers. In its judgment, the court did not expressly limit the power to make a new order under provincial jurisdiction to situations where it is established that circumstances have changed since the order under the Divorce Act was made. However, such a limitation must be implicit. Otherwise, the order under the Divorce Act would be paramount, not because of section 11(2), but because the two orders would be contradictory determinations of the same issue.

A very different approach was adopted by the British Columbia Court of Appeal in its unanimous decision in *Re Hall and Hall*,²² where a much wider effect was given to section 11(2). The husband had been awarded custody of a child in British Columbia under the provincial Equal Guardianship of Infants Act.²³ Subsequently, the wife presented a petition for divorce in Quebec, and obtained an interim order for custody which was registered in British Columbia. The child had been placed by the husband in a foster home in British Columbia, with the assistance of provincial authorities, and these authorities indicated that they would not agree to its delivery to the wife until the provincial custody order had been revoked. The wife, therefore, applied to the Supreme Court of British Columbia for variation of the order, but took the position that the merits need not be gone into in view of the existence of the Quebec order. The trial judge held that a hearing on the merits was required, and, therefore, dismissed the petition. The appeal was allowed, but in the form of a declaration that the British Columbia order was no longer effective.

The Court of Appeal disapproved the reasoning in *Ramsay v. Ramsay* and held that, as long as the Quebec order was in force, there was no jurisdiction in British Columbia to award the custody of the child to anyone, at least on a permanent basis. It was said that "a custody order under s. 10 is paramount to any custody order theretofore or thereafter made otherwise than under the Act".²⁴ The federal Parliament could say which of the superior courts should exercise *parens patriae* power with respect to the custody of infants as complementary to divorce, and this it had done through its provision for variation of an order under section 11(2).²⁵ To this broad application of the rule of federal paramountcy, the court

²¹ *Ibid.*, at pp. 427-428.

²² *Supra*, footnote 2.

²³ R.S.B.C., 1960, c. 130.

²⁴ *Supra*, footnote 2, at p. 498. The same view has been expressed, but without analysis of the issues, by the Appeal Division of the New Brunswick Supreme Court in *Melvin v. Melvin* (1975), 58 D.L.R. (3d) 98, at p. 100.

²⁵ *Supra*, footnote 2, at p. 502.

permitted only one possible exception: a temporary order of protective custody like that made in *Re D.J.C. and W.C.* The court left open the question whether such an order could be made.²⁶

The British Columbia Court of Appeal did not dispute the proposition that a custody order is never final in nature. Its disagreement with the Ontario Court of Appeal concerns the effect of the provision under section 11(2) of the Divorce Act for variation of a corollary relief order by the court which made the original order. The British Columbia Court of Appeal held, and the Ontario Court of Appeal denied, that this creates an exclusive jurisdiction to determine the custodial rights of the parties once a custody order under the Divorce Act has been made. This division of opinion seems to reflect the different approaches to the application of federal paramountcy which have also emerged in decisions of the Supreme Court of Canada in other areas of constitutional law. There has been little consistency in diagnosing the kinds of conflict which will invoke paramountcy. It would seem to be open to a court either to take a narrow view of paramountcy, applying it only where there is a conflict between the *express provisions* of federal and provincial enactments and orders, or to take a broad view, applying it where there is a conflict of *policy*. And these different approaches have been used in different cases.

Adopting the narrow view of paramountcy, the test will be whether the enactments or orders are directly contradictory and thus incompatible in operation. In the cases concerning legislation on the driving of motor vehicles, the Supreme Court of Canada offered several different justifications for upholding the operativeness of provincial legislation. However, in certain parts of the judgments in these cases, the test of direct contradiction seems to have been used. For example, in *O'Grady v. Sparling*, Judson J. said at one point that a federal provision concerning criminal negligence in the operation of a motor vehicle and a provincial provision concerning careless driving were not "repugnant" because they could "live together and operate concurrently".²⁷ The implications of this kind of approach can be seen in *Ross v. The Registrar of Motor Vehicles*,²⁸ a case involving impaired driving, where the automatic suspension of a driver's licence under provincial legislation was held not to conflict with an order made under the Criminal Code prohibiting driving only at certain times and places. In commenting on these decisions, Whyte and Lederman have asked: ". . . have not the courts shown that in this area at least, nothing short of the most blatant operating

²⁶ *Ibid.*, at p. 504.

²⁷ [1960] S.C.R. 804, at p. 811.

