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PROCEDURAL ASPECTS OF ARRANGEMENTS FOR CHILDREN UPON DIVORCE IN CANADA

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The traditional adversarial system has come under considerable criticism from a variety of circles, both legal and non-legal, for its alleged inability to accommodate the human and evidentiary aspects of custody disputes. Yet the competing models of dispute resolution, whose advocates have made significant inroads into the public consciousness, have serious shortcomings as well. Concerns over the traditional model have led to responsive adjustments in many of the country's divorce courts. These have included the introduction of such structural and procedural innovations as pre-trials, mediation, assessment reports by experts and the independent legal representation of children. Notwithstanding these advances, however, the article closes with the observation that further reforms are still warranted in the service of children of divorce.

Toutes sortes de groupes, qu'ils soient ou non juridiques, n'ont pas manqué de critiquer fortement le système traditionnel de procédure contradictoire pour sa prétendue impuissance à régler les aspects humains et les moyens de preuve dans les différends relatifs à la garde des enfants. Et pourtant, les modèles proposés pour remplacer le système traditionnel que leurs partisans ont su déjà faire accepter par le public comportent aussi de sérieuses insuffisances. Les préoccupations que le modèle traditionnel a fait naître ont abouti à une prise de conscience de la part d'un bon nombre de tribunaux qui ont à juger des procès en divorce. Ces derniers ont introduit des innovations structurales et relatives à la procédure,

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telles que des mesures avant le procès, la médiation, les rapports d'évaluation établis par des experts et la représentation légale indépendante des enfants. Malgré ces progrès, cet article se termine par l'observation que des réformes supplémentaires sont encore nécessaires en ce qui a trait à l'assistance à apporter aux enfants du divorce.

Introduction

This topic invites truisms: divorce is traumatic; people are afflicted by emotional suffocation which induces impaired reasoning; children suffer as innocent victims of adult manipulation. This appears to be the recognized human context within which legal appraisals are required. Increasingly, the spotlight has landed on the third maxim—the effect of divorce on children.[1]

This subtle shift in preoccupation from adults as leading players, to parents as supporting cast, has had interesting results. The shift comes, not coincidentally, at a time when there are exponential increases in the number of children affected by divorce, when behavioural scientists are claiming and receiving wider acceptance of their expert catechisms, and when the legal profession is undergoing a responsive period of self-flagellation in the field of family law. The cumulative effect of all of these factors has been to re-examine critically the structural aspects of the decision-making process in divorce.

In Canada, this has resulted in cautious and staggered attempts to replace, refine or complement the adversary process. There is a constant search for a better mousetrap in the face of general disapprobation of the existing structure—a search for the correct instrument in which to perfect and promulgate the wisdom of Solomon.

The difficulty lies in sorting out what the various grievances actually reflect. Do they represent a fundamental disenchantment with the adver-

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[1] S. 2 of the Divorce Act, R.S.C. 1970, c. D-8, defines "children of the marriage" as each child of the husband and wife who at the material time is: "2 (*a*) under the age of sixteen years, or (*b*) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessaries of life; . . ." The word "child", in turn, is defined to include: ". . . any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*; . . ."

Whether a person stands *in loco parentis* in respect of a child has been held to involve consideration of the following factors, according to the case of *Re O'Neil and Rideout* (1975), 7 O.R. (2d) 117, at p. 127, 54 D.L.R. (3d) 481, at p. 491, 22 R.F.L. 107, at pp. 117-118 (Ont. Surr. Ct), per Dymond, Surr. Ct: "1. Did the person provide a large part of the financial support necessary for the child's maintenance? This is a *sine qua non*. 2. Did the person *intend* to 'step into the father's shoes'? 3. Was the relationship between the person and the child a continuing one with the idea of permanency? 4. If the child were living with and supported by its own father (mother?), has the inference that such father (mother?) has not been replaced by the other person been overturned? 5. Has the person, at the time pertinent to the action, terminated his position as *in loco parentis*?"

sary system generally or only as it is applied to family matters? Do they represent resentment at state intervention in private family matters generally or is it the inadequacy of the particular decision-maker that is at fault? Do they represent the malaise with which people travel through the divorce process generally or is it the legal process that generates the malaise? Is there any legal process that can realistically accommodate the grievances divorcing families experience or should the process be removed from the legal arena entirely?[2]

Perhaps one is wrestling with a conflict of expectations. What is the legal process intended to achieve? Does it achieve this purpose? Is it realistic to expect a legal process to alleviate the emotional distress of the families involved, or is the adversary system attracting a disproportionate share of blame for the painful exigencies of disintegrating families.

In response to assertions of inadequacy, there have been fusions and confusions of functions resulting in quasi-adversarial or quasi-conciliatory procedures. These have resulted in the lack of a predictable process which has resulted in the perception if not the actuality of unfairness. Only by defining the various goals of the structural components of divorce decisions can one assess the procedures. These include the adversary system, pre-trials, mediation, expert assessments and legal representation for children. How and why these procedures are used to make arrangements for children when their parents divorce is the subject of this article. The first three processes, although used in making arrangements for children, are germane to all family law matters. The last two have particular relevance to custody.

I. *The Adversary System.*

In Canada custody and child support may be ordered pursuant to federal or provincial legislation.[3] The federal Divorce Act applies to all provinces.[4] This Act states that custody and support are to be ordered by the court when

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[2] In her article The Welfare of the Child, in Ian F.G. Baxter and Mary A. Eberts (eds), The Child and the Courts (1978), p. 231, Dr. Olive M. Stone suggests that: "There is no alternative to some form of judicial process, however much or little it may differ from the type of judicial process with which we are most familiar."

[3] For a review of the jurisdictional and substantive aspects of custody law, see Lyman R. Robinson, Custody and Access in Derek Mendes da Costa (ed.), Studies in Canadian Family Law (1972), p. 543.

The Ontario situation is set out in Ian F.G. Baxter, Family Litigation in Ontario (1979), 29 U. T. L.J. 199.

[4] Para. 91(26) of the British North America Act, 1867, 30 & 31 Vict., c. 3 (U.K.), now Constitution Act 1867, see Canada Act, 1982, c. 11 (U.K.), vests in the federal government the exclusive legislative jurisdiction over "Marriage and Divorce". Para. 92(13) confers on provincial governments the jurisdiction over "Property and Civil Rights in the Province", which has been held to include jurisdiction over the custody and access of minors.

a divorce is granted if the court considers it "fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them". Provincial statutes provide for the granting of custody and support during the subsistence of a spousal relationship. Every provincial statute has a different set of criteria for the determination of custody and support matters. Misconduct is rarely a factor. Judicial discretion is a constant one.

Despite these overlapping jurisdictions and conflicting statutory mandates, the jurisprudence is moving towards the acceptance of a more homogenous approach to custody and support matters. In custody, whether or not it is so defined in the legislation, the test is: what is in the best interests of the child and which of the applicants can best serve those interests?[5] In support, whether or not it is a provincial or federal law, the test is: what are the economic needs of the applicant and to what extent is the respondent able financially to meet those needs? The forum in which these issues are decided is essentially adversarial.

The essence of the adversary process is the provision of an impartial decision-maker before whom competing litigants can present their claims in the expectation of a just determination. It is for the parties to adduce whatever information they feel will advance their respective claims. The assertions are presented in accordance with accepted evidentiary and procedural boundaries. The judge completes the procedural triad as a dispassionate listener who receives the information from the advocates and ensures that it is submitted within the established boundaries. Not only is the process intended to result in a decision, it is intended optimally to result in the emergence of the truth. The judge, having listened to the parties present their perceptions of the facts, is expected to extrapolate those facts that appear more likely to represent accurately the history of the matter under dispute. In addition to making this assessment of credibility, the judge is expected to funnel the true facts through the relevant law. The

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[5] *McKee* v. *McKee*, [1951] A.C. 352, at p. 365, [1951] 1 All E.R. 942, at p. 948, [1951] 1 D.L.R. 755, at p. 761, [1951] 2 D.L.R. 657, at p. 666, [1951] 2 W.W.R. 181, at p. 191, 5 R.F.L. Rep. 36, at p. 45 (P.C.), per Lord Simmonds; *Dyment* v. *Dyment*, [1969] 2 O.R. 748, at p. 750 (Ont. C.A.), per Laskin J.A.

Where the criteria for custody adjudication have been codified, the child's best interests is, either alone or with other considerations, almost always included. The following jurisdictions have made "best interests" the sole or paramount criterion: Alberta: s. 32(1) of the Provincial Court Act, R.S.A. 1980, c. P-20; British Columbia: s. 24 of the Family Relations Act, R.S.B.C. 1979, c. 121; New Brunswick: s. 129(2) of the Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1; Newfoundland: s. 47 of The Child Welfare Act, S. Nfld 1972, No. 37; Nova Scotia: s. 18(5) of the Family Maintenance Act, S.N.S. 1980, c. 6; Ontario: s. 24(1) of the Children's Law Reform Act, R.S.O. 1980, c. 68, as added by 1982, c. 20; Prince Edward Island: s. 35(1) of the Family Law Reform Act, S.P.E.I. 1978, c. 6; Quebec: arts 653 and 654 of the Civil Code of Quebec; Saskatchewan: s. 3(3) of The Infants Act, R.S.S. 1978, c. I-9.

distillation of the truth and the law is intended to result in a fair decision and "justice for the litigants".[6]

Opponents of the adversary system, in family law generally and custody in particular, argue that it is inappropriate for several reasons. First, there is little that can realistically be said to be absolutely "true" about marital histories or children's interests. Although there must of necessity be some exploration of the past relationships between the parties, the nature of spousal or parent-child relationships is so subjective as to be incapable of translation into relevant factual evidence. Other than dates and incidents that are often peripheral to the issue before the court in a custody case, it is hard to see how a parent's attitudes towards a particular child can be assessed in a witness box as truth or dissemblance. A disputed assertion, for example, that a mother or father spends too little time with a child may have little to do with the quality of the time spent or the child's impressions of the time spent.

