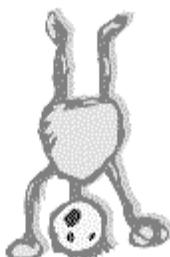




Parliament of Canada

For the Sake of the Children



Report of the Special Joint Committee on
Child Custody and Access
December 1998



Joint Chairs
The Honourable Landon Pearson
Roger Gallaway, M.P.

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SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS

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Joan Cook	Marian Maloney
Anne C. Cools	

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Madeleine Dalphond-Guiral	Philip Mayfield
Sheila Finestone	Denis Paradis
Paul Forseth	Caroline St-Hilaire
John Harvard	Diane St-Jacques
Nancy Karetak-Lindell	

Original Members agreed to by Motion of the Senate:

The Honourable Senators:

Bosa, Cohen, Cools, DeWare, Ferretti Barth, Jessiman and Pearson — (7)

Joint Clerks of the Committee

Catherine Piccinin and Richard Rumas

Research Staff

Kristen Douglas and Margaret Young

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Peggy Butts	Shirley Maheu
Thelma Chalifoux	Lorna Milne
Joyce Fairbairn	Wilfred Moore
Marissa Ferretti Barth	Pierre Claude Nolin
Jean Forest	Lucie Pépin
Jacques Hébert	Raymond Perrault
Duncan Jessiman	Gerry St. Germain
Marjory LeBreton	John Lynch Staunton
Derek Lewis	Charlie Watt

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WHO SERVED ON THE COMMITTEE**

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Gar Knutson	Pierrette Venne
Walt Lastewka	Judy Wasylcyia-Leis





FOREWORD

In December 1997, the Special Joint Committee on Child Custody and Access undertook a challenging task; to examine the issues relating to custody and access arrangements after separation and divorce with a special emphasis on the "needs and best interests" of children. We were aware from the beginning that Canadians were deeply concerned about these issues but we rapidly discovered that the scope of the problem was greater than any of us had imagined. Fortunately, the 23 Senators and Members of the House of Commons who served on the Committee were able to bring substantial and varied expertise and knowledge to the table. As co-chairs, we appreciated the dedication and endurance of our colleagues throughout this whole process. Other colleagues came to listen to the witnesses, sometimes to offer opinions and advice, occasionally to replace one of us as required. All members combined the demanding schedule of this Committee with their other responsibilities in the Senate and the House of Commons, including other committees.

Over the twelve months of our study, the committee held 55 meetings and heard from over 520 witnesses. We endeavoured to hear as many people as possible both in Ottawa and in the many cities across Canada we visited during the course of our public hearings. The public hearing process reflected the nature of the subject matter. This is a most important and highly emotional issue; the number of people who attended our hearings in every centre confirmed this. They brought a level of discernible tension that was evident at every meeting. Daily, Committee members listened attentively to a broad continuum of opinions and views. Similarly, pointed questions were directed to those who were witnesses. Pointed questions are a regular feature of the parliamentary process, the cross examination which occurs in every court. The report is the product of the contribution of all witnesses and reflects the broad range of testimony presented to us.

We would like to thank all those who came before us: the legal, mental health, child development, child protection, academic and other experts who brought forward so many suggestions for changes and improvements to the systems and laws that affect the children of divorce; the groups representing the many facets of the issue; and especially the individuals who shared their stories with us so that we could better understand the problem. It was this latter testimony that added the human dimension to our difficult topic.

The Committee also received hundreds of letters and detailed briefs from concerned people and professionals interested in various aspects of our study. All of their comments and recommendations have been taken into consideration.

In its meetings to draft a report, the Committee reflected for long hours on the recommendations it would propose to Parliament. Each member brought his or her own predisposition toward the understanding of the legal, social, and other issues revolving around parenting after separation and divorce. While we were not always in total agreement, there was a constant attempt to move toward consensus on many significant issues and to share and listen to the views presented around the table.

We hope that "For the Sake of the Children" will assist the public to develop a better understanding of a very complex subject that touches the lives of so many Canadians, and it will be seen as a significant step in the process of finding solutions to the problems raised. Most of all, the Committee hopes its recommendations will contribute to the creation of a culture that prevents conflict rather than promotes it.