²⁸ [1975] 1 S.C.R. 5.

incompatibility will force the courts to invoke the principle of Dominion paramountcy?"²⁹

The alternative, broader view of the paramountcy rule is that it applies to conflicts of policy. This lies at the core of the doctrine of the "occupied field". Under that doctrine, Parliament, by legislating in a field, may "occupy" it in such a way as impliedly to exclude the operation of any provincial enactment or order in the same field. Its application is illustrated by some of the comments in *McKay v. The Queen*.³⁰ In that case it was held that a municipal by-law regulating signs on property could not validly extend to federal election posters. Although it was unnecessary for the decision in the case, Cartwright J. indicated that he was also inclined to think that Parliament had "occupied the field" by enacting that federal election posters bear the names and addresses of the printer and publisher.³¹

If a custody order is made under the Divorce Act, and then, without any change of circumstances intervening, a provincial order attempts to re-determine the custodial rights of the parties, the test of direct contradiction would clearly make the provincial order inoperative. The two orders would be contradictory determinations of the same issue. However, as I noted earlier, if custody orders are only made with respect to circumstances pertaining at a given time, there need not be any conflict between an order made in divorce proceedings and a subsequent provincial order made in the light of new circumstances. In order to create a direct contradiction, there would have to be an express provision in the Divorce Act which excluded the making of subsequent custody orders otherwise than under the Act. In the absence of such a provision, only the doctrine of the occupied field can be used to make an order under the Divorce Act paramount over all subsequent provincial orders.

The doctrine of the occupied field relies heavily upon judicial inference, and, while it has never been rejected by the courts, there seems to be some reluctance to invoke it.³² This reluctance is perhaps reflected in the reasoning of the Ontario Court of Appeal in *Ramsay v. Ramsay*. Without an express provision, the court was not prepared to assume that Parliament intended that a custody order under the Divorce Act should remove the *parens patriae* power of the superior courts of another province. In contrast, the British Columbia Court

²⁹ Canadian Constitutional Law (2nd ed., 1977), p. 4.81.

³⁰ [1965] S.C.R. 798.

³¹ *Ibid.*, at p. 805.

³² The author of a recent constitutional text has argued: "... one must conclude that the cumulative effect of the recent decisions seems to be that the sole test of inconsistency in Canadian constitutional law is express contradiction." See Hogg, *Constitutional Law of Canada* (1977), p. 109.

of Appeal in *Re Hall and Hall* thought that the provision for variation under section 11(2) of the Divorce Act was sufficient to raise this inference, although it did not refer explicitly to the "occupied field" doctrine.

In the absence of clearer guidelines from the Supreme Court of Canada on the usage of the "occupied field" doctrine, it cannot be said that the reasoning in one rather than another of these judgments is correct.³³ Even assuming, however, that *Re Hall and Hall* is correctly decided and that the doctrine may properly be invoked in relation to custody orders subsequent to divorce proceedings, the question remains as to which field has been occupied. Is it the field of all subsequent orders, whether permanent or temporary in nature? Or is it only the field of permanent orders? This may be why, in *Re Hall and Hall*, the question was left open whether it might be possible to make a temporary order of protective custody for sufficient time to permit an application for variation under the Divorce Act. It may well be argued that nothing in that Act is inconsistent with the retention, by the superior courts of all provinces, of a power to deal with emergency situations. The Act makes no provision at all for a decision by a local court in a situation which requires urgent action. Assuming, on the other hand, that the reasoning in *Ramsay v. Ramsay* is correct, the courts of a province have much wider authority to make effective subsequent orders. Their power is limited only by the need to justify the making of a new order by reference to changed circumstances since the order under the Divorce Act was made.

IV. *Custody Orders and Ancillary Powers.*

The paramountcy rule may also apply in situations where an order under the Divorce Act awards custody to one of the parties and a provincial order awards custody to a third party. If it does apply, it could be subject to the possible limitations with respect to subsequent provincial orders which are suggested by the reasoning in *Ramsay v. Ramsay*. However, paramountcy will only apply in this context if an order under the Divorce Act constitutes a valid determination of the whole issue of custody of a child, and not just of the custodial rights of the parties to the divorce. This issue requires interpretation of the Act and analysis of the scope of federal ancillary powers in relation to divorce. There are also certain other respects in which the scope of federal ancillary power is unclear. I shall therefore comment upon some of these before turning to the issue of grants of custody to third parties.

³³ Hogg, *op. cit.*, *ibid.*, p. 378, has argued that *Re Hall and Hall* is correctly decided and the *obiter dictum* in *Ramsay v. Ramsay* is inconsistent with the doctrine of federal paramountcy. His argument, however, takes no account of the peculiar nature of custody orders.

