



# IDEOLOGY AND DYSFUNCTION IN FAMILY LAW

## HOW COURTS DISENFRANCHISE FATHERS

You know the family is in trouble when a  
whole branch of the law is devoted to it.

*-George Jonas*

GRANT A. BROWN, D.Phil., LL.B.



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## Reviews of the book

Buy this book! Meticulously researched and thorough, yet easy to read for the lay person, Oxford educated philosopher, professor and lawyer Grant Brown has created a tour de force exposition of family law in Canada today. There is no more compelling argument for Canadian family law reform than this book. *Ideology and Disfunction in Family Law* is a soon-to-be classic and a must-read for anyone interested in families or family law in Canada.

- **Dr. Paul Millar**, Nipissing University

Grant Brown's well-written and well-researched book should be required reading for anyone involved in the divorce industry. It is an blunt and comprehensive assessment of the badly flawed, gender biased system that routinely removes children from the lives of divorced dads and renders them, at best, as "visitors" in their child's life and, at worst, as "wallets" for their ex-spouses. Brown is at his best using incisive logic and well-crafted illustrations to easily refute the arguments of defenders of the status quo. He fearlessly takes on many in his own profession who serve to perpetuate the system that denies divorced fathers basic rights of parenthood. This is an especially honest and courageous book that should be a catalyst for long overdue changes in the way we approach divorce and parenting. Implicit in Brown's analysis of the serious flaws in the existing (anti-father) system is that unless there is fundamental change to establish an equal parenting system, there is a real risk that prospective fathers (especially the financially successful) will be reluctant to marry and have children.

- **Dr. Chris Sarlo**, Nipissing University

There is no dearth of material on the bias against fathers in western family courts. As a journalist focused on culture and ideology in Canada's social institutions, I have read many books and articles on this subject. *Ideology and Dysfunction in Family Law: How Courts Disenfranchise Fathers* is in my experience unique in its referential breadth and depth. This book unites impeccable legal scholarship, moral philosophy and evidence-based cultural analysis with stylistic precision and elegance. Grant Brown puts forward arguments never heard in family court: parents' inherent rights; children's real best interests (not what the courts usually say they are); the unconstitutionality of the Child Support Guidelines; and, in general the irreconcilability of the law with the first principles of justice. More than a superb reference book for journalists and policy makers, not to mention all educated readers with an interest in judicial fairness, Brown's book should be on the obligatory reading list of every law school in Canada.

- **Barbara Kay**, *National Post* columnist and author

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# **Ideology And Dysfunction In Family Law**

## **HOW COURTS DISENFRANCHISE FATHERS**

**By Grant A. Brown, D.Phil., LL.B.**

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Grant A. Brown obtained a B.A. (Hons.) and M.A. in philosophy at the University of Waterloo, and a D.Phil. in political philosophy at Oxford University, England. He taught applied ethics and applied political philosophy in the Faculty of Management, and theoretical ethics and political philosophy in the Philosophy Department, at the University of Lethbridge. He subsequently obtained an LL.B. at the University of Alberta, before commencing a private practice of family law in Edmonton. Throughout his academic and professional career, Dr. Brown has published extensively in both the popular and academic presses, taking a particular interest in gender issues. His ground-breaking empirical work on employment equity and domestic violence is complemented in the present book by an analysis and assessment of family law in Canada.

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*Over the years, I have benefited from the (mostly unpublished) research and email correspondence of laymen who advocate for father’s rights, in particular: Brian Jenkins, George Piskor, Lucien Khodeir, and Peter Roscoe. Deprived of their proper role as fathers to their children, these men have invested tremendous amounts of time, energy, and intellect tabulating the results of court decisions and the effects of the child support guidelines. Anyone who conscientiously reads their materials could not fail to be impressed by the enormity of*

*the bias faced by fathers in court. These men, working part time, put their full-time, politically correct, academic counterparts to shame.*

*Finally, I would be remiss not to thank activist Jeremy Swanson and columnist Barbara Kay for their unwavering patience and encouragement during the writing of this book. Family law – the enterprise of making fathers pay for the privilege of having meaningful contact with their children taken away – is an utterly depressing subject. Without them in my corner urging me on, this book would doubtless have never seen the light of day. To all of the above-mentioned, thanks.*



## Chapter 1

# Disenfranchising Dads

*It's clear that most American children suffer too  
much mother and too little father.*

*- Gloria Steinem*

For several decades now, fathers have faced significant, widespread bias in family courts across Canada. Judges routinely deny perfectly normal, loving parents fundamental reproductive and financial freedoms, on the flimsiest of excuses and the poorest of evidence – based solely on their biological sex. As the roles of fathers and mothers have evolved in society, this discrimination has only accelerated; for whereas one would expect fathers today to fare better in family court than their grandfathers and even their fathers had, the fact is that there has been no substantial change in the legal status of fatherhood over the generations.

Many readers will find these statements startling, even incendiary, dismissing them as eccentric. This reaction is a product of the anti-male bias that pervades societal attitudes and institutions – bias that is so much a part of the air we breathe as to be almost unnoticeable (Nathanson and Young 2001, 2006). When a particularly glaring example of misandry is reported in the media, most people shrug, acknowledge silently to themselves that the system isn't perfect, and move on. We have all assimilated the cliché that you cannot prove anything with anecdotes. When a particularly motivated writer turns to surveys and compilations, people's eyes glaze over at the technical jargon and emotionless numbers. We have also assimilated the cliché that you can prove anything with statistics. This too-easy rejection of both anecdotal and statistical evidence is nothing but a defense mechanism for those committed to their pre-critical prejudices. Any writer who wishes to present a compelling case for fathers must overcome the powerful forces of confirmation bias.

Despite the popular clichés, respectable qualitative and quantitative methods can be brought bear on controversial subjects to change people's minds and attitudes. It is possible to navigate between the Scylla of anecdotal evidence and the Charybdis of statistical analyses; and it is best, of course, when these complementary approaches are integrated. This book rests its argument primarily on quantitative analyses that show the popular prejudices against fathers have no empirical, ethical, or legal foundation. An anticipated second book will illustrate and reinforce the conclusions presented here through a detailed analysis of a number of concrete cases. The goal is to present an argument that is academically sound without being impenetrable to the motivated and open-minded reader of moderate intelligence. Wherever possible, plain language and popular rhetorical flourish have been employed, without sacrificing scholarly rigour.

The single, over-riding mantra of family law in Canada is that all decisions affecting a child must be made in that child's best interests. The first chapter examines the extent to which judges are true to their own principle when making decisions affecting the custody of children.<sup>1</sup> It is assumed for the sake of argument that the best-interests principle is intelligible, practicable, and correct; the issue here is whether judges actually apply it reasonably and fairly. Empirical evidence is adduced to show, first, that judges in Canada overwhelmingly favour mothers with primary custody; second, that insofar as we can determine what parenting attributes lead to positive and negative outcomes for children, these attributes are not associated with the gender of a parent; and third, that there is thus a disconnect between what judges pretend to be doing in awarding custody and what they are actually achieving.

Chapter two identifies the best-interests principle as a species of consequentialist moral reasoning, and employs the standard suite of criticisms of consequentialism to challenge the merits of this principle. The third chapter of this volume proposes an alternative principle for making custody decisions, one grounded in parental rights. It is argued that a legal presumption of shared parenting should supplant the best-interests principle as the determinant of custody awards. In chapter four, attention is turned to our punitive, "American-style" child-support system. The sociological and ethical bases of the federal *Child Support Guidelines* are examined, along with their questionable legislative history. The penultimate chapter comprehensively critiques the *Guidelines* and their draconian enforcement in the context of a sustained constitutional challenge. It is argued that the child-support regime is mainly an income redistribution mechanism whose objective is to maintain mothers after separation "in the style to which they had become accustomed." The final chapter explores the systemic flaws in the legal system as a means of resolving family disputes. This enormously expensive, extraordinarily complex, and perversely adversarial system typically leaves judges in no position to make informed and reasonable decisions affecting children. In fact, the legal system is arguably the most destructive force working against families in society today.

## The Gender Paradigm

*What persuades men and women to mistake each other from time to time for gods or vermin is ideology.*

- Terry Eagleton

Kuhn (1965) used the term 'paradigm' to refer to the dominant system of mutually reinforcing beliefs that structure thinking about a given subject. Dutton and Nicholls (2005) coined the phrase 'gender paradigm' to refer to theories that account for socio-psychological phenomena as disproportionately or exclusively a function of maleness or femaleness. The gender paradigm posits that men and women are substantially different, that these differences – whether biological or socially constructed – are largely beyond the control of any individual to overcome, and that they lead to widely disparate outcomes in various fields. The gender paradigm has historically promoted patriarchy by assigning to men the roles of governance and employment, while

assigning to women the subordinate roles of mother and caregiver. By a strange inversion, the gender paradigm today tends to promote matriarchy – and nowhere more so than in the legal system (Brown 2006; Nathanson and Young 2006).

Modern feminists have mostly concerned themselves with dismantling patriarchy by debunking and combating the gender paradigm in the “public sphere” – in education, politics, and employment. Regrettably, this battle has often been waged on the misguided basis of an *a priori* political ideology; but happily, the science of gender differences largely supports the endeavour.<sup>2</sup> While it cannot be seriously doubted that gender differences in skills and preferences exist, or that they have significant ramifications in some fields of endeavour, the critically important fact is that they tend to be small on average – pronounced only at the extreme tails of the distributions (Kimura 2000) – and highly malleable to training, education, and experience (Doidge 2007). In short, the great majority of the human population occupy the overlapping area in the middle of the distribution of any aptitude. For all intents and purposes, gender differences are irrelevant to performance in nearly all occupations in existence today, aside from physical labour. It comes as no surprise, then, that feminists have been largely successful in dismantling the vestiges of patriarchy in advanced western democracies like Canada.<sup>3</sup>

Feminists have been less enthusiastic about debunking and combating the gender paradigm in the “private sphere,” however. On the contrary, the vast preponderance of feminist writing supports the notion that men and women are inherently different when it comes to styles of intimacy and parenting, and that the female style is preferable.<sup>4</sup> Feminists have busied themselves preserving the ideology of female superiority in the home, along with the privileges traditionally associated with that status. Thus, for example, the dogma that domestic violence is a serious, widespread, and gendered phenomena stubbornly persists in our culture despite the overwhelming empirical evidence that it is perpetrated almost equally by men and women, and in its more damaging forms is a rare product of individual psychopathology rather than gendered socialization (Dutton 2006). The demonization of men inherent in the gender paradigm in domestic violence has real consequences in our legal system.<sup>5</sup> Brown (2004) has shown that, while justice is supposed to be blind to gender, in actual fact gender is the most predictive factor for outcomes at every stage in the prosecution of intimate partner violence, when all legally recognized aggravating and mitigating factors are taken into account. Thanks to Millar (2009), we now have compelling empirical evidence from which to draw a similar conclusion about the predictive power of gender in the awarding of child custody.

## The disenfranchisement of fathers<sup>6</sup>

*[A] judge's sympathy is aroused by a mother. We seek to avoid the situation of motherless children, so sometimes we may temper justice with additional mercy.*

*- William Kapelman*

Millar's analysis of custody awards is based upon data from the Central Divorce Registry (CDR). This is a huge database assembled by the Department of Justice in Ottawa, documenting all

divorce judgments rendered in Canada since confederation. He analyses the complete data from the proclamation of the current *Divorce Act* on June 1, 1986, until September 30, 2002, to isolate the gender of the parent as a predictor of custody awards in contemporary Canada. The CDR dataset yielded over 1.1 million parent-child pairings in divorce judgments in the search period. Mothers obtained sole custody of the child in 67% of these parent-child pairings; fathers obtained sole custody in 11% of them; and the remaining 22% were joint custody awards (Millar 2009: Table 2.3, p. 25).<sup>2</sup> Put another way, the mother obtained either sole or joint custody over 89% of the children, whereas the father obtained either joint or sole custody only 33% of the time. Thus mothers were 2.7 times as likely as fathers to obtain some form of custody. Millar (*ibid*, p. 26) shows that this represents no change in the awarding of custody since the 1970s. Juby *et al.* (2003: p. 23) confirms this finding. In fact, despite radical changes in the workforce participation of women, and in the proportion of childcare responsibilities undertaken by men (Kruk 2008), there has been virtually no change in the past 100 years in the proportion of cases where mothers obtain primary custody (Millar 2009: pp. 12-13). This unwavering consistency through periods of tremendous social change is a remarkable finding in need of special explanation.

While mothers were 2.7 times as likely as fathers to obtain some form of custody, they were more than six times as likely to obtain sole custody of the child compared with fathers. To convert Millar's findings into a comparison of primary custody *versus* shared parenting, an estimate must be made of the proportion of joint legal custody cases where the child lived primarily with the mother or father. A conservative estimate would be that at least two-thirds of joint-custody cases involved primary physical custody with mothers. Given that figure, mothers obtained primary custody about 80% of the time in the period 1986-2002; fathers obtained primary custody about 13% of the time; and shared parenting arrangements arose for only 7% of the children in this period. Whether in terms of sole or primary custody, mothers were favoured over fathers by more than a 6:1 ratio. Although there was a slight increase in the awarding of joint legal custody under the *Divorce Act* (1985), a great majority of such orders still involved primary residency to the mothers.

The underlying preference for mothers was even greater than this rather crude analysis suggests. The CDR dataset contains a wealth of information about the circumstances of the divorce, including which party initiated the action, the grounds pled (adultery, mental or physical cruelty, or separation for a year), whether or not there was a hearing to determine custody, the family size, the age and position of the child within the family, the age of each of the parents, the region of the country, the year of the divorce, and the duration of the marriage. A multinomial regression shows that nearly all of these variables were statistically significant in predicting custody outcomes (*ibid*, Table A4, pp. 40-41). This is a curious result, since none of these variables is directly related to a child's interests, although some of them are no doubt correlated with parenting aptitude. For example, since parent-child bonding tends to become more established as time goes on, one would expect longer-term marriages with older children to produce more joint custody outcomes. Likewise, one would expect fathers to be more likely to obtain custody when a case goes to trial, since only those fathers in the most

favourable position to contest custody would brave the long odds and incur the considerable expense of a trial. These hypotheses are supported by Millar's analysis. What is of particular interest, however, is that the gender of the parent dramatically increases in significance when controlling for the above variables: Mothers were more than 27 times as likely as fathers to obtain sole custody, and over five times as likely to obtain joint custody, when the influence of the above circumstances of the divorce is controlled for.

Millar presents a second multinomial regression incorporating three interaction variables with gender (*ibid*, Table A5, pp. 42-43). This model shows that when the marriage was of shorter duration, when the wife's adultery was not pled as grounds for divorce, and when a hearing was not held to determine custody, mothers were more than 142 times as likely as fathers to obtain sole custody, and over 12 times as likely to obtain joint custody. In other words, in order for a divorced father to have any realistic chance of obtaining custody, there had to be special circumstances counting in his favour or against the mother. It appears from these numbers that a divorced father will only obtain primary custody of his children if the mother has either abandoned them or has been shown to be an unfit parent. Except for very rare cases, he will obtain shared parenting only when the mother consents to it.

As sociological models go, Millar's is a highly predictive one: it correctly predicts custody outcomes in 70% of cases (*ibid*, p. 33). This casts doubt on the possibility that other variables, not measured in the above-summarized analyses, are more determinative of the assignment of custody.

## In the shadow of divorce

*There is no barsber sanction than to be separated from your child.*

- *unknown*

Millar's results are based only on cases in the CDR, which ended in a divorce judgment. He did not analyse cases where married parents separated without getting a formal divorce, or cases where the parents had been in a common-law relationship, or cases where the parents never married or cohabited. Altogether, Millar's analyses cover less than a third of the children of separated parents (Marcil-Gratton and Le Bourdais 2000: Table 4, p. 15). He addresses this limitation in a rather abstract manner, with a discussion of the role of the legal system and its agents in structuring expectations and controlling outcomes, even in cases where legal involvement is minimal or non-existent. The view that all negotiation takes place "in the shadow of the law" is invoked to explain why we should not expect the determinants of custody in cases of common-law or non-cohabiting parents, or in non-litigated cases, to be radically different from the determinants of custody revealed by an analysis of the cases in the CDR. While there may well be important differences in outcomes between litigated and non-litigated cases, or between divorce cases and common-law cases, Millar hypothesizes that these differences would have more to do with self-selection and broader demographic features of the



different populations than with the way the legal system determines custody in those different parental-status types of case. In fact, one would expect divorced fathers to be in the better position to maintain some custodial role in their children's lives after a separation, relative to never-married fathers. Fathers who never even cohabited with the child's mother would be in an especially disadvantageous position, since they have no opportunity to establish their parenting credentials before a trial.

Abstract reasoning of this kind can be supplemented and confirmed with data from other sources that demonstrate the custodial arrangements of children of separated parents who never obtained a divorce.<sup>8</sup> Le Bourdais *et al.* (2001: p. 13) report that children born to cohabiting parents were considerably more at risk of experiencing the separation of their parents than children born to married couples, and they were significantly less likely to have frequent contact with their fathers after the separation, too. At the other end of the scale, however, children born to married couples were slightly more likely to see their fathers only rarely or not at all after their parents separate, compared to parents who had been cohabiting when the child was born. It seems that when marriage bonds are broken, the greater intensity of the parents' negative feelings toward each other might result in more parental alienation – specifically, more intense efforts by the mother to keep the father away from the children (Baskerville 2007: pp. 246-7).

Marcil-Gratton and Le Bourdais (1999) found that court orders placed 89% of children under the age of 12 in the primary custody of their mothers, and only 8% in the primary custody of their fathers. Only about 3% of children enjoyed shared parenting arrangements. The preference for maternal custody was slightly greater when no court order was obtained. Thus according to this source, mothers were at least 11 times as likely as fathers to obtain primary custody of children under the age of 12. Recall that the ratio in Millar's sample was only 6 times more likely. While numerous similar findings could be adduced from these reports over the years, and while the data from these reports allow for a much more detailed and nuanced understanding of custody arrangements after separation – depending on parental status, age and sex of the child, and so on – suffice it to say for present purposes that the hypothesis that divorced fathers tend on the whole to fare better than common-law and never-married fathers in achieving custody of their children is powerfully confirmed. The law's shadow extends to non-litigated cases as well.

Millar's (2009: p. 33) preliminary conclusion is suitably tentative:

A finding of such a drastic difference in outcomes by gender in virtually any other field of human endeavour would almost certainly lead to strong suspicions of gender bias. Nevertheless, it is possible that variables having unmeasured covariance with gender or with other variables that *do* relate to the best interests of children have an effect. For example, it is important to assess whether gender differences in caregiving or other characteristics result in important differentials in outcomes for children.

Note that a preference for mothers over fathers implies a preference for primary custody over shared parenting arrangements, as that is the only way a maternal preference could be manifest.

But the reverse is not the case: a preference for primary custody can exist without a maternal preference, if primary custody were equally likely to be awarded to fathers as mothers. Given that these two types of judicial preference are distinct, it is necessary to consider whether the preference for primary custody over shared parenting is any better motivated than the preference for mothers over fathers. In what follows, first the preference for primary custody will be examined, followed by the preference for mothers over fathers.

## The primary caregiver theory of parenting

*The childhood shows the man, as morning shows the day.*

*- John Milton*

Judges of course cannot appeal overtly to the gender paradigm in their custody decisions; they cannot say that women simply make better parents than men – although many lawyers have stories to tell about how some relics on the bench even go this far.<sup>2</sup> Rather, the biases inherent in the gender paradigm operate on a subconscious level, filtered through ostensibly gender-neutral criteria. Appealing to ill-defined and malleable principles like “the best interests of the child” is a perfect way to disguise prejudice with neutral-sounding, high-minded bunk. Considering the central importance of this principle to custody decisions, it is revealing that specific criteria related to the best interests of children have never been scientifically investigated by legislative committees, nor articulated in the governing legislation. Judges are simply assumed to be able to appreciate what constitutes a child’s best interests in any given case, by “weighing” and “balancing” numerous potential factors intuitively and unaided by any special training in child psychology or family dynamics. Insofar as the best-interests principle has been subjected to judicial interpretation, it tends to be superficial, idiosyncratic, and based upon theories of child development that have not been subjected to rigorous empirical testing.<sup>10</sup> It is critical, therefore, to appreciate the theory of parenting espoused by appellate courts in Canada, which supposedly connects the best interests of the child to a pronounced preference for primary maternal custody.

Courts do not operate in an ideological or theoretical vacuum. Millar (2009: p. 4) notes that the pronouncement of the *Divorce Act* (1985) coincided with the introduction of “social context education” for the judiciary. These highly secretive courses heavily promote the primary caregiver theory of parenting, deriving from Goldstein *et al.* (1973, 1979, 1986, 1996). According to this theory, a child develops a primary attachment to only one adult, and the preservation of this attachment is all-important to the child’s development. Relationships with other adults are of little positive significance to a child, hence severing those attachments is of little consequence. More typically, adults other than the primary caregiver merely interfere with the child’s primary attachment, resulting in confusion, tension, and anxiety. Thus the primary caregiver theory strongly recommends the awarding of primary custody in all cases where the parents cannot agree on shared parenting. Following legal precedent rather than empirical evidence, Goldstein and his colleagues identify the primary caregiver with behaviours traditionally associated with

early maternal care.<sup>11</sup> Given the strong preference implied for sole custody being awarded to the mother in the event of divorce, the primary caregiver theory amounts to little more than a disguised variant of the traditional “tender years doctrine” (Henry 1994). It merely dresses up the gender paradigm in facially-neutral psychological terms.

The creepy, zero-sum, us-against-the-world aura of the primary caregiver theory has not inhibited judges from embracing it wholeheartedly. Goldstein and his colleagues are cited by the Supreme Court of Canada in two of the most important custody cases of our time: *Young v. Young*, [1993] 4 S.C.R. 3; and *Gordon v. Goertz*, [1996] 2 S.C.R. 27. In *Young*, Claire L’Heureux-Dubé states dismissively that “the role of the access parent is ‘that of a very interested observer, giving love and support to [the child] in the background’.” By “love and support” she means money (in the form of child support), which she considers to be the non-custodial parent’s “most serious obligation to their children.” These pronouncements, which retain their authority undiminished to this day, are a direct application of the primary caregiver theory. Goldstein and his colleagues can boast acceptance from the ranks of the current Supreme Court: when she was on the Ontario Court of Appeal, Rosalie Abella wrote a judgment praising the primary caregiver theory (Millar 2009: p. 57). It is no surprise, then, that mothers were completely successful in 92% of the family-law appeals decided by Abella during her tenure on the Court of Appeal. Her colleague on both appellate courts, Louise Charron, was scarcely more egalitarian, siding with the mother in 90% of the appeals she sat on (Jenkins 2005). Following the doctrine of *stare decisis*, lower courts dutifully implement the primary caregiver ideology espoused by the appellate courts.

## The functional unit theory of parenting

*Human nature constitutes part of the evidence in every case.*

- *Elisba R. Potter*

It cannot be denied that maternal preference in child custody has an instinctive appeal. For millions of years of our ancestral history, proto-human societies were organized on the basis of a division of labour between males and females: men were the hunters and protectors, women were the gatherers and nurturers. It would be astonishing if this long history did not leave its mark in the form of adaptive gender differences, including an uncritical, emotional preference for maternal custody. Despite feminist ideology, contemporary men on the whole really do retain a greater aptitude for impersonal work and dominance competitions outside the home, while women on the whole really do retain a greater aptitude for dealing with people, including children, in a domestic setting (Pinker 2008). Any theory of parenting that is called upon in support of a legal presumption of shared parenting must to come to terms with those underlying facts.<sup>12</sup>

The first point to make is that the truth about gender differences as they relate to the public sphere applies also to gender differences as they relate to the private sphere: differences in



parental aptitudes tend to be small on average, and malleable. The vast majority of the human population occupy the overlapping area in the middle of the distribution of parenting skills and preferences. Moreover, given the plasticity of the human mind, such innate differences as undoubtedly exist between mothers and fathers can be mitigated through training and experience (Doidge 2007: p. 119). It should come as no surprise that the influx of women into the workforce in the past 50 years has been accompanied by a commensurate uptake in the amount of child care assumed by fathers in intact families (Kruk 2008).<sup>13</sup> Such differences in parenting aptitude as exist today are far too subtle for untrained judges to detect reliably in peremptory hearings in courtrooms. This consideration alone is sufficient to support a strong legal presumption of shared parenting after separation.

Although our ancestral families were characterized by a division of labour as just described, it would be a mistake to infer that ancestral fathers played no significant role in relation to their children's development. Humans have a uniquely long period of immaturity after birth. Extended childhoods require great amounts of parental investment, by both parents. The duration and level of parental investment required to raise human children implies a commensurate duration and level of emotional attachment or bonding within families. Expectations of lifelong pair-bonding and deep bonds of kin altruism are very strong among all members of typical human families, as are powerful feelings of resentment and betrayal when these expectations are disappointed. Human families have evolved over millions of years as a functional unit adapted to meeting the needs of long-dependent children.

Since behaviour is not preserved in the fossil record, direct evidence of ancestral human parenting patterns is not available. What little we know about this subject derives by inference from two sources: from physical biology, and from observations of contemporary hunter-gatherer tribes. On the genetic side, Pinker (2008) outlines a number of specific hormonal adaptations relating to the period of lactation in women. These adaptations are both physical and psychological, related to lactation itself and to immediate bonding between mother and infant.<sup>14</sup> Similarly, Brizendine (2010: Chapter Five, The Daddy Brain) notes that human fathers experience adaptive hormonal changes with their mate's pregnancy as well. In particular, testosterone levels decrease and prolactin goes up, frequently resulting in Couvade syndrome or "sympathetic pregnancy." These hormonal changes prepare the male brain for fatherhood, for instance by reducing his sex drive.

The effects of these hormonal adaptations around pregnancy and child birth are relatively short lived, for both mothers and fathers, since the physical and psychological needs of older children, even toddlers, are quite different from the needs of infants. In contemporary hunter-gatherer societies, men spend less time hunting than women spend gathering. Given ancestral population densities, relatively little time would have been spent protecting the tribe from attack by other hominids, as well. Thus men in hunter-gatherer societies probably spent as much time in the village, around children, as women did. While nursing infants has always been the exclusive province of mothers, of course, it is now believed that in our ancestral tribes, as soon as toddlers were able to walk their mothers went back to work in the fields and forests, leaving them behind for most of the day. Too many dangers lurked in the fields and

forests to bring infants there.

Children need more than nurturance to thrive. They also need discipline, and the appropriate mix of nurturance and discipline is very much age dependent. Generally, children need more discipline as they get older, beginning as toddlers. Given the instinctual responsiveness of people to male as compared to female authority, it is likely that fathers have always served a critical role in the disciplining and teaching of children. Teaching boys to become hunters and protectors was especially important in our ancestral past. In today's milieu, teaching girls what it takes to succeed in the public sphere is equally important. In contemporary terminology, fathers have always acted as role models for their sons, and as ideal types of what their daughters should aspire to find in a mate. Further, the two-parent family has built-in checks and balances, where the excesses or deficiencies of one parent can be counteracted by the other. Maintaining checks and balances is especially important after the parents have separated, when children are most vulnerable to all manner of stresses and difficulties (Baskerville 2007: p. 202).

Finally, it must be said that some important life lessons can only be learned in an intact family – lessons about teamwork and the need to compromise and cooperate, for example. Children living in even relatively dysfunctional shared parenting arrangements learn things that would be inaccessible to a child living with only one parent. Human families evolved, after all, as a *functional unit* within society. Two-parent family structures have been the norm for scores of generations, and child psychology has adapted so they were most comfortable, secure, and happy – most fulfilled – within that family structure. Accordingly, a breach in the family structure is instinctively unsettling for children in typical cases.

## The social capital theory of parenting

*It takes a village to raise a child.*

- African proverb

Millar (2009) sketches a complementary theory of parenting that explains the importance of fathers within the family in terms of social psychology. This theory, most powerfully advocated by Coleman (1987, 1988, 1990), is referred to as the “social capital” theory of child development. This theory emphasizes the importance of a child's relationships with a variety of adults and peers, who provide norms, role models, and social networks which are generally of value to the child's development. The more positive social contacts that a child has, the better, according to this theory. In stark contrast to the primary caregiver theory, it predicts that divorce will tend to have a negative impact on children insofar as it removes some of the most important sources of social capital for the child: one parent, along with the child's entire extended family on that parent's side. Although legally unacknowledged, the importance of the extended family to children is empirically well-grounded. For example, 29% of children report that they are able to confide in their grandparents, and 30% say they are able to confide in other relatives (Juby *et al.* 2005: p. 30).

It is an embarrassment for our appellate courts, which have adopted the primary caregiver theory whole-heartedly, that “One of the most universally reported findings in social science is that children of intact two-parent families fare better than do children of other family forms in terms of behavioural, health, and educational outcomes” (Millar 2009: p. 49).<sup>15</sup> Millar’s own original analysis of data from the NLSCY also confirms what the functional unit and social capital theories predict, namely that the most favourable structure for children is an intact, biological family – an effect that is evident even after controlling for all other parental and familial attributes in his model (*ibid*, pp. 85-86, 92). Millar finds that hyperactivity tends to be lower, and school performance better, for children in an intact family structure, which is associated with no significant negative effects. The size of the beneficial effect of growing up in an intact, biological family is comparable to having a custodial parent with four extra years of education (e.g. a university degree compared to a high school diploma). Contrary to what the primary caregiver theory predicts, increased supervision by adults in the home leads to a substantially reduced propensity for aggression and property destruction, although it is also associated with increased hyperactivity. Millar (*ibid*, p. 90) notes that the generally positive effect of a higher parent-to-child ratio is an argument in favour of split custody arrangements in suitable cases – a conclusion that warrants more attention given how rare this form of custody is.

Millar’s findings can be supplemented with the findings of other researchers who worked with the NLSCY. For example, Juby *et al.* (2005: p. vii) found that “children in shared physical custody were significantly *more* likely to confide in both their mother and father.” It seems that regular and substantial contact with both parents improves the psychological security and comfort of children, which in turn increases their confidence level in each parent. This finding directly and powerfully contradicts the primary caregiver theory, and tends to support theories that view the family as a functional unit, even after the physical separation of the parents. It is also consistent with repeated findings that the greatest regret of children of separated parents, when surveyed as adults, is their loss of a meaningful relationship with their non-custodial parent (Braver 1998; Baskerville 2007).

Marcil-Gratton and Le Bourdais (1999: p. 35) found that an increased propensity for fathers to maintain contact with their children after a separation was associated with the existence of “great or some tension” surrounding access and visitation by the father. They hypothesize that this is because little or no tension can arise when fathers fall out of contact with their children. The primary caregiver theory correctly predicts that greater contact with children by a “non-primary” parent would increase tension between parents, but incorrectly predicts that this tension would in turn result in deficits for children. In fact, Millar’s results show that increased parental supervision is associated with improved outcomes for children despite the increased tension associated with post-separation contact between parents. This again powerfully disconfirms the primary caregiver theory. It appears to be the case, as hypothesized by the functional unit and social capital theories, that maintaining meaningful contact with both parents after a separation has benefits for children that outweigh whatever tensions are caused by this arrangement.

Also contradicting the expectations of the primary caregiver theory, Juby *et al.* (2003: p. 32) report that shared custody is more likely to develop into sole paternal custody than sole maternal custody when children are very young at the time of separation. This could be because fathers of young children only gain shared parenting arrangements when there is strong reason to be concerned about sole maternal custody. Likewise, children who alternated between parents every two weeks were more likely to be with the father later on, as were children who were older at the time of separation. This is probably because older children have more autonomy and input into their post-separation living arrangements (Le Bourdais *et al.* 2001: p. 47), which circumvents to some degree the maternal preference of the courts. Juby *et al.* (2003: p. 33, emphasis in the original) conclude: “one important fact can be gleaned from the data: *however shared custody may evolve in the years following separation, it appears to be associated with a higher level of children’s involvement with both parents after separation.*”

## Spurious correlation, or spurious theory?

*There is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts.*

- La Rochefoucauld

Defenders of the *status quo* have been inventive in finding ways to challenge empirical findings that seem to contradict the primary caregiver theory. The first type of response is to claim that the correlation between intact families and superior child outcomes is spurious. Millar (2009: pp. 51-55) identifies two processes that might explain how the deficits experienced by children of broken homes are not a function of their family structure. The first hypothesis posits that divorce and deficits for children have a common cause: lower income and social status might increase the likelihood of divorce and also lead to health, educational, and behavioural deficits for children, for example. This hypothesis is dubious in the absence of a credible candidate for the common cause. Income and social class do not appear to be important factors in any model that measures children’s behavioural outcomes, if measures of parenting skill are included as explanatory variables (*ibid*, p. 53). Given the robust finding that intact, two-parent families are best for children, the onus is on advocates of the primary caregiver theory to demonstrate the existence of important causal factors common to separation and poorer parenting. Advocates of alternative theories cannot be expected to prove a negative – that no common cause exists.

The second process that could produce a spurious correlation between single parenthood and poor outcomes for children is self-selection: parents who opt for divorce tend to possess a different set of personal characteristics than parents who remain married. It is not single parenthood *per se* that causes less favourable outcomes for children, but rather the possession of individual traits that lead both to divorce and to poorer parenting. Testing the self-selection hypothesis directly, Millar divided a large sample of parents involved in the NLSCY into three groups according to their pre-existing, overall parental characteristics: those with the best parental characteristics, those with the worst, and those in the middle. He found no evidence

that those who self-selected for divorce scored worse on parenting skills than those who did not (*ibid*, p. 85). Further, variables reflecting pre-existing parental attributes showed no effect on children's outcomes after controlling for the more proximate parental behaviours and characteristics. This suggests that even relatively non-involved parents are capable of "stepping up to the plate" when called upon to do so, either by the death of a spouse or because of a separation. The primary caregiver theory is not supported.

The self-selection hypothesis also predicts that as divorce becomes legally easier to obtain, more socially acceptable, and more prevalent, higher-quality parents would suffer this fate more often and its effects on children would become weaker. In fact, however, divorce is producing greater deficits now than in previous decades when it was rarer (*ibid*, p. 53). An intuitively plausible explanation for the worsening outcomes for children of divorce in recent times is that more children are experiencing the separation of their parents at an ever-younger age as time goes on (Marcil-Gratton and Le Bourdais 1999). This explanation is not consistent with the primary caregiver theory, either, since one would expect younger children to have a stronger primary attachment to their mother. On the other hand, social capital theory accounts for these observations by the fact that when children lose valuable parental contacts at an ever-younger age, they will suffer longer-term deficits because of it. More to the point for present purposes, if negative parental attributes are associated with parents who seek divorce relative to parents who stay married, then primary custody should be associated with the parent who wishes to remain married rather than the one who initiates a divorce. Yet in recent decades, women have initiated divorce proceedings at least twice as often as men. The disparity peaked in Canada around 1992-94, when women were the Plaintiffs in 74% of divorce actions filed.<sup>16</sup> For these reasons, self-selection is unlikely to assist the primary caregiver theory in explaining the generally poorer outcomes experienced by children of broken homes.

## Parenting under the strains of separation

*There is little less trouble in governing a private family than a whole kingdom.*

- Montaigne

A second line of defense employed by advocates of the primary caregiver theory is to argue that it is the process that brings single parenthood about that causes detrimental effects on children, as opposed to single parenthood *per se*. A few of the detrimental *sequelae* of separation typically identified as culprits are emotional turmoil, increased parental conflict, loss of economic status, and changes of residence and schools. These factors might impact children directly, or influence child outcomes indirectly through their impact on the parenting behaviours of their primary custodian.

There is some disagreement in the literature over the extent to which separation affects parenting skills and behaviours. Strohschein (2007) purports to show that parenting skills are remarkably resilient. Analysing data from the NLSCY, she finds that parents tend to engage in



the same kinds of parenting behaviour after separation as before, which suggests that their parenting skills do not deteriorate due to the strains of separation. However, Strohschein's finding contradicts the preponderance of evidence available on this issue.<sup>17</sup> Millar (2009: p. 54) points out that factors that are known to have explanatory power for child outcomes – parental psychological adjustment, parenting behaviours, and inter-parental conflict – are also known to be adversely affected by the stresses of divorce. Although he does not use divorce as a variable in his models, he does consider family structure and changes of custody, which are highly correlated with divorce, as explanatory variables. His analysis of the same NLSCY data shows that family structure appears to have significant effects on parenting aptitudes, in addition to the direct effects on outcomes for children (*ibid*, Table B2, p. 93). Specifically, intact, biological families are associated with improved consistency in discipline, as well as reduced parental depression.

Millar further finds that a higher parent-to-child ratio in the home appears to be, on balance, a good thing for children, although not as good a thing as living in an intact, biological family. A higher parent-to-child ratio tends to reduce reliance on both verbal and physical punishment, and also has a substantial beneficial effect on positive interaction with the children. At the same time, however, it is associated with deterioration in the consistency of discipline. These findings are intuitively obvious: fewer children in the home would tend to lead to greater interaction with each; more children in the home would tend to lead to a greater reliance on yelling and spanking as less time-consuming means of parental control; and an additional adult in the home would tend to lead to more disagreements over what behaviour warrants discipline and what form of discipline is appropriate. However obvious all this might be, it is not predicted by the primary caregiver theory, which posits that additional interaction from a second caregiver would be of little or even negative value to the child due to the “confusion” it creates for the child.

Thus, upon further examination, the impact of the strain of separation on parenting skills does not assist the primary caregiver theory, whether or not they cause parental skills to deteriorate. If parental skills do not deteriorate under the strain, then the superior outcomes experienced by children from intact families remains unexplained by the primary caregiver theory; and if parental skills do deteriorate, then the indicated policy response would be to share the burden of parenting so as to reduce the strain, even if that entails somewhat more parental conflict, contrary to what the primary caregiver theory recommends.

## Divorce process or family structure

*The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.*

*- Universal Declaration of Human Rights*

In addition to the possible deterioration of parenting skills, *sequelae* of separation such as

a loss of economic status and changes of residence and schools could also negatively affect children. In support of the hypothesis that the divorce process has independent negative effects on children, Millar (*ibid*, p. 50) refers to studies that show children who have experienced the death of a parent fare better than children of single parents who have gone through a divorce, even after controlling for socio-economic status. Likewise, children in remarried families fare worse than children in intact, two-parent families, despite the higher economic status of the former. These findings do not, however, rescue the primary caregiver theory from the challenge posed by the robust empirical finding that intact families produce better outcomes for children than single-parent families. After all, every theory of child development allows that the process of separation will have significant negative effects on children. What distinguishes the primary caregiver theory is the implication that single parenthood should not be associated with negative outcomes after controlling for the effects of separation. That is, only the primary caregiver theory predicts no residual harm to children from living in single-parent households relative to other family structures, after controlling for the effects of the process of divorce.

It should be possible to test this theory, then, by seeing if family structure has an independent effect on outcomes for children after controlling for the effects of separation. The independent impact of family structure on outcomes for children can be seen by comparing cases where the divorce process is held constant. Millar (*ibid*, p. 50) points out:

...neither never-married single parents nor always-married two-parent families have experienced divorce. Since the structure of the family has not changed, the outcomes for children in these two family forms should show the effects of one versus two parents. Studies that differentiate between single-parent homes due to divorce and those of a never-married parent find that both of these marital statuses are associated with deficits for children, even after controlling for the lower socio-economic status in never-married families.<sup>18</sup>

Thus, contrary to what the primary caregiver theory posits, family structure does have an independent influence on outcomes for children, with single parenthood being inferior.

Perhaps the reason single parenthood appears to have negative effects on children relative to other family structures, even when the process of separation is kept constant, is that some of the children in single-parent families have ended up living with their non-primary caregiver. As a final defense to the primary caregiver theory, it might be claimed that it is not the fact of having only one parent that is causing negative outcomes for children; it is the fact of being in the primary custody of the “wrong” parent. This could occur, for example, when the child’s primary caregiver dies, leaving him or her in the care of the other parent. However, the proportion of single-parent cases where the mother has died is tiny. If ending up in the custody of the non-primary caregiver is what explains these findings, then it must be because courts pick the “wrong” parent for primary custody in custody disputes. Rescuing the primary caregiver theory by this means implies that courts should be awarding primary custody significantly more often to the father than they have been. Thus we turn next to an examination of the courts’ preference for maternal custody over paternal custody.

# Factors affecting the interests of children

*A penny-weight of love is worth a pound of law.*

- Scottish proverb

The singular virtue of Millar's book is that it develops more refined theoretical models than have heretofore been advanced, not only to test the courts' preference for maternal primary custody, but to identify those factors that are associated with the child's interests. The NLSCY dataset employed by Millar is rich enough to construct variables measuring a variety of health, educational, and behavioural, outcomes.<sup>19</sup> Using panel regression, he is able simultaneously to isolate the influence of numerous attributes of the child, the parents, and the family, and thereby identify likely causal mechanisms that explain the observed health, educational, and behavioural outcomes for children. Millar's model takes into account the following attributes:

Attributes of the child:

- age; and
- gender.

Attributes of the parent:

- use of verbal or physical punishment;
- positive interaction with the child;
- consistency in discipline;
- depression in the primary caregiver;
- level of education of the primary caregiver;
- gender of the primary caregiver; and
- pre-existing parenting attributes.

Attributes of the family:

- parents cohabiting or separated;
- number of adults per child in the household;
- family income;
- whether the family has an "adequate" income;
- whether custody has changed, and if so to the mother or to the father.

In addition, Millar tested to see if there was a statistically significant change in each of the child's outcomes from the previous survey. This provides a measure of a child's resiliency to external influences. In fact, the most prominent finding is that children were highly resilient over time: previous measures of child outcomes – both good and bad – are, by far, the best



predictors of future outcomes. This is not entirely surprising, since gradual and longer-term effects on children would not be apparent from observations made between the 2-year cycles of the NLSCY.

Also not surprisingly, the age and gender of the child are significant predictors of many outcomes. As children age, their pro-social behaviour and overall health improve, and they display a reduced tendency to destroy property. Boys fared worse than girls on hyperactivity, pro-sociality, direct aggression, property destruction, overall health, and school performance. The only outcome on which girls scored worse than boys was for indirect aggression – i.e. disrupting the relationships of someone with whom the child is angry. If indirect aggression is a resilient trait, as Millar's results suggest, then this finding would tend to support the common complaint of separated fathers that their ex-partners often punish them by engaging in alienation tactics with the children. Although Millar does not directly test this hypothesis, it tends to be confirmed by Benenson *et al.* (2011).

Millar found that many parental attributes have significant effects on outcomes for children, when controlling for the other attributes in the model. Verbal punishment – the tendency to raise one's voice to the child – had the strongest effect, leading to strong negative tendencies for all of the behavioural outcomes but being slightly positively associated with overall health. The frequency of physical punishment was the next most significant parental variable predicting outcomes for children. It had no beneficial effects, and strong negative effects on hyperactivity, direct aggression, and property destruction. Physical punishment was also weakly associated with emotional disorder and indirect aggression. By contrast, the beneficial effects of good parenting practices such as consistency in discipline and positive interaction were significant but less so than negative parenting practices. Positive parental interaction improved scores for hyperactivity, pro-social behaviour, direct aggression, property destruction and overall health, and was weakly associated with better school performance. Parental consistency in discipline had strong positive effects on hyperactivity, emotional disorder, direct and indirect aggression, property destruction, and overall health.

Depression in the primary caregiver had a negative effect on all outcomes other than pro-sociality and school performance. (The effect of other mental-health concerns in the primary caregiver was not investigated due to the limitations inherent in the survey, but this result suggests that further study is called for into the impact on children of mental-health problems in parents.) A parent's level of education was strongly predictive for the overall health and school performance of the child, and higher levels of education substantially improve parental consistency and positive interaction, while reducing depression. Education also has a slightly positive effect by reducing reliance on physical discipline. Thus education can be thought of as an intervening factor that reduces strain on parents or better enables them to cope, which in turn results in better outcomes for children (*ibid*, p. 87).

Finally, the gender of the primary custodian had little or no impact on outcomes for children, after controlling for all the other parental attributes. Specifically, there were no parenting aptitudes in Millar's model on which mothers scored more favourably than fathers, after

controlling for education, family structure, and family income (*ibid*, Table B1, p. 92). Millar did find that a change of custody to the mother was strongly associated with increases in emotional disorder, while a change in custody to the father was moderately associated with increases in hyperactivity. Still, this provides scant basis for preferring one parent over the other in general. The verdict (*ibid*, p. 89):

...parental gender is not a good predictor – in fact not a predictor at all – of any of the child outcomes examined here; that is, behavioural, educational, or health outcomes. Thus, there appears to be a disconnect between the theoretical criterion of custody determinations – best interests – and what actually plays out in the context of the justice system.<sup>20</sup>

## Father knows best?

*Spare the rod and spoil the child.*

- English proverb

Some of Millar's findings tend to support the functional unit theory by suggesting that fathers play an important role in the development of children, particularly where discipline is concerned. Consider the apparently inconsistent triad of findings that: (i) the intact, biological family structure is associated with only positive outcomes for children; (ii) verbal and physical punishments are associated with only negative outcomes for children; and (iii) children from intact, biological families experience more verbal and especially physical punishment than children from other family structures (*ibid*, Table B2, p. 93). This triad strongly suggests an interaction effect between family structure and modes of punishment. However this interaction effect might be accounted for, the conclusion seems inevitable that the presence of fathers in intact, biological families has an important benefit that more than compensates for the detrimental effects of greater verbal and physical punishment associated with this family structure.

The functional unit theory, which is based on evolutionary psychology, is capable of making sense of this triad of findings. This theory posits that parental aptitudes had become somewhat specialized in ancestral families, such that mothers tend to play the nurturing role while fathers tend to be the disciplinarians. Children in turn have evolved to respond better to maternal nurturing and to paternal discipline. If children have an innate tendency to respect – though not necessarily to appreciate – their father's discipline, they might respond better to discipline meted out by fathers. As well, children in intact, biological families would experience greater positive interaction with their parents, feel more secure in this environment, and feel less insecure when punished. Thus they might be able to absorb greater verbal and physical discipline without producing the deficits normally associated with those forms of punishment. Further, seeing their parents form a united front, children might be more willing to accept the discipline that is meted out as being in their own best interests. Insofar as discipline

and nurturance are competing demands on parenting, the greater consistency of paternal discipline relative to maternal discipline could be accounted for by the fact that fathers feel less conflicted than mothers over imposing discipline. In sum, as long as children need both nurturing and discipline, they will benefit from having two parents directly involved in their day-to-day development. Shared parenting would thus be the second-best arrangement.

Millar's analyses of changes in custody reinforce this conclusion. Fathers who were the primary caregivers in the NLSCY exhibited fewer signs of stress and strain than mothers who were primary caregivers, being less prone to depression and less reliant on verbal punishment (*ibid*, Table B2, p. 93). As well, a change in custody to the father was associated with improved consistency in discipline and a reduction of physical punishment. These findings, weak although still statistically significant, are consistent with the well-established fact that mothers, especially single mothers, are more likely to abuse their children than fathers are (Baskerville 2007: Chapter Four). It appears that custodial fathers are better able to cope with the strain of separation, thus minimizing the negative effects of the process on children. Millar cautions that the results for custody assignments to fathers might not be entirely reliable, given that fathers had primary custody in only 8% of the NLSCY sample. (This limitation bears further discussion below.)

Some of Millar's findings have recently been replicated by Pougnet *et al.* (2011). They found that fathers who are actively engaged in the raising of their children help make their kids smarter and better behaved: "Compared with other children with absentee dads, kids whose fathers were active parents in early and middle childhood had fewer behaviour problems and higher intellectual abilities as they grew older – even among socioeconomically at-risk families... [Fathers'] ability to set appropriate limits and structure their children's behaviour positively influenced problem-solving and decreased emotional problems," Pougnet says. Girls are particularly affected by the level of contact with their fathers. "Girls whose fathers were absent during their middle childhood had significantly higher levels of emotional problems at school than girls whose fathers were present." According to the authors, these findings should encourage governments to formulate policies that encourage increased and positive forms of contact between children and their fathers – precisely what the functional unit and social capital theories of parenting call for, in contrast to the judicially preferred primary caregiver theory.

## Skewed samples

*Think back to the last major altercation you had in which you were totally convinced of your rightness and your disputant's wrongness. Now imagine your disputant... telling his version of that dispute to a third party at a time when you were not present. A heck of a lot of essential information favorable to your side got left out, didn't it? In fact, according to that version you're now speculating on, you not only don't look 100 percent right, you look stupid if not villainous.*

- C.H. Freeman

Millar notes two problems associated with the small sample size of custodial fathers in the NLSCY. First, several effects of gender (both good and bad) were not found to be statistically significant that might be found important in a larger sample. This calls for more research, but does not invalidate Millar's findings. In particular, it does not invalidate the findings related to the demerits of primary custody, whether maternal or paternal. All of the evidence points to the fact that greater parental involvement produces better outcomes for children, and that sole parenthood is generally detrimental to their development. What matters most is not whether a given mother is "better than" a given father or *vice versa*; what matters most is that children continue to enjoy the maximum benefits from contact with both of their parents. Refuting the preference for primary custody is sufficient to refute the preference for maternal custody, since the former preference can only be implemented via the latter. It is an added bonus that Millar's analysis casts doubt on the prejudice that parental gender is associated with any of the parenting aptitudes studied.

Second, Millar notes that it is possible that custodial fathers in the NLSCY sample are not representative of fathers generally. No data was collected on the parenting aptitude of the 92% of fathers (or the 8% of the mothers) who did not have primary custody of their children, so little about them is known, directly. Resolute defenders of our existing legal presumption of primary maternal custody could maintain that fathers are only awarded primary custody when they demonstrate the same high parental capabilities as mothers generally demonstrate to explain why the NLSCY sample shows very little difference between the parenting aptitudes of fathers and mothers who ended up being primary caregivers. While skewed samples are always something to be cognizant of, there are good reasons to discount that possibility here. To begin with, more than 20% of lone fathers in the NLSCY have that status as a result of the death of the mother (Marcil-Gratton and Le Bourdais 2000: p. 4). Without the hypothetical mechanism of wise judicial selection operating in this class of cases, those lone fathers can be expected to exhibit the same range of parental aptitudes as fathers generally. If 92% of fathers are so poorly qualified as parents that they are not able to gain even shared custody of the children through the legal system, then 92% of fathers of children whose mothers had died should be expected to produce poor outcomes for their children, too. This effect does not appear to be the case based on Millar's results.

Secondly, Millar's initial analysis of the CDR data strongly suggests that fathers gain primary custody only when the mother dies or is demonstrably unfit – e.g. due to abandonment of the family, addictions of various sorts, or mental or physical disabilities.<sup>21</sup> In that case, too, fathers who obtain primary custody are not being selected so much on the basis of *their* parenting aptitudes as on the lack of parenting skills of the mother. Again, this would tend to produce a sample of fathers who run the normal gamut of parenting aptitudes. Indeed, Galarneau (2005) reports that lone fathers possess a similar demographic profile to lone mothers. Lone mothers are only three years younger, on average, but are better educated (as women in general are these days). Lone fathers, however, are substantially better employed. Likewise, Le Bourdais *et al.* (2001: pp. 19-20) observe:

One might expect fathers' socio-economic characteristics, and their working hours in

particular, to be linked to the frequency of contact with their children. However, the analysis of GSS data reveals only a slender association between these variables. In fact, when these socio-economic characteristics are examined in relation to the average time spent with children, neither the level of education, nor the fact of being employed, working normal hours on a regular basis, appear to be linked in any significant way to the frequency of father/child contact [notably including shared parenting and primary paternal custody].

The demographic similarities between lone mothers and lone fathers, and between fathers with and without custody of their children, suggests that selectivity is not a major contributor to the findings of superior child outcomes associated with paternal custody. Rather, since judges demonstrate a strong preference for mothers *regardless* of a father's parenting attributes, it is expected that custodial mothers would exhibit poorer parenting skills than fathers overall (Millar 2009: p. 117).<sup>22</sup>

## Father figures

*We want the facts to fit the preconceptions. When they don't, it is easier to ignore the facts than to change the preconceptions.*

- Jessamyn West

A sample as highly gender-skewed as the NLSCY can contain multiple sources of bias, and not all of them need favour the same side. One should expect that the data derived primarily from mothers in the NLSCY would be skewed in their favour, on the well-established basis that people tend to minimize their own faults and impute problems they face to faults in others. This tendency is especially true in the case of separated parents, many of whom have a deep-seated anger or unresolved hostility toward the other. Evidence of bias in the NLSCY data is suggested by Juby *et al.* (2004: p. 39), who report that custodial mothers "rarely claim responsibility for [paternal access] visits being cancelled." They continue:

Many parents may still have problems relating to one another... with access to children being a particularly touchy issue, and their perception of the source of the problems relating to this is likely to differ. Unfortunately, the question could not be put to the other parent [i.e. mostly the father in the NLSCY], making it impossible to assess the extent of any differences between separated parents.

Similarly, substantial differences in reporting of child support paid by fathers and received by mothers have been known to exist for decades (Braver 1998). According to Marcil-Gratton and Le Bourdais (2000: p. 21), about 15% more fathers claimed to be paying child support on their tax forms each year from 1986 to 1996 than mothers who claimed to be receiving it. It is unsafe to accept as accurate data derived overwhelmingly from parents of one gender. In the absence of other plausible explanations, the safest assumption might be that the truth lies somewhere in the middle.



Some insight into the extent to which mothers in the NLSCY might have misrepresented the effects of separation and father access on their children is suggested by a careful review of Le Bourdais *et al.* (2001), who used the General Social Survey of the Family (GSS, 10th cycle, 1995) to examine how fathers, and children, view the paternal role. The biggest difference between fathers and mothers in the GSS survey relates to the number of biological children they claim: the mothers reported having 40% more than the fathers. The authors account for this discrepancy in two ways. First, many more mothers than fathers could be contacted by Statistics Canada. They note that fathers missing from the sample tend to be those with little or no contact with their children, meaning that the fathers who did respond to the survey are skewed toward those who maintained more contact, and more regular contact. Still, even the relatively involved fathers who were contacted by Statistics Canada reported on average only 1.436 biological children, while the mothers reported an average of 1.633 – a difference of 14% more children for mothers. The authors attribute this remaining difference to “under-reporting” by fathers, and infer that the information received from fathers is “inferior” to that received by mothers (*ibid*, pp. 3-4). Two points need to be made about this unsupported and discriminatory inference.

First, to be incapable of being contacted by Statistics Canada, a person would have to be living on the margins of society: highly transient, living on the street, in hiding, or having fled the country. In short, the fathers missing from the GSS survey will be those most beaten down by the brutally harsh family-law system. The data suggest that as many as 30% more fathers than mothers are in this extremely marginalized category, which argues strongly for the conclusion that legal and social supports for separated fathers are sadly lacking in Canada. (Derelict or impoverished mothers are entitled to all manner of social assistance to deal with the financial and personal burdens of child care, whereas marginalized fathers are entitled to nothing but a jail cell.) This state of affairs says more about society’s attitude toward fatherhood than about fathers’ attitudes toward the children they have an opportunity to remain in contact with.

Second, a mother will know with certainty how many children she has given birth to, while many a father will not know the number of children he has sired. The biggest class of biological fathers who are unaware of, or uncertain about, the number of children they have sired are fathers of children born “out of union” – i.e. to parents who have never married or cohabited. This is no insignificant number: about 28% of Canadian children are born out of union (*ibid*, p. 14). Many of these children are raised by teenaged mothers, or by mothers who had a casual relationship with the father and do not want them to be involved in the raising of the child. This alone could account for the 14% fewer biological children claimed by fathers compared to mothers in the GSS survey. In addition to children born out of union, fathers could be ignorant of or have reasonable doubts about the paternity of children born to mothers who had multiple partners, including some children born to women in the course of an adulterous affair, some children born to prostitutes or drug addicts, most children born to sperm donors, and possibly others as well. In short, if men and women both answer the GSS questions honestly and to the best of their abilities, it would be expected that fathers report substantially fewer biological children. This does not measure the “inferiority” of the information provided by fathers, only

their relative knowledge. In fact, to study the contributions fathers make to their children, we must consider how fathers who have not been driven to the margins of society by the system view their relationship with children whose paternity they acknowledge. Thus the GSS data soliciting the views of fathers is arguably “superior” to the NLSCY data that overwhelmingly solicits responses from mothers only.<sup>23</sup>

Fathers report having much more contact with their children after a separation than mothers acknowledge (Le Bourdais *et al.* 2001: p. 40). Children tend to agree: fully 87% of children aged 10-15 report that the father figure with whom they spent the most time was their biological father (Juby *et al.* 2005: p. 45) – a figure difficult to account for on the basis of mothers’ reporting of how little contact many children have with their biological fathers. In fact, these children reported surprisingly little difference between their relationships with their biological mothers and fathers, as summarized in Table 1, (derived from *ibid*, pp. 48-51):

Table 1					
Mother			Father		
very little	some	great deal	very little	some	great deal
<b>How well do you feel your parent understands you?</b>					
8%	32%	60%	12%	37%	51%
<b>How much fairness do you receive from your parent?</b>					
6%	31%	63%	6%	32%	61%
<b>How much affection do you receive from your parent?</b>					
4%	20%	76%	7%	28%	63%
<b>Overall, how close would you say your relationship with your parent is?</b>					
not	somewhat	very	not	somewhat	very
6%	32%	63%	10%	37%	53%

These comparisons cast doubt on the reliability of mothers’ reports about fathers’ behaviours and influence on the children.

The more contact fathers report, the stronger they claim their bond is with their children, and the stronger the children report their bond with their father to be, as well. Juby *et al.* (2005: p. 30) report that 55% of children aged 10-15 say they are able to talk about themselves and their problems with their father – a figure almost identical to the percentage of separated fathers

who claim on the GSS to spend more than 2 months per year with their children (Le Bourdais *et al.* 2001: p. 8).<sup>24</sup> By contrast, 74% of these children said they could confide in their mothers – a difference accountable entirely by the proportion of children who have entirely lost contact with their fathers. Juby *et al.* (2005: p. 44) conclude:

The importance of establishing regular contact with children from the start is clear. Whether or not children live with their father after separation, they are more likely to feel able to talk to him when he remains involved on a regular basis. Certainly, children living part of the time with their father are significantly more likely to confide in him than are those who live exclusively with their mother, even if they see their father regularly.

The more frequent a father's contact with his children, the greater is his satisfaction with the arrangement (Le Bourdais *et al.* 2001: p. 32). Father involvement does not diminish when they form new unions, nor even when they sire new children from a subsequent union (*ibid*, p. 42). Neither the child's sex, nor the conjugal status of the parents at the time of birth, nor the father's level of education was associated with the extent of father involvement (*ibid*, p. 42). Not surprisingly, given the extent of the courts' preference for primary maternal custody shown previously, fathers were four times as likely as mothers to express dissatisfaction with their custodial arrangements (*ibid*, p. 31). The dissatisfaction of fathers was overwhelmingly in the direction of wanting more contact (*ibid*, p. 35). Fully two-fifths of children lived at a distance of more than 50 kilometers from their fathers (Le Bourdais *et al.* 2001: p. 14), limiting access time substantially. Fathers who live far away from their children see them less often and are more likely to declare themselves dissatisfied with the amount of time they spend with their children (Juby *et al.* 2005: p. 48).

According to fathers with limited access, separation has a profoundly negative effect on their relationship with their children (Le Bourdais *et al.* 2001: Table 9, p. 32): two-thirds of fathers who spend less than a week per year with their children claimed the separation had a negative or very negative effect, while a third of fathers who spent between a week and two months reported the same effect. Conversely, over half of the fathers who claimed either shared or primary custody said that the separation had a positive effect on their relationship with their children. The authors note that fewer than 6% of fathers agreed with the statement that "the everyday task of raising children is not primarily a man's responsibility" (*ibid*, p. 25), and that more than half of the fathers who had little or no contact with their children saw themselves as better fathers than their own father. They cite research that suggests "we are dealing with fathers who were quite close to their children, but who had to put an end to these relationships, at least temporarily, after a breakup that they experienced as a painful separation distancing them from their children" (*ibid*, p. 24; see also Kruk 1993a). Impecunious fathers who cannot meet their support obligations, or who have so little left after meeting their support obligations that they cannot afford the costs associated with exercising access, also have a tendency to cut off contact with their children (*ibid*, p. 20). In conclusion: "These results present an image of fathers committed to their children that contrasts strongly with the one often presented by the media, that of absent fathers uninvolved with their children" (*ibid*, p. 52). Of course, the



media obtains its image of the “deadbeat dad” largely from sources that reflect overwhelmingly a mother’s perspective.

## Mothers’ mixed emotions

*Heaven has no rage like love to hatred turned,*

*Nor hell a fury like a woman scorned.*

- William Congreve

The GSS paints a consistent picture of fathers after separation: when they are not driven to the margins of society by a brutally harsh family-law system, they tend to be cut off from contact with their children to an extent that is regrettable for both the children and themselves. Fathers want more involvement in their children’s lives, and express greater satisfaction when they obtain it. Curiously, mothers also report greater satisfaction with custodial arrangements the more equal they are; and almost as many mothers as fathers complain that father-child contact is too limited or non-existent (*ibid*, pp. 34-35). If both sides say they want greater father involvement, what stands in the way of achieving it? It will be argued in the final chapter that the adversarial legal system can quickly turn relatively cooperative parents into intractable, squabbling opponents, but that cannot be the whole explanation because parents who make private agreements over custody and access are not substantially better at reaching more equal arrangements.

A significant part of the answer to this mystery is that there is a natural tendency for people to report on surveys what is consistent with a positive self-image. Fathers want to believe that they would spend more time with their children given half a chance, and mothers want to believe that they would facilitate more contact if only it were actively sought. This, however, cannot be the entire answer, either. Marcil-Gratton and Le Bourdais (1999: p. 18) report that tension is greater between parents in cases where court orders are obtained, and that the resulting court orders are somewhat more favourable for fathers than private agreements. Further, fathers are more likely to maintain contact with their children when there is some tension between the parents surrounding custody and access (*ibid*, p. 35). From these facts – and the fact that mothers overwhelmingly get what they ask for from judges in custody and access disputes – one may infer that the tension surrounding custody and access arises mainly because mothers oppose greater father involvement, despite what they claim to the contrary on surveys. More charitably, one might infer that mothers are in favour of greater father involvement “in principle” – i.e. when it is convenient for them to take a break – but if more equal arrangements mean having to divide important occasions like birthdays or Christmas, or having to re-arrange their own schedules, then the idea becomes “impractical.”

Reinforcing this inference about mothers’ mixed emotions when it comes to facilitating fathers’ access to their children is the finding that father involvement does not diminish when they form new unions, nor even when they sire new children from a subsequent union, whereas

father involvement declines significantly when the mother forms a new union (Juby 2007). It seems that when mothers form new unions, they perceive even less of a need for fathers to shoulder their parenting responsibilities. They may even perceive paternal involvement in the lives of their children as an interference with their new family. This is exacerbated when the mother relocates to a new community to start her new life.<sup>25</sup> These facts about how mothers' decisions reduce father involvement at the very least raise doubts about the inference that data obtained overwhelmingly from surveying mothers is "superior" to that obtained from fathers.

Juby *et al.* (2005: p. 60) state that "it takes more than separation to destroy a relationship between parents and children." The "more" in question most often relates in one way or another to an attitude of indifference or hostility on the part of the parent with primary custody to facilitating a role for the other parent – i.e. parental "gatekeeping" by mothers. These authors report that living with a lone mother significantly raises the probability that children will not feel very close to their father. The mother's education level has the same effect: the higher her education level, the *more* likely the children will be to feel not very close to their fathers (*ibid*, p. 55). It seems that the more adept a mother feels she is at coping with parenting on her own, the more she is inclined to alienate the father from the children. According to Baskerville (2007: p. 247), "It is well established that about half of mothers either see no value in the father's contact with his children and actively tried to sabotage it or resent his visits." And Kruk (1994) found:

Fathers describing themselves as having been relatively highly involved with and attached to their children and sharing in family work tasks during the marriage were more likely to lose contact with their children after divorce, whereas those previously on the periphery of their children's lives were more likely to remain in contact. Now disengaged fathers consistently scored highest on all measures of pre-divorce involvement, attachment, and influence.

## Other determinants of child outcomes

*The best laid schemes of mice and men go oft awry.*

- Robert Burns

Variables affecting outcomes for children can be grouped under four broad headings: parenting, biology, peers, and luck. So far, only parenting has been considered. Biological factors include not only genetics, but also congenital developmental features associated with, e.g. alcohol or drug use during pregnancy. Perhaps biology is taken into account by Millar (2009), superficially and indirectly, through the variable of "resiliency" – notably the most predictive factor in his analysis. The influence of peers is obvious and well-established, and requires no further discussion for present purposes. By 'luck' is meant good or bad fortune: winning a lottery or making a fortuitous social contact; or having a close relative or friend suffer a death, serious illness, or major accident. The powerful influence of variables other

than parenting on child outcomes can be seen from differences in outcomes between children within the same family, who experience the same parental influences. It can also be seen from cases where children turn out well despite unfavourable parenting, and where children turn out badly despite favourable parenting. Studies differ over the relative significance of these variables in predicting outcomes for children, but a reasonable approximation would be that each is roughly equally important, each explains about one-quarter of the variability in children's outcomes.

