

FAMILY OUTSIDE THE BOOK ON THE FAMILY

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The orthodox view of the Civil Code of Québec's book on the family as an exhaustive enumeration of legal family relations, and of the legislature as sole law reformer, requires revision. Recent cases in which orders justified by children's best interests have acknowledged other family forms show the judges to be adapting the Civil Code's resources to the situations before them. The creativity of some Quebec judges, balanced by the constraints perceived by common law judges, confirms that, in family matters, the caricatures of the rule-bound civilian judge and the unconstrained common law judge obscure more than they illuminate.

Il est devenu nécessaire de revoir la vision orthodoxe du Livre « de la Famille » du Code civil du Québec, suivant laquelle ce Livre est une énumération exhaustive des relations familiales juridiquement reconnues et est seulement susceptible d'être réformé par le législateur. La jurisprudence récente, selon laquelle des ordonnances justifiées par l'intérêt de l'enfant ont permis de reconnaître d'autres formes de relations familiales, démontre que les juges ont tendance à adapter les ressources du Code civil aux situations qui leur sont présentées. La créativité dont font preuve certains juges québécois, d'une part, et les contraintes que découvrent les juges en common law, d'autre part, confirment qu'en matière familiale les caricatures du juge civiliste empreint de retenue et du juge de common law libre de toutes contraintes sont source de confusion plutôt que d'illumination.

It is a commonplace that family life is increasingly diverse and that there is a gap between state law and social practices of family. This paper highlights a part of the complex story of the relationship between the civil law and family life's legal and social practice. It confines itself to two instances in which the best interests of children have justified results that the *Civil Code of Québec's* book on the family did not directly authorize: orders for temporary use of a residence in the case of

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unmarried partners; and an award of shared custody to a non-parent. Commentary has addressed these developments separately, often eying them – with an understandable pragmatism – for their direct utility to advocates in family litigation. Doctrine has not yet synthesized these strands so as to reflect on their challenge to the general theory of the sources and contours of family law within Quebec, as well as of its modes of amendment. In a modest performance of the doctrinal function, this paper attempts to systematize those “cas épars” decided by judges in order to draw out the guiding principles.¹

The conventional account of family law in Quebec civil law focuses on the enactment of a coherent regime that mediates life through elaborately conceptualized institutions of alliance and kinship. This account contrasts with the legislative and judicial recognition, in the common law provinces, of family defined more functionally. Although the Civil Code continues to regulate through formal institutions, judges have, at least to a degree, adapted resources at their disposal so as to connect family law to contemporary “family practices.”² Judges have ordered temporary use of a dwelling where the regime of the family residence, an incident of marriage or civil union, does not apply. They have also shared custody between a parent and a non-parent in recognition of parenting by same-sex partners. Those cases model approaches to interpretation of the Civil Code that orthodox accounts of Quebec civil law fail to accommodate. The judges’ reliance in those cases on the best interests of children, a principle recognized by the legislature, can be understood in different ways. Perhaps the concept of the best interests of children provides a freestanding basis for judges to adapt the law to family forms, or perhaps such adaptations are more suitably anchored to other rules in the Civil Code. To be sure, this paper does not posit a comprehensive revision of the theory of family law in Quebec. Yet the cases it discusses threaten two widespread but unstudied assumptions: that civil law judges lack entirely the equitable resources at the disposal of their common law homologues; and that the legislature of Quebec enjoys a monopoly on reforming family law.

1. The Conventional Account of Family Law in Quebec

It is indisputable that the practices of family life, especially in Quebec, depart markedly from the legal model focused on marriage. In 2006,

¹ Jacques Ghestin, Gilles Gobeaux with Muriel Fabre-Magnan, *Traité de droit civil, Introduction générale*, 4th ed. (Paris: LGDJ, 1994) at para. 576.

² David H. J. Morgan, *Family Connections: An Introduction to Family Studies* (Cambridge: Polity Press, 1996).

48 per cent of Quebec families consisted of married couples, while 27 per cent consisted of unmarried couples.³ In the same year, unmarried couples represented over one-third of all couples in the province (34.6 percent), much higher than in the other provinces and territories (13.4 percent).⁴ While so-called social legislation in the province recognizes a larger view of family, one including *de facto* spouses,⁵ the civil law privileges a narrower set of relations.

Legislation is not the sole source of law in Quebec's civil law tradition. It is, however, the primary one.⁶ Classically, the civil law defines a family as a "[g]roup of persons related to one another by a bond of kinship or by alliance."⁷ Kinship is the juridical link between persons when one is, or is deemed to be, the descendant of the other, or when both have, or are deemed to have, a common ascendant.⁸ Filiation, the legal link between a parent and his or her child, traditionally rests on ties of blood and adoption. The term "alliance" classically refers to marriage, and so *de facto* unions do not create relationships of alliance.⁹

Quebec's private law of the family, located chiefly in Book Two of the Civil Code, perpetuates this approach. The Civil Code regulates family life using formal, as opposed to functional, means.¹⁰ It mediates the life of families through the core institutions of marriage, civil union, and filiation.¹¹ For example, the alimentary obligation in article 585 is an effect of alliance or kinship. The rights and duties of married and civil-

³ Céline Le Bourdais and Évelyne Lapierre-Adamcyk, "Portrait des familles québécoises à l'horizon 2020" in Gilles Pronovost, Chantale Dumont and Isabelle Bitadeau, eds., *La famille à l'horizon 2020* (Quebec: Presses de l'Université du Québec, 2008) 71 at 89.

⁴ Anne Milan, Mireille Vézina and Carrie Wells, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006, 2006 Census*, Statistics Canada Catalogue no. 97-553-XIE (Ottawa: Minister of Industry, 2007) at 35.

⁵ Michel Tétrault, *Droit de la famille*, 3d ed. (Cowansville, Qc.: Yvon Blais, 2005) at 548-51 [Tétrault, *Droit de la famille*].

⁶ H. Patrick Glenn, "La Cour suprême du Canada et la tradition du droit civil" (2001) 80 Can. Bar Rev. 151.

⁷ Quebec Research Centre for Private and Comparative Law, *Private Law Dictionary of the Family and Bilingual Lexicons* (Cowansville: Yvon Blais, 1999) s.v. "family" [*Private Law Dictionary*].

⁸ *Ibid.*, s.v. "kinship."

⁹ *Ibid.*, s.v. "alliance."

¹⁰ Robert Leckey, "Cohabitation and Comparative Method" (2009) 72 Mod. L. Rev. 48.

¹¹ The same vision of the family appears elsewhere in the Civil Code: arts. 653ff. (successions); art. 2449 (irrevocable beneficiaries of life insurance).

union spouses as such are effects, respectively, of marriage and civil union.¹² Parental authority is an effect of filiation, including the child's duty to respect his or her parents.¹³ Where the Code takes functional, factual situations into account, it does so by accepting functioning in a familial way as an avenue for entry into the conceptualized institution. Thus a marriage, although declared null, produces its effects *vis-à-vis* the spouses if they entered into it in good faith.¹⁴ Moreover, unless public order is implicated, a defect in solemnization ceases after three years to provide a ground for the nullity of a marriage.¹⁵ Similarly, uninterrupted possession of status retains space in the Code, although it is the secondary proof of filiation and of less weight than the formal inscription on an act of birth.¹⁶ Uninterrupted possession of status consistent with an act of birth plays a critical role: on a functional basis, it may confirm a filiation assigned by an act of birth, rendering it uncontestable.¹⁷ This bar against contesting filiation may protect a filial bond between a child and an adult absent a genetic connection; but when, in such cases, the effects of parental authority, including parental obligations, survive the discovery of the absence of a genetic connection, they do so because the legal bond of filiation also survives.¹⁸

Consistent with the emphasis on family rights and obligations as consequences of marriage, civil union, and filiation, the Code grants only limited recognition to *de facto* spouses. Its provisions in this regard produce no duties enforceable as between the partners.¹⁹ *De facto* spouses thus “escape” all the constraints burdening married and civil-union spouses.²⁰ The obverse of this escape is the denial of all protections attaching to married and civil-union spouses as such. With

¹² Arts. 392ff., art. 521.6 C.C.Q.

¹³ Arts. 597ff. C.C.Q.

¹⁴ Art. 382, para. 1 C.C.Q.; *Private Law Dictionary*, *supra* note 7, s.v. “putative marriage.”

¹⁵ Art. 380, para. 2 C.C.Q.

¹⁶ Art. 523, para. 2 C.C.Q. The presumption of paternity in art. 525 C.C.Q. is, arguably, a hybrid of formal and functional bases for establishing a family bond.

¹⁷ Art. 530 C.C.Q.

¹⁸ *Droit de la famille*—09358, 2009 QCCA 332, [2009] R.D.F. 37, leave to appeal to S.C.C. refused (*sub nom. G.R. v. I.B.*), [2009] 2 S.C.R. vi.

¹⁹ For acknowledgement of *de facto* spouses, see arts. 15 (consent to care), 555 (special consent to spouse's adoption of one's child), 1938 (right to maintain occupancy of leased residence). Elsewhere, indirectly, the neutrality of codal drafting permits inclusion of *de facto* spouses; see Jean Pineau and Marie Pratte, *La famille* (Montreal: Thémis, 2006) at para. 376.

²⁰ Mireille D.-Castelli and Dominique Goubau, *Le droit de la famille au Québec*, 5th ed. (Saint-Nicolas, Qc.: Presses de l'Université Laval, 2005) at 176.

similar consistency, the Civil Code withholds establishment of filiation and ascription of attributes of parental authority from *de facto* parents, such as the married, civil-union, or *de facto* spouses of individuals with children in so-called blended families. The centrality of marriage and filiation to legal family life underlies denials by some conservative legal scholars in France that *de facto* spouses and same-sex partners could ever establish a “family.”²¹

Despite its prominence, the Civil Code’s book on the family does not exhaust the positive law of the family in Quebec. “Book One – Persons” contains the provisions on the rights of children. Article 33 states: “Every decision concerning a child shall be taken in light of the child’s interests and the respect of his rights.”²² Article 32 declares every child’s right to “the protection, security and attention that his parents or the persons acting in their stead are able to give to him.” This provision echoes article 39 of the province’s *Charter of Human Rights and Freedoms*.²³ Judicial and doctrinal treatments – whether seen as prudently circumspect or needlessly timid – offer little sense that those articles might potentially alter the structure of family law recognized elsewhere in the Civil Code. The principle of the best interests of the child is understood as conditioning public and private decision-making²⁴ without adding rights to those set out elsewhere in legislation or the Civil Code.²⁵ Although irrelevant for present purposes, ordinary provincial statutes also affect family relations.²⁶

Beyond provincial enactments, two sources of law call for mention. As a consequence of the constitutional division of powers, legislation in relation to marriage and divorce emanates from the Parliament of

²¹ Philippe Malaurie and Hugues Fulchiron, *La famille*, 3d ed. (Paris: Defrénois, 2009) at paras. 18, 19. Conservative scholars in Quebec no longer maintain this position, cautiously acknowledging a range of meanings of “family;” see Pineau and Pratte, *supra* note 19 at paras. 2-3; D.-Castelli and Goubau, *ibid.* at 1.