A parent as witness, moreover, may not reveal those positive or negative attributes that should be assessed in a potential primary caretaker.[7] The system being adversarial, the disputants may be so preoccupied with vindicating their own positions and vitiating those of their adversaries, that they may disclose little of the characteristics that would enable a judge to make an informed custody decision.[8] So many people find the courtroom a daunting and unnatural milieu that it is difficult for them to expose to judicial scrutiny their ante-bellum or normal personality.

Second, the argument is made that even if the truth could be ascertained, there is no clear law with which to synthesize it in order to arrive at a fair decision.[9] The "best interests" test is so amorphous a doctrine, that it defies accurate explication.[10] As a legal doctrine, it lacks the precision that makes a law functional and credible. It is, in short, not a legal principle at all but rather the apotheosis of behavioural scientific research in the field of child development.[11] This calls for an assessment of a scientific and social

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[6] *Phillips* v. *Ford Motor Co. of Canada Ltd*, [1971] 2 O.R. 637, at p. 657, 18 D.L.R. (3d) 641, at p. 661 (Ont. C.A.), per Evans J.A.

[7] Catherine Mallon, A Critical Examination of Judicial Interpretation of a Child's Best Interest in Inter-Parental Custody Disputes in New Zealand (1974), 3 Otago L. Rev. 191.

[8] Phoebe C. Ellsworth and Robert J. Levy, Legislative Reform of Child Custody Adjudication (1969), 4 L. & Soc. Rev. 167, at p. 199.

[9] Adrian Bradbrook, 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 (1971), 49 Can. Bar Rev. 557, at pp. 559 and 571.

[10] *Wakaluk* v. *Wakaluk* (1976), 25 R.F.L. 292, at pp. 298 *et seq.* (Sask. C.A.), per Bayda J.A., dissenting.

[11] An excellent survey of some of the recent child development literature, along with a plea for the abolition of the adversary system in family law proceedings can be found in Julien D. Payne and Kenneth L. Kallish, A Behavioural Science and Legal Analysis of Access to the Child in the Post Separation/Divorce Family (1981), 13 Ottawa L. Rev. 215.

rather than of a legal nature.[12] The judge's solitary role as an arbiter of fact and law is therefore inappropriate.[13]

There is the additional imputed handicap for a judge inasmuch as he or she is presumed to have limited socio-cultural experience,[14] which could result in the imposition of arbitrary values on the litigants. Every decision-maker operates within or around a set of values and norms considered acceptable and even desirable. These values may, however, be inconsistent with the values of some of the litigants who are tendering their values as consistent with the child's interests. Is a judge capable of dismantling long-held and widely endorsed personal views in order to understand the dynamics of the family history that has been presented to the court? In other words, is it really possible for a judge to be nonjudgmental in a matrimonial case?

Truth and law having little to do with custody adjudications,[15] the adversary system, which was designed to accommodate their confluence, is not the appropriate structure within which to make such decisions.[16] The inapplicability of the adversarial system to family law is further exaggerated by the incongruity of feuding counsel in what should be a benign exercise in dispute resolution. The adversarial process thereby is alleged to generate an antipathetic climate that encourages zealously combative lawyers and intractably defiant clients.[17] Dissolving families deserve less ignoble exits as they relocate and allocate their former parts.

These arguments against the adversary system in family law inevitably conclude either with a plea for its replacement by arbitration,[18] mediation,[19] a panel of experts,[20] an inquiry,[21] or the relaxation of the

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[12] Charles Rothenberg, A New Way of Handling Child Custody, New York Times Magazine, Nov. 29th, 1981, at p. 132.

[13] Donna M. Blum, Child Custody—Sharing the Advocacy (1980), 3 Fam. L. Rev. 34, at p. 35.

[14] Donald L. Horowitz, The Courts and Social Policy (1977), p. 45.

[15] Bradbrook, *op. cit.*, footnote 9, at p. 571, said: "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."

[16] Ontario Law Reform Commission: Report on Family Law—Part III: Children (1973), p. 127.

[17] Jerome H. Skolnick, Social Control in the Adversary System (1967), 11 J. of Conflict Resolution 52, at p. 68.

[18] A. Burke Doran, Arbitration of Child Custody Disputes in Canadian Bar Association Continuing Education Seminars No. 2: Family Law (1974).

[19] Jay Folberg, Facilitating Agreement—The Role of Counseling in the Court (1974), 12(2) Conciliation Ct Rev. 17.

[20] Hugh W. Silverman, Custody Criteria—Are There Any? (1976), 24 Chitty's L.J. 28, at p. 30.

[21] Edward D. Bayda, Procedure in Child Custody Adjudication—A Study in the Importance of Adjective Law (1980), 3 Can. J. Fam. L. 57. See also recommendation 2 in

adversarial process.[22] They are grounded primarily in a concern for the tender sensibilities of litigants who bruise easily under the assault of civil litigation. The alternatives proposed provide cushions rather than slings and arrows.

But those who negate the validity of the adversary system perform an indirect disservice to its consumers. No less than any other area of dispute, family problems may be beyond the ability of the parties involved to resolve on their own. No less than in any other area of human interaction, some degree of predictability of performance expectations is useful.[23] This points to the need for clear legislation that defines the respective rights and obligations of the persons who have chosen to embark on a family relationship. It points too to the need for an appropriate structure in which to have those rights and obligations clarified when the parties themselves are unable or unwilling to do so.

This is not to suggest that the law should be intrusive in substance by violating the privacy of a family in imposing arbitrary standards. Whether or not one takes the position that the law of the family should define less and tolerate more, laws are required to provide at least minimal standards against which members of a family can measure the degree to which what they are entitled to is being accommodated. This may be less significant while the relationship is viable and most decisions are presumably consensual. It is, however, crucial when the relationship is miasmic and plans to evacuate are being made. Clarity of the law is necessary not only to assist the parties in making mutually agreeable arrangements for their separation, but also to provide the basis for decisions by third parties when agreement

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chapter II of the Newfoundland Family Law Study, in Family Law in Newfoundland (1973), p. 69.

[22] See Ralph C. Cavanaugh and Deborah L. Rhode, The Unauthorized Practice of Law and Pro Se Divorce—An Empirical Analysis (1976), 86 Yale L.J. 104. The study recommended the use of administrative procedures that do not involve lawyers and judges to handle uncontested divorces. In Canada, even an uncontested divorce requires a judicial hearing to determine whether the petitioner is entitled to the divorce, but any settlements about matters corollary to divorce (such as property division and support) can be accepted by the court in whole or in part. Ellsworth and Levy, *op. cit.*, footnote 8, at p. 201, pointed out that a refusal to accept a family's custody agreement is rarely warranted. See also Ernie S. Lightman and Howard H. Irving, Conciliation and Arbitration in Family Disputes (1976), 14(2) Conciliation Ct Rev. 12, at p. 20.

See further Julien D. Payne, Parenting after Divorce—A Canadian Perspective in Julien D. Payne, Marilyn A. Begin and Freda M. Steel (eds), Payne's Consolidated Digest of Cases and Materials on the Divorce Act of Canada (looseleaf, various dates), pp. 40-578. The author cited a study by Statistics Canada called "A Decade of Divorce—The Canadian Experience 1969-1979", which showed that a vast majority of custody arrangements was never disputed in the courts. The study also showed that the total number of children involved in the survey period was 504,385. Of all the marriages dissolved in that decade, 48.3% involved no dependent children.

[23] Vilhelm Aubert, Competition and Dissensus—Two Types of Conflict and of Conflict Resolution (1963), 7 J. of Conflict Resolution 26, at p. 34.

is impossible. Without statutory criteria as guidelines for these decisions, they become inconsistent and idiosyncratic reflections of the decision-maker's perceptions, rather than relatively consistent reflections of a widespread social policy. The existence of clear laws thereby acts as a measure of protection to the parties that the decision rendered will not be an arbitrary one.

If one does not accept the need for laws that regulate the human condition in its family form, if one argues rather for flexible private standards of behaviour to be assessed on dissolution by an appropriate non-legal expert, then the decision-making process is less complicated an issue. But if one accepts the need for a degree of lawmaking to regulate familial expectations both during and after the subsistence of the family, then one has to assess which process best lends itself to the realization of the rights created by the law.

The determination of respective rights and duties is traditionally undertaken in the adversary system because this system provides a number of safeguards. Allegations can be tested by cross-examination; hearings are conducted in conformity with predictable rules of procedure and evidence; decisions are made by impartial umpires. Without these safeguards, the process en route to a decision will be chaotic. If the process itself is chaotic, the decision resulting from the process becomes suspect. How can one know whether each party had full, fair and equal opportunity to present all relevant evidence supporting his or her position unless the procedure through which the evidence was presented is structured and well-defined? Procedural informality is not an alternative to the adversary system—it is an abuse of it.

If, in addition to the need for laws that define rights, one accepts the need for structured procedures through which they can be exercised, one must choose carefully the forum in which these structured hearings are to be held.