HON. LANDON PEARSON ROGER GALLAWAY

Joint Chairs





ORDERS OF REFERENCE

Extract from the Journals of the Senate, October 28, 1997

Resuming debate on the motion of the Honourable Senator Pearson, seconded by the Honourable Senator Carstairs:

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to parenting arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize parental responsibilities rather than parental rights and child-focused parenting arrangements based on children's needs and best interests;

That seven Members of the Senate and sixteen Members of the House of Commons be members of the Committee with two Joint Chairpersons;

That changes in the membership, on the part of the House of Commons of the Committee be effective immediately after a notification signed by the member acting as the chief Whip of any recognized party has been filed with the clerk of the Committee;

That the Committee be directed to consult broadly, examine relevant research studies and literature and review models being used or developed in other jurisdictions;

That the Committee have the power to sit during sittings and adjournments of the Senate;

That the Committee have the power to report from time to time, to send for persons, papers and records, and to print such papers and evidence as may be ordered by the Committee;

That the Committee have the power to retain the services of expert, professional, technical and clerical staff, including legal counsel;

That a quorum of the Committee be twelve members whenever a vote, resolution or other decision is taken so long as both Houses are represented and the Joint Chairpersons will be authorized to hold meetings, to receive evidence and authorize the printing thereof, whenever six members are present, so long as both Houses are represented;

That the Committee be empowered to appoint, from among its members, such subcommittees as may be deemed advisable, and to delegate to such subcommittees, all or any of its power except the power to report to the Senate and House of Commons;

That the Committee be empowered to authorize television and radio broadcasting of any or all of its proceedings; and

That the Committee make its final report no later than November 30, 1998; and

That a Message be sent to the House of Commons to acquaint that House accordingly.

After debate,

In amendment, the Honourable Senator Cools moved, seconded by the Honourable Senator Watt, that the motion be amended by:

(a) deleting paragraph 1 thereof and substituting the following:

"That a special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests;" and

(b) adding the following after paragraph 9:

"That the Committee be empowered to adjourn from place to place within and outside Canada."

After debate,

The question being put on the motion in amendment, it was adopted.

The question then being put on the main motion, as amended, it was adopted.

ATTEST:

Paul Bélisle
Clerk of the Senate

Extract from the Journals of the Senate, November 19, 1998

Consideration of the First Report of the Special Joint Committee on Child Custody and Access (extension of reporting date), presented in the Senate on November 17, 1998.

TUESDAY, November 17, 1998

The Special Joint Committee on Child Custody and Access has the honour to present its

FIRST REPORT

In accordance with its Order of Reference from the Senate of October 28, 1997, and from the House of Commons of November 18, 1997, your Committee has considered matters relating to custody and access arrangements after separation and divorce and has agreed to the following:

That the Special Joint Committee on Child Custody and Access be authorized to continue its deliberations

beyond November 30, 1998, and that it present its final report no later than December 11, 1998.

A copy of the relevant Minutes of Proceedings is tabled in the House of Commons.

The Honourable Senator Pearson moved, seconded by the Honourable Senator Butts, that the Report be adopted.

After debate,

The question being put on the motion, it was adopted.

ATTEST:

Paul Bélisle
Clerk of the Senate

Extract from the Journals of the House of Commons, November 18, 1997

Ms. McLellan (Minister of Justice) moved, seconded by Mr. Kilgour (Secretary of State (Latin America and Africa)), -

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests;

That seven Members of the Senate and sixteen Members of the House of Commons be members of the Committee with two Joint Chairpersons;

That changes in the membership, on the part of the House of Commons of the Committee, be effective immediately after a notification signed by the member acting as the chief Whip of any recognized party has been filed with the clerk of the Committee;

That the Committee be directed to consult broadly, examine relevant research studies and literature and review models being used or developed in other jurisdictions;

That the Committee have the power to sit during sittings and adjournments of the Senate;

That the Committee have the power to report from time to time, to send for persons, papers and records, and to print such papers and evidence as may be ordered by the Committee;

That the Committee have the power to retain the services of expert, professional, technical and clerical staff, including legal counsel;

That a quorum of the Committee be twelve members whenever a vote, resolution or other decision is taken, so long as both Houses are represented, and that the Joint Chairpersons be authorized to hold meetings, to receive evidence and authorize the printing thereof, whenever six members are present, so long as both Houses are

represented;

That the Committee be empowered to appoint, from among its members, such sub-committees as may be deemed advisable, and to delegate to such sub-committees, all or any of its power, except the power to report to the Senate and House of Commons;

That the Committee be empowered to adjourn from place to place within and outside Canada;

That the Committee be empowered to authorize television and radio broadcasting of any or all of its proceedings;

That the Committee present its final report no later than November 30, 1998; and

That a Message be sent to the Senate to acquaint that House accordingly.