²² This paper follows the *Private Law Dictionary*, *supra* note 7, s.v. “best interest(s) of the child,” by referring to “best interests” rather than to “interests” or “the interest.”

²³ R.S.Q. c. C-12 [*Quebec Charter*].

²⁴ Édith Deleury and Dominique Goubau, *Le droit des personnes physiques*, 4th ed. by Dominique Goubau (Cowansville: Yvon Blais, 2008) at para. 635.

²⁵ *Droit de la famille—2347*, [1996] R.D.F. 129 at 131 (Sup. Ct.), appeal withdrawn, 1996-01-29 (C.A.M. 500-09-001971-969).

²⁶ See e.g. *Youth Protection Act*, R.S.Q. c. P-34.1; *Regulation respecting the determination of child support payments*, O.C. 48497, 1997 G.O. II, 1651. For a capacious view of the laws constituting families, see Alison Diduck and Katherine O’Donovan, eds., *Feminist Perspectives on Family Law* (New York: Routledge, 2006).

Canada. The *Civil Marriage Act*²⁷ supplements the pre-Confederation sources of the law of marriage, including received common law. In addition to providing for corollary support as between spouses, the *Divorce Act* makes child support payable for a “child of the marriage.” As it defines this term to include a child of both spouses as well as any child for whom one or both spouses stand in the place of a parent, a bond of filiation need not connect the debtor spouse to the creditor child.²⁸ Judges may award custody or access in respect of such a child.²⁹ These possibilities, mediated by the adults’ marriage and divorce but not necessarily by filiation, represent a functional approach to family regulation in contrast to that privileged by the Civil Code.

The other source of family law in Quebec is the *Canadian Charter of Rights and Freedoms*.³⁰ Although Quebec scholars have been slower to embrace it than their common law counterparts, its impact merits acknowledgement as a source of family law.³¹

Despite these multiple sources, the sense rightly persists that Book Two of the Civil Code establishes the basic structure of family relationships and obligations. For the family, as for other areas of civil life, the Civil Code “elaborates all those institutions, rules, and concepts that govern interpersonal relationships.” It “presumes itself to be a definitionally exhaustive synthesis of the general concepts governing all topics within its purview.”³² The presumption that the Civil Code is exhaustive leads to frequent deployment of reasoning *a contrario*: the explicit inclusion of one thing is read as implicitly precluding another. Thus the enunciation of support duties in article 585 as operating between married and civil-union spouses as well as between relatives in the direct line in the first degree (parents and children) is typically taken as exhaustive.³³ Admittedly, sometimes an argument by analogy and one *a contrario* are equally conceivable. *A contrario* reasoning is likelier to be appropriate, however, when returning from an exception to a general

²⁷ S.C. 2005, c. 33.

²⁸ *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), s. 2(2).

²⁹ *Ibid.*, s. 16(1).

³⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*].

³¹ Compare Alison Harvison Young, “The Changing Family, Rights Discourse and the Supreme Court of Canada” (2001) 80 Can. Bar Rev. 749; Renée Joyal, “Parents, enfants, conjoints: à la recherche d’un sens” (2009) 50 C. de D. 361 at 379.

³² John E.C. Brierley and Roderick A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 100, para. 87 [footnote omitted].

³³ *Droit de la famille—2347*, *supra* note 25 at 130.

principle.³⁴ Whether regarding the public order relations of status established by family law as stipulative definitions establishing a self-contained domain of the civil law or – on a more neo-liberal view centred on *homo economicus* – as derogating from the law of obligations, readers generally interpret the enunciation of family duties in Book Two as exhaustive.

The conventional account of family law also includes a political, procedural, and institutional dimension. The “preferred means” of ensuring that the Civil Code, including family law, does not become out of date is legislative intervention.³⁵ One factor contributing to this prevailing sense is the distinct character of a codified civil law, a product of comprehensive drafting. Another factor militating for the view of legislative responsibility for updating family law is the perceived absence of a general equitable jurisdiction equivalent to that exercised by common law courts. It is said, for example, that Quebec courts have no *parens patriae* jurisdiction.³⁶ The Quebec Court of Appeal has recently reiterated the view that, unlike courts in the common law provinces, the province’s courts were unable to create “nouvelles institutions juridiques, ajustées aux besoins du moment,” such as constructive trusts. If appropriate at all, held Dalphond J.A., it was for the legislature, not the judiciary, to create “une sorte de société d’acquêts pour les unions quasi matrimoniales.”³⁷ Moreover, despite the rich possibilities that imaginative readers detect in the *Code of Civil Procedure*,³⁸ it has been affirmed that the courts’ statutory jurisdiction confers no legislative, social, or political competence: “la mesure procédurale ne peut exister

³⁴ Henri Roland and Laurent Boyer, *Introduction au droit* (Paris: Litec, 2002) at para. 373.

³⁵ Sylvio Normand, “An Introduction to Quebec Civil Law” in Aline Grenon and Louise Bélanger-Hardy, eds., *Elements of Quebec Civil Law: A Comparison with the Common Law of Canada* (Toronto: Thomson Carswell, 2008) 25 at 89.

³⁶ Brierley and Macdonald, *supra* note 32 at 51, para. 48; Michel Morin, “La compétence parens patriae et le droit privé québécois: un emprunt inutile, un affront à l’histoire” (1990) 50 R. du B. 827. Compare reliance on art. 20 C.C.P. in respect of authorization for a blood test in an action for paternity (*Cayen-Lacombe v. Laverdière*, [1970] R.P. 298 at 300 (Sup. Ct.)); parental rights of access (*Protection de la jeunesse*—392, [1989] R.J.Q. 1356 (C.Q.)); and recognition of paternity and rectification of the registry of civil status (*Droit de la famille*—113, [1984] C.S. 119). If art. 535.1 C.C.Q. has, since 2002, furnished a textual basis for ordering the analysis of bodily substances for actions concerning filiation, the point remains that courts had earlier found power to do so absent that text.

³⁷ *M.B. v. L.L.*, [2003] R.D.F. 539 at para. 31 (C.A.), citing *Pettkus v. Becker*, [1980] 2 S.C.R. 834 [*Pettkus*]; *Peter v. Beblow*, [1993] 1 S.C.R. 980 [*Peter*].

³⁸ Arts. 2, 20, 46 C.C.P.

sans le droit.”³⁹ Such concerns reflect the classical role of the civil law judge: “Tout juge dit le droit, aucun ne l’édicte.”⁴⁰

Critically, where there is legislative will, the choice of regulation via formal means and reliance on legislative initiative need not result in conservatism. Thus, during a “decade of effervescence,”⁴¹ the legislature created a new civil status open to same-sex couples, the civil union.⁴² It also facilitated parenting by lesbian couples by inserting in the title on filiation a chapter on assisted procreation.⁴³ In the terms of a distinction used by some scholars, that amendment altered *la parenté* (filiation), as opposed to *la parentalité* (the affective and material relations of care towards a child viewed more functionally).⁴⁴ In those developments, forms of social life have attained legal recognition, not through incremental judicial developments, but – consistent with the legislature’s preferred formal approach – mediated through the institutions of alliance or kinship.⁴⁵ Instead of regulating otherwise than through those fundamental institutions, the legislature expanded access into them.

³⁹ *Droit de la famille*—3444, [2000] R.J.Q. 2533 at 2540 (C.A.).

⁴⁰ Gérard Cornu, *L’art du droit en quête de sagesse* (Paris: Presses Universitaires de France, 1998) at 175.

⁴¹ Alain Roy, “Le droit de la famille. Une décennie d’effervescence législative” (2003) 105 R. du N. 215.

⁴² Arts. 521.1ff. C.C.Q.

⁴³ Arts. 538ff. C.C.Q.; Robert Leckey, “‘Where the Parents Are of the Same Sex’: Quebec’s Reforms to Filiation” (2009) 23 Int’l J. L. Pol’y & Fam. 62.

⁴⁴ See e.g. Carmen Lavallée, *L’enfant, ses familles et les institutions de l’adoption: Regards sur le droit français et le droit québécois* (Montreal: Wilson & Lafleur, 2005) at paras. 266-67; compare Marie-France Bureau, *Le droit de la filiation entre ciel et terre: étude du discours juridique québécois* (Cowansville: Yvon Blais, 2009) at 167-68. The terms may be analytically useful so long as it is not wrongly presumed that filiation or “la parenté” has an enduring and unalterable vocation of mirroring genetic origins. While *parentalité* has no direct equivalent in the English lexicon of the civil law of the family (it is a sign of its recent entry into the discourse of Quebec civil law that the *Private Law Dictionary*, *supra* note 7, includes an entry only for “parenté”), the *parenté/parentalité* distinction is roughly equivalent to that delineated between parentage and parenthood in a common law jurisdiction by Andrew Bainham, “Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions” in Andrew Bainham, Shelley Day Sclater and Martin Richards, eds., *What Is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 25.

⁴⁵ The Civil Code is explicit – in the French version, at least – that a civil union generates a bond of alliance (art. 521.7 C.C.Q.): “L’union civile crée une alliance entre chaque conjoint et les parents de son conjoint.” Compare the English version: “A civil union creates a family connection between each spouse and the relatives of his or her spouse.”

Despite the dominant view of law reform as a legislative task, it would be wrong to exaggerate judicial passivity. Over time, it is true, codification may lead to a gap between laws and social reality through the tendency to regard the legal system's political resources as fixed.⁴⁶ Yet judicial interpretation of the codified private law need not be rigid or inadaptably to changing social circumstances. Indeed, as its preliminary provision acknowledges, the Code operates "in harmony" with "general principles of law." More specifically, the civil law has a "body of ideas connected to notions of justice, *aequitas*, efficiency and more."⁴⁷ It flows from the nature of a civil code – its provisions drafted at a high level of generality and abstraction – that judges can apply them in response to changing circumstances.⁴⁸ Thus, while legislatures have not recently altered the text of the relevant provisions, courts have nevertheless increased their use of orders sharing custody.⁴⁹ Indeed, some Quebec commentators detect the emergence of an unwritten rebuttable presumption favouring shared custody by the parents.⁵⁰ Nonetheless, such shifts in judicial tendency inhabit the structure set out by the applicable legislation. Is it right to suppose that judges are reluctant to circumvent the set of family relationships explicitly recognized by the codified law?