Arbitration provides a forum in which an increasingly formalized hearing takes place before a non-judicial decision-maker. Its obvious advantage is speed—one can easily obviate the court's backlog by appointing a trained arbitrator to hear the dispute. There is what many perceive to be the added advantage that the hearing takes place in a less redoubtable environment than a courtroom. But the essence of the procedure remains the existence of an impartial decision-maker who hears the evidence usually in accordance with at least some of the evidentiary rules. It is, in short, the adversarial system operating outside the courtroom with somewhat less formality and predictability, and without a judge. The length of the hearing is often the same as a judicial trial would be but may be more expensive since the arbitrator is paid for by the parties. It is the adversary process without the judicial atmosphere, and therefore not generally considered a real alternative to it.

Conciliation or mediation, on the other hand, is now becoming a widely used way of bringing the parties together to try to effect an agreeable solution.[24] It is not an alternative to the adversary system; rather, it is a complementary system. The purpose of mediation is to elicit agreement from the parties, with or without the help of their counsel, by exploring their respective absolute and bargaining positions. The process, although optimally intended to arrive at a decision, is, unlike arbitration, intended to arrive at a decision that is not imposed on the parties but is agreeable to both or all of them. If no consensus is possible, the discussions that took place are generally deemed confidential and the parties are free to pursue judicially-sanctioned remedies. Mediation has the inestimable benefit of providing to the parties a cathartic, informal procedure in which to canvass the possibility of an agreement.

In those few cases where negotiable settlements are not possible despite the efforts of lawyers or mediators, someone must ultimately decide the distribution of powers between the parties. In the absence of a better system, one is drawn to the judicial forum as a paradigm of due process.

Because one of the most attractive attributes of the adversary process is the presence of a dispassionate umpire, the suggestion that the adversarial system be replaced by something akin to an inquiry process is not widely supported. In an inquisatorial procedure, the judge would be permitted and even expected to enter the arena from time to time to elicit or encourage the elucidation of evidence that he or she feels is beneficial to the hearing.[25] This procedure is justified on the grounds that, particularly in cases involving the needs of children, a more aggressive judicial stance is required to ensure that evidentiary lacunae created by counsel for the parties are not permitted to interfere with the court's right to have all relevant information before it. This suggests an inverted approach to what rights are at stake. It is not the essence of a custody case that the court has the right to have all relevant information. Rather, it is the right of the parties to prove their entitlement to the remedy requested that is the essence of a case. It is hard to reconcile their rights to prove their case fairly with the right on the part of the court to act as a transparent third or fourth party to the proceedings. Once having participated in the proceedings, how can the

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[24] This is what two American authors referred to as "private ordering". See Robert H. Mnookin and Lewis Kornhauser, Bargaining in the Shadow of the Law—The Case of Divorce (1979), 88 Yale L.J. 950, for a thorough analysis of the benefits of mediation in family dispute resolution.

[25] The Ontario Court of Appeal reiterated the importance of limiting judicial intervention in order to preserve the appearance of impartial justice in *J.M.W. Recycling Inc.* v. *Attorney General for Canada* (1982), 35 O.R. (2d) 355. But in *Grundy* v. *Grundy* (1978), 20 O.R. (2d) 87, and *Gordon* v. *Gordon* (1980), 23 R.F.L. (2d) 266, the court felt that some judicial informality could be warranted in family law matters. This was also the position taken by Payne and Kallish, *op. cit.*, footnote 11, at p. 263.

judge then make the transformation back to impartial decision-maker? There are other methods such as the appointment of a counsel for the child or an *amicus curiae* that meet the problem without jeopardizing the parties' rights to a fair hearing, or the child's rights to have his or her best interests and rights intelligently determined.

It is a mistake to minimize the importance of the perceptions of the litigants that their rights in a family law dispute are less worthy of the full protection of the adversary system than litigants with other legal problems. As long as family law issues continue to involve the determination of competing rights, they should be dealt with as respectfully as other litigated determinations of rights.

Aside from the obvious observation that to the parties involved, the placement of a child or the ability to obtain financial security is critical, there is the further obvious fact that these remedies are divining rods for emotional geysers. Rather than provide an argument for informality, this emotional foundation argues for a structured, stable setting that allows for a full exploration of the issues in as rational a way as possible.[26] The indiscriminate dissemination of the flotsam and jetsam of a former marriage can overwhelm a proceeding if rules and an umpire are not provided.

It is not generally the court or its officers who are necessarily responsible for the ennui of the parties. The circumstances of the drama in which they find themselves are much more likely to be the cause, if not the object, of their hostility. No one denies that it is desirable to attempt to effect an early resolution of the outstanding issues. But the timetable of the resolution must to some extent be left to the parties to decide as they unravel through the stages of a separation. If they cannot agree despite every reasonable effort, then they are entitled to seek an early unbiased opinion from a decision-maker. They should not be denied the right to seek their remedies because the trauma of the legal process is potentially formidable. Any process is formidable to an emotionally raw litigant.

Nor should they be subjected to hybrid procedures that jump unpredictably from strictly adversarial to informally conciliatory. The confusion that results is disrespectful of the importance of the issues. That the uniquely subjective nature of family law requires certain refinements of procedure is without doubt. But the refinements should not be at the expense of a fair and complete hearing.[27] Litigation should not be confused with its alternatives or derivatives. The streams are conceptually distinct

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[26] Henry J. Foster, Jr., Trial of Custody Issues and Alternatives to the Adversary Process in The Child and the Courts, *op. cit.*, footnote 2, p. 55.

[27] Ontario Law Reform Commission: Report on Family Law—Part V: Family Courts (1974), pp. 46 and 47. The report went on to urge the equipment of an "adequate social arm" as an auxiliary to a Unified Family Court that would adhere to "well-established legal principle and precedent".

from one another and call for separate procedural approaches that do justice to their respective goals.

The other criticisms of the adversary system—the deficiencies of assessing character through oral testimony, the dangers of myopic judicial speculation, and the spectre of irresponsibly pugnacious counsel—are all present in some form in whatever alternatives one proposes for solving a family's legal disputes. Through refinements to the existing process such as the use of experts, pre-trials, mediation, or legal representation for children, many of the criticisms can be neutralized without compromising the purpose of the process; namely, the expeditious and fair resolution of legal disputes. Without commenting on the efficacy of existing substantive law or the problems inherent in judicial discretion, subjects relevant to, but beyond the scope of this article, the balance of the article will continue to assume that a refined adversarial process of judicial decision-making is necessary to avoid the erosion and dilution of the integrity of the law of the family.

II. *Pre-Trials.*

Pre-trials provide early access to a judicial decision. Given that one of the most serious problems in the court process in Canada is the delay caused by the shortage of courtrooms, judges, and trial time available, the pre-trial provides an expeditious and successful way of attempting to resolve disputes.[28] The purpose of a pre-trial is threefold: to indicate to the parties

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[28] Michael Stevenson, Garry D. Watson and Edward Weissman, The Impact of Pre-Trial Conferences—An Interim Report on the Ontario Pre-Trial Conference Experiment (1977), 15 O.H.L.J. 591. At p. 601, the authors found as a result of their study that pre-trial conferences increased the rate of disposition by settlements by slightly more than 25%. For a less enthusiastic perspective on the use of pre-trials in Ontario, see R.M.J. Werbicki, The Pretrial Conference in the Supreme Court of Ontario (1981), 59 Can. Bar Rev. 485.

The use of pre-trials was encouraged by the Law Reform Commission of Canada in its Working Paper 13—Divorce (1975), p. 45. And some judges have embraced the practice enthusiastically; see Abraham H. Lieff, Pre-Trial of Family Law in Ontario—Simplify and Expedite (1976), 10 Gazette 300.

The rules of practice and procedure in many Canadian jurisdictions encourage pre-trials. See: Alberta: r. 219 of the Supreme Court Rules, Alta Reg. 390/68, as am. by Alta Reg. 124/73; British Columbia: r. 25 of the Rules of Court, B.C. Reg. 634/76; and r. 13 of the Family Relations Rules and Regulations, B.C. Reg. 141/79; New Brunwick: rs 50 and 73.12 of the Rules of Court, N.B. Reg. 82/73; Newfoundland: rs 31, 32 and 33 of the Rules of the Unified Family Court, 1979, Nfld. Reg. 99/79; Northwest Territories: r. 231 of The Supreme Court Rules, S.O.R. 79/768; Nova Scotia: rs 25, 26 and 27 of the Civil Procedure Rules, 1971; Ontario: r. 244 of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540; rs 19, 20 and 21 of the Rules of Practice and Procedure of the Unified Family Court, R.R.O. 1980, Reg. 939; rs 21, 22 and 23 of the Rules of Practice and Procedure of the Provincial Courts (Family Division), R.R.O. 1980, Reg. 810; Prince Edward Island: rs 25, 26 and 27 of the Civil Procedure Rules, 1977; Quebec: art. 279 of the Code of Civil Procedure, R.S.Q. 1977, c. C-25; Saskatchewan: r. 196A of The Queen's

what the likely outcome of a trial would be; to narrow and define the issues to streamline the trial; and to encourage evidentiary disclosure and discovery.