It is natural to focus attention exclusively on those variables over which one might have some control. A judge is able to control how much time separated parents may spend with their children through custody and access decisions, so a great deal of a judge's time and resources in family court are expended trying to fine-tune decisions about that. In most cases, this exercise illustrates the fallacy of obsessing over small differences. The analyses summarized in this chapter show that, overall, there are no proven benefits for children to maternal over paternal custody, while the benefit of maintaining maximum contact with both parents is manifest. The evidence indicates that judges do not in fact fine-tune their custody and access decisions to the parenting qualities of the individual litigants, but rather make their decisions mostly on gender-based prejudice and stereotype. A simple and fair rule, such as a legal presumption of shared parenting, would be an improvement in the broad range of "normal" cases.

No doubt there are cases in which one parent could be proven in court to be substantially better than the other, were the judge to hear the case with an unbiased mind. Even so, the benefits to the child of spending more time with the better parent might be marginal in the overall scheme of things, considering the effects of variables other than parenting that are beyond a judge's control. Even the best laid schemes of judges will often go awry due to luck or the influence of peers. And making finely tuned adjustments to custody and access based on the individual characteristics of the parents will often have little impact due to the resiliency of the child's relatively fixed personality traits. Meanwhile, it is known that the process of divorce – the psychological and financial stresses and strains of litigating custody and access – has a considerable negative impact on parents and children. A judge would have to be able to improve the odds of good outcomes for children quite significantly merely to off-set the proven negative impact of prolonged litigation.

These cautions about the limits of family litigation should not be misinterpreted as counselling fatalism. There remains a role for judges in determining post-separation custody of children. Considering how little in the grand scheme of things *differences* in the attributes of typical parents make to child outcomes in the vast majority of cases reinforces Millar's proposal that judges and custody evaluators should focus their attention instead on determining on the basis of clear evidence if the influence of one parent or the other is likely to be detrimental to the child's well-being. This more modest standard, typically employed in apprehension cases by child-protection agents, is perhaps within reach of judicial competence.

## Conclusion

In drawing his conclusions, Millar affects the detachment of a social scientist and the courtesy of a diplomat. He refrains from making the observation that must hit readers of his book most forcefully. There is a monumental irony to the fact that the legal system, which is charged with rooting out the last vestiges of gender discrimination in every other institution in society – and which attempts to do so with evident zeal – turns out to be the final refuge of the most pervasive and significant reliance upon the discredited gender paradigm. In fact, when the obvious, large-scale, and unabashed discrimination that goes on in family courts is compounded by the equally obvious, large-scale, and unabashed discrimination that goes on in criminal courts when it comes to intimate partner violence (Brown 2004), the judiciary loses all credibility as adjudicators of challenges under section 15 of the *Charter of Rights and Freedoms*. The verdict is clear: no other institution in Canada is as viciously discriminatory as the legal system itself. This conclusion is reinforced by the theoretical discussions in subsequent chapters of this book, and is illustrated by the cases in the Appendix.

Millar's findings suggest that judges not only get the decision wrong well over half the time, they are in fact not even asking the right question when it comes to assignments of custody. The proper question is not the individualistic and adversarial one – “Who is the better parent?” – but rather, “How can we best maintain the child's relationships with all of the significant people in his or her life after the parents separate?” The main policy recommendation arising from Millar's investigations is for judges to discontinue their unwarranted reliance upon the gender of the parent in the assignment of custody, in favour of a strong presumption of shared parenting after separation. That is, judges should view the family as a system, a functional unit that must be made to work on behalf of children despite the separation of the parents. Since both parents are a valuable resource to children, emphasis should be placed on reducing the disruption of parent-child relationships, as recommended by the social capital theory of child development.

## Chapter 2

# The Limits of the Best-Interests Principle

*A good principle not rightly understood may prove as hurtful as a bad.*

*- John Milton*

A great deal of obfuscation is found in the language of politicians, lawyers, and judges on parental rights and the welfare of children – which is to say, on the very essence of family law. It is necessary to cut through the empty rhetoric and state clearly what is at stake in custody disputes. The prevailing legal doctrine holds that custody and access decisions must be made by judges taking into account solely what is “in the best interests of the child.” This chapter challenges that doctrine by pointing out theoretical limitations and practical flaws in the principle. The next chapter puts family law on a firmer foundation by reintroducing the primacy of parental rights.

Modern family law is a complex overlay of common law traditions, statute law, case law, constitutional law, and even international law. A brief history of the development of the law relating to families shows how the various parts fit together today, which in turn promotes clear-headedness in thinking about claims being made about the rights and responsibilities of parents and children.

## The ancient law of *pater familias*

*Evolution is cleverer than you are.*

*- Orgel's Second Rule*

In pre-medieval times, the father was the head of the household. Parental rights resided ultimately in the father, who “owned” his children by virtue of having “planted the seed” that grew into the child. Children were much like chattels with a duty of obedience to the father, at least to the age of majority but in some societies even until the father’s death. Paternal rights were conceived of as *sui generis* natural rights, accruing to fathers *qua* fathers, simply and solely by virtue of their biological relatedness to the children. The *pater familias* concept has long since been consigned to the dustbin of history in the Western world, yet its ghost still haunts the modern legal system and judges continue to conduct exorcism rituals over it. The mere allegation that a man is only engaged in a custody or access dispute because he wants to “control” the wife and children after separation is often sufficient for a judge to give the mother whatever she wants.

Consider the following straw-man attack on the concept of parental rights by L'Heureux-Dubé in *Young v. Young*, [1993] 4 S.C.R. 3, at p. 45:

The power of the custodial parent is not a “right” with independent value which is granted by courts for the benefit of the parent, but is designed to enable the parent to discharge his or her responsibilities and obligations to the child. It is, in fact, the child’s right to a parent who will look after his or her best interests. Indeed, courts have recognized that there is no magic to the parental tie and will, when the best interests of the child warrant, grant custody to a third party.

As will be shown in the next chapter, the modern concept of parental rights has nothing to do with “magic ties,” or any other mythology.<sup>1</sup> Facile criticisms of ancient jurisprudence are no longer needed, and serve only to throw parents on the defensive in court. Judges wield the “parents have no rights” mantra in their courtrooms like a mace, demanding that parents justify themselves in the face of their superior judgment. Fathers and their lawyers, in particular, live in fear of being perceived as in any way supporting the ancient rights of fathers.

Be it well noted that the denial of parental rights, and the concomitant shift in focus to parental responsibilities, in no way makes the family-dispute system less adversarial. Parents fight as much over who will exercise responsibilities on behalf of their children as they do about who has the right to decide matters for their children. This follows from the logical point that rights and responsibilities are correlative. That is, one cannot fulfill one’s parental responsibilities without having the right to be physically present in the lives of the children and to make decisions on their behalf that the rest of the world has a duty to respect. In the majority of cases, disputes over legal rights and responsibilities in family court are a proxy fight for what parents fundamentally care about: the companionship of their children, including sharing mutual love and affection; the challenges and rewards of nurturing their children and providing a role model for them, according to their own abilities and perspective; the growing together into adulthood and old age, sharing a personal history of increasing depth and nuance. The most important ingredient for the achievement of all of these objectives is simply shared time together, and there is no substitute. Most disenfranchised dads would gladly trade off legal rights to “control” their children in exchange for having greater physical contact time with them than the standard alternate-weekend visitation that judges deem to be adequate to maintain and father-child relationship.

Family courts are inherently adversarial because the essence of their business is to strip one parent of his presumptive rights and responsibilities, and to remove that parent physically from the children for substantial periods of time (Millar and Goldenberg 2004). This reality cannot be papered over with trendy language about “parenting orders” that “grant” one parent some responsibilities and “award” another parent a different set. Family courts do not give parents anything they lacked before; they are merely redistributing what was once shared. Thus custody decisions are inescapably negative and destructive.<sup>2</sup> The reality is that the *only* class of parent who has no rights, only responsibilities, is the non-custodial parent. The enormous sense of loss that most fathers feel after leaving family court is not illusory, and is the real



reason custody battles are often bitter and long. In short, the quixotic battle against the ancient concept of *pater familias* has resulted not in its abolition but in its complete inversion.

## The English common law and *parens patriae*

*The magistrate is a speaking law.*

- Cicero

Under the English common law, parental rights were an extension of the general right to liberty enjoyed by all subjects of full age and property. Such persons were presumed to be at liberty to do whatever was not expressly proscribed by legal tradition. Thus parents, still principally fathers, had the unencumbered right to decide nearly everything on behalf of their minor children. Still, the Sovereign, acting through the common-law courts, had since time immemorial reserved the right to protect children from parental abuse that shocked community standards. As time went on, more and more areas of parental conduct were opened to judicial review in the common-law courts. Exercise of this Sovereign right to oversee parental conduct is known as the *parens patriae* jurisdiction of the court. Like all of the common law, it is judge-made law, worked out in the context of specific cases that have been brought before the courts over time. In the common-law tradition, judges exercised their *parens patriae* jurisdiction modestly and incrementally, recognizing that they were circumscribing the *sui generis* natural rights of parents.

Absolute monarchy was abolished in England in 1215, with the *Magna Carta*. Over the ensuing centuries, law-making power gradually devolved from the fiat of the Sovereign to an assembly of noblemen, and then further to an elected assembly. The law courts were fractured correspondingly, some dealing with the common law, some with ecclesiastical or cannon law, and still others with the laws enacted by Parliament. The unification of the law courts, which ultimately gave primacy to laws enacted by Parliament, is a relatively recent development.

## Statutory law and case law

*The best laws should be constructed so as to leave as little as possible to the discretion of the judge.*

- Aristotle

As the British tradition of parliamentary supremacy developed, it became commonplace that when the people's representatives were unhappy with the direction the Sovereign's judges took or refused to take in the common-law courts, they would enact statutes to override judge-made law. Over time, law-makers aimed to rationalize, codify, homogenize, extend, and sometimes reverse the common law in many areas, through passage of statutes of general application. In the area of family law, for example, specific statutes were passed protecting children from

excessive labour, requiring school attendance and inoculations, and setting standards for the discipline of children. Comprehensive child-welfare statutes were introduced much later, with stand-alone agencies to investigate and litigate suspected cases of parental abuse or neglect. In recognition of the inherent rights of parents, the bar was set high: parents had to be found “unfit” in order for the state to remove children from their care. In more current legalese, state intervention into a legal guardian’s sphere of liberty is warranted only when the child is “at risk” or “in need of protection” from the guardian, or from a particular decision of the guardian.

Along side the various context-specific statutory enactments delineating the boundaries between parental rights and the rights of the State in directing the growth of children were statutes relating to divorce, parental separation, and their corollaries: child custody, child and spousal maintenance, and matrimonial property division. Statutes relating to child custody and welfare are now, collectively, so comprehensive that it is rare to find a type of dispute involving children that requires a genuine exercise of the court’s common-law *parens patriae* jurisdiction.

However, much of the common-law function of judges has been retained in another way, despite – indeed, because of – the growth of statute law. The meaning of statutes is not always clear on its face, due to the general indeterminacy of language and often to the deliberately vague drafting of statutes by legislators. Thus judges are called upon to interpret what legislators have proclaimed into law. The more vague and indeterminate statutes are, the more judges must use their own experience and intellect to interpret and apply them in particular cases, to give concrete meaning to the statutes. The interpretation of statutes by judges gives rise to a body of law known as “case law,” which formulates precedents usually involving presumptions or guiding principles for future cases of a similar nature. Thus there is no absolute distinction between common law and statute law; the application of the law in any given area may be either statute-like or common-law-like, depending on the scope allowed for judicial discretion due to the indeterminacy of the statutory language. Given the radical indeterminacy of much of modern family law, it retains very much a common-law flavour, with case law being at least as often the *de facto* guiding authorities as the statutory wording.

## The consequentialist turn in jurisprudence

*Law, being a tyrant, compels many things to be done contrary to nature.*

- Plato

Since the industrial revolution, various intellectual, technological, and social developments have resulted in an almost complete reversal of the *pater familias* system of family law. The first major intellectual revolution was the crumbling of the philosophical foundations for the ancient concept of natural rights. In its place, the positive-law doctrine that held that human rights are a matter of convention and deliberate human invention paved the way for parliamentary and judicial expansion of the state into the regulation of familial life. Two



intellectual powerhouses in the first half of the 19th century, Jeremy Bentham and John Stuart Mill, provided the justificatory framework for positive law that was to last until well into the second half of the 20th century. They were the first utilitarians, who proposed that all laws should be drafted so as to promote “the greatest happiness for the greatest number.” Under their influence, the law gradually and incrementally assumed more consequentialist foundations, focusing on the promotion of social welfare.<sup>3</sup> Given this consequentialist turn in jurisprudence, it is perhaps not surprising that the welfare of the child should come to be seen as the “controlling consideration” in custody matters.

Consequentialist legal principles have an inherent tendency to become totalitarian. It is easy to fall into thinking that there is generally only one “maximum,” one “best” outcome – and generally only one avenue to it. Thus consequentialist legal principles tend to stand the old English common law on its head, implying the Calvinist dictum that “Whatever is not commanded is prohibited.” The best-interest principle, being a species of consequentialism, has tended toward totalitarianism, too. Although it was first explicitly adopted in Canadian federal legislation with amendments to the *Divorce Act* in 1985, it had been the “settled formula” in the case law for a century or more by this time. Until it was codified into statutes, however, judges tended to apply it with a fair amount of common-sense restraint, allowing parents to exercise a broad range of discretion with respect to the raising of their children in practice. As late as 1950, the Supreme Court of Canada cautioned against disturbing parental decision-making without the clearest of reasons (*Martin v. Duffell*, [1950] S.C.R. 737, at 747, *per Rand*):

...in determining [the child’s] welfare, we must keep in mind what Bowen L.J., in the case of *In re Agar-Ellis* [(1883) 24 Ch. D. 317], as quoted by Scrutton, L.J. in *In re J.M. Carroll* [[1931] 1 K.B. 334], says: “...it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.” Only omniscience could, certainly in balanced cases, pronounce with any great assurance for any particular custody as being a guarantee of ultimate “benefit” however conceived.

This passage will sound anachronistic to contemporary lawyers, both in its judicial modesty and in its respect for paternal judgment. But Rand instinctively appreciates three fundamental truths which judges in the mold of L’Heureux-Dubé fail to grasp. First, it is a law of nature that fathers care more about their children than any judge will ever do. Second, judges are not omniscient and certainly lack the detailed, personal knowledge of individual children who are affected by their decisions that parents generally possess. Third, there are many competing conceptions of what the child interests are, and it is not the judge’s role to impose his values upon litigants outside of exceptional cases. Little could Rand have imagined that, by the time the child who was the subject of this case could have had children of his own, activist Canadian judges would be claiming the beneficence and omniscience His Lordship here abjures. Little could he have imagined the disdain subsequent generations of Supreme Court judges would show for fathers, relegating them to the role of “interested observers,” and mocking the “magic ties” of paternity.

Given its centrality to contemporary family law, the best-interests principle will be subjected to a sustained critique in remainder of this chapter. This critique draws upon standard and widely accepted arguments in theoretical ethics, and owes an especial debt to Elster (1989). Once the theoretical underpinnings of the best-interest principle have been demolished, the historical trail that culminates in contemporary jurisprudence will be taken up again in the next chapter. A host of practical problems with implementing the best-interest principle are discussed in the final chapter.

## Ultimate objectives and mediating principles

*Consequences cannot alter statutes, but may help to fix their meaning.*

*- Benjamin Cardozo*

Choosing the best chess move in a given position is not a principle of rational choice; it is merely a way of stating the ultimate objective of maximizing one's winning chances. If it were feasible to calculate every possible variation to the very end, it would be feasible to apply the "best-move principle" directly in a given chess position, as it is in simpler games such as tic-tac-toe. Since this is not feasible, however, human limitations call for the application of mediating principles that provide practical guidance to the chess player: king safety, mobility of pieces, passed pawns, and so on. In a task as complicated as a chess game, useful mediating principles are both legion and subtle. It is no different with adjudicating a custody dispute, except that the task is even more complex and the ultimate objective much less clearly defined than in a game.

Promoting the best interests of children is not a principle of rational choice; at best, it is an ultimate objective. Achieving this ultimate objective requires the application of mediating principles – rules of thumb, legal presumptions, and other forms of practical guidance. Judges recognize this, which is why a large body of case law has developed in family practice. The thesis of this chapter is that the case law is vast and convoluted, full of inconsistencies reflecting the idiosyncrasies of individual trial judges, which appellate courts have done a poor job ironing out. Moreover, insofar as a consistent body of case law has been developed, judges have settled upon the wrong set of mediating principles – among them, the tender years doctrine, presumptions in favour of the primary caregiver and the *status quo*, awarding sole custody (not joint custody) in high-conflict cases, and the rule granting great deference to the wishes of the custodial parent, to mention a few. The outcomes for children summarized in the previous chapter suggest that the mediating principles that have been adopted by the courts do not in fact promote the child's best interests very well, for very long, or very reliably, for the most part. The primary purpose of the following sections is to show, theoretically, why the best-interest principle leads family law into seas that are so fraught with difficulty. In the next chapter, it will be argued that parental rights should be restored to their former role as the most fundamental mediating principle in custody disputes. In particular, it will be argued that the presumption of shared parenting follows from sound mediating principles such as the maximum-contact and friendly-parent principles.

# Values are incommensurable and contestable

*Do **not** do unto others as you would that they should do unto you.*

*Their tastes may not be the same.*

*- George Bernard Shaw*

Philosophers, theologians, and sometimes scientists have debated the nature of value for millennia, with no sign of the arguments ending. Do values exist independently of human sentiment, or are all values ultimately subjective? Which values are truly human and which are mere chimera? Most peoples' eyes glaze over when confronted with abstract and abstruse arguments addressing these questions. Meanwhile, practical people must get along in society, and live their lives by their own lights. They agree to disagree. Even if values do exist "objectively" in some metaphysical realm, it is safe to say that there is no publicly recognized method of identifying them and ranking them from most to least important. Pluralistic, liberal democracy is premised on the fact that ultimate values are essentially contestable. Free citizens need the legal protections afforded by a document like the American *Bill of Rights* or the Canadian *Charter of Rights and Freedoms* so as not to have external values imposed on them by others, acting through the agency of the State.<sup>4</sup>

The most radical critique of consequentialism in general, and of the best-interests principle in particular, has to do with the incommensurability of values: quite simply, there is no publicly recognized metric of value. Maximization entails that all values can be ranked objectively on a cardinal scale, that they can be measured in a single unit of currency (such as utility or dollars). This is fundamentally antithetical to the value pluralism that is the basis of liberal democracy. Given the impossibility of producing a publicly recognized, cardinal ranking of values, any attempt to decide custody cases based on the child's best interests is fundamentally misconceived.

An example drawn from the reasons of Cory and Iacobucci in *Young* illustrates the problem acutely: suppose one parent adheres to a fundamentalist religion while the other is a strict Darwinian scientist. Judges have no special insight into which parent's views or values should be imparted to the child in cases like this. But one need not appeal to deep, existential differences to make the relevant point. If one parent wants to encourage the child to become a Harvard philosophy professor and the other wants to encourage the child to become a beauty queen and super model, whose influence on the child should a judge decide is to prevail? On a completely mundane level, are tattoos an innocent indulgence for social acceptance, or an ugly abomination for an adolescent child? Value pluralism implies that there is no objective better or worse with respect to the myriad influences that parents expose their children to, so judges have no basis on which to decide in favour of one or the other. Each parent must be free to instruct the child as he or she sees fit, if the *Charter* values of liberalism and pluralism mean anything.

The problem cuts deeper than disagreements over what is of ultimate value, or what life

experiences a child should be exposed to out of the endless variety of human lifestyles available. Even in cases where parents agree on which values to promote in their child, a judge still cannot decide a custody dispute based on the child's best interests in the absence of a generally accepted ordinal ranking of values. Without knowing how much of one value is equivalent to what amount of another value, there is no way to adjudicate which parent will maximize the child's interests all things considered. Suppose the father wishes to encourage the child to become a high-profile professional like himself, while the mother wishes to encourage the child to become a self-fulfilled artist like herself. Both parents might agree that self-fulfillment and financial security are important values, but disagree about their relative worth, and therefore about how the trade-off should be made in typical cases where the child is unlikely to achieve high levels of both. Without an objective metric, a judge is at a loss when adjudicating such a dispute. The only logical course is to maximize contact time with both parents and allow them to vie for the child's heart and mind. Indeed, only if the child were to have equal exposure to the two contrasting lifestyles could he or she form an autonomous opinion, without the undue influence of one parent or the other. It is in the child's best interest to learn the true costs and benefits of contrasting lifestyles first-hand.

The premise that custody and access should be determined solely in the best interests of the child implicitly reduces the decision to a math problem: list all the positives and negatives of each option, attach a numerical value to each positive and negative aspect, multiply by the probability of each outcome being realized, and add up the expected utilities; then pick the option with the highest score. It is revealing that judges and custody assessors never do what children are expected to do on their math exams, namely show their work. They talk a great line about "balancing" this value and "weighing" that one, but they never demonstrate, with calculations, which values they have considered and what scale they used to weigh them. Rather, in most cases they simply throw out a bunch of considerations that have arisen in the course of litigation, and then pull out a decision – not quite from thin air, but in favour of the mother. The same is true of custody assessments written by child psychologists. If value pluralism is true, this is of course all they can do, and the pretext of basing a decision on the child's best interests is a fraud. Faced with a dispute centering on essentially contestable values, judges and custody assessors necessarily end up doing one or both of two things: either they apply their own values to the case, illiberally and illicitly supplanting the values of the parents; or else they decide who gets to influence the fundamental, structural values of the child on the basis of relatively trivial or irrelevant differences between the parents. Judges routinely award primary custody of peripubescent children to the parent who changed more diapers or attended more parent-teacher meetings, for example. This is truly a case of the tail wagging the dog.

The practical way out of this morass of value pluralism is to recognize that some things are important in life no matter what a person's ultimate values are. Some things have indisputable instrumental value due to being necessary conditions for promoting whatever ultimate values a person may have. Political freedom is one such value: without it, nobody may live their life to the best of their abilities, by their own lights. Many individual values are likewise instrumental:

good physical and psychological health; a basic level of education, including at a minimum literacy and numeracy; and a set of basic virtues such as honesty and respect for the lives and property of others that facilitates living freely in society. As the child ages, it is also important to foster autonomy and independence, so that the person who emerges in due course is a mature, properly functioning member of a pluralist, liberal democracy. Society has an interest in making sure that children receive the minimum parenting necessary to achieve these instrumental results; society has no interest in promoting one parent's values for the child over another's. It follows that the most judges can be expected to do – as well as the least that judges can be expected to do – is to prevent certain identifiable physical and psychological harms from befalling children at the hands of a parent. As long as the *parens patriae* jurisdiction resides in judges, their role should begin and end with administering the no-harm principle, which is their statutory role in child welfare cases.

## Problems of indeterminacy

*If mom is happy, everybody is happy.*

*- Family-court adage*

Even in those (rare) cases where there is no dispute between the parents about what ultimate values to promote in their child and what the relative importance of those values is, the best interests of the child may still be indeterminate. To begin with, it is theoretically impossible to determine what is in a person's long-term interests when their preferences change unpredictably. Yet the preferences of children, especially young children, inevitably change frequently, and unpredictably, as they develop. Critically important here is that changes in preferences are often a response to changes in the feasibility set – i.e. changes in what is offered to the child as live options. Since changes in custody and access arrangements clearly affect the live options available to a child, the child's interests are inescapably shaped by the custody and access arrangements imposed by a judge. For this reason, custody and access decisions tend to have the character of a self-fulfilling prophesy. In typical cases, judges do not really make these decisions in the child's best interests; rather, the child's interests adapt to the decisions made by the judge so as to make the most of it. Had the judge made a different decision within a broad range of plausible options, the child would have maximized his or her interests for that feasibility set, too.

The previous chapter showed that father-child bonds frequently deteriorate when mothers obtain primary custody after a separation. It is sometimes argued that this proves that judges were correct in their original assignment of primary custody to the mother: a devoted father would preserve ties to his children at all cost. This is psychologically naïve in the extreme. A primary custody award effectively closes off deeper psychological attachments to the parent with visitation, so that the child inevitably finds such fulfillment as is possible in their relationship with the custodial parent. This initial distancing of the child from the father can easily snowball. Each in a series of court applications over the first year or so after separation may promote a



child's short-term interests, even as the child's long-term interests associated with meaningful paternal contact is undermined. The incremental removal of fathers from the lives of children after separation in some cases is due to the changing needs for the father's love and affection caused by primary custody awards. This dynamic goes a long way toward explaining the paradox observed in the previous chapter that it is the most highly involved fathers prior to the separation who end up losing contact with their children after a separation.<sup>5</sup> The stronger the father-child bond is before separation, the more vigorously he is likely to fight for shared parenting after separation; yet when this arrangement is resisted by the mother, the acrimony between the parents is most likely to lead to an award of primary custody in her favour, causing irreparable damage to the close father-child bond. As one advocate has aptly pointed out, "Any step away from shared parenting is a step in the direction of parental alienation." The take-home lesson for judges in this limitation of the best-interests principle is studiously to disregard short-term expediencies and be mindful of the child's long-term interests. Unfortunately, in the crush of interlocutory applications that typically follow immediately upon a separation, expediencies are often the only type of consideration judges entertain. The dye is cast for all the wrong reasons.

The second reason for the indeterminacy of the child's best interests relates to the interdependence of the utility functions of family members. A judge cannot unambiguously advance the child's interests when the child's happiness depends upon the happiness of his or her parents, and the parents' happiness conflicts. Given how deeply intertwined attachments are within human families, the best interests of the children cannot be considered separately from the best interests of their parents in typical cases. In concrete terms: if mom gets primary custody, dad will be unhappy, and thus the child will be unhappy. There is a risk that the child might come to believe that dad is unhappy "because of them," and feel guilty because the custody decision was made ostensibly on their behalf. Likewise, if dad gets shared parenting, then mom will be unhappy, and thus the child will be unhappy, with the same result. A standard method of untangling such conflicts in consequentialist moral theories is to rule certain types of interest inadmissible in the calculation. For example, the pleasure a sadist derives from inflicting suffering on others should not count at all in favour of sadistic practices.<sup>6</sup> Likewise, the unhappiness a parent suffers from not being able to gain primary custody of the child should not be given any weight in a custody decision. More generally, the interdependence of intra-familial utility functions calls for the application of the friendly-parent principle, giving greatest weight to the wishes of the more co-operative parent.

Regrettably, the Supreme Court inverts this logic in *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the leading case dealing with mobility rights. The upshot of this case is that promoting the custodial parent's happiness should take precedence over mitigating the access parent's unhappiness, since the child has to live with the custodial parent and not the access parent. As a principle of justice, this eerily mimics the words the Apostle Matthew (25:29) attributes to Jesus: "For to every one who has will more be given, and she will have abundance; but from him who has not, even what he has will be taken away." Yet if the custodial parent cannot be happy with what she already has – primary custody – and is unmoved by the misery of the access parent



caused by relocating the children very far away from him, then it is appropriate to reconsider which parent is truly putting the best interests of the child first and which is putting her own needs first. In typical cases where the child is bonded with both parents, shared parenting is called for because that at least minimizes the unhappiness of the parents and thus minimizes harm to the child.

## The problem of uncertainty

*I have no spur*

*To prick the sides of my intent, but only*

*Vaulting ambition, which o'erleaps itself,*

*And falls on th'other.*

*- William Shakespeare*

Aside from intractable disputes between the parents over fundamental values, undoubtedly the biggest decision-theoretic problem faced by judges is ascertaining the relevant facts of the case, and from them predicting what the outcome for the child might be for various possible resolutions of the custody dispute. When important facts of the case are in dispute between the parents, there is often no objective reason to prefer the testimony of one parent over the other.<sup>7</sup> Moreover, judges lack expertise in psychology, family dynamics, sociology, child medicine, economics, and other related fields which might assist in predicting outcomes for children based on the case-specific facts. Often, they lack even basic knowledge of these fields and rely purely on gut instinct or the dubious “social context training” secretly provided to judges by the National Judicial Institute. Even in the relatively rare cases where a custody assessor is called in to make a professional recommendation, and the dispute goes to a trial with *viva voce* testimony by the parents before a judge, uncertainties about the case can still be great. Much more will be said in the final chapter about these systemic failings of the family-dispute system. Suffice it to say for present purposes that making predictions about how children will turn out based on the testimony of the parents, at a snapshot in time, after being filtered through partisan lawyers, is not a science. It is at best speculation in any case where abuse or neglect is not established.

The question remains how a judge, recognizing the limitations of information and knowledge inherent in the system, is to choose a custody arrangement rationally. Many decision theorists advocate the maximin principle of choice in circumstances of radical uncertainty (Rawls 1971).<sup>8</sup> Maximin is an abbreviation for “maximizing the minimum.” This principle directs the decision-maker’s attention to the worst outcome that might arise from each option under consideration, and recommends that the option with the best of the bad outcomes be chosen. A family-court judge has broadly three options: maternal primary custody; paternal primary custody; or some variation on a split, parallel, or shared parenting regime. The research summarized in the previous chapter powerfully discredits any presumption in favour of maternal or primary

custody, and thus supports a presumption of shared parenting. Nevertheless, grant for the sake of argument that the child's best interests are promoted by awarding primary custody to the more-able parent, even in cases where the less-able parent is neither neglectful nor abusive. Still, in typical cases it will not be glaringly obvious to an unbiased observer which parent is more able and which is less able. In those cases, there will be an appreciable risk that judges will get it wrong, choosing the less-able parent for primary custody.<sup>2</sup> By hypothesis, this would be the worst possible outcome. At least in a shared parenting regime, the "better parent" will be able to moderate the influence of the "worse parent." Thus one would expect the worst outcome from shared parenting to be better than the worst outcome from a primary custody award. Encouraging judges to attempt to make fine discernments between disputing parents, under conditions of considerable uncertainty, is a recipe for making bad mistakes (Kruk 2005).

The above argument is premised on the best-case scenario, when neither parent is neglectful or abusive. But problematic family disputes are perhaps most common between parents who are atypical, who are far from ideal, where there is something to be concerned about in each parent. The maximin principle is especially appropriate when *both* parents leave much to be desired. The well-established finding bears repeating in this context: children are most at risk of all manner of harm and self-destructive behavior when in the custody of single mothers. They are far more likely to be physically abused by their mother and sexually abused by their mother's partner or a stranger.<sup>10</sup> They are more likely to drop out of school, have substance-abuse problems, become pregnant as a teen, be convicted of property crimes, and suffer from a litany of other issues (Baskerville 2007, Rohner and Veneziano 2001, Braver 1998, among many, many others). The academic, governmental, and advocacy literature on this subject is staggering, and frightful. Since even fathers who have little aptitude for nurturing tend to be highly protective of their children, at least a shared parenting arrangement allows him to monitor properly the child for significant harms that might be occurring in the mother's care. The more pressing it is to avoid the worst possible outcomes for children, the more shared parenting is recommended as the starting point in custody disputes.

## The best-interests principle is self-defeating

*He would give his right arm to be ambidextrous.*

- G.A. Brown

Previously it was argued that granting what might be in a child's best interests at a given point in time, on a particular application in court, might not be in the child's long-term interests, because the child's interests are affected by a change in the feasibility set imposed by the initial decision. Judges must take the long view, anticipating the drifting or whittling away of the father-child bond in response to being relegated to a visitor in the child's life, and avoiding that where possible. Similarly, a case-by-case application of the best-interests principle sets up systemic incentives that work contrary to the best interests of children generally.<sup>11</sup> A system that tells fathers that their children may be substantially taken away from them at any time, at

the pleasure of the child's mother, is one that does not encourage strong father-child bonding. A system that tells children that their father may be substantially taken away from them at any time, at the pleasure of their mother, is one that does not encourage strong child-father bonding. In short, such a system promotes the scourge of "deadbeat dads," which is detrimental to children overall, in the long term. The best way to preserve the valuable institution of fatherhood is to have a rule that gives fathers a significant role to play after separation, even if that might not be thought to promote a particular child's best interest narrowly calculated.

More generally, the family-dispute system should aim to preserve the institution of the family as much as possible, even if that means exposing some particular children to some amount of parental conflict for some period of time after a separation. Trying to protect a child from the stress of parental separation by turning one parent into a Big Brother is both short-sighted and narrow-minded. Application of the best-interests principle must be done, if it is to be done successfully, at a level far removed from the courtroom – i.e. by legislators who can take the long view, and the societal view, into account. We need a rule of law that protects fatherhood after separation. Judges must be restrained by statutes promoting shared parenting wherever practical, so that they do not do broader societal damage in the pursuit of the child's best interests on a case-by-case basis.

## The best-interests principle is self-limiting

*A lawyer and a wagon-wheel must be well greased.*

*- German proverb*

A principle is self-defeating when its application in particular cases undermines the objective of the principle generally. A principle is self-limiting, on the other hand, when its simple-minded application in a particular case creates incentives or attitudes that undermine the objective of the principle in the same particular case. In such a situation, the principle itself calls for a more nuanced application – the principle limits itself. What follows is a discussion of three of the most important ways in which the best-interests principle is self-limiting.

### 1. Institutional effects:

It is trite to note that a separation is often an emotional and stressful time in a person's life. A family-dispute system that cared for the best interests of children would attempt to mitigate the turmoil of separation for children and parents alike. Yet the incentives inherent in the existing system do nothing but exacerbate turmoil. Millar (2009) concludes that the courts create some of the deficits experienced by children of divorce. Even when parents are determined to separate amicably, the system preys upon their emotional vulnerability, inexorably guiding them into a long and bitter fight. The best-interest principle is a main culprit in this dynamic, because it creates a winner-takes-all contest by encouraging everyone to think that "the better parent" should have primary custody of the child.<sup>12</sup> In short, custody battles are often long and bitter because the stakes are so high and the outcome often depends on the perception of a razor-

thin difference between the parents. The first way in which the best-interests principle is self-limiting, then, is that the direct and single-minded pursuit of it sets up incentives for parents to fight rather than to co-operate after a separation. Anything that can be done to simplify the process and mitigate the turmoil would likely improve outcomes for children. Narrowing the range of possible outcomes in the vast majority of cases – thereby substantially reducing the stakes involved – would go a long way toward promoting more amicable separations. A strong presumption that each parent will have residency of the child at least 40 per cent of the time after a separation would leave most parents only a small range of contact time to fight over. The focus could then shift to finding practical solutions to making the split work.

## **2. Personality effects:**

A direct and single-minded pursuit of the child's best interests tends to be self-limiting for the same reason that the direct and single-minded pursuit of one's own self-interest tends to be self-limiting – it leads to personality traits that make it difficult to function in an interdependent world.<sup>13</sup> The best-interests principle threatens to create a society of “little emperors” and “little princesses,” who believe that theirs are the only interests that count, because they have always been told this and have always been treated as though this were so. Surely one of the most important lessons children need to learn is that other people have interests and rights that matter, too, and that they must accommodate others' interests and rights if they hope to get along in this world. The very last thing children need encouragement for is to be selfish, to play one parent off against the other in order to get the best deal they can, to run rough-shod over the rights of their parents. Children also need to learn to respect authority, even if it seems arbitrary or wrong to them, because they will have to respect the arbitrary authority of politicians, judges, employers, and many others throughout their lives if they hope to stay out of trouble. As a former leader of the Liberal Party of Canada observes:

...children will not develop well when there is no continuity of care and concern. Continuity implies sacrifice but reasonable sacrifice doesn't necessarily mean putting children's interests first. *No model of family life will work if it is based on unequal and unlimited sacrifice.* As a moral training ground, families ought to teach the lesson that no one's interests should automatically come first and certainly not the children's.<sup>14</sup>

The over-riding importance of basic moral training for children should be obvious to anyone who deals with them. Yet the training they receive in the course of a custody dispute, and as a result of the custody outcome, is the very opposite of what they need for success. Judges utterly fail to appreciate the effects of one-sided custody decisions on a child's moral development, and are inclined to look at lawyers who ask them to compare the “moral training grounds” provided to children by each parent as though they were speaking Ferengi. Indeed, the most shocking and unforgivable omission from the statutes and the case law that give substance to the best-interests principle is consideration for the moral development of children.

## **3. The costs of applying the principle:**

The problem of uncertainty discussed above can be overcome to some extent by getting more

and better information about the family into court – including more extensive examinations for discovery, more cross-examination of the parties on the witness stand, more collateral witnesses, better expert witnesses, and so on. Any decision requires good information, but marshalling information involves financial and psychological costs. In a large range of cases, a rigorous attempt to apply the best-interests principle would quickly exhaust the financial and emotional resources of the parties, given the enormous amount of detailed information that may be relevant to determining a child's best interests. The quest to obtain better information, or to suppress that information when it is detrimental to one's case, is often used as a cover for strategic manoeuvring. In a large range of cases, it is to the advantage of one parent to burden the other with financial and emotional costs in order to obtain a concession or even complete capitulation, or to protract the litigation in order to maintain a favourable status quo. It has been estimated that the average family-law trial costs more than the average income earned in a year, for each party.<sup>15</sup> It is not surprising, then, that very few cases actually get to trial. A series of shorter court applications, especially when they involve a custody evaluation by a child psychologist, can quickly add up to the cost of a trial, anyway.

In short, parents often need to be saved from themselves after a separation. They need to be prevented from engaging in a war of attrition that, although each battle in the war might be justified as being in the child's immediate best interests, ultimately leads to everyone losing. Cost-reduction measures are desperately needed in the family-dispute system, if it is to produce results that are truly in the best interests of the child. Simplifying the rules, taking the dispute out of the hands of unaffordable lawyers as much as possible, and relying upon fair, general principles as discussed above – the no-harm principle, the maximum-contact principle, and the friendly-parent principle – would be a good start.

Two concrete proposals for cost-reduction measures are worth mentioning: “nesting” arrangements and open mediation. A nesting arrangement has the child continuing to reside in the matrimonial home, while the parents move in and out on a weekly basis (or at some other regular interval, depending on the age of the child). This simple yet ingenious arrangement preserves maximum stability for the children, maximum contact for each of the parents, and at minimum cost. It is fair, since the parents generally wish to occupy two separate residences after separation, and there is usually no compelling reason why one should continue to enjoy all of the amenities of home while the other has to find and furnish another place suitable for visitation with the child. One apartment that the parents can alternate occupancy of during their non-custodial weeks is all that is needed. Nesting arrangements are not unknown in the family-dispute system, mostly on an *interim* basis before a trial, when a more permanent arrangement can be made. Yet this fair and efficient arrangement is oddly frowned upon by the judiciary, who would rather see a full-blooded, all-or-nothing contest for the children and the matrimonial home than countenance a bit of on-going friction between the parents resulting from the need to leave each domicile in a habitable condition when the weekly transition takes place. Sorting out disputes over these quotidian frictions is not something the legal system is at all competent or comfortable doing, which is why the second proposal would typically need to be implemented along side the first, at least temporarily.

Open mediation is another simple yet under-utilized measure in our family-dispute system. The main features of open mediation are these: (a) The parents must agree upon a mediator to meet with and discuss the problems they are experiencing. The mediator would in most cases be a registered family therapist, but it need not be. It could be anyone the parties trust to be fair and reasonable in resolving their differences, including their church clergy, an elder of the tribe, a trusted relative or friend, and so on. The advantage of using a registered family therapist is that they generally have more expertise and objectivity. (b) They must meet with the mediator on a schedule prescribed by the mediator, which will vary depending upon how urgent and how difficult the dispute is. (c) The sessions must be conducted face-to-face between the parties and the mediator. No lawyers may be present during the mediation sessions, although of course lawyers may be consulted for advice outside of the session. (d) The mediator must have the authority to consult with anyone who might be helpful in assisting with resolving the dispute, including anyone with information that bears on the dispute. This includes the children themselves in appropriate circumstances. (e) If the parents reach an impasse in mediation, the mediator must be authorized to write a report for the judge that states what the impasse is about, what independent evidence has been obtained relating to the concerns, what solutions have been proposed, and what reasons were given by each parent for why various proposals would not work. If the mediator deems it appropriate, he or she could make any other observations that might assist the judge, and make a recommendation for resolving the dispute.

Each of these features of open mediation is important. In order to begin with trust, a mediator cannot be foisted upon one parent or the other. Just as importantly, the requirement of mutual agreement on a mediator would quickly weed out professionals with biases and prejudices in favour of mothers or fathers. Regular, face-to-face meetings with the parents would provide the mediator with a wealth of nuanced information about the communication styles, attitudes, and other personality traits of each of the parents, assessed with professional experience that judges do not possess. Given the proper court-ordered authority, the mediator would be able to “get to the bottom” of many disputes by obtaining relevant information directly from family doctors, teachers, relatives, neighbours, social workers, police, and others who have had contact with the family – cheaply, quickly, and unfiltered. Finally, it is important that mediation not be a privileged form of settlement negotiation, so that if an impasse is reached the judge is able to determine which party is responsible for the failure of mediation. This feature is critical if the process is not to become a charade. Open mediation, even at a chartered psychologist’s normal rate of pay, would be much more cost-effective than involving lawyers (on both sides) in every disagreement that arises. It would be possible to purchase an entire year of family mediation, one session per week for an hour, for the median cost of a typical *interim* motion.<sup>16</sup>



## The best-interests principle is unduly narrow

*Continuity [of care] implies sacrifice but reasonable sacrifice doesn't necessarily mean putting children's interests first. No model of family life will work if it is based on unequal and unlimited sacrifice. As a moral training ground, families ought to teach the lesson that no one's interests should automatically come first and certainly not the children's.*

- Michael Ignatieff

One of the attractions of utilitarian reasoning is its inherently democratic nature: “everyone counts as one, and nobody counts for more than one.” In principle, nobody’s interests run rough-shod over anybody else’s interests. In this respect, utilitarianism is the very antithesis of egoism, where the decision-maker’s own interests over-ride everyone else’s. It is curious that the best-interests principle could be considered in any way superior to egoism as a principle of dispute resolution, given that it is every bit as narrowly focused on one individual. The interests of the child are deemed not only to be most important, but important to the exclusion of all other considerations. Most people regard such a fanatical narrowness of focus to be the very antithesis of morality. This point is distinct from the arguments made above about the effects on family and personality that a direct and single-minded application of the best-interests principle leads to. There, the point was that an interplay of interests between members is the *sine qua non* of normal family life, so to elevate the child’s interests above everyone else’s is to demolish the family as an institution and the child as a social being. Here, the point is that, quite independently of the effects on family and personality, it is simply wrong in principle to elevate one person’s interests over everyone else’s. Elster (1989: 143, footnote omitted) makes the point powerfully:

The commonsensical attitude... is to protect the disadvantaged at the expense of the well-off, but not if the gains are unreasonably small compared with the costs... Applied to child custody, the reasoning suggests that one should avoid two extremes. The child custody decision should not be made on utilitarian principles with the goal of maximizing the total welfare of the family members.[ ] The child needs special protection. That protection should not, however, extend to small gains in the child’s welfare achieved at the expense of large losses in parental welfare.

To summarize the message of this chapter: Whether or not parents have *sui generis* natural rights in relation to their children as a philosophical matter of abstract legal or ethical theory, it is clearly in a child’s best interest for everyone involved to *believe* and *act* as if parents have rights which might circumscribe the child’s immediate interests and limit the kinds of considerations that might be raised about the child’s best interests. Only by ascribing legal rights to both parents, as mediating principles that continue to protect their parental authority after a separation, will the best interests of children actually be advanced.

## Contrary to public policy

*It is not enough to be rude; one must also be wrong.*

*- Hungarian proverb*

Finally, it must be noted that the best-interests principle is not sacrosanct in our family-dispute system. In the next chapter, we will see that it is not applicable at all in the whole class of cases where children are apprehended from a legal guardian by child-welfare authorities. In the chapters after that, we will see that judges have little discretion to attune maintenance payments to the child's best interests, but instead are required by statute to follow rigid tables based on a flawed formula. Here, we take a look at situations, some already recognized in law, where it is contrary to public policy, or to considerations of justice, for the child's best interests to be the controlling consideration in a custody decision.

Public policy has long been recognized as a limit to promoting the best interests of children. Consider the following types of case: (a) Back in the day when mixed-race and homosexual couples faced severe public discrimination, courts refused to take into account the additional stresses a child might face growing up in such a family. It was thought wrong to punish a parent seeking custody of a child for the prejudices of the general public, even when those prejudices were real and could reasonably be known to cause the child considerable distress. (b) In a recent Quebec case, a woman sought to adopt a child who was the product of her husband's sperm and a surrogate mother's ovum. The identity of the surrogate mother was never revealed, and there was no question that the child would be cared for by this couple as though he were their natural child. The adoption could not be denied if the child's best interests were the controlling consideration. Yet the adoption *was* denied, on the ground that granting it would be tantamount to legitimizing the surrogacy contract, which is illegal in the Province of Quebec. The judge was concerned that the couple had taken the law into their own hands and presented the court with a *fait accompli*, concluding that the end cannot justify the means: "This child is not entitled to a maternal lineage at any price." The best-interests principle cannot "purify whiter than white and erase everything that has been done before": *Adoption – 091*, 2009 QCCQ 628, per Dubois J.C.Q.

(c)(i) When a child is kidnapped by a stranger from a neonatal ward or from a playground only to be discovered some years later, the controlling consideration is not what is in the best interests of the child at that time. Considerations of justice, based on the inherent rights of the biological parents, trump the child's best interests. The child is transitioned to the "rightful" parents without a custody hearing of any kind, though of course with due attention to mitigating the trauma this might involve. (ii) Likewise, when a parent kidnaps a child over whom they have lost custody, the courts do not reward such behaviour by reconsidering some years later, when the child is found, what is in the child's best interests at that time. (iii) Extreme parental alienation is tantamount to kidnapping; indeed, it is sometimes worse than a simple kidnapping in that the child is emotionally poisoned and positively turned against the non-custodial parent. Although the judicial response to such cases is at best weak and uneven,

there have been cases where the alienating parent has been stripped of custody and the child has been transitioned back into a relationship with the alienated parent. The principle of justice that a person must not be allowed to take the law into their own hands or benefit from the commission of a crime is considered determinative.<sup>17</sup> Regrettably, it takes an extreme case for judges to react appropriately. Garden-variety false allegations that are used to gain a temporary advantage in a custody battle, and routine breaches of access orders by custodial parents, are rarely remedied, much less punished. This soft-on-parental-crime attitude by judges is not in the best interests of children generally, or in the long run. Breathing life back into the concept of parental rights is the best way to protect children from these abuses.

## Conclusion

Two hundred years ago, utilitarianism represented a clear advance over the stultifying, mysterious, and arbitrarily elitist natural rights doctrines that preceded this mode of moral and legal justification. It was appealing to a burgeoning democracy, especially since few could deny that the practical consequences of an action are an important consideration in any social decision. But ethical theory has not stood still; it has taken tremendous strides in the past 200 years. No other class of ethical theory has been subjected to such thorough and penetrating examination, nor has any been refuted with such a wide range of withering critiques, as consequentialism in all its various forms. These critiques cut across the entire political spectrum, having been endorsed by political theories as diverse as Marxism on the one hand and libertarianism on the other. It would be disastrous for “persons of action” – as politicians, lawyers and judges typically style themselves – to dismiss the arguments of this chapter as a sterile bundle of academic technicalities. On the contrary, the criticisms summarized here cut to the quick of what it means to live in a free and pluralistic society, where cooperation is prized over conscription.

Modern ethical theory has not only played a destructive role, tearing down consequentialism as the foremost framework for ethical and legal justification; it has also made positive advances. Most significantly, and in large part as a reaction to the totalitarian tendencies of consequentialist moral and legal reasoning, ethics has developed in the direction of understanding rights as a practical bulwark against collectivist rationalization. The burden of the next chapter is to show that the rights revolution should not pass parents, and families, by. Paradoxically, it is only by strengthening, protecting, and respecting the rights of parents that the best interests of children can be promoted.

## Chapter 3

# A Vindication of the Rights of Parents

*Any step away from shared parenting is a step in  
the direction of parental alienation.*

*- unknown*

Family-law jurisprudence is mostly stuck in the Victorian era. Despite the overwhelming theoretical and practical limitations of consequentialist legal reasoning adduced in the previous chapter, and despite vast economic and sociological changes that have transpired since the industrial revolution, judges and politicians have become increasingly fixated on the best-interest principle as the salvation of family law. In this chapter, we pick up where we left off in the historical development of family law, concluding with an argument for restoring parental rights to their proper place in jurisprudence.

## Social and technological impacts on the family

*The law hath not been dead, though it hath slept.*

*- William Shakespeare*

The industrial revolution led to the wide-scale destruction of traditional “cottage industries.” These were family-run enterprises or small guilds, home-based businesses where parents worked side-by-side and passed their specialized skills down to their children. Self-employment in homes and on farms inexorably gave way to paid employment in factories and offices. A long period of increasing division of the family labour ensued, with mothers largely confined to the home caring for children while fathers spent long and often brutal hours as wage earners. This trend, which lasted well into the 1960s, meant that fathers’ relationships with their children typically became more attenuated. Accordingly, the old presumption of paternal custody increasingly gave way to presumptions favouring mothers. Millar and Goldenberg (1998) trace this development back as far as the *Talfourd’s Act* (1839), which allowed mothers to petition for custody of their young children. Kruk (2008: p. 24) notes that the judicially created “tender years doctrine,” which held that young children should reside with their mothers, was already established in Canadian jurisprudence at the beginning of the 20th century. The tender-years doctrine did not operate independently of, or contrary to, the best-interests principle; it was a mediating principle, arising from the particular social circumstances that existed at the time.

The trend toward increasing specialization of family labour reversed in the 1970s, as women began entering the workforce as a matter of routine expectation. Women’s labour-force participation was assisted by affirmative action laws, as well as advances in birth control

and liberal abortion rights, which have given women essentially complete control over their reproduction. Still, women's labour-force participation rate today is not yet equal to that of men, who continue to work for pay on average more hours per week, more weeks per year, and more years per lifetime. But the social trends are unmistakable: almost 30% of married women earn more than their husbands (Fitzpatrick 2006), and more than half of all professional and managerial workers are now women. This trend shows no signs of abating. There are almost 50% more women than men currently enrolled in post-secondary education, which does not auger well for the next generation of men. It should come as no surprise, then, that among dual-income couples, parenting of children is almost equal. According to the latest statistics (*circa* 2000), fathers spent 10.5 hours per week caring for their children while mothers spent 11.1 hours per week (Kruk 2008: p. 14).<sup>1</sup>

The increasing participation of women in the labour force has not lead, as one might expect, to a legal presumption of shared parenting in family disputes, nor even to a lesser reliance on the presumption of maternal custody. While the tender-years doctrine was judicially discarded in the 1980s due to its overt discriminatory overtones, it has been replaced by two presumptions with equivalent effect, namely that the mother is the "primary caregiver" of the children (Henry 1994) and that this *status quo* should prevail after a separation. According to Kruk (2008: p. 14):

Paradoxically, the new act [the *Divorce Act* (1985)] coincided with a proportionally larger share of cases of sole maternal custody, resulting from the introduction of social context education of the judiciary that emphasized the unfairness to mothers of legal custody outcomes.... Since 1986, a major expansion of family law has occurred, with considerable reliance on parental gender for custody decisions, in the absence of predictors of the "best interests of the child."

## The women's rights movement

*"Still?"*

– *Winston Churchill, when advised that in the next century women would rule the world.*

The reason maternal preference gained ground in custody disputes even while the time mothers spent providing child care dramatically declined and fathers increasingly took up the slack is that women's rights became the *cause célèbre* in Canada in the second half of the 20th century. The rise of feminist ideology and its baneful influence on the law has been painstakingly and compellingly documented by others.<sup>2</sup> The pertinent observation here is that there has been scant recognition in custody disputes of the changed role of mothers and fathers in the past 40 years. The tension that has always existed within feminist ideology between the rhetoric of equality – implying that gendered roles should be overcome both in the workplace and in the home – and the rhetoric of liberation – implying that families are inherently patriarchal, so women must be given complete autonomy to decide if and when to enter and exit family

life, and on what terms – has been resolved by allowing women to have it both ways – i.e. with preferential treatment both in employment and in family court.

While the official legal dogma is still consequentialist – the best-interests principle is still what judges must appeal to in justifying custody decisions – this principle is consistently applied so as to give maximal weight to the mother’s interests, at the expense of the father’s interests and even, frequently, at the expense of the interests of the child. It is as though our elderly judges are still fighting the battles of their youth, oblivious in their ivory towers to the changes that have taken place in society around them. By the end of the 20th century, a matriarchal social system had been instituted for the first time in recorded human history. Canadian society was not unique in taking this turn, but we did so perhaps more aggressively than any other democracy.<sup>3</sup> In a widely followed Saskatchewan case, for example, a newborn infant was adopted by an unrelated couple against the wishes of the biological father, who was willing and able to care for him: *Hendricks v. Swan*, 2007 SKQB 36. This case affirmed that a Canadian father has no rights in relation to his own flesh and blood.<sup>4</sup> In yet another case where a father failed to gain custody of his biological child in the face of an adoption to an unrelated couple, the court ruled that only when all other considerations are equal might biological parentage “tip the balance”: *Re: B.C. Registration No. 99-00733*, 2000 BCCA 109. Even race is given more consideration in parental custody disputes than biological fatherhood is: *Van de Perre v. Edwards*, 2000 BCCA 167; 2001 SCC 60.

Ostensibly, judges must have a reason to take care and control away from a child’s natural father. Or perhaps one should say not a “reason” but rather an opening, since it need have nothing to do with parental misconduct, fault, or failing of any kind. The mere fact of separation is usually considered a sufficient opening to deny a father care and control of his child, by evicting him from the matrimonial home and assigning him “visitation” times. (The reverse is never the case.)

## A mother’s exclusive rights

*...such laws as conflict, in any way, with the true and substantial happiness of women, are contrary to the great precept of nature and of no validity, for this is “superior in obligation to any other.”*

- Elizabeth Cady Stanton

If it sounds hyperbolic to say that we live in a matriarchal society, consider the various rights that women have, exclusively, where children are concerned. Some of the rights listed below are expressly recognized in statutes and regulations; others are granted by judges in the case law. Included are rights that are properly called “immunities;” that is, actions women may take without fear of legal consequences, either because the law imposes no consequences or because judges typically refuse to impose consequences.

The first trio of rights relate to conception and prenatal choices reserved for mothers alone. The



point of listing these rights is not to impugn a woman's right to control her own reproductive system. The point is that the reproductive choices women make unilaterally impose life-long psychological, social, and financial costs on biological fathers. Such costs, for women, are substantial enough to constitute one of the major justifications for publicly-funded (but privately delivered) abortion on demand. Yet for men, they are not deemed worthy of any legal or moral consideration at all. The psychological costs men bear, relating to the birth of children that they do not want or the aborting of children they do want, may be an inevitable result of the biological fact that only women can bear children. However, the social and financial costs imposed on fathers are a product of the way the legal system assigns rights and responsibilities. That one may not be held morally responsible for what is not within one's rightful control is a time-honoured, universal moral and legal principle. It follows that the person with all of the reproductive rights should also bear all of the responsibilities, as the old legal maxim states: "He who derives the advantage ought to sustain the burden." As Karen DeCrow (1982), former President of the National Organization for Women, has said:

Justice... dictates that if a woman makes a unilateral decision to bring pregnancy to term, and the biological father does not, and cannot, share in this decision, he should not be liable for 21 years of support. Or, put another way, autonomous women making independent decisions about their lives should not expect men to finance their choice.

That is likely to be considered ancient logic by today's standards, according to which a biological father's financial responsibilities are not diminished in the least by the fact that he has no reproductive rights. In a just legal system where reproduction is almost exclusively in the control of women, men would only bear the responsibilities associated with procreation if they have opted into the role of father with fully informed consent. Furthermore, "opting in" to the life of his child would be a biological father's presumptive right, rebuttable only by evidence that he is unfit as a parent.

### **1. The right to conceive a child through force or fraud:**

Coerced sexual intercourse is thought of by prosecutors as a crime for which only women can be victims. Yet there is nothing in the law or in human nature that precludes male victimization. According to s. 273 of the Criminal Code, consent to engage in sexual activity cannot be obtained when a person lacks capacity to consent – most often due to intoxication, but also due to immaturity, duress, or mental disability – or when a person is induced to engage in sexual activity through the abuse of a position of trust, power or authority. This consent requirement has been extended to cover cases where men have had sexual intercourse with women without disclosing that they are HIV-positive. The risk of contracting a life-threatening disease is deemed to change the character of the act in such a way that fully informed consent is required to absolve the man of criminal wrong-doing.

The reality is that women often engage in sexual intercourse without obtaining a man's fully informed consent, by the prescribed standards of the law. Studies of university students show that men are pressured into sexual intercourse as often as women are – against their will, by aggressive partners. A woman may have intercourse with a man who is intoxicated without

fear of any legal consequences. If she becomes pregnant, the rape victim is not absolved of financial responsibility for the child, should the rapist choose to bring it to term.<sup>5</sup> Neither are there exceptions in the *Child Support Guidelines* for boys who have been seduced by female teachers, or for men who have been seduced by female bosses – stereotypical rape scenarios when genders are reversed. Another not uncommon scenario is where a woman claims to be using birth control in order to convince a man to have sex with her. Perhaps it is imprudent for a man to trust a total stranger who tells him she is using birth control; but even wives have been known to become pregnant after assuring their husbands that they are protected. Yet, if having another child is the straw that breaks the back of the marriage, a husband cannot be absolved of child support despite having been deceived into conceiving the child.

## **2. The right to damage a fetus by engaging in substance abuse:**

There is no criminal offense – nor even any civil cause of action – against a mother who damages fetal development by engaging in substance abuse during pregnancy. Children born with fetal alcohol syndrome, to take the most common example, impose huge costs on society in terms of intensive schooling and the increased risk of criminality. Fathers of FAS children, too, are liable to be held responsible for the additional, “section 7,” expenses associated with raising such children. By contrast, if a man injures a fetus either through negligence or domestic violence, he can be held criminally and civilly liable for the damages. In an abhorrent inversion of the *pater familias* doctrine, fetuses are deemed to be the property of their mothers.

## **3. The right to secretly entrap a man into fatherhood:**

When scientists first studied the heritability of blood types, they took large-scale samples from putative parents in neonatal wards to test various theories. They consistently found that around 15% of the children did not have blood types predicted by their models of heritability, and eventually concluded that these children were fathered by men other than the woman’s partner. Subsequent studies confirmed these results, and in some places and times found much higher rates of paternity fraud.<sup>6</sup> Yet paternity fraud is not criminal and does not negate a man’s obligation to pay child support. As long as a husband is deemed to have stood *in loco parentis* to the child, even unwittingly, the mother is entitled to child support – even if she and the child are being supported by a new partner, and even if the new partner is the biological father.

## **4. The right to abandon an infant at birth:**

Mothers have the right to abandon their children at birth, with no questions asked and no strings attached. They may do this either by secretly putting the infant up for adoption, or even, in many places, by dropping the child off at locations designated for unwanted newborns. As the *Hendricks* case illustrates, biological fathers do not even have the right of first refusal when mothers abandon their infants. Mothers who voluntarily abandon their child at birth unilaterally waive all financial obligations to the child. By contrast, biological fathers will be held financially responsible whenever the mother asks the court for his support. This disparity, which is manifestly contrary to s. 15 of the *Charter of Rights and Freedoms*, cannot be justified on the ground that it is “in the child’s best interests” to be financially supported by

their biological fathers, since the same argument is equally persuasive when applied to their biological mothers. There is clearly a punitive aspect to the way the law treats conscripted fathers.

#### **5. The right to alienate the father from his child:**

A woman may keep her pregnancy a secret from the biological father, raise the child on her own, and then years later – when the father’s opportunity to be involved in his child’s life has been effectively foreclosed – sue the father for child support, both prospectively and retrospectively. Additionally, mothers routinely move children to an inconvenient distance from the father, even in cases where the father has been highly involved with the child since birth. As was mentioned in the first chapter, 40% of children from broken homes lived at a distance of more than 50 kilometers from their fathers (Le Bourdais *et al.* 2001: p. 14). Mothers are rarely ordered to bring children back to their fathers when they take children away without notice and without prior court approval. Courts are equally derelict in rectifying the psychological alienation of children from their fathers by hostile mothers.

#### **6. The right to deny or disrupt access between father and child:**

Although access to their non-custodial parent is every bit as much a right of the child as is child support, these two sets of rights are enforced very differently. Whereas there are special statutes and multimillion-dollar enforcement agencies at the beck and call of mothers to collect child support, there is typically no effective means of enforcing access. Mothers may deny court-ordered access with impunity in most cases – at least once in a while, but sometimes systematically and relentlessly. The police will not enforce a normal access order, and judges very rarely punish mothers who thumb their noses at them by breaching the access provisions in their orders. As Jack Watson, now on the Court of Appeal of Alberta, once said in open court, “It’s not my job to punish mothers.”<sup>7</sup>

#### **7. The right to make false allegations against the father:**

Mothers who falsely accuse fathers of child abuse or domestic violence in order to gain an advantage in a custody dispute can expect to face no repercussions, even when their allegations are determined to be completely baseless. While fathers, too, may make false allegations, they are much less likely to be effective, because they are much less likely to be believed by judges, or if believed then deemed relevant. Moreover, men are much more likely to be punished just for making the allegation, by judges who disapprove of men who talk ill of mothers.

Note that mothers may exercise any two or more of the above rights in conjunction, to the extent that doing so is conceptually possible. Kay (2011) describes a recent case from the United Kingdom in which a surrogate mother decided to keep the baby she had contracted to bear for another couple, after having received payment for her expenses during the pregnancy. In the U.K., surrogacy contracts are not enforceable, thus opening the way for women to commit this type of breach with impunity. To add injury to insult, the surrogate mother then successfully sued the biological father – the husband of the couple who had contracted the surrogacy – for child support. Since the child had his DNA, he was required to pay. Except for

the money earned by the surrogate, this child would not have existed at all. Yet in determining custody, the judge felt that the mercenary motive of the surrogate mother counted for more than the acute desire for a child on the part of the professional couple who went to such lengths and took such risks to obtain one. The wisdom of judges passes all understanding.<sup>8</sup>

The next time you hear that “Parents do not have rights, only responsibilities,” remember this list. The simple truth is that mothers have all the rights; fathers have all the responsibilities.

## Rights of families and parents in international law

*The family is more sacred than the state.*

- Pope Pius XI

The women’s rights movement was part of a broader human and civil rights “revolution,” both within Canada and internationally. The rights revolution in the western world was largely a reaction to the rise of two totalitarian, collectivist movements in the first half of the 20th century, fascism and communism. These political philosophies elevated the state above the individual, allowing the interests of powerful groups to run roughshod over the interests of others. The horrors of fascism and communism provided an impetus for the intellectual re-invigoration of the concept of individual rights that supersede or “trump” considerations of the collective interest.

Of particular interest here is the emergence of international law relating to the collective rights of the family and the individual rights of its members.<sup>2</sup> For example, Article 16(3) of the *Universal Declaration of Human Rights* states:

The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State.

Article 26(3) further specifies:

Parents have a prior right to choose the kind of education that shall be given to their children.

Likewise, the *International Covenant on Civil and Political Rights* expressly recognizes the fundamental place of the family unit in society. Article 18(4), for example, provides that:

The States party to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Finally, the *Convention on the Rights of the Child* declares in its preamble:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all of its members and particularly children, it should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Canada is a signatory to or adopter of all of these international covenants and conventions. Yet, as will be seen presently, they are as so much straw in the wind in Canadian judicial practice.

## Parental rights as agent-centered prerogatives

*I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.*

*- Learned Hand*

Central to the rights revolution in the second half of the 20th century was the demystification of the concept of rights. Rights were no longer proclaimed as being God-given or natural or self-evident as in the ancient tradition; rather, they were seen as an important pragmatic bulwark against the totalitarian tendencies of consequentialist moral, legal, and political reasoning. The essential consequentialist duty that agents maximize some presumed value implies that whatever does not maximize this value must *ipso facto* be immoral if not illegal. Consequentialism thus tends to be both elitist, in that the values to be advanced are generally the values promoted by a politically powerful group, and oppressive, in that, to quote John Calvin, “Whatever is not duty is sin.” When politicians, lawyers, and judges proclaim that parents have no rights, only responsibilities toward their children, and that parental responsibilities must be awarded by the legal system according to the best interests of the child, they are unwittingly adopting a totalitarian, Calvinist view of parental responsibilities. They imply that whatever is not in the best interests of the child may be, should be, and ideally would be, legally prohibited.