First, there is some doubt, on grounds not only of interpretation but also constitutional jurisdiction, about the time at which an order for corollary relief may be made under the Divorce Act. It has not yet been settled that the power to award corollary relief upon granting a decree *nisi* includes, or could validly include, the power to make an order when the issue was not raised at the time of divorce. In *Goldstein v. Goldstein*,³⁴ the Alberta Court of Appeal held that corollary relief could be awarded in these circumstances without limitation as to time. However, the Supreme Court of Canada declined to answer the question in *Zacks v. Zacks*,³⁵ and in subsequent cases has been cautious in its approach to interpreting the corollary relief power. Thus, without either approving or disapproving the kind of broad interpretation favoured by the Alberta Court of Appeal, it has held that there was jurisdiction to make a subsequent award where, in *Lapointe v. Klint*,³⁶ the issue of corollary relief had been reserved in the decrees *nisi* and absolute, and where, in *Vadeboncoeur v. Landry*,³⁷ the failure to make application at the time of divorce had been due to an oversight which was corrected within reasonable time.

In addition, there are several respects in which it is uncertain which kinds of provision relating to custody fall within the scope of federal legislative power. For example, the Ontario Court of Appeal in *Ramsay v. Ramsay* doubted whether the elimination of a court's *parens patriae* jurisdiction over children within its territorial jurisdiction could be regarded as a necessary incident of divorce and, therefore, within federal authority.³⁸ In contrast, the British Columbia Court of Appeal in *Re Hall and Hall* took the view that by assuming jurisdiction over custody upon divorce, the federal Parliament was in effect taking over *parens patriae* jurisdiction in relation to divorce.³⁹ And, by doing so, it became entitled to prescribe which courts could exercise this jurisdiction. The reasoning in *Re Hall and Hall* is attractive, but it still remains to determine how much of *parens patriae* jurisdiction is "in relation to divorce" and therefore within the scope of federal authority. It should extend to the custodial rights of parties to a divorce in relation to a child of whom they are also the natural parents. However, it is unclear how much further this jurisdiction may extend.

Thus, a constitutional question is raised, as the Law Reform

³⁴ (1976), 67 D.L.R. (3d) 624. See also *Re Kravetsky and Kravetsky* (1975), 63 D.L.R. (3d) 733, where the Manitoba Court of Appeal held that there was jurisdiction to hear a subsequent application made within reasonable time.

³⁵ *Supra*, footnote 9, at p. 914.

³⁶ [1975] 2 S.C.R. 539.

³⁷ (1976), 68 D.L.R. (3d) 165.

³⁸ *Supra*, footnote 6, at pp. 427-428.

³⁹ *Supra*, footnote 2, at p. 502.

Commission of Canada has noted,⁴⁰ with respect to a court's power in divorce proceedings to make a custody order relating to a child to whom one or both of the parties have stood *in loco parentis*.⁴¹ It is not clear whether the Divorce Act purports to extinguish the custodial rights of natural parents who are not parties to the marriage, or whether ancillary powers in relation to divorce could extinguish these rights. The Law Reform Commission of Canada has also drawn attention, although not in a constitutional context, to the occasional grant of custody of a child in divorce proceedings to a third party.⁴² Constitutional difficulties may also arise here. And finally, there is the problem of the effect of an order under the Divorce Act upon a provincial order in favour of a third party.

The issue of ancillary powers in relation to custody orders in favour of third parties has been raised very clearly by the decision and reasoning of the Newfoundland Court of Appeal in *Re Clarke and Hutchings*.⁴³ A wife had been granted custody of the children of the marriage in divorce proceedings in Ontario, and had registered the order in Newfoundland. One child was resident in the latter province in the care of relatives of the husband. The wife applied in Newfoundland for a writ of *habeas corpus* for delivery of the child to her. She succeeded at first instance on the ground that the court was obliged to give effect to the divorce decree. However, the appeal by the husband's relatives was allowed, and the matter remitted to the trial judge for a determination on the merits. The Court of Appeal held unanimously that an order under the Divorce Act does no more than declare which parent is to exercise parental rights of custody. Its effect is limited to custodial rights as between the parties to the divorce, and it gives no superior rights than both parties enjoyed before the divorce. Thus, the courts of a province where the child is resident retain jurisdiction to make a subsequent order in favour of a third party in the interests of the child. In contrast, in *Re Hall and Hall*, the British Columbia Court of Appeal said that a custody order under the Divorce Act is paramount over *any* other custody order made theretofore or thereafter, and that once such an order had been made, the courts of British Columbia had no jurisdiction under the provincial Equal Guardianship of Infants Act to award custody to anyone.⁴⁴

Although the court in *Re Clarke and Hutchings* approached the question primarily as a matter of interpretation, two of the three

⁴⁰ Report on Family Law (1976), para. 4.47.