Because so much of family law is substantively diffuse, particularly in light of the proliferation of legislation at the provincial level, it is difficult for lawyers to know how to advise clients in settling cases. The basis of suggesting reasonable bargaining positions to clients is being able to inform them what the current case or statute law indicates is the likely result should the matter proceed to trial. Negotiations proceed best between parties who have the perception that they have more to lose by going to trial than by settling.[29] One of the reasons more people are going to trial is undoubtedly because their lawyers can no longer advise them that this is the case. The law being indeterminate, the risks are perceived to be minimized. One does not usually settle for less if the stakes are high and the chances evenly divided on the possible outcome.[30]

This is not to suggest that people only settle when they know with certainty what they risk losing in a contest. But given the intransigence that often accompanies the other emotional extremes in a family breakdown, the inconclusiveness of the law is more likely to nourish rather than quell the urge to remonstrate publicly, particularly if you can have your remonstration and a favourable result besides.

At a sufficiently early stage in any proceedings that have been instituted, pre-trials provide that counsel can attend before a trial judge to explain what evidence they would present on behalf of their clients at a trial. Their clients may or may not be present, this being a matter of diverse judicial preference. Some judges feel the clients should be present so that they are not excluded from what may otherwise appear to be an arcane and mysterious process. Most, however, prefer to see counsel alone to ensure complete candour and the absence of posturing. The parties themselves are available on the premises to give instructions to counsel. They may, in appropriate circumstances, be called in to the pre-trial so that the process can be explained to them.

If one of the parties is without counsel, the pre-trial either does not take place, or takes place with extreme caution.

The discussions are without prejudice. Because any disclosures made are confidential, any documents exchanged are not necessarily admissable at trial without further formal notice usually required by evidence

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Bench Rules, 1961, as am. rs 26 and 27 of the Rules of the Unified Family Court (1978), 74 Sask. Gaz. 1364.

[29] Aubert, *op. cit.*, footnote 23, at p. 28.

[30] Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration (1973), 2 J. Leg. Stud. 399. At p. 422, the author observed: ". . . a principal cause of litigation is 'mutual optimism'—both parties believe they have a good chance of winning."

statutes.[31] What develops is a form of judicial mediation based on informal discovery resulting in the judge telling counsel what his or her disposition at trial would be. This is then communicated to the parties who will responsively give counsel instructions based on this authoritative speculation.

If the parties are still unable to agree despite the suggestions of a judge, the pre-trial proceeds as an assessment of what the issues are, what records are likely to be introduced, how many witnesses each party intends to call, and how long the trial is estimated to take. A trial date is then fixed before a different judge to avoid prejudice.

Pre-trials are more likely to be mandatory than they were in their nascence several years ago. There is growing confidence that pre-trials effectively resolve disputes. Where they do not, they facilitate the expeditious use of court time by narrowing issues and trial times. They are used either immediately after all pleadings have been filed or several months later on the eve of trial. Occasionally there are pre-trials at both of these stages to assess whether the earlier pre-trial was premature in presenting settlement possibilities to the parties. Its purpose, like mediation, is to exhaust all settlement possibilities before a trial takes place. Combining as they do the benefit of facilitating settlement without the disadvantage of depriving the parties of their right to a hearing, pre-trials are a welcome station en route to a fair trial.

III. *Mediation.*

Whereas the judicial process results in the imposition of a decision upon the parties, mediation attempts to achieve a consensus. Mediation is a process whereby a third person attempts to resolve a dispute by creating an environment of empathy and openness in the hopes of assisting the parties to understand each other's position and effect an agreement between them.[32] It has a persuasive rather than a coercive ambience.

The benefits of mediation are obvious. Notwithstanding any refinements to the adversarial process, the better solution to resolving disputes between family members lies in achieving consensus rather than imposing judgment. In the short term, the benefit of mediation, if properly performed, is that it provides the parties with a better understanding of themselves, the issues, and the position of the other party. It also gives to the parties the sense that their privacy and family autonomy has remained sacrosanct. In the long term, this awareness may assist the parties in resolving future disputes in a flexible manner. The brittleness that may result from the imposition of an unfavourable decision can easily encour-

[31] *Moss* v. *Colodny*, unreported decision of Gravely Co. Ct J., Feb. 12th, 1982 (Ont. Unif. Fam. Ct), Hamilton registry D3358/81, digested at (1982), 4 Fam. L. Ref. Rptr 109.

[32] Lon L. Fuller, Mediation—Its Forms and Functions (1971), 44 So. Cal. L. Rev. 305, at p. 325.

age the continuation of the kind of intractability that resulted in the initial litigation. This has the tendency of proliferating litigation by encouraging the reliance on this process in resolving grievances.[33]

Any mediation or conciliation services that have been established in Canada have all demonstrated that the service is an effective one both from the point of view of the parties involved and from the public policy aspect.[34] Almost all mediation services available to date are in some way connected to the court system and act as short-term crisis-counselling units. Referrals may be from lawyers or from the courts. The process normally involves one to six visits. If it appears that no agreement will be possible, the matter is referred back to the lawyers or to the court for further disposition. The discussions that took place between the parties and the mediator or conciliator are confidential and the mediator is not compellable to give evidence with respect to the negotiations.[35] This protects the candour of the negotiations, ensuring that the parties express themselves freely without fear that their observations or perceptions will be used in a subsequent proceeding against their interests. The Divorce Act has a specific protection for conciliators, directing that their efforts to assist the parties in reconciliation discussions are protected from subsequent disclosure in legal proceedings.[36]

Although the Divorce Act specifically refers to reconciliation rather than conciliation, most conciliation services that now exist in Canada do not focus on reconciliation. There are a number of stated goals to mediation, one of which may well be to assist the parties in continuing to cohabit or reconcile. But the more compelling aspect of mediation is its attempt to educate the parties to accept the situation in which they find themselves and

[33] Folberg, *op. cit.*, footnote 19, at p. 17. See also Lightman and Irving, *op. cit.*, footnote 22, at p. 14.

[34] See T. Michael Quiggan, Report on the Conciliation Project—Provincial Court (Family Division) (Ont.) (1977). See also the Conciliation Project—Provincial Court (Family Division)—Progress Report (Ont.) (1978); and Howard Irving, Michael Benjamin, Peter Bohm and Grant Macdonald: Final Research Report of the Conciliation Project—Provincial Court (Family Division) (Ont.) (1981).

For a discussion of the Alberta conciliation service, see Final Report on Edmonton Family Court Conciliation Project (Edmonton: Family Court Conciliation Service) (1975), Vol. 1, and The Edmonton Family Court Marriage Conciliation Service—Five Year Summary of Operations—1972-1977 (Edmonton: Family Court Conciliation Service) (1978). See also Institute of Law Research and Reform: Report No. 26—Family Law Administration: Court Services (University of Alberta) (1978).

[35] Quiggan, *op. cit.*, *ibid.* The classical law of evidence recognized no privilege between a conciliator and his or her subjects, although courts have been most reluctant to violate this confidentiality. See *Dembie* v. *Dembie* (1963), 21 R.F.L. 46 (Ont. H.C.) and *Shakotko* v. *Shakotko* (1976), 27 R.F.L. 1 (Ont. H.C.). A few Canadian jurisdictions have specifically codified this privilege. See: British Columbia: s. 3(3) of the Family Relations Act, *supra*, footnote 5; Manitoba: s. 22(2) of The Family Maintenance Act, 1978, c. 25; Ontario: s. 31(7) of the Children's Law Reform Act, *supra*, footnote 5; Saskatchewan: s. 20 of The Unified Family Court Act, R.S.S. 1978 (Supp.), c. U-1.1.

[36] S. 21 of the Divorce Act, *supra*, footnote 1.

to assist them in coping with the decision-making and realities inherent in this post-conjugal period.

The benefits for children in such a process are equally obvious. If adults can appreciate the nuances in their own or the gestures of their former partners, and if they are helped through conciliation to protect themselves from any negative incidents of the nuances, then they will be better able to set aside their own irrational proclivities in the interests of furthering the well-being of their children. Since parents are generally in the best position to know and accommodate their children's needs, they, rather than a judge, are the best people to make decisions about them.[37] Where they are handicapped by emotional disabilities resulting from injuries sustained in the fall from marriage, they may need some assistance in once again being able to make these decisions.[38] Mediation provides this assistance and avoids the need for judicial intervention.

Mediation cannot however be perceived as anything other than a complementary parallel to the adversarial system. There are still those, particularly in custody matters, who refuse to compromise. Their refusal may have nothing to do with wounded sensibilities—there may be a genuine inability to accede to the demands of the other parties because of an intense belief that their own position is best for the child. In those circumstances, one reverts to providing access to the judicial process where the dispute will be resolved by judicial fiat.

Based on the assumption that a good bargain is better than a good fiat, mediation will continue to be increasingly relied upon in assisting parties to settle disputes. It also guarantees that only those matters that are incapable of prior resolution will be dealt with by the courts. By reducing the possibility of accumulated backlogs, speedier access to the court is provided for those who cannot or will not bargain.

Despite the utility and desirability of mediation, it is not yet a compulsory process. The reasons for this are clear; bargaining involves the voluntary subjugation of a party to the possibility that he or she may be persuaded to reduce demands and settle for less. Unless a party is willing to enter into discussions freely, it is difficult to see how agreement is possible.

There is some debate whether the conciliation services should be provided as a court-related service or whether it should be perceived to be independent from it.[39] As an arm of the court and a service available to the

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[37] Janet Maleson Spencer and Joseph P. Zammit, Mediation-Arbitration—A Proposal for Private Resolution of Disputes between Divorced or Separated Parents, [1976] Duke L.J. 911, at p. 918. See also Joseph Goldstein, Anna Freud and Albert J. Solnit, Beyond the Best Interests of the Child (1973) and by the same authors, Before the Best Interests of the Child (1979).