2. Expanding Law's Functional Family

Over the past forty or fifty years, forms of family previously consigned to family law's margins have gradually obtained recognition. Law has increasingly recognized familial states of fact. The agents responsible for such developments have varied, as have the means, ranging from large-scale reform aiming at conceptual coherence to ad hoc interventions.

Compared with the civil law of Quebec, law in the common law provinces reveals less ambition for a coherent architecture of the family. Legislation in those provinces typically does not mediate family rights and duties exclusively through core institutions. Marriage and parentage

⁴⁶ Paul-A. Cr  peau, "La renaissance du droit civil canadien" in Jacques Boucher and Andr   Morel, eds., *Le droit dans la vie familiale* (Montreal: Presses de l'Universit   de Montr  al, 1970) xiii at xv.

⁴⁷ Nicholas Kasirer, "Couvrez cette communaut   que je ne saurais voir: Equity and Fault in the Division of Quebec's Family Patrimony" (1994) 25 R.G.D. 569 at 579; see also Hessel E. Yntema, "Equity in the Civil Law and the Common Law" (1967) 15 Am. J. Comp. L. 60.

⁴⁸ Brierley and Macdonald, *supra* note 32 at 144-47, paras. 117, 118.

⁴⁹ Milan, V  zina and Wells, *supra* note 4 at 15.

⁵⁰ Marie Christine Kirouack, "La jurisprudence relative    la garde: o   en sommes-nous rendus?" in Barreau du Qu  bec, Service de la formation permanente, ed., *D  veloppements r  cents en droit familial* (Cowansville: Yvon Blais, 2007) 665 at 722-27.

continue to produce significant legal effects, some of which are exclusive to married spouses and to parents and children. Protections in most provinces relating to matrimonial property, intestate succession, and the matrimonial home come to mind. Yet, as evidence of a functional approach to family regulation, other effects of close family relationships extend beyond individuals connected by alliance and kinship.

Legislation in the common law provinces includes variable context-specific definitions of family relationships. For instance, Ontario's *Family Law Act* defines "spouse" at the outset as meaning either of two persons married to each other as well as either of two persons having entered a voidable or void marriage in good faith.⁵¹ But in the part on support obligations, it enlarges that definition by adding either of two persons who are not married to each other and have cohabited, either continuously for not less than three years, or, if they are the parents of a child, in "a relationship of some permanence."⁵² This functional definition of "spouse" served as a point of entry for same-sex couples into family law in that province via constitutional litigation. In *M. v. H.*,⁵³ the Supreme Court of Canada held that including unmarried opposite-sex cohabitants within the regime of spousal support while excluding unmarried same-sex cohabitants infringed the guarantee of equality in section 15 of the *Canadian Charter*.

The law in Ontario also defines "parent" functionally. It stipulates, for some purposes, that the term "includes a person who has demonstrated a settled intention to treat a child as a child of his or her family."⁵⁴ A person may thus qualify as a "parent" for the purposes of support under the *Family Law Act* without being a "mother" or a "father" in the sense of the statute regulating parentage, the *Children's Law Reform Act*.⁵⁵ Because a duty to support children under the *Family Law Act* need not be an effect of parentage, it can, if controversially, survive the discovery that the debtor is not the child's genetic father. That is, without altering the obligation owed, the basis for the duty of support may shift from the formal meaning of "parent" to the functional one.⁵⁶

⁵¹ R.S.O. 1990, c. F.3, s. 1(1) "spouse."

⁵² *Ibid.*, s. 29 "spouse."

⁵³ [1999] 2 S.C.R. 3. The inclusion of unmarried opposite-sex cohabitants in the *Family Law Act*, on a functional basis, had earlier opened the door for the constitutional challenge to an insurance statute that indemnified married spouses but not unmarried couples; see *Miron v. Trudel*, [1995] 2 S.C.R. 418.

⁵⁴ *Supra* note 51, s. 1(1) "parent."

⁵⁵ R.S.O. 1990, c. C.12.

⁵⁶ *Cornelio v. Cornelio* (2008), 94 O.R. (3d) 213 (S.C.J.) *T.D.G. v. L.M.G.*, 2009 NBQB 207, 351 N.B.R. (2d) 22; compare text accompanying note 18.

By contrast to these context-specific definitions, the Civil Code uses marriage, civil union, and filiation to establish statuses (married or civil-union spouse, father, mother, child) that apply consistently throughout.

In two provinces, the legislatures have extended the matrimonial property regimes to unmarried couples.⁵⁷ In Alberta, reaching further yet beyond the marriage model, the legislature has ascribed duties of support to interdependent adult couples without a requirement that the relation be conjugal.⁵⁸ Thus the enacted law on its face does not restrict core effects of family law – support, custody of a child, in some places a sharing of property – to individuals connected by bonds of alliance or kinship. Depending on one's predisposition, this approach appears flexible or unprincipled.

In addition to these practices of legislative drafting and the constitutional litigation that they have generated, the common law courts have an equitable jurisdiction that they occasionally wield to recognize effects of familial relationships beyond the enacted law. Courts have recognized constructive trusts as a remedy for claims in unjust enrichment raised by former unmarried cohabitants.⁵⁹ The Supreme Court of Canada has rejected the notion that enactment of a legislative scheme for the property rights of married spouses implicitly precluded equitable remedies for unmarried spouses.⁶⁰ The common law may eventually work itself pure, but the exercise by the courts of their equitable jurisdiction in relation to property allocation on termination of an unmarried relationship has resulted in a regime that some authors believe no legislature would enact as such, given the large measure of judicial discretion.⁶¹ While it is infrequent, a common law court can exercise its *parens patriae* jurisdiction where it detects a gap in legislation. In *A.A. v. B.B.*,⁶² the Ontario Court of Appeal declared a woman to be a child's second mother and third parent. That scenario depended not only on the residual jurisdiction of the courts, but also on a particular view of enacted law. The approach contrasts with the

⁵⁷ *The Family Property Act*, C.C.S.M. c. F25, ss. 13, 14, as am.; *Family Property Act*, S.S. 1997, c. F-6.3, ss. 4, 21(1), 22(1), as am.

⁵⁸ *Adult Interdependent Relationships Act*, S.A. 2002, c. A-4.5, ss. 1(1)(f), 3(1); *Family Law Act*, S.A. 2003, c. F-4.5, s. 56.

⁵⁹ *Peter*, *supra* note 37.

⁶⁰ *Pettkus*, *supra* note 37 at 851.

⁶¹ Heather Conway and Philip Girard, "'No Place Like Home': The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain" (2005) 30 *Queen's L.J.* 715 at 725.

⁶² 2007 ONCA 2, 83 O.R. (3d) 561, leave to appeal to S.C.C. refused (*sub nom.* *Alliance for Marriage and Family v. A.A.*), 2007 SCC 40, [2007] 3 S.C.R. 124.

assumption that the *Civil Code of Québec*, in contrast to ordinary statutes, is gapless.⁶³

Yet it is wise to avoid exaggerating the degree of liberty to adapt family law that the common law judges see themselves as having. The property rights of unmarried partners form a fitting example. In 2002, in *Nova Scotia (Attorney General) v. Walsh*, the Supreme Court upheld the constitutional validity of restricting matrimonial property regimes to married spouses.⁶⁴ Shortly afterwards, the Ontario Court of Appeal reminded trial judges that it was a reversible error to deploy the doctrine of unjust enrichment so as to achieve indirectly for unmarried couples the equal sharing that the limited ambit of the *Family Law Act* did not allow them to reach directly.⁶⁵ In other words, the courts' equitable jurisdiction is subject to unwritten limits; unjust enrichment is not a license for applying matrimonial property rules by analogy.⁶⁶ That sense of restraint hints that the Quebec Court of Appeal, in its discussion of unjust enrichment and *de facto* unions, may have exaggerated the common law judges' perception of their agency.⁶⁷ This acknowledgement of perceived constraints on common law judges – contrary, perhaps, to views current in Quebec – sets the stage for closer examination of judicial creativity on the part of judges in the latter jurisdiction.

Before embarking on that examination, however, it bears acknowledgement that some Quebec commentators, aware of developments in the common law provinces, have called for altering their province's family law using some of the avenues discussed here. Perhaps, as some have argued, the confinement of some of the effects of marriage and civil union to married and civil-union spouses will eventually succumb to a challenge under section 15 of the *Canadian Charter* or article 10 of the *Quebec Charter*.⁶⁸ In framing such a

⁶³ Brierley and Macdonald, *supra* note 32 at 100, para. 87; see also Denis Alland and Stéphane Rials, eds., *Dictionnaire de la culture juridique* (Paris: Presses Universitaires de France, 2003) s.v. "codification" at 229, distinguishing a code from merely "une législation plus étendue et mieux construite." For affirmation that Quebec civil law has no gap in respect of the possibility of three parents but rather a "legal economy" which precludes it, see *Droit de la famille—07528*, 2007 QCCA 361, [2007] R.J.Q. 525 at para. 55.

⁶⁴ 2002 SCC 83, [2002] 4 S.C.R. 325 [*Walsh*].

⁶⁵ *Wylie v. Leclair* (2003), 64 O.R. (3d) 782 (C.A.).

⁶⁶ This position is consistent with the account of limits on equity offered by Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart Publishing, 2009).

⁶⁷ See text accompanying note 37.

⁶⁸ *Boisvert v. Brien* (28 February 1997), Rimouski 100-04-008038-961 (Sup. Ct.); Raymonde LaSalle, "Les conjoints de fait et le droit d'usage de la résidence

challenge, it would likely be necessary to distinguish the protective function of a right to use the family residence or of a right to aliments from the allocative function of asset division, one deemed by the Supreme Court of Canada in *Walsh* to turn on choice and consent.⁶⁹ Others have argued that the legislature might appropriately amend the Code in the instrumental pursuit of substantive equality for the children of unmarried parents.⁷⁰ For instance, it might regularize the right to use of the family home irrespective of the adults' marital status, or otherwise recognize *de facto* or "psychological" parents.⁷¹ Yet whatever the merits of such speculation and exhortation to legislative action, judicial developments calling for notice are already underway.