ATTEST:

Robert Marleau
Clerk of the House of Commons

Extract from the Journals of the House of Commons, November 18, 1998

By unanimous consent, it was resolved, - That the 1st Report of the Special Joint Committee on Child Custody and Access, presented on Tuesday, November 17, 1998, be concurred in.

TUESDAY, November 17, 1998

The Special Joint Committee on Child Custody and Access has the honour to present its

FIRST REPORT

In accordance with its Order of Reference from the Senate of October 28, 1997, and from the House of Commons of November 18, 1997, your Committee has considered matters relating to custody and access arrangements after separation and divorce and has agreed to the following:

That the Special Joint Committee on Child Custody and Access be authorized to continue its deliberations beyond November 30, 1998, and that it present its final report no later than December 11, 1998.

A copy of the relevant Minutes of Proceedings is tabled in the House of Commons.

ATTEST:

Robert Marleau
Clerk of the House of Commons





SUMMARY OF RECOMMENDATIONS

- 1. This Committee recommends that the Divorce Act be amended to include a Preamble alluding to the relevant principles of the United Nations Convention on the Rights of the Child. (page 23)***
- 2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the Divorce Act be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another. (page 23)**
- 3. This Committee recommends that it is in the best interests of children that**
 - they have the opportunity to be heard when parenting decisions affecting them are being made;**
 - those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;**
 - a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;**
 - the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the Divorce Act or provincial legislation; and**
 - we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction. (page 23)**
- 4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child. (page 23)**
- 5. This Committee recommends that the terms "custody and access" no longer be used in the Divorce Act and instead that the meaning of both terms be incorporated and received in the new term "shared parenting", which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms "custody and access". (page 27)**
- 6. This Committee recommends that the Divorce Act be amended to repeal the definition of "custody" and to add a definition of "shared parenting" that reflects the meaning ascribed to that term by this Committee. (page 28)**
- 7. This Committee recommends that the federal government work with the provinces and territories toward a corresponding change in the terminology in provincial/territorial family law. (page 28)**
- 8. This Committee recommends that the common law "tender years doctrine" be rejected as a guide to decision making about parenting. (page 28)**

9. This Committee recommends that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should extend to schools, doctors, hospitals and others generating such information or records, as well as to both parents, unless ordered otherwise by a court. (page 28)

10. This Committee recommends that all parents seeking parenting orders, unless there is agreement between them on the terms of such an order, be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order. Parents should not be required to attend sessions together (page 30).

11. This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans. (page 32)

12. This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans. (page 32)

13. This Committee recommends that the Minister of Justice seek to amend the Divorce Act to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court. (page 32)

14. This Committee recommends that divorcing parents be encouraged to attend at least one mediation session to help them develop a parenting plan for their children. Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision making should be structured to screen for and identify family violence. Where there is a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution should be used to develop parenting plans only when the safety of the person who has been the victim of violence is assured and where the risk of violence has passed. The resulting parenting plan must focus on parental responsibilities for the children and contain measures to ensure safety and security for parents and children. (page 33)

15. This Committee recommends that the Divorce Act be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the "best interests of the child". (page 44)

16. The Committee recommends that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child, and that list shall include

16.1 The relative strength, nature and stability of the relationship between the child and each

person entitled to or claiming a parenting order in relation to the child;

16.2 The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;

16.3 The views of the child, where such views can reasonably be ascertained;

16.4 The ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;

16.5 The child's cultural ties and religious affiliation;

16.6 The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;

16.7 The importance of relationships between the child and the child's siblings, grandparents and other extended family members;

16.8 The parenting plans proposed by the parents;

16.9 The ability of the child to adjust to the proposed parenting plans;

16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;

16.11 Any proven history of family violence perpetrated by any party applying for a parenting order;

16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;

16.13 The willingness shown by each parent to attend the required education session; and

16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute. (page 45)

17. This Committee recommends that the Divorce Act be amended to ensure that parties to proceedings under the Divorce Act can choose to have such proceedings conducted in either of Canada's official languages. (page 46)

18. Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:

18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed by this Committee;

18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;

18.3 The desirability of considering both parents' income, or financial capacity, in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is ``shared parenting'';

18.4 Recognition of the expenses incurred by support payors while caring for their children;

18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;

18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;

18.7 The ability of parties to contract out of the Federal Child Support Guidelines; and

18.8 The impact of the Guidelines on the income of parties receiving public assistance. (page 51)

19. This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders. (page 55)

20. This Committee recommends that the federal government establish a national computerized registry of shared parenting orders. (page 55)