[38] Spencer and Zammit, *op. cit., ibid.,* at p. 934.

[39] Payne and Kallish, *op. cit.*, footnote 11, p. 270, and Folberg, *op. cit.*, footnote 19, argued for court-connected counselling services.

public, there are obvious financial advantages to the parties in having it provided by the court. But until this is accepted as a meritorious aspect of the court system, an aspect that governments are prepared to fund as part of the administration of justice, mediation as a process will likely expand by reliance on private mediation resources offered by professionals in the community.

Procedures have not yet been well defined with respect to the appropriate interaction between courts and mediation. Clearly the pre-trial is an effective way to canvass the possibility of conciliation. So is an educated bar that appreciates the need for mediation and accepts negotiated settlements as more preferable to litigation. By coming to understand when mediation is appropriate, members of the bar will make more effective use of their time, with clients coming to them for legal advice and going to conciliators with more social and psychological concerns. The possibility of mediation should obviously be canvassed as early in the life of family dissolution as possible and, subsequently, as early in the life of any litigation as is feasible.

What is necessary then is a kind of integrated relationship between the courts, the bar, and conciliation services so that each understands the purpose and value of the other.

IV. *Expert Assessments.*

Independent expert assessments are as much an admission on the part of the judicial system that it lacks omniscience in custody matters as it is a recognition that the adversarial system with its partisan emphases cannot always be relied upon to present a full picture to the court. They are also acknowledgements that the adversarial system, while adept at gleaning historical or antecedent facts, is less well able to encourage the evocation of social or consequential facts.[40] Since custody involves the formulation of policies and prognoses about the mental and physical well-being of the child, mere facts about the child's background may be insufficient information upon which to base a decision about the child's future placement. What is required in most of these cases is an analysis of emotional, factual, and psychological factors, only some of which a judge is able to ascertain from the perceptions of the parties or their supporters. It is for these reasons that the adversary process has entrenched the use of impartial expert assessments that investigate skilfully those facts that are not otherwise ascertainable.[41] A recommendation is made to the court that is not binding

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Only two provinces in Canada have openly prescribed a court-connected service. See: British Columbia: s. 3 of the Family Relations Act, *supra*, footnote 5; Ontario: s. 18 of the Unified Family Court Act, R.S.O. 1980, c. 515.

[40] Nathaniel Gozonsky, Court-Ordered Investigations in Child Custody Cases (1976), 12 Willamette L.J. 11, at p. 511; See also Horowitz, *op. cit.*, footnote 14, pp. 45-51 and 275.

[41] Ellen Goodman, Child Custody Adjudication—The Possibility of an Interdisciplinary Approach (1976), 50 Aust. L.J. 644, at p. 648.

but provides a valuable contribution to the mosaic that is being pieced together..

With very few exceptions, independent expert assessments are not provided routinely by the court systems in Canada.[42] They therefore continue to be an expensive proposition for the parties albeit a valuable one for the court. Frequently, the court will encourage the parties to submit to an assessment but as yet this is not a compulsory procedure. The communications made during the assessment are not confidential and in fact the purpose of the assessment is to disclose to the court as much information as possible about what the assessor has learned from and about the parties. The goal of the assessment is not only to explore the psychological and psychiatric aspects of a given custody dispute, but also, where possible, to provide a recommendation to the court on the basis of these findings. The assessment will therefore likely include the reason for the referral, the sources upon which the report or assessment is based, the number and duration of meetings or interviews with various parties, the recommendations of the clinician and the reasons for these recommendations, as well as the degree to which these recommendations represent either consensus, compromise or disagreement between the various parties.

Copies of the report are normally distributed to all parties in advance of the trial. If the parties had not agreed before the assessment was undertaken that the judge be permitted to read the report in any event, then there may be some doubt whether or not the judge should read the assessment without learning from the parties whether or not they agreed that the report be admissible without the author's being called. Any party would have the right to subpoena the author of the report for purposes of cross-examination. Although technically in these circumstances the report is not

[42] They can be ordered by a court of competent jurisdiction under its *parens patriae* powers, whether enjoyed inherently or conferred by statute. See *Cillis* v. *Cillis* (1981), 23 R.F.L. (2d) 76 (Ont. Div. Ct).

They can also be ordered under specific statutory or regulatory authority. See: Alberta: r. 218 of The Supreme Court Rules, Alta Reg. 390/68; British Columbia: s. 15 of the Family Relations Act, *supra,* footnote 5; Manitoba: s. 351(1) of The Queen's Bench Rules, Man. Reg. 26/45, as am.; New Brunswick: s. 11.4 of the Judicature Act, R.S.N.B. 1973, c. J-2, as added by 1978, c. 32 and am. by 1979, c. 36; Newfoundland: s. 16 of The Unified Family Court Act, 1977, c. 88; r. 30 of the Rules of the Unified Family Court, 1979, Nfld Reg. 99/79; Northwest Territories: r. 230 of The Supreme Court Rules, S.O.R. 79/768; Nova Scotia: s. 19 of the Family Maintenance Act, *supra,* footnote 5; r. 23 of the Civil Procedure Rules, 1971; Ontario: r. 49 of the Rules of Practice and Procedure of the Provincial Courts (Family Division), R.R.O. 1980, Reg. 810; r. 53 of the Rules of Practice and Procedure of the Unified Family Court, R.R.O. 1980, Reg. 939; r. 267 of the Supreme Court of Ontario Rules of Practice, R.R.O. 1980, Reg. 540; s. 30 of the Children's Law Reform Act, *supra,* footnote 5; Prince Edward Island: r. 23 of the Civil Procedure Rules, 1977; Quebec: art. 414 of the Code of Civil Procedure, *supra,* footnote 28; Saskatchewan: r. 25 of the Rules of the Unified Family Court, *supra,* footnote 28.

For a discussion of the role of a court-related assessment facility, see the Report of the Task Force on Family Court Clinics (Toronto) (1978).

admissible if the author is present to give his or her expert evidence, the more common practice is for the report to be introduced and considered to be the expert's examination-in-chief. All parties would have the right to cross-examine the author of the report and would in addition have the right to call their own expert to challenge either the recommendations or the perceptions of the assessor.[43]

There is no uniformity in Canada as to the appropriate use of experts, who should appoint the expert, or when a referral to an expert for an independent assessment should be made. In ideal circumstances, the selection of an assessor is made on consent by the parties from a neutral list of qualified experts in the region. Where this is not possible, and where no expert assessment facility is available to the court, the selection may be made on a rotating basis by the court from the same neutral list of qualified personnel.

The existence of an expert in the courtroom represents a classic clash of cultures. There has been very little cross-educational pollination between the professions of law and behavioural science.[44] As a result there is limited comprehension on both sides of the objectives and semantics of the other profession. Psychiatrists and psychologists are frequently unsympathetic to being subjected to devastating scrutiny through cross-examination when their purpose is simply to explain a scientific conclusion in as objective a way as possible.[45] Lawyers and judges, who perceive themselves to be commonsensical, are suspicious of what they perceive to be impracticable behavioural sophistry. The discomfort of experts in a courtroom setting, matched as it is by a sceptical reception to their expertise, represents an inadequate partnership.

Psychiatrists are learning to appreciate the significance of legal process to those who are legally skilled, and to understand that the respect given to procedures does not indicate an insensitivity to the issues presented. The legal profession on the other hand is learning to pay more

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[43] Occasionally, there is some question of privilege in the use of psychiatric experts. See *supra*, footnote 35. John Henry Wigmore, in para. 2285 of his Evidence in Trials at Common Law (McNaughten ed., 1961), set out several grounds for the existence and maintenance of the privilege. This reasoning was accepted by the Supreme Court of Canada in *Slatuvych* v. *Baker*, [1976] 1 S.C.R. 254, 3 N.R. 587, [1975] 4 W.W.R. 620, 55 D.L.R. (3d) 224, 38 C.R.N.S. 306. See also the English House of Lords ruling in *D.* v. *National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171, [1977] 1 All E.R. 589, [1977] 2 W.L.R. 210, 76 L.G.R. 5.

The Law Reform Commission of Canada, in its Working Paper 1—The Family Court (1974), pp. 47-48, urged that a family court have the discretion to order an expert investigation that would result in an admissible report that could then be subject to cross-examination.

[44] See Payne and Kallish, *op. cit.*, footnote 11, at p. 270.

[45] S. Halleck, Law in the Practice of Psychiatry (1980). Sue Stevenson, Thoughts on Child Custody Issues, in British Columbia Family and Children's Law Commission (1975), Vol. 5.

deference to the diagnostic skills of those who are expert in problems of human behaviour. At the very least, these experts have had the benefit of experience and information that is not part of the regular legal or judicial literary diet.

Since the test in custody is "best interests" and since the evidence required must necessarily go beyond materially demonstrable perceptions, it is difficult to see how informed judgments can be made about the best interests of children without at least the assistance of a non-partisan expert who can better attempt to evaluate the competing emotional claims that underlie the pursuit of legal remedies.[46] Since the jurisprudential mandate includes assessing a child's emotional needs, the courts should make this assessment on the basis of the most complete evidence available. This evidence is often not complete without authoritative exploration of these needs. This is not a usurpation of the judicial function—it is an indispensable contribution to its proper exercise.