3. Extending the Effects of "Family" in Quebec

Courts and scholars in Quebec no longer call unmarried couples and their children "illegitimate families," nor even "natural" ones. Indeed, family relations outside marriage are achieving limited recognition under the general law of obligations. In applying the civil law, judges increasingly take into account relations once obscured as the illegitimate family. The modest success of recourse under provisions relating to unjust enrichment,⁷² as well as undeclared partnership,⁷³ undermines the notion that *de facto* spouses are entirely legal strangers and invisible to the civil

familiale" in Barreau du Québec, Service de la formation permanente, ed., *Congrès annuel du Barreau du Québec (1997)* (Cowansville: Yvon Blais, 1997) 347 at 361-62 [LaSalle, "Conjoints de fait"]; Tétrault, *Droit de la famille*, *supra* note 5 at 600. Not all observers believe that the judgment of the Superior Court in the unsuccessful challenge to Quebec's matrimonial regime in *Droit de la famille—091768*, 2009 QCCS 3210, [2009] R.J.Q. 2070, appeal argued and judgment reserved 19 May 2010, C.A.M. 500-09-019939-099, represents the final word on the matter.

⁶⁹ The distinction between effects of marriage "based on need and dependency" and the allocation of property's "contractual nature" emerges most sharply from Gonthier J.'s concurrence in *Walsh*, *supra* note 64 at 425, 427. In Quebec that distinction applies most convincingly to matrimonial property relations outside the family patrimony, the latter being vested with public-order status by art. 391 C.C.Q.

⁷⁰ Christine Morin, "La contractualisation du mariage: réflexions sur les fonctions du *Code civil du Québec* dans la famille" (2008) 49 C. de D. 527 at 549.

⁷¹ See e.g. Michel Tétrault, "De choses et d'autres en droit de la famille: La revue annuelle de la jurisprudence 2007-2008" in Service de la formation permanente, Barreau du Québec, ed., *Développements récents en droit familial* (Cowansville: Yvon Blais, 2008) 83 at 337 [Tétrault, "La revue annuelle de la jurisprudence 2007-2008"]; Benoît Moore, "La notion de 'parent psychologique' et le *Code civil du Québec*" (2001) 103 R. du N. 115.

⁷² Arts. 1493ff. C.C.Q.; *M.B. v. L.L.*, *supra* note 37.

⁷³ Arts. 2250ff. C.C.Q.; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Angers v. Gagnon*, [2003] R.J.Q. 924 (C.A.).

law. Judges are occasionally explicit that provisions in Book Two, if unavailable for direct application to *de facto* unions, may nevertheless “inspire” a determination on the breakdown of such a union, as in respect of a claim in unjust enrichment.⁷⁴ Moreover, while no civil obligation of support attaches between *de facto* spouses, a natural obligation can serve as cause so as to render enforceable a contractual undertaking to pay support to a former *de facto* spouse⁷⁵ or to her child.⁷⁶ Drawing together the scattered acknowledgements of the *de facto* family emerging from the book on obligations is a task beyond this paper.

The present concern, more narrowly, is with orders ostensibly made outside the book on the family, but with reference to the best interests of children. This paper thus brackets a line of cases in relation to former *de facto* spouses – entirely based on Book Two – that increase a parent’s alimentary obligation to his children in order to palliate “undue hardship” for the other parent, as contemplated by article 587.2.⁷⁷ This part of the paper describes orders for temporary use of a residence where children are present, as well as an order requiring a titulary of parental authority to share custody with a non-parent, her former partner. Then it draws together the discursive recognition evident in the texts: by their language, judges recognize family relationships beyond those enumerated by the Civil Code.

A) De Facto Spouses and the “Family Residence”

The consequences of marriage include the regime of the family residence. “Family residence,” a legal concept,⁷⁸ is the principal residence of married or civil-union spouses and, as may be, their children.⁷⁹ It may be factually “where the members of the family live while carrying on their principal activities.”⁸⁰ The spouses may also formally designate a residence.⁸¹ This term of art contrasts with expressions such as “conjugal domicile” and “matrimonial home,” which have no specific denotation in Quebec civil law.⁸² While cases have

⁷⁴ *Beaulieu v. Bélanger*, 2009 QCCS 1565, [2009] J.Q. n° 3073 (QL) at para. 26.

⁷⁵ Arts. 1410, 1411 C.C.Q.; *Ponton v. Dubé*, 2005 QCCA 413, [2005] J.Q. n° 4326 (QL).

⁷⁶ *C.R. v. J.B.*, 2005 QCCA 547, [2005] R.J.Q. 1391.

⁷⁷ Jocelyne Jarry, *Les conjoints de fait au Québec: vers un encadrement légal* (Cowansville: Yvon Blais, 2008) at 141-43.

⁷⁸ Pineau and Pratte, *supra* note 19 at para. 116.

⁷⁹ Arts. 401ff. C.C.Q.

⁸⁰ Art. 395, para. 2 C.C.Q.

⁸¹ Art. 406 C.C.Q.

⁸² *Private Law Dictionary*, *supra* note 7, s.v. “family residence.”

elaborated the term “family” as including realities other than the spouses and their children,⁸³ the regime of the family residence applies only to married and civil-union spouses.⁸⁴

Most of the regime’s provisions, such as restraints on alienating or charging the property, operate during the spouses’ common life.⁸⁵ Several rules, however, operate only once the common life of the parties has ended. In the event of separation from bed and board, dissolution or nullity of the marriage, or proceedings for dissolution of a civil union,⁸⁶ a court may award the right of use of the family residence to the spouse to whom it awards custody of a child.⁸⁷ Moreover, during proceedings in relation to separation from bed and board, nullity or dissolution of the marriage for married spouses, or during proceedings for dissolution of a civil union, a court may order either spouse to leave the family residence.⁸⁸ These rules provide for “limits and conditions ... determined by law” on the owner’s “right to use, enjoy and dispose of property.”⁸⁹ Some authors see provisions by which a judge can award to one spouse use of an immovable owned by the other as testifying to the family home as a “point d’ancrage” for the family in the “torment” of divorce.⁹⁰ It is wrong to construe these obligatory effects of marriage restrictively as derogations from the *ius commune*.⁹¹ Still, some view the possibility for a judge to limit an owner’s use of his or her immovable property as departing significantly from the general regime on ownership in the book on property.⁹² It could be supposed, accordingly, that express legislative authorization would be essential.

⁸³ D.-Castelli and Goubau, *supra* note 20 at 107.

⁸⁴ Arts. 391, 401ff., 521.6, para. 4 C.C.Q. *a contrario*. In addition, art. 415 provides that the family patrimony includes “the residences of the family or the rights which confer use of them.”

⁸⁵ See e.g. art. 404 C.C.Q.

⁸⁶ Art. 521.17 C.C.Q.

⁸⁷ Art. 410, para. 2 C.C.Q.

⁸⁸ Art. 500, para. 1 C.C.Q.

⁸⁹ Art. 947 C.C.Q.

⁹⁰ Malaurie and Fulchiron, *supra* note 21 at para. 822. Carol Smart, *Personal Life* (Cambridge: Polity Press, 2007) c. 6, provides a sociological reminder of the darker side of ostensibly intact family relationships, one hinting at shades of torment prior to family breakdown.

⁹¹ Readers today may criticize *Droit de la famille*—67, [1985] C.A. 135 (C.A.), for its narrow interpretation of the compensatory allowance as a derogation from the entrenched principle of freedom of contract.

⁹² D.-Castelli and Goubau, *supra* note 20 at 112 write, perhaps hyperbolically, of “une atteinte directe à l’ancienne conception de la propriété.”

Consistent with the general position of laissez-faire respecting *de facto* spouses, no special regime applies to their residence. The traditional view had been that it was impossible for one *de facto* spouse to obtain exclusive use of an immovable on breakdown of the relationship. B  nard J. has expressed doubt – “fort justement” on one scholarly assessment⁹³ – that it would be possible to deprive a person of the use of his property, even in the name of the interests of the children, absent express provision by the Civil Code.⁹⁴ Yet despite the absence of legislative authorization, judges do in fact confer exclusive use of a residence in a way suggestive of the rules on the family residence.

Orders for use of the so-called family residence absent marriage have been made in two situations.⁹⁵ In one, the *de facto* spouses own a residence together in undivided co-ownership. Under the Civil Code’s book on property, the point of departure is the right of such partners, like any undivided co-owners, to use their undivided property.⁹⁶ The Superior Court has granted use of the family home to a child and, by extension, to the parent assuming most of the care of that child, pending trial,⁹⁷ for a specified time,⁹⁸ or until division of the co-ownership and sale.⁹⁹ One judge has hypothesized that, when adjudicating a dispute over use between former cohabitants who are co-owners, the same factors are relevant “as if we were in a marriage situation,” although the decision might be temporally limited.¹⁰⁰ Evidently, the lack of legislation governing “the modalities of common-law break-ups” [*sic*] does not prevent the courts of original general jurisdiction from adjudicating on occupancy of a co-owned residence pending sale or partition.¹⁰¹

⁹³ Pineau and Pratte, *supra* note 19 at para. 580 n. 1896.

⁹⁴ *S. v. P.*, [1997] R.L. 438 at 441 (Sup. Ct.).

⁹⁵ *Gagnon v. Angers*, [1996] R.D.I. 507 (C.A.), in which the court upheld an order granting the former *de facto* spouses and co-owners of an undivided property exclusive use of it in alternate years, appears a unique case, rather than an instance of a category. LaSalle, “Conjoints de fait,” *supra* note 68 at 358, suggests that the Court of Appeal created a substantive right out of nothing.

⁹⁶ Art. 1016, para. 1 C.C.Q.

⁹⁷ *Droit de la famille*—3302, [1999] R.D.F. 384 (Sup. Ct.).

⁹⁸ *Droit de la famille*—06928, 2006 QCCS 7354 (seven and one-half months).

⁹⁹ *M.B. v.   .H.* (24 May 2002), Trois-Rivi  res 400-04-004304-022 (Sup. Ct.); *Deniau v. Gautreau* (15 October 2002), Montreal 500-05-071510-026 (Sup. Ct.) [*Deniau*] (postponing partition by five years from the judgment); *J.W. v. B.B.* (11 August 2000), [2000] Q.J. No. 2805, District of St-Fran  ois 450-04-004439-005 (Sup. Ct.); *Droit de la famille*—3751, [2000] R.D.F. 745 (Sup. Ct.).

¹⁰⁰ *J.W. v. B.B.*, *ibid.* at para. 9.