The all-encompassing, black-and-white view of morality and legality implied by consequentialist reasoning leaves no room for what Scheffler (1982) calls agent-centered prerogatives. An agent-centred prerogative is simply a sphere of liberty that surrounds a particular agent in a given aspect of life, within which the agent may exercise his or her own discretion. The most common form of agent-centred prerogative is a property right, which protects a person’s discretion over the use that may be put to a given piece of the furniture of the world. Life would be unbearably oppressive in the absence of a large sphere of liberty within which one may exercise one’s discretion. Agent-centered prerogatives are essential to a free society – indeed, to any sane social organization, including families. The prospect of having others, especially strangers in Elizabethan costume, constantly looking over one’s shoulders, scrutinizing one’s every move with the intent of second-guessing, reversing, and ultimately taking away one’s discretion for perceived misuse leads inevitably to indulgent and politically correct parenting. It risks spoiling the child by pandering to them rather than administering necessary discipline that might displease them. And it risks reflexive conformity to prevailing trends out of fear that any idiosyncrasy in parenting could be seen as inferior and thus prohibited.

The claim that parents do not have rights but only responsibilities with respect to their children is and always has been nonsense, of course. Nobody seriously contends that cohabiting parents

have no right to determine where the children shall live, what clothes they shall wear, what they will eat, what school they will attend, how late they will stay out at night, when or even if they will receive certain medical treatments, what if any religion they will be instructed in, or a myriad other matters both large and quotidian. Cohabiting parents have always had the right to make these types of choices without the “by your leave” of any judge. Moreover, nobody seriously contends that cohabiting parents have rights in these respects only to the extent that they exercise them to promote the best interests of the child – in other words, that parental rights are entirely derivative of the rights or interests of their children. Common sense, which has been shaped by evolution toward kin altruism, tells us that parents have rights with respect to how their children will live quite independently of judicial speculation about how the exercise of those rights might affect specific children in specific circumstances, and they have them simply by virtue of being biological parents. Cohabiting parents have very broad agent-centered prerogatives with respect to raising their children; the sphere of liberty that they traditionally enjoy is their complement of parental rights. The mystery is not where parental rights derive from; the mystery is why these rights should be thought to disappear, at least for the father, simply as a consequence of a separation.

Equally obviously, of course, parents do not have completely unfettered rights. The sphere of liberty that parents enjoy is not impregnable, because children have independent interests and rights, too. But limitations on a right are not the same thing as the complete negation of the right. Pretending that parents literally have no rights – no inherent agent-centered prerogatives – in order to pass laws or make rulings that circumscribe parental rights in the best interests of children is throwing the baby out with the bathwater. It is intellectually dishonest and, as was argued in the previous chapter, very much counterproductive.

## Parental rights in the age of the *Charter*

*We are under a Constitution, but the Constitution is what judges say it is.*

- *Charles Evans Hughes*

Although Canada is a signatory to all of the international proclamations referred to in a previous section, Canadian jurisprudence has not consistently followed the principles enunciated by them. The feminist movement in Canada is much more politically influential than reasoned consistency with international law, and politicized feminism has always been hostile to the recognition of the rights of the family and of parents. The family is seen as a patriarchal institution from which women must be liberated – if and when they choose, and on the terms they choose. Thus when Canada took its own deliberate step down the path of the rights revolution, by adopting the *Charter of Rights and Freedoms* in 1982, the rights of families and parents were conspicuously absent.

Nevertheless, when judges found it expedient to appeal to the *Charter* in adjudicating a certain class of custody dispute, they discovered ways to marshal some of the more open-ended sections



into service.<sup>10</sup> Custody disputes arise not only between parents, at the time of a separation; they also arise between a parent and the state, whenever a child is perceived to be at risk or in need of protection pursuant to child-welfare statutes. These latter custody disputes can be either quite narrowly focused, or all-encompassing: the state might wish to intervene in only one particular parental decision, such as whether to authorize a blood transfusion on behalf of a child in a medical emergency; or the state might wish to remove the child from the care of a parent entirely and permanently, for example as a result of severe abuse or drug addiction problems in the home. The Supreme Court of Canada has had some interesting things to say about parental rights in the context of this second class of custody dispute. These rare words of wisdom bear citing at great length.

Consider the words of La Forest, writing for the majority in *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, beginning at ¶85:

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*.

The respondents also argued that the infant's rights were paramount to those of the appellants and, on that basis alone, state intervention was justified... Children undeniably benefit from the *Charter*, most notably in its protection of their rights to life and to the security of their person. As children are unable to assert these, our society presumes that parents will exercise their freedom of choice in a manner that does not offend the rights of their children. If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. In fact, we must accept that parents

can, at times, make decisions contrary to their children's wishes – and rights – as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. However, the state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children. On this point, N. Bala and J. D. Redfearn, *supra*, observe, at. p. 301:

...while the state may be justified in limiting parental rights, it is wrong to conceive of this as a situation where the court or state is somehow protecting *constitutional* rights of the child. Rather this should be viewed as a situation in which the state limits the constitutional rights of parents, and sometimes those of a child, to promote the welfare of the child.... However, it seems inappropriate to allow an agency of the state to invoke the *Charter of Rights* to limit the rights of a citizen. The *Charter* is intended to protect individuals from the state, not to justify state interference. [Emphasis in original.]

...Once it is decided that the parents have a liberty interest, further balancing of parents' and children's rights should be done in the course of determining whether state interference conforms to the principles of fundamental justice, rather than when defining the scope of the liberty interest. Even assuming that the rights of children can qualify the liberty interest of their parents, that interest exists nonetheless. In the case at bar, the application of the [child welfare] Act deprived the appellants of their right to decide which medical treatment should be administered to their infant. In so doing, the Act has infringed upon the parental "liberty" protected in s. 7 of the *Charter*. I now propose to determine whether this deprivation was made in accordance with the principles of fundamental justice.

In *New Brunswick (Minister of Health and Community Service) v. G. (J.) (J.G.)*, [1999] 3 S.C.R. 46, beginning at ¶ 61, former Chief Justice of Canada, Antonio Lamer, speaking for the majority, said:

I have no doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)*, *supra*, at ¶83, "an individual interest of fundamental importance in our society." Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As a person's status as parent is often fundamental to personal identity, the stigma and distress resulting from the loss of parental status is a particularly serious consequence of the state's conduct.

...*prima facie*, the natural parents are entitled to custody unless by reason of some

act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed...

The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their different rules, dealt with custody.

The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

Finally, even L'Heureux-Dubé, who in *Young* purported to see no "magic" in parental bonds, chimed in to reaffirm the rights of parents in apprehension cases in *Winnipeg Child and Family Services v. K.L.M.*, [2000] 2 S.C.R. 519, at ¶ 72:

The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit.

The upshot of these wise judgments is that the bar is set much higher for intervening to remove a child from a parent by child-welfare agents than to remove a child from a parent in a custody dispute between parents. In the former case, the legal test is that the child must be proven to be at risk if left in the care of the parent, or in other words the child must be in need of protection from the parent. In short, the no-harm principle applies. This is obviously a much more stringent test than the best-interests principle used in cases where separated parents dispute over custody.

## Principled versus result-driven reasoning

*Wherever judges aren't pettifogging, they are merely obfuscating.*

*- Canadian father*

As these passages make plain, there is no principled consistency in judicial reasoning between one type of custody case and another. Rather, custody decisions are entirely result driven:

judges decide the outcome they wish to come to, and then search for legal reasons to support that outcome. This is explicit in La Forest's bald assertion that "parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter*." In other words, despite the lack of any explicit or even suggestive language in the *Charter* conferring rights on parents, judges must nevertheless pull the parental-rights rabbit out of the constitutional-law hat in order for them to arrogate the authority unto themselves to supervise both the state and the parents where children's interests are concerned.<sup>11</sup>

While the derivation of parental rights out of the broad provisions of s. 7 of the *Charter* is dubious from a logical point of view, having made that constitutional leap, it is doubly dubious to resist the same form of reasoning in custody disputes between separated parents. If parents do indeed have a constitutionally protected "liberty interest" that compels judges to "accept that parents can, at times, make decisions contrary to their children's wishes – and rights – as long as they do not exceed the threshold dictated by public policy, in its broad conception," what suddenly happens to that "liberty interest" when it comes to custody disputes between separated parents? Where is the "balancing" of parents' and children's constitutional rights in the normal case? If "the parental interest in raising and caring for a child" is "an individual interest of fundamental importance in our society," then why is that interest ignored in custody disputes between separated parents? If the parent's "right to security of person is at stake" when their child is threatened with being taken away, why is there no presumption of equal shared parenting at the time of separation?

If removing a child from a parent's care is "a serious interference with the psychological integrity of the parent," and "a gross intrusion into a private and intimate sphere," then why are judges so eager to intrude upon separated parents in precisely this way? If the removal of a child from parental care often "stigmatizes" that parent as "unfit," thus impairing the person's "fundamental identity" as a parent, resulting in serious "distress" to that parent, then why are judges so routinely dismissive of the claims of perfectly normal fathers in family court? Why do fathers get nowhere arguing in family court that "...*prima facie*, the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed"? Why is the "mutual bond of love and support" between fathers and their children deemed to be irrelevant and deserving of no respect in family court? Why are "unnecessary disruptions of this bond" – first by the court and then by mothers who routinely flout court orders for access – deemed to be of little consequence in family court? Your guess is the same as mine: apprehension cases almost always involve removing children from the care of their mothers, while custody disputes almost always involve separating children from their fathers. This difference requires that different considerations apply to the two types of case.

# No squaring this circle

*If the court please, I am about to illustrate it by diagrams, and I hope to make it so plain that the audience and perhaps the court will understand it.*

*- James T. Brown*

Lawyers make their living by distinguishing cases. But not every factual difference calls for a difference in the appropriate principle to apply to the case; otherwise there would be no such thing as principled reasoning. To make a *principled* distinction between custody disputes involving separated parents and custody disputes where children are apprehended by child-welfare agents, the differences in fact between these two types of case must be such as to call forth the radically different principles or legal tests applied in them. Two arguments have been advanced to distinguish custody disputes involving separated parents from custody disputes where children are apprehended by child-welfare agents. These will be addressed in turn.

## 1. The *Charter* application argument:

The first argument begins with the observation that the *Charter* is meant to protect citizens from the actions of the state; it is not a general-purpose law that grants rights to individuals in private disputes with other individuals. Thus *Charter* rights are relevant to apprehension cases because the state is directly involved as a party to the dispute. By contrast, custody disputes between separated parents are purely private disputes where *Charter* rights have no application. Courts are called upon to adjudicate both types of custody dispute, but courts are not deemed to be agents of the state in a way that requires them to apply *Charter* rights in the absence of more direct state involvement, so the argument goes. The fact that every member of the Supreme Court save one could buy into this argument (see *Young*), despite its obvious flaws, reveals much about the biases of that court.

The proposition that the *Charter* rights of parents do not apply in custody disputes between separated parents is internally inconsistent. For if the custody dispute were truly a purely private one, then the state would have no business legislating custody matters in the first place. Indeed, the whole premise of custody legislation is that these disputes affect unrepresented third parties – the children – who are vulnerable and generally not in a position to advance their own interests in court. The state's *parens patriae* jurisdiction over children derives in the first instance from the premise that society, represented by the Sovereign, has an interest in promoting the well-being of children. It is self-contradictory to turn around and say that custody disputes between separated parents are a “purely private matter.”

Even if a custody dispute between separated parents were a purely private dispute, this is nothing to the point. Employment and landlord-tenant disputes are purely private, if anything is. They involve independent adults, who have signed or are contemplating entering into voluntary contracts. Yet when governments enact laws prohibiting discrimination in the formation of these private contracts, the Supreme Court has declared that the *Charter* applies to those laws: *Vriend v. Alberta*, [1998] 1 S.C.R. 493. By parity of reasoning, when governments



enact laws dealing with how custody disputes are to be settled between separated parents, the *Charter* must apply to those laws as well. Just as equality rights must be “read in” to legislation dealing with private contracts between adults to make human-rights laws conform with the *Charter*, so must parental rights be “read in” to legislation dealing with child custody to make custody laws conform with the *Charter* – once it is accepted that parental interests attract *Charter* protection. Sopinka is the only member of the Supreme Court of Canada who got the constitutional question right in *Young*, when he simply said that the *Divorce Act* – like all legislation – must be interpreted and applied so as to be consistent with the rights and values prescribed by the *Charter*.

Consider in this light how courts deal with cases when embryos have been inadvertently switched during the process of *in vitro* fertilization, or when babies have been accidentally mixed up in a neonatal ward. These cases involve “purely private disputes” between biological parents and clinics or hospitals, in every way on a par with custody disputes between separated parents. Yet the best-interests principle is not applied here; when errors of this type are discovered, courts do not simply reassign all of the children to the custody of the parents they deem to be “better.” In cases where the mix-up is discovered soon after it has happened, hospitals are still liable in negligence for the psychological trauma caused to the biological parents. In cases where the switch is discovered many years later, courts attempt to reconnect children with their biological parents as much as possible – as though they had rights to know each other.

It is as much a stretch to say that parental rights are hidden in the broad and open-ended language of the *Charter* as it is to say that private property rights are hidden there. But once the courts have teased parental rights out of the *Charter* in custody disputes between parents and the state, they cannot be stuffed back into the bottle for the purpose of custody disputes between separated parents. Doing so is unprincipled and result-driven: the objective is to deprive fathers of any presumptions that might give them a fair outcome in custody disputes with mothers.

## **2. The tie-breaking argument:**

A second argument sometimes used as an excuse to invoke the best-interests principle in custody disputes between separated parents accepts the premise that parents have *Charter* rights in relation to their children, but observes that these rights result in a stalemate between the disputing parents. If each parent has equal rights where their child is concerned, and they disagree about what should be done for the child, then courts cannot decide the matter on the basis of parental rights but must invoke a tie-breaking principle such as the best interests of the child. This is another superficially attractive argument that falls apart upon further examination.

Note that courts often make rulings that neither parent has asked for, on the basis that it is in the child’s best interests. As L’Heureux-Dubé says, courts may award custody to third parties in appropriate circumstances. Courts often settle disputes by compromise, by granting both parties less than they had sought. Here the best-interests principle is not acting as a tie-breaking principle; it is functioning as a *sui generis* principle that over-rides the rights of both



parents. This is, of course, consistent with what judges in custody disputes see themselves as doing – making a ruling that in no way takes into account parental rights, but considers only the best interests of the child.

More fundamentally, there is a false premise in the argument stated above. If all parents initially have the same complement of *Charter* rights with respect to their children, the way to resolve disputes between typical parents is not to invoke a different principle entirely but to divide the rights as equally as possible, giving each parent 100% authority over half the decisions affecting the child. The solution is to divide custody between the parents with a split, parallel, or shared parenting arrangements – subject, of course, to the no-harm principle. One reason for preferring a presumption of an equal division of custodial rights upon separation is that the same factual considerations with respect to parent-child bonding that drive custody disputes between parents and child-welfare authorities are relevant to custody disputes between separated parents. If it is traumatic for a child to lose the companionship of what child welfare experts consider to be a neglectful or abusive biological parent in one context, it is at least as traumatic to lose the companionship of a perfectly normal father in the other context. If the dispossessed parent has a liberty and security interest under the *Charter* to the care and control of a biological child in the one context, then the same applies to a father in the other context. Yet it is rare to hear a judge give any sympathetic consideration to a dispossessed parent in a separation case.<sup>12</sup>

## Vague in principle, unequal in application

*I know of no duty of the Court which it is more important to observe, and no powers of the court which it is more important to enforce, than its power of keeping public bodies within their rights. The moment public bodies exceed their rights, they do so to the injury and oppression of private individuals.*

- Nathaniel Lindley

The failure of appellate courts to develop a consistent, principled body of reasoning in custody cases, even on the most fundamental questions, is a *leitmotif* of this treatise. Without clear, relatively simple, and consistent principles to guide them, lower courts flounder. This problem is mitigated in apprehension cases, where parental rights set limits to the kinds of considerations that come into play and where the no-harm principle governs judicial thinking. The problem is most pronounced in custody disputes between separated parents where the best-interests principle gives judges effectively unfettered discretion. One reason with constitutional *bona fides* to prefer the no-harm principle over the best-interests principle is that it is at least somewhat clearer in application. To be compatible with fundamental justice, as required by s. 7 of the *Charter*, laws must give adequate guidance to those subject to them as well as to those applying them. A law that provides no effective guidance is worse than no law at all, because it leads to the arbitrary exercise of judicial power; it invites the rule of judges not the rule of law. The usual fate of laws that provide (to use the legal jargon) “no judiciable

standard” is to be struck down in court, sent back to the legislature for clarification. But that is not what happened to the best-interest principle enshrined in the *Divorce Act* (1985). Instead, judges have attempted to clarify the best-interests principle themselves, by enunciating a host of specific considerations and principles that purportedly triangulate the child’s best interests in a welter of circumstances. It might be argued that the best-interests principle has been sufficiently clarified in the case law over the years to provide reasonable guidance to parents and judges.

There are only two problems with this. First, it puts the judicial cart before the legislative horse. In a parliamentary system such as Canada’s, it is the job of legislatures to make laws and the job of judges to apply and interpret them. Passing excessively vague laws abdicates the law-making function proper to the legislature and turns it over to judges. This is something judges have a duty under the constitution to decline, not embrace. Second, as argued and illustrated throughout this treatise, the judicial attempt to clarify and apply the best-interests principle in case law has been, where it attempts to go beyond the no-harm principle, an unmitigated disaster. It must be obvious to any thinking person that a child’s interests are so individual, so multifaceted, so complex, and so circumstance dependent, that formulating general guidelines for adjudicating family disputes is as likely as not to lead to suboptimal outcomes. If this is not obvious *a priori*, one merely has to read enough family-court rulings to realize that judges are all over the map when deciding what is in the child’s best interests. (For some brief illustrations, see the Appendix.) When cases are appealed all the way to the Supreme Court of Canada, it is not uncommon for each of four levels of court to have come to different conclusions. This does not inspire confidence in our laws or our family-dispute system.

Provincial legislatures have in fact returned to the drawing board to fill the gaping holes of the federal *Divorce Act* (1985) where child custody is concerned, by passing statutes that deal with families outside the formal bonds of marriage. Section 18(2) of Alberta’s *Family Law Act*, S.A. 2003, c. 4.5, for example, sets out the considerations judges must take into account when making a determination of the best interests of the child. “Protection of the child’s physical, psychological and emotional safety,” particularly from the effects of family violence, is referred to several times. The child’s “need for stability” must be considered, and in particular the maintenance of the child’s relationships with extended family members. Judges must be satisfied that a custodial parent is able to meet the age-appropriate “needs” of the child. Where possible, the child’s views and preferences are to be considered.<sup>13</sup> Finally, judges must take into account the parents’ “ability and willingness... to communicate and co-operate on issues affecting the child.”<sup>14</sup>

It bears emphasizing that the legislative elaboration of the best-interests principle never ventures beyond the abstract and commonplace. The main focus is on protecting children from various harms and neglect – considerations that surely would not favour one parent over the other in the vast majority of custody disputes. Likewise, ‘needs’ is a narrow subclass of interests; a child’s basic needs can be well met by either parent in the typical case. Maintaining stable relationships is problematic when the parents are suddenly living in separate residences; but surely the last thing this requirement calls for is reducing one parent to a visitor in the child’s

life – along with a corresponding diminution of contact with grandparents, aunts and uncles, and cousins on that side of the family. Provincial legislators have apparently recognized the impossibility of articulating the best-interests principle in highly precise terms, and have not attempted to do so in anything like the nuance and detail attempted by judges in the case law. If judges were to take guidance from the provincial legislation that attempts to put substance on the notion of the child's best interests, they would apply modest and cautious principles and presumptions, such as the maximum-contact principle, the friendly-parent principle, and the no-harm principle. Together, these principles amount in practice to the presumption of shared parenting – that in the absence of a proven risk of harm by a parent, custody should be shared as equally as is practical.

## Conclusion

Walt Whitman famously boasted, “I am large. I can contain contradictions.” The case law relating to child custody is also large and contains numerous contradictions. But this is nothing to boast about; rather, it calls for an extra-legal explanation. One explanation is that our appellate judges are incompetent at their primary task of making the law consistent and principled. Charity dictates that this conclusion be resisted if others are available that account for the data just as well. In fact, appellate judges are nothing if not clever; it cannot be supposed that intelligence is lacking. The more plausible explanation is that judicial inventiveness is subservient to their inherent biases. The most salient difference between custody disputes where parental rights are recognized and the no-harm principle is applied and custody disputes where the best-interests principle is applied is that the former type of case almost always involves taking children away from their mothers while the latter type of case involves taking children away from their fathers in the vast majority of contested cases. The reason there is no principled consistency in the application of *Charter* considerations between the two types of case is that judicial bias in favour of mothers drives judicial decision-making. The question judges consciously or unconsciously ask themselves in every individual case is, “Is it possible to keep the children with their mother, and if so what reasons can I find for doing so?”

In short, the reason the best-interests principle has been seized upon by judges dealing with custody disputes between separated parents is that it opens the door wide to the expression of their own biases, prejudices, and amateur philosophizing. The unconstitutional vagueness of the best-interests principle serves an ulterior unconstitutional purpose, namely favouring mothers over fathers, contrary to sections 15 and 28 of the *Charter*.<sup>15</sup> Feminist ideology in the law has trumped not only substantial changes in the role of fathers in recent decades; it has trumped principled reasoning, international law, constitutional law, and common sense.

## Chapter 4

# A Penal Code for Separated Fathers

*Ab, yes, 'divorce' – from the Latin word meaning 'to rip out a man's genitals through his wallet.'*

*- Robin Williams*

Some Canadians are concerned about the fact that we have no constitutional protection for property rights. The Crown is the “ultimate owner” of all land in Canada, and your title to it is merely a grant of permission to use it that could be revoked, without compensation, at any time the government chooses. Though a valid concern, it must be said that the absence a constitutional protection for property rights in practice affects only a relatively small number of Canadians, once in a while. What most Canadian fathers should be more concerned about is that they have no legal protection for their *parenting* rights – constitutional or even statutory. The courts are the “ultimate legal guardians” of all Canadian children in the same sense that the Crown is the ultimate owner of all land. But as a practical matter, a man’s care and control of his children is at much greater risk of being taken away by the courts than his property is to be confiscated by the government. And whereas the government will almost certainly compensate him for any property it expropriates, the courts are equally certain to make him pay for the privilege of not raising his own children.

On May 1, 1997, Canada adopted an American-style child-support regime, simultaneously altering the tax rule for declaring child support. These changes represented a double hit for non-custodial parents – overwhelmingly men<sup>1</sup> – because the federal *Child Support Guidelines* substantially increased support obligations even as payors were no longer allowed to deduct their contributions from income for tax purposes. While the *Guidelines* were introduced at the federal level for married couples seeking a divorce, each of the Provinces and Territories – with the notable exception of Quebec – participated in their development and concurrently implemented parallel changes to provincial laws affecting parents who were not married. The provinces also moved to establish draconian agencies with extraordinary powers to enforce payment of child-support obligations. It has been aptly said that criminals today have more rights than non-custodial fathers.<sup>2</sup>

On matters of public policy, the devil is usually in the details. But with the *Guidelines*, even the broadest and most fundamental aspects of the regulations are bedevilled. The current child-support regime was conceived by ideologues working to advance gender politics rather than the best interests of children. Based on fraudulent sociology, to address a phantom need, in the pursuit of illegitimate and unreasonable objectives, the *Guidelines* breach fundamental constitutional rights and freedoms. Since their inception, they have been cloaked in dishonest

and inconsistent rationalizations, and fashioned by judicial fiat, without adequate democratic monitoring and review. In a word, the law relating to child support is of a piece with Canadian family law generally.

## Background

*Men, it has been well said, think in herds; it will be seen that they go mad in herds, while they only recover their senses slowly, one by one.*

*- Charles Mckay*

The movement to codify child support obligations into rigid regulations began in the United States in the 1980s, as a knee-jerk political response to earlier policy mistakes (Braver 1998; Baskerville 2007). Federal benefits to single mothers with dependent children had been expanded generously in the 1960s and 1970s, to the point where poor mothers had large incentives to raise children alone rather than cohabit with the child's father. Welfare fraud was perceived to be rampant, as mothers claimed to receive no support from fathers in order to collect benefits. To reign in the escalating cost of welfare for single mothers with dependent children, the federal government mandated that States establish child support guidelines and enforcement mechanisms aimed at recovering welfare payments from "deadbeat dads" in order to continue to receive contributions from federal agencies. Inevitably, these programs overshoot their mark, applying presumptively to all disenfranchised fathers and not only to those in cases where the mother was collecting welfare.

Congress imposed extraordinarily short timelines on States to develop guidelines, considering the broad societal implications and complexities of this legislation. Every State receiving federal funds for women with dependent children was obligated to implement a comprehensive child-support regime by 1989. To meet this deadline, the development of guidelines was often turned over by legislative committees to self-interested lawyers and collection agents, aided by eager ideologues. Activists and academics reacted to these legislative initiatives by producing much research, of very mixed quality, into the costs of raising children. Undoubtedly the most influential voice in the field of family finances after divorce was that of sociologist Lenore Weitzman, whose 1985 book, *The Divorce Revolution*, provided the underlying premise upon which all models would be designed. Based upon an idiosyncratic analysis of a small sample of cases from one area of California in the 1970s, Weitzman famously concluded that a woman's standard of living decreased by 73% as a result of divorce, while a man's standard of living increased by 42%, on average. This factoid circulated endlessly in the academic, popular, and public-policy publications of the era, usually coupled with the implication that welfare dependency and poverty was largely a product of unfairly meagre child and spousal support awards in family courts. The result was that whenever faced with a choice between various models or assumptions within models, the developers of child-support guidelines were predisposed by this gender paradigm to pick the one that maximized the amount to be transferred from the father to the mother.

In order for child-support guidelines to be effective at reducing welfare dependency, they had to be coupled with enforcement mechanisms whereby the amounts prescribed could be collected. Thus, rather than solving the problem of welfare fraud directly by going after the real criminals – i.e. mothers who were falsifying claims – State agents were mandated to pursue “deadbeat dads” as though they were felons. Outside of organized crime, nowhere in the civilized world are personal debts enforced with such zeal and disregard for constitutional protections as in the case of enforcing child-support obligations.<sup>3</sup> To call the laws relating to child support mere “guidelines” is therefore quite misleading. The amounts prescribed by the “guidelines” are mandatory for judges to impose, and mandatory for enforcement agencies to collect. It would be more accurate to refer to these laws as the “The Penal Code for Separated Fathers.”

## Les Misérables

*Those who are ignorant of history are doomed to repeat it.*

*- Arnold Toynbee*

The federal and provincial governments in Canada did not wait to see how this social experiment would pan out in the U.S. before importing it *bolus bolus* into Canada. Rather, they hastened to begin their own process of developing child-support guidelines in 1990. On this side of the border, however, the guidelines were a solution in search of a problem, since they could never have been sold to the public as a remedy for welfare fraud by single mothers. Naturally, when you have a good solution, problems are not difficult to find.

Prior to the implementation of the *Guidelines*, child support was determined judicially, on a case-by-case basis. As in every other area of the common law, such as tort litigation, novel claims were advanced and the case law adapted to changing circumstances, following the principles of *stare decisis*. The model implicitly adopted by judges tended to be a cost-share regime, where the documented expenses of raising a child were apportioned between the parents according to their incomes. Judges had broad discretion to make awards based on any circumstance they deemed relevant, notably including the cost of exercising access and the effects of remarriage of the parents. The main advantage of this method of determining child support was that it allowed judges to take into account significant local variables, such as seasonal work patterns and the cost of housing. It was also possible to take into account relevant personal variables of the parents. Moreover, because child support was an integral facet of family law, not a completely isolated feature that could be litigated on its own, judges could look at the situation of the family holistically when setting child support, considering, for example, the parent’s respective assets and the custodial parent’s willingness to facilitate access.

Naturally, giving broad discretion to judges to set child support inevitably resulted in apparently inconsistent awards from one case to the next, based on the idiosyncratic considerations of



different judges. It is but a small leap to conclude that when awards are inconsistent, some will be inadequate. Thus the rallying cry for child-support guidelines north of the border was typically Canadian: it was a simple matter of “fairness.” Indeed, it was more than that: it was a matter of fairness for children, since these innocents ultimately paid the price when support was inadequate. It is difficult to overstate how important the emphasis on remedying child poverty was when the *Guidelines* were being developed. A “background paper” published by the Law and Government Division of the Parliamentary Research Branch (Douglas 1993) summarizes the argument for child-support guidelines in Canada.<sup>4</sup> The following passages set the tone:

Many observers have concluded that inadequate levels of child support and ineffective enforcement of child support obligations have contributed significantly to child poverty in Canada.

...There are a significant number of Canadian children living in poverty – one in five in 1985 – and the causes of child poverty have been linked to marriage breakdown. Single-parent families headed by women are the most poverty-prone of all groups in Canada: 59% of them live below the poverty line. [p. 3]

Douglas then cites the work of Weitzman to show that fathers make out like bandits after divorce, leaving women and children to fend for themselves. “This dynamic is equally observable in Canada, and for many of the same reasons,” she concludes, without any empirical support. While it is *de rigueur* among Canadian researchers and public-policy advocates to claim that Canada is a distinct society from the United States, and to insist that Canada-specific sociological research be conducted whenever public policy is concerned, in this particular case Weitzman’s methodology and research conclusions were happily adopted wholesale. Many Canadian researchers referenced Weitzman uncritically, and were in turn uncritically referenced themselves,<sup>5</sup> turning what had been an American factoid into a Canadian certainty. By the early 1990s, the Supreme Court of Canada began taking judicial notice of this “certainty” in many of its family-law rulings.<sup>6</sup>

To hear advocates for the *Guidelines* tell it, in the bad old days when judges exercised broad discretion to make child-support awards, they were nearly always inadequate and unfair. They were inadequate in that they left women and children in grinding want; and they were unfair in that they left most fathers in the lap of luxury, free to pursue their dreams. Never before or since have judges – particularly male judges – been so excoriated by special-interest groups, lawyers, academics, and politicians, for exercising such poor judgment so systematically. Under the heading “Current Practice,” Douglas (1993) summarized the state of the advocacy literature:

... a 1989 survey [found] that the most common words used by writers, lawyers or judges to describe child support levels were *inadequate, inconsistent and arbitrary*. Child support orders are arbitrary in the sense that the amounts are not related to any cost guidelines, nor are they based on any judicially articulated principles, in most cases. There is also tremendous inconsistency between judges and jurisdictions. [p. 5]

Across Canada, this inconsistency is magnified many times by the number of levels of courts making child support decisions... [p. 6]

Family lawyers often comment that judges fail to appreciate the costs of raising children. The judiciary is “largely uneducated about the cost of raising children, and as many are male, and from intact families, [they] have little or no personal experience in the raising of children.” As a result, many observers have advocated judicial education in this area, or the establishment of child support guidelines that would remove judicial discretion from the process. [p. 7]

The courts have established few general rules... In many cases, the non-custodial parent will arrange his or her affairs so as to appear unable to contribute to child support. [p.8]

In an unprecedented *mea culpa*, even judges piled on, vying for the honorary title of most ardent supporter of poor, helpless women and children. Even a lowly family-court judge felt no compunction about chastising his superiors on the appellate courts, in the country’s leading journals dedicated to family law, for failing to properly articulate principles for making child-support awards. Williams (1987, 1989) took it upon himself to do their job by creating a long checklist of factors judges should take into account.<sup>7</sup> His superiors, properly chastened, concurred:

The unsatisfactory state of the law under which quantum of child support is established by judges was examined in great detail by Madame [sic] Justice L’Heureux-Dubé in her concurring judgement in *Willick v. Willick*. In her reasons, she argued that the reality that many women suffer financial hardship following divorce should not be ignored when courts are dealing with child support. She cited a Justice Department study evaluating the *Divorce Act* which found that child support levels had deteriorated between 1985 and 1988, thereby increasing the burden on custodial parents. Other authorities cited also dealt with the inadequacy of child support across Canada and the attempted solutions, such as attempts in various jurisdictions to quantify the actual costs of raising children, the identification of a “glass ceiling” or invisible barrier that acts to prevent more than minimal levels of child support from being ordered, and judges general lack of awareness of what should be included in calculating the costs of childrearing. Madam Justice L’Heureux-Dubé strenuously objected to children living at or near the poverty level while non-custodial parents have the means by which to meet their needs, and stated that “the financial burden of divorce should not be borne primarily by children and their custodial parents.”<sup>8</sup>

The official version of what was happening in Canadian courts prior to the implementation of the *Guidelines* may be summarized thus: Wise and compassionate judges patiently waded through masses of contradictory evidence to discern the best interests of the child, correctly balancing the myriad complexities involved in custody disputes and nearly always deciding in favour of mothers. Having settled the custody issue so competently, these same judges suddenly became callous ignoramuses, incapable of performing basic arithmetic and budgeting, much less articulate and follow legal precedent to arrive at fair and consistent results. Judges thereby

left women and children destitute – a social safety net apparently being unknown in Canada at the time. The prescribed response to this state of affairs was to leave judges with broad discretion to craft nuanced custody orders that fit the circumstances of each individual child, while placing them in a straightjacket by *Guidelines* setting out child support.<sup>2</sup> According to the official version, Canada was a Dickensian society prior to 1997: It was the best of times *for men*, it was the worst of times *for women and children*, it was the age of wisdom *in custody determinations*, it was the age of foolishness *when awarding child support*...

## Reality check

*Man's major foe is deep within him. But the enemy is no longer the same. Formerly it was ignorance. Today it is falsehood.*

*- Jean-François Revel*

There is no better place to begin debunking the official version of the financial effects of divorce than with the work of Weitzman herself, not only because of her direct and indirect influence on the motivation behind the *Guidelines*, but also because most of her methodological assumptions were later adopted by the designers of the *Guidelines*. Most fundamental of all was the assumption that the financial position of the parties in the marital *status quo* is the appropriate baseline for comparisons of how the parties fare after the separation. In a word, ex-wives were deemed entitled to an equal share of financial resources after divorce, regardless of their own efforts to support themselves. Indeed, the assumption was that ex-wives should continue to be maintained in the style to which they had become accustomed during the marriage, despite the abrogation of any *quid pro quo* with respect to domestic chores for the ex-husband. Divorce was meant to bring complete freedom for women, with no commensurate economic sacrifice.

To arrive at her startling conclusions, Weitzman assumed that fathers have no costs associated with access, that separated parents never form new relationships, and that there are no tax benefits to having custody of children. An unrealistically high estimate for the cost of raising children was employed. Nor did Weitzman take into account the division of matrimonial property and debt upon divorce. Since the mother and children usually retain the matrimonial home, their cost of living after separation is often quite low, while the father has to obtain and furnish a new residence from his current earnings at full cost. Likewise, since the father usually has the higher income, he is left to deal with family debts such as credit card balances after a separation. Child support should reflect those realities – and tended to, before the implementation of the *Guidelines*. Even Weitzman's math was found to be erroneous upon a re-examination of the original, by now greatly out-dated, data. Not surprisingly, the factoid that a woman's standard of living decreased by 73% as a result of divorce, while a man's standard of living increased by 42% on average, was never replicated.<sup>10</sup>

Meanwhile, Canadian research also failed to support the dire “feminization of poverty” thesis.

Even those who adopted Weitzman's questionable methodological assumptions produced dramatically different results. Finnie (1993), using data from 1982 to 1986, found that the median "adjusted family income" (AFI) for women fell by 33% one year after a separation, while the median AFI for men increased by 11%. (It was rarely noted that a discrepancy of this magnitude favouring men was usually required in order for the dispossessed father to acquire and furnish a new home, among other extra costs he would incur as a consequence of being the breadwinner.) Galarneau and Sturrock (1997), using data from 1987 to 1993, found that women's median AFI fell by only 23% one year after separation, while men's median AFI increased by 10%. They further found that differences in AFI diminished substantially over time and upon the remarriage of the parties, which took place for half of the sample within five years of separation. These figures stand in stark contrast to the 73% decline and 42% increase found by Weitzman, yet her more dramatic results continued to be cited misleadingly in Canadian advocacy literature and court decisions.

In real terms, these percentage differences in AFI amount to between a few hundred and a few thousand dollars per year for the average family – hardly a compelling case for introducing the massively intrusive legislative changes implied by the *Guidelines*, the tax reversal for child support payments, and the draconian, multi-million-dollar maintenance enforcement bureaucracies. It is entirely likely that after taking into account the tax benefits of children, the division of matrimonial property and debt, the costs of exercising access, and differences in workforce commitment between fathers and mothers, there remains no difference in the standard of living of the separated parents. Moreover, these AFI averages hide more than they reveal. Perhaps surprisingly, the parents who are least affected economically by a separation are the ones who start off in the lowest income bracket. According to Juby *et al.* (2003: p. 13), prior to the introduction of the *Guidelines*, mothers whose family income was less than \$25,000 before the separation had an average family income of \$17,800. After separation, their family income dropped only 11.8% to \$15,700. This modest decrease would barely cover the added costs of supporting two households, meaning that the economic sacrifice inherent in separation must have been shared quite evenly for the lowest-income families. By contrast, mothers whose family incomes were \$60,000 and above before the separation suffered an average decline of 54.9% in family income after separation, which nevertheless left the children above the LICO level. By far the greatest effect of the *Guidelines* was to mitigate the fall in family income for mothers separating from high-earning men.

The *quantum* of child-support awards is only half the issue; the other half is compliance with child-support orders or agreements. A popular myth of the day was that upwards of 70% of non-custodial fathers deliberately refused to make court-ordered payments. This myth has the imprimatur of no less than the Supreme Court of Canada, in the form of L'Heureux-Dubé's assertion that a "vast number of non-custodial parents are in default of their most serious obligations to their children." But according to Carolina Giliberti, the chief of the Department of Justice Canada's family law research unit at the time, "True deadbeat dads are few and far between" (Vienneau 1995). Only a small percentage of dads who do not make their child support payments are deadbeats; most are simply broke or only unintentionally in arrears.

“I’ve seen estimates that about 10% are willful defaulters. The rest just don’t have the resources to go back and get their court order varied.” These are mostly seasonal workers, or men who are temporarily laid off. According to Giliberti, many continue to make partial payments and eventually resume full payments when they get back to work. Juby *et al.* (2003: p. vi) confirms this: “The absence of child support payments is not necessarily permanent. More than a quarter of children who have received no support at all for the last six months in 1994-95 received some support during the following two-year period. Almost half of these payments were being made regularly by 1996-97.” Further, “When payments are part of the support agreement, they are mostly regular and for the full amount, at least within the relatively short period (up to two years) after the separation: regular payments were made for 84% of children, and more than 90% of regular payments were paid in full” (Juby *et al.* 2004: p. vii). When payments were not made in full, by far the most common reason given by the recipients themselves was that the other parent was unable to pay (29%). Mothers did not ask for or want support (14%) more often than fathers could not be located or would not agree on support (10%) (*ibid*, p. 43).<sup>11</sup>

It bears noting as well that at any given time more than 10% of the general population suffers from mental disorders such as depression, bipolar spectrum disorder, schizophrenia, paranoia, the effects of concussions and post-traumatic stress disorder, and drug, alcohol and gambling addictions. These problems – to which we should add non-clinical difficulties with concentrating or focusing on work – are likely to be higher among separated parents, since they are both a cause and an effect of relationship breakdown. They are especially likely to be higher among men whose lives have been torn apart and whose children have been taken away through no fault of their own. Arguably, a majority of separated fathers face greater emotional turmoil and strain than those experienced by the “unemployable” ex-wife in *Leskun v. Leskun* 2006 SCC 25, who claimed to be still devastated (and was evidently extremely bitter) many years after a separation caused by her ex-husband’s affair. Between underemployment and mental distress, the surprise is that over 80% of disenfranchised fathers still nevertheless find a way to make child support payments – mostly regularly, mostly on time, and mostly in the full amount.

Given this more complete picture, it is not surprising that there was no perceived need for changes to the child support regime by those directly affected. The 1995 General Social Survey found that three-quarters of fathers and seven out of ten mothers were satisfied with the contribution made by fathers to child support (Le Bourdais *et al.* 2001: pp. 37-38). Likewise, Justice (1990) found that the majority of both custodial and non-custodial parents were satisfied with the amount of child support awarded. When dissatisfaction was reported, it was most often with the relative affluence of the ex-spouse as opposed to the adequacy of the support award *per se*. In fact, custodial mothers were more likely than non-custodial fathers to report an increase in standard of living after divorce.<sup>12</sup> Another study, commissioned by the Family Law Committee (1991) specifically to provide a “before” snapshot of the child-support situation in Canada, found that pre-guideline awards left custodial parents with on average about 10% higher after-tax incomes than non-custodial parents. Likewise, this study found that – contrary to advocacy myth – child support awards were highly consistent across the provinces, at about 10% of the non-custodial parent’s pre-tax income (Stripinis 1994). Millar



and Gauthier (2002: p. 145) conclude:

Thus the satisfaction of the majority of both custodial and non-custodial parents with these orders that was noted by the previous Department of Justice study does not seem terribly surprising. Given the results of this study, one would expect that the developers of the guidelines would want to pursue similar outcomes, within a mathematical framework to enhance consistency. However, as we shall see, their interest in increasing support awards was undiminished.

## Deadbeat moms

*A mother is a mother still, the holiest thing alive.*

*- Samuel Taylor Coleridge*

The period of time over which the guidelines were developed represents the high-water mark for feminist misandry in Canadian public policy and law (Nathanson and Young 2001). According to the prevailing *zeitgeist*, every social disadvantage was suffered predominantly by women, and in every case the disadvantage could be traced back largely to some fault of men that stood in need of legislative correcting. No effort was expended looking at the possible contributions women might make to their own fate; doing so was condemned as “blaming the victim.” These self-fulfilling ideological blinders resulted in a misdiagnosis of the problem of child poverty, which in fact had little to do with family breakdown. Undoubtedly the main cause of child poverty was and remains the mother’s lack of commitment to the workforce – not deadbeat dads, but deadbeat moms. According to Fleury (2008: p. 17), “for more than one-third (34%) of low-income children from single-parent families, the parent did not declare any earnings.”<sup>13</sup> Further, single parents of low-income children who did declare earnings worked on average 500 fewer hours (i.e. three fewer months) per year than other parents. Given these findings, it is a virtual certainty that over half of the low-income children from single-parent families had mothers whose commitment to the workforce was insufficient even to support themselves, let alone any children.

It is a challenge even for dual-parent families to juggle work and child care; and the need to provide child care undoubtedly compounds a single parent’s ability to make commitments to the workforce. Still, the weak commitment of single mothers stands in stark contrast to the strong commitment of single fathers. In 2000, according to Galarneau (2005), 59% of lone fathers worked “mostly full-time, full-year,” compared to only 40% of lone mothers. As a result, the average income earned by lone mothers was \$19,900 compared with \$38,000 earned by lone fathers. When lone mothers worked mostly full-time, full year, they earned \$34,100 on average – only 11.4% less than lone fathers. This shows the dramatic impact workforce commitment has on the earnings of lone mothers. Unsurprisingly, “low-income situations were [less than] half as common for lone fathers as for lone mothers (20% and 43% respectively).”<sup>14</sup> In this day and age of equality between the sexes, employment equity, and



higher educational attainment by women, only a small proportion of lone mothers contribute toward their children's financial support to the level that lone fathers expect themselves to do. Nor can demographic differences explain the discrepancies between these two groups in either workforce commitment or earnings. The average age of lone fathers was 41.8, compared with 38.7 for lone mothers. Reflecting educational trends that have favoured women for over a generation, more lone fathers had not attained a high school diploma (26.4% vs. 21.9%), and fewer had attended a post-secondary institution (46.9% vs. 52.3%) – though lone fathers were marginally more likely to have had a bachelor's degree (12.6% vs. 11.6%). The average number of children in lone-father families was 1.5, versus 1.7 in lone-mother families.

## Making sausages<sup>15</sup>

*Those who like sausages and respect the law should not watch either of them being made.*

*- Otto von Bismarck*

The development of the *Guidelines* was a bipartisan political process. It was initiated under Progressive Conservative Justice Minister (later Prime Minister) Kim Campbell in 1990 and, without skipping a beat, continued under the Liberal government of Jean Chretien, elected in 1993. The driving force behind the development of the *Guidelines* was the Federal-Provincial-Territorial Family Law Committee, working together with civil servants from the Department of Justice Canada who provided research and technical assistance. As is customary for high-level civil servants, the Family Law Committee led Parliament by the nose throughout the process. It began promisingly enough when they released a report seeking public consultation (Family Law Committee 1991). However, this consultation turned out to be purely symbolic. Response to the discussion paper was not widely solicited; most of those who were told how to make contributions were parties the Family Law Committee and the Department of Justice Canada viewed as ideological fellow-travelers. As well, only a few months were given to contribute to this technical and far-reaching policy, so only those already primed with a position could realistically contribute. Indeed, no input from the public seems to have found its way into the end product; by all appearances, the Family Law Committee simply pursued its preconceived agenda and only used the public consultation as a way of anticipating, finessing, and avoiding opposition.

From 1992 to 1994, the Family Law Committee explored various models for maintaining children of broken homes that can be found in other jurisdictions. They made comparisons between what these models generated and existing levels of child support. The myriad child-support models can be divided into two broad categories: those that at bottom seek to share expenditures, and those that seek to transfer a share of income. By 1993, the Family Law Committee had already rejected the cost-sharing class of models, which are based on the intuitively appealing premise that parents should apportion expected child care expenditures according to their respective incomes. This decision was apparently made on the basis that cost-sharing did not generate awards that were sufficiently greater than existing judicial practice.

Instead, the Family Law Committee favoured a “Revised Fixed Percentage [of Income]” formula. They also asked researchers in the Department of Justice Canada to examine the implications of reversing the tax treatment of child support – i.e. making child support taxable in the hands of the payor rather than the recipient – despite the fact that the Supreme Court of Canada had just rejected a Charter challenge to the existing tax treatment: *Thibaudeau v. Thibaudeau*, [1995] 2 S.C.R. 627. The Family Law Committee’s preference was particularly puzzling given that the project’s alleged motivation was to reduce child poverty. The vast majority of children in low-income homes *benefited* from the then-existing tax treatment, which almost always left a higher after-tax income in their parents’ hands. Evidently, by this stage of the process the interests of high-earning mothers who would benefit most from receiving tax-free child support had become paramount over reducing poverty.

Justice (1995) released its “final report” summarizing the research done to develop the *Guidelines*, and the Family Law Committee (1995) released its recommendations on child support. It was then a matter of turning principles and formulas into legal language and Tables, to create a comprehensive code dealing with child support issues. The centerpiece of the *Guidelines* is a formula that generates Tables. Section 3 prescribes the Table amount as the “presumptive amount” for non-custodial parents to pay based solely on their income, province of residence, and number of children. The Tables also provide a “starting point” for calculating child support in cases of split and shared custody (sections 8 and 9, respectively). Various provisions of the *Guidelines* acknowledge circumstances when the presumptive amount might not apply, or when it might be open to discretionary judicial adjustments, either up or down. For example, s. 4 deals with incomes over \$150,000; s. 5 deals with non-biological parents; s. 6 deals with medical and dental insurance; s. 7 deals with added amounts for special and extraordinary expenses; and s. 10 deals with circumstances of undue hardship. Other sections of the regulations detail what form of payments may be ordered, when an order may be varied, and how income may be determined and when it may be imputed. There are also “administrative” provisions dealing with the way income information is to be produced and what information must be included in a child-support order.

Once these final reports were issued, the legislative process proceeded apace. Included in the federal budget of March 1996 was a “new child support package” that reversed the tax treatment of child support. The net effect of this new tax treatment was to leave recipient mothers with higher after-tax incomes and to give the government a tax windfall (estimated at the time to be in the range of \$400 million to \$700 million annually), both at the expense of tax-paying non-custodial fathers. Most perversely, the tax reversal meant that low-income families would typically end up with lower after-tax income to support their children, or meant for the children but being spent on their mother, thus augmenting their impoverishment. To neutralize this effect on low-income earners in theory, the “new child support package” also increased government benefits to low-income families with children. As with all universal programs, this increase did not accomplish its objective effectively. One implication was that fathers who were separated from their children and earned just above the low-income threshold for receiving the augmented benefits ended up paying higher taxes to support generous government subsidies

to children of intact, low-income families. Another defect of this aspect of the “package” is that the increase in child benefits ended up being treated by the *Guidelines* as a pure windfall to the children (i.e. to the mother who receives it). It was not taken into account by the formula used to generate the Tables so as to reduce the cost of raising children, and hence reduce the level of contribution required from the father, despite the fact that he was now paying child support in after-tax dollars. Fathers ended up paying for the government’s generosity, while receiving no credit for it.<sup>16</sup>

Bill C-41, *An Act to Amend the Divorce Act*, was then introduced to authorize the Governor in Council (i.e. Cabinet, but in effect the Justice Minister) to establish child-support guidelines, and to direct judges to apply those guidelines. In June 1996, the Family Law Committee released the child-support Tables. The timing of this release implies that the formula upon which the Tables are based must have been settled much earlier. Alar Soever, who was involved in his own divorce at the time, wanted to know how these newly released Tables were arrived at, so he phoned the Department of Justice Canada to inquire (McLean 2002a). He was told that a technical report would be published in the Fall of 1996. Follow-up phone calls were met with the response that the document was not ready. It was still not available by February 1997, when Justice Minister Allan Rock ushered Bill C-41 through Parliament. Parliament essentially signed a blank cheque on the accounts of non-custodial fathers, to the tune of billions of dollars annually.

The mysteriously dated technical report (Justice 1997) was finally “released” on April 9, 1998. Apparently, the Child Support Team at the Department of Justice Canada spent two years after settling the formula and calculating the Tables to come up with a scant, incomplete, nine-page explanation of what they had done. Documents produced by the Department of Justice Canada pursuant to a Freedom of Information request by Liberal MP Roger Gallaway indicate a deliberate attempt to limit circulation of this report, out of concern that wide dissemination would raise impertinent questions. Thea Herman, Senior Assistant Deputy Minister, advised the Justice Minister:

Its final drafting and publication have been delayed because the [Child Support] Team’s efforts have been focused on implementation of the *Guidelines*...

The document is highly technical and is designed for use by mathematicians, economists and other experts...

Although we do not intend to advertise this document, we have so far received about 40 requests from the general public for copies. Some members of the public may be disappointed that the report does not contain a list of specific expenses taken into account in setting up the *Guidelines*’ tables...

The Child Support Team proposes to release the report to members of the Federal/Provincial/Territorial Task Force on Child Support and the Federal-Provincial-Territorial Family Law Committee, and otherwise only by request on April 9, 1998.

Everything about this ministerial summary is phoney. It could not have taken two years to

produce an essential explanatory document running to only nine pages. The document was not in fact “highly technical;” any modestly intelligent layperson can understand it. Indeed, fear that members of the public would understand it all too well is the real reason there was no intent to advertise or circulate the document. It never did make an appearance on the Department of Justice Canada website, and the only way members of the public even knew about its existence is from an obscure reference to it in an earlier publication (Justice 1995). It was legislation by stealth.

The chicanery does not end here. Also produced pursuant to Gallaway’s Freedom of Information request was “draft #6” of the technical report, dated November 15, 1996 – the one that Soever was told was “not ready” yet when he phoned to inquire; the one that Parliament should have seen before debating Bill C-41 in February 1997. This report is 31 pages long, and contains an appendix of cases illustrative of how the *Guidelines* would impoverish below-average-income fathers. When asked by a reporter why this document had not been released upon request by a member of the public, “Spokesmen for the Department of Justice... den[ied] that the document was suppressed, saying it was merely delayed while being fine-tuned for the public” (McLean 2002b). Senior council Lise Lafreniere Henrie explained that MPs had confidential briefing notes in place of the technical report, although at least one MP found those notes to be sufficiently suspicious to conduct his own Freedom of Information request. Nor is the explanation offered by Jim Sturrock, a senior researcher involved in the project, any more convincing: “We struggled mightily with the level of technicality and decided to cut it down to make it short and succinct. If we gave examples, it was too long.” Even assuming Parliament and the public could not be trusted to understand all of the technicalities, eliminating the simple, illustrative examples that anyone could understand would only make matters worse. Sturrock’s erstwhile colleague, Ross Finnie, who had raised public criticisms of the *Guidelines* (1996, 1997), had a different take on why the technicalities were suppressed: policy decisions, he said, “came out of the air with no real explanation. It came from within the Justice Department... I suspect someone said, ‘How can we ratchet up these awards a little bit?’ Let’s just say... it ended messily between myself and the Justice Department” (McLean 2002a). In testimony to the Standing Senate Committee on Social Affairs, Science and Technology in 1996, Finnie bluntly stated that “In a practical sense, awards can become exorbitantly high, punitively so.”

## Follow-up cover-up

*Sunlight is the best of disinfectants.*

*- Louis D. Brandeis*

Parliament at least had the sense to include a clause in Bill C-41 that would require the Justice Minister to conduct a review of the operation of the *Guidelines* and report back within five years.<sup>17</sup> Unfortunately, this review process was as easily manipulated by the bureaucrats in the Department of Justice Canada as the design of the *Guidelines* had been. Despite the alleged importance of this social policy in addressing a major shortcoming in our legal system, nothing

systematic and meaningful has been published by either the Department of Justice Canada or Statistics Canada to assess its impact. The government-sponsored studies of the effect of child-support changes that do exist are scattered and employ inconsistent definitions and methodologies, making it difficult to draw conclusions. All of them offer highly uninformative analyses based on “average” (i.e. mean or median) awards, without breaking the analysis down further by income level. Of course, means and medians are quite distinct, making comparability impossible between studies that employ one measure as opposed to the other. Some studies do not even break down awards by the number of children; others give a “per child” average which is impossible to make sense of because the relationship between *quantum* of support and number of children is not linear. The different tax implications of child-support transfers before and after 1997 are not expressly addressed. Considering that one of the main criticisms of child-support awards prior to the *Guidelines* was their lack of consistency from case to case, the least one would expect of those attempting to design something better would be methodological consistency on the tracking of awards pre- and post-*Guidelines*. Given the absence of any reliable, systematic review, one suspects that knowledge of the impact of the *Guidelines* was being deliberately suppressed.

A glance at three official, public studies that report on child-support transfers before the *Guidelines* came into effect shows a glaring lack of consistency. Justice (1990: p. 81) found that in 1985-86, the mean award was \$470 per month, while in 1988 the mean award was \$503. By contrast, Galarneau (1992) states that the mean award in 1988 was \$4600 per year (\$383 per month), and the median award was \$3000 per year (\$250 per month). What’s worse, Galarneau’s figures supposedly include spousal as well as child support, making it difficult to reconcile her findings with the earlier Department of Justice Canada study. Stirpinis (1994) indicates that the “average monthly support award per child” in the period October 1991 to May 1992 ranged widely, from \$260 to \$450 per month, depending on province. This includes only child support, but since the figure given is “per child” it is impossible to compare meaningfully with the other studies. Given the very wide range of figures coming out of these studies, it is impossible to establish either the extent to which child support might have been deficient prior to the implementation of the *Guidelines*, or even a reliable “before” snapshot of child support orders that can be compared to awards after the *Guidelines* were implemented.

There are only two government reports that make before-and-after comparisons of child support awards. Justice (2002a: p. 9) summarizes the findings as follows:

Extensive testing and comparison of the two databases has shown that, generally speaking, post-*Guidelines* amounts were much more consistent at each payor income level than were pre-*Guidelines* amounts. The post-*Guidelines* amounts were generally higher than the pre-*Guidelines* amounts... Because there had been a particular concern about the impact of the *Guidelines* on low-income families, the federal Department of Justice analysed cases in which both parents had incomes of \$20,000 or less. This analysis showed that for one- and two-child families, median and mean amounts were considerably higher in post-*Guidelines* cases than in pre-*Guidelines* cases. In addition, post-*Guidelines* amounts were generally higher than the table amounts, even in cases



without special expenses...

No publication is cited where this analysis can be found, and no actual amounts are stated. This loose summary of important findings is, to put it mildly, an oddity that recalls the suppression of information in the technical report (Justice 1997). Given the manifestly unreliable summaries of findings observed in other government publications on this topic (Douglas 1993; Justice 1990), one suspects that the underlying research alluded to here must be too embarrassing to publish even for political purposes – which is saying a lot. In fact, the second and “final” government publication (Justice 2002b: p. 33) frankly admits that “there is no definitive way of identifying how much child support amounts changed with the advent of the federal guidelines but there are indications that the size of awards may have increased.”

The first government-sponsored study examining child support awards after the *Guidelines* came into effect is by Bala *et al.* (2005). Based on cases from 1998 to 2003, the median section 3 award was \$435. Section 7 add-ons were awarded in about a third of cases, and the median for them was \$117. While not directly comparable – particularly since inflation and the changed tax treatment of child support need to be taken into account – these figures do not appear to represent a substantial increase from the \$503 per month figure that existed in 1988, as reported by Justice (1990: p. 81). They also appear to be broadly consistent with the upper range of awards reported by Stripinis (1994) from the early 1990s. By contrast, Robinson (2009a: Table 4, p. 16) reports that the “median monthly regular payment due was \$300 in 2007/2008.” The median monthly regular payment due as at March 31, 2009, seems to have fallen in most provinces other than Alberta (Robinson 2009b: p. 21, Table 10), perhaps due to the recession the country was experiencing at the time. Robinson’s figures suggest that nominal child support awards have not changed since the second half of 1988. The most likely explanation for these anomalously low figures is that Robinson based his analysis on cases enrolled with the maintenance enforcement agencies in the provinces. It would seem that these cases are heavily skewed toward low-income payors who have difficulty keeping up with their payments, which is why maintenance enforcement has become involved in the first place.

Although the official studies summarized above do not clearly demonstrate this effect, it would be surprising if the *Guidelines* did not produce a sharp rise in child support awards. Millar (2009: p. 105) found an increase in average child support awards of 11%, albeit based on a less than satisfactory dataset. Without being able to adjust the “average increase” figure for wage inflation and for the effects of the reversal of the tax treatment of child support – which will differ significantly depending on the incomes of the payor and the recipient – it is unclear what to make of these increasing averages. In any case, Millar’s finding is probably at the low end of estimates of the effect of the *Guidelines*. The assumptions underlying the model upon which the Tables were constructed, as well as other concrete provisions of the regulations (about which more in the next chapter), clearly indicate that the developers of the *Guidelines* took great pains to design a system that would increase awards across the board. Finnie (1995: p. 317), an economist who had worked on the development of the *Guidelines*, expected an average increase of 32%, and said that in “many” cases child support would double. This estimate is consistent with the finding referred to earlier from Stripinis (1994) that pre-*Guidelines*



support was highly consistent across the provinces at 10% of the non-custodial parent's pre-tax income, compared to the presumptive s. 3 Table amount of the *Guidelines* which, as will be shown in the next chapter, amounts to 17% of the non-custodial parent's pre-tax income for one child. When s. 7 expenses and multiple children are involved, a doubling of support obligations from 10% to 20% or more of after-tax income can easily be reached.

Given the difficulties with empirical estimates of how the *Guidelines* affected the quanta of child support payable, an examination of some theoretically typical and some actual cases will be helpful.

## Typical cases

*To cheat a man is nothing; but one must have fine parts, indeed, who cheats a woman.*

*- John Gay*

As was noted above, "draft #6" of what became Justice (1997) contains an appendix of illustrative examples. One of them concerns a Newfoundland couple, each earning a gross income of \$25,000, and having two children. Applying the formula, the custodial mother ends up with an after-tax-and-transfer income of \$27,369 while the non-custodial father is left with only \$14,489. Since the putative objective of the *Guidelines* is to leave the parents with the same standard of living after the children have been taken care of, one might suppose that the difference of \$12,880 is what the *Guidelines* deem to be a suitable amount to support the two children. Yet that is not what the formula implies. Rather, the cost of raising two children for a Newfoundland couple with a family income of \$50,000 is assumed to be only \$8,880 (\$370 per month for each parent). The difference of \$4,000 is a pure windfall for the mother, often referred to as "embedded spousal support." Moreover, because the "government's" contribution to the support of the children is paid to the mother, she really contributes less than \$3,000 while the father pays his full share (\$4,440). If the father incurs costs during his access time, the contribution ratio is of course skewed even further – dramatically so when access approaches 40% of the time (Maclean 2002a).

The formula assumes that the parents earn the same gross income, so all of the illustrative examples in "draft #6" follow this assumption. Yet it is highly unrealistic in most cases. On average, custodial mothers earn only about half of what non-custodial fathers earn. It helps to appreciate the effects of child support payments to family finances to consider a more realistic, "average" family.<sup>18</sup> Consider the case of a non-custodial father earns \$50,000 per year and a custodial mother who earns \$25,000 per year. If there are two children, then a father in Alberta would pay \$719 per month in s. 3 child support (\$8,628 per year). Assuming modest additional s. 7 expenses of \$100 per month for each child, the father would be responsible for "his proportionate share" which is an additional payment of \$1,600 per year. Thus the total child-support transfer from father to mother would be \$10,228 per year, after tax.

Income tax (including compulsory payroll deductions for CPP and EI) for a single adult earning

\$50,000 per year is approximately \$15,000. By contrast, income tax for an adult earning \$25,000 with two dependent children is approximately \$1,500. The mother would also receive approximately \$750 per year in GST credits, and approximately \$600 per month (\$7,200 per year) in child tax benefits, depending on the ages of the children. (Assume that the children are too old to qualify for the Universal Child Care Benefit of \$100 per month.) Suppose the father pays a modest \$700 per month to rent an apartment, while the mother, living with the children in the matrimonial home, pays a mortgage of \$1,000 per month. (In many cases, the mortgage will be considerably lower than this because the parents have built up equity in the home.) In that case, the parents' income after tax, transfers, and "fixed costs" would be as follows:

Father:  $\$50,000 - \$15,000 - \$10,228 - \$8,400 = \$16,372$  (1)

Mother:  $\$25,000 - \$1,500 + \$10,228 + \$7,950 - \$12,000 = \$29,678$  (2)

Of course, the mother has to pay for the cost of the children from her income. Right off the top, the mother pays \$2,400 for the section 7 expenses. Given the assumptions underlying the formula by which the Tables were created, the basic cost of raising two children for a family with a total income of \$75,000 is given by doubling the child support payable by a payor earning \$37,500 (since each parent is assumed by the model to earn the same income, and the recipient is assumed to contribute the same amount as the payor to the support of the children). The Table amount for an income of \$37,500 is \$538 per month, which is \$6,456 per year – or \$12,912 from both parents combined. Thus, at first approximation, the amount the mother has left for her own discretionary use, after paying the children's costs, is as follows:

Mother:  $\$29,678 - \$12,912 - \$2,400 = \$14,366$  (3)

Note that the mother's discretionary income in line (3) is only \$2,000 per year less than the father has available for his discretionary use in line (1). But the situation is actually much better than this for the mother, since there is an element of double-counting of the child-raising costs in the above figures. The \$12,912 per year it costs to raise two children includes all costs, and since the full cost of the mortgage was already deducted in line (2), some amount has to be added back in to line (3) to eliminate the double-counting of the fixed costs of raising children. The most common estimate is that fixed costs – mainly housing and transportation – comprise 50% of the total costs of raising children; while variable costs – food, clothing, entertainment, etc. – account for the other 50%. In that case, as much as \$6,456 would have to be added back into the mother's income in line (3) to make it comparable to the father's income in line (1). A more mother-friendly assumption in this scenario would be that the mother's accommodation cost is the same as the father's – \$700 per month – and that the additional cost of the mortgage – \$300 per month – represents the marginal cost of accommodations for the children. This \$3,600 per year is included in the \$12,912 in line (3), as well as the \$12,000 in line (2), and should be removed from one of them. In that case, the mother's discretionary income is actually \$17,966 compared to the father's discretionary income of \$16,372. In short, the mother ends up with 10% more income for herself than the father, even though he earns twice the gross income.

It is clear that this result is no accident, no product of well-chosen numbers. According to the assumptions underlying the construction of the *Guidelines*, the marginal cost of raising the first child is supposed to be 40% of the cost of a single adult, and the marginal cost of raising the second child is supposed to be 30% of the cost of a single adult. Thus in order to equalize household standards of living between a single father on the one hand and a mother with two children on the other, the mother would have to have \$1.70 for every \$1.00 the father has, after tax. In the present example, the family's total after-tax income is \$66,450; distributed according to the assumptions underlying the *Guidelines*, the father should retain \$24,611 for himself while the mother should get the balance: \$24,611 for herself and \$17,228 for the children. Notice that more than the entire amount required to raise the children – \$18,178 – is transferred from the father (\$10,228) or the government (\$7,950). The mother in effect contributes nothing from her own income to the support of the children, and in fact has her accommodations subsidized from the children's support. That is why, after the cost of accommodations is taken into account, the mother has more disposable income than the father despite earning only half his income. The *Guidelines* promote divorce by turning children into a profit centre for mothers (Allen 2007; Baskerville 2007).