There are additional benefits that may accrue to the parties as a result of an expert's involvement.[47] Although no one argues for the insularity of professions in family matters, there are certain aspects that are better handled by one group than another. No one would suggest to a client to seek advice on the rules of evidence from a psychiatrist, and yet clients consistently consult their lawyers on matters of an emotional nature.[48] In addition to providing assessments, then, mental health professionals may be of great service to lawyers in being able to deal with the psychological needs of a client. By operating in tandem, a lawyer, with the assistance of this professional, can assist the client in accepting the legal, practical and social consequences of what has just happened to him or her. These mutually reliant professional relationships enhance rather than detract from the abilities of either profession to meet the needs of their clients.[49]

No one suggests that the expertise provided is of a uniform quality. There is the additional reality of the multiplicity of theories and approaches which percolate through the behavioural sciences—one expert's hypo-

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[46] Silverman, *op. cit.*, footnote 20, at p. 28.

[47] Craig Jackson, Specialist Evidence in Child Custody Disputes in New Zealand (1981), 11 Vict. U. Well. L. Rev. 43, at pp. 57-58.

[48] Bruce W. Callner, Boundaries of the Divorce Lawyer's Role (1977), 10 Fam. L.Q. 389, at p. 392.

[49] Frank Bates, New Trends and Expert Evidence in Child Custody Cases—Some New Developments and Further Thoughts from Australia (1979), 12 Comp. & Int. L.J. So. Afr. 65, at p. 82. At p. 76, the author, in arguing for the need of expert evidence to supplement judicial common sense, quoted from an article by Brian Mackenna (a Justice of the English High Court): "There is no difference between the judge and the Common Man, except that the one administers the law and the other endures it. . . ."

See Brian Mackenna, The Judge and the Common Man (1969), 32 Mod. L. Rev. 61. See also Saul Levine, The Role of the Mental Health Expert Witness in Family Disputes, in Family Law—Dimensions of Justice (1983).

thesis is another expert's antithesis. But these may simply be unavoidable tangents of an unavoidably human process. They accentuate the benefit of those aspects of the adversary system, like the right to cross-examine or to call contradictory evidence. However vulnerable the injection of experts is to the charge of fallibility, it is a vital and credible part of a process which ultimately minimizes the weaknesses of its participation and relies on its strengths.

V. *Independent Legal Representation for Children.*

Children are not parties to a divorce or custody action. At the same time, they are no less affected by the outcome than are the actual parties. This is an aberration in the adversarial process whereby as a rule no one is bound by a decision unless he or she was a party to the proceedings upon which the decision was based. Except in custody and divorce actions, anyone who may be bound by a decision is entitled to make representations and participate fully in the process that may ultimately result in a change of status.

To fill the vacuum between the lack of party status on the part of children, and the inevitability of their being affected by the outcome, the practice has gradually arisen in Canada of having lawyers represent children.[50] To preserve independence, these lawyers are either appointed

[50] This situation has been called "a twilight zone where children are not strangers to the action, yet not parties to it". See Robert Hansen, The Role and Rights of Children in Divorce Actions (1966), 6 J. Fam. L. 1, at p. 2. Divorce courts in Ontario at least have confirmed the non-status of children in divorce proceedings. See *Tapson* v. *Tapson*, [1970] 1 O.R. 521, 8 D.L.R. (3d) 727, 2 R.F.L. 305 (Ont. C.A.), and *Mierins* v. *Mierins*, [1973] 1 O.R. 421, 31 D.L.R. (3d) 284, 9 R.F.L. 396 (Ont. H.C.).

In proceedings for custody or access *simpliciter* outside of any divorce context, certain provincial statutes give the child a right to be the applicant (and therefore a party) in an application for custody or access. See: Alberta: s. 32(2)(*b*) of the Provincial Court Act, *supra*, footnote 5; s. 56(1)(*b*) of the Domestic Relations Act, R.S.A. 1980, c. D-37; Northwest Territories: s. 34(1)(*b*) of the Domestic Relations Ordinance, R.O.N.W.T. 1974, c. D-9. In other Canadian jurisdictions, the legislation is worded broadly (for instance, "On application, the court may. . .", without indicating who may bring the application), so that it is possible for any interested person, including the child, to commence the action. See British Columbia: s. 35(1) of the Family Relations Act, *supra*, footnote 5; Manitoba: s. 116 of The Child Welfare Act, 1974, c. 30, as am. by 1980, c. 41; New Brunswick: s. 129(2) and 129(3) of the Child and Family Services and Family Relations Act, *supra*, footnote 5; Ontario: s. 21 of the Children's Law Reform Act, *supra*, footnote 5; Prince Edward Island: s. 35(1) of the Family Law Reform Act, *supra*, footnote 5; Saskatchewan: s. 3(1) of The Infants Act, *supra*, footnote 5.

To this must be added the observation that some courts have advanced the proposition that access (or visitation) is a right of the child. See *M.* v. *M. (Child: Access)*, [1973] 2 All E.R. 81, at p. 85 (Fam. Div.), per Wrangham J.; *Currie* v. *Currie* (1975), 18 R.F.L. 47, at pp. 51-52 (Alta T.D.), per McDonald J.; *Knudslien* v. *Rivard* (1978), 5 R.F.L. (2d) 264, at p. 269 (Alta Fam. Ct), per White Asst Ch. Prov. J.

See Patrick T. Galligan, Separate Representation of the Child in Family Law Week (Toronto: Law Society of Upper Canada, Department of Continuing Education) (1976).

anonymously by the court from a panel of lawyers selected and specially trained for this purpose, or are retained privately by the child through a legal aid plan. They may be requested by the court under the court's inherent and *parens patriae* jurisdiction, or under the rules of procedure in various provinces. Once appointed, they act for the child as if the child were a party with full rights to participate in the trial, including discovery and participation in pre-trial discussions, to call and cross-examine witnesses, and to make submissions.

It is acknowledged in Canada that the wishes of a child are relevant in a custody proceeding.[51] There is no agreement, however, on how old a child should be before his or her wishes are solicited. Nor is there any agreement on how those wishes should be presented to the court. The existence of a lawyer for the child assists in resolving the dilemma for the court inasmuch as it then becomes to some extent the child's lawyer's responsibility.

The role of the lawyer for the child in representing those wishes is still the subject of some debate.[52] Most studies on the subject indicate that the lawyer's role should be to represent what the child wants in the same way as the lawyer would represent the wishes of any adult party to a custody dispute. The premise on which this position is based is that it is not for the

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The practice of appointing legal representatives for children was also encouraged by the Law Reform Commission of Canada in its working paper on divorce, *op. cit.*, footnote 28, p. 48. In its Report on Family Law (1976), p. 53, the Commission recommended that the role of counsel for the child should be to represent the child's best interests. And in its working paper on the Family Court, *op. cit.*, footnote 43, pp. 40-41, it stressed that the lawyer should be independent of the court.

[51] *MacDonald* v. *MacDonald*, [1976] 2 S.C.R. 259, 7 N.R. 293, 62 D.L.R. (3d) 301, 21 R.F.L. 42.

See also Frank Bates, The Relevance of Children's Wishes in Contested Custody Cases—An Analysis of Recent Developments in Canada and Australia (1979), 2 Fam. L. Rev. 83.

[52] Jeffrey S. Leon, Recent Developments in Legal Representation of Children—A Growing Concern with Capacity (1978), 1 Can. J. Fam. L. 375; Donald J. MacDougall, The Child as a Participant in Divorce Proceedings (1980), 3 Can. J. Fam. L. 141; Donald C. Schiller, Child Custody—Evolution of Current Criteria (1977), 26 De Paul L. Rev. 241. Compare the judicial attitudes in: (a) *Re Cameron*, [1976] 5 W.W.R. 271, 27 R.F.L. 205 (B.C. Prov. Ct); *Re Debra N.*, unreported decision of Felstiner, Prov. J., Sept. 10th, 1979 (Ont. Prov. Ct, Fam. Div.) of the Jud. Dist of York; *Re W.* (1980), 27 O.R. (2d) 314, 13 R.F.L. (2d) 381 (Ont. Prov. Ct, Fam. Div.); *Re Honey C.*, unreported decision of Felstiner, Prov. J., Aug. 7th, 1980 (Ont. Prov. Ct, Fam. Div.) of the Jud. Dist. of York; *Hare* v. *Hare*, unreported decision of Wilkins, Prov. J., March 11th, 1981 (Ont. Prov. Ct, Fam. Div.) of the Jud. Dist of York; with (b) *Re C.* (1980), 14 R.F.L. (2d) 21 (Ont. Prov. Ct, Fam. Div.); *Re J.C. and S.C.* (1980), 31 O.R. (2d) 53 (Ont. Prov. Ct, Fam. Div.).

In May 1981, the Professional Conduct Committee of the Law Society of Upper Canada recommended that there be no change to the professional conduct rules to take account of the role of counsel for the child. The Committee's position was that the traditional solicitor-client relationship should be maintained with the child as with adult clients.

lawyer to represent the child's best interests since the lawyer is incapable of making that judgment.[53] Such a judgment anticipates the function of the judge whose role it is to assess and determine best interests based on all of the evidence presented. It would be premature for counsel for a child to attempt to represent the best interests of the child prior to having had the benefit of hearing all of the evidence.

The wishes of the child are not determinative but are one of a number of factors that the court must consider in deciding what is best for a child. The lawyer therefore cannot be seen to be acting irresponsibly when putting forward wishes of the child that do not strike him or her as sensible in the circumstances. If the child is going to have full and effective participation in the proceedings, he or she should be entitled to the same vigorous advocacy of a position that the other parties have.