¹⁰¹ *Ibid.* at para. 6. Other issues, which cannot be canvassed here, relate to the courts’ application in such contexts of the right to compensation on the part of one

Cases in the second situation show greater “suppleness,” even “a certain audacity.”¹⁰² They concern an order for use of a residence in favour of the children and a custodial parent when the custodial parent is not a co-owner.¹⁰³

Judges ordering temporary use of a residence in the case of *de facto* spouses do not purport to apply article 410.¹⁰⁴ Instead, they justify such orders on three bases. One is the interests or rights of the child. Judges have invoked the best interests of a child without reference to any legal text,¹⁰⁵ and also with reference to the call in the book on persons to respect children’s rights.¹⁰⁶ A second basis is the alimentary obligation, either the general duty of support in article 585,¹⁰⁷ or the parental duty of maintenance in article 599.¹⁰⁸ The third basis is article 522, which states that children whose filiation is established have the same rights and obligations whatever the circumstances of their birth.¹⁰⁹ Part 4 of this paper will study in more detail the relative strengths of these justifications.

B) Parenthood Outside Filiation

This section addresses a decision concerning parental authority, by which the judges effectively recognized parenthood on the part of a person whom no bond of filiation connected to the children. Since 1987, it has been unquestionable that a court can confer custody of a child on

co-owner in indivision when another has exclusive use and enjoyment of the property (art. 1016, para. 2 C.C.Q.). Raymonde LaSalle, “Les conjoints de fait et la résidence familiale” in Service de la formation permanente, Barreau du Québec, ed., *Développements récents sur l’union de fait* (Cowansville: Yvon Blais, 2000) 99 at 114-17.

¹⁰² Pineau and Pratte, *supra* note 19 at para. 384 [footnote omitted].

¹⁰³ See e.g. *Droit de la famille—3457*, [1999] R.D.F. 777 at 780 (Sup. Ct.) (exclusive use of residence for one month to the other, non-owner spouse “à titre de mère de l’enfant unique des parties”); other cases are cited in Pineau and Pratte, *ibid.* at para. 580 n. 1897.

¹⁰⁴ *Droit de la famille—3457*, *ibid.* at 778.

¹⁰⁵ *Droit de la famille—3302*, *supra* note 97 at 385; *M.B. v. É.H.*, *supra* note 99; Deniau, *supra* note 99.

¹⁰⁶ *Droit de la famille—3751*, *supra* note 99 at para. 17 (arts. 32, 33 C.C.Q.); *Droit de la famille—3457*, *supra* note 103 at paras. 20, 21 (arts. 32, 33 C.C.Q.); *Quebec Charter*, *supra* note 23, art. 39.

¹⁰⁷ *Droit de la famille—3457*, *ibid.* at para. 23.

¹⁰⁸ *Droit de la famille—06928*, *supra* note 98 at para. 19 (parental duty to “maintain” his or her children during their minority implying adequate lodging); see, similarly, *Droit de la famille—3457*, *ibid.* at 779.

¹⁰⁹ *Droit de la famille—06928*, *ibid.* at para. 17.

a third party without simultaneously depriving the parents, in whom parental authority is vested, of that authority. In *C. (G.) v. V.-F. (T.)*,¹¹⁰ the Supreme Court of Canada awarded custody of two children whose mother had died to their late mother's sister and brother-in-law. Beetz J. relied on the children's interests as the determining factor, even absent wrongful conduct by the father. The Civil Code is now explicit that when custody is entrusted to a third person, the father and mother "retain the right to supervise the maintenance and education of the children."¹¹¹

Droit de la famille—072895 concerned a dispute over the custody of two teen-aged girls after the breakdown of a lesbian relationship.¹¹² The two women in question had been *de facto* spouses from 1988 until 2002. There were complicated facts, including a sham marriage for immigration purposes between the appellant and the respondent's brother. During the women's conjugal life, the two girls were adopted, one in 1992 from one country and the other in 1994 from another. As adoption by a same-sex couple was not widely understood as permissible at the time,¹¹³ the respondent had applied for adoption as a single person. Adopting the two children was nevertheless the women's "projet commun"¹¹⁴ and the parties subsequently raised the children together. The girls called the appellant "Maman F" and the respondent "Maman G." The parties separated in March 2002. With an eye to the children's stability, the women agreed that the girls would stay with the respondent, where they had been living, until the school year ended. Beginning that summer, the parties shared the custody of the girls equally. The girls spent one out of every two weeks in the appellant's home.

In June 2004, Maman F had claimed maternity in respect of the girls, a claim that was refused on the basis that it lacked any legal foundation. She did not appeal that determination. In January 2006, she sought confirmation of shared custody as well as certain orders relating to its exercise. The trial judge found that the evidence showed that the women regarded one another as the girls' parents and that both recognized that alternating shared custody served the girls' best interests. He viewed the

¹¹⁰ [1987] 2 S.C.R. 244.

¹¹¹ Art. 605 C.C.Q.

¹¹² 2007 QCCA 1640, [2008] R.J.Q. 49.

¹¹³ While the Court of Appeal had twice indicated in *obiter* that the gender neutrality of the Code's regime on adoption did not necessarily preclude adoption by same-sex couples (*Droit de la famille—1704*, [1993] R.J.Q. 1 at 5 (C.A.); *Droit de la famille—3444*, *supra* note 39 at 2538), those comments by no means reflected a consensus; see Pineau and Pratte, *supra* note 19 at para. 443.

¹¹⁴ *Droit de la famille—072895*, *supra* note 112 at 51.

application for shared custody as a disguised appeal from the failed action for recognition of Maman F's maternity.¹¹⁵ He granted enlarged rights of access and of information, reserving to the respondent all the prerogatives and attributes of parental authority.¹¹⁶ In her appeal, Maman F identified the interests of the children as the sole applicable criterion. While now recognizing that the law precluded her from acquiring parental status, she contended that a judgment conferring shared custody would serve the children's best interests and legally solidify their circumstances. For their part, the children through their advocate asked the court to recognize that, in their daily lives, they had and loved two parents whom they wished the justice system to treat equally. The respondent, Maman G, acknowledged the emotional reality of the relationship between the children and the appellant. She insisted, however, that the appellant was a third party *vis-à-vis* the children. In her view it was legally impossible for a court to recognize any prerogatives of parental authority on the appellant's part.

The Court allowed the appeal, conferring custody of the two girls on both parties by alternate weeks. Duval Hesler and Dalphond J.J.A. wrote separate reasons, Doyon J.A. agreeing with both. The chief basis for Duval Hesler J.A.'s decision was that it advanced the children's best interests.¹¹⁷ She referred to the children's right to the protection, security, and attention of persons acting as parents in article 39 of the *Quebec Charter*. The judge also anchored her decision on Beetz J.'s judgment in *C. (G.) v. V.-F. (T)*.¹¹⁸ She acknowledged that, ordinarily, when a third party obtained custody, it was in substitution for a parent. In her view, though, granting shared custody was possible on the facts.¹¹⁹ Dalphond J.A. underscored the exceptional character of the case and the judgment's limited precedential value.¹²⁰ He noted the heavy burden of proof for a

¹¹⁵ *Ibid.* at 52; the trial judgment appears as *Droit de la famille—06742*, 2006 QCCS 7179.

¹¹⁶ *Droit de la famille—072895*, *ibid.*

¹¹⁷ *Ibid.* at 55, citing *Droit de la famille—1881*, [1993] R.D.F. 630 (C.A.).

¹¹⁸ *Supra* note 110; art. 605 C.C.Q.

¹¹⁹ *Droit de la famille—072895*, *supra* note 112 at 55.

¹²⁰ *Ibid.* at 56. A further difference that Dalphond J.A. did not address results from the kind of filiation attaching the respondent to the children, that is, adoption as opposed to filiation by blood. Was it easier to view both women as "mothers" when neither had given birth to the children? A rich literature has examined the dynamics between pairs of women who parent, one of whom is a birth mother and the other merely a "social" mother; see e.g. Deirdre M. Bowen, "The Parent Trap: Differential Power in Intact Same-Sex Families Based on Legal and Cultural Understandings of Parentage" (2008) 15 Wm. & Mary J. Wom. & L. 1; Adital Ben-Ari and Tali Livni, "Motherhood Is Not a Given Thing: Experiences and Constructed Meanings of Biological and Nonbiological

third party seeking custody, contrasting the more usual disputes between two parents each vested with parental authority.¹²¹ In his view, the appellant needed to prove definitively that keeping the girls under their adoptive mother's exclusive custody would risk compromising their development. Like his colleague, he cited article 39 of the *Quebec Charter*. In his view, that provision included a right of the child to be brought up by a person who had acted as a parent, and might entail that person having custody.¹²²

Dalphond J.A.'s emphasis on the exceptional character of the facts shows his intention that the judgment not be read as a general licence for indiscriminate orders sharing custody between titularies of parental authority and third parties. By his reference to the facts, however, he rejected the respondent's assertion that the formal status of parent and the legal characterization of stranger should be dispositive in such circumstances. However rare similar orders might be in the future,¹²³ Dalphond J.A.'s judgment means that it is no longer adequate to take the vesting of parental authority as a basis for rejecting out of hand an order sharing custody with a third party. Such a case can no longer be resolved (if it ever could) by syllogistic application of rules in the Civil Code. Instead, the judge must look contextually at the facts to determine the child's best interests. It appears that the legislature's vesting of parental authority in parents as defined by the title on filiation no longer represents an abstract, *a priori*, and peremptory determination of those interests. *Droit de la famille*—072895, in which an order relating to the exercise of

Mothers”(2006) 54 Sex Roles 521; Rhonda Brown and Amaryll Perlesz, “In Search of a Name for Lesbians Who Mother Their Non-biological Children” (2008) 4 Journal of LGBT Family Studies 453.

¹²¹ Art. 604 C.C.Q.

¹²² Dalphond J.A. added that art. 39 of the *Quebec Charter* seemed to guarantee the children a right to support on the part of the appellant; see *Droit de la famille*—072895, *supra* note 112 at para. 87. Tétrault, “La revue annuelle de la jurisprudence 2007-2008,” *supra* note 71 at 477, wonders if that comment inaugurates the concept of *in loco parentis* into provincial civil law via the *Quebec Charter*. It may, however, be understood as acknowledging that the granting of custody to a third party entails duties to supervise the child and provide for his or her current needs; see Pineau and Pratte, *supra* note 19 at para. 521. That matter is distinct from whether a civil obligation for support, equivalent to that possible under the *Divorce Act*, burdens a *de facto* parent absent any right to custody, a possibility incompatible with the usual reading of art. 585 as exhaustive.