The typical case is even worse than this for the father, since the above calculations do not take into account any costs associated with his access. Most fathers buy Christmas and birthday presents for their children, take them on summer holidays, pay for meals and entertainment every other weekend, and contribute in numerous others unrecognized ways to the support of their children. These activities can quickly add up to thousands of dollars per year – while relieving the mother of an equal financial burden associated with custody. If the father has access 25% of the time, his cost of access would amount to at least \$3,000 per year in a typical case. Thus a comparison of the discretionary incomes available to the parents looks more like the following:

Father:  $\$16,372 - \$3,000 = \$13,372$  (4)

Mother:  $\$17,966 + \$3,000 = \$20,966$  (5)

The amount of money available to the mother to spend on herself is 57% higher than the money available to the father to spend on himself, even though she starts out by earning only half his income. Clearly, with a discretionary income of only \$13,372 per year – barely \$1,000 per month – the average father paying child support for two children would have nothing left to pay a lawyer to contest access denials, let alone save for retirement. It is little wonder that some of them are forced to walk away from their children.<sup>19</sup>

## Dead-broke dads

*An ending with horror is better than an unending horror.*

*- Friedrich Schiller*

It is a commonplace of statistical analysis that a modest change in the average can hide huge

changes at the extreme tails of a distribution. When government analyses boast about increases in the “average” child-support award, this could easily disguise great injustices among the highest and lowest of income earners. Since no government research has ever been done to look into the effects of the *Guidelines* on payors, one can only consider anecdotal evidence to see how extreme cases might be dealt with. While no pretence is made that the cases summarized in this section are representative, it is likely that the hype surrounding the introduction of the *Guidelines* was instrumental in encouraging courts to create these abominations.

(i) “Stephen Wainwright” (not his real name), a Toronto physician, was ordered to pay \$4,200 child maintenance plus \$7,200 spousal maintenance per month, on a salary of \$180,000 per year (Bauer 2005). That amounts to \$140,400 per year, or 78% of his gross income, not even leaving enough to pay his deductions at source.

(ii) “Michael,” also from the Toronto area, was ordered to pay \$4,153 child maintenance plus \$3,000 spousal maintenance, on a gross income of \$158,000 (Laframboise 2000). That amounts to 96% of his take-home pay of \$7,455 per month, leaving him \$302 per month to live on. A three-judge panel of the Ontario Court of Appeal upheld this award as being reasonable and fair. Ironically, the reason his wife left him, according to her, was neither infidelity nor domestic violence, but the fact that he worked too hard. When the *Toronto Star* published an article on “deadbeat dads,” his 16-year-old, \$4,153-per-month son had the impertinence to tell him, “That’s what I think of you.”

(iii) Ken Sandall of Ottawa was ordered to pay \$2,000 per month in child and spousal maintenance on an income of \$2,250 per month, which amounts to 89% of his gross income, again leaving not enough to cover deductions at source (Kay 2007).

(iv) Darrin White of Prince George, B.C., was ordered to pay \$1,071 child maintenance plus \$1,000 spousal maintenance per month on a gross disability income of \$2,200. On top of that, he had previously been ordered to pay \$439 per month child maintenance to the mother of his eldest child in Saskatchewan. Thus his support orders totalled 114% of his gross income. According to relatives, Darrin brought home only \$950 per month after deductions at source, which would be about right if the \$439 owing to the eldest child was garnisheed by the maintenance enforcement agency – a very routine, almost automatic procedure. In that case, the B.C. support order amounted to 218% of his net income (Lee 2000).

Impossible rulings like these are the product of arrogant judges who whimsically impute income to fathers and callously disregard any hardships they might face. In Dr. Wainwright’s case, the matrimonial property settlement left him with \$600,000 in assets, on which the judge imputed an income that his ex-wife was deemed entitled to share in – notwithstanding that she already got her fair share of the matrimonial property. Never mind that most of these assets were probably either not income-generating – e.g. a new home to live in – or else invested long-term for the purpose of a retirement income. Even if Dr. Wainwright had been able to earn a 7% cash income on all \$600,000 of his assets, he would still have been paying 63% of his gross income in family maintenance, perhaps leaving just enough to cover his deductions at source but nothing to live on.

In Darrin White's case, Master Doug Baker chose to believe that he was not actually paying the \$439 per month that had been ordered in Saskatchewan, and also chose to believe that he would "soon" be off stress leave and back earning his regular salary as a train engineer. Why Mrs. White was entitled to spousal maintenance at all, given that she also worked as train engineer at the time of the separation, is a mystery. To top everything off, Baker also ordered Mr. White out of his home on 48 hours' notice – forcing him to obtain and furnish a new residence on his own resources. Finally, Baker refused to enforce any "visitation" with Mr. White's children. Tragically, Baker's ruling, like untold others, was fatal. Sometime between March 12 and March 17, 2000, Darrin White went into the woods and hanged himself. Retired B.C. Supreme Court Justice Lloyd McKenzie, who spoke on behalf of the court, delivered what was intended to be an exoneration of Master Baker, saying that this case was no different than any of the thousands that go through the courts. Ask yourself if any judge in Canada would dare make such a brutally callous remark were a mother's life at issue. Rather than being an exoneration of Baker's ruling, this judicial comment is a damning indictment of the entire system, which turns dead-broke dads into suicide statistics at an alarming, though (of course) undocumented, rate.

The statistics reviewed above tend to support the contention that Darin White's situation is not unusual. Recall that the post-separation income of low-income mothers was only 11.8% lower than their pre-separation income. If, as the government boasts (Justice 2002: p. 9), the *Guidelines* increased awards "considerably" for this class of parents, it would mean that non-custodial fathers are being forced to absorb the entire loss of standard of living consequent upon setting up two households. As will be shown in the next chapter, low-income fathers have been persecuted relentlessly by the maintenance enforcement system since the *Guidelines* came into effect: overwhelmingly, those jailed for non-support are unemployed and marginally employed (Millar 2010). The more generous awards undoubtedly going to middle- and upper-income mothers should not be used to mask the damage done to low-income fathers, as the use of "averages" in the government studies tends to do.

## Effects on children

*When money speaks, the truth is silent.*

*- Russian Proverb*

If government research exploring the impact of the *Guidelines* on the quantum of monetary transfers between parents is sketchy, official research on the impact of the *Guidelines* on the health, educational, and behavioural outcomes for children is non-existent. Yet this is what it is all supposed to be all about, after all: benefiting the children. While it is safe to say that lifting children out of poverty would have positive effects for children,<sup>20</sup> the evidence indicates that the *Guidelines* have been totally ineffective in reducing the poverty rate among children. The rate of low-income children seven years before the *Guidelines* came into effect was about the same as seven years after they came into effect. This rate tends to fluctuate with



general economic conditions. Indeed, it should have been obvious from the facts summarized above that the *Guidelines* would have no positive impact on child poverty in Canada – its ostensive *raison d'être*. Juby *et al.* (2003: p. 30) make the obvious point that “supporting two households on an income that previously supported one entails many financial adjustments in the best of circumstances; in situations in which the family income was barely sufficient to support one household, a transfer of resources from one household to the other is simply not possible.” Meanwhile, Le Bourdais *et al.* (2001: p. 44) confirm a common finding that fathers who cannot meet their support obligations due to periods of unemployment or part-time employment tend to spend less time with their children, preferring to break off contact rather than continue to be in a situation they find too difficult. The question is why the politicians, academics, lawyers, judges, and bureaucrats who supported and developed the *Guidelines* refused to see this a decade earlier.

If attacking child poverty were really the objective, then increasing the proportion of children in shared custody, or in the father’s primary custody, would have been the best method. It is noteworthy that “children in British Columbia were the most likely to be in a low-income situation in 2004 (their low-income probability was estimated at 23%)... [while] Children in Quebec were the least vulnerable (8%)” (Fleury 2008: p. 17). The Quebec family-law system differs from that in the rest of Canada in two important respects that tend to explain Fleury’s finding: first, shared parenting is more common there; and second, the distinct Quebec model for child support leads to awards that are between 10% and 90% lower than awards based on the Tables in the federal *Child Support Guidelines* (Khodeir 2009).<sup>21</sup> Not coincidentally, Robinson (2009b) reports that compliance with registered child support orders is highest in Quebec, where 79% of payors paid every penny owed on time each month of the entire year in which the survey was conducted. The more fair custody and support awards in Quebec are greeted with higher compliance rates, which benefits children more than punitive awards that end up being evaded or defaulted on in the rest of Canada. Juby *et al.* (2004: p. 45) provide statistical analyses that support this assessment. As the legal proverb goes, “A lean agreement is better than a fat judgment.”

At the other end of the income scale, one might wonder if awarding tens of thousands of dollars per month in child support actually improves outcomes for children of wealthy parents. Here, an important finding from the first chapter bears repeating. Millar (2009) shows that it takes a ten-fold increase in family income to produce significant positive effects on a child’s health, education, and behaviour. If the father earns ten or more times as much as the mother, transferring very large sums of money from the father to the mother might indeed raise the income in the child’s household enough to produce positive outcomes for the child. However, again, the simpler method would be to award primary custody to the father in the first place, should he be willing and able to assume custody.<sup>22</sup> But for the vast majority of cases in between the poor and the rich, a ten-fold increase in family income is not even remotely achievable through the child-support system. Moreover, that isn’t even the proper comparison to make. The relevant question is not whether the *Guidelines* represent an improvement over no child support at all, but whether they represent an improvement over the previous system of judicial



discretion. Even the most extreme estimate of the effect of the *Guidelines* – a doubling of support awards (Finnie 1995) – does not come close to the ten-fold increase in family income to the recipient needed to bring about significant benefits for middle-class children. Since transferring money from non-custodial fathers into the general operating accounts of custodial mothers has little or no discernable effect on outcomes for children, the only argument in favour of the child-support regime is to apportion the costs of raising children fairly between parents. The propaganda about increases in child support being needed to promote the best interests of children is unwarranted and unhelpful.

To be fair, connecting child-support transfers to outcomes for children points to one respect in which the *Guidelines* might represent an improvement over the previous system. Section 7 of the *Guidelines* encourages judges to make awards for special medical and educational expenses (among other, less meritorious, things). Such targeted awards, when supported by actual expenditures, can be expected to lead to improved health and educational outcomes for children. Nobody could reasonably object to child-support payments that cover such necessary expenses, within the means of the parents. But since nobody could reasonably object, it is doubtful that judges in the previous discretionary system were routinely ignoring claims for such expenses, either. Indeed, one of the strengths of the discretionary system (which persists in s. 7 of the *Guidelines*) was that it forced parents seeking support to produce reasonable and documented child-related expenditures.

## Customer satisfaction

*World coming to an end: women disproportionately affected!*

*- Apocryphal headline*

Financial support for separated women comes in many forms that are interconnected. After the *Guidelines* came into effect, some judges might have been inclined to reduce spousal support awards so as to take into account the prescribed increases in child support (which include “embedded spousal support”). Likewise, some judges might have been more careful in apportioning matrimonial property equally (rather than continuing to favour mothers). Further, many payors undoubtedly adjusted their own discretionary spending on their children when faced with an increase in mandatory child support awards. Impecunious payors who are financially stressed would cut out trips to the movies, dinners out, or shopping – reducing the child’s satisfaction with their access time. Payors of considerable means might reasonably reckon that their children are already being generously served by “presumptive” awards in the tens of thousands of dollars per month, plus section 7 awards covering every imaginable extracurricular activity; they might well reduce their own spending on big-ticket items for the children like travel or extravagant birthday presents. The fact of the matter is that most middle- and upper-income fathers do not complain that their children are receiving too much from the *Guidelines*; they want the best of everything for their children, too. Rather, they complain about the lack of influence they have over what is done with the money being spent on their

children. They complain about the generous support being automatic, regardless of the child's efforts to earn their generosity. And they complain about receiving no gratitude or satisfaction for personal sacrifice of being the breadwinner and provider.

According to Justice (2002: p. 6), only 56% of recipients and 41% of payors in British Columbia in 1998 agreed that the amounts prescribed by the *Guidelines* were fair. This represents a substantial reduction in the satisfaction with child support awards before the *Guidelines* came into effect, as reported by Le Bourdais *et al.* (2001) and Justice (1990) cited previously. Other surveys reported by Justice (2002) are more favourable toward the *Guidelines*. In Alberta in 1999, 74% of recipients and 65% of paying parents agreed that the *Guidelines* were fair. In 2000, a national telephone survey found that receiving parents gave the *Guidelines* an 8 out of 10 on a scale of fairness to themselves, while paying parents produced an average rating of only 5 out of 10. Both recipients and payors rated the *Guidelines* 7 out of 10 in fairness to the children. Still, these satisfaction levels are on the whole no improvement upon the levels experienced by parents prior to the *Guidelines*, suggesting that the main effect of these regulations was to inflate the expectations of mothers and inflame the resentment of fathers.

## The Morality of Maintenance

*An approximate answer to the right question is worth a great deal more than a precise answer to the wrong question.*

*- John Tukey*

Before addressing in detail the assumptions and provisions of the *Guidelines*, it pays to step back and consider the more fundamental question: whence the entitlement to child support in the first place? What can be said in favour of Professor Deech's "extreme view... that no maintenance should be payable unless the claimant spouse is unable to work or has the care of young children"? Although this question is rarely posed, and even more rarely taken seriously, there are strong moral reasons for dispensing with maintenance entitlements as we know them. The moral case against maintenance entitlements, beyond a time-limited minimum, is presented in this section; the technical legal case against the *Guidelines* in particular is presented in the next chapter.

The meaning and scope of maintenance entitlements needs to be defined at the beginning of this critique. By 'entitlement' is meant a government-mandated benefit, especially one that cannot be contracted out of by those affected. Thus the *Guidelines* count as an "entitlement" program, but not voluntary arrangements such as prenuptial contracts or separation agreements that include maintenance payments as part of their terms.<sup>23</sup> Further, the scope of the critique in this section extends to family maintenance in general, as opposed to child support in particular, since all family maintenance is geared toward one goal: maintaining separated mothers in the style to which they had become accustomed during cohabitation. It has gone out of fashion to put the objective in quite those terms; in our brave new world of equality, all reference

to gender or to gender roles has to be struck from legal discourse, or masked with neutral-sounding jargon. But the true objective of family maintenance is logically unmistakable. In place of “maintaining separated women in the style to which they had become accustomed during cohabitation,” we strive for an “equalization of household standards of living,” which amounts to the same thing. The child-support *Guidelines* were expressly designed with the goal of equalizing the standard of living between the separated households – which is to say, to prevent the mother’s standard of living from falling, and the father’s from rising, due to the separation. Moreover, to the extent that the child-support *Guidelines* fail to achieve this equalization, the “Spousal Support Advisory Guidelines” (Rogerson and Thompson 2005) step into the breach to promote the same objective. Finally, if child and spousal support are together deemed inadequate to maintain women in the style to which they have become accustomed in a relationship, then an unequal property division in their favour is a method of last resort to achieve what judges perceive to be an equalization of household standards of living. Thus judges commonly have the means and the motive to effect an equalization, if not an over-compensation in favour of mothers. The morality of that extreme form of mandated equalization is in issue in this section.

Opposition to government-mandated entitlements has long been a plank in the conservative policy platform, although the extension of this hostility to family-maintenance entitlements tends to be overlooked.<sup>24</sup> Stated in its broadest terms, the problem is that mandatory entitlements tend to be morally corrosive, leading to dependency and ingratitude in the recipient and resentment and resistance in the payor. They inevitably alter the terms on which prospective recipients and payors interact, to the detriment of their relationship. Temporary entitlements that are narrowly targeted to an individual need – the proverbial “hand up” as opposed to a “handout” – can be effective tools for remedying certain problems. But when broadly applied entitlements are aimed at some form of equalization – especially equalization regardless of the conduct of the recipient – the corrosive and deleterious effects are most pronounced. The moral argument against family maintenance replicates and extends this argument. It starts with the premise that stable, functional families are the keystone of society. Anything that impairs the formation and stability of families, or increases dysfunction within families, is to that extent an evil to be avoided.

Since time immemorial, there has been an implied contract between men and women. Men risked their life and limb to protect women and children, and to provide dangerous-to-acquire food and shelter for the family; and in return, women tended to the hearth and home. This contract was as evident in Jane Austen’s English parish as it was in our ancestral hunter-gatherer societies. Modern technological advances have dramatically altered the nature of work both in the field and at home, such that the ancient contract has become greatly attenuated. Yet this basic division of labour remains to some degree a part of most conjugal relationships. Men still predominate in the protective and high-risk occupations (soldiers, police, firefighters; miners, off-shore fishers, manual labourers); men still suffer from stress-related illnesses and death at much higher rates than women; and men still earn a substantial majority of the income. Meanwhile, women still do more tending to the home and young children, although

much of that child-care work has been professionalized in daycares and elementary schools. In ancient times, when the overwhelming preoccupation of nearly everyone was with basic survival and reproduction, the family was a finely balanced institution. Nowadays, the balance is much harder to find. The rapid expansion of liberty and equality in contemporary society has resulted in a corresponding expansion of the feasibility set of nearly everyone. But with more options comes more potential for tension and conflict in a relationship. No two people have preferences that mesh so hand-in-glove as to make compromises and trade-offs unnecessary.

It is trite to observe that the formation of successful, long-term relationships requires three elements. First, the interests and values that matter most to each person must be a close match. Second, the parties must be skilled at negotiating the trade-offs and compromises that are called for where their preferences do not align perfectly. Third, each person must bring something to the relationship that the other wants, and cannot readily obtain otherwise. Family-maintenance laws that aim for the equalization of household standards of living between separated parents tend to undermine each of these elements and thereby destabilize the family unit. In the first place, they create incentives for women to have children by men with whom they have no intention of living or co-parenting. They can obtain the benefit of the father's paycheque for 18 years or more without having to make any of the compromises or trade-offs associated with having a relationship, let alone bearing the burden of doing his laundry and cooking his meals. Because family maintenance makes the "exit conditions" so favourable to women, they no longer have much of an incentive to wait for and search out a close and compatible match to begin with. They may indulge their romantic fantasies without much fear.<sup>25</sup>

When women marry a middle- or upper-income man and things don't work out, they face no dire economic consequences of their poor choice of mate. Indeed, if they marry the right paycheque, they stand to profit handsomely from even a short-term relationship. This is a major reason divorce rates have reached historic highs, and why women are twice as likely as men to initiate a divorce. Commenting on the destabilizing effects that child support has on relationships, Baskerville (2007: p. 123, footnotes omitted) states:

"While the new measures resulted in virtually no measurable improvement in the lives of impoverished single-mother families," Seidenberg points out, "it did create a windfall of income for middle-class and upper-middle-class divorced women." Misleadingly promoted as a measure to help poor children whose mostly young and unmarried fathers had allegedly abandoned them, the new laws ended up as a means to plunder middle-aged and middle-class fathers who had done no such thing and whose children were taken away from them through literally "no fault" or agreement of their own.

Empirical evidence indicates that this is precisely the effect. Economist Robert Willis calculates that child-support levels vastly exceeding the cost of raising children creates "an incentive for divorce by the custodial mother." His analysis indicates that only between one-fifth and one-third of child-support payments are actually used for the children; the rest is profit for the custodial parent. "We believe that the recent entitlement," write two other scholars, "...has led to the destruction of families by creating financial incentives

to divorce [and] the prevention of families by creating financial incentives not to marry upon conceiving of a child.”

Another economic study also concluded that child support serves as “an unintended economic incentive for middle-class women to seek divorce.” “As long as the middle-income father works at a level comparable to before [or during] the marriage,” write Kimberly Folse and Hugo Varela-Alvarez, who based their study on child support at an atypically low percentage of fathers’ income (17 percent), “divorce can be attractive, or at least economically rewarding for her.” This simply extends well-established findings that increased welfare payments result in increased divorce.<sup>26</sup>

Even intact relationships are affected by the distortion of incentives created by family maintenance. The “lesser interest principle” states that the person who has the lesser interest in maintaining a relationship sets its terms. The reason is simple: any possible fissure or break in the relationship will be perceived as more threatening by the party with the greater interest in it. The power play between partners need not be Machiavellian, or even conscious. The party with the lesser interest in maintaining a relationship will slip into a mode of setting its terms because he or she feels less anxiety over rejection; and the party with the greater interest in maintaining a relationship will slip into a mode of accepting the terms set down by the other party rather than suffer the anxiety of rejection. Since one of the main assets men have always brought to the negotiating table in their relationships with women is their superior commitment to earning an income, when that trump is taken away from them by family-maintenance laws, it places men at a distinct disadvantage in negotiating within a relationship. Men are expected to be the main breadwinner, and to be an equal contributor in every other respect of the relationship as well. In order to please their partners, men have to offer a premium, something above and beyond their extra financial contribution to the relationship. To earn appreciation and affection, men have to put in a full week’s work and then share equally in the housework and support the woman’s interests as well. Men’s nights out, for poker or hockey or other interests, are jealously resented. The dysfunction of these common dynamics cannot go unnoticed by the children, who suffer anxiety as a result of parental tensions and bickering.

One of Professor Deech’s main objections to family maintenance is that it creates what is known in the literature as a “welfare trap.” The expectation that a woman will be kept by her partner in the style to which she had become accustomed during cohabitation leads to a dramatic diminution in her commitment to the workforce.<sup>27</sup> As the law of unintended consequences predicts, this inducement into complete or partial economic dependency is ultimately detrimental to her long-term well-being. The “feminization of poverty” has very little to do with men failing to live up to any fair measure of family-maintenance obligations; it is mostly an artefact of women’s relative longevity and the related health-care costs, exacerbated by the ingrained and unrealistic expectation of receiving generous support indefinitely, that leads women not to plan adequately for their retirements. Not only does it reduce a woman’s commitment to the workforce, the confiscatory marginal tax rate implied by family maintenance seriously impairs a father’s work incentive as well. The irony is that laws aimed at achieving



“the highest possible standard of living for children” actually produce the opposite effect, by destroying the incentives of both parents to work. Children in general would be better served relying upon the tender mercies of their parents, freely doing what parents typically do for children with whom they are permitted to retain more than an economic relationship.

Studies consistently show that fathers who retain a meaningful role in their children’s lives willingly support them financially – whether they are living with or separated from the mother (Le Bourdais *et al.* 2001; Baskerville 2007; Braver 1998). Most fathers do not mind giving their children every advantage possible, as long as they are appreciated, respected, and loved for their efforts. What troubles most fathers about the child-support regime is not so much the amount they are required to pay, but the commercialization of their relationship to their children. Children who are separated from their fathers do not see them coming home every day from a hard day’s work; they do not see them paying the bills or doing the family budgeting; they are unaware of the automatic bank transfers that remove money from their father’s account and place it into their mother’s account on the first day of every month. All child beneficiaries of family maintenance see is that their mother pays for everything, and that they have to petition their mother for everything they want. In some cases, all they hear is their mother complain about their father being a “deadbeat,” even when he is doing his level best. In some cases, mothers use the child-support money against the fathers who earn it – for example, by bribing the children with fun extracurricular activities at times that conflict with scheduled visits with their father, or by denying access outright and then using child support to pay a lawyer to justify it in court.

In most cases for which the *Guidelines* were ostensibly created, child support orders do not increase the amount of money being spent on the child at all; they merely determine who gets to spend the money and on what. For below-average-income families, add-on expenses for activities that mom wants the child to engage in only reduce what dad has available to spend on his access time with the children. The clear effect is to diminish the role of the father in the eyes of his children, while inflating the mother’s importance. When fathers are relegated by the family-dispute system to the status of an “interested observer” with a wallet, many will protest in the only way left open to them: by reneging on their financial support. Judges who chastise fathers for failing to meet the “most serious obligation” to their children that they have not been stripped of by a judge are not only naïve about human psychology, they are callous and cruel. Belittling fathers as a way of encouraging them to pony up is what too many judges consider good psychology.

Gresham’s Law states that bad currency drives good currency out of circulation. This is true of the currency of family relationships, too. When court-ordered maintenance entitlements become the currency of family relationships, they tend to drive out affection, respect, and even minimal civility. Mothers come to believe that they are only getting what is their due; children come to believe that they are entitled to subsidized trips to Disneyland and a free pass through university, regardless of how well or ill they behave toward the one ultimately paying the bills. Fathers, already pushed to the margins of parental authority, are unable to teach their children responsibility and the normal give and take of living because they have nothing to negotiate



with. The son of “Michael” in the case mentioned above expresses an all too common attitude of children toward their non-custodial fathers; he might as well have said: “Get real, Dad. You can’t ground me, and you can’t even cut off my allowance! You are going to pay for my hockey tournaments and my university education whether or not I work as hard as you would like in school, stay away from the bad crowd, or have anything to do with you.”

## Conclusion

The critique of the family-maintenance system contained here parallels the critique of child-custody system in the first two chapters. Just as judges have been willingly bamboozled into granting one-sided custody awards by an erroneous and baseless psychological theory of child development, so have they been willingly bamboozled into imposing punitive child-support awards based on a grossly distorted sociological theory of the feminization of poverty. In both cases, a careful examination of the ethical foundations of family law has shown current practice to be the very opposite of enlightened and fair. And just as a great deal of questionable and self-contradictory legal argument had to be engaged in to deny fathers and their children any paternal rights after separation, we shall see in the next chapter that judges have been incompetent at their primary task of administering the law as it relates to child support.

## Chapter 5

# An Unconstitutional Entitlement

*Those are my principles.  
If you don't like them, I have others.*

*- Groucho Marx*

In addition to being bad law for all the reasons given in chapter four, the federal *Child Support Guidelines* also raise three distinct sets of constitutional problems. First, the *Guidelines* offend the equality rights of child-support obligors under s. 15(1) of the *Charter of Rights and Freedoms*. Second, Cabinet had no authority to approve of subordinate regulations that work contrary to the objectives of the governing legislation as passed by Parliament; thus the *Guidelines* are *ultra vires*. Third, the draconian manner in which awards under the *Guidelines* may be enforced breaches a range of *Charter* rights including mobility, due process of law, and security of person. These constitutional issues are the subject of the present chapter.

Challenging a government initiative for being contrary to the *Charter* is a two-step process. The first step is to show that the initiative breaches a particular *Charter* right; the second is to show that the initiative cannot be saved under the general escape clause, s. 1 of the *Charter*. The claimant bears the onus of proving a breach of a *Charter* right, while the government bears the onus of proving that the breach is nevertheless a “demonstrably justified” limit of the *Charter* right. One approach to challenging the *Guidelines* is to inflict death by a thousand cuts, by challenging particular provisions of the regulations for being in breach of various *Charter* rights. In *Souliere v. Leclair* (1998) 38 R.F.L. (4th) 68 (Ont. Gen. Div.), for example, a child’s entitlement to support for post-secondary education under s. 7 of the *Guidelines* was claimed to violate the equality provision of the *Charter*, s. 15(1), on the ground that married parents have no obligation to support healthy offspring once they have reached the age of majority. In addition, it was argued that requiring a parent’s new spouse to disclose her income for the purposes of comparing household standards of living under s. 10 of the *Guidelines* is a breach of the new spouse’s privacy rights under s. 7 of the *Charter*.<sup>1</sup> The principal argument of this chapter takes a different tack, challenging the *Guidelines* wholesale for being in breach of the equality provision. Other “micro-challenges” based on the *Charter* are incorporated into this over-arching argument.

# Equality, without discrimination

*Let all laws be clear, uniform, and precise;*

*to interpret laws is almost always to corrupt them.*

- Voltaire.

Equality is one of those grand political values which are protean in meaning. Every plausible political philosophy embraces equality, each according to its own peculiar conception (Brown 1997). There is no One True Meaning of equality; it is an essentially contestable political value. Thus any attempt to give concrete meaning to equality rights through the adjudication of particular cases will necessarily involve choosing, sometimes unawares, between conceptions of equality based on the judge's own ideological commitments or political prejudices. The *Charter* right to equality is perhaps not completely up for grabs, however, since it is fleshed out in several ways that may assist in its interpretation. Section 15(1) provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It has been suggested that the operative concept here is not really equality, but rather discrimination: the aim is not to promote equality of outcome but rather to prevent unwarranted differential treatment of various groups by government. This reasonable point does not take us very far, however, because discrimination is not a concept whose meaning is transparent or uncontested, either. Every law draws distinctions, dividing people into classes who receive different treatment. The question thus becomes: What more, beyond mere differential treatment, is needed to establish discrimination contrary to s. 15(1)? As a first approximation, we may say that the purpose of s. 15(1), is to prohibit differential treatment based on irrelevant characteristics – especially the listed characteristics that have historically been used to oppress segments of the population.

In the decades since s. 15(1) of the *Charter* came into force, courts have struggled to delineate which personal characteristics are irrelevant to which government initiatives. Initial judgments tended to take an essentialist approach to this question, focusing on the type of personal characteristic typical of invidious discrimination: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. Courts became obsessed with identifying “discrete and insular minorities” that were adversely affected by impugned laws. The personal characteristics explicitly listed in s. 15(1), together with a judicially circumscribed set of “analogous grounds,” were deemed *prima facie* irrelevant to any legitimate government purpose – although, in exceptional cases, initiatives based on those distinctions might be saved under s. 15(2) or s. 1.<sup>2</sup> But defining invidious discrimination in terms of the mistreatment of discrete and insular minorities soon proved unsatisfactory, as challenges under the equality provision broadened in scope. The implication that only members of groups who could claim to have faced a history of pre-

existing oppression or disadvantage could be discriminated against by their governments quickly became untenable, and the highest court felt compelled to overhaul the early analysis of s. 15(1): *Law v. Canada*, [1999] 1 S.C.R. 497, *per* Iacobucci.

Iacobucci attempts to emphasize the continuity between *Law* and the earlier cases by sifting through them in an attempt to distil out the purpose of s. 15(1). He purports to find a common thread: “It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration” (*Law*, at ¶51). Now, attempting to elucidate the concept of equality by appeal to the concept of human dignity is akin to trying to improve the resolution of a digital photograph by enlarging its pixels. However, this approach does have one salutary effect: it quite properly reorients the analysis to focus on the effect of the government initiative on the individual claimant, rather than on the claimant’s membership in a discrete and insular minority. It recognizes “the intrinsic worthiness and importance of *every individual*... regardless of the age, sex, colour, origins, or other characteristics of the person” (*Law*, at ¶50, *emphasis added*). As Iacobucci further says, human dignity is concerned with the physical and psychological integrity and empowerment of the individual, and with the realization of personal autonomy and self-determination. Human dignity exists when the individual feels self-respect and self-worth, and is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals. Further:

Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law (at ¶53).

Thus, “A member of any of the more advantaged groups in society is clearly entitled to bring a s. 15(1) claim which, in appropriate cases, will be successful” (¶65). This new emphasis on the effect of the government initiative on the autonomy and self-worth of the individual claimant is an entirely welcome development, even though it must be seen as a repudiation of the earlier focus on group disadvantages and group characteristics and group histories.

To reduce the jurisprudence of *Law* to a single sentence: “An infringement of s. 15(1) of the *Charter* exists if it can be demonstrated that, from the perspective of a reasonable person in circumstances similar to those of the claimant who takes into account the contextual factors relevant to the claim, the legislative imposition of differential treatment has the effect of demeaning his or her dignity” (¶75). Accordingly, the list of prohibited or analogous grounds of discrimination is no longer at centre stage, but has been properly relegated to the supporting role of putting the challenge into its proper context. Iacobucci mentions several “contextual factors” that need to be considered when determining if a government initiative discriminates

against a claimant. First, if the claimant suffers from pre-existing disadvantage, vulnerability, stereotyping, or prejudice, which is exacerbated or at least not ameliorated by the impugned initiative, then the initiative is most likely to be found discriminatory contrary to s. 15(1). This is because to the extent that someone already faces unfair circumstances, government initiatives that impose further differential treatment will have a more serious impact on them and will tend to perpetuate or promote their standing as someone not worthy of equal consideration and respect.

The second contextual factor is how well the government initiative is tailored to meeting its objective by treating the claimant differently, given the claimant's actual characteristics or circumstances. It will be easier to establish a breach of s. 15(1) to the extent that the impugned government initiative fails to take into account the claimant's actual situation, and more difficult to the extent that it properly accommodates his needs, capacities, and circumstances. Third, if the government initiative has an ameliorative purpose or effect for a more-disadvantaged person or group, it will be more difficult for a claimant to make the case that the initiative is discriminatory contrary to s. 15(1). Conversely, if the initiative has no ameliorative purpose in s. 15(1) terms, then it will be easier to establish that the differential treatment faced by the claimant breaches s. 15(1). Finally, a breach is easier to establish the more serious the nature of the interest affected is. Differential treatment cannot be fully appreciated without evaluating the constitutional, societal, and economic significance of the interests at stake.

## Purposive and contextual judicial prejudices

*...it is the worst oppression, that is done by colour of justice.*

*- Edward Coke*

Applying this approach to the case at hand, we begin by identifying the ground upon which the *Guidelines* discriminate, contrary to s. 15(1) of the *Charter*. The ground of discrimination is found by identifying that characteristic which triggers child-support obligations, for it is that fact about the claimant that causes him to be treated differently pursuant to the *Guidelines*. To a close approximation, the unique fact about child-support obligors that triggers the *Guidelines* is their being a non-resident parent.<sup>3</sup> Of course, being a non-resident parent is not a ground listed in s. 15(1) of the *Charter*, nor even (as yet) a judicially recognized analogous ground. But given the “purposive and contextual” approach to interpreting this *Charter* right set out in *Law*, this need not be fatal to the challenge; everything depends upon making out the case that non-resident parents are treated with less dignity and respect than resident parents by the *Guidelines*. Moreover, being a non-resident parent is very highly correlated with being a father – i.e. being male. Since sex is a prohibited ground expressly listed in s. 15(1), the treatment of non-resident parents by the *Guidelines* should attract careful scrutiny by the courts as a form of adverse-effect discrimination.<sup>4</sup> Adverse effect discrimination, where a facially-neutral government initiative has a disproportionate negative effect upon a group that is protected under s. 15(1) of the *Charter*, has been recognized as a basis for a s. 15(1) challenge ever since

*Andrews*. The courts have constantly emphasized that s. 15 guarantees substantive equality, not merely formal equality; thus being able to demonstrate adverse-effect discrimination against men, in addition to direct discrimination against non-resident parents, makes the challenge more difficult for the government to rebut.

Identifying the ground of discrimination is tantamount to identifying one of the comparator groups for the purpose of a *Charter* challenge – namely, the group to which the claimant belongs. But to whom should non-resident parents be compared? Both a broader and a narrower comparator group may be valid for different purposes: (i) resident parents; and (ii) recipients of support under the *Guidelines*.<sup>5</sup> One approach to challenging the *Guidelines* is to attack it piecemeal, arguing that this or that provision treats payors of child support unfairly relative to recipients. Many instances of such discriminatory treatment in the model that underlies the *Guidelines* will be noted in passing in the ensuing sections. The *Guidelines* will be shown to deserve death of a thousand cuts as a consequence of the many micro-discriminations contained within them. However, the principal and over-arching argument of this chapter is that the very premise of the *Guidelines* is discriminatory, contrary to s. 15(1). This requires contrasting the treatment non-resident parents receive under the *Guidelines* to the way the law treats parents who reside with their children, whether they are in intact relationships or not.

We know from the discussion of child-protection laws in chapter three that parents in intact relationships have a legal duty to provide only the necessities of life to their children – and not a stitch more. Child welfare authorities are not to interfere with the constitutional rights of cohabiting parents absent evidence that a child is at risk and in need of protection. The same is true for a parent who resides with the child but not with the child's other parent, and in particular for separated parents who are recipients of child support. The *Guidelines* simply assume that recipients will spend child support on the child, with no mechanism to enforce that. Recipients of child support are subject to no law governing their parenting conduct other than the child-welfare laws that apply to all resident parents, which require them to provide the necessities of life and no more. By contrast to the minimalist financial requirements imposed on all resident parents, the *Guidelines* automatically define the non-resident parent's support obligations, without need of the slightest evidence that the children are not receiving the necessities of life. Immediately upon separation, the non-resident parent's obligation to provide for his children jumps from supplying (half of) the necessities of life to supplying *at least* what the mathematically average child of a Canadian family with his income theoretically receives by way of material benefits. That tectonic shift in obligations, based purely on the fact of being non-resident with his children, is what calls for *Charter* scrutiny. The issue is whether, in all of the circumstances, the substantially more onerous financial obligations placed by the *Guidelines* upon non-resident parents is discriminatory.

The answer to that question was obvious to at least one judge, without the need to engage in a detailed and systematic analysis. In *Michie v. Michie* (1997) 36 R.F.L. (4th) 90 (Q.B.), the judge found the *Guidelines* to be obviously discriminatory, but went on to determine them, equally summarily, saved by s. 1 of the *Charter*. Given the perfunctory judgment in *Michie*, which was delivered before the test for a breach of s. 15(1) was fully elaborated in *Law*, it will



be necessary to carry through the analysis here by taking a closer look at the four contextual factors identified by Iacobucci to see if the differential treatment accorded non-resident parents impairs their dignity.

***(i) Do non-resident parents suffer from any pre-existing disadvantage, vulnerability, stereotyping or prejudice that is exacerbated by the Guidelines?*** The answer to this question is a resounding “yes.” First, non-resident parents are economically disadvantaged relative to resident parents inasmuch as they must support two homes for their children rather than just one. As we shall see below, the additional financial burden of supporting two households is not mitigated but exacerbated by the *Guidelines*. Second, non-resident parents are vulnerable to all manner of denial and disruption of their time with their children, and the *Guidelines* exacerbate this by imposing financial obligations that are independent of the non-resident’s parent’s access. Indeed, mothers can and do use child support to bribe their children into activities that conflict with their visitation times, and to respond in court to claims of access denial.<sup>6</sup> Third, non-resident parents are subject to the most indiscriminate, vicious, and unwarranted stereotyping in the form of the ubiquitous “deadbeat dad” epithet. As we saw in the previous chapter, this prejudice is fanned even by the Supreme Court of Canada, although there is little empirical support for it – certainly in comparison to the evidence for deadbeat moms. Iacobucci indicates that the existence of stereotyping and prejudice is the most important contextual consideration that would lead to a conclusion that a group is being treated without due respect and consideration, demeaning to their innate human dignity. The question that begs to be asked is why the Supreme Court is so blind to one of the most blatant and pervasive forms of prejudice and stereotyping remaining in Canada.<sup>7</sup>

The *Guidelines* imply, and the courts appear to agree, that fathers *en masse* would suddenly stop wanting to provide the necessities of life to their children after being separated from them; that is why they are needed, where only child-welfare laws are needed for resident parents. We must ask: what is supposed to happen to fathers that would turn them from presumed generous and loving guardians when resident with their children into cold and distant brutes as soon as they become non-resident? In the absence of a compelling answer to this question, the assumption that all separated fathers must be compelled by force of law to provide far in excess of what any resident parent is ever legally obligated to provide their children is sheer prejudice. The thinking appears to be this: “When the system cruelly and remorselessly ruptures the bond between a loving father and his child, he is bound to be resentful and to react in the only way left open to him, by refusing to provide even minimal financial support. Therefore, the system is justified in pre-emptively compelling him to pay a much higher, indeed a punitive, amount – without any evidence in any particular case that the father is actually delinquent according to the legal test for resident parents.” The whistle on that train of thought is clearly broken. The prejudice that separates fathers from their children in the first place is what needs to be remedied – not any speculative, hypothetical reaction of fathers to the initial injustice.

***(ii) How well are the Guidelines tailored to meeting their objective by treating non-resident parents differently than resident parents, given the actual characteristics or***

***circumstances of non-resident parents?*** Arguably, the onus of proving that the *Guidelines* are appropriately tailored to the circumstances of non-resident parents should be on the government, as it would be if this question were raised in the context of trying to save the *Guidelines* under s. 1 of the *Charter*. Indeed, the substance of this question is similar to that of the *Oakes* test, which calls upon the government to demonstrate the rational connectedness, minimal impairment, and proportionality of the provisions of the *Guidelines* to their objectives. A fulsome answer to the question posed here will therefore have to await the discussion of the *Oakes* test to follow. The short answer is that the *Guidelines* are not tailored *at all* to the non-resident parent's circumstances. Every last assumption and every single choice made in the model underlying the *Guidelines* is unrealistic, and results in higher financial obligations for non-resident parents than resident parents.

***(iii) Do the Guidelines have an ameliorative purpose or effect for a group that is more disadvantaged than non-resident parents?*** The difficulty with applying this test is that the *Guidelines* are a regulation of general application which by definition does not pick out discrete and insular minorities in need of amelioration. Resident parents – the relevant comparator group – can hardly be thought disadvantaged in general, since they include married as well as single parents, rich as well as poor. And while non-resident fathers have been stereotyped as deadbeats who make out like bandits after separation, this is a myth created from tendentious sociological research. The fact is that non-resident parents run the gamut of social and financial advantage just as resident parents do. Probably the most down-trodden of all parents are impecunious, non-resident fathers – as we saw in the first chapter, so marginalized that Statistics Canada cannot even contact them to conduct surveys. In any case, resident parents are certainly not a lower caste than non-resident parents within Canada, which might justify being very lenient in terms of imposing financial obligations on them while being relatively harsh on non-resident parents. It is true that the *Guidelines* were initially touted in the advocacy literature as a means of ameliorating poverty for children and their mothers; however, that is not a stated objective of the *Guidelines* and indeed is not their effect, either. On no account can the differential treatment of non-resident parents be dismissed as a small price to pay for the greater good of ameliorating disadvantage in society more generally.

***(iv) How serious is the breach of equality implied by the Guidelines, in terms of the constitutional, societal, and economic significance of the interests at stake?*** There do not appear to be any constitutional interests at stake, beyond the breach of equality itself. The societal interests at stake were discussed in the final section of the previous chapter, dealing with the moral case against the *Guidelines*. Briefly: generous, mandatory child-support awards substantially alter the terms on which families operate. When everything the child gets suddenly comes from the mother and the child never sees dad coming home from a hard day's work, his role as provider is suppressed or hidden, often leading to ingratitude and disrespect in the child. Fathers tend to lose whatever influence they might have had over their children, first by no longer being a substantial physical presence in their lives and then by not being able to offer financial rewards or impose financial penalties to shape the child's behaviour – an integral part of normal family life. As was also shown in the previous chapter, and as will be

detailed in subsequent sections, the economic interests at stake are substantial, both in absolute terms and relative to the minimal requirement imposed on resident parents. Generous child-support awards tend to trap mothers in dependency; and due to the high implied marginal tax rate, they discourage extra work effort by fathers, too. This tends to lower the overall economic well-being of the family over time. Finally, there is something self-contradictory about arguing on the one hand that the interests brought into play by the *Guidelines* are only minor economic interests, while at the same time arguing that these economic interests are so important that the radical overhaul of the system implied by the *Guidelines* is needed to address them. In short, either the economic interests at stake are minor, in which case the *Guidelines* are unimportant; or else the economic stakes are major, in which case non-resident parents are just as negatively affected by the *Guidelines* as recipient parents are positively affected by them – transfers of money being zero-sum games.

That the *Guidelines* attack the dignity, self-worth, autonomy, and freedom of non-resident parents in such a way as to breach their equality rights under the *Charter* is apparent from the simple fact that resident parents – especially parents of intact families – would never tolerate the level of intrusion into their financial affairs that non-resident parents are automatically subject to. Moreover, politicians would never dream of imposing *Guidelines*-like financial obligations on resident parents; it would be political suicide to try to do so. The only reason the *Guidelines* can be imposed on non-resident parents – fathers in at least 95% of cases – is that misandry generally, and the “deadbeat dad” stereotype in particular, had reached fever pitch in the 1990s. Non-residency as a ground for imposing these punitive financial obligations is manifestly discriminatory, contrary to s. 15(1) of the *Charter*. Once the veil of prejudice has been lifted by the foregoing analysis, we are in a position to properly conduct the second stage of the *Charter* challenge.

## The Oakes test

*The court will even make up or accept a spurious purpose for the law in order to justify differential treatment.*

- Susan C. Ross

It might be objected that the argument of the previous section misses something important: child support is not about the equality rights of resident and non-resident parents, it is about the financial security of children from broken homes. This objection is misguided, since the financial obligations of parents and the financial security of children are two sides of the same coin. To restate the point of the argument in the previous section: if the financial security of children from broken homes requires the imposition of *Guidelines*-like financial obligations on non-resident parents, then the financial security of all children requires the imposition of similar obligations on resident parents. Conversely, if the minimal requirement of providing the necessities of life is a sufficient obligation to impose on resident parents in order to protect the financial security of children, then the same minimal obligation is sufficient to impose

on non-resident parents. That is how the presumption of equality built into the *Charter* is supposed to work.

If there might be something deficient, or at least different, about non-resident parents or their circumstances (other than being overwhelmingly male) that could justify the unequal treatment they receive under the *Guidelines*, the onus is on the government to establish that. This brings us to the second step of *Charter* jurisprudence, where we examine whether the breach of a *Charter* right to equality might be justified after all. That the *Guidelines* discriminate against non-resident parents is beyond dispute; the only debatable legal question is whether the discrimination inherent in the child-support regime can be rescued under s. 1 of the *Charter*. This section provides that:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This is the grand-daddy of all vague and essentially contestable constitutional clauses. It invites subjectivity like no other: if you like the government initiative, you will be inclined to think it is “demonstrably justified in a free and democratic society;” and if you don’t like it, you won’t. To avoid complete subjectivity in the application of s. 1, the Supreme Court attempted very early on in its jurisprudence to give some structure to an analysis of under this provision: *R. v. Oakes*, [1986] 1 S.C.R. 103. In order for a government initiative that violates a *Charter* right to be saved, the “*Oakes* test” requires the government to show that:

1. The legislation must pursue a pressing and substantial objective; and,
2. The means prescribed by the legislation must be proportionate to its ends. More particularly:
  - (a) The means must be rationally connected to the objective;
  - (b) There must be minimal impairment of rights; and,
  - (c) There must be proportionality between the infringement and the objective of the legislation.

In *Michie*, the judge simply asserted that ensuring that the children of divorced parents continue to benefit from the financial support of both parents is “pressing and substantial,” and the effect of the discrimination implicit in the *Guidelines* is “proportionate to the benefit received.” These assertions need to be reconsidered in light of the evidence adduced in the previous chapter.

Determining the “legislative objective” of the *Guidelines* is not as straightforward as might be hoped. There are at least three sets of putative objectives to consider: (i) the objectives that were touted as the motivation for developing the *Guidelines* in the first place; (ii) the objectives as set out in the governing legislation and incorporated into the regulations themselves; and (iii) the *de facto* aim of the regulations as revealed by their construction and effect. In the following three sections, each set of objectives will be put under the microscope. It will be shown that insofar as a putative objective might be pressing and substantial, the *Guidelines* are not an effective and proportionate means to achieving it; and insofar as the *Guidelines* achieve

some putative objective, it is not pressing and substantial. Thus the *Guidelines* cannot meet both elements of the *Oakes* test simultaneously, no matter which objectives are assumed.

## (i) A foolish consistency

*There is a kind of inequality in treating unequals equally.*

- Aristotle

What motivated reform of the child-support system in the 1990s was largely concern about lifting children out of poverty, and reducing the “feminization of poverty.” These would be pressing and substantial objectives, if they related suitably to inadequacies in child maintenance. Notwithstanding the hand-wringing of the ideologues, there is scant evidence that the common-law system of child support contributed in any way to child poverty or the “feminization of poverty.” Nor is there any evidence that the new regime has raised women or children out of poverty. Insofar as poverty afflicts women and children, by far the most significant cause is the lack of commitment to the workforce of single mothers, as compared to single fathers. The *Guidelines* have been a boon for children and mothers separated from middle-class and wealthy men, but improving the condition of the most well-off in society cannot be considered a pressing and substantial objective that trumps *Charter* rights to equality.

A secondary objective driving the development of the *Guidelines* was to improve the consistency of awards for similarly situated parents. This objective is also stated in the legislation, so what is said in this section applies equally to the next. The first point that begs to be made is that consistency *per se* is not a pressing and substantial objective. After all, absolute consistency could be achieved simply by abolishing child support altogether. This shows that the merits of consistency are entirely parasitic upon the merits of the primary objective: if the primary objective is pressing and substantial, then achieving it consistently will be a big bonus. However, in human affairs it is often the case that pressing and substantial objectives are inherently complex and intractable. In such cases, designers of social programs face a trade-off: they can only improve consistency through simplification, but simplification reduces the ability to meet the primary objective of the program. The burden of this section is to show that the *Guidelines* achieve only a superficial consistency, an appearance of consistency, at the cost of gross oversimplification. They produce a foolish consistency which, as Ralph Waldo Emerson reminds us, is the hobgoblin of little minds.

Identifying a non-resident parent’s child-support obligation in the Tables prescribed by s. 3 of the *Guidelines* requires only three items of information: the province of residence, the number of children, and the payor’s income. Every payor with those three characteristics in common will be obligated to pay the same amount, subject to differences in the discretionary provisions in the *Guidelines* that will be discussed presently. This is what advocates and defenders of the *Guidelines* tout as the improved consistency of awards since their adoption (Justice 2002a). But the complaint with the previous discretionary system was not that judges were taking



too many variables into account and thus making awards that were too complex. The lament, rather, was that judges were not consistently taking enough variables into account. This is why Williams (1989) took the trouble to produce a long check-list of variables for other judges to consider in every case that comes before them. Recall that this checklist was endorsed by the Supreme Court. It bears noting some of Williams's variables that clearly affect the cost of raising children but that are not taken into account by the *Guidelines*.

First, s. 3 of the *Guidelines* does not distinguish between cases in which fathers never see their children and those in which they have care and control 40% of the time. A mother who looks after her children only 60% of the time will incur substantially lower costs of raising them, while a father who has his children 40% of the time will have expenditures almost indistinguishable from the mother's. Second, the *Guidelines* do not take into account the age of the child, even though it was accepted by advocates of reform (Williams 1989; Douglas 1993) that child-care costs increase with age. Third, the *Guidelines* do not take into account the location of residence of the parents, other than by province.<sup>8</sup> Yet the cost of living varies enormously across Canada, especially in respect of housing between the major urban centres and rural locales, and between wealthy regions and poor. Fourth, the *Guidelines* prescribe the same level of child support regardless of the wealth or debt of the parents. A mother who owns a home with no mortgage payments gets the same level of child support as one who has to rent accommodations or pay a full mortgage. A mother who has inherited millions gets the same as an immigrant with no assets. A father who is left with large credit-card debts must pay the same amount as a father who has inherited millions – as long as their “line 150 income” is the same. Many other variables that are not taken into account by the *Guidelines* will be discussed separately in the sections to follow. Suffice it to say for now that the *Guidelines* do not advance the objective of treating similarly situated parents similarly by one iota. Rather, a system in which similarly situated parents might sometimes be treated somewhat differently has been replaced with one in which very differently situated parents are treated similarly. This is no advance toward any valuable objective, especially justice.

Consideration of any of the variables discussed in the previous paragraph is forbidden by the *Guidelines*. This is not to say, however, that the *Guidelines* have eliminated discretion from judicial decisions in the area of child support. On the contrary, they leave judges with nearly as much discretion as they had in the pre-existing common-law system. Bala *et al.* (2004: Table 4.1) found that over 40% of child support awards differed from the Table amount by 5% or more. It would not be misleading to say that the *Guidelines* leave judges broad discretion to adjust child support awards upward, but very little discretion to adjust them downward from the Table amount. About the only way fathers can obtain some measure of relief is if they can convince a judge that they are in dire straits. However, less than 1% of divorces involve a successful undue hardship application (Justice 2002b: p. 29). One of the favoured methods of increasing child support awards is to impute income to fathers whenever a judge believes he is not working to his full potential.<sup>9</sup> As we saw in the case of Dr. Wainright, judges may also decide that a father's assets should be earning an income, and then impute that income whether it exists or not.<sup>10</sup> Self-employed fathers are put under the microscope, where the



merits of every business expense is questioned and every employment “benefit” is added to income.<sup>11</sup> Section 9 of the *Guidelines* allows judges broad discretion in setting child support when each parent has custody at least 40% of the time.<sup>12</sup> Finally, of course, there is the wide-ranging s. 7 of the *Guidelines*, which permits judges to add on child support for “special or extraordinary expenses.”<sup>13</sup> The *Guidelines* do not structure a judge’s thinking about these discretionary matters any better than the pre-existing appellate rulings did; indeed, there is no reason to believe that judges are any more (or less) consistent in the way they handle the discretionary provisions of the *Guidelines* than they were in the old common-law system. Insofar as consistency is a *desideratum* of child support awards, the *Guidelines* have not advanced that objective at all, and almost certainly represent a step backward.

## (ii)(a) Meaning and nothingness

*I know you lawyers can, with ease,  
Twist words and meanings as you please.*  
- John Gay

Turning now to the legislative objectives of the *Guidelines*, we begin with Section 26.1(2) of the *Divorce Act* (1985) which sets out the “principle” underlying the contemplated regulations:

The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

Two phrases in this principle merit preliminary discussion: “joint financial obligation” and “relative abilities to contribute.” In law, an obligation is shared “jointly” when each parent may be called upon to fulfill it, and in the event that one of them dies, disappears, or otherwise defaults, then the other is required to meet the entire burden. But if each parent is expected to contribute “in accordance with their relative abilities,” then their obligation is not technically joint. Rather, this phrase implies “several obligations,” which exist when each parent is responsible for his or her proportionate share, and only his or her proportionate share. In that case, if one parent dies, disappears, or otherwise defaults, the other parent may not be called upon to step into the breach. Thus there appears to be a contradiction built into the legislative principle of child support.<sup>14</sup>

To interpret this clause, it helps to understand its legislative history. Bill C-41 as originally introduced did not include what is now clause 26.1(2) of the *Divorce Act*. The objectives of the *Guidelines* were enunciated only within the *Guidelines* themselves. This raised alarm bells among Parliamentarians, who feared that it would open the door for the government of the day, by order in council, to amend, delete, or revise the objectives of the *Guidelines* without Parliamentary approval. Nor was the Senate satisfied that Bill C-41 sufficiently emphasized the joint financial responsibility of divorced parents.<sup>15</sup> As a result of those concerns, the Senate Committee proposed an amendment which became clause 26.1(2). Senator Mabel DeWare

expressed the wishes of the Committee:

Therefore, the Committee believes it is a serious error to remove the recognition of joint financial obligation and that this must remain part of the law. While we are aware that the obligations of both spouses are alluded to in the objectives set out in section 1 of the draft guidelines, we feel that such a significant principle must be stated clearly in the act itself. [*Senate Debates*, No. 70, 12 February 1997.]

Clearly, at least from the point of view of Parliament, it was a pressing and substantial objective to hold both parents – not only one of them – responsible for the financial support of their children.

Yet despite this express legislative language, the *Guidelines* do not impose a joint financial obligation. If a father defaults or goes into arrears on his child-support obligations, all the regime can do is redouble its efforts to collect his share from him; it cannot go after the mother to meet the balance of the obligation. By design, resident parents are immune to enforcement measures, no matter how financially delinquent they may be. Indeed, mothers have no obligation to earn any income whatsoever; when they choose not to work, the entire burden of child support necessarily falls upon the father (and upon the government, in welfare cases), without recourse. The *Guidelines* do not even impose a several obligation on resident parents – they impose no obligation at all. Rather, the mother's financial contribution is simply assumed: the mother is assumed to have the same income as the father, and the child is assumed to have the same standard of living as the mother. The validity of these assumptions will be considered next.

## (ii)(b) Assuming half of the problem out of existence

*A physicist, an engineer, and an economist were stranded on a desert island with only a can of beans. The physicist said, "If we leave the can out in the sun, the contents will expand and the lid will pop off." When that did not work, the engineer said, "If we squash the can with a rock, the lid will pop off." When that did not work, the economist said, "Assume we have a can opener..."*

- economist joke

Although Parliament clearly was not satisfied with the objectives as enunciated within the *Guidelines*, we should nevertheless consider them on their merits. The question once again is whether they can be considered pressing and substantial, and if so whether the *Guidelines* implement them in such a way as to impair the equality rights of non-resident parents minimally. Section 1 of the *Guidelines* enumerates four distinct objectives:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child

support more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the level of child support orders and encouraging settlement; and,

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

The last objective – consistency – was dealt with in an earlier section. The third objective – efficiency – can be dealt with similarly: it too is an entirely parasitic or derivative objective. Efficiency in the achievement of flawed objectives is no virtue. Moreover, to the extent that the *Guidelines* make for a more efficient resolution of child-support claims, they do so at the expense of the other objectives, such as fairness and consistency. If the first two objectives are not pressing and substantial, then they cannot be rescued by appeal to the merits of the last two.

Reducing conflict in family disputes is certainly a pressing and substantial objective, about which more will be said in the final chapter. Justice (2002a) purports to show that conflict and tension have been reduced since the *Guidelines* came into effect by adducing statistics showing that child support orders are achieved in a higher proportion of cases, and more quickly, under the *Guidelines* compared with the pre-existing common-law regime. This is altogether too simplistic. After all, a regime that abolished child support completely would settle all such disputes immediately, while elevating conflict and tension correspondingly. Conflict and tension are most pronounced when child-support regimes tend toward the extremes, when no support is payable or when 100% of a father's discretionary income is confiscated. They can be expected to be lowest somewhere in the middle, when awards are perceived to be fair by most payors and recipients alike. It is worth recalling that the Quebec model appears to have reached a happier middle ground than the federal *Guidelines*, given that agreements in Quebec are more common and compliance with them is higher than in the rest of Canada. Yet the Quebec provincial guidelines prescribe awards that are between 10% and 90% lower than the federal *Guidelines* (Khodeir 2009). Given that there is a happier extant alternative, we may conclude that the *Guidelines* do not minimally impair the *Charter* right to equality.

We also saw in the previous chapter that the *Guidelines* did not result in greater overall satisfaction among separated parents, relative to the pre-existing system of judicial discretion. If anything, they tend to increase the satisfaction of recipients while reducing the satisfaction of payors. It is difficult to credit the claim that conflict and tension have been reduced by a system that has pushed recipients and payors in opposite directions in its perceived fairness. More likely, conflict and tension have spilt over into other aspects of the post-separation relationship. One undoubted consequence of the introduction of the *Guidelines* is that fathers are more inclined to fight for custody of their children, or at least to strive for the 40% access threshold.<sup>16</sup> Fathers facing elevated child-support awards are also likely to fight harder against spousal support and for an equal division of matrimonial property than before. Conflict and tension in one area has merely been shifted to others. Another undoubted consequence is that fathers simply disappear or commit suicide when faced with impossible support orders.

Conflict and tension may be reduced in those cases, but at a wholly disproportionate cost.

If the above reasoning is correct, then the objective of reducing conflict and tension is ultimately parasitic upon the objective of achieving greater fairness, leaving only the first objective as a viable means of rescuing the *Guidelines*. Whether fairness is a pressing and substantial objective ultimately depends upon how it is operationalized in the model underlying the *Guidelines* – a matter to be addressed in the next and subsequent sections. For present purposes, it is sufficient to reiterate that the *Guidelines* are, by design, an epic failure when it comes to assuring that children benefit from the abilities of mothers to earn an income. (Note that this design flaw is not shared by the Quebec model, according to which support is based upon both parents' discretionary incomes.) The *Guidelines* are unfair to children because they require no contribution from mothers; and they are unfair to fathers in that only fathers have legal obligations. Allan Rock, who as Justice Minister when the *Guidelines* were introduced, was repeatedly called upon to defend this design element. He argued – or rather, vigorously asserted – that the assumption that mothers support their children in proportion to their relative abilities is perfectly valid:

First, the standards of living of a child and of the parent with whom the child lives are inseparable. If I have sole custody of the child, that child has my standard of living. If I have two children in my sole custody they have my standard of living. They're inseparable.

Second, parents spend an average proportion of their income on children no matter what their income level. If I'm making \$10,000 a year or \$100,000 a year, it can be statistically determined what average proportion of my income I spend on my children...

Why is it fair to disregard the income of the custodial parent? Because the custodial spouse is already paying the average proportion. It's inescapable. [*House of Commons Standing Committee on Justice and Legal Affairs*, Meeting no. 54, on 21 October 1996]

What about the custodial parent? Why should he or she not have to contribute? That person does contribute, because the standard of living of the child and the parent who has custody are inseparable. It is impossible to look differently at my standard of living and the standard of living of my children. They are the same, because I live with them.

We have started from the presumption that the custodial parent also spends the same average proportion of his or her income on the children... That is the theory. To me, it is compelling. [*Senate Standing Committee on Social Affairs, Science and Technology*, Issue no. 17, on 11 December 1996]

This is nothing more than a head-in-the-sand denial of reality. First, we saw in the previous chapter that (at least) half of all poor children living with single mothers received no financial support at all from their mothers, because they didn't earn enough income even to support themselves. Non-resident fathers are not legally licensed to opt out of work like this. Second, we saw that in typical cases non-resident fathers in effect pay the entire burden of child support. Even the misandric Supreme Court recognizes that the father's child support contributions necessarily subsidize the mother's standard of living (*Contino*, at ¶¶59-60). The reason is

that child support includes a portion to cover the “fixed costs” of raising children, mainly housing and transportation. Fixed costs are typically estimated to be about 50% of the child support amount, and since mothers benefit along with the children from the expenditure on these fixed costs, as much as 25% of child support is actually “embedded spousal support.” (This embedded spousal support is also apparent from the analyses of the typical cases in the previous chapter.) Third, mothers have complete discretion over how much of their own income they spend supporting the child, and even how much of the child support goes to the benefit of the child – provided only that they continue to provide the child’s necessities of life. No accounting is required from the resident parent for how child-support transfer is spent. It is nonsense to assert that mothers necessarily spend an average amount on their children, or that children inescapably share the same standard of living as their mother.

The premise of the *Charter* challenge being urged in this chapter is that the level of financial support made by resident parents varies greatly at any given income level. Some parents choose to live relatively austere, putting a large portion of their incomes into savings in the hope of achieving financial security and retirement self-sufficiency at the earliest possible age. Others spend extravagantly (relative to their incomes) on booze, cigarettes, gambling, ocean cruises, or other frivolities, leaving relatively little for extras for the children. Other parents sacrifice virtually everything for their children: they spend all discretionary income on the child’s education, extra-curricular activities, and special occasions. In a pluralist, liberal country – in a “free and democratic society,” to quote from s. 1 of the *Charter* – there is nothing normative about either extreme, or indeed about the “average” or the “typical” family. At any given time, literally half of the intact families in Canada, at every income level, fail to provide the average level of financial support to their children. This is true by definition of what an average (i.e. mean) is. Logically, it cannot be a pressing and substantial objective of the *Guidelines* to compel non-resident parents to live up to that obligation, unless it is likewise a pressing and substantial objective to compel every intact family to spend the average amount on their children. That, of course, is absurd and totalitarian.

If mothers are entitled to the benefit of the assumptions that they work to generate income to the best of their abilities, and that they spend their own income and the child support they receive for the benefit of the children, then the equal protection and benefit of the law demands that fathers have the benefit of the same assumptions. To assume without case-specific evidence that fathers are deadbeats while mothers are saints, and to build those assumptions into the operation of the law, is plainly discriminatory contrary to s. 15(1) of the *Charter*. Nothing could justify constructing public policy on the basis of a legal presumption that one class of citizen is utterly irresponsible and must be compelled while the complementary class of citizen is perfectly responsible and is entitled to near-absolute discretion. The *Guidelines* are fundamentally and irredeemably flawed. Of course, to assume that fathers, like mothers, can be counted on to earn money and spend it on the support of their children would be to assume the issue of child support away – and with it the rationale for legislated child-support guidelines. That would be a substantial improvement upon the current regime, constitutionally and probably in practice as well.



### (iii) Illiberal, totalitarian objectives

*It is not the possessions but the ambitions of mankind that need to be equalized.*

- Aristotle

The formula used to calculate the Table amounts is an equation. What it purports to equate is the non-resident parent's standard of living with the standard of living of the resident parent and child(ren), under various assumptions. This has led many commentators to the conclusion that the objective implicit in the *Guidelines* is to equalize household standards of living; that equalization is how the model operationalizes the concept of fairness stated in the objectives of the regulations.<sup>17</sup> But given that the Table amounts are considered a “floor” rather than a “ceiling” (Justice 2002a), the objective of the discretionary provisions of the *Guidelines* is obviously to augment awards even beyond equalization. Indeed, the objective stated in the technical document is that the “transferred sum should *maximize* the amount available to be spent on the children while still allowing an adequate reserve for the self support of the paying parent” (Justice 1997: p. 1, emphasis added).<sup>18</sup> Statements like this have led some commentators, including some judges, to state that the objective of the *Guidelines* is really to “maintain the *highest possible* standard of living for the child.” If the level of income transfers anticipated by Finnie (1995) are anything to go by, then the *Guidelines* would achieve even this most ambitious objective in a broad range of cases.