In the event that the child's wishes are ambiguous, that the child is too young to express them, or that counsel is unable for some other reason to obtain instructions from the child, it is open to the lawyer for the child to take no position on the child's behalf but merely to act as someone who can assist the court in ensuring that all relevant information is before the court so that an informed judgment can be made. This may involve requesting the use of mediation or an assessment where these have not hitherto been canvassed by the parties.[54] In this capacity the lawyer is an *amicus curiae* acting as the court's not the child's counsel, and should be so designated.

The question still remains however of how best to express to the court what the wishes of a child are. This can either be done through the evidence of a social worker, psychologist or other expert who has interviewed the child, or, less desirably and depending on the age of the child, by asking the child to give evidence under oath.

One of the most contentious methods of eliciting the child's wishes is the judicial interview of a child.[55] This procedure developed in the absence of legal representation for children because judges appreciated the relevance of children's wishes and had no other vehicle for independently determining and weighing those wishes. Although these interviews used to take place privately, the practice has developed that insofar as it is possible, the requirements of natural justice be maintained. This means that it is

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[53] Wallace J. Mlyniec, The Child Advocate in Private Custody Disputes—A Role in Search of a Standard (1977), 16 J. Fam. L. 1.

See also *McKercher* v. *McKercher*, [1974] 2 W.W.R. 268, 41 D.L.R. (3d) 760, 15 R.F.L. 39 (Sask. Q.B.); *Re Reid and Reid* (1975), 11 O.R. (2d) 622, 67 D.L.R. (3d) 46, 25 R.F.L. 209 (Ont. H.C.); *Rowe* v. *Rowe* (1976) 26 R.F.L. 91 (Ont. H.C.); *H.* v. *H.* (1976), 13 O.R. (2d) 371, 71 D.L.R (3d) 161, 29 R.F.L. 200 (Ont. H.C.); *Johnston* v. *Johnston* (1975), 20 R.F.L. 211 (Sask. Q.B.); *More* v. *Primeau* (1978), 2 R.F.L. (2d) 254 (Ont. C.A.); *J.* v. *J.*, [1978] 1 W.W.R. 8, 4 R.F.L. (2d) 157 (Man. C.A.).

[54] Blum, *op. cit.*, footnote 13, at p. 36.

[55] Doran, *op. cit.*, footnote 18, p. 82.

normally explained in advance to all parties, including the child, that any opinions expressed or information given will be communicated to the parties, that a transcript will be made of the interview, and that the child's counsel and all other counsel may be present during the proceedings. The parties are not present. The judge may request from the parties a recommended list of questions to be put to the child so that issues the parties feel are relevant will be canvassed by the judge who, except for the information learned at trial, is a stranger to the family dynamics. The interview usually takes place at the end of the trial after the judge has had an opportunity of learning whatever of the history of the family is ascertainable.

Once the interview has been completed, the judge will then resume the proceedings by indicating to counsel what information he or she has learned. The parties are then given an opportunity to challenge or reply to the information either by submissions or by the calling of additional evidence.

Critics of the practice of judicial interviews refer to the secrecy of the process and the lack of proper training on the part of the judge fully to appreciate a child's motivations and perceptions.[56] They suggest that in the short time available for such an interview, it is impossible without expert assistance fully to comprehend the nature of the information received from the child, particularly in view of the fact that the information is being tendered in an authoritarian and intimidating environment.[57]

The procedure as well invades the concept of impartiality upon which the adversarial system is based inasmuch as it entails the unilateral participation of the judge who temporarily combines a legal with a social work mantle. Where other more objective methods of ascertaining wishes are available, therefore, they are preferable to the judicial interview.[58]

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[56] Barbara A. Chisholm, Obtaining and Weighing the Children's Wishes—Private Interviewing with a Judge or Assessment by an Expert and Report (1976), 23 R.F.L. 1. See also David M. Siegal and Suzanne Hurley, The Role of the Child's Preference in Custody Proceedings (1977), 11 Fam. L.Q. 1.

[57] Stephen Borins, Family Assessments in Custody and Access Disputes under The Children's Law Reform Act, 1977 in All in the Family (Toronto: Ontario Branch of the Canadian Bar Association), Sept. 25th and 26th, 1981.

In Ontario, s. 30 of the Children's Law Reform Act, *supra,* footnote 5, allows a court to appoint a person who has "technical or professional skill" to assess and to report to the court on the needs of the children and the ability of the parties to satisfy those needs. The report would be admissible into evidence and be open to cross-examination by the parties. S. 65(2) also gives the court the right to interview the child to obtain his or her views and preferences; under ss 65(3) and 65(4), the interview would be conducted in the presence of a court reporter and of counsel for the child.

[58] Ron Hewitt, Case Comment on *McKercher* v. *McKercher* (1978), 42 Sask. L. Rev. 295, at p. 296. See also *Re Allan and Allan* (1958), 16 D.L.R. (2d) 172 (B.C.C.A.); *Official Solicitor* v. *K.*, [1965] A.C. 201, [1963] 3 All E.R. 191, [1963] 3 W.L.R. 408 (H.L.); *Saxon* v. *Saxon*, [1974] 6 W.W.R. 731, 17 R.F.L. 257 (B.C.S.C.); *H.* v. *H. (Child: Judicial Review)*, [1974] 1 All E.R. 1145, [1974] 1 W.L.R. 595.

In addition to protecting the impartiality of the court, other methods relieve the child of the responsibility of answering blunt questions about his or her wishes that may be difficult for the child to answer in a direct way. With a skilful inquiry, these wishes may be ascertained in a more subtle manner.[59]

No one suggests that appointing counsel for children is a guarantee that their best interests will be served.[60] But if one perceives the essence of custody actions to be not the right of a parent to custody of the child, but rather the right of the child to have his or her needs met by the person best able to meet those needs, then the focus must be on the child. To ensure that this continues to be the focus, an advocate for the child is often helpful, and frequently indispensable. The existence of a child advocate allows full participation in decisions that affect the child, and enhance the child's perception that the process is a fair one.[61]

VI. *Reform Proposals.*

The procedural and substantive aspects of arrangements for children upon divorce have received a healthy share of attention from the Law Reform Commission of Canada. It recommends the abolition of the fault-oriented laws that create an atmosphere of provocative self-defence.[62] So long as the law provides that custody or support is to be based on the conduct of the spouses towards one another, the process must necessarily degenerate into a crossfire of vituperation and character assassination in order to justify the presence or absence of the remedy claimed.[63] It is obvious to all law reform and advisory bodies that this form of inquiry produces little information that is relevant to the financial or psychological needs of a child. Attached to these concerns for the elimination of a fault-oriented divorce law, is the parallel concern that the adversary process may be inappropriate as a mechanism for the solving of matrimonial conflict.[64] The conclusions

[59] Laura Taylor and Emmy Werner, Child Custody and Conciliation Courts (1978), 16(2) Conciliation Ct Rev. 25, at pp. 29-30. The authors feel that the child's representative should be trained in both the law and child development and should act as the court's representative rather than the child's advocate.

[60] See Bernard M. Dickens, Representing the Child in the Courts—Review of Canadian Legal Representation Practices in The Child and the Courts, *op. cit.*, footnote 2, p. 294.

[61] Hewitt, *op. cit.*, footnote 58, at p. 303. See also Monroe L. Inker and Charlotte Anne Perretta, A Child's Right to Counsel in Custody Cases (1970), 55 Mass. L.Q. 229; reprinted in (1971), 5 Fam. L.Q. 108.

[62] Law Reform Commission of Canada, *op. cit.*, footnote 28.

[63] Galligan, *op. cit.*, footnote 50, p. D-2.

[64] In its Report on Family Law, *op. cit.*, footnote 50, p. 45, the Law Reform Commission of Canada observed: "It is extremely difficult in a framework premised on confrontation and accusation and lacking in counselling and conciliation services . . . to reach the human or psychological reality that is ultimately determinative of the best interests of the children."

See also its working paper on the Family Court, *op. cit.*, footnote 43, p. 11-12.

normally exhort the establishment of a series of court connected services such as conciliation, custody investigation and assessment personnel, and counselling services to deal with the human aspects of what is, by virtue of the Divorce Act, currently characterized as a legal problem.

The other commonly accepted theme that has now been implemented in five provinces, is the suggestion that family law can only function fairly, expeditiously and effectively if it functions as a specialized court with one judicial level having jurisdiction over all family law matters along with a parallel and concomitant social services branch.[65] There have been a number of reports on the success of these Unified Family Courts, all of them indicating that the predictions for success were warranted. The Unified Family Court structure proved to be the fairest and most practical for the parties in dealing with family law disputes. Most of these Unified Family Courts have non-legal resources available either on the premises or by arrangement with community resources, and the legal and behavioural aspects operate in a symbiotic relationship.

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[65] Claire L'Heureux-Dubé, Family Law in Transition, in Family Law—Dimensions of Justice (1983). See also Sheldon G. Krishner, Child Custody Determination—A Better Way! (1979), 17 J. Fam. L. 275, at p. 281.

See further: Law Reform Commission of Canada, *op. cit.*, footnote 43; Institute of Law Research and Reform: Report No. 25—The Unified Family Court (Edmonton: University of Alberta) (1978); Institute of Law Research and Reform, *op. cit.*, footnote 34; Ontario Law Reform Commission, *op. cit.*, footnote 27; First Report of the Royal Commission on Family and Children's Law (Vancouver, 1974); Fourth Report of the Royal Commission on Family and Children's Law—The Family, the Courts and the Community (Vancouver, 1975); Civil Code Revision Office: Report XXVII—Report on the Family Court (1975).