⁴¹ Section 2 of the Divorce Act provides that a "child" of a husband and wife includes any person to whom they stand *in loco parentis*.

⁴² *Op. cit.*, footnote 40, at paras 4.40-4.41.

⁴³ *Supra*, footnote 4.

⁴⁴ *Supra*, footnote 2, at pp. 498 and 503.

judges also suggested that it might be beyond federal constitutional power to go beyond a determination of rights as between the parties to the divorce.⁴⁵ In any event, the constitutional and the interpretive issues are interrelated since, as Cartwright J. said in *McKay v. The Queen*: "... if words in a statute are fairly susceptible of two constructions of which one will result in the statute being *intra vires* and the other will have the contrary result, the former is to be adopted."⁴⁶ Therefore, if it is unclear whether the Divorce Act purports to authorize a determination of the whole issue of custody of a child, and if it is considered that such a determination would be beyond federal power, the Act should be interpreted as simply authorizing a determination of the custodial rights of the parties.

The decision in *Re Clarke and Hutchings* concerned jurisdiction to make a custody order in favour of a third party who was a private individual, subsequent to divorce proceedings in another province. However, much broader implications are involved in viewing custody orders under the Divorce Act as merely determining the rights of parties to the divorce. First, the court's reasoning would cover orders which grant custody to public officials under, for example, child welfare legislation. Secondly, it could also apply to circumstances where an order in favour of a third party had been made before the divorce.⁴⁷ Thus, an order under the Divorce Act might never become operative in a province in which such an order was already in force. Furthermore, this reasoning could apply even where the two orders had been made in the same province, in which case the only effect of the divorce order might be outside that province. Finally, some doubt might appear to be cast on the constitutional validity of orders made in divorce proceedings which grant custody of a child to a third party.

There is much to recommend the position taken by the Newfoundland Court of Appeal, at least in relation to orders made subsequent to divorce proceedings, and especially in relation to orders made under child welfare legislation. In the absence of express provisions, it would be a surprising interpretation of the corollary relief provisions of the Divorce Act that they preclude the making of an order under child welfare legislation after a custody order has been granted in divorce proceedings. Prior to the passage of the Divorce Act it had been established that a custody order of a superior court did not oust the jurisdiction of a lower court in child welfare proceedings.⁴⁸ The capacity of the federal Parliament to

⁴⁵ *Supra*, footnote 4, at pp. 361 and 366.

⁴⁶ *Supra*, footnote 30, at p. 804.

⁴⁷ This seems to have been contemplated by Morgan J.A. in *Re Clarke and Hutchings*, *supra*, footnote 4, at p. 366.

⁴⁸ *Kredl v. Attorney-General of Quebec*, *supra*, footnote 16.

legislate with this effect must also be in grave doubt on constitutional grounds. The Supreme Court of Canada, in upholding the validity of the corollary relief provisions of the Divorce Act in *Zacks v. Zacks*, noted that: "The Act only contemplates orders as to these matters as a necessary incident to the dissolution of a marriage."⁴⁹ It is questionable whether restrictions upon the power of the provinces to provide for the protection of children *inter alia* from their own parents could be regarded as a necessary incident of the termination of a marital relationship between those parents. Thus, it would seem that, regardless of whether it has purported to do so in the Divorce Act, the federal Parliament cannot use its constitutional power in relation to divorce to oust provincial jurisdiction to make subsequent custody orders in favour of third parties. And in this respect it should be irrelevant that both orders were made in the same province, even though the effect of the provincial order will be to render the divorce order inoperative in that province.