What seems to animate people who talk unctuously about “maximizing transfers” so as to provide children with the “highest possible standard of living” is the simple-minded thought that if supporting children is good, then supporting them to the highest level possible must be best. In their unbridled zeal to promote the best interests of children, they completely lose sight of the fact that another person in the equation also has but one life to live. Sometimes banalities need to be stated: All rational parents have interests independent of and outside of their children; however important children may be, spending money on them is not the be-all and end-all of existence. It should be patently obvious, then, that maximizing transfers from non-resident fathers to resident mothers is not a pressing and substantial objective. If this were the true objective of the *Guidelines*, then they clearly cannot be rescued by s. 1 of the *Charter*. We live in a society where resident parents may spend all of their income on themselves, after allowing a minimal reserve for the support of the child; yet the precise reverse is the case for non-resident parents under the *Guidelines*: they must make all of their income available to be spent on the child, after allowing a minimal reserve for self-support. Insofar as the *Guidelines* achieve this designed objective, they make indentured servants of non-resident parents. This wholesale disregard for the human dignity of separated fathers must surely be repugnant to all thoughtful citizens of a free and democratic society – what the ideologues in the Department of Justice Canada might think notwithstanding.

Let us disregard for the time being the discretionary sections of the *Guidelines* that amp up support awards to the max; let us consider just the equalizing formula that underlies the Table amount of child support. It is true that equalization is a somewhat more modest objective than



maximization, so perhaps it cannot be dismissed quite so summarily. But equalization seems to have been sold mainly on its intuitive appeal to the mandarins in Ottawa and other capitals. Very little in the way of argument or rationale has been offered in its defense. Since the onus rests on the government to demonstrate that equalization is a pressing and substantial objective, we could summarily conclude that the *Guidelines* fail the *Oakes* test on this point. Nevertheless, in a second act of charity, let us see what more could be said on behalf of equalization as an objective of child-support transfers.

The best argument for equalization takes as its premise that children should not suffer economically as a result of a parent's decision to separate; they should continue to enjoy, as much as possible, the standard of living they enjoyed while the family was intact. (Of course, this only applies to families where the parents have cohabited; we ignore for the sake of this argument children born out of union.) To the extent that this objective can be achieved within a primary custody regime, it is achieved by equalizing the two household standards of living. But in the absence of requirements for the resident parent to earn an income and provide a budget that demonstrates her expenditures on the child, equalizing transfers are bound to be misused or abused in many cases. More importantly, if maintaining the children in the style to which they had become accustomed is a substantial and pressing objective, then the more assured and direct way to achieve it would be to award custody to the primary breadwinner, where parental incomes are significantly different.

Another rationale for equalization that is sometimes voiced is that it is thought undesirable for children to move back and forth between homes with widely divergent standards of living. This claim is not obviously true, however, and no empirical evidence has ever been adduced to demonstrate it. (Section 1 of the *Charter* does require the government to "demonstrate" its position, not simply assert it.) Experiencing the almost inevitable trade-off between hard work with a higher income on the one hand, and more leisure with a lower income on the other, could in fact be a valuable lesson for children to learn first hand and early in life. Moreover, the assumptions built into the *Guidelines* are inconsistent with this rationale. The psychological effect on the child from moving back and forth between homes is an odd concern to express within a regime that assumes fathers have no costs of access, which could only be realistic if fathers never saw their children.

No doubt part of the intuitive appeal of the equalization objective is a result of a narrow focus on ideal cases. When we think of child support in the context of a divorce, we are inclined to imagine two middle-class, middle-aged parents who are leaving a long-term marriage with two or three dependent children. In such cases, equalization might not be either unrealistic or unappealing. But it bears remembering the full scope of cases the *Guidelines* were designed to cover. The participating provinces and territories were expected to adopt the *Guidelines* to govern parents who have never been married, some who have never even cohabited. Thus in practice they are intended to cover every type of relationship from a one-night stand that produces a single child to a long-term marriage that produces multiple children. Even after long-term marriages, child support alone was never intended to equalize the standard of living of the households, as laudable as that outcome may be in that context. Rather, mothers who

have sacrificed careers or promotions in order to care for the children are to be compensated with spousal support; and mothers who have been married long term are generally entitled to an equal division of matrimonial property. It is surely strange to think that a woman who has had a one-night stand that produces a child should thereby become entitled to the same equalizing share of the father's income for the next 20 years or so as a mother from a long-term marriage. While the equalizing objective is not quite as extreme as the maximizing one, it is extreme enough to be an unlikely candidate as a pressing and substantial objective – certainly not in all types of case.

## ***Ultra vires***

*The illegal we do immediately. The unconstitutional takes a little longer.*

- Henry Kissinger

If household standards of living were to be equalized through child support transfers, there would be no remaining scope or rationale for spousal support. Or rather, the spousal support already “embedded” within equalizing child-support transfers would obviate any need for further transfers specifically for spouses. Yet the *Divorce Act* contains sections dealing with spousal support, and these provisions are routinely applied in family court. It is a principle of statutory interpretation that Parliament could not have intended one provision of an *Act* to negate another; therefore, it cannot have been Parliament's intent to imply that parents' “joint financial obligation to maintain the children” goes so far as to require equalization of household standards of living. Whether or not equalization is a pressing and substantial objective, this demonstrates that the *Guidelines* are disproportionate to the objective of the legislation and therefore must fail the *Oakes* test again.

In fact, this incompatibility between the equalization objective of the *Guidelines* and the provisions of the broader family-maintenance regime in the *Divorce Act* amounts to a constitutional challenge to the *Guidelines* in its own right, separate from its role in defeating the government's position within the *Oakes* test. It is a fundamental principle of constitutional democracy that the Governor in Council (i.e. Cabinet) cannot get around the will of Parliament by using its authority to enact subordinate regulations that are incompatible with the governing legislation passed by Parliament. When authority is delegated to draft regulations, the drafters are bound by the governing legislation; they may not pursue a “frolic of their own.” Regulations that fail to implement Parliament's intent are said to be *ultra vires* – outside the jurisdiction or authority of the Governor in Council – and therefore of no force or effect. The Supreme Court vaguely recognized this problem in *Francis v. Baker*, [1999] 3 S.C.R. 250, at ¶41, when they said:

However, even though the *Guidelines* have their own stated objectives, they have not displaced the *Divorce Act*, which clearly dictates that maintenance of children, rather than household equalization or spousal support, is the objective of the child support payments.

Unfortunately, the constitutional challenge posed in this section was not explicitly before the Supreme Court in *Francis v. Baker*; as they were not asked to make a ruling on the *vires* of the *Guidelines*. Nor apparently did the Supreme Court appreciate the full force of their own observation, for they elected not to strike down the offending regulations on their own initiative.

Of course, the *Guidelines* do not actually equalize household standards of living, except in rare cases. As will be shown presently, various unrealistic assumptions built into the model transform it from a household equalization formula to one that in effect transfers a fixed percentage of the payor's income: 17% for one child, 26% for two children, 33% for three children, and so on. In reality, there remains plenty of scope for applying the spousal-support provisions in the *Divorce Act*, after implementing the *Guidelines*. Thus it is true that the *Guidelines* do not in fact render the broader family-support provisions in the *Divorce Act* redundant. The problem is that this defense of the *Guidelines* orphans the fixed-percentage-of-income transfer called for by the Tables from any justification or rationale at all. Without being tethered to a normative principle, the numbers in the Tables are purely arbitrary. (Surely nobody would claim that a transfer of 17% of the non-resident parent's after-tax income for one child is intuitively obvious or self-justifying.) One of the *Guidelines*' own objectives is to apportion child-support obligations between the parents fairly; and equalization of household standards of living is the only conception of fairness articulated in the technical document that explains how the Tables were arrived at (Justice 1997). Any defense of the Table amounts must inevitably trace back to the underlying formula, and thus to the equalization principle which is incompatible with the *Divorce Act* as a whole. It is inescapable. The Table amounts cannot be tied closely enough to equalizing household standards of living to justify them, yet not tied closely enough to render the spousal-support provisions redundant.

A somewhat different variation of the *ultra vires* argument was posed by the defendant in *Premi v. Khodeir* (2009), CanLii 42307 (Ont. Gen. Div.). Rather than attacking the *Guidelines* root and branch by arguing that their central, structural objective of equalization is inconsistent with the general maintenance scheme set out in the *Divorce Act*, Khodeir targeted the inconsistency between section 26.1(2) of the *Divorce Act* and certain flawed assumptions underlying the *Guidelines*. That is, he argued that the *Guidelines* do not in fact require financial contributions from both parents, nor contributions proportionate to their *relative abilities* to earn an income. He submitted that Cabinet had no authority to implement regulations that directly contradict the governing legislation in those respects.

Turnbull, of the Ontario Superior Court, dismissed Khodeir's challenge with rather curious reasons. He began by acknowledging the undeniable, namely that the *Guidelines* are flawed in exactly the ways set out by Khodeir:

[48] I concur with Mr. Khodeir's submissions that the Quebec guidelines are much more understandable than the Federal CSG and the Ontario CSG, and frankly, they appear to be much more equitable in their approach to the calculation of child support...

[53] While I understand the position of the respondent, and would even go so far as

to say that some of the policy assumptions underlying the Guidelines may seem to be unfair to non-custodial parents..., I have great difficulty reconciling a finding of unconstitutionality with what the Supreme Court has written about the Guidelines...

Turnbull's allusion to what the Supreme Court has written goes back to the words of Fish, from ¶87 of the *Contino* decision, to the effect that "That sort of social policy decision is a matter for Parliament. And Parliament has spoken." In passages that clearly expose the errors in Turnbull's analysis, he elaborated:

[52] ...the federal government chose to reflect the principle of joint responsibility and relative abilities through the Guideline model currently imposed but allowed the provinces to choose different models.

[83] In the circumstances, while the provisions of the legislation may appear to be inequitable or poorly considered, it is the responsibility of Parliament to amend it, not the courts.

Turnbull here confuses "the federal government" with "Parliament," and "legislation" with "regulation" – the two distinctions upon which the *ultra vires* challenge fundamentally rests. This is especially surprising given that he competently reviewed the legislative history of Bill C-41 within his reasons for judgment. Thus he knew perfectly well that Parliament was not satisfied with the objectives as set out in the draft guidelines; he knew that Parliament had insisted that stronger language be put directly into the *Divorce Act*, where it was immune from ministerial revision, to protect the principle that *both* parents had an obligation to support their children in accordance with their *relative abilities*. As Turnbull well understood, Parliament did not adopt the various assumptions built into the *Guidelines*; rather, it was the government of the day through the Justice Minister that chose a model that incorporated assumptions inconsistent with s. 26.1(2) of the *Divorce Act*. It is not the "provisions of the legislation" that were "inequitable and poorly considered;" that is a defect of the subordinate regulations – the *Guidelines*. It is truly disheartening that a superior-court judge is incapable of following an argument based on two simple distinctions that can be sketched in five scant sentences.

## Assumptions related to incomes

*Law is a pickpurse.*

*-James Howell*

In this and subsequent sections, it will be argued that the *Guidelines* are not a "proportionate" means to the end of equalization (though they may be proportionate means to the objective of maximizing transfers). The *Guidelines* contain numerous arbitrary and inconsistent assumptions and provisions that are not rationally connected to the equalization objective; nor do these provisions minimally impair the *Charter* right to equality that non-resident parents are entitled to.<sup>19</sup>

In order to equalize household standards of living, one might suppose that both the incomes and the expenditures of both of the households would have to be known. Since only the payor's income, the province of residence, and the number of children is used to calculate the Table amounts, the formula underlying the *Guidelines* must incorporate many assumptions. In this section, the major assumptions relating to the income side will be discussed. In the next section, the major assumptions relating to the expenditure side will be discussed. In addition to weighing the inherent reasonableness or unreasonableness of these assumptions, one must also consider whether the assumptions are rationally connected to the objective of the *Guidelines*, whether they minimally impair the *Charter* right to equality of non-resident parents, and whether the infringement of the right is proportionate to the objective of the legislation. It is argued that the cumulative impact of the numerous disconnected and maximally impairing assumptions built into the *Guidelines* constitute a wholly disproportionate infringement of non-resident parents' equality rights.

Calculating the total after-tax income available to be distributed between the two households should be a elementary matter of subtracting taxes paid from gross income for each parent, and then adding the results together. The required information is available on each parent's T1 General and Notice of Assessment, so no additional difficulty is incurred to obtain these income details. The Quebec model incorporates this approach, but the federal *Guidelines* attempt to make matters more complicated. They do not require the recipient of support to go to the trouble of establishing her after-tax income; instead, the assumption that the parents' gross incomes are equal was adopted. This assumption is obviously false in practically every case; parents' incomes are not even roughly equal in at least 95% of cases. Moreover, starting with gross incomes rather than easily calculated after-tax incomes loses important information that ends up distorting outcomes significantly. The deliberate loss of this information requires further assumptions to be built into the model about the "average" tax burden that "typical" people with a given gross income would face. Tax accountants have shown that the model does not properly account for all of the mother's tax benefits and tax credits, thereby seriously and systematically under-assuming the amount of income already available to her before transfers (F.A.C.T. unpublished). Clearly, making distorting assumptions cannot be said to be rationally connected to the objective of equalizing household standards of living, particularly when the Quebec model demonstrates that no such assumptions need be made at all.

Having chosen to assume that each parent earns the same income, there are two ways to go: one could require the resident parent to establish her income, and assume that the non-resident parent earns the same; or one could require the non-resident parent to establish his income, and assume that the resident parent earns the same. The former route has two distinct advantages: it is administratively simpler and it reduces moral hazard. It is administratively simpler to require the party seeking support to provide income information, since it aligns incentives to be fulsome in disclosure with the party doing the disclosing. And it reduces moral hazard because it encourages mothers to earn as much as possible in order to gain the highest possible child support amount. The drawback, as it may be perceived, is that most mothers earn less than most fathers, so awards under this assumption will be lower on average. (Also,



too many custodial mothers will be revealed for the “deadbeats” they truly are.) On balance, the developers of the *Guidelines* determined that the latter assumption was the better one, thereby rejecting the assumption that minimally impairs the *Charter* right to equality for non-resident parents.

Defenders of the *Guidelines* tendentiously claim that the equal-incomes assumption works to the benefit of fathers, overall (McRae 2001). They point out that in the majority of cases, when payors earn more than recipients, it would take an even greater transfer than the *Guidelines* prescribe to equalize the household standards of living. This argument assumes what is in issue, namely that equalization is a legitimate, pressing and substantial objective, and that child support is the appropriate way to achieve it. The real effect of the equal-incomes assumption is to turn a model that aims to equalize household standards of living into a model that transfers a percentage of the non-resident parent’s income. Moreover, the assumption that both parents earn the same income means that in practice the total family income assumed by the model will be higher than it actually is in the majority of cases. Fathers in these cases will be expected to pay half of the child support that is deemed be appropriate to a family of greater means. In cases where the mother earns no income, the formula assumes that total family income is double what it actually is; thus the father will be required to pay 100% of the support appropriate to the actual total family income. The mother is *assumed* to earn an equal income but is *obligated* to contribute nothing; in fact, the child tax benefits that accrue to her are a windfall.<sup>20</sup> The outcome in the “typical case” analyzed in the previous chapter is not a fluke; the system is designed to force fathers to cover all reasonable child-care costs – not to apportion them between the parents according to their means.

If the equal-incomes assumption is good enough to construct the Tables that prescribe the presumptive amount of child support pursuant to s. 3 of the *Guidelines*, one might expect it to be good enough to be employed in the discretionary sections as well. But when it comes to apportioning special and extraordinary expenses (s. 7), or determining child support in split custody cases (s. 8), or apportioning child support in shared custody cases (s. 9), or making adjustments in cases of undue hardship (s. 10), the actual income of the resident parent must be used. Why is the mother’s actual income appropriate in this class of calculations but not in calculating the Table amounts? Your guess is the same as mine: in the discretionary provisions of the *Guidelines*, the equal-incomes assumption would work against mothers in the majority of cases. Section 7 expenses would be divided equally, rather than fathers paying the lion’s share; no child support would be payable in split and shared custody cases, rather than mothers receiving set-offs; and it would be much easier to establish undue hardship if mothers were assumed to earn an equal income. Those consequences of treating men with equal consideration and respect will never do.



## Assumptions related to expenditures

*"If the law supposes that," said Mr. Bumble, "the law is a ass, a idiot."*

*- Charles Dickens*

Equalizing household standards of living is not a simple matter of equalizing incomes between the parents because, except in some split and shared custody arrangements, broken households will contain different combinations of adults and children. The expenditure required to maintain one household at a standard comparable to another will depend upon the relative cost of supporting the particular combination of adults and children in the two households. Since no information about the actual expenditures of parents is used to identify the Table amount of child support a payor owes, all of the needed calculations are done internally within the model, based on yet more assumptions. A major assumption that the formula relies upon on the expenditure side relates to the cost of raising a child and economies of scale for raising multiple children. The question is, by how much must a larger family's income exceed the income of a smaller family in order for the two families to enjoy equivalent standards of living? A whole specialty within economics is devoted to the empirical study of this question; the literature attempting to construct "equivalence scales" is vast and complex. It is instructive to see how the developers of the *Guidelines* handled this question.

After scanning the academic and technical literature, 15 distinct equivalence scales were identified (Finnie *et al.* 1995). These ranged from a low of 1.16 – meaning that a household with one adult and one child would have expenditures 16% higher than that of a single adult – to 1.46. The highest value was admitted by its developer to be higher than the true equivalence value, so it was rejected in favour of the second-highest value. This came from an obscure Statistics Canada publication, according to which a single adult counted as 1.0, the first additional child added 0.40, and each subsequent child added another 0.30. Thus a single mother with three children would require twice the income of a single father:  $1.0 + 0.40 + 0.30 + 0.30$ . (Costs in this model were capped at a maximum of six children. Households with more than six children were assumed to have no additional costs.) The designers of the *Guidelines* defended their choice of equivalence scale in a footnote of the deliberately suppressed Technical Report (Justice 1997: p. 3, footnote 2):

This scale is based on econometric evidence and a consultation process. See Statistics Canada, *Income Distribution by Size in Canada*, Cat. no. 13-3027 (Ottawa, 1991). The term 40/30 is used because the particular percentage values that increment with size of family, from a 40% increase for the first member in addition to a single adult to a 30% increase for each additional member. The ratios have been found to be relatively stable at different income levels.

As F.A.C.T. (unpublished) remarks with considerable understatement, "These comments are definitely misleading and not supported by Statistics Canada documentation or techniques." Indeed, another Statistics Canada publication dealing with the 40/30 equivalence scale states as follows:

This is yet another topic in the whole field of measuring low incomes about which there is little agreement. For the [low income measures], in keeping with the principle of simplicity and conspicuously arbitrary choices, each additional adult is assumed to increase the family's 'needs' by 40% of the 'needs' of the first adult, and each child's 'needs' are assumed to be 30% of that of the first adult. Other values could just as easily have been chosen... [*Low income measures, low income after tax cut-offs, and low income after tax measures*, Cat. no. 13F0019XPB, pp. 10-11.]

In plain language: The 40/30 equivalence scale is not based on "econometric evidence;" it is a simplistic and arbitrarily chosen set of ratios. Moreover, the 40/30 scale was intended specifically to compare standards of living of low-income households. This ratio has not been "found to be relatively stable at different income levels." In fact, every competent econometric study – including studies commissioned by the Department of Justice itself – shows that the proportion of income spent on children declines as income increases. This is not difficult to understand, since well-off people spend a smaller percentage of their income on "fixed costs" – housing, food, and transportation – than poor people do, and the fixed costs are a substantial component of the cost of raising children. Finally, it must be noted that the first 40% increment was meant to reflect the cost of an additional *adult* in the household, not the first additional "family member." Each child, from first to last, was assumed to add 30% of the first adult's expense. Thus the 40/30 equivalence scale inflates the cost of raising the first child by a full third, even relative to an already arbitrarily high estimate for most families.

To add injury to insult, Statistics Canada considers the 40/30 equivalence scale to be an "all in" estimate of the costs of raising low-income children – a "ceiling" rather than a "floor." The provision in the *Guidelines* for "special and extraordinary expenses" to be added onto the Table amount therefore represents double-dipping – making dad pay twice for the same things. As was observed previously, the equal-incomes assumptions turned the equalization-of-standards-of-living model into a *de facto* proportion-of-payor's-income model. Unrealistic expenditure assumptions set the proportion of the payor's income in the Table amount at 17% for one child, 26% for two children, 33% for three children, and 39% for four children (after a reserve for self-support is set aside). Had the formula incorporated an equivalence scale representing the average of the empirically based scales that can be found in the literature, the Table amount would have represented approximately 10% of the payor's income for one child. This is roughly the same as it was under the pre-existing common-law system (and closer to what the Quebec model prescribes), suggesting that the pre-existing system was actually quite reasonable to begin with.

Why did the designers of the *Guidelines* knowingly adopt an expenditure model with no empirical basis? Again, your guess is the same as mine: the 40/30 equivalence scale was the highest "authoritative" scale they could find in the literature. The higher the assumed cost of raising children, the greater the transfers would have to be to "equalize" household standards of living. As Finnie later suggested, it was not the conscientious pursuit of a scientifically grounded fairness that was driving the design of the *Guidelines*, but an ideological determination to ratchet up child support to the highest politically feasible level (McLean 2002a). The equivalence

scale assumed on the expenditure side is therefore not rationally connected to the objectives of the *Guidelines*, and does not minimally impair the *Charter* right to the equal protection and benefit of the law between resident and non-resident parents.

## Costs of access and the 40% threshold

*The law is a sort of hocus-pocus science,  
that smiles in yer face while it picks yer pocket.*

- Charles Macklin

A second important assumption related to expenditures is that non-resident fathers incur no costs when enjoying visitation with their children. This assumption is just as unrealistic as every other assumption built into the model. Having to accommodate children for alternate weekend access entails fixed costs that are scarcely different from the resident mother's costs: dad needs transportation to pick them up and drop them off, and he needs a house with the same number of beds. Henman and Mitchel (2001) found that if a child spends 20% of their nights with the non-resident parent, that parent incurs 40% of the child-related costs of the resident parent. Thus Soevar points out that "The *Guidelines* offer clear and powerful financial disincentives to joint parenting by penalizing those payor parents with substantial [access]. Most perversely, parents who abandon their children are actually rewarded with a higher standard of living than the children they abandoned" (Maclean 2002a). He has gone to the trouble of quantifying the penalty involved fathers incur if they have an average income (Soevar 2002). If a father spends no time with his children and thus incurs no expenses, his standard of living will be 16% higher than members of the other household enjoy. (This calculation of course assumes the validity of all the other dubious assumptions built into the model. Nobody has tried to control for all of the flaws in the model simultaneously.) But if he spends just one night every other week with his children, they will enjoy a lower standard of living while with him than with their mother. When access approaches 40%, the standard of living in the father's home will be 30% lower than in the mother's home.

Surely this punitive result does not advance any pressing and substantial objective. In addition to the inequities the no-access-costs assumption creates between mothers who care for their children 100% of the time and mothers who incur expenses only 60% of the time, it plays havoc with the implicit objective of the *Guidelines*. It is neither rationally connected to the objective of equalizing household standards of living, nor does it meet the minimal impairment and proportionality requirements of the *Oakes* test. A cynic looking at these income and expenditure assumptions might suggest that the purpose of the *Guidelines* is to transfer so much income from the father to the mother that middle- and lower-income fathers do not have enough left over to afford accommodations for their children, thereby justifying the high level of judicial kidnapping from impecunious fathers that goes on in our courts.

Nor may fathers expect much relief when they share custody of the children at least 40% of the

time. Section 9 of the *Guidelines* provides that:

Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account:

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

It cannot be said that this clause is overtly discriminatory or unfair, as so much in the *Guidelines* clearly is. This is only because its meaning is utterly obscure. Consequently, lower courts tended to be all over the map when deciding cases involving shared parenting. It was left to the Supreme Court to provide the authoritative, discriminatory interpretation of s. 9 in *Leonelli-Contino v. Contino* 2005 S.C.C. 63. Before examining the court's reasoning in detail, a brief summary of how it was decided in the lower courts merits a peek.

The case was first adjudicated in March 2001, by a motions judge of the Ontario Superior Court. At the time, the child was 15 years old and living with both parents equally. The father's income was \$87,000 and the mother's was \$68,000. The Table amount for an income of \$87,000 in Ontario was \$688, and the Table amount for an income of \$68,000 was \$560. A common approach used by courts at the time in shared parenting situations was to award the set-off amount, which in this case would be \$128. Strangely, the motions judge divided the set-off in half, grossed that amount up by 50%, and then rounded up to \$100 per month. The mother appealed. The Divisional Court saw no reason why the father should have any reduction in his child support obligations at all, despite caring for the child half the time. They awarded the mother the full Table amount of \$688. The father appealed. The Ontario Court of Appeal started with the set-off amount, then grossed it up by 67% to take into account the mother's fixed costs of raising the child. (Does the father not have fixed costs, too?) They then considered the variable expenses each parent claimed to incur: the mother budgeting \$403.41 per month and the father \$270, for a total of \$673.41. Deciding that the father should be responsible for 55% of the total amount (\$370) to reflect his higher income, they added the difference between this and the amount he claimed to be spending while the child was in his care to the mother's award. Finally, they noted that the mother was voluntarily contributing \$153.84 per month to an RESP for the child, and ordered the father to pay 55% of that expense, too. Thus his total support obligation was set at \$399.61 per month. The mother, not satisfied with this outcome, appealed to the Supreme Court, which found in her favour and increased the award to \$500. Thus four different levels of court came to four different conclusions, ranging from \$100 to \$688. None of them opted for the set-off amount, nor a straight proportion-of-income award.

Bastarache delivered the reasons of the Court. He said that the set-off amount suggested by subsection (a) should only be the "starting point" of the analysis. What concerned him most was the so-called "cliff effect," the precipitous drop in child support that would result

from a minor increase in access time around the 40% threshold, if the set-off amount is used. He proposed to soften the blow of the “cliff effect” for support recipients by interpreting subsections (b) and (c) in ways favourable to her. But the court’s concern with the “cliff effect” is frankly misplaced, since it is an unavoidable artefact of the 40% threshold prescribed by the *Guidelines*. Applications for child support under s. 3 of the *Guidelines* are quite rigid; the Table amounts are mandated except in narrowly circumscribed cases of undue hardship. If the mother had custody 60% of the time or more, she would be entitled to \$688 per month in child support; and if the father had custody 60% of the time or more, he would be entitled to \$560 per month in child support. It follows inexorably that a 20 percentage-point variation in residency between the parties will result in a \$1,248 per month swing in financial transfers. Courts can manipulate where along the continuum of access within this shared parenting range the steep change in support obligations will occur, but they cannot avoid triggering a “cliff effect” without undermining s. 3 of *Guidelines*.<sup>21</sup> If the “cliff effect” is unacceptable, the only real solution is to abolish the 40% threshold altogether. Fathers who have access 39% or even 20% of the time have all of the same fixed costs, and proportionate variable costs, as fathers who have access 40% of the time or more. There is no reason to treat them radically differently.

Moreover, softening the blow for recipient parents is difficult to see as the objective of subsections (b) and (c), without further logical contortions. The main interpretive question of subsection (b) concerns what the “increase” in costs is relative to. What is the baseline being alluded to in subsection (b)? Bastarache correctly observes (at ¶52) that it cannot be an increase relative to some pre-existing *status quo* where the payor-parent exercised access less than 40% of the time, because “some applications under s. 9 are not meant to obtain a variation of a support order, but constitute a first order.” Furthermore, interpreting “increased costs” to mean an increase over the *status quo* would have the peculiar effect of granting vastly greater consideration to a payor who goes from 1% to 40% residency than to a payor who goes from 39% to 40% – despite the fact that the positions being adjudicated are identical. Where parents were before the threshold was met is surely irrelevant to what is fair in their current arrangement. What “the increased costs of shared custody arrangements” must mean, therefore, is simply the *higher* costs of a shared parenting arrangement relative to sole custody. Thus Bastarache concludes:

[52] ...s. 9(b) recognizes that the *total cost* of raising children in shared custody situations may be greater than in situations where there is sole custody... Consequently, *all* of the payor’s costs should be considered under s. 9(b)... [This] means that the court will generally be called upon to examine the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally. Increased costs would normally result from duplication resulting from the fact that the child is effectively being given two homes. [emphasis in the original]

It bears emphasis that, according to the foregoing analysis, neither the direction nor the magnitude of a change in access should have any bearing on an award in a shared parenting



arrangement. In other words, s. 9 applications should involve a fresh inquiry into the actual costs to each of the parents of raising the child. As Bastarache says (at ¶53), “These expenses will be apportioned between the parents in accordance with their respective incomes.” One wonders why this logic would not lead to the conclusion that a set-off award of \$128 is appropriate when the child spends exactly the same amount of time in each parent’s residence.

The principled way to take into account the increased cost of a shared parenting arrangement (without disturbing any of the assumptions built into the model) would be to start with the total family income, and look up the child support required to be paid by a non-resident parent earning half that amount. In the *Contino* case, total income is \$155,000 and child support for a non-resident parent earning \$77,500 would be about \$650. Now double that amount to take into account the resident parent’s equal contribution: \$1300. If half of child support relates to the mother’s fixed costs, then an equal amount must be added to cover the father’s fixed costs in a shared parenting regime. Thus the total cost of raising a child for this family would be about \$1950 per month – an “increase” of \$650 over the sole residency situation. Next add in any s. 7 expenses deemed appropriate, such as a \$150 RESP: \$2100. Finally, by apportioning this total cost according to the income of the parents, dad would be responsible for \$1178 and mom for \$922. Thus a transfer of \$128 – lo and behold, the set-off amount – would equalize their contributions.

In his discussion of subsection (c), Bastarache makes much of the obvious fact that:

[54] ...not every dollar spent by a parent in exercising access over the 40 per cent threshold results in a dollar saved by the recipient parent... [Thus] irrespective of the residential arrangement, it is possible to presume, in the absence of evidence to the contrary, that the recipient parent’s fixed costs have remained unchanged and that his or her variable costs have been reduced only modestly by the increased access.

But this way of framing the issue illicitly smuggles back into the analysis considerations that have just been determined to have no basis in s. 9 of the *Guidelines*. The baseline comparison is not with increases or decreases in costs borne by parents relative to a possibly non-existent *status quo* of sole residency. We are supposed to be engaged in a fresh inquiry into apportioning responsibility for “all” of the child’s expenses borne by *both* of the parents, recognizing that the “total cost” of raising children in shared custody situations is expected to be greater than in situations where there is sole custody because of the duplication of the fixed costs of housing and transportation. Thus the issue of “saving dollars” for one parent by “spending more” from the other cannot conceptually arise.

The question for a s. 9 analysis is not how one parent’s level of access affects the expenses of the other parent; after all, those effects are necessarily reciprocal and symmetrical. In cases of shared parenting, *neither* parent’s access time materially affects the fixed or variable costs borne by the other parent; *neither* parent “saves dollars” by virtue of the spending of the other. Because the non-effect of each parent’s expenditures on the other parent’s expenditures is symmetrical and reciprocal, it is difficult to see how this subsection could be used to soften the blow of the “cliff effect” for only one of them. What Bastarache is really concerned about in



his subsection (c) analysis is equalizing household standards of living. Thus at the end of his analysis he concludes:

[68] ...The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

And earlier, he says:

[51] ...The court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to another, something which Parliament did not intend. As I said in *Francis v. Baker*, one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households...<sup>22</sup>

The formula purports to equalize household standards of living; but given all of its unrealistic and tendentious assumptions about incomes and expenditures, the model cannot be said truly to aim at equalization. The objectives of the *Guidelines* are an impenetrable muddle, except for consistently striving to ratchet up support amounts. If the resident parent earns \$200,000 per year and the non-resident parent earns \$20,000, the non-resident parent is still required to pay about \$170 per month in child support even though such an income transfer would certainly exacerbate the disparities in household standards of living experienced by the two parents. There is no concern in this and many other types of case where fathers get the short end about the children experiencing a significant change in their standard of living as they move from one household to another, even if they spend 39% of their time with their relatively impoverished dads.

As a case in point, consider how the courts have dealt with applications for undue hardship under s. 10 of the *Guidelines*, this being the only place in the regulations where household standards of living are actually required to be compared. After reviewing the case law, the court in *Hanmore v. Hanmore*, (2000) ABCA 57 concluded:

[17] It is evident from these authorities that the burden of establishing a claim of undue hardship is a heavy one. We agree with the comment of Wright J. that the objectives of the *Guidelines* will be defeated if Courts deviate from the established guidelines without compelling reasons. The hardship must be more than awkward or inconvenient. It must be exceptional, excessive, or disproportionate in the circumstances. Further, it *is not sufficient that the payor has obligations to a new family or has a lower household standard of living than the payee spouse*. The applicant must specifically identify the hardship which is said to be undue. [emphasis added]

Under s. 10, courts have been rigorous in marginalizing the objective of equalization. The case law dictates that a payor is not entitled to a reduction in child support simply because his household income ratio is lower than that of the recipient-parent. That is a necessary but not a sufficient condition for a successful application for undue hardship. The hardship has to be

“exceptional, excessive, or disproportionate” to merit a reduction in the Table amount. Thus we have two discretionary sections of the *Guidelines* – s. 9 and s. 10: for one, equalization becomes the over-riding objective, while for the other it is marginalized to insignificance. When fathers seek a reduction in child support due to undue hardship, equalization of family incomes is not a pressing and substantial objective; but when they seek a reduction due to shared parenting, then equalization must be invoked to keep support as high as possible. The Supreme Court must have left the equality section of their copy of the *Charter of Rights* in their back pockets the day they made this ruling.

Paradoxically, equalization of household incomes appears to be a more important consideration the more equal the parents’ incomes are to start off with. The gross income disparity between the parents in *Contino* is only \$19,000. After a transfer of the straight set-off amount of child support, namely \$128 per month, and after taking into account the tax implications for the parties, *ChildView’s*® net monthly cash projections leave Mr. Contino with \$4,868 per month and Ms. Leonelli-Contino with \$4,397 per month. That’s a difference of a mere \$471 per month – a disparity that Bastarache evidently finds too “great” to be left alone. Yet a difference of only \$471 per month for a family with a combined gross income of \$155,000 per year is in reality inconsequential. A child could not possibly notice a “disparity” in household standard of living based on such a small dollar difference, even if all other things were equal. But all other things are rarely equal. A \$471 per month disparity would easily be lost in differences between the parents’ respective preferences for consumption and savings. It could even be lost in differences between the parents’ abilities to manage money. It is astonishing that Bastarache thinks it is the courts’ business to micro-manage the finances of separated families to the extent of equalizing incomes down to the last dollar. If you thought you lived in a free country, think again.

But it is actually even worse than that. By ordering the father to pay \$500 per month in child support, the court ended up leaving the mother with a *higher* net monthly cash projection, at \$4,770 vs. \$4,495, according to *ChildView*®. Apparently, Bastarache did not fully take into consideration the tax and tax credit implications of his ruling. Rulings like this create perverse incentives for separated couples: they undermine the incentive of fathers to put in more hours or bear greater stress at work to earn a higher gross income; and equally, they leave mothers no incentive to increase their own income post-separation, lest there be a dollar-for-dollar reduction in child support in order to keep the after-transfer household incomes equalized. As always, equalization conflicts with maximization; in the end, less is expected to be available to spend on the child.

The net result of Bastarache’s reasoning is that factor (a) is overwhelmed by the tendentious and discretionary considerations he introduces into his analysis of this case by way of factors (b) and (c). The straight set-off amount of \$128 was quadrupled to \$500 per month, making one wonder what the point of using the set-off calculation as a “starting point” was.

## Fairness for second and blended families

*I want a girl, just like the girl, who divorced dear old dad.*

- Condé Nast Agency

One significant assumption underlying the *Guidelines* formula that affects both the income and expenditure of families is that there are no family transitions after the separation. That is, the payor is assumed to forever remain in a single-adult household, and the recipient is assumed to forever remain a lone parent living with the children of the payor. This assumption, too, is highly unrealistic, as households are not static. Within three years of separation, a third of fathers and a quarter of mothers have new partners. Close to half of the new relationships formed by separated parents were with individuals who already had children from a previous union. By nine years after separation, 40% of both fathers and mothers have started a second family (Juby *et al.* 2005).<sup>23</sup> If equalization of household standards of living is to be achieved, adjustments to account for these family transitions would be required. And if the expenditure assumptions incorporated into the formula to calculate Table amounts are good enough for that purpose, they should be good enough to be used to recalculate equalization after family transitions. The only additional information that would have to be gathered would be the incomes of the new partners. That might raise privacy concerns for some people, but as was observed above, the privacy of third parties is not something either the courts or the designers of the *Guidelines* care much about.

Why are family transitions assumed not to happen, or to have no effect on household incomes and expenditures? Why is no provision made in the *Guidelines* for automatic adjustments to child support after family transitions? As before, your guess is the same as mine: when men form new unions, it most often entails greater expenditures relative to income; whereas when women form new unions, it more often entails a higher income relative to expenditures. Let us take a closer look at these two cases in turn.

When a man assumes financial responsibility for a second wife and subsequent children, the *Guidelines* do not generally permit adjusting child support to the first wife downward so as to re-equalize household standards of living. While s. 10(2)(d) of the *Guidelines* does allow a judge discretion to adjust child support payments in recognition of a legal duty to support another child, this only applies in narrowly defined circumstances of undue hardship. As we noted earlier, proving undue hardship is an extremely difficult hurdle to jump: less than 1% of child support cases involve a successful application under this rubric (and some of those are made on behalf of mothers seeking a discretionary increase in support). Judges are not shy to say in court that fathers know they have financial obligations to the children of their first relationship before they form second families, and those responsibilities come first. E.F. Macklin, of the Court of Queen's Bench in Edmonton, likes to stigmatize support-paying fathers by opining that they are "the authors of their own misfortune" – as though this were really about punishing dads for their sins.<sup>24</sup> This is a bizarre, antiquated, and often erroneous perspective which has no place in a modern courtroom.

To see just how discriminatory the no-family-transitions assumption is, consider how the logic would apply to intact families. Every married couple knows they have responsibilities toward their first child before they conceive a second. It does not follow that the rights of the first-born must have absolute priority over those of the second-born, which in turn have absolute priority over later-born children. Rather, it is a commonplace that a first-born child's right to support is automatically compromised as soon as subsequent children come along within a marriage. It makes no difference from a child-welfare perspective – and should make no difference from the legal perspective – whether later-born children have the same mother, or the same father, or whether their parents are cohabiting or separated: all of the children born to a particular parent should benefit equally from his financial support. A mantra that is repeated every day, in every family court in the country, is that “child support is the right of the child,” not the right of the recipient parent. Taking this right seriously would surely imply that a father's every child has equal rights to share in his income, whether born first or last, within marriage or outside of a cohabitation relationship. No rationale has ever been offered why later-born children of a separated father should have any less than an equal claim on the father's income than an earlier-born child has. The no-family-transitions assumption is discriminatory in its own right, is not rationally connected to the equalization objective of the *Guidelines*, and does not minimally impair the *Charter* right to the equal protection and equal benefit of the law for non-resident parents.

By contrast, when divorced mothers remarry and start a second family, if they choose to take time off work to look after their later-born children they are automatically relieved of any child-support obligations to their first-born children. Mothers of second families are not considered to be deliberately unemployed for the purpose of evading child support. If her first husband has primary or even shared custody of the children, her child-support obligations will end when she starts a second family – even though you might equally well say she is “the author of her own misfortune” by starting a second family. More commonly, if a mother has custody of the children of the first marriage, and if s. 7 expenses are at play, quitting work to start a second family will mean that dad will suddenly end up paying for 100% of the s. 7 expenses. She is then the author of his misfortune. The only consistency in the application of the child support principles in Canada is that fathers have to pay, no matter what.

Now consider the case where a mother enters a more affluent household through remarriage. According to Allan Rock, the children will benefit from this arrangement also; it is “inescapable.” In that case, it should be both possible and desirable to relieve the non-resident father from some of his child-support obligations, so as to re-equalize household standards of living. Of course, the no-transitions assumption arbitrarily precludes this. Indeed, by judicial interpretation, it is possible for a mother to collect the full Table amount of child support from the biological father and each in a string of step-fathers she has been cohabiting with since the child was born. There is no concern here about the psychological hardship the child might experience from having to transition between households of highly disparate incomes. In cases where the mother improves her standard of living by entering into a new relationship, the no-family-transitions assumption is not rationally connected to the equalization objective of the

*Guidelines*, and does not minimally impair the *Charter* right to the equal protection and equal benefit of the law for non-resident parents, either.

## Other indicia of discriminatory intent

*When you have no basis for argument, abuse the plaintiff.*

- Cicero

The charitable way to read the record of judicial application of the *Guidelines* is to suppose that judges have no inkling of the degree of discriminatory impact upon separated fathers already imbedded in them; for rather than mitigating the built-in adverse impact by interpreting the discretionary provisions narrowly and conservatively, they consistently pile on with “liberal and generous” interpretations of their own. Recall that the 40/30 equivalence scale underlying the *Guidelines*, in addition to being an obviously inflated scale, is supposed to be an “all-in” estimate of the cost of raising children. It should therefore be an extremely rare circumstance when additional support is warranted. Yet most judges have never met a special or extraordinary expense they didn’t like; if mom thinks it is a good idea to spend dad’s money on something, who is a judge to disagree? That is mainly why only about 54% of child-support awards granted actually reflect the Table amount – the vast majority of the remainder being higher.

When it comes to apportioning s. 7 expenses between the parents, the *Guidelines* provide:

- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

This clause has been judicially determined to mean that s. 7 expenses are apportioned between the parents according to their *gross* income, not their discretionary income (i.e. on their income after taxes, after expenditures on s. 3 child support, and after withholding a minimal reserve for self-support). In the typical case analyzed in the previous chapter, where the father’s gross income was \$50,000 and the mother’s was \$25,000, this would mean that the father would pay two-thirds of all s. 7 expenses. However, in reality the father’s discretionary income is much lower than the mother’s: \$13,372 compared to \$20,966. If s. 7 expenses were apportioned according to the actual means of the parents, the father in this example would only be responsible for two-fifths of s. 7 expenses. Of course, if the mother chooses not to earn an income, the father is left to foot 100% of the expense regardless of his discretionary income.

It is actually worse than this, because s. 3 of Schedule III of the *Guidelines* provides that, “To calculate income for the purpose of determining an amount under the applicable table, deduct... the spousal support received from the other spouse.” This means that mothers do not have to pay child support from their spousal-support income, even though it is taxable income like any other. Spousal support thus constitutes the *only* source of income that attracts immunity from being considered for the support of children; not even pension income is



treated so favourably. Your guess as to why spousal support receives this special treatment is the same as mine: spousal support is almost always received by women. To make matters worse, the immunity spousal support enjoys from claims of child support extends to calculating the mother's proportionate share of s. 7 expenses. If spousal support is her only source of income then she is liable for none of the additional costs. Meanwhile, the father's proportionate share of s. 7 expenses is based on his income *before* s. 3 child support is paid, i.e. based on income that has already been spent on the child – usually by means of an automatic deduction. So while the mother pays no s. 7 expenses based on income intended for her, the father pays s. 7 expenses based on income already spent on the child – another case of double-dipping into the father's income. This discriminatory treatment is not an accidental effect of some valid principle; it is a deliberately discriminatory design feature of the *Guidelines*: deadbeat dads must be punished at every turn.

A favoured excuse for treating fathers as punitively as possible, whenever possible, is that mothers bear the “hidden costs” of caring for the children, and these costs are not accounted for in the *Guidelines*. “Hidden costs” include the time and energy spent doing menial tasks associated with childcare, as well as the lost career opportunities associated with conflicts between work and home. This is a repugnant and disingenuous argument. In the first place, time and energy spent caring for children is not a “cost;” it is called parenting. It is what most non-resident fathers want more of, but are denied. It is what gate-keeping mothers jealousy hoard for themselves (Baskerville 2007: pp. 246-7). If parenting did not bring at least commensurate “hidden benefits” – the giggles and hugs and charming mannerisms everyone adores in children – people would not have children in the first place, and mothers would not seek primary custody as a matter of pride. (We will explore in the next chapter why so many members of the legal profession tend not to understand the concept of parenting, and can conceive of it only as an economic activity filled with drudgery.) In the second place, when parenting affects a mother's career opportunities, the family-maintenance regime factors that into the quantum of spousal support awarded; it is not an appropriate consideration for child-support transfers. Third, it is not mothers but fathers who typically have the right to complain about the “hidden costs” of separation. A father's financial obligation to support his ex-wife and kids continues undiminished, despite the fact that he can no longer expect any *quid pro quo* from her. He no longer benefits from cooking and cleaning and the other wifely duties that supposedly allowed them to work harder and longer hours to build his career. If a non-resident father finds he is unable to keep up the pace at work now that he is doing his own household chores and spending alternate weekends with the children, he cannot expect the courts to be sympathetic and reduce his support obligations accordingly. If anything, he is liable to be deemed to be deliberately slacking, and to have his pre-separation income imputed to him.



# Diaper Duty, Revisited

*The decisions of the courts on economic and social questions depend on their economic and social philosophy.*

*- Theodore Roosevelt*

The facts in *Doe v. Alberta*, 2007 ABCA 50 are easily summarized: John and Jane Doe were common-law partners. Jane wanted a child, but John did not wish to father a child, to stand in the place of a parent, to act as a guardian, or to support a child. Jane was artificially inseminated with another man's sperm, and gave birth to a child. John and Jane sought to enter into an express written agreement which would stipulate that John has neither parental rights nor any obligation of support toward Jane's child. They asked the court for a declaration of the validity of such an agreement, despite the provision in the *Family Law Act* which gives final authority over the issues of parental rights and responsibilities to the courts.

In rejecting the declaration sought, the Alberta Court of Appeal reasoned as follows:

[22] ...The "settled intention" to remain in a close, albeit unmarried, relationship thrust John Doe, from a practical and realistic point of view, into the role of parent to this child. Can it seriously be contended that he will ignore the child when it cries? When it needs to be fed? When it stumbles? When the soother needs to be replaced? When the diaper needs to be changed?

[23] In my opinion, a relationship of interdependence with the mother of the child in the same household, of itself, will likely create a relationship of interdependence of some permanence, *vis-à-vis* the child. John Doe's subjective intent not to assume a parental role will inevitably yield to the needs (and not merely the physical needs) of the child in the same household. Were it otherwise, one can only imagine the emotional damage visited upon the child. One must keep in mind that, among the factors cited in s. 48(2) [of the *Family Law Act*] is the child's perception of the person as a parental figure...

[28] As I see it, John Doe was not deprived by the legislative scheme of the ability to order his life and his respective rights and obligations towards Jane Doe's child as he saw fit. In fact, he chose freely to enter into a relationship of interdependence of some permanence with the mother of a newborn child. Going back to the realities, support obligations flow from the choice made by John Doe.

To see how weak this argument is, suppose that John Doe were a favoured uncle who lived in the same home as the mother of a newborn child; or suppose he were a gay house-mate or renter, or a live-in nanny. In any of those cases, he would have all of the duties of care for infants in distress that members of society at large have, plus whatever babysitting duties were specifically contracted for with the mother – and nothing more. Furthermore, in that case, rather than John owing support obligations to the child, Jane might well owe John remuneration for his invaluable daycare services, based on the equitable doctrine of unjust enrichment. Why,

on the sole basis that John and Jane share a bedroom, is the flow of entitlement to financial support reversed by the Alberta Court of Appeal? It is difficult to resist the conclusion that the old traditionalists on the court cannot fathom allowing John to have sex with Jane “for free,” and they are determined to make him pay for it with this ruling.

Compare the result in *Doe* with the leading case dealing with the equitable doctrine of unjust enrichment in cohabitation arrangements: *Peter v. Beblow* (1993), 1 S.C.R. 980. In that case, a woman sought compensation from her common-law partner for domestic services rendered to him and his two children. Although Mr. Beblow had provided, among other things, free room and board for Ms. Peter and her own four children throughout the time period in question, the Supreme Court of Canada determined that Ms. Peter was entitled to additional compensation. They gave her Mr. Beblow’s home, free and clear, for her contributions to four or five years of child care before his two children had left the home. (That is not a typo: she got his house for being chief cook and bottle-washer to his two teen-aged children for a few years.) In coming to this conclusion, the court reasoned as follows:

[12] This court has held that a common law spouse generally owes no duty at common law, in equity, or by statute to perform work or services for her partner...

[13] Nor... was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant was “under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return...” This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant’s services to her partner were a “gift” from her to him. The central element of gift at law – the intentional giving to another without expectation of remuneration – is simply not present...

[17] ...Today courts regularly recognize the value of domestic services. This became clear with the court’s holding in *Sorocan*... If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*...

Note that the domestic services referred to in the above Supreme Court cases include those very same services alluded to by the Alberta Court of Appeal in *Doe*.

It is unfortunate that the Supreme Court declined to hear an appeal of the *Doe* decision, so that some clarity and consistency might be found in this area of the law. The state of the law in Alberta today is that, when a man lives in a relationship of some permanence with the mother of a biologically unrelated child, he acquires support obligations toward that child; but when a woman lives in a relationship of some permanence with the father of a biologically unrelated child, she acquires rights to his property. The Alberta Court of Appeal’s decision at least has the virtue of being consistent with a long line of family-law cases in Canada which interpret the supposed “mutuality of rights and obligations” arising from these relationships so as to assign all of the rights to the mothers and all of the obligations to the fathers.

# Draconian enforcement

*Absurdities lead to atrocities*

- Voltaire

*The state must declare the child to be the most precious treasure of the people. ...as long as government is perceived as working for the benefit of children, the people will happily endure almost any curtailment of liberty.*

- Adolf Hitler

Demonstrating that the size of child-support awards is unconscionably and unconstitutionally high might be academic if the arrears so often created were treated like the civil debts that they are. However, at the same time as the federal government ratcheted up support obligations under the *Guidelines*, provincial governments began ratcheting up their enforcement measures in complete disregard for principle or practicality. The law was revised so that debtors could no longer escape crushing support arrears by proving in bankruptcy proceedings that they were unable to pay them. Support arrears – both child and spousal – now stay with debtors for life. Maintenance enforcement agencies, with wide-ranging powers to investigate a debtor's financial means and extract money from debtors, have been set up to pursue collection of support obligations. These powers include wage and bank account garnishments;<sup>25</sup> liens against property; motor vehicle license, hunting and fishing license, professional license, and passport suspensions; and ultimately imprisonment. Most recently, some provincial governments have taken to posting the identities and photographs of the “worst deadbeats” on the internet, in the hope of either publicly embarrassing debtors or having members of the public rat them out. The “Chinese walls” within and between governments that normally protect individuals from having private information shared and used for purposes for which it was not intended have been torn down in the case of support obligors. Government departments, both federal and provincial – most notably Revenue Canada – share information freely in an effort to track down debtors and impose garnishments on tax refunds, GST rebates and the like. No stone is left unturned, no liberty left undisturbed in the collection of support debts.<sup>26</sup>

Like Justice Department bureaucrats, politicians, and judges, the agents of provincial maintenance enforcement programs (MEPs) are steeped in the mythology that fathers are deadbeats, only interested in evading their financial responsibilities. Incredibly, MEP agents in Alberta have more discretionary powers than judges, who are permitted by law to suspend collection measures only temporarily, for a period of 90 days. MEP agents use their powers to pursue debtors relentlessly, remorselessly, and too often with ferociousness that defies understanding. Some measures taken are at best counter-productive. For example, suspending a driver's license typically prevents a father from getting to work, or even looking for work.<sup>27</sup> The cost of reinstating a license with the Department of Motor Vehicles – approximately \$70 each time a suspension is put into place – detracts from the debtor's ability to pay child support. Throwing men in jail prevents them from earning an income at all – and puts such a

stain on their record as to make most employers unwilling to consider hiring them.<sup>28</sup> A father's support obligations are not even suspended for the period of time he is in jail, despite the fact he is involuntarily prevented from earning an income.

The legality and constitutionality of some of these enforcement measures is certainly open to question. Privacy laws protect the identity of mothers who are charged with criminal abuse of their children – up to and including murder – ostensibly to protect their surviving children from exposure, and possible stigma and ridicule from peers. At the same time as physically abusive mothers may not be revealed in media reports, fathers who fall behind on their support payments are paraded in a rogues' gallery for all the world to see, with no concern about exposing their children to stigma or taunting. This disparity of treatment, which defies any rationale, is illustrative of the bias men face throughout the system.

The suspension of passports is a clear breach of the mobility rights enshrined in s. 6 of the *Charter*, which provides that:

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
  - (a) to move to and take up residence in any province; and,
  - (b) to pursue the gaining of a livelihood in any province.

A passport is an essential document for international travel, the right to which is one of the most foundational rights of citizenship. Suspension of that right is not even done routinely after a person has been convicted of a serious crime.<sup>29</sup> The purpose of suspending a passport is to prevent fathers who have been crushed by the system from fleeing the country and establishing a new life abroad – a practice that has become more common since the *Guidelines* came into effect (McLean 2005).<sup>30</sup> Arguably, the suspension of driver's licenses also infringes s. 6 of the *Charter*, given that this mode of transportation is a precondition of a wide range of jobs in many parts of Canada.

Support debtors may be detained and imprisoned if they are deemed to be willfully refusing to make payments, and even more commonly if they are deemed to be uncooperative with their MEP agent (e.g. by not taking time off work to attend a Financial Examination). The power to imprison support debtors raises a host of legal and constitutional issues. The *Charter* is supposed to protect the following legal rights, *inter alia*:

10. Everyone has the right on arrest or detention... (b) to retain and instruct council without delay and to be informed of that right...
11. Any person charged with an offense has the right...
  - (c) not to be compelled to be a witness in proceedings against that person in respect of that offense;
  - (d) to be presumed innocent until proven guilty according to the law in a fair and

public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause...

Yet as Millar (2010) points out, fathers who are detained and jailed pursuant to MEP enforcement procedures enjoy none of these rights.<sup>31</sup> They are not advised of their right to retain counsel, nor is a duty counsel made available to them for the hearing which may result in their continuing detention (known as “default hearings”). In court, debtors bear a reverse onus to prove that they have been cooperative with MEP to the best of their abilities – an onus that is practically impossible to meet. Default hearings have the character of an inquisition rather than an independent and impartial tribunal: the judge conducts an examination of the debtor based on materials supplied by the MEP agent and a Justice Department lawyer. The whole process is designed to be a slam-dunk for the “prosecution.” It is much easier to obtain bail on a crime involving personal injury than it is to be released after a default hearing for support debtors.<sup>32</sup>

While these *Charter* rights apply straightforwardly to persons facing criminal charges, the Supreme Court has long held that they must also “provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense”: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. “Penal consequences” is just a fancy legal term for detention, incarceration, or jail. Millar (2010: p. 154) points out that 77% of MEP sentences are “indefinite,” meaning they extend for the statutory maximum of 90 days incarceration, or until arrangements satisfactory to the creditor can be made. The mean period of detention for support debtors is 28 days, which is equivalent to a sentence of 42 days where the convict is statutorily released after serving two-thirds of his sentence. “This puts the severity of MEP sentencing somewhere in the range of the more severely punished administrative offenses, such as unlawfully at large (mean sentence 38 days), and the less serious personal crimes, such as theft (mean sentence 59 days) or common assault (mean sentence 58 days),” says Millar (2010: p. 153). It would be more accurate to compare support debtors to first-time, non-violent offenders, who are normally eligible for parole after serving only one-sixth of their sentence. Thus serving 28 days in jail would be equivalent to a sentence of 168 days. Many commentators have compared this situation to a reinstatement of debtors’ prisons – a Dickensian institution that has been grouped with slavery and indentured servitude as notorious human rights abuses. Debtor’s prison was abolished in Canada in 1869 for being dysfunctional and inconsistent with the elevated morals of that by-gone era (Millar 2010: p. 151).

Pursuing default hearings is not sheer madness on the part of MEP agents. There is method to their madness. A debtor may be summoned to a default hearing in one of two ways: either by being served a notice of motion by the MEP agent, or by being detained on a warrant. To obtain an arrest warrant, the MEP agent simply commences an *ex parte* hearing, where the judge hears only MEP’s side of the story. The warrant is then passed on to the police for execution. The police locate the debtor and bring him to the holding cells until another judge is available to conduct the default hearing. Before the hearing, the MEP agent and Justice Department lawyer typically meet with the debtor to discuss his situation, without him having



legal representation. They explain to him the difficulties he is in, and then try to reach an “agreement” that will “allow” them to have him released. Debtors often report that MEP agents offer to release them if they demonstrate cooperation by payment of a lump sum toward the arrears. If the debtor is demonstrably unable to pay the lump sum requested – and most often, the MEP agent knows this – he is asked whether a friend or relative might be willing to put up the amount. While such negotiations might on the surface appear to be nothing more than an attempt to offer the debtor a way out of his predicament, in fact they involve extortion as defined by the *Criminal Code*. Section 364 provides that:

- (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

The reason MEP agents have no “reasonable justification or excuse” to ask debtors for a lump sum payment is that such a payment would almost always exceed the statutory limit of 40% of his gross monthly income – i.e. the amount already being collected through wage and bank garnishees. (If he is not employed, then MEP agents have no reasonable justification to ask for any payment.) Nor are agents justified in asking friends or relatives to cover a debtor’s obligation on pain of keeping him in jail. Support is not owed by friends or relatives, and using emotional ties to shake people down is unacceptable in a free and democratic society. These are the tactics of mafia goons.

It would be tedious to go through the *Oakes* test again to determine whether the above breaches of *Charter* rights might be found “demonstrably justified” under s. 1. Any person of conscience and a modicum of empathy can see that the methods employed by MEP to extract money out of marginally employed fathers are wholly disproportionate to the gains for children. Hundreds of millions of dollars are spent each year funding provincial collection agencies, which would be better directed to social assistance instead. When the private cost of lawyers, the hidden cost of court time, and the extra work created for government agencies and private companies to implement the complete arsenal of enforcement measures is considered, the cost of maintenance enforcement nationwide is undoubtedly in the billions of dollars. It is unlikely that the marginal increase in child support collected by these agencies even pays their way. Looking at the collection system from the child’s perspective, Millar (2009: p. 106; reference omitted) concludes:

The incarceration of debtors for non-payment without benefit of many of the protections guaranteed by the *Charter of Rights and Freedoms* may represent an inappropriately heavy emphasis on child support collection than is justified by the best interests of the child; it is unlike the protections afforded other kinds of debt. The social benefits from the coercive collection of support may not exceed the costs, when viewed from the perspective of the children, whose parental relationships, including those of the non-custodial parents, are an important resource.



## Tears are not enough

*The tears of strangers are only water.*

*- Hindu proverb*

Is Macklin right that support debtors are “the authors of their own misfortune”? Are they truly deadbeats, unworthy of relief or even sympathy? How, after all, could innocent fathers get so behind in their support obligations, and how do they manage to excite MEP agents to pursue them to the ends of the Earth? Millar (2009, 2010) is the only researcher in Canada who has tried to answer these questions, by examining the maintenance-enforcement system empirically. A demographic profile of those who are subjected to the most severe forms of coercion, namely default hearings and imprisonment, is revealing: these are nearly always men, disproportionately aboriginal and visible minority, unemployed and uneducated. With respect to gender, Millar (2010: p. 156) notes that there is “more of an imbalance than in federal prisons, whose inmates are 2.8% female.” Given that 12% of mothers are non-resident parents and therefore liable to pay child support, and that mothers are less likely to comply with support orders than fathers are (as was shown earlier), one would expect more than 12% of those imprisoned for defaulting on support obligations would be women. The fact that virtually no mothers are pursued in default hearings by MEP for non-compliance indicates that the *Charter* “guarantee” of equal treatment under the law is a false promise in this area as well. Aboriginal fathers are twice as highly represented in default hearings in Alberta relative to their proportion in the general population; and black fathers are 5.5 times as highly represented. Men who face default hearings are 2.5 times as likely as the general population to be unemployed. They are 1.6 times as likely to have not completed secondary school; 1.6 times as likely not to have graduated from high school; and 3 times as likely to have only a high school certificate. Like bullies of all stripes, MEP agents pick disproportionately on the most vulnerable in society.

A large part of the explanation for why the most vulnerable are disproportionately represented among those subject to severe enforcement measures is that support obligations are excessive to begin with, most especially for low-income earners (Finnie 1997). Millar (2010: p. 155) shows that while imprisonment for non-support has been an enforcement measure available to Alberta’s MEP since 1986, the number of men caught up in this nightmare remained relatively low – between one and seven per year – until shortly after the *Guidelines* came into effect. Between 1999 and 2005, imprisonments rose from four to 59 men per year. It is not hard to see why. According to Millar (2010: p. 157):

The highest marginal rates [of confiscation] are reserved for those with the lowest incomes and the most children, reaching 88% for a payor with four children earning \$10,000 per year. A person in this situation would retain \$0.12 for every \$1 earned after support and taxes. This marginal rate of taxation for those with low income, punitive in effect, is likely to provide a disincentive to earn more income. Perhaps most importantly, these punishing rates of taxation for lower-income individuals limit their ability to perform any meaningful parenting role due to lack of financial resources...<sup>33</sup>

Millar goes on to graph the hourly wage fathers are left with after support and taxes. He shows, for example, that a father of two children earning the minimum wage would keep just \$2 per hour for every extra hour he worked. A father of two children earning around \$30,000 per year would keep less than \$8 per hour for every additional hour worked; he would be working for less than the current minimum wage in any province of Canada.

A second way innocent men can run afoul of MEP is that support orders have lower variability than income (Millar 2009: chapter 5). That is, support awards, once made, tend to remain relatively constant over time, despite increases and decreases in the income of the payor. But there is an important asymmetry between upward variability of income, and downward variability. On the one hand, annual inflationary adjustments to child support will typically not be high enough to cover the cost of pursuing the adjustment; in these cases, recipients will pursue adjustments less frequently. On the other hand, when a payor loses his job, becomes disabled, or is temporarily laid off, he will often lack the financial resources to pursue an adjustment through the legal system, which is unfriendly toward downward adjustments to begin with. Overall, the lower variability of child support relative to income will have a minor (and usually temporary) negative impact on recipients, but a potentially crushing impact on payors whose income experiences high variability. One of the most common causes of distress to payors is a loss of income due to unanticipated unemployment, a drop in commissions earned, and the like. Judges tend to be ruthless in refusing to grant a discretionary downward variation even when no income is coming in for the payor. Many will not even consider a variation application until a record of unemployment has been established for several months. Judges seem to fear or assume that as soon as a downward variation is granted, the payor will regain employment and fail to make the upward adjustment again. They live in a fantasy world where typical fathers are forever looking for ways to cheat their children out of financial support, and where fathers living on the margins of existence have vast savings or assets upon which to draw “temporarily” in order to meet their support obligations until they move into a new job.

Related to the above problem is the fact that many low-income fathers are poorly educated wage laborers who possess low coping skills where paperwork, bureaucracy, and personal finance are concerned. Establishing their true income, assets, and liabilities to the satisfaction of jaded judges and MEP agents is often an insuperable obstacle. Many of these men had allowed their partners to handle their finances prior to the separation, and left all documentation relating to income, taxes, bank accounts, credit cards, and investments in their home when they were summarily kicked out, either by the partner or by court order. At the initial application for child support, their pre-separation income is therefore apt to be set too high, based on the selective disclosure or even bald exaggeration by the mother; and judges are apt to impute an unduly high income to them “out of an abundance of caution” when full disclosure is not forthcoming. The lack of documentation may dog them for years if they are unable immediately to establish a new permanent residence to receive their redirected mail. If they move from place to place, boarding temporarily with friends or relatives, the paper trail might never catch up to them; it is bound to be thrown out by careless former housemates after they move on. Obtaining

replacement documents from banks and other institutions, at \$5 to \$25 per page (not including the cost of taking time off work to make inquiries and fill out forms), may be more costly than what they are worth, or at least than can be afforded. If a man manages to collect all of his relevant financial disclosure and passes it on to his lawyer, that is the last he is ever likely to see of it. His funds will be quickly exhausted in custody negotiations and disputes, and the lawyer will not release his file until the fees are paid. Too often, documents are lost or misplaced by the lawyer or MEP agent, and no copies were made before they were passed on. It takes very little time for arrears to accumulate when these types of problems arise.

Sometimes fathers are saddled with arrears in the very first support order. If the parents never cohabited, the mother may bring her initial application a year or more after the child was born and seek support retroactively. Sometimes there is a dispute over the date of separation, with the mother claiming to have separated months before the father knew of it, and seeking support for a period of time when she still had access to his bank account and when the mortgage was still being paid automatically from it. Sometimes there is an on-again, off-again period that stretches for months while the parties attempt reconciliation. In retrospect, the mother claims to have separated right from the time the father initially left the house. Judges are apt to “err on the side of caution” (as they see it) by post-dating the separation as far back as is possible for support purposes. Sometimes the parents reach an “informal agreement” on support after separating, and either do not obtain a court order or do not register it with MEP right away. There follows a period where the father does not document his support payments as rigorously as a judge or an MEP agent might wish. Sometimes he is foolish enough to trust the mother with undocumented cash payments; sometimes he naively assumes that cheques made out to the mother for the same amount on the first of every month will be recognized as support;<sup>34</sup> sometimes he foolishly thinks that in-kind purchases, such as a computer or school supplies for the children, will be recognized as his contribution to support ... (Fathers are often surprised when a judge decides that in-kind purchases for the child are a “gift.”) In these and an endless array of other ways, a man can find himself in arrears without any reasonable chance of having budgeted for them. The appearance of dreadful “arrears” on a debtor’s statement is taken as a sign that a debtor is “uncooperative” or not voluntarily compliant with his support obligations. It may take years to pay down the initial arrears, and if the father faces any other financial difficulties in the meanwhile, it is two strikes and he is out. His troubles snowball from there. The question is not how innocent men could fall afoul of MEP; the question is how any marginalized father in society could not run aground eventually on the reef of support obligations, given all of the possible pitfalls he must negotiate around.