¹²³ For another order sharing custody between a child's mother (this time a birth mother) and her former *de facto* same-sex spouse, see *Droit de la famille*—092011, 2009 QCCS 3782, [2009] R.D.F. 587, suspension of execution pending appeal refused, *Droit de la famille*—092327, 2009 QCCA 1824. The mother had deliberately refrained from seeking maternal status for her partner under the law of filiation (*ibid.* at paras. 31-34).

parental authority recognized a concept of parenting wider than that acknowledged by the law of filiation, hints that the horizon of *parentalité* may advance more quickly and flexibly than that of *parenté*. Descriptive observation in this vein cannot, however, be taken as in any way conceding ground in the normative debate as to appropriate eventual boundaries for kinship or filiation. In any event, the larger question is the extent to which other Quebec judges will follow suit by using the best interests of children to recognize family configurations outside filiation and alliance.

C) Naming Family Life

Examination of judicial language reveals that judges in Quebec use the lexicon of family law to speak of domestic situations not directly regulated by Book Two, as well as to extend the application of concepts of family law. In the cases of orders for temporary use in relation to *de facto* spouses, judges refer to the “family residence.”¹²⁴ Given the sense in matters of codal interpretation that a package of effects follows a classification, transposing this term of art outside the matrimonial context already makes likelier an order subjecting an immovable to treatment other than that prescribed by the book on property.¹²⁵

Similarly, the description of the facts in *Droit de la famille*—072895 showed a refusal to view the adoptive mother’s former partner as a stranger towards the girls. Duval Hesler J.A. wrote of the two parties as having always looked after “their girls” together.¹²⁶ The appellant had established “a mother-daughter relationship” with the children.¹²⁷ The girls wished that “one mother” not exercise greater control over them “than the other.”¹²⁸ These lexical choices are noteworthy given that prior proceedings, not under appeal, had confirmed the appellant’s lack of parental status; she was not a “mother” in the sense of Book Two’s title on filiation. Frankly, the portrait is difficult to square with the traditional view of parental authority as an effect solely of filiation. What emerges is a judicial willingness to make space for manifold existing forms of

¹²⁴ *Droit de la famille*—3302, *supra* note 97 at 385; *J.W. v. B.B.*, *supra* note 99 at para. 10 (Sup. Ct.); *Droit de la famille*—3751, *supra* note 99. For greater caution, see *Droit de la famille*—3457, *supra* note 103 at 778; Bellavance J. uses telling inverted commas to speak of “l’habitation de la résidence ‘familiale.’”

¹²⁵ Brierley and Macdonald, *supra* note 32 at 104, para. 89.

¹²⁶ *Droit de la famille*—072895, *supra* note 112 at 52; see also 54.

¹²⁷ *Ibid.* at 54.

¹²⁸ *Ibid.* at 55. Similarly, Dalphond J.A. spoke of the “reality” of the appellant’s “status” as co-mother; *ibid.* at 56, also 57, 58. See similarly *Droit de la famille*—092011, *supra* note 123 at para. 85, where Sénécal J. finds: “La preuve est toutefois claire que, dans les faits, l’enfant a eu deux ‘mères’ qui se sont occupées de lui depuis sa naissance.”

family, to attempt to bridge the gap between contemporary social discourse and the legal discourse of the Civil Code.¹²⁹

The Court of Appeal's order reveals an innovative character in relation to familial recognition. In granting custody to the aunt and uncle two decades earlier in *C. (G.) v. V.-F. (T.)*,¹³⁰ Beetz J. and the other judges of the Supreme Court had understood themselves as serving the interests of the children in the aftermath of their mother's death. They were not simultaneously validating the raising of children by an aunt and uncle as a newly cognizable familial form. There was no sense that the operative rules of filiation failed to include realities of family life. Nor was there a sense that the judges were implicitly amending those rules by allocating effects of filiation absent the *vinculum juris*. By contrast, precisely that sense emerges from the Court of Appeal's reasons in *Droit de la famille—072895*. Beyond identification of this discursive recognition of family forms, how might such recognition inscribe itself *vis-à-vis* the codified civil law?

4. *Situating Multiple Family Forms in the Civil Law*

Whatever the hopes for law reform noted above, it is worth attempting to understand the existing resources within the private law that courts are already deploying, however modestly, to address the variety of family situations before them. Although some judges have cited more than one of the possible bases for orders of temporary use, massing them together is analytically unsatisfactory. Among other things, the possibilities differ with respect to various potential beneficiaries. They are not uniform in their implications for future scenarios, and consequently they are neither interchangeable nor casually cumulative.

This part sketches two ways of reading the developments discussed above. These readings hypothesize different responses to questions about the function of best interests and the implicit constraints on that principle's ability to authorize interference with rights. The two readings explore the extent to which the comparatively open-ended norms in the book on persons interact with more specific provisions elsewhere in the Civil Code. Such questions about the relationship between a principle of general application – here the best interests of the child – and a regime detailed in the Civil Code are not novel. For instance, judges have

¹²⁹ Michelle Louise Wirth, "Who's Your Daddy? Or: Using Semiotic Tools to Deconstruct Legal Determinations of Who Holds Parenthood Obligations and Privileges" (2009) 22 Int. J. Sem. L. 83 at 102-103.

¹³⁰ *Supra* note 110.

disagreed over the extent to which the principle of a child's best interests, one reiterated at the outset of the chapter on adoption, injects discretion into the rule dispensing with a parent's consent to his child's adoption.¹³¹ Moreover, the issues are similar to those raised by the relation of provisions on good faith and abuse of rights in Book One to rights and obligations elaborated later in the Code, such as those in the book on obligations.¹³²

What this part calls the *large reading* understands the judges to have viewed the provisions on the respect of children's rights in Book One as freestanding authorization for their orders. By contrast, the *narrow reading* regards those provisions in Book One as an avenue for accessing or mirroring, by analogy, provisions elsewhere in the Civil Code. The second reading represents less of a departure from established understandings of Quebec's civil law of the family. Consequently, it might appear preferable, at least on prudential grounds. Advancing the narrow reading where it would suffice to justify a desired result does not necessarily entail a judgment that the large reading is invalid.

Ultimately, whichever reading appears preferable, the developments addressed here challenge conventional understandings of Quebec's family law. It is important not to overstate their impact. Temporary orders for use or custody orders do not represent a transformation of family law. Still, they merit further reflection, as they reveal judicial inventiveness in the interstices of the codified civil law.

A) Best Interests as Freestanding Norm?

Courts in the "family residence" and custody dispute cases have made orders that recognize a family life unmediated by the institutions,

¹³¹ Arts. 543, para. 1, 559 C.C.Q.; *Droit de la famille—1914*, [1996] R.J.Q. 219 (C.A.). See also the insistence on the "primordial" character of the child's best interests in a discussion of art. 3093 and private international law – albeit without mention of art. 33 – by H. Patrick Glenn, "Droit international privé" in Barreau du Québec and Chambre des notaires du Québec, eds., *La réforme du Code civil: Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires* (Ste-Foy: Presses de l'Université Laval, 1993) 669 at para. 24.

¹³² Arts. 6, 7 C.C.Q. The term "similar" is used advisedly; while the duty of good faith can be regarded as potentially conflicting with contractual stability, a desideratum internal to the regime of contract (Jean-Louis Baudouin, *Les obligations*, 6th ed. by Pierre-Gabriel Jobin with Nathalie Vézina (Cowansville, Qc.: Yvon Blais, 2005) at para. 92), reliance on the child's best interests (art. 33) in situations outside the book on the family imposes no direct equivalent detriment on those relations already within family law.

respectively, of marriage (or civil union) and filiation. On the large reading, the orders for temporary use of a residence and for shared custody show the judges deploying the provisions regarding children's rights – such as their right to parental and quasi-parental protection (article 32) and the right to have decisions made in their best interests (article 33) – in order to adapt law to particular facts. According to this hypothesis, articles 32 and 33 would be standalone provisions, themselves the source of authority for the orders. Those provisions would aid judges when confronting situations that, outside marriage and filiation, find no direct recognition in Book Two, but strike them as unquestionably “family” matters. While such orders evince creativity, the judicial approach displayed can be reconciled with the traditional account of family law because the judges, instead of improvising without any enacted touchstone, are “applying” children's rights that the legislature has already incorporated into the law.¹³³

Article 33 is potentially the most sweeping of the justifications cited for the orders for temporary use of a residence. It states no requirement that a “decision concerning a child” relate to a parent or individual attached by some other bond of kinship. This reach makes the provision applicable in child welfare and youth protection proceedings. The provision thus imposes no explicit constraints on whom an order made in the best interests of a given child may burden, nor on the ways in which it may advance those interests. Viewed, not as an interpretive device for applying other provisions, but as a freestanding source of authority, article 33 could potentially authorize any decision viewed as advancing the interests of some child, somewhere. The issuance of orders burdening private persons absent the *vinculum juris* of filiation would, however, represent a considerable departure from the traditional reading of the Civil Code. If there is a sense that there are appropriate limits on law's power to impose positive duties, even in pursuit of a welfare agenda,¹³⁴ caution would be warranted in relying on article 33 as a freestanding basis for interfering with property and other rights established by the Civil Code.

Article 32 appears narrower in that it specifies a limited set of debtors. It asserts a child's right respecting “his parents or the persons acting in their stead.” That last phrase indicates that filiation does not

¹³³ Kenneth Einar Himma, “Inclusive Legal Positivism” in Jules Coleman and Scott J. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 125.

¹³⁴ Pierre Noreau, “Notions juridiques et réalité sociale: un éternel divorce ou un divorce nécessaire? – Le cas du droit de la famille” (1999) 33 R.J.T. 307 at 323-24; Nicholas Kasirer, “Agapè” (2001) 53 R.I.D.C. 575.

exclusively define the class of persons burdened by article 32. It can be invoked outside a parent-child relationship. Viewing article 32 as the basis for judicial orders could mean, for instance, that an owner could be ordered to turn over use of his residence to his former *de facto* spouse and her child, if he had acted as a parent towards the latter. The provisions might also conceivably operate where neither of two (or more) adults was a child's parent. Imagine two brothers sharing a home and together raising their deceased sister's child. If the brothers had a falling out, then article 32, if seen as the justification for the orders considered here, might offer a basis for awarding interim use of the immovable to the child and to the brother having custody. Article 32 is further limited: parents and *de facto* parents owe only the protection, security, and attention that they are able to give the child. By contrast, the debtor's ability to pay does not limit the content of ordinary civil obligations.