21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child. (page 57)

22. This Committee recommends that the federal government provide leadership by ensuring that adequate resources are secured for the following initiatives identified by this Committee as critical to the effort to develop a more child-centred approach to family law policies and practices:

22.1 Expansion of unified family courts across Canada, including the dedication of ample resources to interventions and programs aimed at ensuring compliance with parenting orders, such as early intervention programs, parenting education, make-up time policies, family and child counselling, and mediation;

22.2 Civil legal aid to ensure that parties to contested parenting applications are not prejudiced by the lack or inadequacy of legal representation;

22.3 A Children's Commissioner, an officer of Parliament reporting to Parliament, who would superintend and promote the welfare and best interests of children under the Divorce Act and in

other areas of federal responsibility;

22.4 The provision of legal representation for children when appointed by a judge;

22.5 Parenting education programs;

22.6 Supervised access programs; and

22.7 Enhanced opportunities for professional development for judges, focused on the concept of shared parenting formulated by this Committee, the impact of divorce on children, and the importance of maintaining relationships between children and their parents and extended family members. (page 59)

23. This Committee recommends that the federal government continue to work with the provinces and territories to accelerate the establishment of unified family courts, or courts of a similar nature, in all judicial districts across Canada. (page 63)

24. This Committee recommends that unified family courts, in addition to their adjudicative function, include a broad range of non-litigation support services, which might include

24.1 family and child counselling,

24.2 public legal education,

24.3 parenting assessment and mediation services,

24.4 an office responsible for hearing and supporting children who are experiencing difficulties stemming from parental separation or divorce, and

24.5 case management services, including monitoring the implementation and enforcement of shared parenting orders. (page 64)

25. This Committee recommends that, as much as possible, provincial and territorial governments, law societies and court administrators work toward establishing a priority for shared parenting applications, above other family law matters in dispute. (page 64)

26. This Committee recommends that in matters relating to parenting under the Divorce Act, the importance of the presence of both parties at any proceeding be recognized and emphasized, and that reliance on ex parte proceedings be restricted as much as possible. (page 64)

27. This Committee recommends that court orders respecting shared parenting be more detailed, readable and intelligible to police officers called upon to enforce them. (page 67)

28. This Committee recommends that provincial and territorial governments explore a variety of vehicles for increasing public awareness about the impact of divorce on children and, in particular, the aspects of parental conduct upon marriage breakdown that are most harmful to children, and implement such education programs as fully as possible. To the extent practicable, the Committee recommends that the federal government contribute to such efforts within its own jurisdiction, including the provision of funding. (page 68)

- 29. This Committee recommends that the federal government extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship. (page 68)**
- 30. This Committee recommends that the Divorce Act be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time. (page 70)**
- 31. This Committee recommends that provinces and territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments. (page 72)**
- 32. This Committee recommends that federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children. (page 74)**
- 33. This Committee recommends that professionals who meet with children experiencing parental separation recognize that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention. (page 74)**
- 34. This Committee recommends that the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada. (page 76)**
- 35. This Committee recommends that the Divorce Act be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a parent and a child in situations of transition, or where there is clear evidence that the child requires protection. (page 76)**
- 36. This Committee recommends that the provincial and territorial governments require child protection agencies to provide disclosure of records of investigations to court-appointed assessors examining families who have been the subject of such investigations. (page 77)**
- 37. This Committee recommends that the attorneys general of Canada and the provinces, along with police forces and police organizations, ensure that all warrants in child abduction matters provide expressly that their application and enforcement are national. (page 84)**
- 38. This Committee recommends that the Attorney General of Canada work to develop a co-ordinated national response to the problem of child abduction within Canada. (page 84)**
- 39. This Committee recommends that the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent be recognized as contrary to the best interests of the child, except in an emergency. (page 84)**
- 40. This Committee recommends that a parent who has unilaterally removed a child not be permitted to rely on the resulting period of sole care and control of the child, of whatever duration, as the basis for a sole parenting order. (page 84)**

41. This Committee recommends that the federal government implement the recommendations of the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled International Child Abduction: Issues for Reform. (page 84)

42. This Committee recommends that the Minister of Foreign Affairs and the Passport Office continue to examine ways to improve the identification of minor children in travel documents and consider further the advisability of requiring that all children be issued individual passports. (page 84)

43. This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the Criminal Code in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury. (page 90)

44. This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem. (page 93)

45. This Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way. (page 97)

46. This Committee recommends that the federal government include as the basis for such consultations the family law-related recommendations of the Royal Commission on Aboriginal Peoples and work toward their implementation as appropriate. (page 98)

47. This Committee recommends that sexual orientation not be considered a negative factor in the disposition of shared parenting decisions. (page 99)

48. This Committee recommends that the Minister of Foreign Affairs work toward the signing and ratification as soon as possible of the 1996 Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. (page 101)

* Page numbers in parentheses indicate the location of the recommendation in the text of the Committee's report.