It is said that you cannot get blood from a stone. But MEP can get blood from the flesh and bone of “debtors.” If money is not forthcoming from debtors then blood certainly seems to satisfy their lust. The relentless enforcement of support obligations has driven many Canadian men to suicide, although this is one statistic that neither the maintenance-enforcement agencies nor Statistics Canada cares to track. The sketchy evidence available from other countries is summarized by Baskerville (2007: p. 157). He points out, for example, that an Australian member of parliament who heads a committee dealing with the effects of divorce estimates as

many as 20 male suicides per week are attributable to hardships resulting from the judgments of family courts. Likewise, Professor Pierre Baume of Monash University puts the figure at 1,000 men per year in the United States. Professor Augustine Kposowa of the University of California at Riverside found that the suicide rate for men doubled after divorce. And suicide is only the tip of the iceberg. Many more men are forced into dangerous criminal enterprises in an effort to stay out of jail for non-support.

## Conclusion

If it is possible for men to be treated beneath their human dignity – a proposition that admittedly remains without legal precedent in Canada to this day – then the existing child-support regime surely manages to do it. It systematically disregards the rights and interests of non-resident parents, and systematically treats them with less consideration and respect than resident parents – or even than common criminals. At every turn, the *Guidelines* make discriminatory assumptions and elections that raise rates of child support to punitive levels, effectively forcing non-resident fathers to carry the entire burden of supporting their children (and in some cases even turning a profit for the resident mother). The myriad simplifying assumptions underlying the *Guidelines* make them far too complicated for the average judge – evidently, even for Supreme Court judges – to comprehend. The opacity of the regime allows everyone working in the system to turn a blind eye to the blatant unconstitutionality of what they are doing. When consistency calls for inconsistency; when the bigger part of the problem is assumed not to exist, the better to vilify and hound the supposed cause of the lesser problem; when illiberal, even totalitarian objectives are promoted in the name of the rights of children; when elementary logic eludes the “best legal minds in the country;” when the legal establishment says there is nothing unusual about cases where men kill themselves to escape persecution – in short, when reason has been so grossly perverted, that is the time when injustice is most difficult to see. When injustice is as ubiquitous as the air we breathe and the water we drink, it becomes invisible, tasteless, odourless, silent, and something very few people can feel. In the final chapter, we shall see that the legal system is the most unfeeling of all.

## Chapter 6

# Deadbeat Judges

**The judiciary is still the one place in our system where authority can be abused with virtual impunity.**

*- Steve Martini*

Superior Court justices in Alberta are still addressed as “My Lord” and “My Lady.” This seemingly quaint anachronism carries a mighty sting. In family courts across the land, judges hold effectively the same powers over separated parents and their children as feudal lords held over their serfs, and it pleases them to exercise it obtrusively and without restraint. Indeed, it is touted as a *virtue* of our system by politicians, lawyers and judges alike that “parents have no rights, only responsibilities.” This premise paves the way for judges to supplant parents as the ones with ultimate discretion to decide what is in “the best interests of the child.”

A perceptive cultural anthropologist studying Canadian family courts early in the 21st century would notice a second feature in some ways reminiscent of feudal society: a form of chivalry that pervades the entire system. Our Lords and our Ladies reflexively defer to mothers, using their broad *parens patriae* jurisdiction to usurp the role of the father as a guardian in his child’s life. They do this by routinely evicting fathers from their own homes as soon as the mother wants a separation; by giving primary custody of the children to mothers as a matter of course; by refusing to enforce even the meagre and insulting visitation they allow to fathers; and by burdening fathers with sometimes crushing but always substantial maintenance awards. Post-separation, fathers are ushered to the back of the bus, to be obedient observers in the background of their child’s life. This wholesale disenfranchising of fathers commences immediately upon separation, and regardless of whether or not he had done anything wrong – legally, morally, or prudentially. In favourable cases, fathers may retain a kindly, avuncular status; while in unfavourable cases, they are reduced to the psychological state of an automated teller machine.

This is the organizing theme of the present volume: how gender-based inequality in the application of the law by all-powerful but unaccountable judges results in a drastic loss of freedom in the lives of fathers who have the misfortune to be estranged from the mothers of their children. In this chapter we take a closer look at the critical role judges play in creating the post-separation train wrecks that everyone is all too familiar with. It might seem harsh to focus so much criticism on judges, when nearly every actor in the system – politicians, lawyers, child psychologists, child-welfare workers, educators, and police – is equally at ease with the way the system “works.” But judges sit at the apex of power in our family-dispute system; what they do and do not do in court has ramifying effects throughout the system and into society at

large. They must be attributed their fair share of responsibility for the unfortunate results of post-separation conflict. The epithet “deadbeat judges” in the title of this chapter has a dual meaning. First, by assisting in the above-mentioned ways to push fathers to the sidelines of their children’s lives, judges go a long way toward *creating* “deadbeat dads” out of ordinary, loving fathers. Second, when judges embrace the role of ultimate decision-maker for separated parents on behalf of children, and use their power to displace fathers from their children’s lives, they become by functional substitution the “absentee fathers” or “deadbeat dads” of folklore.

A detailed analysis of actual case histories, such as is contemplated for a second book on this subject, would illustrate that too many family-court judges are deadbeats not just in the metaphorical sense outlined above; they are deadbeats *qua* judges, *qua* adjudicators of disputes. A disconcerting proportion of judges do not know the law they are supposed to be applying – or do not care to apply it, if they do know it. They do not read or listen carefully to the evidence presented to them – or if they do, they ignore it. They lock in decisions quickly when they favour mothers, but defer making father-friendly decisions in the hope that circumstances will change in favour of the mother. They routinely base their rulings on prevailing anti-male myths and stereotypes – an uncorroborated, self-serving allegation against a father being as good as proof. If family-court judges were judged by the same high standards to which they hold fathers, many of them would have to be stripped of their *parens patriae* authority for incompetence – even for outright dishonesty from the Bench. Judges are not up to the task of supplanting fathers, yet they presume to do it, anyway, as a matter of course.

## Judicial passivism

*Thieves for their robbery have authority*

*When judges steal themselves.*

*- William Shakespeare*

The preceding chapters have dealt principally with custody and support. But judges prove themselves to be deadbeats perhaps most routinely when it comes to the quotidian matter of enforcing access. It must be emphasized that visitation – to use a term that is more honest and therefore less in favour within the legal system – is every bit as much a right of the child as support is; and like support, it is a right that has been reduced to a court order by a judge. That is, a judge has already determined that it is in the child’s best interests to have contact with the father for the specified periods of time. Given the manifest biases of judges, the specifically ordered visitation is likely to be, at best, the minimal amount of time necessary to maintain a bond between child and father, so any denial of access poses a serious threat to that bond. One should expect, therefore, that judges would take access denial very seriously, being both a selfish refusal on the part of the mother to do what is in the child’s best interests, and a rebuke to the judge who made the access order in the first place.



There is certainly no excuse for being lenient where access denial is concerned on the ground that the law does not give judges adequate powers to enforce a father's contact time with his child. In Alberta, a whole division of the *Family Law Act* is devoted to the enforcement of contact time with the child. Section 40 gives judges the power to order:

- (a) compensatory time for access denied,
- (b) posting of a security that would be forfeited for failure to comply with a contact order,
- (c) reimbursement for expenses incurred as a result of the denial of time with the child,
- (d) monetary penalties for denial of contact time,
- (e) imprisonment for up to 90 days,
- (f) the assistance of police to enforce the terms of an access order, and
- (g) anything else that the court considers appropriate in the circumstances.

All provinces have laws creating similar enforcement measures. In addition, judges always have the common-law remedy of civil contempt for mothers who flout access orders. Ultimately, judges can even invoke s. 16(10) of the *Divorce Act*, which provides that:

In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.<sup>1</sup>

Where access denial is chronic, the law dictates that custody should be reversed in favour of the father, if he is more willing to facilitate contact with the mother than she has shown herself to be.

The above provisions are without doubt the most under-utilized laws in the family-law system in Canada. Jack Watson, who now sits on the Alberta Court of Appeal, has stated in open court that he does not consider it his job to “punish” mothers for denial of contact time with fathers.<sup>2</sup> Judges typically decline to award compensatory contact time on the ground that the time missed is now water under the bridge, and, bizarrely, that the child is too young – or too old – to benefit from make-up time, anyway. They always resist making mothers pay monetary penalties for access denial on the ground that it only takes money from the children. When refusing enforcement clauses in access orders, they say it would be “traumatic” for children to be taken away from their mothers by a police officer. They wonder who would look after the children if the mother were imprisoned for contempt. These arguments are exceedingly weak rationalizations for what amounts to civil contempt. The implication is that mothers are incorrigible and would not learn from experience if they were made to suffer the natural consequences of their misconduct once or twice. Sending mothers to jail on weekends when the father has access might be salutary in chronic cases of access denial. As for the “trauma” to children that might be a consequence of mothers flouting court orders with police

assistance clauses, it does not seem to occur to our esteemed judiciary that mothers who are that determined to alienate their children from their fathers should not have primary custody of the children in the first place.

Even when fathers meet with some measure of success on applications to enforce contact time, it is too often a pyrrhic victory. They typically spend thousands or even tens of thousands of dollars in legal fees in an attempt to maintain a meaningful role in the lives of their children, before being able to convince a judge that a remedy is necessary. By this time, their financial resources have been exhausted and they are unable to afford to do anything with the children involving extra expense on their access time. When mothers lose in court they are rarely made to pay court costs, again on the premise that this would only take money away from the children. But payment of penalties and costs is merely a transfer between parents, and only prejudice supports the proposition that fathers would be less generous toward their children than mothers, given the time and financial ability to do so. Nothing would bring recalcitrant ex-partners into line faster than having to pay the court costs of their ex who seek a remedy for the breach of an order.

To get a clear sense of the priorities of our family-dispute system, contrast the endless lame excuses judges use not to impose even the mildest of remedies for access denial with their brutal attitude toward making and enforcing child support orders. The contrast is especially stark considering that enforcing access against contemptuous mothers is very likely to be effective, whereas enforcing child-support obligations against dead-broke fathers is highly inefficient, even counter-productive. The courts seem determined to create deadbeats, in order to afford themselves a ready excuse to be increasingly harsh toward fathers who fight for a meaningful role in their children's lives.

A lot has been written since the coming into force of the *Charter of Rights and Freedoms* about "judicial activism" by Canadian courts – the creation of law by judges. Of greater concern for most separated fathers is the opposite tendency of our courts to ignore statutory provisions for the enforcement of parental contact time with the children – i.e. judicial passivism. When it comes to access denial, judges prefer to follow the principle that the apostle Matthew (25:29) attributes to Jesus: "To everyone who has will more be given, and she will have abundance; but from him who has not, even what he has will be taken away."

## When chivalry cohabits with feminism

*Biology is surely most deterministic for those who are ignorant of it.*

– Richard Alexander

This volume does not support a conspiracy theory. No suggestion is being made here that a corrupt marital-industrial complex has been consciously designed by its practitioners to separate fathers from their children as a means of separating parents from their financial assets. At the root of the problem is a confluence of two powerful yet equally misguided ideologies.

On one side are the waning traditionalists – mostly old men who earned their law degrees in the 1950s and '60s and who adhere rigidly to the age-old division of labour whereby the mother's role is bound up with hearth and home, and the father's role is bound up with provisioning and protecting the nest. On the other side is a nascent strain of feminist, who seek to give women absolute freedom of choice over the mix of family and work responsibilities that they wish to assume, without any interference or “control” from men. A conspiracy between old-school traditionalists and radical feminists whose goal is to smash the traditional nuclear family and replace it with a matriarchy is not a viable hypothesis. But when ancient chivalry can be dressed in the garb of modern feminism, professionals working to resolve family disputes get to indulge their atavistic instinctual preference for mothers, while feeling intellectually *avant-garde*.

The reason the pro-mother bias that pervades contemporary family law is such a tough nut to crack is not only that it represents a paradoxical confluence of ideologies. In this instance, self-interest reinforces the ideology. The divorce industry is comprised of a myriad agents who do very well off of the misfortunes and vulnerabilities of separated parents, including judges and lawyers, child counsellors and psychologists, custody assessors, social workers, forensic accountants and pension evaluators, support-collection bureaucracies, police officers, the various academic “experts” who critique and instruct lawyers and judges, and testify in court – and all of their support staff. Many of these agents are guilty of inflaming disputes between separated parents, as a means of making themselves “useful” and justifying their work. Every weakness in the existing system can be explained simply as an unintended consequence of ordinary self-interested actors operating on the basis of false ideologies. Because they tend to have done quite well by the existing system, the professional practitioners within it are largely blind to its faults, and are unwilling to consider alternatives that might reduce the demand for their own services. The current system has its constituency of professional beneficiaries who are eager to defend it, and to attack anyone who proposes radical change.

To say that judges harbour powerful, unconscious biases in favour of mothers is merely to say that they are human, the product of millions of years of evolution and a lifetime of socialization. For most of human existence, survival required women to spend a large part of their lives bearing and nurturing children. In the extremely hostile environments of our past, vulnerable mothers with children needed physical protection by men. Men therefore evolved powerful instincts to protect women, and women evolved powerful instincts to expect protection from men. Tribes that did not socialize their boys to follow those instincts did not survive.<sup>3</sup> Today, we still live with this psychological legacy of our evolution: men and women alike are far more attuned to the suffering of women and children than to the equal or greater suffering of men. The principle of putting “women and children first” was not invented on the Titanic; it has been a feature of human society since time immemorial. But these natural, innate sentiments are dysfunctional and out-dated in technologically advanced, pluralistic societies such as Canada. In the developed world today, women are not in need of special protection by men; here, the over-protection of women manifests itself in sexist favouritism, as the conditions of vulnerability that historically called for special protection of women no

longer exist. As Nathanson and Young (2001, 2006) document at length, women have enjoyed more favourable outcomes in the areas of education, employment, health, and the law for a generation or more now, yet they are still misperceived to be the gender in need of legislated preferences. The only way to combat powerful, subconscious biases that are the product of evolution and socialization is to bring them into consciousness where they might be disarmed by reasoned argument.

It is perhaps unsurprising that the legal system is caught in the grips of a reactionary over-correction in favour of mothers. The reason for focusing the attack of this chapter so pointedly at judges is not because they – or lawyers more generally – are a morally inferior caste of humanity. The point is that judges sit in a privileged place in society: they see every day the negative consequences of separation on children, and they can do something to mitigate it if they are open-minded and reflective enough to desire to do so. Nor are all judges alike in their hostility toward fathers. Some judges are much better, and try much harder, than others to be fairer to fathers. But even the best judges are burdened by the weight of precedent and handcuffed by the limitations of the impersonal system. One purpose of this book is to awaken the Canadian judiciary from their dogmatic slumbers.

## The least qualified branch<sup>4</sup>

*All in all, I'd rather have been a judge than a miner. And what's more, being a miner, as soon as you are too old and tired and sick and stupid to do the job properly, you have to go. Well, the very opposite applies with judges.*

- Peter Cook

If adjudicating family disputes were simply a matter of following established procedures – formalisms such as rules of court and rules of evidence – and if it required only the rote application of the black letter of statute law to settled fact scenarios, a mere undergraduate degree in law together with a few years of legal practice would be adequate for the job. But determining what is in the best interests of particular children with particular parents and a particular, often highly contested, family history involves, at a minimum, the exercise of objective and impartial judgment. Judging wisely must be conditioned by deep interest in and searching knowledge of sociology, child psychology, and of family dynamics. Considering the power and deference accorded to judges in our system of governance, considering the complexity and importance of the issues they are called upon to decide, and considering the tenure, pay and perquisites of the job, one would expect judges to be among the most highly qualified professionals in society. Certainly one would expect Appeal Court judges and Supreme Court judges to have spent a considerable amount of time acquiring an education and training commensurate with the job. Yet nothing in the education, training, or selection of judges gives them the requisite objectivity, interest, or knowledge to be the über-parents they presume to be. Indeed, the education, training, selection, and performance-evaluation of judges leads one to expect exactly the kind of misbegotten rulings discussed in this book.

## **1. Education:**

Judges at both the provincial and superior-court level typically possess only two undergraduate degrees. The first may be in any subject, but is unlikely to be related to an area of the law that a judge, some decades later, might be called upon to adjudicate. It is the rare judge sitting on criminal matters who has a degree in criminology, for example; and equally rare for a family-court judge to have an education in child psychology or child development. A typical judge's second degree, of course, is a three-year study of law. Appellate-court judges are somewhat more likely to have been drawn from the ranks of law professors, who possess a graduate degree in law; but few judges at any level of the system possess advanced qualifications in a subject outside of jurisprudence. Jurisprudence itself is not a rigorous discipline with a real subject matter; it is largely the preserve of wordsmiths who revel in the inventive chopping of logic to see how far words can be distorted beyond their normal meaning. An undergraduate education in the law is a generalist training. One scratches the surface of the basic branches – constitutional law, contracts, torts, and criminal law – together with courses on legal research, civil procedure, rules of evidence, and the like. Electives allow students to get a more advanced understanding of the four main branches, and to acquire some of the basics of other functional areas (such as environmental law, commercial law, or human rights law) that they might wish to practice upon graduation. But law school is best thought of as a proving ground, an accreditation that one is capable of learning the practice of law, rather than proof that one is an expert in any substantive discipline.

The generalist nature of a legal education is certainly a necessity given the millions upon millions of pages of specialized laws and regulations in any modern society – not to mention the billions of pages of case law interpreting them. Nobody could know more than a tiny fraction of statute law, much less the vast body of case law, the legislative history, and the substantive theory that underlies the law of every area. The single-minded devotion to the insular world of jurisprudence that is the hallmark of a legal education has its drawbacks. Judges almost universally lack a basic competence in science or statistics. In particular, their knowledge of social science and economics is marginal, and their understanding of ethical theory and political philosophy, where it exists at all, tends to naïve, out-dated, superficial, and ideological. Few if any Canadian judges would be able to follow a technical work like Millar (2009), much less give a competent critique of its strengths and weaknesses. The result is that judges are incapable of distinguishing reliably between ideological propaganda and sound social science, between fringe hypotheses and established theories. Even as recently as the 1990s, Canadian courts have embraced such items of junk science as recovered memories of childhood sexual abuse, and they still accept as proven the so-called battered woman's syndrome. These everlasting embarrassments should give judges pause before using the family courts to combat "patriarchy" and the "feminization of poverty" on behalf of women and children. The sophomoric pseudo-knowledge of judges, especially appellate judges, is a dangerous thing.



## 2. Training:

A judge's training consists mainly in the practice of law for some years prior to being appointed to the Bench. The practice of law is about the worst conceivable training ground for acquiring the skills and mind-set necessary for objectivity and impartiality. A lawyer is an advocate, who earns a living by indulging in partisanship, zealously pursuing a client's interests in the face of sometimes overwhelming evidence that there is no merit to client's case. This is fertile ground for acquiring the bad habit of confirmation bias. Criminal-defense lawyers come to believe that every accused is either innocent, or has an excuse, or committed the offence in mitigating circumstances; crown prosecutors come to believe that anyone who is accused or charged with a crime must be guilty of something.<sup>5</sup> Insurance-industry lawyers come to believe that personal injuries suffered in motor-vehicle accidents are often faked or exaggerated; lawyers representing claimants come to believe that injuries are, if anything, under-stated by clients and need to be embellished for the benefit of a judge who might not be sufficiently sympathetic. Practitioners of family law quickly absorb as if by osmosis the anti-male culture of family court: the prejudices, biases and stereotypes endemic to the system that have been exposed in the earlier chapters of this volume. This is a simple matter of survival; naively challenging judges in open court to consider how they would respond to the facts before them were the genders of the litigants reversed is likely to result in judicial rebukes and punitive awards against their male clients.

Lawyers quickly become inured to conflict and adversarial procedures; it is the normal mode of operation for them, and it is what earns them their fees. It is every citizen's right to make full use of the legal system as they see fit, and judges are not about to curb that right in the best interests of the children. The atomistic, individualist sensibility inherent in the adversarial contest impairs a judge's ability to see the separated family as a system in need of repairs that will allow it to function as a unit despite the fact that the children now have two homes. Female litigants who behave atrociously by all normal standards are treated with as much respect as male litigants who are sensible, compromising, civil, and interested in settling rather than fighting. Judges have infinite patience for the most obstructive and antagonistic behavior, at least when perpetrated by mothers, because this is their legal right.

The practice of law in this day and age requires specialization, often very narrow specialization. Most lawyers deliberately avoid family law, considering it to be the most unpleasant branch of this most unpleasant business. Yet judging in Canada remains a generalist occupation: every superior-court judge is assigned to adjudicate cases in every area of the law.<sup>6</sup> Since only a small fraction of superior-court judges practiced family law before being appointed to the Bench, they generally have no feel for the subject, no sensibility for the interests of children, and no sympathy for separated parents facing the most difficult and stressful time of their lives. Some superior-court judges do not even disguise how miserable they are when they have to sit in family court, being rude and abrupt and bullying with lawyers and parents alike. Lacking detailed knowledge of statutes and procedures specific to family law, let alone the vast body of case law in this area, judges tend to glom onto standardized practices regardless of the specifics of the individual case before them. Imaginative and innovative approaches to



problems are seen as risky and lacking in “authority,” the better to be avoided.

Few if any judges who adjudicate family disputes are capable of or interested in following, on their own initiative, the controversies and debates within the academic literature concerning family issues such as the importance of a father’s influence on a child’s development, or domestic violence.<sup>7</sup> Their limited education and counter-productive training for dealing with family conflict leaves them eager to settle for quick and dirty “backgrounders.” Enter the National Judicial Institute (NJI), which styles itself “an independent institution building better justice through leadership in the education of judges in Canada and elsewhere in the world.” Its Board of Directors is composed entirely of judges and law professors, making it both insular and self-serving. Its programs “focus on the three major components of judicial education: substantive law, skills training and social context issues.” The secret indoctrination of judges on “social context issues” is of greatest concern here, since it is impossible to disabuse judges in court of false notions they may have picked up from NJI programs when the programs themselves are not publicly available.<sup>8</sup> It is a travesty that impressionable judges are so easily swayed by the prevailing winds of political correctness and the ideological nonsense propagated by feminist legal professors hired to teach social context issues (Morton and Knopff 2000; Nathanson and Young 2006; Martin 2003).

### **3. Selection:**

Although the older cadre of judges in the twilight of their careers remain a product of a completely political selection process, superior-court judges are no longer appointed at the unfettered discretion of Cabinet (i.e., in effect, the federal Justice Minister). In recent decades, a semi-independent application process of sorts has existed. Lawyers who wish to be considered for appointment to the Bench must put their names forward by completing a form that lists their various qualifications and accomplishments and includes some letters of reference from members of the profession. These applications are vetted and ranked – highly qualified, middling, or unqualified – by politically appointed committees in each region of the country.<sup>9</sup> Any lawyer who has distinguished him- or herself by criticizing the profession or demonstrating an independence of mind is likely to be passed over. Although this secretive vetting process might eliminate the worst of the purely political appointments that have plagued courts at every level in decades past, the final selection of judges from the dozens of “qualified” candidates leaves the Justice Minister all the discretion necessary to appoint judges who share the ideological prejudices of the government of the day. The political nature of judicial selection can be illustrated by Sheila Greckol, who had been a labour and human rights lawyer in Edmonton. She had also been a vocal, life-long supporter of the NDP. However, for the federal election in November of 2000, she jumped ship to work for the re-election campaign of Liberal MP Anne McLellan. This is the same Honourable A. Anne McLellan who served as federal Justice Minister from 1997 to 2002. There is no reason to believe that there was anything exceptional about Greckol’s appointment to the Bench in December 2001.

Just as the political leanings of judges are badly skewed by the selection process, so are their personal attributes. Lawyers tend to be highly ambitious, type-A personalities, who are

preoccupied to the near exclusion of all else with climbing the rungs of the legal system: making partner in a law firm and checking off all the boxes lawyers are expected to accumulate in order to be considered “judge material.” This narrow and single-minded devotion to the law, involving long hours spent at the office, typically precludes the acquisition of a healthy and balanced understanding of what is involved in parenting children. Older male judges tend to retain from their developmental years in the 1950s or ’60s an impoverished view of what it means to be a father. They take the attitude that what was fine for them should be fine for every father who has the misfortune to appear before them in court, seeking to maintain a more meaningful relationship with their child. As a class, younger female judges are no better. If they have children, they will have relied very much on daycare providers, babysitters, nannies, relatives, and husbands to carry the parenting load.

The justices who sit on the Supreme Court of Canada must be willing to relocate their families to live in Ottawa. For their entire adult lives, everyone and everything must have been subordinated to their own ambitions. The impoverished view of parenting that this engenders is well illustrated by the following off-hand comment from Canada’s Chief Justice, Beverley McLachlin, speaking of her deceased first husband (Wente 1999):

He put his career on the back burner and put mine first... Rory did a lot of the child-rearing. Every time [their son] Angus had to go to emergency, it always seemed it was Rory with him. It liberated me to do other things.

The mind-set of the legal establishment in general, and of the judiciary in particular, is that parenting is a drudgery that involves “hidden costs” and no hidden benefits, from which one must be “liberated” in order to pursue a more exciting, more fulfilling, and more rewarding career.<sup>10</sup>

The point is not that McLachlin’s attitude is morally wrong, or ethically inferior. In a free, pluralistic society, judges must be permitted their own personal values, too. The point is that a judiciary which evinces this kind of an attitude is increasingly out of touch with the common man, who considers parenting to be life’s greatest joy and purpose (Kruk 2008; Braver 1998). A judge’s personal attitude about the place of parenting in life cannot help but colour their rulings in custody cases, most evident in their glib dismissal of parental rights. Most judges unreflectively assume that the primary care giver must be the mother, who has made a tremendous sacrifice for the children, for which she should be rewarded both monetarily and with effectively exclusive control of the children after separation, without the father’s “interference.” Judges are incapable of imagining why ordinary loving fathers might find this arrangement unfair. Judges cannot make objective and wise rulings when they cannot properly appreciate the circumstances and mindset of most of the litigants who come before them. Judges with a modicum of humility would not be so quick to assume the parenting role to other people’s children, dictating in detail their family life and finances. Ironically, fathers are expected to respect judges who learn their job as über-parent on the fly, even as those same judges refuse to give fathers an opportunity to learn to be more hands-on parents.

#### 4. Retention:

Once appointed to the Bench, judges enjoy secure tenure until retirement. They may elect to retire at any age between 65 and 75, and if they retire “early” they may serve as supernumeraries until mandatory retirement at age 75. Judging must be the only profession in the world where there is, by design, no regular review of job performance. Neither the salary nor continued employment of judges depends in any way on their ability to apply the law to the cases before them, on the number or the difficulty of the judgments they have delivered or written, on the number of legal citations or favourable academic commentaries accruing to their decisions, on the satisfaction with their decisions expressed by litigants or lawyers, on their service to the community, or indeed on anything else. As long as they show up for their appointed duties, judges may be as unpleasant, lazy or incompetent as you please and not risk their job security. Under these circumstances, it would be contrary to human nature for judge’s not to acquire bad habits over time.

Some members of the public naively believe that judges are held accountable by the Canadian Judicial Council (CJC). But the CJC does not consider complaints that a judge is unqualified, biased or incompetent in any ordinary sense. When judges misapply the law, no matter how blatantly or how comprehensively, the CJC responds summarily by pointing out that the litigant’s recourse is to appeal the decision to a higher court. The CJC only considers complaints about a judge’s “conduct” – what amounts to complaints of moral turpitude. Moreover, the CJC is composed entirely of sitting judges, who are hardly impartial adjudicators of complaints against members of their club. (CJC tribunals may sometimes contain lay members, though they are never a majority of the panel and are selected by CJC judges for their “understanding” of the judicial role.) This is why only a small handful of judges has ever been disciplined by the CJC.<sup>11</sup> The most common type of complaint that is received by the CJC each year concerns bias against men in family court. It is telling that no such complaint has ever been upheld.

Isolating judges from any meaningful performance assessment is mistakenly thought to be required by the sacrosanct constitutional principle of an independent judiciary. While it is not the purpose of this book to advance an extended argument for a better method of selecting and monitoring judges, the present criticism of the institutional design of the third branch of government would be hollow without at least a sketch of a superior alternative. The key to improving judicial performance generally, and for settling family disputes in particular, would be to allow the litigants themselves to select the judge who adjudicates their case. This is a method commonly used in private arbitration. The first positive effect of allowing litigants to choose the judge who decides their case would be a tendency toward specialization. Those judges with a reputation for being more interested in and knowledgeable about family matters would tend to be preferred by parents, while those with other interests and aptitudes would have to seek work from other types of litigants. The second positive effect would be to weed out those judges who are perceived to be most unfair to fathers, or to mothers. Since each side could veto any judge (until only one judge in the pool was left), judges wishing to get work adjudicating family disputes would have to earn a reputation for being fair and impartial. They

would have to write coherent reasons for every significant decision they make to demonstrate continually their competence and objectivity. In this system, a judge's remuneration would depend upon the number and complexity of cases he or she was selected by the public to handle. Judges who were perceived to be unfair or incompetent in the adjudicative role would soon be out of work and would have to be replaced by other candidates who would seek the patronage of litigants by demonstrating their own qualities in their judgments.<sup>12</sup> In this way, the market for adjudicative services would lead to a continual renewal and invigoration of the judiciary, while providing a democratic check on this branch of government. It would in fact be a superior method of assuring the independence of the judiciary from political interference because politicians would no longer have a role in appointing judges.

Respect cannot be given; it must be earned. Judges cannot command respect any more than tyrants can. What they can – and do – command is deference, which they typically mistake for respect. It is pointless to argue that the public must “respect the office of the judiciary,” even if they disagree with the judicial application of the laws. The single-minded devotion to the insular world of jurisprudence that is required to become a judge, together with the genuflecting deference that custom requires in court, produces judges who necessarily possess only a superficial understanding of the subject matter of the disputes they adjudicate and yet great self-assuredness in their own abilities to pronounce upon them. This combination of enforced deference and limited knowledge is dangerous. Judges with a modicum of humility and an appreciation of their own limitations – and the limitations of the system – would not be so quick to parent other people's children and to dictate their family life and finances.

## Systemic limitations

*Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood.*

*- Warren Burger*

The legal system is not set up to deal with the kinds of disputes typically encountered when parents separate. It is best suited to cases where a significant wrong or harm is alleged to have been committed at a fixed time in the past, where there is no urgency to investigating the facts of the case, and where the issue can be settled once and for all at a trial. Family disputes, by contrast, are about the best interests of the child, and typically involve no allegations of wrong-doing or harm, at least not of a criminal or tortious nature. Insofar as wrongs such as the under-payment of child support and access denial are alleged within the context of a family dispute, they are often too minor to justify the expense of litigation on an instance-by-instance basis. The formal legal process is so cumbersome and time-consuming that it is usually impossible to rectify the kinds of harms encountered in family disputes in a timely manner, much less prevent them in anticipation. Most family disputes are best handled “on the fly,” with whatever evidence is available at the time the dispute arises. Rather than rectifying a wrong in the past, the objective of family law is to set the parties on a favourable path into

the unpredictable future. This requires judges to hit a moving target, as change is constant for separated families: children's needs change as they age; parents form new partnerships and acquire new families, commence different employment, and move to other neighbourhoods or cities; and exogenous variables such as housing prices and medical emergencies can play havoc with even the best-made plans. It is folly to think that a judge, even after a lengthy trial, can settle custody, access, and support issues once and for all time. Family disputes require an entirely different skill set – more the skills of a mediator than an adjudicator.

Judges of course prefer to blame parents for the problems they encounter after separation. Brownstone (2009: p. 1) begins his defense of family-court judges by frankly and obligingly acknowledging some of the systemic defects in the system:

After more than 14 years presiding in family court, one question has never ceased to amaze me: how can two parents who love their child allow a total stranger to make crucial decisions about their child's living arrangements, health, education, extracurricular activities, vacation time, and degree of contact with each parent? This question becomes even more mind-boggling when one considers that the stranger making the decision is a judge, whose formal training is in the law, not in family relations, child development, social work or psychology. Now add the fact that, due to heavy caseloads and crowded dockets, most judges have to make many child custody, access, matrimonial property, and support decisions every day on the basis of incomplete, subjective, and highly emotional written evidence (called *affidavits*), with virtually no time to get to know the parents and no opportunity to meet the child whose life is being so profoundly affected. What person in their right mind would advocate for this method of resolving parental conflicts flowing from family breakdown?

The answer to the rhetorical question at the end of this passage is obvious: nobody in their right mind advocates for this method of resolving parental conflicts. Yet, as we shall see in a subsequent section, the *status quo* has many powerful defenders among politicians, lawyers, and judges. (The reader is invited to draw the inference.)

Given these manifest systemic limitations, why do parents continue to resort to judges, according to Brownstone? He tendentiously observes that “the vast majority of couples who break up manage to settle their affairs, including the custody and access arrangements for their children, without ever setting foot in a courtroom” (*ibid*, p. 2).<sup>13</sup> The difference between this class of parent and those who clog the courtrooms, he claims, is “maturity” (*ibid*, p. 3). That is, mature parents settle amicably, while immature parents squabble endlessly in court over every detail.

In the context of a relationship breakdown, being mature means loving your children more than you dislike your ex-partner. Being mature means caring enough about your children that you will force yourself to deal in a civilized way with someone you may hate... Being mature means putting your children's needs ahead of your own. It means truly understanding and accepting that your children are entitled to love and be loved by both of their parents. It means giving your children emotional permission to express



and receive that love, even though you and the other parent dislike each other. Being mature means being willing and able to reach compromises so that your children can have peace rather than be caught in a tug of war and conflict of loyalties. Being mature means recognizing that you can be an ex-partner but you are never going to be an ex-parent. True maturity requires parents to appreciate that children need both parents in their lives, working cooperatively to make the best possible decisions for their upbringing. (*ibid*, p. 4)

These are welcome words of wisdom, to be sure. The crux of the issue is that they are more honoured in the breach by the same preachy judges who utter them.

Following Brownstone's ostensive definition, family-court and appellate judges are the most immature players in family courts. Because of them, the legal system remains bound to the thoroughly discredited primary caregiver theory of child development. Because of them, the presumption of shared parenting gains no traction, as judges acknowledge in their rulings little use for fathers beyond their income-earning potential. Judges are the ones who lack the insight to recognize that children need *both* of their parents to work cooperatively; judges are the ones who routinely make stereotypical, gender-biased rulings, pretending they have carefully weighed all of the relevant evidence to decide what is in the best interests of the child; judges are the ones who practice the alchemy of turning loving fathers into ex-parents, largely by neglect (i.e. refusing to discipline mothers who disrupt visitation) but too often by active involvement (i.e. by permitting the mother to relocate the children a substantial distance from the father); and judges are the ones who ignore the wishes of the parent most willing to compromise, opting instead for winner-takes-all awards to the most uncompromising of the parents. Judges seem incapable of practicing the simplest of thought experiments to check their own biases: they cannot ask themselves how they would rule were the genders of the parents reversed. If judges demonstrated more of the "maturity" that Brownstone longs to see in the litigants who appear before him, much of the problem would be solved.

The reality is that the vast majority of mothers who appear in family court want and expect to "have it all" – primary custody of the children, an equalizing share of the father's income, and exclusive possession of the matrimonial home. Their lawyers, citing abundant case-law precedent, do nothing but encourage them to believe they will get it. The adversarial culture of the legal system makes compromise impossible for fathers, the vast majority of whom would be perfectly content with sharing parenting equally.<sup>14</sup> The reality is that mature fathers comprehensively lose under the rules of engagement of the current regime, whereas mothers whom Brownstone implies are immature routinely win.<sup>15</sup> The primary reason the majority of separated parents do not step into a courtroom is that the majority of fathers pre-emptively exercise their Solomonic wisdom by not putting their children through an acrimonious court battle that risks cutting their loyalties in half. Most fathers opt not to subject their family to the judicial despoilage on exhibit in this volume, acquiescing instead to their presumptive subordinate role. It is harsh indeed to blame the few fathers who refuse to give up on their children for the legal "tug of war" that ensues. Fathers are damned if they do fight for their children, and damned if they don't. Brownstone is so immersed in the system, he cannot think



outside the box; he cannot appreciate that the adversarial legal system was not designed to produce harmonious and cooperative parents and functional families after separation.

It is possible in this section only to touch on the limitations of the legal system in broad strokes. On this subject, the devil really is in the details: you have to be an experienced practitioner of family law to understand fully how counterproductive the adversarial, winner-takes-all legal system is in dealing with family disputes. The theoretical and practical limitations of the legal system resulting from the exorbitant costs it imposes on parents have been explored in previous chapters; however, one further consequence must be noted in the present context. Lawyers these days normally charge hundreds of dollars per hour: \$250 to \$300 per hour is average for garden-variety family lawyers. Between both parents, even the simplest of chambers applications cost thousands of dollars. Little wonder that the Chief Justice of Canada has been crisscrossing the country for a decade now decrying the scourge of self-represented litigants clogging the family courts. Self-represented litigants regularly come to court having not followed established legal procedures, having chosen inappropriate or incomplete procedures, unaware of the range of options available to them, unfamiliar with the relevant case law, and generally unprepared to deal with the complexities of the issues they wish to address. To a large extent, the problem resides not with the parents, who often have a fairly sophisticated sense of their own child's best interests and are articulate enough to explain the situation in layman's terms. (A large proportion of parents are as well educated these days as the judge they appear before.) The problem resides in the system, which has so many overlapping and sometimes conflicting layers of written and unwritten procedure – provincial rules of court, practice notes developed by regional judges, conventional formalisms, rules of evidence – and law – constitutional, statute, case-law, and common-law – as to make legal representation difficult even for lawyers who do not heavily specialize in family law. Moreover, family-court procedures and case law are constantly being revamped and tweaked.<sup>16</sup> The ancient Greek philosopher Heraclitus stated, "You can never step twice into the same river, for other waters are continually flowing on." Likewise, you can never step twice into the same family court, for other judges, statutes, procedures, and case law are continually flowing on. This constant state of flux is a boon to lawyers, but has nothing else to recommend it.

## Out of the morass

*[Fatherhood is] The **real** love that dare not speak its name.*

*- Bob Geldof<sup>17</sup>*

In an earlier section, a radical transformation of the family-dispute system was suggested whereby judges would be selected by the litigants themselves to adjudicate their case. Such a transformation is both legally and politically fraught with difficulty. It is a very long-term solution. However, the manifest limitations of judges and the legal system for dealing with family disputes argues powerfully for removing them from courts as much as possible. Before he became a politician, Ignatieff (2000: p. 110) had recognized the merits of this proposal:

Families that divorce need help so that parenting responsibilities can be genuinely shared, not reluctantly conceded in rigid custody-and-access schemes that end up dividing children from their parents. We need to create new cheap and efficient institutions that mediate family conflict instead of impoverishing families with exorbitant legal costs.

A modest step in this direction, which would not require any change to the laws nor any new bureaucracy, would be for judges to order parents to choose a mediator and attend open mediation early on in the litigation process. (The concept of open mediation was explained in chapter two.) More radically, family disputes that fall short of involving criminal conduct should be removed from the legal system and dealt with by specialized tribunals staffed with experts in disciplines relevant to the functioning of families.<sup>18</sup> At a time when nearly half of all children experience the separation of their parents before they reach adulthood, setting up mediation and arbitration services specifically aimed at the needs of separated families should be a no-brainer.

Of course it would be pointless to set up specialized tribunals that mediate and arbitrate family disputes if they merely replicated the anti-father biases in the application of the law that prevail in our legal system. The fundamental change that is most needed is to enshrine the principle of shared parenting front and centre in the law governing family disputes. The purpose of mediation and arbitration in family tribunals must be limited to finding ways to make shared parenting work in as many cases as possible; and where this is not possible, to grant primary custody to the parent most willing to accommodate the participation of the other parent in the child's life. Again, in his pre-political, academic life, Ignatieff (2000: p. 105-6) hit the nail on the head:

...this crisis is too complex to be blithely blamed on “deadbeat dads” alone. In hearings before a parliamentary committee in Canada in 1998, groups of fathers bitterly complained that they were bearing the brunt of public blame for what has happened to the family. In fact, they claimed that they were discriminated against. Courts were favouring mothers over fathers in custody disputes, and the divorce process was being abused by lawyers despoiling working men of their assets. These groups demanded that the “custody and access” regime created by the *Divorce Act* of 1985 be replaced with a “shared parenting” regime in which both parents were given equal rights to bring up their children. These are sensible and overdue suggestions, and the fact that they're being made shows that men and women are struggling to correct the rights revolution, so that equality works for everyone.

The only thing Ignatieff can be faulted for is his optimism – something his political career has presumably cured him of since writing this passage. The rights revolution has a long way to go before it can be said that “equality works for everyone” in family law.

The way to promote the best interests of children, paradoxically, is to give both of their parents strong presumptive rights to care for them more or less equally in the event of a separation, and where conflict is irresolvable to side with the parent who is most cooperative and creative in finding solutions to the practical problems that inevitably arise in shared parenting arrangements.

Actually, this is not really so paradoxical at all. To return to the analogy with property rights: The way to ensure the best long-term use of resources is not to set up a Central Committee that decides how each and every asset is to be used on every given occasion and by whom; rather, it is to protect individual ownership and to uphold contracts, so that those most intimately connected to the resource can reap the rewards of their good stewardship. Although situations arise every day where we are inclined to think owners demonstrate poor stewardship of their property, any “solution” that significantly undermines the institution of private property ends up producing even worse outcomes, for reasons that are well understood in the economic literature. Likewise, although situations arise every day where we are inclined to think that parents demonstrate poor stewardship of their children, any “solution” that undermines the institution of the family, and in particular one or other of the parental roles, ends up producing even worse outcomes, for reasons that are well understood in the psychological literature. Security of tenure as a parent should play the same legal role for children as security of tenure for private property plays in the economic realm.

## When pigs fly

*A client twixt his attorney and counsellor is like a goose twixt two foxes.*

– *proverb*

In June 2009, Conservative MP Maurice Vellacott introduced a private-member’s bill calling for the presumption of shared parenting after separation in cases not involving abuse. This bill was a topic of concern at the Canadian Bar Association’s annual “Legal Conference and Expo,” which was held in Dublin, Ireland, that August. Federal Justice Minister Rob Nicholson addressed the meeting. When asked, with typical lawyerly neutrality, “Will you stand up for children and oppose this private member’s bill,” he responded, “I believe... that the best interests of the child are always paramount, ... and should be.” This response was greeted with applause and cheers.<sup>19</sup>

There could be no better endorsement of the presumption of shared parenting than to be opposed by a room full of high-flying lawyers. Make no mistake: lawyers have an enormous personal stake in perpetuating a system in which custody disputes are long, bitter, and endlessly arguable. Family law is a multi-billion dollar industry, and as one judge has said, “a justice system that permits plunder of that nature, particularly when children are involved, is in desperate need of overhauling” (see endnote 15 of chapter 2). In this age of no-fault divorce, separation is not a matter for civil litigation; it is not an exercise in proving fault and toting up damages. A separation involving children is a social problem, a problem requiring a whole different skill set than that offered by lawyers and judges. Separations call for mediation, family therapy, and sometimes individual counselling and financial advice. A lawyer’s skill-set adds no marginal value to the situation; arguably, lawyers do little in most cases other than to inflame antagonisms and add costs. In most cases, the marginal contribution of lawyers to the child’s interests is negative.

One could perhaps believe the sincerity of lawyers who support the best-interests principle if they would also endorse beefing up the professional codes of conduct of their provincial law societies so as to require them to advocate solely for the child's best interests in family matters. But that will never happen; by long tradition, the loyalty of a lawyer is owed to the one who pays his or her account. Promoting the child's best interests, rather than following the instructions of their client, is a principle more honoured in the breach by the legal profession. Judges, too, could not care less when lawyers bring frivolous applications to court, mislead the court in family disputes, cause delay and expense to the parties, and generally make it as difficult as possible for the best interests of the child to be known.

Law societies will never change their codes of professional conduct so as to put the interests of children first in family disputes, ahead of serving a client's interests, because inevitably they would be flooded with complaints against their members if they did so. Just as the best-interests principle provides no judicable standard for deciding custody disputes in court, it provides no judicable standard for assessing the conduct of lawyers acting on behalf of parents. Thus, law societies would quickly become embroiled in the same endless disputes involving parents that lawyers applaud at their annual confabs. The last thing lawyers want is to be caught up personally in the kinds of disputes they make a living at promoting between members of the public. If the best-interests principle is not a good enough standard for lawyers to be held to, then it is no better as a standard for lawyers to be arguing over in court.

# Conclusion

*The fault, dear Brutus, lies not in our stars,  
But in ourselves, that we be underlings.*

– William Shakespeare

It is a commonplace of conservative ideology that the nuclear family – father, mother, and children – is the fundamental unit or building block of a healthy society. But one does not have to be ideologically conservative to accept this obvious truth. In fact, the primacy of two-parent, biologically related families is a product of millions of years of evolution, which has finely honed this functional unit for survival. That is why most people react in horror to the idea of raising children from birth in professionally staffed, scientifically calibrated, cradle-to-adult facilities typical of utopian literature going back at least to Plato's *Republic*. Children do not flourish in sterile, rationalistic settings like these; they flourish within families characterized by particularized and strong emotional bonding. Neither do people beget children out of the abstract contemplation that children should be well looked after. People have children so that *they* will be able to look after *their* particular children as well as *they* are able, by *their* own lights. And it is a good thing that they do, because this innate, unconditional emotional attachment is just what children need to flourish. Denying that that attachment matters for what amount to reasons of mere expediency is bound to play havoc with the psychology of fathers and children alike.

Once the family-dispute system has denied basic human motivation to fathers, it is easy to visit the most intrusive indignities upon them with equanimity – indignities that would never be visited upon mothers, or upon parents who cohabit. It is easy to attach labels like “bitter” and “deadbeat” when fathers react in predictably human ways to these indignities. Given the biological and psychological imperative that children represent to most people, the surprising thing is not that there are a few post-separation murder-suicides each year in Canada, or – much more commonly – that some fathers kill themselves in the face of having their lives destroyed by the family-dispute system. No, the surprising thing is that there are not many more such tragedies – and more violence committed against lawyers, judges, and custody assessors who are so instrumental in ruining the lives of so many fathers each year.



## Appendix

### ***The Worst Interests of the Child***

The most consistent refrain heard in opposition to the legal presumption of shared parenting is that judges need unfettered discretion to make rulings that are in the child's best interests: children deserve nothing less, and parents are entitled to nothing more. As noted at the beginning, the arguments presented in this volume tend to be "theoretical" in nature. Many readers who are unfamiliar with the workings of the legal system might find it difficult to believe that judges are as incapable of crafting nuanced rulings based in the specific facts of the case before them as these arguments imply. An entire second book of actual case studies aimed at disabusing readers of that notion is contemplated. Meanwhile, it is helpful to offer a foretaste of what is yet to come by way of a very brief summary of a few cases that attained media attention in recent years. The first four cases expose how judges deal respectively with behavioural, health, and educational issues—plus a final case that has it all. Indeed, if the Canadian judiciary had read and absorbed the correct lessons from the report of the Zachary Turner inquiry (Markesteyn 2006), perhaps this treatise would be unnecessary. A fifth case illustrates starkly how extreme the pro-female biases are at every level of the legal system. The final case deals with the somewhat tangential issue of spousal support, which nevertheless illustrates perfectly the anti-male biases of family-court judges. For a layman's valiant attempt to expose the dysfunctionality of the family-dispute system, see Tansley (2007).

### **Exhibit A:**

#### ***Judging risky behaviour***

The Mom and Dad, residents of Gatineau, Quebec, were divorced in 1998. Their daughter was only two years old at the time. Over the course of an on-going custody battle, Dad ended up with sole custody. This highly unusual outcome begs the inference that there was something manifestly deficient in Mom's ability to parent or co-parent.

Trouble arose in the early part of 2008, when the daughter repeatedly disobeyed Dad's rules about accessing internet chat rooms that he deemed inappropriate for a girl her age, and posting salacious pictures of herself there. When Dad attempted to block her access to the internet at home, she circumvented this by using a friend's computer. As a last resort, Dad grounded the daughter, telling her that she could not go on the traditional year-end camping trip with her Grade 6 class.

The daughter responded by turning to Mom, who was evidently more lenient about trolling the internet. Since Dad had legal custody, the daughter still needed his consent to go on

the school camping trip. To circumvent this, Mom convinced the daughter's court-appointed lawyer, Lucie Fortin, to take Dad to court to dispense with his consent. Suzanne Tessier was the duty judge appointed to hear the application. She granted the relief sought. All three of these women accepted the 12-year-old daughter's view that her Dad's discipline was excessive.

You be the judge. Bear in mind that in the same week as this story broke the media were abuzz with reports of the guilty plea of Vincent Duval, a 31-year-old Belgian man who had been caught in a hotel room in Montreal with a 13-year-old girl he had lured into a relationship over the internet. In the context of ubiquitous police warnings and media frenzy over predatory pedophiles that followed Mr. Duval's arrest, it is safe to say that if Dad had permitted his daughter to access internet chat rooms and post salacious pictures of herself, there is a very good chance Mom would have been successful in an application to have custody reversed due to his negligence. Damned if he is too harsh; damned if he is too lenient: a custodial father has to tread an impossibly fine line.

Reasonable people may differ over what constitutes excessive discipline, or what alternative measures might have worked more effectively. Details in public accounts are too sparse to know exactly how risky the daughter's internet escapades might have been, or what alternative punishment the judge might have ordered to try to curb her risky internet use. Still, nobody was in a better position to judge these things than Dad, who had day-to-day and face-to-face contact with his daughter. Certainly the meddling Tessier would have been in the poorest position of anyone to judge the appropriate disciplinary measures, given that she would have had only brief and conflicting affidavit evidence to go by, and no personal knowledge of the daughter at all.

There is a larger issue here than the quality of Tessier's judgment as a parent. The larger issue is whether judges should arrogate unto themselves the authority to substitute their opinion for that of the custodial parent's judgment when it comes to disciplinary measures that fall far short of being abusive. We do not have to agree with the discipline meted out by parents to accept that they properly have the authority to discipline their own children as they see fit—and to recognize that meddling with their decisions by absolute strangers is the surest way to undermine parental authority.

When children are encouraged by lawyers and judges to play parents off against each other, and take them to court whenever they do not agree with their decisions, the institution of parenting is irreparably damaged. It is difficult enough for parents to discipline children in today's permissive and temptation-filled *milieu*; judges should not encourage children and their lawyers to run to court to fine-tune parental decisions whenever a disagreement arises.

A gender-neutral application of the principles enunciated in leading case authorities might have stood Tessier in good stead. In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, the custodial mother sought to relocate with the children to Australia, against the wishes of the father whose access would have been severely attenuated by the move. In deciding that the move was in the best interests of the children despite its impact on their contact with their father, Canada's top court stated that "the custodial parent's views are entitled to great respect." If a custodial

mother's decision to excise a father from the lives of their children by moving to the other side of the world is entitled to "great respect," surely a custodial father's non-abusive disciplinary measures, aimed at curbing clearly risky behaviour, are entitled to a modicum of deference by the courts.

Our favourite high-court feminist, L'Heureux-Dubé, was even more emphatic when she spoke for the majority in *Winnipeg Child and Family Services v. K.L.M.*, [2000] 2 S.C.R. 519, at ¶72: "The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit." Of course, this was a case where authorities apprehended a child at risk from her mother. Collectively, the decisions of Canadian courts stand for the proposition that a mother's wishes are entitled to "great respect," whether she is the custodial parent or not. In sharp contrast, a father's judgment, even when he is the custodial parent and his decisions are completely reasonable, is to be accorded no deference at all by our meddling judiciary.

*Addendum:* Dad appealed Tessier's ruling to the Quebec Court of Appeal. In a promising clarification, the Appeal Court stated that tribunals should not be a forum for children who want to dispute parental punishment unless their health, security or education is imperilled. Since the daughter's health and security were imperilled by her risky use of the internet, and the punishment had no impact on her formal education, one might think that the appeal was a slam-dunk for Dad. Nevertheless, the Appeal Court managed to side with Mom, anyway. One of the most frustrating aspects of family law is that, even after enunciating sound principles, judges get the result obviously wrong by failing to apply the principles to the case in a reasonable manner. In this case, the Appeal Court said that what should have been a daily parenting decision grew into a major conflict, and the daughter was right to ask the courts to intervene since her parents could not agree. (Kids: if you don't like the punishment, simply escalate the conflict.)

Kudos go to Dad's lawyer, Kim Beaudoin, who had the rare courage and rectitude to state publicly that she was ashamed to be a Quebecer as a result of this decision. "I can't believe we let a child do this," she said, adding, "It doesn't reflect my values, and I think it doesn't reflect the values of our society." Such an independent and "disrespectful" attitude will not sit well with a judiciary that is as exquisitely sensitive to internal criticism as ours is.

*Sources:* "Father of girl, 12, appeals Quebec court decision overruling parental punishment," *National Post*, June 18, 2008; Lorne Gunter, "Court says no to sensible parenting," *Edmonton Journal*, June 22, 2008; *National Post* editorial, June 21, 2008; "Quebec father sued by daughter over grounding loses appeal," *National Post*, April 8, 2009.

## Exhibit B:

### *Judging health concerns*

Robert and Lisa had twins—a boy and a girl—in 1998, before separating in 2000. Custody of the twins was hotly contested from the date of separation until February 2008, when a judge in Newmarket finally assigned custody to Lisa after a trial. The main bone of contention at the trial, and in the years preceding it, was the weight problems experienced by the children. By the age of two, the boy had been diagnosed by Dr. Glenn Berall, chief of paediatrics at North York General Hospital, as “morbidly obese;” the girl was merely “overweight.” They were prescribed a course of treatments, including twice-weekly weigh-ins.

Dr. Berall, who styled himself an advocate for the children in court, observed that “consistently, with rare exceptions, the children lost weight under the care of their father and consistently gained weight, with rare exceptions, under the care of their mother.” But the judge preferred Lisa’s self-serving and non-expert opinion that Robert was obsessive and negative about the children’s weight, and that they were happier and well-adjusted when with her. One might reasonably wonder what child isn’t happier with the parent who is most lenient—even if the leniency endangers their health and their very lives. One might naively ask if protecting children from their own destructive impulses isn’t part of parenting anymore.

As puzzling as this case might be taken in isolation, it is downright strange when seen in the context of other recent cases that deal with childhood obesity. In one such case, the Ontario Children’s Aid Society apprehended a child after determining that the mother was contributing to her child’s weight gain and was oblivious to the required medical regime. The judge in that case sided with the CAS in removing the child from the mother’s care, citing obesity as the reason.

In related news, an Australian study headed by Professor Melissa Wake found that preschool age children are more likely to have a higher body mass index (BMI)—an indicator of being overweight or obese—when their fathers are either permissive or disengaged parents. Children of fathers who are classified as “authoritative” tend to have a lower BMI. There may be some aspects of parenting that fathers are just naturally more adept at, despite the “social context training” judges receive that would incline them to see this as merely “controlling.”

*Sources:* Anne Marie Owens, “Obesity new factor in grading parents: Children’s diets key issue in custody case,” *National Post*, March 3, 2008; “Obesity linked to dad’s parenting style,” *National Post*, Dec. 18, 2007.

## Exhibit C:

### *Judging educational benefits*

The issue was which elementary school a child should be enrolled in. The father wanted the child to attend the school the parties had previously agreed upon. According to him, the child would be able to develop his artistic abilities and musical talent there, and would be with several friends from daycare who live in the same neighbourhood as he does or who take swimming lessons with him. The mother wanted to send the child to the same school as his older half-brother. In her opinion, that would permit the child to grow up in the same school environment as his half-brother, thus bringing him a measure of stability.

The Superior Court held that fostering the fraternal relationship is preferable to placing the child in an academic program suited to his aptitudes and in which he would be with several friends, and it accordingly authorized the mother to register the child in the school she favoured. The Court of Appeal granted the mother's motion to dismiss the appeal on the basis that it had no reasonable chance of success, and the Supreme Court of Canada dismissed the father's further appeal.

One might wonder how this decision takes into account this child's individual interests and aptitudes. According to the initial agreement, both parents at one point recognized the child's special aptitude for arts and music. The fact that he had an older brother certainly did not change—it was not something new that the mother could not have factored into her earlier agreement. Moreover, how much “fostering of the fraternal relationship” would take place at school, given the age difference between the two boys? And what prevents the boys from developing their fraternal bonds while in the mother's care and control, as nearly all siblings do as a matter of course? This case bears all the marks of a decision that was arrived at by careful observation of parental gender, and then crafting a nuanced argument to justify giving preference to the mother's wishes.

*Source: F.H. v. A.-C.L. (Quebec C.A., March 22, 2010).*

## Exhibit D:

### *The Shirley Turner Story*

**Zachary was in the care of his mother when he should not have been. I reach this conclusion, not on hindsight—which is obvious to all—but based on information which could have been known, if investigated, by the parties responsible for Zachary.**

*- Peter H. Markesteyn*

Shirley Turner was born in Kansas to a Canadian mother and an American father on January 28, 1961. From 1968, she was raised by her mother and a step-father in Newfoundland, in an underprivileged environment. Andrew Bagby was born in California to a British mother and an American father on September 26, 1973. He had had, by all accounts, a wonderful childhood.

Shirley met Andrew at the Medical School of Memorial University, in St. John's, Newfoundland. They began an intimate relationship in the Spring of 1999, which sort of continued as each pursued their medical careers in the U.S., even though residing about 1,000 miles apart. Unbeknownst to Andrew, Shirley conceived a child by him on October 20, 2001. On November 3, Andrew ended the relationship. Two days later, Shirley murdered Andrew, and shortly after fled to Canada. On July 18, 2002, Shirley gave birth to Zachary Andrew Turner. On August 18, 2003, Shirley murdered Zachary by drowning in the Atlantic Ocean.

An investigation was ordered by the government of Newfoundland into how the systems responsible for the safety of Zachary had failed. The investigation was headed by Peter H. Markesteyn, M.D., F.C.A.P., with the assistance of David C. Day, Q.C., as legal counsel. Although they had less authority to gather evidence than the relevant public authorities had while Shirley Turner was undergoing the extradition process for the murder of Andrew Bagby, their report comprises three long volumes. The chapter detailing the history of the case runs to some 450 pages.

Dr. Markesteyn's report should be required reading for all professionals dealing with children. If its lessons had been widely disseminated and fully appreciated, there might be little need for this book. Like this book, it is "a chronicle of unpalatable truths freighted with public and professional controversy." It has only two defects. First, to protect the incompetent, Dr. Markesteyn declined to name any of the public officials involved—Crown prosecutors, judges, social workers and administrators, and police officers. Second, to cover ideologically based government policy, Dr. Markesteyn declined to provide a gendered analysis of the events. This summary attempts to avoid those defects, insofar as possible.

Shirley Turner had four children from three different fathers. The eldest was a son born in 1982 with her first husband. The second was a daughter born in 1985, also with her first husband.



The third was another daughter, born in 1990, to her second husband. Zachary was her fourth child. In between, there had been abortions and miscarriages, or at least alleged abortions and miscarriages. (Claiming to be pregnant was a tactic Shirley frequently used to gain sympathy or some other leverage in her dealings with others.) From early on, Shirley accumulated a public record of child abuse and neglect, including:

- In October 1993, a boarder who had been renting living space from Shirley found the experience so unpleasant that he moved out and filed a complaint with the child-protection authorities alleging, among other things, that Shirley struck her children (mostly her elder daughter) in the face. This complaint was investigated and confirmed by the children. The file was closed in January 1994 without the authorities ever speaking to Shirley.
- When Shirley began medical school in 1994, she left the two older children with their paternal grandmother and the younger child with her father, who lived in remote parts of Newfoundland. In September 1995, she brought the children with her to St. John's. This arrangement lasted until February 1997, at which time she obtained a divorce from her second husband and was granted custody of her younger daughter. Within days of obtaining legal custody, she delivered the children back to the paternal grandmother and the father claiming that parenting is incompatible with her continued medical education. (At least part of the motivation for having the children with her in St. John's was to obtain financial assistance from welfare agencies, and greater amounts in student loans. She obtained substantial over-payments by claiming that the children were living with her when they had not been. She was never held accountable for these frauds against the public purse.)
- In 2000, her son began studies at Memorial University in St. John's. He had to finance his education entirely on his own, as Shirley had spent the college funds she had set aside for the children from their "baby bonuses" on her own education. In fact, Shirley never paid child support for the children—even when her income was for a time \$171,000 U.S. Also in 2000, after another violent incident with her 15-year-old daughter, Shirley consented to having her live and go to school in Ontario, where she had developed an internet relationship with a boy. According to Dr. Markesteyn, this would have been grounds for the child-protection authorities to intervene, but they did not. Shirley frequently used her children as excuses for missing school and work, even when they were not in her care. Her parenting was exercised to meet her own needs rather than the needs of the children.

In addition to having instrumental and conditional relationships with her children, Shirley also had a documented history of highly abusive and manipulative relationships with men. If she were a man, she would be described as "controlling," or possibly even a "dangerous offender." Her first marriage was a proverbial shot-gun wedding, after she became pregnant. While living with her first husband, she had a clandestine affair with a previous boyfriend. She eventually divorced her first husband and married the boyfriend, whom she also left, in order to pursue university studies. She used her ex-husbands and their relatives for child care whenever it was convenient for her.

In March 1996, Shirley commenced a relationship with a man 9 years her junior. He tried to

end it a few months later when he moved to a remote part of Newfoundland, but as soon as he obtained a phone at his new residence she began harassing him with calls. This continued until November 1997, when he moved to Halifax. The marathon telephone calls continued there, as well as unannounced visits by Shirley. After her school term ended in July 1998, Shirley appeared at his door uninvited. He made the mistake of allowing her in, and she refused to go. Apparently feeling sorry for her, he did not summon the police. On one occasion that summer, he was violently beaten by Shirley with an object. On another occasion, he had to take her to the hospital where she was admitted for psychiatric treatment. (In all, she would be treated by four different psychiatrists, mostly for depression.) In September, he moved to Pennsylvania, and Shirley went back to St. John's; but the phone calls continued. In April 1999, nearly three years after this man had first tried to end their relationship and around the same time as she had begun her relationship with Andrew Bagby, Shirley went to Pennsylvania and was found on his doorstep passed out from a drug overdose. She was all dressed up, holding a bouquet of roses and 4 letters. One of them was a suicide note; another was a letter for her psychiatrist in which she stated, "I am not evil, just sick." (It was subsequently determined that the drugs she had taken were not lethal, and as a doctor Shirley probably knew this. She later appears to have described this incident as a "fake suicide," but also admitted to having "attempted suicide" more than once in her life.) Shirley was treated, released, and continued to call the Pennsylvania man at least until the end of 1999. She left numerous messages on his answering machine, saying things like, "You will die. I'll stab you. You'll soon be 6 feet under. The time will come when I'll have to call your family, your friends." This prompted him to notify the police for his own protection. When he learned of Andrew's murder, he said, "I slept with my doors bolted in Pennsylvania and one of my roommates stayed on the couch each night with an axe. We figured I was next."

Prior to commencing medical school at Memorial University, Andrew had been engaged. The engagement was called off, but he remained friends with his former fiancée. In fact, she was the one who had suggested Memorial as a place to apply for medical school, and she followed him there a few years later. Thus Shirley, Andrew, and the former fiancée were all associated with the Medical School at the same time around 2000. Shirley's relationship with the former fiancée was abrasive and harassing. When she returned to St. John's after murdering Andrew, the former fiancée also had a friend stay with her out of fear of what Shirley was capable of doing.

Another person with whom Shirley was prohibited from having contact as a condition of her release was a former medical supervisor of one of her residency placements. She had been extremely upset with him for having written an unsatisfactory report of her, focusing on her demanding and dishonest nature. This physician described Shirley as "a manipulative, guiltless psychopath." He told Dr. Markesteyn, in hindsight, that she was "cute, petite, always looked injured. She just fooled everyone." The physician's diagnosis is only partially and superficially true. In fact, Shirley had two modes of operation. When playing the injured, vulnerable mother did not work, she would go on the offensive with false accusations, intimidation, and violence. She was capable of switching back and forth rapidly between these two modes, either in her

dealings with different people at the same time or in dealing with the same people over time. The deeper truth is that everyone Shirley came into contact with was conditioned to be fooled by her. This is obvious when you consider that no man could have gotten away with half of what Shirley was allowed to do, before being stopped in his tracks with criminal, civil, or child welfare interventions. This deeper truth becomes even more blindingly obvious from the events following Andrew's murder.