The large reading of *Droit de la famille*—072895 emphasizes the provisions on children's rights in Book One as the basis for ordering shared custody. On this reading, the order departed from the usual view that the holders of parental authority – parents, as established by filiation – may exclusively exercise custody on the basis of statutory recognition of the importance of children's interests. The large reading would imply that articles 32 to 34 combine to authorize an award of shared custody so as to recognize a family configuration, whatever its relation to the bipartite models of filiation and alliance. More particularly, the girls' evidence regarding their relationship with the appellant can be viewed as crucial. The child's opportunity to be heard, provided in article 34, suggests that there is space for not only the legislature's definition of family, but also the child's.¹³⁵ The judges' many references to the girls' perception and their reality might lead one to suppose that this judgment represents a promising avenue for the recognition, by orders for shared custody, of other hitherto marginalized forms of family, ones not reflected by acts of birth inscribed in the register of civil status. On this reading, the judgment appears a potent resource for palliating "normative dissonance" by adapting law to familial fact.¹³⁶

¹³⁵ Indeed, Tétrault, "La revue annuelle de la jurisprudence 2007-2008," *supra* note 71 at 472-73, underscores the court's treatment of this right of the girls. Compare the perceptible impact of testimony of the child of lesbian parents in another case calling into question the legislated contours of parentage, this time a constitutional challenge to a provincial birth registration scheme: *Rutherford v. Ontario (Deputy Registrar General)* (2006), 81 O.R. (3d) 81 at 137 (S.C.J.).

¹³⁶ Brierley and Macdonald, *supra* note 32 at 180, para. 143.

B) Best Interests as Avenue to Other Provisions?

An alternative reading of the cases relies less robustly on the provisions relating to children's rights as the primary justification for the orders, although it still reads the Code as an organic whole in which provisions in one book condition the reading of those in another. Its point of departure is uneasiness with the ill-defined character of a principle of children's best interests understood as freestanding authorization for orders inconsistent with the regimes elsewhere in the Civil Code.

The narrow reading does not view articles 32 and 33 as the primary basis for the orders considered. It holds that, in a more secondary role, articles 32 and 33 provide an avenue for accessing primary rules in the book on the family or elsewhere.¹³⁷ When those articles are viewed as gateways to other written rules, the latter supply limits on what judges may order.

A judicial sense that pursuit of children's best interests, however admirable an objective, requires an anchor in more specific provisions is detectable in the limited duration of a right of use. It lasts in some cases until the partition of property held in undivided co-ownership, an event that the book on property indicates can be postponed for at most two years.¹³⁸ Yet in *Deniau v. Gautreau*, Fraiberg J. concluded, despite the right of either *de facto* spouse to the partition of the property, that it would be in the best interests of their children to order continuance of undivided co-ownership "pour la période maximale permise par la loi, soit cinq ans de la date du présent jugement."¹³⁹ This decision represents an analogical application of the maximum postponement of indivision contemplated by law, in respect of a succession.¹⁴⁰ Arguably, it is reasonable to analogize a family situation following the breakdown of a *de facto* union to a succession, which reflects the logic of status. Such an analogy might seem more apt than adhering strictly to the book on property, in which indivision is an effect of contract. Still, while regarding the approach as "seductive" for its advancement of the

¹³⁷ This more restrained reading is consistent with the fact that, in a recent introduction to the Civil Code, neither provision figures amongst those singled out as having a "structural effect" extending well beyond the book in which they appear; see Normand, *supra* note 35 at 61-64. But compare the caution that transversal equitable principles need not be explicit, and that their salience may alter over a civil code's life; see Brierley and Macdonald, *ibid.* at 129-30, para. 104, and at 192, para. 151.

¹³⁸ Art. 1032, para. 1 C.C.Q.; see e.g. *Droit de la famille—3751*, *supra* note 99.

¹³⁹ *Supra* note 99 at para. 7.

¹⁴⁰ Art. 844, para. 1 C.C.Q.

children's best interests, Tétrault suggests that there is cause for unease in an analogical application of the book on successions where both co-owners are living.¹⁴¹ The larger point, though, is not the aptness of one analogy or the other. It is the common judicial sense that the best interests of the child cannot be understood as a freestanding and limitless principle, and that consequently the temporal contours of a right of use must reflect existing rules. Articles 32 and 33 do not, on this view, authorize unstructured improvisation. What, then, are those other provisions to which the best interests of children might facilitate access, and what are their relative merits?

In discussion of the regime of the family residence, some scholars, advocates, and judges cite article 522, which affirms the equality of children's rights and obligations whatever their circumstances of birth. Those jurists do so to evoke, among other things, the concern that the restriction of article 410 to married and civil-union spouses disadvantages the children of unmarried parents.¹⁴² The implication is that the effects of marriage or civil union flow beneficially to the children of married or civilly united parents, indirectly disadvantaging children whose parents are unmarried. The function of article 522 in this context invites scrutiny.

Justifying an order for a child's temporary use of her parent's residence on the basis of article 522 requires courts to characterize the effect of marriage and civil union in paragraph 2 of article 410 as a right of the child. The difficulty with such analysis is that there is no conceptual, as opposed to prudential, reason to limit the analogical application of the effects of marriage and civil union to temporary use of a residence. The same logic could be applied, probably supportable by empirical research, to show that each rule relating to the family residence – such as the bar against unilateral alienation or encumbrance¹⁴³ – indirectly benefits the spouses' children. Indeed, other effects of marriage and civil union, such as the ability of one spouse to bind the other by a contract for current needs of the family,¹⁴⁴ have similar indirect effects. Even the partition of the family patrimony might be seen as indirectly advantaging children insofar as it partly equalizes their parents' post-divorce standard of living. Given the severity of their

¹⁴¹ Tétrault, *Droit de la famille*, *supra* note 5 at 599-600.

¹⁴² See e.g. Dominique Goubau, Ghislain Otis and David Robitaille, "La spécificité patrimoniale de l'union de fait: le libre choix et ses 'dommages collatéraux'" (2003) 44 C. de D. 3.

¹⁴³ Art. 401 C.C.Q.

¹⁴⁴ Art. 397 C.C.Q.

intrusion into the prerogatives of ownership, however, applying those rules by analogy would seem suspect. Article 522 is undoubtedly significant as a representation of legislative commitment to children's equality. Yet there is no principled basis by which a court could conclude that article 522 authorizes the analogical extension of some but not all effects of marriage and civil union, once those effects are viewed as indirectly benefiting the children of married or civil-union spouses.

Another and perhaps more promising hypothesis would posit that the orders conferring temporary use of an immovable, whether owned by one parent or both, concretizes an implicit element of the alimentary obligation owed to a child. The alimentary duty is not mediated through the other *de facto* spouse; it is owed directly to the child. A focus on the direct binary relationship between the parent and child may alleviate the understandable worry that such orders analogize a *de facto* union to a marriage or civil union but without the partners' consent and produce the effects of articles 410 or 500.

An order for use has been justified on the basis of article 585, which sets out the general alimentary obligation operating reciprocally as between married and civil-union spouses and between parents and children. As noted in one of the cases, article 592 contemplates a dispensation for a debtor owing support who offers to take the creditor into his home.¹⁴⁵ Given the breadth of article 585, that justification would in principle permit orders for use in circumstances not involving minor children. If a parent and her adult child lived in a residence owned by the child, and they quarrelled and the owner-child moved out, would a court confer entitlement to use of the residence on the parent, pending some resolution? If, as one might predict, the answer is negative, it helps confirm the intuition that the right of use is perceived as confined to circumstances of parents and minor children. That intuition points to the Code's title on parental authority, as opposed to that on the obligation of support, as the most promising source of justification.¹⁴⁶

Indeed, relying on the parent's duty of maintenance in paragraph 2 of article 599, as opposed to the general duty of support in article 585, establishes limits on orders for temporary use that are arguably consistent with the intuition about their appropriate scope. The parental

¹⁴⁵ *Droit de la famille*—3457, *supra* note 103 at 780.

¹⁴⁶ Admittedly, the regime at art. 585ff. C.C.Q. provides one basis for a temporal limitation: an award of support takes account, where appropriate, of "the time needed by the creditor of support to acquire sufficient autonomy." This provision limits the duration of an obligation; it does not imply that the creditor's age precludes an award *per se*.

duty of maintenance is already understood as including lodging among the other necessities.¹⁴⁷ It is temporally limited; the duty of maintenance, like the other attributes of parental authority, lapses on the child's majority or emancipation.¹⁴⁸ As parental authority is an effect of filiation, the parental duty of maintenance would justify an order for use only where a bond of filiation linked the child beneficiary to the adult whose residence was burdened. The understanding that the orders are justified by article 599, itself solely an incident of filiation until the legislature modifies this exclusionary state of affairs, would imply that the use of an immovable could not be awarded to a child at his step-parent's expense.

Moreover, in comparison with the other justifications already canvassed, only the duty of maintenance in article 599 rests on the connection between custody of the child and the parental duty. That duty appears immediately after the statement of the father's and mother's rights and duties of custody, supervision, and education of their children. The Civil Code's adjacent placement of the rights and duties of custody and the parental duty of maintenance captures the connection discernible in the orders.

While article 599 might justify the orders reported here, it does not explain their temporal contours. The constraint emanating from the title on parental authority is lapse on the child's majority. It offers no concrete guidance as to either the appropriateness of a judge's suspending division of property or the duration of such a suspension, whether it should be two years as under the book on property, for example, or five years as under the book on successions. Perhaps the temporary character of the orders considered here reflects article 589's preference for payment of support as a pension rather than a lump sum. Indeed, Blondin J., discussing the justification for an order for temporary use as flowing from the alimentary obligation, expressed unease with the possibility that an order for use might effectively convert a support obligation into a transfer of property.¹⁴⁹

¹⁴⁷ Jean Carbonnier, *Droit civil*, t. 2, *La famille, l'enfant, le couple*, 21st ed. (Paris: Thémis, 2002) at 53; Gérard Cornu, *La famille*, 9th ed. (Paris: Montchrestien, 2006) at para. 105; Pineau and Pratte, *supra* note 19 at para. 517.

¹⁴⁸ Art. 598 C.C.Q. *L. (N.) v. B. (F.)* (9 August 2004), Quebec 200-04-012001-036 (Sup. Ct.) (use of family residence and its furnishings accorded to the child until attainment of the age of majority on the basis of the parental obligation of maintenance in art. 599 C.C.Q.), discussed by Tétrault, *Droit de la famille*, *supra* note 5 at 598.