Less attractive are the implications of the reasoning of the Newfoundland Court of Appeal in relation to the status of orders made in divorce proceedings and their effect upon prior orders in favour of third parties. The view that divorce orders can only constitute a determination of rights as between the parties to the divorce seems too narrow. When the Ontario Court of Appeal considered the issue of custody in relation to divorce in *Papp v. Papp*, Laskin J.A. said: "Where there is admitted competence, as there is here, to legislate to a certain point, the question of limits (where that point is passed) is best answered by asking whether there is a rational, functional connection between what is admittedly good and what is challenged."⁵⁰ This statement was cited with approval by the Supreme Court of Canada in *Zacks v. Zacks*.⁵¹ It can be argued that there is a rational, functional connection between the dissolution of a marriage and a general review of the question of custody of children of that marriage. Since any previous custody order will have been made in the light of circumstances which can be altered materially by the divorce, the time of the divorce could be an appropriate time to review the whole issue of custody of children of the marriage. There may, however, still be a question as to whether, in this respect, "children of the marriage" could include children to whom one or both of the parties have stood *in loco parentis*. If such children are included, an order made in divorce proceedings could extinguish the custodial rights of natural parents who are not parties to the marriage. However, it may well be that provision for the making in divorce proceedings of custody orders relating to such

⁴⁹ *Supra*, footnote 9, at pp. 901-902.

⁵⁰ (1969), 8 D.L.R. (3d) 389, at pp. 393-394.

⁵¹ *Supra*, footnote 9, at pp. 904-905.

children can only be justified as a determination of the custodial rights of the parties.

Subject to this last reservation, a custody order upon divorce can be seen as a determination of the legal position of a child and not just of the rights of the parties to the divorce. And it may, therefore, be permissible for the federal Parliament to provide for the return of parental rights which had been withdrawn in earlier proceedings under provincial jurisdiction or for the withdrawal of parental rights in favour of a third party. Alternatively, it may even be possible to uphold the constitutional validity of awards of custody to third parties in divorce proceedings on the narrow view of the ancillary power: that is, that it is confined to the determination of the custodial rights of the parties. The power to award custody to a third party might be viewed as a necessary incident of the power to decide that neither of the parties should have custody.

It is a different question whether the Divorce Act should actually be interpreted with the broad effect that custody orders made in divorce proceedings will supersede all existing custody orders. It may well be doubted that divorce orders are intended to override prior orders in favour of third parties when such parties are neither required to be notified that a claim for custody will be made in divorce proceedings nor granted any right to be heard in these proceedings. If it is accepted that custody can be awarded to a third party in divorce proceedings, then in at least one respect a custody order under the Divorce Act will go beyond a determination of the rights of the parties. However, it has been noted that this may be viewed merely as a necessary incident in a decision to deny custody to both the parties. On the other hand, it may be contended, in support of a broad interpretation of the effect of custody orders under the Act, that where different courts assume jurisdiction over a child it has always been possible for an order to be made without affected persons being notified or heard.

V. Conclusions.

It is not clear whether the provisions relating to custody in the Divorce Act are intended to empower merely a determination of the custodial rights of the parties to a divorce or whether they are intended to empower a general review of the issue of custody of children of a marriage. I have argued only that it may be permissible for the federal Parliament to provide for a general review of the issue of custody, whereas it would be beyond federal power to oust provincial jurisdiction to make a subsequent order in favour of a third party. A claim to legislative power in relation to the whole issue of custody which is limited to the time of divorce is distinguishable from a claim to the assumption of exclusive

jurisdiction thereafter in relation to the welfare of a child. Any claim to assume exclusive subsequent jurisdiction must surely be limited to the determination of the rights of parties to the divorce and, therefore, exclude orders in favour of third parties.

In relation to the custodial rights of parties to the divorce, I have contended that it is within federal power to provide that a court which makes an order under the Divorce Act relating to the custody of a child has exclusive jurisdiction thereafter in this matter. If this were done, the effect would be that orders under the Act would be paramount over not only antecedent orders but also subsequent provincial orders which attempt to re-determine the custodial rights of the parties. Again, however, it may be questioned whether Parliament has actually legislated with this effect. The Divorce Act is sufficiently imprecise, and the operation of the paramountcy doctrine so confused, that several possible interpretations are justifiable. The answer may eventually depend on whether, in constitutional law generally, the courts will rely solely on direct contradiction to invoke paramountcy or whether they will view this as only one of the circumstances in which provincial enactments or orders become inoperative. I have confined my argument on the interpretation of the Divorce Act in this respect to the claim that there should be at least no inference of exclusion of provincial jurisdiction to make temporary orders to deal with emergency situations.

The overall lack of clarity in the law is particularly to be regretted where the welfare of children is at stake. There is therefore an urgent need for specification of the purported scope of federal ancillary powers over custody, as well as the intended effect of the provision for variation of a custody order which has been made under the Divorce Act. The Law Reform Commission of Canada has been largely silent on these matters in its proposals for the reform of family law. However, now that the issues have been clarified by recent cases, it is to be hoped that they will not be avoided in any amendments to the law of divorce.