Andrew completed his medical studies in May 2000, and began a residency in Syracuse, N.Y., in September. Shirley began her first job as a medical practitioner in Sac City, Iowa, at a salary of \$171,000 U.S., plus perks such as arrangements to have her student loans paid off. She visited Andrew in Syracuse, and later at his second residency in Latrobe, near Pittsburgh. In July 2001, she quit her job, in breach of her employment contract, and walked out on a \$156,000 debt owing to the company. Despite her dismal record, she was quickly hired at a hospital in nearby Council Bluffs, Iowa, even though she would be unable to see patients until the paperwork for her practitioner's licence was completed in November 2001. By now, Andrew was trying to end his relationship with Shirley, but she would not accept it. She obtained a gun permit on October 11, bought a second-hand .22 calibre handgun on October 16, and began taking shooting lessons. Her instructor noticed that the gun was feeding improperly and sometimes released live rounds. He suggested she try ammunition manufactured by CCI, which she did, but the problem persisted.

Andrew was best man at a friend's wedding on October 20, 2001. He did not want to invite Shirley, but she insisted on attending. It was on that occasion that Zachary was conceived, although Shirley did not know this until a month later. She returned to Latrobe on October 26. Andrew told her that he was ending their relationship and that he had developed an interest in another employee of the hospital in Latrobe. Shirley responded by harassing that woman by phone. Andrew drove her to the airport on November 3 and said good-bye for what he hoped would be the last time.

In the early afternoon of November 4, Shirley packed her gun and commenced a 16-hour drive back to Latrobe virtually non-stop. She arrived at Andrew's door at around 5:30 a.m. on November 5. They arranged to meet up at a park after his shift ended that day. He went to work looking agitated and mentioned this meeting to his supervisor. The next day, Andrew's body was found in the parking lot of the park. He had suffered blunt trauma to the back of his head, and five bullets were found in his body: two in his head, one in the torso, and two in the rectal area. A sixth live round of .22 calibre CCI ammunition was found on the ground. A witness saw Shirley's and Andrew's cars parked side-by-side at around 6:10 p.m. on November 5.

On her drive back to Council Bluffs, Shirley called her employer (among others) to say she would be at home all day on November 5 nursing a migraine headache. These calls were later traced, through communication towers along the highway, to her cell phone, not her home phone as claimed. Numerous other pieces of compelling circumstantial evidence pointed to her as the only suspect in Andrew's murder. Principle among the evidence was her own statements given to the police after being notified of Andrew's death. Practically everything she

said was quickly determined to be false. As her alibis unravelled, she had to change her story several times, each time becoming more incredible. Still, by the time the police got around to charging her with premeditated murder, Shirley had already fled to Canada.

The extradition process ground on for nearly two years before it was mooted by Shirley's murder-suicide on August 18, 2003. It is beyond the scope of this summary to describe the extradition process in detail. Suffice it to say that she was incarcerated for only a brief period in this entire time. The first bail hearing took place upon her initial arrest in Canada, on December 12, 2001. The facts mentioned above, and much more, were either known to the authorities or could easily have been gathered by them. Yet Crown and defense lawyers came to court with a deal for a release on her own recognizance already worked out, and Justice J. Derek Green (since promoted to Chief Justice of the Court of Appeal) simply rubber-stamped the deal. Shirley was eventually incarcerated on November 14, 2002, as a result of an extradition order finally being granted that day. She appealed this result, and consequently was entitled to another bail hearing on January 10, 2003. This time the Crown opposed bail, but ineffectively. Justice Gayle Welch granted bail, saying, "Regarding the public safety issue, while the offence with which she is charged is a violent and serious one, it was not directed at the public at large. There is no indications of a psychological disorder that would give concern about potential harm to the public generally." In short, Shirley did not have to "fool" the legal system; the legal system deliberately turned a blind eye to the risks she posed.

A desire to rekindle a relationship with her children arose once Shirley returned to St. John's in November 2001. She first moved into an apartment her son shared with a few other university friends, driving them out and eventually forcing her son to evict her. When she left, she stole her son's computer, camcorder, and other items.

At Easter 2002, Shirley's daughters came to St. John's for a visit. The elder daughter left after being assaulted again. Shirley convinced the 12-year-old daughter to stay with her, and enrolled her in school there. The father immediately brought an application to have the daughter returned to him. Considering that: (i) the child had lived with her father and step-mother continuously for the past five years, at Shirley's request; (ii) it had been agreed from the start that the daughter would be visiting in St. John's for a specified period of days only; (iii) her schooling would have to be interrupted at least twice in the coming months as Shirley's extradition was completed; (iv) Shirley stood accused of first-degree murder, and was preoccupied with her legal cases; (v) Shirley was being treated by a psychiatrist, and was experiencing enormous stress; (vi) Shirley was expecting another child shortly, and could barely take care of herself; (vii) Shirley was an historical child abuser, had just recently assaulted her elder daughter again, and her other two children could not abide living with her; and (viii) Shirley would have to rely upon welfare and other forms of public assistance in order to support the daughter – considering all of this, you might suppose that the father's application would be a slam-dunk. Yet his request was summarily denied, on the ground that Shirley retained legal custody from the 1997 Divorce Judgment. Evidently, it was deemed to be in the child's best interests for her to reside with her mother, while the father was invited to bring a more extensive application to change legal custody. That application had to be heard in St. John's, an 11-hour drive from

his residence. As so often happens, the father lacked the wherewithal (and the stomach) to pursue the matter.

Meanwhile, Andrew's parents, Kathleen and David Bagby, had moved from California to St. John's to watch the extradition proceedings and to take custody of their grandchild once Shirley was incarcerated. In the months surrounding his birth, Shirley was obsessed with making plans to keep Zachary away from the Bagbys, asking the child welfare authorities about how she could place him with her friends or even adopt him out to strangers. Working personal connections, she was able to obtain assistance from Elizabeth ("Betty") Day, the provincial Director of Child, Youth and Family Services. Everyone, in their professional capacity, was more concerned to assist this mother than to look out for the best interests of the children. One agency board member wrote a letter to the Justice Minister on her behalf, urging not to approve extradition on the ground that she had much to contribute to society as a doctor. Shirley's psychiatrist, John Doucet, acted as a surety for her bail bond, in contravention of his professional code of conduct. Shirley didn't have to fool anyone; everyone was fooling themselves.

When Zachary was born, Shirley refused to allow the Bagbys to visit him in the hospital. They applied for custody and access. The judge determined that Zachary's best interests were to be left in Shirley's custody, while granting the Bagbys one whole hour of access per week. On October 31, this was generously increased to two hours per week; and on November 14, the Bagbys assumed care and control of Zachary when Shirley was jailed. The custody deal required the Bagbys to drive Zachary to the women's prison, two hours outside of St. John's, several times per week, which they faithfully did. At the recommendation of two attending physicians, Shirley was placed on a 30-minute suicide watch for her entire stay in prison. Yet nobody in the legal system deemed her to be a risk to herself or others, either in the extradition process or in her custody battles with the Bagbys and the father of her younger daughter.

Shirley's 12-year-old daughter had been left alone in Shirley's apartment when she was incarcerated. The Bagbys dropped in on her periodically, gave her food and took her on outings to the mall. Although the social workers assigned to this extraordinary and high-profile case were fully aware of the extradition situation, they never bothered to pre-arrange sending this girl back to her father; nor did they apprehend her and send her back after the fact. By Christmas 2002, the child's situation had become untenable and she voluntarily returned to her father. This was to last only until Easter 2003, when she again visited Shirley in St. John's, again decided to stay, and again enrolled in school there. This was her 6th school change in two years; she had gone from being a "brilliant student" and a "leader" to being a failing student who was foul-mouthed and acting out—all meticulously documented by the vigilant social workers. Also recorded were more physical assaults by Shirley on this 13-year-old child.

Although the extradition order had been granted on November 14, 2002, it wasn't until June 9, 2003, that "Justice" Minister Martin Cauchon got around to approving the extradition (pending the result of Shirley's appeal, which was still being processed). In his letter to Shirley's lawyer, Cauchon states, "It is certainly tragic when children, through no fault of their own, are separated from their mother." This is galling coming from a politician who evinces no sympathy for



children who are separated from perfectly loving fathers in custody disputes. In fact, it was certainly tragic that Zachary was not separated from his mother.

Everyone at Zachary's first birthday party, including Shirley, observed and remarked upon how Zachary was more bonded to the Bagbys than to her—despite the fact that they only had access to him for mere hours per week. At one point, Shirley handed Zachary over to the Bagbys, saying he obviously loved them more than her, and stomped off to mope by herself. Dr. Markesteyn observes, "Zachary was not adequately attached to [his mother]; certainly, not in the way he responded to the Bagbys... [O]ne possibility... was that the bonding between Dr. Turner and Zachary might have been 'conditional'."

The end came quickly and suddenly, but with another twist that might have been anticipated by the very learned lawyers and judges involved in the custody and extradition proceedings, had they been paying attention. Shirley met a young man in a bar on July 4, 2003, and they became intimate. When a friend showed him news stories about her, he immediately ended the relationship. She kept after him, harassing and stalking him. Between July 13 and August 12, she called him 200 times, at all hours. At one point, she claimed to be pregnant by him. Three times, he called the police about how to deal with this situation, but refused to give his name or press charges. Had he done so, Shirley would have been found in breach of her bail condition to "keep the peace," and perhaps this time might have been incarcerated pending extradition.

Shirley had ominously told her daughter that she had no intention of going back to jail or leaving Newfoundland. Time was running out on her appeal, which had been scheduled for September 26, 2003. It is not known when she decided to murder Zachary and commit suicide, but she appears to have decided to kill three birds with one jump by framing the young man for her murder-suicide. On August 17, she wrote several letters to relatives, and visited friends in St. John's for a last time. She filled a month-old prescription for 30 tablets of Ativan (she evidently had not been taking her medication), ground them up, and dissolved them into Zachary's milk bottle. Early in the morning of August 18, she drove to the young man's residence outside of St. John's, parked her son's car, and fed Zachary the drug-laced milk. She then placed identifying photographs and a used tampon on the young man's driveway, walked to the end of a nearby wharf, and threw herself into the north Atlantic Ocean, clutching a comatose Zachary.

Her son reported her and his car missing the next morning. In the course of their search, police contacted everyone with whom she might have spoken, including her psychiatrist, who told them, "[S]he's coping well, she's very realistic about the charges and the situation. She wants to get it all settled so she could concentrate on being a mother first and a physician." Before the day was out, tourists would find two lifeless bodies on the rocky beach.



## Exhibit E:

### *Judging Domestic Violence Allegations*

(The case of *R. v. Nicole Patricia Doucet* 2013 SCC 3, was released as this volume was in its final stages of preparation. While it is impossible without further time-consuming research to determine exactly who is responsible for all of the ways in which this train went off the rails, enough is known to make it a brilliant illustration of the extreme pro-female biases that pervade the Canadian legal system.)

Nicole Doucet was a school teacher; Michael Ryan was in the military. They were married in 1992, had a daughter in 2000, and separated in the summer or fall of 2007. Michael moved to a town in Nova Scotia about 100 km away, living with his new girlfriend. A dispute soon arose over custody of their daughter: Nicole wanted sole custody while Michael wanted shared custody.

Conflict ensued. Three of Nicole's family members, including her father Herbert Boudreau, were charged with assaulting Michael and his new girlfriend with a steel pipe, causing him to be hospitalized. In September 2007, Nicole began contemplating hiring a hit-man to kill Michael. Meanwhile, she made numerous complaints to the RCMP, victim services, and other authorities about alleged misconduct by Michael. Most of these complaints concerned "civil matters"—property destruction, access disputes, and the like—to which the authorities declined to respond. Michael claims that he was usually at home, an hour away by car, when the alleged misconduct was supposed to have taken place, so it was easy for the authorities to dismiss the complaints. One complaint, however, involved threats of violence: in November 2013, Nicole alleged that Michael had threatened to burn her house down with her and their daughter inside. On that information alone, Michael was charged. (The charges were later dropped.)

Over the next four months, Nicole contacted at least three men for the purpose of hiring someone to kill Michael. In January 2008, her father gave her \$25,000 for the purpose of hiring a local fishmonger to find someone to kill her husband. He kept the money and refused to participate in the plot. Nicole was not particularly discreet about her plans; according to the fishmonger, it was common knowledge in her small town that she was looking for a hit-man. In March, 2008, the RCMP got wind of this, and sent an undercover officer to pose as a hit-man. Nicole seized the opportunity as soon as it was presented. The arrangements for the hit took place in the undercover officer's car, and were video-recorded. Nicole was mostly business-like and unemotional—at times laughing and joking about the situation. When asked for her motivation, she stated it had nothing to do with jealousy or abuse; there were no beatings. She vaguely said she wanted him dead "for everything he took and destroyed." She also said that she had no problem if the hit-man had to kill the girlfriend, too, if she got in the way—although she couldn't pay extra for that. But she wanted the hit completed before April 1, the date of her next custody hearing. Money was exchanged, with a promise of more when the job was done.

The next day, Nicole was arrested and charged with conspiracy, along with her father. (The charges against her father were subsequently withdrawn, for reasons unknown.) At trial, all of the facts needed to establish conspiracy were admitted; indeed, they could hardly be denied. Nicole was in a tight spot: The usual defense for women who kill their husbands—the battered wife defense—was unavailable because the *Criminal Code* provisions for self defense limit it to a self-help remedy, and do not extend to hiring someone else to do the pre-emptive act. Instead, her defense team appealed to the common-law defense of duress. Duress is traditionally pled as a defense when one is coerced into committing acts of violence against a third party by threats of violence made against oneself or loved ones. As such, it doesn't fit the facts of this case any better than the defense of self-defense does, since here the violence contemplated by Nicole's conspiracy was not to be committed against a third party. However, duress is a common-law defense, not fully circumscribed by statute; this allows a sympathetic judge to stretch the definition if he or she feels inclined to create a new excuse in law.

The question is why any judge would feel inclined to distort the definition of duress so much as to allow Nicole to use it as a defense in this situation. The first task is to get the judge's sympathy, and for that Nicole was put on the stand to testify to a long history of extreme domestic abuse at the hands of Michael. Her litany stretched back to the early years of their marriage, and included weekly sexual assaults, beatings, and death threats. She claimed to have been repeatedly threatened with a gun. She claimed to have made numerous complaints to the RCMP about this abuse, and to have received no help from them. She said she felt trapped, unable to endure any more abuse yet unable to obtain any legal assistance, either. The defense called a psychologist, Dr. Hucker, to testify to Nicole's state of mind at the time of the murder contract. He stated that he believed Nicole was in a state akin to "post-traumatic stress disorder."

Upon cross-examination, Dr. Hucker had to admit that Nicole made no allegations of domestic abuse or violence of any kind in their initial interviews; he had to drag this out of her with a questionnaire and leading questions. He admitted that he did not know anything about the contents of Nicole's complaints to the police and victim services, and indeed that much of what she had testified to at the trial was new information to him. He admitted that there were significant inconsistencies in Nicole's reporting of abuse, and that she had never told him about Michael brandishing firearms at her. (By contrast, Nicole gave him detailed accounts of her contemporaneous disputes with Michael and her family members over property.) He admitted that he made no specific inquiries about what was going through Nicole's mind on or around the time she contracted with the undercover officer, or indeed with the other men she had approached for the same purpose over that four-month period. He admitted that he had not seen the video recording of Nicole's meeting with the undercover officer.

In rebuttal, the prosecutor adduced evidence from three psychologists and a clinical social worker who had interviewed Nicole shortly before and after contracting the murder. The clinical social worker saw her several times between November 14, 2007, and February 2008: Nicole never disclosed any physical or sexual abuse or the brandishing of weapons. Her complaints centred on property, custody, and family conflicts. She claimed to have been well supported

by the school where she worked, and flatly rejected the suggestion that she go to a transition house. Dr. Mulhall saw Nicole on November 17, 2007, and also testified that she did not disclose to him any physical or sexual abuse. Nor did she mention being fearful of Michael. Dr. Pottle conducted seven interviews with Nicole between April 1 and April 25, 2008. He testified that Nicole had specifically denied any history of physical or sexual abuse. Even the report drawn up by Dr. Pick in 2009 for the purposes of a custody determination revealed on-going inconsistencies in Nicole's allegations of abuse.

The prosecutor impugned Nicole's motives on cross-examination, as well. When asked whether she wanted her husband killed before the April 1 custody proceeding, she replied, "I want my daughter safe. That's what I'm begging for." Apart from her testimony, there is no evidence that Michael was any danger to his daughter. At this point, one may perhaps forgive the prosecutor for being confident in his case. In any event, he closed his case without feeling the need to call Michael, or the relevant RCMP officers, or the fishmonger, to rebut Nicole's version of events directly. He considered conviction a "slam dunk," which of course it should have been. Yet he did not count on the enormous capacity of judges to see what they want to see and disregard the rest, especially where protecting female litigants is concerned. An experienced council who was familiar with the relevant literature (Brown 2004) would not have taken any chances, but would have adduced all of the available evidence out of an abundance of caution.

On the basis of evidence of the above quality, the trial judge, David Farrar (who was elevated to the Nova Scotia Court of Appeal shortly after this trial), "had no difficulty in concluding that Mr. Ryan was a manipulative, controlling and abusive husband;" and that Nicole's "sole reason for her actions was her fear of her husband which arose from his threats of death and serious bodily harm to herself and her daughter" (*Ryan*, ¶18). He was therefore happy to extend the legal definition of duress to cover the case of a "battered wife" who feels helpless and vulnerable and is offered a solution to all of her problems when she receives a phone call from the undercover officer posing as a hit-man. An acquittal was entered, and Nicole walked out of court a free woman.

Remarkably, Farrar went so far as to characterize Nicole's testimony of abuse as being "uncontested." Far from being "uncontested," it wasn't even consistent on the key elements—she contested her own facts, over and over again. The allegations of abuse were self-serving, *ad hoc*, and uncorroborated in any meaningful sense. One would think that if Nicole had indeed been brutalized by Michael, and if she had complained repeatedly to the RCMP about it, then her lawyer would have called the RCMP officers and victim services agents to the stand to support her story; she would have produced evidence from the custody dispute supporting it; she would have called work colleagues or medical doctors to the stand to support it; and she would have fled to a women's shelter at some point. Indeed, what gives Nicole's testimony an air of unreality is her instance that nobody in authority would help her. To accept that the RCMP would not take any woman's allegations of domestic violence seriously, and that agents in victims services would advise her not to bother seeking a s. 810 peace bond against Michael because it would be "worthless," requires a large measure of delusion about how these agencies operate. Anyone with even a casual acquaintance with them knows that they

take all unreasonable measures when allegations of domestic violence are mentioned (Brown 2004), and like Farrar, never question the veracity of the “victim’s” word.

One has to be naïve beyond belief to think in this day and age that such extreme and constant abuse as was alleged would go unnoticed and unremarked upon by everyone in the small town she lived in.

(The foregoing focusses on exposing the questionable findings of fact inherent in Farrar’s decision. A considerable amount of questionable reasoning over the niceties of the law of duress is required to get from these “facts” to an exoneration of the accused, and the trial judge’s biases are equally evident in his eagerness to stretch and strain for the defense in this regard. Time and tedium prevent a fuller deconstruction of Farrar’s biases here.)

The story continues, as legal horror stories are apt to, with an appeal of the verdict by the Crown. The appeal was two-pronged: the Crown argued that many of Farrar’s conclusions were “patently wrong;” and in any event, the defense of duress was not available in law to the facts of this case. The Nova Scotia Court of Appeal dismissed the Crown’s appeal. That decision was appealed finally to the Supreme Court of Canada, which to their credit upheld the appeal, finding that the defense of duress could not be extended to cover self-defense situations. So, did this mean that Nicole Ryan was ultimately guilty of conspiracy to commit murder? Actually, no. In a crowning act of foot-shooting, the Supreme Court decided that poor Nicole had been through enough already, and by an 8-1 majority entered a stay of proceedings on her behalf. This meant that Nicole was forever free and clear of any criminal responsibility for her actions.

With respect to the stay, the top court reasoned as follows:

[35] It is apparent that the law of duress was unclear, which made resort to it as a defense unusually difficult. Coupled with that consideration is the problem in this case that the Crown changed its position about the applicable law between the trial and the appeal process. The trial proceeded on the basis that duress was available as a matter of law to Ms. Ryan if the facts supported it. She therefore went to trial on the basis that the issues were mainly the factual ones relating to whether she had pointed to evidence capable of raising a reasonable doubt about the various components of duress. Presumably, decisions about the conduct of the defense were made on this basis and might have been made differently had the legal position later adopted by the Crown on appeal, that duress was not open to her in law, been known at the time of the trial. There is therefore a serious risk that some of the consequences of those decisions could not be undone in the context of a new trial and this raises concern about the fairness of ordering a new trial. In addition, the abuse which she suffered at the hands of Mr. Ryan took an enormous toll on her, as, no doubt, have these protracted proceedings, extending over nearly five years, in which she was acquitted at trial and successfully resisted a Crown appeal in the Court of Appeal. There is also the disquieting fact that, on the record before us, it seems that the authorities were much quicker to intervene to protect Mr. Ryan than they had been to respond to her request for help in dealing with his reign of terror over her... In all of the circumstances, it would not be fair to subject

Ms. Ryan to another trial. In the interests of justice, a stay of proceedings is required to protect against this oppressive result.

The reasoning here is truly bizarre. First of all, the law of duress was not terribly unclear at the start of the trial. What was clear to everyone concerned is that there was no legal precedent for applying it to situations like the one Nicole found herself in. Indeed, it was a common premise that if successful, this case would constitute an extension of the law of duress. The defense was “unusually difficult” not because the law was particularly unclear, but because the evidence was so weak and the law would have to be changed by judicial fiat to cover the case even if the weak evidence was accepted *holus bolus* by the trial judge. Next, did the Crown really change its position between the trial and the appeal? In both venues, the Crown argued that the evidence was not sufficient to support a defense of duress. At the Court of Appeal the Crown was perhaps clearer in arguing that the defense was not available in law, but that was hardly prejudicial to the defense. Had the Crown taken the position that duress was not an available defense in law at the trial, the defense would have had to prepare a legal brief to meet that case at the trial, rather than at the Court of Appeal. That’s all. If anything, allowing the defense more time to prepare their legal brief on this point would have benefited the defense. Next we come to the court’s speculation that the defense might have been conducted differently at trial had the accused known that the Crown would dispute the availability of the defense of duress – as well as her evidence in support of it. It is difficult to see how the defense could have changed its tactics: the video evidence proving the conspiracy would not have disappeared. Does the Supreme Court honestly think that if the Crown had disputed the legality of the defense of duress, she might have contested the identity of the woman in the RCMP video, or the meaning of the words she spoke on it? Just how could her defense have changed? She was caught red-handed; the desperate defense of duress was her only hope; she played it as well as she could have expected, and ultimately lost. Next, we are asked to have sympathy for a confessed attempted-murder conspirator on the ground that she has been worn down by the oppressive processes of the law. A more reasonable sentiment is chagrin that she enjoyed five years of freedom that she didn’t deserve.

A stay of proceedings is a “drastic remedy of last resort” (*Ryan*, ¶188). Yet in this case, a woman involved in perpetrating the most serious form of domestic violence possible is granted a stay on the flimsiest of reasons. Indeed, it would have been unfair to subject Ms. Ryan to another trial; the appropriate remedy in the circumstances would have been to substitute a guilty verdict for the acquittal at trial, and send the matter back for sentencing. (This is what the Crown was seeking.) After all, the defense had admitted all of the facts needed to establish the conspiracy; there was no possible dispute about that. The only point of contention, in the end, was a purely legal one: was the defense of duress available to her given her version of events? As it turns out, duress was *not* available to her as a matter of law; that is what the Supreme Court had just decided. The “facts,” even as implausibly found by the trial judge, were not enough to get her off. So why would a new trial be needed? What could the defense hope to accomplish from a new trial? It is true that an appellate court should not readily substitute a verdict of guilty for an acquittal. But in this case, nothing useful could be served by going through the



exercise again—other than, perhaps, finally give Michael his day in court to respond to the vicious fabrications against him.

The reason this case is so shocking to the public is that every level of court simply accepted Nicole's uncorroborated and self-serving testimony at face value, despite all of its inconsistencies and inherent implausibility. The Supreme Court made a misstep when appealing to "the record before us" to chastise the authorities for being "much quicker to intervene to protect Mr. Ryan than they had been to respond to [Ms. Ryan's] request for help in dealing with his reign of terror over her." That comment invited closer scrutiny of the record, and a response from the RCMP. What the record (as summarized briefly above) shows abundantly clearly is a host of terribly gullible and biased judges, incapable of weighing evidence while falling all over themselves to extricate this evil woman from the serious troubles she had gotten into. One cannot help but recall Rosalie Abella's ignorant assertion that 95% of domestic violence is perpetrated by men (see endnote 7 to chapter 6): anyone who is so grossly misinformed about the basic facts is liable to believe any nonsense they read.

The RCMP's response was equally damaging. By releasing to the media the video of the murder contract being negotiated, people could see for themselves and judge the judges. No longer could the judges hide behind their own distorted summary of the "facts" of the case to justify their decision. A subsequent independent review by the Commission for Public Complaints Against the RCMP, released on July 10, 2013, found that the judicially chastised officers had in fact dutifully responded to and investigated every one of Nicole's complaints. It was determined that they mostly involved civil matters, or were unfounded. There was absolutely no substance to her allegation that the RCMP left her vulnerable to the "reign of terror" by her husband. It says a great deal about the mindset of the judges that they would believe the uncorroborated, self-serving testimony of someone who had contracted to have her husband killed when it impugns the conduct officers of the national police service.

It bears repeating: the irony is that judges are tasked with the job of rooting out gender bias in every other aspect of society when they are undoubtedly by far the most gender-biased class of citizens themselves.

*Sources:* *R. v. Ryan* 2013 SCC 3; factums submitted to the Supreme Court, found on the SCC website; various news reports on the internet concerning the independent RCMP review.



## Exhibit F:

### ***The Court-Mandated Prostitution Racket***

Rod and Katia began cohabiting in August 2002. In February 2004, they got married. In December 2005, they separated. They had no children or assets upon separation.

As a wife of 22 months, Katia wanted spousal support, of course. She offered two grounds of entitlement: First, she claimed to have suffered “emotional difficulties” as a result of the separation, which prevented her from working. Second, she claimed that Rod had encouraged her to quit work and continue her studies, making her dependent on him.

The “emotional difficulties” Katia experienced after the separation were not so great as to prevent her from commencing a cohabitation relationship with another man a few months later, having twins by him in April 2007, and obtaining care and custody of the infants. She was not unfit to be a mother; she was only unfit to work.

Katia last worked in 2001, so she quit work long before she was in a cohabitation relationship with Rod. Her “dependence” on him was therefore not a consequence of the relationship, but of her own voluntary choice – a choice which it is contrary to public policy (e.g. employment equity) for the courts to encourage. Besides, if she had completed her studies between 2001 and 2005, as Rod had “encouraged” her to do, by 2006 she would have been in a position to earn a lot more than the \$12,000 she was making in 2001.

But no good deed goes unpunished in our family courts. According to the *Federal Spousal Support Guidelines*, Katia would be entitled to between \$180 and \$300 per month for 22 months. But Justice Thomas Granger awarded Katia \$1,500 per month for 5 years, or indefinitely longer if she could not find employment. That is between 5 and 8 times the quantum recommended by the *Guidelines*, for at least 3 times the duration.

Rod was a young lawyer, earning \$60,000 annually. After spousal support, taxes, and the costs of earning a living (vehicle expenses, suits, restaurant meals, parking, etc.), Rod’s disposable income would have been perhaps a tad more than Katia’s under this arrangement. As a young lawyer, he would probably be working 50 or 60 hours a week, while Katia watched soap operas and ate bonbons.

The appellate court felt that awarding Katia between 15 and 24 times the recommended amount for spousal support was excessive. So they kept the quantum at \$1,500 per month, but reduced the duration to 42 months. This is still between 9 and 16 times the amount recommended by the *Guidelines*. Even more bizarrely, Rod did not get his costs for the appeal, even though he had a measure of success. In fact, costs of \$2,500 were awarded against him because he dared to ask for a stay of the trial judge’s order pending the appeal, and offered to pay Katia “only” \$875 per month in the *interim* (i.e. between 3 and 5 times the *Guideline* amount).

*Source: Refcio v. Refcio*, 2009 CanLII 17353 (ON.S.C.D.C.), *per* George T. Valin, Janet Wilson, and Timothy D. Ray JJ.

# Endnotes

## Chapter One

1. Custody is of two types: physical and legal. Physical custody simply means having care and control of the child at a given time. Legal custody is another term for guardianship, the authority to make decisions on behalf of a child. It may be vested in one parent – sole legal custody – or in both – joint legal custody. There are, further, two forms of joint legal custody. In the less common form, one parent has sole discretion over some specified aspects of the child's life, such as religious and educational training, while the other has sole discretion over other specified aspects, such as medical treatments and residency. This situation is referred to as 'parallel parenting'. In the more common form of joint legal custody, each parent is entitled to a say over all aspects of a child's life; ideally, they discuss and decide by consensus all major issues affecting the child. Joint legal custody of this type is the default option, the custody arrangement parents enjoy by automatic operation of the law as soon as a child is born in the context of a marriage or common-law partnership. (Fathers of children born "out of union" bear the burden of establishing custody in complex ways.) Disputes arise most acutely when parents with joint legal custody cannot come to a consensus decision. Then a judge may be called upon to side with one parent or the other, or to choose a third way for the child. Judges have a strong tendency to go along with whatever the parent with primary physical custody wants for the child, on the assumption that the parent with care and control of the child most of the time is most knowledgeable about what is in the child's best interest, and in any event is going to have to implement and live with the consequences of the decision. Thus a parent with joint legal custody and primary physical custody typically ends up with de facto sole legal custody. In view of the practical equivalence of sole legal custody on the one hand and joint legal custody with primary physical custody on the other, the term 'primary custody' will be used to cover both of those situations. The critical distinction for the purposes of this volume is between primary custody and shared parenting, which means joint legal custody together with roughly equal physical custody (or residency) to each parent. "Rough equality" exists when each parent has physical care and control of the child for at least 40% of the time throughout the year. Only a shared parenting regime, as so defined, puts parents on a level custodial footing. (Custody is said to be 'split' when each parent has custody over one or more children, typically when the boys go with dad and the girls go with mom, or when the older child goes with dad and the toddler stays with mom.)
2. By far the most insightful scientific explanations of gender differences are inspired by the theory of evolution by natural selection, and are found in the burgeoning field of evolutionary psychology. An early, seminal work in that field is Dawkins (1976; see especially Chapter 9, "The Battle of the Sexes"). Kimura (2000) and Pinker (2008) are two female Canadian scholars who have made significant contributions to the study of gender that owe much to evolutionary psychology. While evolutionary psychology might be controversial among the ill-informed, and while it can hardly be thought to provide a complete or final word on the subject, there is little reasonable doubt that it is a powerful explanatory tool. The relatively modest claims about gender differences advanced in the text are consistent with what is relatively firmly established in this literature.
3. Actually, feminists have been more than successful, in that they have achieved for women unwarranted preferences and privileges in schools and in the workplace. The prevailing gender paradigm in education and employment emphasizes the "special contributions" of women that explain why they should occupy "at least half" of all positions in every traditionally male field of endeavor while retaining their predominance in every traditionally female field of endeavor such as nursing, teaching, parenting, etc. (see Brown 1992, 1993a, 1993b, 1994). The Supreme Court of Canada is staunchly and overtly feminist in this regard. For example, in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, it was held to be wrongful discrimination for the government to hold female applicants seeking firefighting work to the same physical standards as male applicants. Ironically, the reason for setting up different standards for women and men in occupations like firefighting is that, for all our judiciary knows to the contrary, it might be possible for women to compensate for their proven physical deficits in ways that men are not capable of! Equality, according to our brightest legal minds, requires employers to make the assumption that women are better able to adapt to a physically demanding workforce

than men are. Contrast this with the attitude of the Supreme Court toward fathers: these same legal minds believe it would be wrong to assume – in the name of that vaunted principle of equality – that fathers are adaptable to the non-traditional role of primary caregiver for children. As we shall see, fathers must be content to accept the role of “interested observer” in their children’s lives.

4. It is difficult to make generalizations about feminism as a political movement or an academic discipline without inviting a torrent of abuse from its various factions. Feminism is like religion in this respect: there is a different brand for every believer. In this volume, feminism is identified with the view that men and women are equal in every respect, except for those in which women are superior. This captures the common core of the great preponderance of what identifies itself as feminist thought these days – certainly of the feminist ideologies with any practical clout.
5. The demonization of men is not always a product of feminist ideology; sometimes it purports to be based in evolutionary psychology (Daly and Wilson 1988; Wrangham and Peterson 1996). One socio-biological argument derives from the observation that an ancestral man who used his physical superiority to subjugate and control ancestral women would have had more children and would have been less likely to have wasted his efforts supporting children not his own. By passing on their genes to future generations, physically dominant males would have passed on physical dominance in males as a trait. On this theory, male aggression against females had an adaptive function in ancestral societies, which might persist even today. The error in this argument is a failure to recognize that mate selection actually matters more to women than to men, because their reproductive opportunities are limited to one child per year (Baker 1996). The physical dimorphism between men and women must have a different evolutionary basis than being the product of a straightforward physical contest for mating opportunities, as hypothesized above. What usually accounts for physical dimorphism within a species – typically, larger males than females – is a competition for mating opportunities *among the males*, with many females choosing the few winners. This is known in the literature as harem-building, as illustrated by one of our closest primate relatives, the gorillas. In short, greater physical strength in males arises because it confers a benefit of some kind on choosy females of the species. The noted primatologist Frans de Waal (1996, 2005) has observed that when a member of the harem wants something from the alpha-male gorilla, he gives it to her nine times out of ten because his status depends upon pleasing the females in his society while subjugating rival males. An alpha male, no matter how large and dominant, cannot afford to wage a war on two fronts by attempting to subjugate his harem in addition to his male rivals. Given our relatively slight dimorphism, a human male is most likely built to protect women and transfer resources to them as a strategy for the survival of his genes. Physical dimorphism is not great among humans, but it is substantial enough to explain why dominance-aggression among males is a marked feature of human sociality, why male-on-male violence is at least twice as prevalent and twice as consequential as male-on-female violence, and why male-on-female violence is widely considered a cowardly aberration, even among criminals.
6. The phrase “the disenfranchisement of fathers” in this context means the disenfranchisement of fathers *of their children*, which *ipso facto* means the disenfranchisement of children of their fathers. While the latter expression is preferable insofar as it puts the emphasis where it properly belongs – on the loss of a parental relationship experienced by the children – it is also a more cumbersome expression. The shorthand expression “the disenfranchisement of children” is no substitute, since it is ambiguous: children could be disenfranchised of their mothers, or of both parents, too. Hence the more felicitous shorthand expression “the disenfranchisement of fathers” is used in this volume. The author of the pull-quote for this section, William Kapelman, is a former New York State Supreme Court Justice. “Additional mercy” is typical judge-speak for “discrimination against fathers.” Kapelman’s broadcast of his sexist biases was in the *New York Times*, June 19, 1974. Today’s judges are certainly less candid, but no less discriminatory in their approach, as we shall see.
7. Note that the CDR codifies outcomes in the standard legal terminology of sole and joint custody, rather than in the more practical terms “primary custody” and “shared parenting” as defined in endnote 1 above. As a result, information from other data sources must be relied upon to fill out the picture. Bear in mind also that only the most important of Millar’s results are summarized here. Readers who are interested in the nuances and the methodology of Millar’s work are strongly advised to consult the original source.

8. This data was collected by the Department of Justice Canada for the National Longitudinal Survey of Children and Youth (NLSCY) – a large scale survey that began in 1994 and was repeated with the same representative sample of families every two years thereafter. The findings are published in a series of articles from the Department of Justice. See: Marcil-Gratton and Le Bourdais (1999, 2000); Le Bourdais, Juby and Marcil-Gratton (2001); Juby, Le Bourdais and Marcil-Gratton (2003, 2005); and Juby, Marcil-Gratton and Le Bourdais (2004). In addition to these Department of Justice Canada publications, Millar (2009) uses the NLSCY dataset for the empirical analysis in chapter four of his book. Strohschein (2007), too, uses this dataset. (Academic researchers should note, however, that the original analysis in Le Bourdais *et al.* (2001) derives from Statistics Canada's General Social Survey of the Family (GSS, 10th cycle, 1995), rather than from the NLSCY.) A pervasive problem in this field is that various studies and official statistical reports use different samples and definitions, making results difficult to compare. For example, the GSS produced data including children aged 0-17, whereas most analyses from the NLSCY use a more limited sample, such as children aged 0-11 or 0-13, for various technical reasons. Some studies on child support expand the sample to all dependent children, including children 18 and older who are mentally or physically handicapped or who attend a post-secondary school. Some analyses are limited to biological and adoptive fathers; others include step-fathers. Some include all types of lone parents; others exclude lone parents who never cohabited with the other parent of their child or lone parents whose partners have died. That is, some studies restrict their analysis to children of separated parents, since children born "out of union" to single mothers in many ways constitute a distinct class (Juby *et al.* 2004: p. 1). This welter of complexity always needs to be borne in mind.

9. The following anecdote was told by a provincial court judge (Tousignant 2007) to a meeting of family lawyers at the Legal Education Society of Alberta (LESA) seminar:

At a LESA seminar a couple years ago, a certain [Judge] was present while a highly respected local psychologist explained why fathers are important to their children. More than a few lawyers I was sitting with were shocked and appalled by a question by [that Judge] to the effect of "so how much 'magic time' with the father do we have to allow?" The question, the demeanor and the attitude making it completely evident what [the Judge] thought of the importance of fathers to their children.

When judges feel so little compunction about showing contempt for fathers at "educational" seminars, it is not hard to believe reports of even more blatant anti-father attitudes expressed in private meetings.

10. The next chapter is a lengthy demonstration that the best-interests principle is little more than high-minded bunk. The concluding chapter details the limitations of judges, and of the adversarial legal system in general, when it comes to adjudicating custody disputes. It is routinely argued against the presumption of shared parenting that judges need full discretion to tailor their decisions to the individual circumstances of the child. All of the evidence in the present chapter suggests that judges do not use their discretion to tailor decisions to the individual circumstances of the parties, anyway. Rather, they use their discretion to find inventive ways of favouring mothers. The appendix illustrates this conclusion by summarizing a few recent cases where judges delivered decisions that blatantly ignored the child's health, safety, and educational interests in a desperate attempt to justify favouring mothers. An anticipated second book that delves into a handful of actual cases in great depth illustrates this conclusion beyond any reasonable doubt.

11. Reliance on circular reasoning is one of the marks of a wobbly paradigm. In this instance, courts appeal to academics who in turn appeal to courts. Of course, no appeal to authority can replace empirical evidence; at some point, theories need to be tested against the facts. This is what sets Millar apart from the ideologues who till the field of family law. Judges and lawyers never debate the merits of the primary caregiver theory in court, and most do not even realize that they are basing their decisions and arguments on it. The theory is so deeply ingrained into legal practice that lawyers merely have to make the case that the mother has been the primary caregiver before separation in order for judges to grant the typical *interim* award of primary maternal custody. Ask a lawyer or a judge why primary maternal care of a toddler during marriage should automatically result in primary maternal custody of a school-aged child on separation, and you are likely to receive blank stares, or at best mumbles to the effect that this is the way it has always been.

12. Note that a legal presumption is just a starting point that is open to being rebutted or negotiated around. There is no more reason to believe that a legal presumption of shared parenting will result in all children of separated parents spending precisely equal time with both parents than there is to believe that equal opportunity in employment will result in men and women being equally represented at every level in every work place. A presumption of equal opportunity should not be allowed to transmute into a fetish for equality of outcome, whether in the public or the private sphere. The point of a legal presumption is merely to put the brakes on insidious biases that have in the past lead to highly skewed outcomes.
13. The film *Chimpanzee* documents a year in the life of an infant chimp, "Oscar." Shortly after Oscar had been weaned, his mother died as a result of a raid of territorial conquest by a neighbouring tribe of chimps. For weeks, Oscar mourned the loss of his mother; but once he realized she was not coming back, he attempted to attach himself to other mothers in the tribe. All of them rejected Oscar, having children of their own to care for. Even the other young chimps rejected him. Oscar was clearly incapable of caring for himself, and his health quickly deteriorated. Finally, out of desperation, Oscar attached himself to the alpha-male of the tribe, tagging along and attempting to play. A bond soon developed between the pair, as the alpha-male adopted the orphaned Oscar and taught him how to find food. Oscar began to thrive and became a full-fledged member of the tribe again. The rapidly expressed ability of the alpha-male chimp to assume a parenting role toward little Oscar – being by all appearances equally proficient at it as the mother chimps in the tribe – is something most judges assume human fathers are incapable of.
14. It bears noting that the intense emotions experienced by mothers after child birth are not always beneficial to infants. In particular, postpartum depression often leads to neglect or abuse of an infant, and in severe cases even to infanticide. Experts debate whether postpartum depression is a misfiring of the hormonal system, or an adaptive trait. In support of the latter, Pinker (2011) notes that throughout human history, being an unwanted child resulted inexorably in exploitation, misery, and early death. It is argued that a brief period of postpartum depression, before bonding with the infant could take place, allows the mother to make a realistic assessment of the child's prospects and to end its life if the prospects are dire. The Criminal Code even recognizes infanticide by mothers (but not by fathers) as a separate and less blameworthy type of homicide. The fact that new fathers routinely step up to the plate and nurture infants when mothers experience postpartum depression shows that hormonal adaptations to nurturing infants is not a necessary condition of successful primary care for infants.
15. Findings like these are often cited by social conservatives as a critique of no-fault divorce and as a reason to revert to making divorce more difficult to obtain (Baskerville 2007). This is misguided. In the first place, the fundamental problem for children is family breakdown – the separation of their parents, not their marital status. Making divorce more difficult to obtain would not inhibit parents from seeking separations, except perhaps in that diminishing demographic of those whose reason for separation is the intent to marry someone else, and for whom non-married cohabitation is not an option. In the second place, this proposal would have no impact on the fastest growing demographic: children of unmarried parents. It would likely only accelerate unmarried cohabitation.
16. Nathanson and Young (2006: p. 527n32) cite Statistics Canada catalogue no. 84-213 for this high-water mark. In some cases, no doubt, women initiate a divorce because they see that the parenting of their husbands is having a negative impact on the children. But in the absence of an ideology which places fathers generally on a lower moral plane than mothers, this cannot account for the fact that women are at least twice as likely to initiate a divorce. The more plausible hypothesis is that women have much less incentive to remain in an unsatisfactory marriage because post-divorce they generally end up with the children, the matrimonial home, and child and spousal support.
17. Given that the data from the NLSCY derives from self-report surveys, it is possible that Strohschein's finding is more an artifact of the resilience of people's self-image than a reflection of their resilience in dealing with the strains of separation. Parents would tend to view their parenting practices and skills as relatively fixed, especially between any two-year cycles of the longitudinal survey. In correspondence, Millar also points out that Strohschein unaccountably controls for marital satisfaction in her model. Since the degree of conflict between parents is likely to be inversely correlated with marital satisfaction, and since conflict between spouses is one of the *sequelae* of separation that might directly or indirectly impact



children of broken homes, controlling for marital satisfaction is likely to hide some of the effect of separation on parenting behavior and skills.

18. In principle, the influence of family structure should also be evident by comparing families with different structures that have all gone through the process of divorce – specifically, lone custodial parents with custodial parents who have remarried. Millar (*ibid*, p. 51) notes that “very little benefit (some studies find none) is obtained by the addition of a step-parent.” This is likely because it usually takes a considerable period of time for a step-parent to gain the trust and confidence of a step-child, by which time the child is often no longer a minor. Still, this finding provides ambiguous support to the primary caregiver theory.
19. Overall health and school performance are intuitively clear. “Behavioural outcomes” are broken down into: hyperactivity, pro-social behaviour, emotional disorder, direct and indirect aggression, and property destruction. To see how the raw survey data is converted into measures of overall health, school performance, and behavioural outcomes, consult the original source (Millar 2009). The model Millar constructs for testing is diagrammed at p. 78. The validity of his models can be inferred from the fact that they replicate many results that have been established from other studies, though these models push the analysis much further.
20. The impact of family income on outcomes for children will be discussed in the chapters on child support. Briefly, Millar (2009: Table B1, p. 92) found that for children, higher household incomes are strongly associated with better overall health, a reduction in emotional disorder, and a reduced tendency to commit property offenses. For the primary custodian, higher household incomes are strongly associated with reduced depression and less reliance on physical punishment (*ibid*, Table B2, p. 93). (It could be that material rewards are favoured over physical punishment for higher income earners.) More weakly, higher incomes are associated with greater consistency in discipline but lower positive interaction. (It could be that the extra time it takes to earn a higher income impinges on positive parenting time.) This is all good, as expected. However, it must be appreciated that it takes a ten-fold increase in income to produce these results, so the implications for social policy are unclear. A more realistic approach is to see what impact having an adequate household income, defined as lower-middle-class, might have. Millar found that an adequate income was strongly associated only with a reduction in emotional disorder among children. It improved positive interaction with the child by the parent, but also reduced consistency in discipline. Having an adequate income also reduced reliance on verbal and physical punishment, although this effect was weak. Again, it must be appreciated that these effects would be difficult to achieve through income transfers between parents, since transfers to families with incomes below \$20,000 or so will trigger a dollar-for-dollar claw-back in social assistance. Given the difficulties with significantly improving a child’s outcomes through the transfer of income between parents, these findings tend to favour shared parenting over primary maternal custody, since in a workable shared parenting regime the child will have the full benefit of each parent’s income, half the time. If primary custody is preferred, then insofar as the impact of household income is concerned, it should go to the higher income earner, usually the father. Generally, these findings tend to support the hypothesis that the financial strain on parents going through a divorce will have a negative impact on parenting aptitude, with corresponding deficits for the children. This is especially true for the unacceptably large proportion of separating families that end up in bankruptcy proceedings, in no small part due to the costs of extended litigation over custody and access.
21. Even compelling evidence of a mother’s unfitness as a parent does not preclude the awarding of primary maternal custody, as is demonstrated by several of the cases the author anticipates writing up in a subsequent book.
22. One way to settle the issue conclusively would be to analyze the health, education, and behavioural outcomes for children who have experienced the death of one parent. Since the death of a spouse is a random event relative to a person’s parenting aptitude, comparing the impact on children of widows and widowers would be as close to a controlled experiment as this field is capable of producing. Moreover, the parenting skills within this group could not reflect either the stresses of divorce or the evident selection biases of the family-law system, again providing an uncontaminated test of the merits of the judiciary’s preference for primary maternal custody. With all the resources available to the government and to the feminist lobby to conduct such a study, it is noteworthy that it has never been attempted.



23. It would be equally facile to impugn the validity of the information supplied by mothers by pointing out that their own reports are inconsistent: mothers responding to the NLSCY reported that 15% of separated fathers never visit their children, whereas mothers responding to the GSS reported that 25% of biological fathers never visit their children. The fathers in the NLSCY who never visit their children could be, in significant part, fathers who have been disenfranchised by mothers who relocate without telling the father where they live, or by mothers who move to a distance that makes it virtually impossible for fathers to visit. (More than a fifth of children from broken homes live more than 400 km away from their fathers, according to Le Bourdais *et al* (2001: p. 14).) The incremental 10% of never-visiting fathers on the GSS is likely accounted for by the fact that these fathers do not even know that they are the fathers of the children they never visit. Note that 17% of fathers on the GSS reported never visiting their children, a figure in line with the reports of mothers to the NLSCY.
24. The standard access arrangement favoured by judges allows fathers every other weekend with their children, plus two weeks of holidays throughout the year – approximately two months' time. Thus it seems that the standard access arrangement falls at the lower level of access sufficient to instil in children the confidence to talk to their fathers about themselves and their problems. When fathers are unable to exercise even this minimal level of access due to a relocation or other disruption of access by mothers, their relationship can be expected to spiral into decline. Judges who are unwilling to enforce these meagre visitation orders against recalcitrant mothers do children a substantial disservice and are an equal participant to the alienation of children.
25. Juby *et al* (2003: p. 34) report that changes in the levels of father-child contact are “not unidirectional.” Two-fifths of the changes in contact between Cycle 1 and Cycle 2 of the NLSCY represented *more* contact with the father, while three-fifths represented less contact. It should be recalled that as many as 40% of children relocate to live 50 km or more away from their fathers after a separation, making increased contact practically impossible. Of the children who remain within a reasonable distance of their fathers, therefore, it seems that most of them actually increase their contact with him over time. This result is not predicted by the primary caregiver model, unless the courts are regularly making fundamental mistakes about who the primary caregiver of a child was.

## Chapter Two

1. No, parental ties are not “magical;” they are the product of evolution by natural selection, as explained long ago in a seminal article by W.D. Hamilton (1964). Hamilton's thesis has become thoroughly entrenched in evolutionary biology under the rubric of “kin altruism” (see Dawkins 1976: Chapter 7, “Family Planning”). If judges familiarized themselves with the biological basis of human families, they might be more respectful of the “natural law” that, in general, parents are both more knowledgeable about and more highly motivated to pursue the best interests of their children than any judge could possibly be.
2. This point was made by Beetz in *C.(G.) v. V-F(T)*, [1987] 2. S.C.R. 244 at p. 280: “The effect of a custody award is to remove the right of the non-custodial parent to exercise his or her parental authority” (cited approvingly by L'Heureux-Dubé in *Young* at p. 46). At least L'Heureux-Dubé was brutally honest about her view of family law, which is more than can be said for most contemporary judges and politicians. Tousignant (2007) is typical of modern judges who believe that choosing the right words to describe outcomes in court orders will magically reduce the adversarial nature of family law.
3. The term ‘consequentialism’ encompasses a broad class of normative principles. The common element to this class is its exclusive focus on outcomes: they all posit that the right thing to do in any situation, or the right law to enact to deal with a type of situation, is that which is expected to advance a particular kind of consequence. Different versions of consequentialism posit different types of consequence to advance, with different degrees of vigour. The earliest version, going back at least to the ancient Greek philosophers, is egoism. This normative theory posits that one should always act in such a way as to maximize one's own happiness or “utility.” So powerful is the grip of egoism that rationality itself is frequently identified with individual utility maximization (e.g. in economics and decision theory). As an ethical theory, however, egoism has obvious limitations. Indeed, the philosophical task of ethical theory is commonly understood as reconciling ethics with

rationality so conceived. Utilitarianism grapples with this problem by positing that ethical rules and laws should be crafted so as to maximize *social* utility. One attraction of utilitarianism is that it seems to extend a principle of rational choice for individuals – utility maximization – to society as a whole. In this way, utilitarianism is closely associated with the “ideal observer theory,” which posits that agents should choose that course of action which would be recommended by an observer who is both omniscient and benevolent, but otherwise like us. The best-interests principle in family law is another version of consequentialism. It posits that the only consideration a judge or custody assessor should take into account in making decisions on behalf of a child is that child’s best interests. (For ‘best interests’ in this formula, one could equally substitute ‘welfare,’ ‘utility,’ or other cognates of well-being.) Although the best-interests principle is other-regarding, it is nevertheless just as narrow in its objective as egoism is: it takes into account the welfare of only one individual. In the following sections, what could aptly be called “child-centred egoism” is shown to have the same limitations as ancient egoism from the ethical point of view.

4. Social conservatives might resist the argument of this section on the ground that they believe in the objectivity of value. They need to bear in mind two points. First, the argument for pluralism and liberty hinges not on the metaphysics of value, but on the epistemology of value. All that is claimed is that there is no publicly recognized ranking of values – a fact that faith-based commentators are only too eager to lament. Second, this epistemic skepticism only extends to “ultimate” values, not “instrumental” values. *Given* certain ends, it is in theory possible to derive values that are instrumental in achieving those ends. Thus, for example, if the ultimate end of families, from the point of view of social policy, is to produce the next generation of productive citizens – an outcome everyone has an interest in promoting – then we should strive to identify those values that tend to result in productive citizenship. That was largely the burden of the first chapter, which broadly supports the social-conservative view of benefits of the intact biological family and the harms of single parenthood for children. In actual fact, it is not the “right wing” social conservatives who most need to be mindful of the argument of the present section; it is the “left wing” liberals, multiculturalists, pluralists, and value relativists. Ironically, the liberal-elite in the legal establishment tend to be most vociferous in insisting that judges must have unfettered discretion to craft custody and access decisions to the precise circumstances of every separated family, apparently forgetting for the nonce the impossibility of so adjudicating whenever ultimate values are at issue – as they almost always are in family disputes. Liberal jurists should be chastened by the severe limitations placed upon the best-interests principle by their own implicit philosophy, and curtail their interventionist tendencies accordingly.

5. Parental alienation is felt most acutely by fathers who were most involved in the children’s lives (Kruk 1994, p. 21; see also Kruk 1993a):

Fathers describing themselves as having been relatively highly involved with and attached to their children and sharing in family work tasks during the marriage were more likely to lose contact with their children after divorce, whereas those previously on the periphery of their children’s lives were more likely to remain in contact. Now-disengaged fathers consistently scored highest on all measures of pre-divorce involvement, attachment, and influence.

6. There is precedent for this type of reasoning even in child custody cases. As noted in a subsequent section of this chapter, children whose custodial parent is in a homosexual or biracial union can often be expected to suffer significant negative effects due to discrimination, peer taunting, being ostracized, and the like. Courts have refused to take these very real effects into account when awarding custody, on the reasonable ground that they do not want to recognize or give influence to illegitimate or improper attitudes.

7. Sheer prejudice leads most judges – even on the Supreme Court of Canada – to prefer the evidence of the mother, often even in the face of objective evidence to the contrary. (See *R. v. Ryan*, 2013 SCC 3 for a particularly blatant illustration.) That, though, is a separate problem, to be addressed in the final chapter.

8. It bears pointing out once more how off-side with the fundamental tenets of their own political philosophy the liberal legal elite are when advocating the best-interests principle in custody disputes. Not only does it sit uncomfortably with their commitment to value pluralism, it also sits uncomfortably with principles of rational choice like maximin and the precautionary principle, to which most liberals are wedded in other contexts. Indeed, the fountainhead of the maximin

decision rule, Rawls (1971), is widely regarded as the Bible of liberal political philosophy. Rawls's proposal for a principle of choice under uncertainty is not the only reasonable candidate, but it is the most widely cited and discussed by decision theorists and ethicists. All reasonable candidates share the properties of being cautious and modest in their objectives.

9. The current legal presumptions in favour of the *status quo* and the primary caregiver will often lead to this result, because it is often the case that one parent is more competent than the other at most or all aspects of life. The fact that parents have opted for a specialization of tasks prior to a separation, with one focusing more on the children and the other at earning an income, in no way indicates that the primary caregiver is better at parenting or (more relevantly) at co-parenting after a separation. Indeed, if a mother cannot find gainful employment once the youngest child is in school in this day and age, this should raise concerns about the existence of a personality problem the children are best sheltered from. Despite public policy promoting affirmative action for women in the workplace, family courts continue to favour stay-at-home mothers with primary custody even long after the children have been in school.
10. It has long been known and widely accepted by researchers that one of the biggest risks children of separated parents face is physical and sexual abuse at the hands of a step-father, or a boyfriend of the custodial mother. Daly and Wilson (1988: 87-88) call this the "single most powerful risk factor for child abuse that has yet been identified." The child's vulnerability is obviously increased, and the risk heightened, when the biological father has limited involvement in the child's life.
11. Bumping the analysis up a level is a typical response by utilitarians to systemic problems arising from a direct, case-by-case application of the utility-maximizing decision principle. The classroom example relates to the institution of promise-keeping. Suppose you make a death-bed promise to your mother, but it turns out later that breaking the promise would lead to the greatest happiness for the greatest number. (The happiness of your mother, having died in the meanwhile, will be unaffected by your decision to break your promise.) The question is: Should you break your promise? An "act-utilitarian" would say that you should because doing so straightforwardly maximizes utility, and your action should be judged on this basis only. A "rule-utilitarian" would say that this takes too narrow a view. If everyone were to break their promises with impunity whenever circumstances changed, nobody could count on promises being kept and so very few promises would be made. That would be counter-productive; undermining the institution of promise-keeping would obviously reduce utility overall in the long term. Thus we need a rule always to keep promises, even if breaking a promise in a given case would maximize utility. The argument in the text favouring rules that support the institution of fatherhood parallels this rule-utilitarian argument in support of the institution of promise-keeping.
12. When mothers seek primary custody, fathers are caught in a double-bind. On the one hand, if they go to court proposing a reasonable shared-parenting regime, they risk having the judge deliver a compromise, splitting the difference between the parties by awarding the mother primary custody but granting the father an extra over-night during the week. (Judges often "split the difference" when they do not want to decide completely in favour of one party or the other, or when they feel unable to do so due to decision-theoretic problems such as uncertainty discussed above.) On the other hand, if they go to court proposing that they get primary custody, hoping to get a compromise on shared parenting, the judge is likely to reject that position out of hand as being unrealistic – and then punish the father for taking such an unrealistic negotiating stance. Thus it is always in the mother's interests to seek primary custody, at least as a negotiating position, rather than going directly for the best solution for the child.
13. This is a formulation of the ancient "paradox of egoism," which states that self-interest is best pursued by taking an interest in other things and in other people. Such paradoxes are not uncommon in consequentialist reasoning. The failure to attend to the distinction between ultimate objectives and mediating principles is fatal to any application of the best-interests principle.
14. Ignatieff (2000: pp. 103-104, emphasis added). On the campaign trail in 2008, Ignatieff was asked if he stands by his views of family law as stated in this book, and he affirmed that he does. Regrettably, his influence with the women's caucus of his party appears to have been limited, as the Liberal "Pink Book III" makes no mention of divorce-law reform toward equal shared parenting.
15. Peter K. Roscoe, in an unpublished but exhaustive survey of reported family-court decisions in Ontario between 2000 and

2008 (n>500), estimates that the median cost of an *interim* motion is \$8,580 for both parties. The median cost of a divorce trial is \$60,200 for both parties; and the median cost for a variation application is \$17,800 for both parties. (The average cost is approximately double these figures due to a number of wealthier litigants who ran up enormous costs.) Trials and *interim* motions often deal with issues other than custody, but custody tends to be the most hotly contested and uncertain aspect of a family dispute. Roscoe also helpfully cites about 15 pages of judicial commentary on the issue of costs from the cases he surveyed, from which the following are drawn:

The average household does not have the income to fund a heated legal battle and also save for their children's future education. Monies expended on costly litigation over custody may well equal or exceed the costs of sending a child to college or university. [*Lampshire v. Lampshire*, 2002 ONSC 2737, ¶13, per Pierce J.]

Although it is obscene that anyone should have to spend \$100,000 in respect of a custody application (the equivalent, perhaps, of five years of university, including tuition, books, room and board), that sad fact alone does not prove the motion. (And I expect that the father has paid, or is liable to pay, a similar amount to his counsel.) ... As an aside, I have asked both parties voluntarily to attend upon a psychiatrist to be assessed as to whether mental illness is fuelling this litigation. I understand that the father is doing so. I do not know about the mother. [*Stefureak v. Chambers*, 2005 ONSC 7890, ¶9, per Quinn J.]

Not surprisingly the submissions with respect to costs have consumed many pages – to my way of thinking a shockingly excessive number of pages. Taken together the costs claimed total about \$400,000.00 – considerably more than the equalization payment and more than 50% of the net worth of both parties at the date of the separation. To my way of thinking a justice system that permits plunder of that nature, particularly when children are involved, is in desperate need of overhauling, and, but for the censure I have recently received for interfering too much with counsel at trial, I would never have permitted this trial to proceed as it did. [*Janmaat v. Janmaat*, 2005 ONSC 25900, ¶¶33-34, per Misener, J.]

I am concerned that costs in family proceedings are becoming so high that it threatens to jeopardize access to justice for many litigants contrary to a fundamental principle of any democratic society. Access to justice and to the courts of our country cannot be restricted to only those who can afford it. [*Dube v. Horzempa*, 2007 ONSC 20776, ¶16, per Smith, J., echoing the dire warnings of Canada's Chief Justice in recent years]

And on and on it goes.

16. See the previous endnote for a comparison of costs. Some will be inclined to believe that you get what you pay for: that relatively inexpensive mediators will be correspondingly less effective at resolving family disputes in the best interests of children than lawyers and judges. It cannot be denied that many family therapists today are no better than judges in resolving disputes between parents. Some, indeed, are little better than quacks or sell-outs. Until the profession is better regulated and qualifications are better standardized, increasing the role of mediators in family disputes will strike some as misplaced. The biggest problem with court-appointed mediators today is that they must answer to judges, and pander to the biases of judges lest demand for their services dry up. Having mediators answer ultimately to parents rather than judges – as the requirement of mutual agreement entails – should ensure a higher level of objectivity and competence than is evident in the legal system today. In any event, it certainly is not being suggested here that mediators replace judges; it is only being suggested that mutually agreed upon mediators be enlisted to smooth the friction around the edges of a presumptive shared parenting arrangement, rather than have the parents run to court with lawyers over every bothersome issue.
17. A diehard consequentialist might argue that applying the best-interests principle in cases where someone has obtained custody by breaking the law would be self-defeating since it would encourage more people to break the law, contrary to the best interests of children generally. Thus refusing to reward illegal behaviour – indeed, punishing illegal behaviour without regard for the *ex post facto* best interests of the child – is actually in keeping with the ultimate objective of advancing the best interests of children overall, and in the long run.

## Chapter Three

1. Methods of calculating parenting time are prone to statistical manipulation, and so any figures cited are likely to be debatable. Everything depends on what is and is not counted as “parenting time” or “housework.” Anomalies abound in this area of research. Some studies count the time mothers spend shopping for groceries and cloths and household items as “family labour” – but not the time men spend at work earning the money to pay for these things. Some studies count dusting and vacuuming and laundry, but not car maintenance, home renovations, and cutting the lawn. Some studies count the time mothers spend driving children to school or extracurricular activities, but not the time fathers spend driving the family to church or other outings and vacations. The study Kruk (2008) references minimizes these anomalies by counting only direct parental contact or interaction with the children: bathing, feeding, changing clothes, reading, tutoring, playing, and the like.
2. The manner and extent to which extremist, radical feminism has penetrated mainstream Canadian political and legal culture has been well documented in several sober academic accounts, starting with University of Calgary political scientists Morton and Knopff (2000). An even more trenchant criticism is offered by University of Western Ontario law professor Martin (2003); see especially chapter 7, “The Matriarchy in Charge.” Finally, McGill sociologists Nathanson and Young (2006) document the trend in meticulous detail in their massive tome; see especially Chapter 6, “Maternal Rights vs. Paternal Rights: The Case of Children,” and appendix 9, “Dissing Dads: The Debate over Custody.”
3. Human-rights activist Erin Pizzy, founder of the first women’s shelter in Britain in the 1970s, has said that, “For gender politics, Canada is the scariest country on the planet” (February 2008). If Canada is “the scariest country on the planet” for fathers, then it is a near-run thing with the United States, from whence much of Canada’s bad family law is adopted. The American experience is described in horrifying detail by Baskerville (2007).
4. A taste of how agreeable Canadian courts are to fathers who seek custody of their children can be discerned from ¶4 of this judgment: “At or about the time the child was born, the [father], through members of [the mother’s] family, was advised that [the mother] was pregnant and that he was likely the child’s father. *More troublingly*, [the father] was advised that it was [the mother’s] intention to place the child for adoption” (emphasis added). Why is it “troubling” *at all* that a father should be advised of the whereabouts of his newborn child, and of the child’s pending custodial arrangements? If the mother had wanted to keep the child and the father had wished to have nothing to do with it, then the court would have found this attitude “troubling,” and made a punitive child-support award against the father. What is truly disturbing is the judicial mentality that finds a father’s wishes “troubling” no matter what they are. Ultimately, the court deemed it to be in the best interests of the child to grow up with the more affluent but unrelated adoptive couple, thereby contradicting years of case-law precedent stating that the income earning power of a prospective custodian is not a relevant consideration in a custody dispute (because it usually favours fathers in disputes with mothers). By contrast, see *B.C.S. v. C.L.J.*, 2007 ABCA 24 for a case where the biological mother was preferred over a biologically unrelated couple who had actually raised the child to the age of 3½ years. The only consistent “principle” that can be discerned in these adoption cases is to favour the wishes of the biological mother no matter what they are, and to disregard the interests of the biological father (and the child) completely.
5. If this scenario seems fanciful, consider the plight of an 85-year-old disabled man who was raped by his maid while recovering from a stroke. He sued and was awarded damages for the assault, but he was also ordered to pay his rapist child support. His pension was garnished to make sure he paid. To top it all off, he was denied access on the ground that it was not in the child’s best interest to see his dad (Hiller 2000).
6. Similar results have been found to obtain in many pair-bonding bird species. This is because it isn’t only male DNA that benefits from infidelity. A general principle of genetics is that producing offspring with diverse genetic make-up is valuable for males and females alike. The more genetically diverse one’s offspring, the more likely at least some will survive disease and other challenges of life. Life-long pair-bonding thus entails reproductive costs, inasmuch as it limits the genetic diversity of one’s offspring. This is less problematic for males, who may spread their seed to many females outside of their pair-bond at little cost. A promiscuous female, on the other hand, risks losing the support of her long-term partner if she produces a child not belonging to him. Human females have evolved their own adaptations to reduce the risk of losing a partner’s support due to genetically advantageous promiscuity (Baker 1996). In particular, it is a curious if not singular fact about women that their



period of fertility is disguised not only from potential sexual partners but from themselves. Before the era of DNA testing, this made the paternity of children not generally provable, allowing women clandestine indiscretions with relative impunity. (To be confident he is raising his own children, a man must jealously guard his partner from interlopers. Male jealousy evolved as a response to a disguised estrus cycle in pair-bonding humans.) Baker also notes that a woman experiences orgasm differently depending on whether she is mating with a long-term partner or having a clandestine affair, such that she is more likely to conceive in the latter case than in the former even if she has sex less often. The point here is that female infidelity and reproductive deception is not some kind of aberration; it is an evolved trait that finds frequent expression. A woman who disguises her fertility from a man in order to have sex with him engages in the act without obtaining his fully informed consent. This can have life-altering consequences for him. According to the logic of the courts in cases where women are found not to be fully informed participants, disguising one's fertility in order to obtain sex would be criminal conduct by women. The fact that it is not shows again how one-sided reproductive rights are in Canada.