¹⁴⁹ *N.L. v. L.B.*, [2004] R.D.F. 550 at paras. 36-39 (Sup. Ct.). For criticism of this consideration, on the basis that Quebec decisions had already recognized the possibility of attributing ownership of an immovable as payment of a lump sum, see Tétrault, *Droit de la famille*, *ibid.* at 597.

As an aside, it may be that the duty of maintenance in paragraph 2 of article 599, and not the spouses' consent, best justifies the application of paragraph 2 of article 410 in the case of married and civil-union spouses. The latter stands out among the rules on the family residence for its necessary connection between the spouse who benefits from it and the custody of a child. The sense that the parent's duty to support his child underlies such awards helps rationalize the cases from the 1980s, prior to the addition and coming into force of what is now article 410, paragraph 2, in which courts had ordered a right of use to the family residence as an incident of the non-owner's custody of the children.¹⁵⁰ By contrast, article 500, by which a court may order either spouse to leave the family residence during proceedings for separation from bed and board, for nullity or for divorce, or during proceedings for dissolution of a civil union, makes no reference to children. It may thus find justification in the spouses' consent on solemnization.

Returning to the order for custody in *Droit de la famille—072895*, the analysis shifts, although the question remains how best to understand the relationship between the order and the codified family law. It has been suggested here that, with respect to the residence orders, it is the alimentary obligation, not the rights or interests of children, that may be plausibly viewed as pulling the weight. But the custody dispute plainly turned on the best interests of children, whether codified in articles 32 and 33 or in article 606. Sketched in the context of *Droit de la famille—072895*, the narrow reading relates to the best interests of children as a basis for analogical application of the civil law of the family beyond its formal confines. Here too, the narrow reading requires less departure from established understandings of the Civil Code. If favoured, it might well limit that judgment's impact, as Dalphond J.A. evidently intended.

Whatever the breadth of articles 32 and 33, the judges likely detected hidden contours that constrained their recognition of forms of family. That is one way to make sense of Duval Hesler J.A.'s reference to the legal reforms in favour of same-sex couples that were made subsequent to key moments of family formation for the parties, notably the adoption

¹⁵⁰ *Droit de la famille—579* (1988), [1989] R.J.Q. 51 (C.A.) (relying on the *Divorce Act*, characterizing the right of use as incidental to child custody); *Droit de la famille—745*, [1990] R.J.Q. 204 (Sup. Ct.) (relying on the new provisions enacted between the initiation of the action and the appeal, or, in the alternative, on the connection with an order for child custody). But see the view that art. 410 is entirely a matter of the rights of the separating spouses, not of their children's: Pineau and Pratte, *supra* note 19, at para. 581 n. 1902.

of the girls by the respondent.¹⁵¹ The status of those comments in the analysis is initially puzzling. Prospective legislative reforms are often taken as confirming that what they henceforth permit was previously impossible. As those reforms modified filiation, rather than adding new modalities for the exercise of parental authority, they appear to have further entrenched filiation's conceptual centrality. Why did the judge regard as relevant to a dispute over the exercise of parental authority the possibilities for recognition of same-sex conjugality and parenting enacted into the civil law after the parties' separation in March 2002?

Those developments would be relevant if the judges had a sense that beyond the bonds of kinship the best interests of the child has internal limits and is not wholly amorphous. Perhaps the reforms can be invoked to achieve partial recognition of a family unit that is sufficiently close to families as recognized by alliance and filiation. On this hypothesis, the subsequent reforms cited by Duval Hesler J.A. help indicate that the configuration of the two women and the two children, even after the breakdown of the adults' *de facto* union, was now enough like a "family" to influence judicial discretion. Although they were not deployed directly, the legislative amendments between the breakdown of the relationship in 2002 and the appeal had redefined the recognizable forms of family life, and with a retroactive resonance, if no direct effect.¹⁵² The two women in the appeal were analogous to same-sex couples that adopted children together, or who were married or civilly united so that a presumption of parenthood might arise in a case of assisted procreation.

In the case of male partners, while some perceive the public policy against surrogacy agreements as preventing the establishment of filial bonds between an adult who is not a genetic parent and a child born to a surrogate mother,¹⁵³ the approach to children's best interests modeled by

¹⁵¹ *Droit de la famille*—072895, *supra* note 112 at 54, citing art. 578.1 C.C.Q. (adoption by same-sex couples, added in 2002); *Civil Marriage Act*, *supra* note 27 (the possibility from 2005 onwards of marriage); *Divorce Act*, *supra* note 28 (custody and support in respect of any "child of the marriage"); art. 555 C.C.Q. (special consent for adoption of one's child by one's *de facto* spouse of at least three years).

¹⁵² Compare the determination that the provisions on the filiation of children born of assisted procreation were immediately applicable but not retroactive in effect; see *Droit de la famille*—07528, *supra* note 63.

¹⁵³ Two readings of art. 541 C.C.Q. remain in contention. Cast crudely, one holds that the absolute nullity of surrogacy agreements precludes state institutions from any complicity in arrangements having involved surrogacy (Adoption—091, 2009 QCCQ 628, [2009] R.J.Q. 445 (adoption refused)). The other, more narrowly, sees art. 541 simply as precluding civil enforcement of any such agreements but leaving open the path to adoption

the Quebec Court of Appeal in *Droit de la famille—072895* might lead on suitable facts to shared custody. Even where an order establishing filiation is precluded, an order for shared custody might be possible where the adults in question – a parent, say, and a third party – are conceivable within family law as a conjugal couple. However restrained the possibilities in relation to filiation via assisted procreation, the Civil Code's recognition of adoption by two men,¹⁵⁴ as well as of a civil union with same-sex spouses, makes recognizable and thinkable the carrying out of parenting by a male couple.

By implication, on this reading it might be harder to deploy article 33 in a custody dispute so as to recognize a configuration currently less familiar as familial.¹⁵⁵ For example, it might be more difficult to secure already shared custody on the part of an individual without parental authority if three adults – a cluster with no analogous form of legal adult conjugality – had been raising a child together, even if the child regarded all three as parents.¹⁵⁶ Or it might be expected that a court might lean more heavily on the constraint posed by the vesting of parental authority in a child's legal parents if, say, a parent were raising a child with a friend.¹⁵⁷

5. Conclusion

Whether or not one agrees with those scholars who opine that legislative reform of Quebec's law of the family is in order, if not overdue, the understanding of the sources of law and of the respective lawmaking roles of legislature and judiciary requires revision. The judicial decisions recounted here – interstitial lawmaking, though not legislation – do not substitute for systematic legislative reform. At a minimum, however, they hint that Quebec judges do not always find the legislature's posited law quite as confining as is sometimes supposed.

by special consent of a child born to a surrogate mother (Adoption—09184, 2009 QCCQ 9058, [2009] R.J.Q. 2694 (adoption granted on unusual facts, including the altruism of the surrogate mother who was the aunt of the woman seeking to adopt the child); Adoption—09367, 2009 QCCQ 16815, [2009] J.Q. no 18623 (QL) (adoption granted, distinguishing Adoption—091, *ibid.*, on the basis that the contractual side of the arrangements had been legally executed in California)).

¹⁵⁴ Art. 578.1 C.C.Q.

¹⁵⁵ See generally Alison Diduck, "Shifting Familiarity" (2005) 58 Current Legal Problems 235.

¹⁵⁶ See the trial judge's finding in *A.A. v. B.B.*, *supra* note 62, that the child's best interests called for recognizing the parental status of the second mother, in addition to the birth mother and the father.

¹⁵⁷ Jessica R. Feinberg, "Friends as Co-Parents" (2009) 43 U.S.F. L. Rev. 799.

The cases discussed here show some judges to have deployed the resources in the Civil Code, including the importance of children's best interests affirmed by article 33, so as to extend the horizons of family. These judges, like the exegetes discussed by Philippe Rémy, do not genuflect before the positive law or the Code. They interrogate those sources of law in a "dialectical art," subjecting them to sustained questioning.¹⁵⁸ The signs of Quebec judges' creativity, balanced by indications of common law judges' perceived constraints, confirm that the caricatures of the rule-bound civilian judge and the unconstrained heroic common law judge obscure more than they illuminate. At least some Quebec judges craft orders reflective of a sense that, in family matters, the Civil Code's spirit, suffusing and surrounding the letter of the law, is purposive and adaptive.¹⁵⁹ It remains to be seen whether the large or the narrow reading of the cases resonates with judges, but whichever approach prevails, the methodological lessons discernible in the cases discussed here reach beyond their immediate effects.

While the legislature indisputably maintains pride of place as a site of law reform,¹⁶⁰ distinctions between the respective roles of the judiciary and the legislature are less watertight than recently suggested in the challenge to Quebec's matrimonial regime under section 15 of the *Canadian Charter*.¹⁶¹ It is understandable that a trial judge would reiterate the standard account of the institutional division of labour. The better view of evolving practice, however, is that courts, with the legislature, partake in "la collaboration permanente de différents facteurs de création;"¹⁶² they exercise a shared competence in the development of family law. And within a terrain structured by that shared competence, the modes of amendment available to the participating actors – textual or non-textual, explicit or implicit, to use distinctions elaborated in an insightful study of law reform¹⁶³ – are numerous and variable. It is to be

¹⁵⁸ Philippe Rémy, "Éloge de l'exégèse" (1985) 1 *Droits* 115 at 121-22.

¹⁵⁹ Compare another approach to the dialectic between general principles and codal text: in discussion of the Court of Appeal's indications that the gender-neutral drafting of the Code permitted adoption by same-sex couples in *Droit de la famille—072895*, *supra* note 112 (which was decided prior to the 2002 enactment of art. 578.1 C.C.Q.), Pineau and Pratte, *supra* note 19 at para. 443, write that "la lettre du Code civil ne devait pas en contredire l'esprit."

¹⁶⁰ Consider the ambitious proposals sketched for public consultation in the draft bill *An Act to amend the Civil Code and other legislative provisions as regards adoption and parental authority*, 1st Sess., 39th Leg., Quebec, 2009.

¹⁶¹ *Droit de la famille—091768*, *supra* note 68 at 2107.

¹⁶² Alland and Rials, *supra* note 63, s.v. "sources de droit" at 1433.

¹⁶³ Roderick A. Macdonald and Hoi Kong, "Patchwork Law Reform: Your Idea Is Good in Practice, But It Won't Work in Theory" (2006) 44 *Osgoode Hall L.J.* 11.

hoped that an unsuccessful challenge under the *Canadian Charter* will not chill an organic process already underway by which the state's law of the family aligns itself, in fits and starts, with its citizens' practices of family.