Five provinces have functioning Unified Family Courts, either as pilot projects or as permanent structures. See: New Brunswick: ss 2(4) and 11 to 11.6 of the Judicature Act, *supra*, footnote 42, as added by 1978, c. 32 and as am. by 1979, c. 36, 1980, c. 28, and 1981, c. 36; Newfoundland: The Unified Family Court Act, *supra*, footnote 42, as am. by 1978, c. 35 and 1979, c. 14; Ontario: Unified Family Court Act, *supra*, footnote 39; Prince Edward Island: s. 16.2 of the Judicature Act, R.S.P.E.I. 1974, c. J-3, as added by 1975, c. 27, and as am. by 1978, c. 6 and 1981, c. 12; Saskatchewan: The Unified Family Court Act, *supra*, footnote 35, as am. by 1979-80, c. 92 and 1980-81, c. 90.

British Columbia had a Unified Family Court Act, S.B.C., 1974, c. 99 (now repealed), that purported to establish such a tribunal. In reality, however, the scheme consisted of housing a Provincial Court with its summary family law jurisdiction in the same building as a County Court presided over by a County Court Judge who was also a Local Justice of the British Columbia Supreme Court and who could therefore deal in all of the matrimonial causes matters within the exclusive jurisdiction of the Supreme Court. This was not an attempt to consolidate all family law powers under one tribunal, but a mere residential readjustment of two different courts under one roof. The Manitoba Legislature, under a New Democratic government, amended The Queen's Bench Act, R.S.M. 1970, c. C-280, by a 1976 amendment that would have set up a pilot project in St. Boniface, Manitoba. See S.M. 1976, c. 73. Plans were to create the "St. Boniface Family Law Division of the Manitoba Court of Queen's Bench". The amendment was never proclaimed in force.

Conclusion

This article deliberately avoids the substantive law issues connected with custody and support arrangements for children upon divorce.[66] This is not to say that the inconsistent and punitive statutory mandates under which these arrangements are made are irrelevant to procedural aspects. They are, as the Law Reform Commission of Canada points out, critically important. Nor has there been any discussion except perhaps inferentially of the desirability of relaxing rules of evidence in matters affecting children to ensure that facts are not hidden behind the arbitrariness of the evidentiary barriers. Given the position expressed earlier that the adversary system appears to be the least detrimental alternative to the other forms and aberrations of litigation, these evidentiary relaxations are more apposite to hearings in the nature of those that take place before an administrative tribunal and not before a court. It may well be that the trend towards rendering the hearsay rule impotent will continue in family law as in other branches of law, but at best this is largely a cosmetic improvement.

The castration of the hearsay rule may have more impact, however, if it is done in conjunction with an abolition of the existing terminology in custody cases as well as a rescission of the fault provisions of the Divorce Act. Custody has been everywhere defined and nowhere understood. It is a term that at its best is amorphous[67] and at its worst represents ossification. It connotes victory and loss, which in turn suggest winners and losers. Joint custody not having found much favour with the Canadian courts to date,[68] those parents who cannot agree on this form of arrangement are limited to the winner-take-all proposition that the term "custody" historically and jurisprudentially symbolizes. It represents psychological as well as physical vindication of the position necessarily taken at trial that the non-custodial parent was less fit to parent the child than the parent in whose care the child was entrusted by the court.

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[66] Payne and Kallish, *op. cit.*, footnote 11, at p. 274, pointed out that "neither procedural nor substantive changes in the law can operate in isolation".

[67] The classic definition of custody appeared in *Hewer* v. *Bryant*, [1970] 1 Q.B. 357, at p. 373, [1969] 3 All E.R. 578, at p. 585, [1969] 3 W.L.R. 425, at p. 433 (C.A.), per Sacks L.J. It was referred to as a "bundle of rights" and a "bundle of powers".

The Ontario Law Reform Commission, *op. cit.*, footnote 16, p. 87, observed: "In our researches in the law relating to the guardianship and custody of children, we have been continually surprised by the lack of clarity surrounding the exact meaning of these two terms. Legislatures and courts have used the terms loosely, often interchangeably, to the point where it is now a matter of conjecture what the rights and duties of guardians and custodians are."

For an attempt to distinguish between the two terms, see Walder G.W. White, A Comparison of Some Parental and Guardian Rights (1980), 3 Can. J. Fam. L. 219.

[68] *Baker* v. *Baker* (1979), 23 O.R. (2d) 391, 95 D.L.R. (3d) 529, 8 R.F.L. (2d) 236, 2 Fam. L. Rev. 69 (Ont. C.A.); *Kruger* v. *Kruger and Bond* (1980), 25 O.R. (2d) 673, 104 D.L.R. (3d) 481, 11 R.F.L. (2d) 52, 2 Fam. L. Rev. 197 (Ont. C.A.). But see the strong dissent of Wilson J.A., in the latter case.

The impact of such a decision on the non-custodial parent is often devastating. He or she is relegated to the status of a visiting relative who has no enforceable voice in the decision-making process of raising the child, notwithstanding the fact that up to the time of separation, parenting was a joint responsibility. This means that instead of divorce representing a termination of only the spousal relationship and status, it effectively terminates the incidents of the status of parent. Raising a child then becomes a process that has inherent and inchoate rights of parental obsolescence rather than being a process that lasts as long as the child continues to be legally dependent and entitled to the care of adults.

Most of the behavioural scientists are suggesting that except in extreme circumstances, children are entitled to the benefit of co-parenting for the duration of childhood.[69] The law should somehow be able to synchronize its tenets with these scientific observations. The cessation of a parent-child relationship upon divorce is arbitrary and unfair from the perspective of the child since he or she is neither a legal nor an emotional party to the termination of the marriage. The status as child is independent of the relationship between his or her parents and should be preserved notwithstanding their physical separation. Rather than develop laws and procedures that encourage the notion of sole custody,[70] the direction should be towards developing processes and laws that enhance the possibility of the continuation of parenting.

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[69] Judith S. Wallerstein and Joan Berlin Kelly, Surviving the Break-Up—How Children Cope with Divorce (1980), p. 311.

See also Arthur Leonoff and Maureen O'Neil, Custody Decisions—Psychological Aspects (1979), 2 Fam. L. Rev. 192, at p. 195; William F. Haddad and Mel Roman, No Fault Custody (1979), 2 Fam. L. Rev. 95, at p. 100; and George A. Awad and Ruth Parry, Access Following Marital Separation (1980), 25 Can. J. Psychiat. 357. Goldstein, Freud and Solnit took a different view in Beyond the Best Interests of the Child, *op. cit.*, footnote 37.

[70] In *Dipper* v. *Dipper*, [1981] Fam. 31, [1980] 2 All E.R. 722, [1980] 3 W.L.R. 626, the English House of Lords held that it was a legal myth that the child's custodian had the unilateral right to make important decisions about the child's life. Ormrod L.J., stated, at pp. 45 (Fam.), 731 (All E.R.), 638 (W.L.R.): "In day-to-day matters, the parent with custody is naturally in control." But where there was disagreement over major decisions, it was the court that should decide the matter. At pp. 48 (Fam.), 733 (All E.R.), 640 (W.L.R.), Cumming-Bruce L.J., stated: "The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent, he has the right to come to the court in order that the difference may be determined by the court. What is not practicable, when a judge is worried about the moral aspect of the parent who is going to have care and control, is to try to resolve the problem by giving the other parent an apparent right to interfere in the day-to-day matters or in the general way in which the parent with care and control intends to lead his or her life."

In light of this latest emasculation of the custody power, it seems unnecessarily provocative to continue to dangle the term as a legal carrot before separating parents. The Law Reform Commission of Canada in its Working Paper on Divorce, *op. cit.*, footnote 28, p. 56, seemed to share the view that the granting of "custody" is gratuitously threatening to both parents.

Aside from the routine ordering of joint custody, and aside from the elimination of semantics such as "awards" of custody, one way might be to have hearings to determine a child's residence. No parent would be "awarded" custody. The hearing would determine simply where the child should live and would delineate what the respective rights and obligations of both parents are. One parent would necessarily have the final say, but there would be on the part of the parent with whom the child does not live a right to information about the child, the right to be advised and consulted about major decisions affecting the child, as well as the right to access at mutually agreed upon times. This would, in many cases, cauterize the psychological wounds that result from the notion of "losing" custody. It would not then become a question of the competing rights of each parent to have custody of the child or the right of the child to be cared for by one of the two competing parents, but rather would be a hearing to assess which environment would best provide the emotional nourishment this particular child needs. The court would make the assessment on the basis of evidence from all parties and would in the end declare the location of the child's home rather than the winner of the custody lottery. These "residence hearings" may be nothing more than semantic distinctions but in matters such as these, the terminology may be critical to the psychological future of the former members of the family.

It is clear that the existing structures, procedures and laws are inadequate to the gargantuan task of properly adjudicating children's rights when their parents divorce. Perhaps, however, in fairness to those who participate in and innocently perpetuate these inadequacies, the task may be so onerous that any procedures may be inadequate. This should not prevent the effort being made. How a family dissolves will affect its individual and group successors. The fact that there are remnants in human form of the social process makes it mandatory that we continue to struggle to perfect those aspects of the legal process with which the human element comes into contact.

No system guarantees an infallible judgment at the conclusion of the process, but it can ensure that the process itself is just. There is no better way to protect the credibility and fairness of the ultimate decision than to ensure that its sources are credible and fair. With a refined procedure which synchronizes without compromising the human and legal imperatives, the objectives of justice can be better met in the resolution of disputes affecting children.