7. This comment was made in the context of an application to hold a mother in contempt after six years of extreme parental alienation, access denial, and general disruption and disregard for the judge's orders and directions. Watson had been case-management judge for three of those years by this point, and he had had the benefit of a custody assessment that squarely placed the blame on the mother for telling the young children absurd lies about the father to get them to fear him and be uncomfortable around him. In court, the mother sat in her place and challenged Watson to throw her in jail, saying, "If you are going to send me to jail for not forcing the children to visit their father, then you might as well take me away right now" – while holding her arms ramrod straight in front of her, with wrists pressed together as if ready to be handcuffed and taken away. It was an astonishing scene, where a very senior judge positively withered before a sociopathic mother who announced her intention to flout his orders. This remarkable case is to be detailed in an anticipated second book that details actual cases in family law.
8. As might be expected, the couple who had contracted to obtain this child through surrogacy were quite wealthy, while the surrogate mother was quite poor. The difference in family incomes undoubtedly surpassed the 10-fold difference shown by Millar (2009) to have favourable outcomes for children. For this reason, too, you might expect a court to have awarded custody of the child to the biological father and his wife, if the child's best interests were the governing concern. Recall that that is indeed what the judge ruled in the *Hendricks* case. What these cases illustrate is that one's greater affluence and professional standing can only be invoked to deny a biological father his parental rights; they can never be thought to count in a biological father's favour in custody decisions.
9. Chipeur (2003) usefully elaborates on the themes of this and subsequent sections.
10. The adoption of the *Charter of Rights and Freedoms* ended the tradition of parliamentary supremacy in Canada. What we have now is a system of *de facto* judicial supremacy, as judges are invited by litigants, special-interest groups, and even politicians to review statute law for conformity to the vague and essentially contestable provisions of the constitution. This is no less true in matters of custodial rights than it is of the more heated debates over abortion, same-sex marriage, and the like. The increasingly aggressive intrusion by judges into family matters that will be panned in the final chapter is attributable in no small part to their elevated status and self-importance following the adoption of the *Charter*. (Arguably, the "notwithstanding clause" in the *Charter* preserves Parliamentary and legislative supremacy inasmuch as it allows politicians to pass laws that over-ride judicial pronouncements. However, the over-ride itself is time-limited; the notwithstanding clause is better thought of as merely suspending the judicially determined outcome for a period of 5 years, after which politicians have to extend the immunity for another 5 years, or allow it to lapse in favour of the judicial determination. In practice, if not quite in theory, judicial supremacy reigns.)
11. Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." By insisting that this provision requires courts to oversee how parents and the state deal with children, La Forest is guilty of judicial activism – the creation of law out of whole cloth. Parental rights, though no doubt fundamental to a free society, are no more derivable from s. 7 of the *Charter* than are the equally fundamental right to private property. Indeed, essentially the same reasoning as La Forest engages in to



derive parental rights from s. 7 of the *Charter* could be used to derive private property rights; yet that conclusion has always been anathema to the Canadian judiciary.

12. The rare exceptions to this generality prove the rule. In 2002, Deborah Jean Craddock lost custody of two children to her ex-husband, Thomas Zinns, in the Dominican Republic. In 2006, she falsified a court order and absconded with the children to Canada, where she was promptly arrested. At the sentencing hearing in 2008, the presiding judge, Ann Adler said, “I am sympathetic to you. It is a terrible thing not to have your children when you want them,” before sentencing her to a 12-month conditional sentence (McCooley 2008). It seems that the only parents our family-dispute system has any sympathy for are mothers who commit crimes against their children. By contrast, perfectly normal fathers are stripped of their children with equanimity every day.
13. One consistent finding from surveys of children of divorce as adults is that what they regret most is losing contact with their fathers. See, among others, Kruk (2008) and Braver (1998). Of course, when a father is reduced to a visitor in his child’s life, the child’s entire extended family inevitably becomes very occasional visitors in the child’s life. Regrettably, mostly by judicial fiat, extended families have practically no value in our family-dispute system.
14. Legislative clauses similar to the last one cited are often referred to as “the friendly-parent principle,” because it is naively assumed that the objective of the clause is to favour a parent who is co-operative over one who is hostile. While the friendly-parent principle as just enunciated is indeed a good and useful one, the statutory provision cited is not usually applied in the manner suggested. In fact, the opposite is more commonly the case in practice. This clause gives a mother who wants primary custody every incentive to inflame disagreements, to create misunderstandings and hostility, and to refuse to share information relating to the child, because if she can convince the judge that co-operation is impossible, then primary custody is the prescribed result. An unco-operative mother merely has to convince the judge that the balance of the remaining considerations favours granting her primary custody. Since one consideration judges must take into account is “the history of care of the child,” and since it is easy to convince judges that mothers are the primary caregivers in most cases, even mothers who are found to be highly hostile and unco-operative toward the father obtain primary custody nine times out of ten.
15. Section 15(1) of the *Charter* provides: “Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Section 28 of the *Charter* provides: “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”

## Chapter Four

1. Information provided by provincial maintenance enforcement programs indicate that women are the registered recipients of child support in 97% of cases (Paul Robinson 2009a: p. 5). Men are referred to as “debtors” in an equal percentage of cases. Yet fathers obtain primary custody in about 10% of separations – a proportion that has been fairly stable for decades (Morissette and Ostrovsky 2004: p. 11). In addition, about 7% of cases involve shared or split custody, where the higher income earner is expected to transfer support to the lower. Since 30% of women in the general population now earn more income than their partners (Fitzpatrick 2006), one might expect mothers to be the payors of child support in a further 2% of cases, or 12% in total. It appears, therefore, that only a quarter of mothers who are eligible to pay child support actually do so. According to Juby *et al.* (2004: p. 44), “payments are less common for children in their father’s custody; approximately one-third of those with an agreement expected child support payments to be made. This supports other studies showing that non-custodial mothers are rarely required to contribute to their children’s financial support.” In this chapter, non-custodial parents and child-support payors will be referred to as fathers, given the extremely high correlation between gender and “debtors.”
2. Thousands of men are sent to jail every year for failing to meet their deemed support obligations, even while homicidal women are allowed to walk free and take custody of their children. See the story of Shirley Turner in the Appendix for one

such example.

3. Baskerville (2007) is a good source for cases that rival anyone's worst nightmare. The stories are too many and varied to summarize here, but a couple of illustrative scenarios should whet the appetite of those who have a taste for social injustice. It is periodically reported that servicemen returning from a year-long tour of duty in Afghanistan or Iraq have been immediately arrested upon setting foot on American soil. Their crime is to have fallen into arrears on their child support, notwithstanding that they were never told that an order was outstanding against them – or even that they had become separated while serving overseas. There is even an absurd law in the U.S. that prevents a man from contesting parentage more than six months after a claim is made against him – even if he was not served with the initial order in time to contest the claim, and even if he is too poor to be able to afford a DNA test to disprove parentage. As in Canada, it is futile to argue constitutional protections against these kinds of arbitrary enforcement measures: a naïve pursuit of the child's best interests supposedly trumps all, even fundamental justice (Millar 2010).
4. Statistics Canada's "low income cut off" (LICO) was universally employed as a measure of poverty by activists and academics who decried the inadequacy of maintenance orders prior to the implementation of the *Guidelines*. This misuse of LICO represents a deliberate inflation of poverty statistics, since LICO only measures relative affluence, and is expressly and constantly denied to be a measure of poverty by Statistics Canada.
5. Perhaps the most prolific and influential Canadian disciple of Lenore Weitzman was University of Toronto Law Professor Carol Rogerson (1987, 1989). The Federal-Provincial-Territorial Family Law Committee that oversaw the development of Canada's *Guidelines* cited conclusions from Weitzman and Rogerson uncritically, for example in their earliest publication, "Child Support: Public Discussion Paper" (1991). The academics who were commissioned to assist the Committee with the development of the *Guidelines* naively refer to Weitzman (1985) as a "classic" work (Stripinis *et al.* 1993: p. xi).

To be fair, Douglas cites some original Canadian research by Rogerson (1989: p. 274), to the effect that "Typically the household of the custodial parent (usually the mother) and children is left with an income between 40% and 80% of that enjoyed by the non-custodial parent." But her methodology follows that of Weitzman, and the quality of her sample and other aspects of this research are questionable. As we shall see, Rogerson's figures are not representative of the state of finances of separated parents at the time.

6. Judges are permitted to take into account common knowledge that is not open to reasonable dispute, even if the facts have not been lead as evidence by the parties to the litigation. This is known as "taking judicial notice" of a fact. Judicial notice is widely abused by Canadian judges, especially by appellate courts that reference sociological or psychological findings that are far from established in the scientific literature. Here, the "fact" taken notice of by judges is the "feminization of poverty," a phrase that appears in *Moge v. Moge*, [1992] 3 S.C.R. 813; *Peter v. Beblow*, [1993] 1 S.C.R. 890; *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765; *Willick v. Willick*, [1994] 3 S.C.R. 670; *M. v. H.*, [1999] 1 S.C.R. 3; and *Miglin v. Miglin*, [2003] 1 S.C.R. 303. In *Moge*, as well as in *Young*, the Supreme Court specifically cites Weitzman's work as establishing a link between the "feminization of poverty" and marriage breakdown. In all of these judgments, the Supreme Court cites various Canadian authors who cite and were influenced by Weitzman. The Supreme Court's totally unbalanced reliance upon dubious sources from the feminist echo chamber make for some gut-wrenching reading. The undisguised contempt for men and their role as fathers prevailing within the legal establishment in the 1990s finds its most eloquent expression in the judgments of L'Heureux-Dubé. The following snippet from *Young* gives a flavour:

A vast number of non-custodial parents are in default of their most serious obligations to their children...: the responsibility to provide economic support... The most pressing issue in child custody and access is the burden borne by women and children as a consequence of the failure of men to accept their responsibilities to their children. As Ruth Deech noted, ... "[t]he reality is the call on fathers to pay more, not to enjoy more rights." There is a certain irony in the claim to greater contact and control on the part of access parents in the face of such widespread neglect of the children's basic needs.

This passage illustrates not only L'Heureux-Dubé's contempt for fathers, but her contempt for the truth. As we shall see,

fathers have never been guilty of “widespread neglect of the children’s basic needs,” even after being forcibly removed from their children’s lives through no fault of their own. And to cite Ruth Deech – now Baroness Deech, Gresham Professor of Law – as authority for this proposition is contemptible. Dame Deech was merely stating a fact, the “reality” that fathers are always expected to “pay more” while enjoying fewer rights. She was not endorsing or prescribing this state of affairs. In fact, her own view is diametrically opposite that of L’Heureux-Dubé. In speeches now readily available on the internet, she states her view with admirable clarity and vigor:

The strongest argument in favour of maintenance is that the divorced wife will have raised children and her career has been undermined by marriage. Given that most women work, this is a matter of choice; childcare does not take up the whole of a long marriage; and the wealthier the spouses the less likely that there was much to do by way of housework. The notion of ‘compensation’ recently put forward by judges as a basis for awards is unrealistic.

My extreme view, which will never hold sway, is that no maintenance should be payable unless the claimant spouse is unable to work or has the care of young children. Her incapacity for work should be one for which there is no state support and which is also fairly attributable to cohabitation with the other spouse, and for which it is reasonable to expect him to pay.

If divorce is, indeed, inevitable in society, then women should be educated to face it, and it is no solution to the material and psychological problems to expect them all to rely on ex-husbands.

7. A close parallel can be drawn between the quantification of child support in the old common-law system and the quantification of jail terms for criminal misconduct. Many aggravating and mitigating factors need to be taken into account in both situations – individual circumstances that tend to increase or decrease the *quantum* of support or jail time. In both types of case, lower-court judges are supposed to apply principles articulated by appellate courts to the particular circumstances of an individual case. In both types of case, judicial discretion is fairly broad, despite the principles articulated by appellate courts. In both types of case, courts have been widely criticized for making judgments that are “inadequate, inconsistent and arbitrary.” (In the criminal context, see Paciocco 1999 and Macdonald 1999, among others.) Yet it is unimaginable that a lowly Provincial Court judge would pen a scathing indictment of appellate practice where criminal sentencing is concerned, comparable to that penned by Williams on the quantification of child support. Surely the complexities and consequences inherent in making child-support awards are no greater than those inherent in criminal sentencing – or in assessing damages in tort cases, for that matter. If judges are incompetent at the former, one should expect them to be no less incompetent at the latter. Yet even the modest attempts of successive Conservative governments to impose minimum sentencing requirements on judges have been opposed by the legal profession tooth and nail. The broadest possible judicial discretion for criminal sentencing is elevated to constitutional principle. One suspects that judges happily abdicated their discretion over making child-support awards, while jealousy guarding their discretion in criminal sentencing, not because they felt they have any greater competencies in criminal over family law, but because many of them loathe family law and so were quite happy to see legislators impose punitive, non-discretionary awards, whereas they needed to retain discretion in criminal sentencing in order to continue to favour female convicts (Brown 2004). As noted in a previous chapter, gender politics in the legal business was at a high tide at the time of these developments.

8. Douglas (1993: p. 6, endnotes omitted). The study referred to in this passage (Justice 1990: p. 81) did not actually show that child support levels had deteriorated between 1985 and 1988. What it showed is that for a very small and unrepresentative sample, child support levels had increased, although not by as much as a hypothetical inflation adjustment might have warranted.

9. To mitigate opposition when the *Guidelines* were being debated, the Liberal government agreed to set up a Parliamentary committee to look into custody and access issues. The committee conducted extensive interviews across the country, releasing an exhaustive report in record time (Parliament 1998). Titled *For the Sake of the Child*, it documented the egregious dysfunction of the existing custodial and access regime, advocating instead a rebuttable presumption of shared parenting. In May 1999, Justice Minister Anne McLellan issued the “Government Response to the Report of the Special Joint Committee on Child Custody and Access” (Justice 1999). Though sub-titled “Strategy for Reform,” the government’s response was that

the *status quo* would essentially prevail where custody and access are concerned. The Liberal government explicitly rejected legislating any presumptions, stating that doing so would violate the “principle” that “one size does not fit all”:

...while the laws governing divorce and custody and access need to apply uniformly to all parties, the unique characteristics of families and family members mean that couples’ separating and divorcing experiences will be very different. Conflict levels of separating parents vary widely, as do individual children’s needs. As well, children undergo developmental changes over time, and adjustments may be needed to allow for changing relationships and circumstances. For these reasons, a fundamental aspect of the Government of Canada’s reform strategy is to support improvements that will allow for flexibility to meet the best interests of children. It is essential to recognize that no one model of post-separation parenting will be ideal for all children. [p. 5]

Other chapters in this volume tackle the hubris that judges are capable of crafting nuanced custody and access orders to the particular circumstances of individual families. Here the point is to highlight the government’s hypocrisy in promoting rigid and simplistic child-support guidelines – *because judges cannot be trusted to exercise their discretion fairly and reasonably* – while at the same time claiming that judges are well situated to make individualized custody and access orders. The consistent thesis of this volume is that the family-dispute system in Canada is dysfunctional all around, leading more often than not to bad custody, access, and support determinations alike.

10. See Millar and Gauthier (2002) for a thorough debunking of Weitzman’s work. Although it did not go unchallenged at the time (see, for example, Abraham 1989; Peterson 1996; and Braver 1998), one would never know that there were critics from reading judicial and government sources. The one positive thing that can be said about Weitzman’s analysis is that it only looked at divorce cases. As illustrated by the excerpts from Douglas (1993) earlier in the text, many Canadian researchers and judges, by contrast, conflated the effects of divorce with the circumstances of single motherhood generally. It is characteristically harsh of Department of Justice Canada advisors to blame fathers for non-support even when they were deliberately kept out of the lives of children from the moment of conception.
11. Justice (1990: p. 81) reports on women who were asked why they did not request child support. “Of the 24 women who responded to that question, 11 said because their ex-husbands could not pay, ten because they had no need of child support, two because they did not want their spouse to use it as a ‘bargaining tool’ and one because she felt her ex-husband would put up a fight.” On this basis, L’Heureux-Dubé blames men for “widespread neglect of the children’s basic needs.” There is a greater outcry in the advocacy literature over the fact that a third or a quarter of men fall behind in their child support payments, or are late making them, than that two-thirds to three-quarters of non-custodial mothers make no child support payments at all (as calculated in endnote 1 above).
12. L’Heureux-Dubé showed no interest in revealing these facts in her judgments, although she was keen to cherry-pick others from the same study that appeared to be more supportive of her anti-father diatribes. Millar and Gauthier (2002) note that the study presented many of its findings in a highly tendentious fashion, and reached conclusions that were unsupported or even contradicted by its own facts. It is therefore likely that L’Heureux-Dubé was willfully bamboozled by this advocacy document. However, the particular facts mentioned in the text were presented plain and undisguised. So in addition to being in over her depth, L’Heureux-Dubé was also guilty of cherry-picking only those “facts” that suited her preconceived judgment. This is the very antithesis of impartial adjudication. Amateur sociological dabbling of this kind seems to be an irresistible temptation when judicial activism calls.
13. It goes without saying that single-parent families are overwhelmingly headed by women. These figures are based on 2004 income data, when the rate of low-income children was near a 15-year low (see the chart on p. 14 of that study), and when the economic prospects for women were at record highs. When the *Guidelines* were being developed, the problem of deadbeat moms was significantly higher. For example, Marcil-Gratton *et al.* (2000: p. 22) report that in 1995, “Almost two-thirds of recipients [of child support] reported a total income of less than \$20,000 per year.” Note that in 1995, “total income” would have included child and spousal support, as well as government transfers, meaning that for most recipients of child support, their own earned income would have been negligible.

14. Although low income was less common among lone fathers than lone mothers, it was more severe when it existed: “The data... suggest that the level of poverty of these lone fathers surpasses even that of lone mothers who are not employed” (Le Bourdais *et al.* 2001: p. 12). The main reason, of course, is that unemployed lone fathers almost never receive child or spousal support, because women are rarely ordered to pay, and rarely pay when ordered (see again endnote 1). Lone fathers are also less likely to receive social assistance, since fathers are stereotypically perceived to be an unsympathetic class by government agencies.
15. An authoritative history of the development of child-support guidelines in Canada has not been written, and this brief section does not purport to fill that gap. Justice (2002: p. 39) provides a very brief but nevertheless helpful summary of the public process that culminated in the *Guidelines*. What little is known about the internal process is found only in unpublished sources on the internet, specifically in articles written by advocates for fathers who came late to the scene of the crime and had to engage in forensic inquiry to piece it together. This section, as well as some others in this chapter, owe much to the unpublished writings of, and follow-up discussions with: George Piskor (2009, 2011), of the Canadian Equal Parenting Council; Brian Jenkins (undated), of Fathers Are Capable Too (F.A.C.T.); and Lucien Khodeir (2009), working on his own. Alar Soever (2002) was a very helpful source; some of his findings were publicized at the time of their release by McLean (2002a, 2002b).
16. To this day, the government has never released any document to the public that explains how taxes are dealt with in the generation of the Tables. The tax treatments do not even appear in Justice (1997). As we shall see, bureaucrats do not believe that researchers could be trusted with technical information of this nature. Ironically, they do trust private firms that develop software for lawyers and judges to use to calculate child support to handle the technicalities. (Indeed, the government has created a private monopoly in the provision of child support software by their selective release of the tax treatments.) All that is publicly known about this subject has been inferred from reverse-engineering: i.e. by testing various hypotheses about what tax provisions must have been taken into account in order to replicate the Table amounts. But reverse-engineering can only be done in retrospect, knowing the provisions of the “new child support package” as well as the Tables. No lawmaker could have known that the augmented child support benefits would be treated as a windfall to mothers at the staggered times these laws were passed. This suggests a concerted effort by the bureaucracy to disguise the true impacts of these measures.
17. Section 28 of the *Divorce Act*, as amended in 1997, states: “The Minister of Justice shall undertake a comprehensive review of the provisions and operation of the Federal Child Support guidelines and the determination of child support under this Act and shall cause a report on the review to be laid before each House of Parliament within five years after the coming into force of this section.”
18. A host of assumptions is built into the model in the technical report released by the Department of Justice Canada to explain how the Tables were calculated (Justice 1997). More will be said about many of these assumptions later; for the purpose of this illustrative example, they are taken as given.
19. Soever’s (2002) more technical analyses confirm the validity of the example in the text. He shows that as access time approaches 40%, the financial contribution made by the mother falls to a “negligible amount,” since the father’s contribution is sufficient to cover the entire cost of raising a child 60% of the time. In fact, if the father’s contribution is pro-rated over the number of days the child is actually in the mother’s care, the implied cost of raising the child amounts to 98% of the parents’ combined gross income. Soever estimates that fathers with 40% access will have a standard of living 30% lower than mothers, barely above the poverty line for average income earners in Canada.
20. As noted in the first chapter, Millar (2009: p. 86) found that having an “adequate” income was associated with a reduction in emotional disorder for children. Adequacy of income is defined as having at least lower-middle income as defined by Statistics Canada. It is perhaps surprising that having an adequate income was not associated with any other health, educational, or behavioural outcomes, when controlling all of the other family and parental characteristics. This tends to confirm how very weak family income is as a predictor of a child’s future prospects in Canada – as many generations of poor immigrants whose children have accomplished great things can attest. It is typical of governments to waste a great deal of energy trying to “fix”



perceived problems with simple legislative measures while ignoring the truly important factors.

21. The Quebec guidelines produce results that appear to be comparable to pre-guideline levels of support in the rest of Canada. Given that the Quebec guidelines have been judicially recognized not only as adequate, but even as being more fair than the federal *Guidelines* (in *Premi v. Khodeir* (2009), CanLii 42307), one wonders why everyone was so convinced that pre-guideline awards were consistently inadequate. (Prospective fathers in the rest of Canada would do well to anticipate a separation and enter into prenuptial or separation agreements that specify support awards consistent with the Quebec guidelines.)
22. In *Young*, L'Heureux-Dubé remarks with dismay that, "Women in particular have become concerned that the importance of women's work in caring for young children can be devalued under the best interests test, as judges consider such factors as the superior financial position of most fathers when deciding custody matters." L'Heureux-Dubé once again shows herself to be the grandest promoter of feminist myths and stereotypes, as this stated concern is completely unconnected with reality. As was shown in chapter one, the proportion of primary custody decisions in favour of mothers had actually *increased* in the years following the passage of the *Divorce Act*. The reality is that judges universally believe that children are better off living in low-income situations with mothers whose commitment to the workforce is tenuous than with fathers who work full-time all year and thus live comfortably.
23. It would undoubtedly be a good thing if, before they had children, couples entered into voluntary parenting contracts that contemplated custodial and financial arrangements in the event of a separation. This would focus their minds on what they each want out of the relationship and thus what they are willing to put into it – rather than allow a court decide for them. The existence of family maintenance statutes that are impossible to contract out of causes few people to take the prudent course of discussing these matters before marriage and children.
24. Murray (1984) is a sustained critique of social welfare entitlements in the U.S. For decades, mainstream economists as well as think-tanks such as the Fraser Institute and the Atlantic Institute for Market Studies (AIMS), have been exposing the counter-productive effects of corporate welfare. AIMS, as well as the Frontier Centre for Public Policy, have also exposed the deleterious effects of equalization transfers between provinces – an inter-governmental entitlement program. See Milke (2002) for more about the latter. Given this well-established theoretical framework, it is curious that so many conservatives fail to perceive the comparable deleterious effects of legislated spousal maintenance entitlements.
25. Our grandmother's question, "Why would he buy the cow if he can have the milk for free?" has been inverted to, "Why would she clean the barn up after the bull if she can have the beef for free?" Recall the section on "A mother's exclusive rights" in chapter three for a list of ways women can acquire an equalizing claim to a man's paycheque using morally culpable force or fraud. This list does not include the simplest method of all, namely by preying on a man's biologically conditioned weakness of will. While it may be a moral shortcoming for a man not to be able to control his sexual urges, it is also a moral shortcoming in women to exploit that weaknesses for their own gain. Moral blame is rarely all on one side when children are conceived "accidentally." Despite this obvious truism, only men are chastised for not "keeping it zipped;" only a man may be branded "the author of his own misfortune" in family court.
26. It is noteworthy that the *Guidelines* are designed to transfer 17% of the father's after-tax income in section 3 support for one child. When there are multiple children and section 7 add-ons, it could easily climb to 50% of his after-tax income. Allen (2007) shows the effect of net wealth transfers on promoting divorce.
27. Consider the proverbial single mother of two children collecting social assistance of \$15,000 per year, tax free. She is certainly not living in luxury; yet the minimum wage would have to be very high indeed to coax her into gainful employment. At \$15 per hour, she would earn \$30,000 per year. After tax and payroll deductions, she might have about \$25,000 left. Her employment costs – including clothes, transportation, daycare, and extra for prepared food – would consume a large portion of the difference between her \$25,000 after-tax income and her welfare entitlement of \$15,000. She might net \$4,000 per year by working full time as opposed to collecting welfare. Thus her net benefit would be \$2 per hour – an amount that is easily spurned given most people's preference for leisure over entry-level, minimum-wage work. Even if the job at \$15 per



hour is a stepping stone to a higher-paying job down the road, it is difficult to get motivated to take that job for the paltry immediate benefit it confers. This is how people get trapped into a life of welfare dependency.

## Chapter Five

1. Both of these arguments were summarily dismissed, though for dubious reasons and without the benefit of the latest jurisprudence on s. 15(1) of the *Charter*. The provision imposing an obligation on separated, non-residential parents to finance their adult children's school attendance was not even found to be in breach of the *Charter* right to equality. The privacy argument was rejected on the bizarre ground that the right of children to support is supposedly "paramount" even to *Charter* rights. This nonsense is unworthy of even a first-year law student, much less a sitting judge. As s. 52 of the *Charter* makes plain:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The astute reader will noticed that *Charter* challenges to the *Guidelines* are few and far between in the lower courts, and even clearly meritorious cases never reach the appellate level. As the German proverb goes, "Poor men's reasons are not heard." In contrast to the numerous appellate cases brought on behalf of women and funded by ideologically motivated interveners such as LEAF (Morton and Knopff 2000), there is no public money for desperate men to pursue their rights in appellate courts.

2. Whether the *Guidelines* can be saved under s. 1 of the *Charter* is the topic of much of this chapter. Here, a brief detour into s. 15(2) jurisprudence might be warranted. That subsection, the so-called "affirmative action" clause in the *Charter*, permits otherwise discriminatory programs whose aim is to ameliorate the conditions of disadvantaged individuals and groups. Since the development of the *Guidelines* was motivated, at least in the early advocacy literature, as a means of ameliorating the economic conditions of separated women with children, it might be suggested that they can be saved from a s. 15(1) challenge on the basis of s. 15(2). Until recently, this argument might have had some superficial appeal, since s. 15(2) had received scant judicial attention prior to *R. v. Kapp*, [2008] 2 S.C.R. 483. However, the reasoning of the Supreme Court in *Kapp* makes it clear that this defense of the *Guidelines* is a non-starter. To begin with, the expressly stated objectives of the *Guidelines*, as we shall see presently, have nothing really to do with combating the "feminization of poverty." But even if it were logical to delve into the legislative history of the *Guidelines* to dredge up an ameliorative purpose, the court states reasonably enough in *Kapp* that the government cannot save legislation simply by attaching an ameliorative purpose to it, however tenuously. To be rescued by s. 15(2), a program must be carefully designed to substantially advance the claimed ameliorative purpose. As the remainder of this chapter demonstrates, the *Guidelines* are not even tenuously connected to the purpose of ameliorating the conditions of economically disadvantaged children and their mothers. The *Guidelines* cover all cases, from millionaires to paupers, where children are separated from a parent who is or had been married. Thus they are at once overly broad, in that they cover a great range of cases where no pre-existing disadvantage exists, and overly narrow, in that they fail to cover desperate cases where the parents were not married. The *Guidelines*, in short, are not an "affirmative action" program; simply stated, they are a broad social policy aimed at distributing the costs of raising children. As the court states at ¶55 of *Kapp*, "Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs..."
3. It is more common to identify child-support obligors with non-custodial parents, but this is less accurate. A parent who retains joint legal custody of the child after a separation is still liable to pay child support when the other parent has primary residential care. Thus residency with the child is a better, though still not perfect, way to draw the distinction between child-support obligors and non-obligors. It is not perfect because in shared parenting cases where one parent earns significantly more than the other, the higher-income-earner is a residential parent but is still liable to pay child support. To be precise, the characteristic that triggers child-support obligations is really a complex disjunction: *being legally separated from the*

*other parent and {either being non-resident with the child or else sharing residential care and having the higher income}*. Obviously, this leaves something to be desired as a statement of the ground of discrimination, so the convenient shorthand of being a non-resident parent will be used instead. Incidentally, the centrality of residency with the child explains why it is so important for mothers to obtain exclusive possession of the matrimonial home upon separation, rather than allowing the father to live separate and apart under the same roof (e.g. by setting up his bedroom in the den or study or basement). Child support flows to the mother only when the father is physically separated from his children.

Another anomaly is worth noting here. Recall from chapter three that a mother who gives up her child for adoption at birth is not liable to pay child support. Likewise, parents whose children are apprehended by the state due to abuse or neglect are not liable to pay child support. In both cases, a parent is not liable to pay child support despite being both non-custodial and non-residential. Note that the vast majority of parents who can escape child-support obligations despite being non-custodial and non-residential are mothers. This tends to support the suggestion advanced at various places in the text that the *de facto* ground for discrimination when it comes to child support obligations is gender, although it operates disguised in a veneer of gender-neutral verbiage.

4. It is sometimes claimed that men are not a “protected group” under s. 15 of the *Charter*, even though it lists ‘sex’ as a prohibited ground of discrimination. The basis of this prejudice is the empirically dubious supposition that men have not faced a history of disadvantage in Canada and therefore do not need the protections afforded by s. 15. On this interpretation, ‘sex’ refers more narrowly to ‘women’ only. This too-clever-by-half reasoning harkens back to the early, essentialist analysis of s. 15(1), according to which one had to establish membership in a disadvantaged, discrete and insular minority to prove discrimination contrary to s. 15(1). Fortunately, as explained in the text, *Charter* jurisprudence has moved well beyond that pinched and prejudiced application. Moreover, the more restrictive interpretation of s. 15 is inconsistent with s. 28 of the *Charter*, which provides that “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” That is, s. 28 *requires* s. 15 to be interpreted so as to prohibit discrimination against men and women equally. (Note that s. 28 is not a separate, independent, stand-alone guarantee of sexual equality; it only guarantees, equally to men and women, all of the other rights set out in the *Charter*, including s. 15.)
5. As suggested by endnote 3 above, there is actually a third possible comparator group to consider: non-resident parents who are not liable to pay child support under the *Guidelines*. Here the difficulty for the government is to justify imposing onerous child-support obligations on perfectly normal, loving fathers, who have done nothing wrong either to their children or their children’s mother, just because they have been judicially separated from their children against their wishes, while at the same time exempting mothers from support obligations when their children have been judicially removed from them due to abandonment, neglect or abuse. There seem to be only two options, if equality before and under the law is to be maintained: either cease and desist where non-resident fathers are concerned, or start taking action against mothers who abandon, neglect or abuse their children. At the risk of leaving judges to work out the argument in detail themselves, that much seems too obvious to warrant a long-play version of the *Charter* analysis.
6. Section 10(2)(b) of the *Guidelines* allows a judge to reduce child support due to undue hardship arising from “unusually high expenses in relation to exercising access to the child.” This section is normally applied when the custodial parent moves to a great distance from the non-custodial parent, requiring him to undertake long-haul vehicle trips, air travel, hotels, and related expenses to see his children. But apparently judges do not consider the cost of making constant court applications to address access denial and parental alienation to be what it straightforwardly is: “an unusually high expense in relation to exercising access to the child.” In the case discussed in endnote 6, chapter 3, it was argued that the father’s support obligations should be reduced in view of the legal costs he had incurred during six years of constant access denial and parental alienation. Without numerous court applications, and even a professional custody assessment that found him innocent of all of the allegations raised by the mother, the case history demonstrated beyond any doubt that the father would have completely lost contact with his children were it not for taking these expensive measures. (When the father ran out of money to fight in court, the mother stopped the children from coming to see him. This happened twice.) The judge, Jack Watson, who case-managed this file, summarily rejected the father’s application to have his child support reduced, characterizing this argument as “not formidable.” The reader may judge for him- or herself.

7. The irony is apparently lost on Iacobucci when he cautions, “although it is clearly appropriate for the purpose of s. 15(1) to take judicial notice of certain forms of disadvantage and prejudice, among other things, one should not unwittingly or otherwise use judicial notice to invent stereotypes or other social phenomena which may not or do not truly exist” (¶179). Judicial notice in this context is tantamount to judicial prejudice.
8. The only way that the Table amount of child support is affected by the province of residence is by taking into account the tax treatment of the payor’s income, since the Table is based on a stereotypical payor’s after-tax income. One wonders why the developers of the *Guidelines* elevated province of residence to one of the three most significant variables to be taken into account, considering that the different tax rates between provinces produce much smaller variances in Table amounts for most payors than any of the other variables discussed in the text would produce. They could have improved consistency – i.e. the fairness and accuracy of the Tables – by ignoring province of residence in exchange for nearly any other variable mentioned, without increasing the complexity of the calculations. Indeed, they could have improved consistency in every respect simply by basing the formula on the actual after-tax income of payors, forgetting about province of residence as a variable entirely.
9. Some separated fathers lose a tremendous amount of personal freedom as a result of the ability of judges to impute income. A father in his mid- or late 20s who has lost interest in his current employment may be prevented from going back to school to retrain if a judge decides not to suspend or reduce child support temporarily to accommodate this. A financially successful, middle-aged father may be prevented from pursuing more personally rewarding career opportunities, or take a reduced workload, if that means earning a lower income. Fathers nearing the statutory retirement age are still expected to put their children through university, even if that means abandoning long-held plans to retire. (While a 28-year-old may be deemed a “child of the marriage” for the purposes of support, a 14-year-old may be deemed an adult for the purposes of the criminal law. When the law countenances such discrepancies, it loses the respect of the common man.)
10. Separated fathers are sometimes compelled to cash in their RRSPs to pay for a new home or to fund their custody litigation. When they do, they will find that their child support increases, since RRSP redemptions are included in taxable income. It makes no difference if the mother has already received an equivalent value in the division of matrimonial property; child support may be extracted both from a fathers’ contemporaneously earned income and from income earned during the marriage. This is but one instance among several where the *Guidelines* prescribe “double dipping.”
11. It is difficult to over-state the level of intrusiveness some lawyers and judges go to in an effort to identify “unwarranted expenses” and “free benefits” in the dealings of self-employed fathers. If he has a home office, child support may go up to take into account his ability to deduct a portion of his living expenses from income. If he drives a company vehicle, child support may go up because he receives a benefit that reduces his “normal” cost of living. And so on. All of this scrutiny can seriously affect the operation of the business, not to mention a person’s mood. If a self-employed father takes what might be considered a small income in order to reinvest company profits into expanding the business, a judge may decide to impute a higher income – e.g. the year’s total profits – even if reinvestment of profits had been his pattern while the family was intact. If a father has business partners, he might be unable to maintain his share of the business because of this judicial fiat; in some cases, the company might have to be restructured, especially when the partners do not want their own financial business aired publicly.
12. The leading case dealing with s. 9 is *Leonelli-Contino v. Contino* 2005 S.C.C. 63. A full discussion of that case is found in a later section. Here, a comment on the inconsistency with which this discretionary provision is treated by judges is relevant. *Contino* was initially heard in the Ontario family court, and proceeded through three levels of appeal. Each of these four levels of court made a different ruling on the *quantum* of child support called for in the circumstances. If four levels of court cannot treat the exact same case similarly, the prospect of different judges treating parents who are merely “similarly situated” consistently is illusionary. One might hope, now that the Supreme Court has given its definitive ruling on the way to interpret s. 9, that greater consistency in application can be expected. Unfortunately, the principles enunciated by the Supreme Court are so harsh toward higher income earners in these circumstances that lower-court judges almost certainly ignore them more often than not.

13. In a case with which the author is intimately acquainted, the mother was awarded custody of a young child during the week, while the father had custody every weekend, because the mother liked to go dancing at bars every Friday and Saturday night. The trial judge considered it to be in the child's best interests to be with a non-working, "stay-at-home mom" during the week. The mother later submitted claims to the maintenance enforcement agency for after-school child care and babysitting totaling 100 hours in a single month – i.e. more than four hours per day she had custody. The case management judge would not summarily dismiss these extravagant claims, much less reverse custody on the ground that the mother apparently didn't care for the child herself from after school until bedtime, despite being a "stay-at-home mom."
14. It is possible to avoid self-contradiction by interpreting the "relative abilities" phrase in s. 26.1(2) of the *Divorce Act* to refer to the parents' collective ability to contribute to the support of their children relative to other parents in society. That is, perhaps the confounding phrase might suggest the appropriate overall level of child support rather than its apportionment between the parents. But this certainly was not how the principle was understood by Parliamentarians during debates on Bill C-41.
15. The government of the day tried repeatedly to assure the House of Commons and the Senate that the *Guidelines* would properly recognize the obligation of both parents to support their children financially. For example, Gordon Kirby, who was Parliamentary Secretary to the Minister of Justice at the time Bill C-41 was introduced, advised: "The principle [is] that a child's standard of living, both before and after divorce, should reflect the means of *both* parents. These reforms make sure that it does. Children are a shared responsibility and divorce does not change that" (*House of Commons Debates*, no. 78, 1 October 1996, at 4900; emphasis in the original). Some legislators were unconvinced by these blandishments.
16. Probably every practicing family lawyer has been at one time or another faced in court with the accusation that the father is only seeking to obtain access at least 40% of the time so as to be in a position to reduce his support obligations. Of course, child support is a zero-sum game: every dollar saved by one parent is lost to the other. It follows that mothers have every bit as great an incentive to resist the 40% access threshold, yet somehow mothers are never accused of having improper motives in pursuit of custodial dominance. More relevantly to the present discussion, this argument implies that the Table amounts far exceed what is really spent on the support of the child. If child support truly reflected the costs of raising children, then any amount saved by the access parent in child support due to reaching the 40% threshold would be lost to higher child-care costs during access. Any argument that a non-resident parent is seeking increased parenting time to reduce child support is *ipso facto* and argument that the resident parent is making a profit from child support.
17. In fact, equalization is both the implicit and explicit objective of the developers of the model: "Simply stated, the model equalizes the financial circumstances of the two households" (Justice 1997: p. 2). According to Finnie (1995: p. 321), Canada is the only jurisdiction in the world that has adopted a model for child support with the objective of equalizing household standards of living. In reality, the numerous assumptions built into the model, most notably the assumption that the custodial parent earns the same income as the payor, means that equalization will only be achieved in a rare class of cases. Almost always, the *Guidelines* will either over-shoot or undershoot the mark, since the underlying assumptions in the model are inconsistent and so far removed from reality.
18. These words were chosen carefully: the objective is to make funds "available" to be spent on the children by transferring it into the hands of their mothers; by design, no attempt is made to guarantee that mothers will actually spend it on the children.
19. One blatantly discriminatory provision of the tax code is that legal fees associated with disputes over child support may be deducted from income for the recipient, but not for the payor. Even when a father succeeds in proving that the mother is not entitled to child support, she may deduct her legal fees but he cannot. Little wonder that Bala *et al.* (2005) found women were more likely to be represented by a lawyer of family courts, despite men earning more income in the majority of cases.
20. When parents cohabit, the father may claim the children as dependents to obtain a credit against taxes payable. However, when the parents separate, the father can no longer claim to have dependent children. The tax credit always goes to the recipient of child support, even when the payor has shared custody. If the mother earns little or no income, she cannot

benefit from the tax credit, either. The tax credit is a pure loss to the family, and a windfall for government. The government has turned around and increased child tax benefits to mothers, funded in part by this windfall. By this means, the government augments its role as substitute father and takes credit for increasing the child benefits. Mothers become more grateful to the government than to the fathers who really pay the bills, which goes a long way to explaining why women tend to favour larger, more intrusive, and more “generous” government. Government builds its own constituency without much planning or forethought; natural selection works on human institutions, too.

21. Bastarache seems to think that if you cut off the end of a rope, the rope will not have an end. Consider that if the child were subsequently to live with the father 60% of the time, then the mother would suddenly have to pay \$560 instead of receiving \$500 per month. That would be a \$1,060 change in support obligation as a result of a 10% change in residency. The Supreme Court has not muted the “cliff effect;” they have merely relocated it and thereby made it more precipitous than ever. There is no principled reason this new child-support contour makes for a better-shaped cliff; the decision to change the location and slope of the cliff is driven purely by pandering to a mother’s special pleading.
22. The incautious reference to “Parliament” in this paragraph should call to mind the *ultra vires* arguments presented in a previous section. It seems that judges at all levels of the court system have difficulties distinguishing the intention of Parliament as expressed in legislation from the choices of the government of the day as expressed in mere regulations like the *Guidelines*. Anyway, it bears repeating what Bastarache actually said about equalization in *Francis v. Baker*:

[41] In my opinion, child support undeniably involves some form of wealth transfer to the children and will often produce an indirect benefit to the custodial parent. However, even though the *Guidelines* have their own stated objectives, they have not displaced the *Divorce Act*, which clearly dictates that maintenance of the children, *rather than household equalization* or spousal support, is the objective of child support payments... While standard of living may be a consideration in assessing need, at a certain point, support payments will meet even a wealthy child’s reasonable needs. [emphasis added]

Here Bastarache seems to be saying that household equalization should *not* be taken as the objective of child support. One can certainly forgive the Divisional Court for summarizing this as, “The court held that in considering an application for deviation under any statutory exception, and court must first... (e) focus on the child’s actual circumstances and not perceived parental fairness considerations, such as balancing of parental means”: *Leonelli-Contino v. Contino* (2002), 62 O.R. (3d) 295, at ¶12. When a Supreme Court judge cannot even interpret his own words consistently from one case to the next, you know that rationalization rather than reason is driving the argument.

23. Galarneau and Sturrock (1997) found that fully half of parents had remarried within only five years prior to the *Guidelines* coming into effect. The substantial difference between this finding and that of Juby *et al.* suggests that new family formation decreased after the *Guidelines* came into effect. This would be the predicted outcome for fathers, at least, since after the *Guidelines* came into effect they would be less likely to have the means to support a second family.
24. To illustrate just how difficult the undue hardship threshold is to meet, consider the case of *Domingo v. Ocampo* (2005), an appeal court decision from Alberta. Ocampo was a poor and uneducated immigrant, working as a janitor for less than \$23,000 per year. He was married and had two children, with a third on the way when the appeal was in process. While living alone in Canada, before sponsoring his wife and children to the country, he had a brief intimate relationship with a young college student, which produced a child. Ocampo began paying the s. 3 Table amount of \$175 per month from the child’s date of birth. When the child’s mother finished her schooling, she sought contribution for s. 7 daycare expenses, so that she could move into a regular day job starting at about \$20,000 per year. This was granted to her in the amount of \$119.65 per month. Thus Ocampo was expected to pay \$295 per month in support of his extramarital child, from his take-home income (after deductions at source) of \$1372 per month. That left only \$1077 per month to live on for him, his wife, and his soon-to-be three children. The Alberta Court of Appeal summarily dismissed his application for a reduction in child support, with costs, taking the view that his financial hardship was not “undue” and that his children of the marriage were not entitled to an equal share of his income. This case also illustrates that it is not always the children of the first union whose rights hold sway under the *Guidelines*; first in time is not always first in right.



25. There are statutory limits to how much of a person's wages may be garnisheed by the maintenance enforcement program (MEP), supposedly to allow debtors a reserve for self-support. In Alberta, this limit is 40% of gross earnings for the lowest income-earners. If in addition 20% of income is withheld for deductions at source (income tax, CPP, EI), someone who earns \$20,000 per year could be left with as little as \$8,000 per year to live on – including paying for transportation to work. Millar (2010: p. 154) notes that “at high income levels, the amount for attachment and taxation exceeds 90% of income.”
26. In Alberta, a payor does not even have to miss part of a monthly payment to have penalties levied against him. Merely being late with a payment by a single day incurs an automatic \$25 fine. At the time this penalty was introduced, fathers who had for years dutifully hand-delivered cash to the MEP office on the first of the month, or mailed in their post-dated support cheques a week before the end of the month to be sure it arrived on time, suddenly noticed an accumulation of penalties the next time they requested their MEP statement – which in many cases could have been months. A phone call to their MEP agent met with the response that their payment had not been “processed” on time, and they now had the authority to levy fines for late payment. Not coincidentally, MEP had been hounding these fathers for months to change from making payments by cheque or cash to setting up an automatic bank transfer. An automated transfer was preferable for MEP since they could set it up once with the bank rather than handling cash, issuing receipts, and going to the bank to deposit cheques every month. Enforcing these penalties was all about administrative convenience for MEP.
- Men living on the margins financially have good reason not to want MEP to have direct access to their bank accounts. Sometimes MEP clerks make mistakes, and withdraw more than the mother is entitled to, for various reasons. In such cases, it can take months to go back to court to sort out the dispute, with MEP holding the cash the while just in case the mother finds a way of convincing a judge she should be allowed to keep it. If there has been an erroneous over-payment, most often the remedy is to reduce the payments going forward after the error is judicially determined, until the over-payment is credited back to the dad. But when money is tight, this error could easily trigger a series of financial defaults: NSF cheques, partial credit-card payments, late rent, and so on. Each of these can entail penalties and bad marks on a person's credit history that someone living on the financial margins cannot afford to incur. MEP certainly takes no responsibility for indemnifying “debtors” for these consequences of their errors.
27. Millar (2010: p. 155) shows that the suspension of driver's licenses is a favoured method of enforcement in Alberta. In 2005/2006, of a total case load of 45,975 this method was applied 20,547 times. This does not necessarily mean that 44.7% of debtors had their licenses suspended that year, since some debtors might have had theirs suspended twice in the same year. However, the comparable figure in B.C. was 8.3%. (Figures for other provinces are not supplied by their collection agencies, presumably to hide the extent to which fathers are subject to harassment. In Alberta, being tough on “deadbeats” appears to be a matter of pride for the Progressive Conservative government.)
28. Some employers even find wage garnishees inconvenient to comply with. Due to all of the disturbances MEP can cause for employers and employees alike, some employers shy away from hiring men who are involved with the MEP. This is not permitted by law, but prosecution is extremely difficult when there are innumerable legitimate reasons that can be given for hiring a different person. Of course, once MEP throws a man in jail, his job is no longer protected; an employer is at liberty to replace him.
29. In December 2008, bookkeeper David Reiner was sentenced to two years in jail for defrauding 21 daycare centres in the Toronto area of \$755,000. None of this money was ever returned or accounted for. According to the CBC's Fifth Estate (“Disappearing Act,” originally aired on 1 October 2008), Reiner was also suspected of misrepresentation and fraud in his dealings with agencies in Africa coping with the AIDS epidemic. Reiner served 13 months of his sentence, netting \$58,076 per month of jail time served. According to a follow-up story by the Fifth Estate (“Getting Off Easy,” originally aired 11 March 2011), shortly after his probation ended, he was back in Africa trying to convince AIDS agencies that he could help them handle their money. Yet fathers who are only a few thousands of dollars in arrears on child support, and have never been convicted of any criminal offense, can have their passports suspended. Once again we see that fathers have fewer rights than criminals.
30. News reports in early 2010 indicated that a Montreal man by the name of Francisco Caruso had challenged the passport-



suspension provisions as being contrary to s. 6 of the *Charter*. (His job depended upon being able to do international travel.) No follow-up stories can be found on the internet, and passport suspensions continue to be made. One infers that Caruso's application was rejected and never appealed – the usual fate of compelling legal arguments favouring non-resident fathers in Canada.

31. Procedures may vary by province. Strong censure must be levelled at the Alberta MEP for their apparently deliberate attempts to disguise the extent of their bullying. Millar (2010: p. 154) notes a huge discrepancy between the official number of persons undergoing default hearings and the actual number. According to De Champlain (2007), MEP conducted only 12 default hearings in the entire 2005/2006 reporting year. Millar phoned the Centre for Justice Statistics to ask whether this was a transcribing error or some other mistake, but the number was confirmed as that received from Alberta Justice (presumably compiled for them by MEP). Yet according to the data obtained by Millar directly from the Alberta Solicitor General through a freedom of information request, between 40 and 60 men were imprisoned during the year in question. Since a default hearing is the precursor to imprisonment, that sets a lower limit on the number of such hearings. Moreover, since many debtors make “satisfactory arrangements” with MEP that see them released rather than imprisoned at default hearings, the number of default hearings scheduled is several multiples of the imprisonment figure. Millar observes that “Default hearings are held regularly in every judicial district in Alberta: the major centres of Calgary and Edmonton hold them weekly. A single default hearing [session] in Calgary involved more individuals than reported by Alberta Maintenance Enforcement for the entire year. This finding brings other figures from Alberta Maintenance Enforcement into question” (endnotes omitted).

32. Everyone wants to be perceived as the champion of children. But bear in mind that these draconian enforcement procedures apply even when only spousal support is owed. It passes all understanding what pressing and substantial policy objective could possibly be advanced by employing, at considerable public expense, a government collection agency with such vast and unconstitutional powers to enforce a civil debt owed by one adult to another. Nothing remotely comparable is employed to force criminals to make restitution to victims of economic crimes.

33. Baskerville (2007: p. 140; citing Brown 2002), comments:

For all its professed concern about fathers ‘abandoning’ their children, the regime comes down hardest on those fathers who refuse to do so, since fathers who quit their jobs to move to where their children have been taken are given no relief for this sacrifice of their careers and earning power but instead can be prosecuted for being unemployed and losing income. Ontario’s Orwellian-named Family Responsibility Office (which operates out of an unmarked building, refuses to give its address, and does not sign the threatening letters it sends to parents it claims are in arrears) confiscated the passport and driver’s license of a father who fell behind after he moved to where his children had been relocated to and was unable to find employment to match the level he had been earning when support payments were set.

You know that a government bureaucracy is aware it is making untenable demands on citizens when it feels it must hide behind security-controlled entrances, and employ uniformed security guards to usher clients and process servers to exchange documents with its agents, who always remain anonymous and behind bullet-proof glass. Such is the Ontario’s Family Responsibility Office – a little slice of communist East Germany in our free and democratic country.

34. Fathers are sometimes driven to absurd lengths to “prove” that regular monthly payments to the mother were “really” meant for support. In one case, a father complained to his MP and his MLA that MEP would not believe that regular monthly cheques payable to the mother and labeled “CS” on the memo line were intended for “child support.” When the MP faxed copies of the very same cheques to MEP with a cover letter asking what the issue was, MEP finally accepted them as valid. Some men get impatient with this ridiculous bureaucratic run-around, and bury their heads in the sand hoping it will go away. It never does. They eventually find themselves in “arrears” and in default hearings just because MEP agents insist on being obtuse.

## Chapter Six

1. This very helpful clause in the *Divorce Act* includes both the maximum-contact principle and the friendly-parent principle. The maximum-contact principle implies that, at least in typical cases, the child's best interests do not triangulate a precise custody and access regime, because (for the reasons adduced in the second chapter) the child's best interests are consistent with a wide range of possible custody and access regimes. This clause instructs judges to choose the regime that maximizes contact with both parents, which logically implies the custody and access arrangement within the acceptable range that is most equal. One would therefore expect shared parenting arrangements to be far more common than they are, if judges modestly applied this part of the law. Likewise, judges should be more willing to side with the parent proposing a shared parenting arrangement, since that parent is clearly most willing to facilitate contact with the other parent. As the findings in chapter one demonstrate, judges do not take s. 16(10) of the *Divorce Act* seriously, preferring to ignore it completely.
2. See chapter three, endnote 6, for the context of this comment. When the father's lawyer asked Watson whether he considers it his job to "discipline" mothers, or to enforce his own orders when mothers wilfully breach them, Watson declined to answer, but looked in evident exasperation at the lawyer who had the impertinence to challenge his spinelessness.
3. Since the rise of civilization and the increasing stratification of societies, this natural inclination for men to protect women and for women to seek their protection has sometimes lead to a genuinely patriarchal social structure – not the phantom of patriarchy modern feminists attribute to contemporary society. The historical subjugation of women should be seen as a form of over-protection of women, which under certain ecological and sociological circumstances must have been functional or else it would have died out before the modern era. Nor is true patriarchy a picnic for men: only a few alpha males enjoy the fruits of this organizational structure, while the common man bears the costs of war, of brutalizing work, and in polygamous patriarchies, of no prospect for ever finding a mate.
4. Alexander Hamilton, in *The Federalist No. 78*, called the judiciary the least dangerous branch of government. That opinion is open to debate in this age of unchecked judicial activism (Martin 2003). In the present section, it is argued that the judiciary is the least qualified branch of government to be trusted with adjudicating family disputes, for all manner of systemic reasons.
5. In the case of domestic violence prosecutions, it is the official position of Alberta Justice that anyone accused of the crime is the "perpetrator" and anyone making an allegation is the "victim" (Campbell 2006). The presumption of innocence is not mentioned even once in this official, 160-page treatise, nor is the criminal burden of proof beyond a reasonable doubt stated. The only time false allegations are mentioned is in the context of a "victim" recanting her story: then the authorities are advised that her recantation must be false, not the original complaint. Alberta is typical of the manner in which Canadian governments approach cases involving domestic violence (Brown 2004).
6. Provincial courts are typically organized into criminal, small civil claims, and family divisions. This modest degree of specialization would represent a slight improvement were it not for the fact that provincial-court judges are at the bottom of the judicial pecking order and therefore are bound by the ill-considered precedents of all higher courts.
7. In a radio interview for the Australia-based program "Dads on the Air" (April 8, 2008), *National Post* columnist Barbara Kay reported that she has a "personal friend" on the Supreme Court of Canada, whom she described as a "wonderful woman in every way," except that she has a "blind spot for ardent feminism." (Kay must have been referring to Rosalie Abella, who was elevated to the highest court in 2004.) In one of their conversations, Abella scolded Kay for insisting in her columns that intimate partner violence is committed roughly equally by men and women, characterizing this claim as "ridiculous." When probed, Abella stated that 95% of domestic violence was committed by men. Kay responded, "My dear, you are quoting police statistics, arrest statistics!" – as opposed to what the sociological surveys reveal. (In fact, the 95% figure is a complete fiction that corresponds to nothing. Police arrest rates hover between 85% and 90% in most jurisdictions.) Abella's willful, ideologically based ignorance about the basic facts of domestic violence is a "really sad commentary" on the judiciary in Canada, as Kay put it with some understatement.

8. Schafer (2005) notes that the National Advisory Committee on the Status of Women, the Women's Legal and Education Action Fund (LEAF), the DisAbled Women's Network, and Status of Women Canada are all deemed appropriate sources for an "information base," useful resource material, and lists of contacts who can teach social context issues to judges in relation to gender issues. These groups are not balanced by any individuals who might be expected to provide a male-friendly perspective. When attempting to dig deeper into this problem, Schafer was denied access to the NJI library of resource materials and social-context training binders. The constitutional right to open courts is of limited value when judges have closed minds made up for them behind closed doors.
9. The selection process for Supreme Court judges is unsettled and changing, but recent candidates have been required to respond to questions by parliamentarians after having been selected by the Justice Minister. While not much of an improvement, even this limited public vetting of Supreme Court judges might have inhibited politicians from putting forward some of the most ideological nominees in the past.
10. McLachlin undoubtedly benefited from affirmative action pressures during her meteoric rise to the Supreme Court as well. She obtained a B.A. in philosophy in the early 1960s and then took an LL.B., by her own account, almost on a whim. Upon graduation, she practiced law for a scant five years before becoming a law professor at UBC in 1972. (Law and Fine Arts are the only university departments where an undergraduate degree is generally considered qualification enough to obtain tenure.) McLachlin was first appointed to the Bench in 1981, and rose from the ranks of County Court judge to the Supreme Court of Canada in an unprecedented eight years.
11. One such judge is Jean Bienvenue, who was appointed to the Quebec Superior Court after a distinguished political career. In December 1995, he delivered a rambling decision while sentencing a woman who had slit her partner's throat and watched him die (see *R. v. T. Th  berge*). Among other offensive things, he said:
- It has always been said, and correctly so, that when women – whom I have always considered the noblest being in creation and the noblest of the two sexes of the human race – it is said that when women ascend the scales of virtue, they reach higher than men, and I have always believed this. But it is also said, and this too I believe, that when they decide to degrade themselves, they sink to depths to which even the vilest man could not sink.
- These remarks attracted several complaints to the CJC, including one from federal Justice Minister Allan Rock, who expressed outrage that a judge could evince such an unacceptable attitude toward women. Part of Bienvenue's defense was to claim that the anti-woman comment had been "taken out of context." He pointed out that he had in fact praised women on the whole as superior creatures to men and therefore could not have a sexist attitude toward women. This admitted preference for the superior nobility of women probably did not come as a surprise to the many loving fathers who had appeared before him on routine family matters. But that is not what the colleagues who sat in judgment of Bienvenue were bothered by, since they evidently shared the female preference themselves. Rather, they agreed with Allan Rock and considered it improper to say anything negative at all about women as a class, even the tiny minority of women who commit grievous crimes. Bienvenue was found to have conducted himself improperly in rendering this decision, and was recommended for removal from the Bench by the CJC.
12. The simplest method of replacing judges who cannot attract litigants would be to have the current pool of judges in a judicial district nominate replacements each year, to assure that enough judges were available to handle the local workload. Since the current pool of judges has, by hypothesis, met the public test of being fair and competent adjudicators of disputes, and since they would have an interest in sharing the workload with fair and competent colleagues, they would be in the best position to consider candidates. Still, all the current complement of judges could do is to nominate adjudicators to the pool; it would still depend on litigants selecting among the available judges to assure the quality of the judicial pool.
13. Brownstone might have noted that even most parents who use the legal system to resolve their disputes do not set foot in a courtroom. Only a very tiny fraction of cases actually reaches trial; most are abandoned – 'settled' is too affirmative a word for it – after a few initial applications in chambers that give fathers the foul taste of how dysfunctional the system truly is. These initial chambers applications are typically made by lawyers who are practiced in the art of obfuscating the character

flaws of their own client and smearing the character of their opposite's client – with no regard for the best interests of the child – in the course of a ten minute song-and-dance routine, often improvising on and adding to their client's sworn testimony in the exuberance of the occasion.

14. The rules of court have provisions to encourage settlement of civil lawsuits. Any party may make a formal offer of settlement, stating the terms on which they propose to resolve the dispute. In the event that the party obtains at trial at least what their settlement had proposed, they are entitled to double the costs for all intervening steps in the litigation, including the cost of the trial. These rules work fine for cases where purely monetary damages are in issue, since in those cases it is easy to determine whether an offer has been met or exceeded by the judge's ruling. But in family court, the precise terms of a custody and access judgment are usually so difficult to predict and quantify as to make it virtually impossible to craft a formal offer that could be said to unambiguously "beat" the trial judgment. Moreover, many judges seem impervious to applying the rules of court, including the rules relating to payment of costs, rigorously to family disputes. When the established rules of procedure or evidence or costs dictate a ruling they are uncomfortable making, judges have no difficulty over-riding them "in the best interest of the child." Most often, judges "bend" the rules to favour mothers, consistently with their pronounced gender bias in the application of the substantive law. The uncertainty in the application of the law further frustrates and impedes fathers who seek to maintain meaningful contact with their children, which is another reason many give up after witnessing it in a few chambers applications.
15. Inevitably, an author dealing with the injustices visited upon fathers by our family-dispute system will be accused not just of judge-bashing, but much more damningly of mother-bashing – that worst of all possible ingratitude. This reflexive, ideological accusation is the product of simplistic, zero-sum thinking which presumes that if you are pro-father you must be anti-mother. The message of this volume is that children do not have to love their mothers any less in order to love their fathers more. Judges would not be punishing mothers by elevating fathers to an equal status in their children's lives; indeed, they would be furthering the erstwhile feminist objective of liberating women from their traditional role of sole provider of child care. The balanced view of this volume is simply that women do not have a monopoly on virtue, and men do not have a monopoly on vice. Virtue and vice are pretty equally distributed between the sexes, although certain particular manifestations of both virtue and vice may well be correlated with gender for a variety of reasons. It is taken as given that people are largely self-centred, that their perceptions of reality reflect their own self-interests to a considerable degree, and that they respond to the incentives they face accordingly. This is all the more so when they feel that their most precious interests are at stake – their children. If our family-dispute system rewards women who make parental cooperation impossible after a separation, by granting them primary care of the children (and exclusive possession of the matrimonial home, child support, and alimony), then many women will be inclined to make it appear that cooperation is impossible. Men would do the same thing if they faced the same incentives. One of the objectives of this book is to lay bare the counter-productive incentive structures set up by our legal system that separated parents face. The objective is to find ways of fixing the incentive structure set up by the winner-takes-all family-dispute system, to produce better outcomes for children.
16. Judges who are faced with a strong or even overwhelming case in favor of an unrepresented father can almost always delay making a decision in his favour by identifying procedural faults or demanding further procedures, such as appointing a lawyer for the child, or having a child psychologist give a report. Even something as apparently routine as setting up a court date can take months if the other parent's lawyer sees no advantage in appearing – most judges being amazingly accommodating to mothers who drag their feet and even refuse to appear in court. Wrangling over procedure is a more subtle bias of the system favouring mothers, but its consequences are no less real.
17. The pull-quote for this section is the title of a television series written and produced by Sir Bob Geldof. (It is now readily available for viewing on the internet.) Geldof relates that, upon entering court for his custody trial, he was pulled aside by a well-meaning clerk and advised not tell the judge how much he loved his children, as doing so would be considered "extreme." Fathers are expected to be stoic and manly in family court; if they go against type, they are liable to be seen as weak or emotionally unstable. The title of Geldof's production is a variation on a line from an 1896 poem by Lord Alfred Douglas, purportedly written to Oscar Wilde, which allegedly refers to homosexuality as "The love that dare not speak its name." Homosexuality was a criminal offense at that time, and so could not be declared openly. After his encounter with the

family-law system, it struck Geldof that nowadays it is a father's love for his children that is the real love dare not speak its name.

- [18.](#) The need for specialized tribunals has been recognized in many other areas of social importance, such as human rights, workers' compensation, and landlord-tenant disputes, to name a few. These tribunals are mentioned merely by way of analogy; it is certainly open to debate their individual merits. All that is being claimed here is that the demerits of the legal system, and thus the merits of establishing a system for mediating disputes between separated parents, are too great to be ignored any longer. At the same time, it is recognized that such a system must be carefully circumscribed by legislation, so that the "mission creep" evident in some other tribunal systems does not come to destroy the sole purpose of the new family-dispute system: namely to assist separated families in making a shared parenting regime work.
- [19.](#) American President Barack Obama has a favourite sermon he likes to deliver on Father's Day. The theme is to call upon young fathers, particularly inner-city minority fathers, to "take responsibility" for their children. Obama appears to be ignorant of the fact that these fathers cannot "take responsibility" for their children because there is not a judge in the country who would give these fathers responsibility for their children – other than to pay child support, of course. Certainly no politically correct judge appointed by President Obama voices a judicial philosophy that is friendly toward father custody. One cannot reasonably expect underprivileged boys to value fatherhood when their own mothers did not value their fathers, when the mothers of their children do not value them as fathers, and when judges almost always give their seal of approval to the mothers' wishes to exclude them from a meaningful role in their child's life. This is no chicken-and-egg problem. The logical order of things is this: Before we can begin to expect men to live up to their responsibilities as fathers, we have to robustly recognize their legal status as fathers.

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