INTRODUCTION

Children whose parents divorce experience a fundamental rearrangement of the households in which they have been living. The foundation under their lives shifts, and for many, the resulting disadvantages - economic, social and emotional - may endure for the rest of their lives. Rising public concern about this issue came to the attention of parliamentarians in 1996 and 1997. During parliamentary study of Bill C-41, which amended the *Divorce Act* to provide for the establishment of mandatory child support guidelines, witnesses came forward in large numbers with compelling stories about the inadequacy of the legal system's mechanisms to deal with custody and access, or parenting arrangements, following divorce.

Particularly when the bill reached the Standing Senate Committee on Social Affairs, Science and Technology, Senators such as Duncan Jessiman, Anne Cools, and Mabel DeWare, Chair of the Committee, made sure that the concerns expressed to them by witnesses were not ignored. Too many witnesses had pleaded with the Senate Committee for consideration of their custody and access-related concerns for Senators to pass the bill without first securing the federal government's commitment that those issues would also be studied. In accordance with the agreement reached between the Senate Committee and the Hon. Allan Rock, Minister of Justice at the time, a parliamentary committee consisting of Senators and Members of the House of Commons was struck to study the issues facing children whose parents divorce, and to look for better ways to ensure positive outcomes for these children.

The Special Joint Committee on Child Custody and Access met first in December 1997 to outline the critical issues concerning parenting arrangements after divorce. Public hearings began in February 1998. The Committee's Terms of Reference comprise the following objectives:

That a Special Joint Committee of the Senate and the House of Commons be appointed to examine and analyze issues relating to custody and access arrangements after separation and divorce, and in particular, to assess the need for a more child-centred approach to family law policies and practices that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.

Senators and Members of the House of Commons, from all political parties, approached their task with a great deal of empathy for the suffering of the many adult witnesses, and their children, who had the courage to share their personal tragedies so openly with the Committee. Members were particularly affected by the evidence given by the small number of children and young adults who participated. Most Members of the Committee had some personal or professional experience involving divorce, and so were partially prepared for the evidence they would hear. However, during the 39 often extended public meetings across Canada, at which more than 500 witnesses were heard, Members were continually moved by their many heart-wrenching stories.

The Committee determined from the beginning of its study that its approach would be as open as possible. Every effort was made to accommodate all the individuals and groups that asked to appear as witnesses, and although every possible community and professional organization was offered an opportunity to appear, the huge numbers of individuals who asked to participate made it impossible to hear them all. In every city to which the Committee travelled - including Vancouver, Edmonton, Calgary, Regina, Winnipeg, Toronto, Montréal, Fredericton,

Charlottetown, Halifax, St. John's, and Ottawa - the Committee heard from at least a representative sample of the individuals who had submitted requests to appear as witnesses. It had been the Committee's desire to travel more extensively, but time and financial constraints prevented us from doing so. Witnesses presented a vast diversity of opinion; among them were individual parents, children, fathers' organizations, women's groups, and professionals, including lawyers, judges, social workers, psychologists, physicians and others.

Of course, individuals whose divorces had been more or less amicable were underrepresented among the pool of witnesses who asked to appear. Given the nature of the study, Members understood that those who were least satisfied with the divorce process would be most motivated to testify. Some stories did not therefore represent the full spectrum of views of divorced parents. As a result, Members were cautious about solutions based on exceptional cases or worst-case scenarios. Nonetheless, Members recognized the importance of the painful testimony they heard. There is clearly a need for some dramatic revisions in the way parenting arrangements are decided following separation and divorce.

Most witnesses emphasized the importance of custody and access decision making - the current terminology for parenting arrangements after divorce - in the lives of children. Indeed, a certain number linked their unhappy situations with their own suffering stemming from their parents' divorce. As Nick Bala, Professor of Law at Queen's University, told the Committee:

The issues that arise affect the child's life not only while the child is in that stage of life, but through adolescence and indeed through adulthood and through their entire lives. (Meeting #6)

Witnesses before the Committee were in general agreement that most couples who divorce do so without involving the legal system or with, at the most, some lawyer-assisted negotiation and possibly an interim motion or two. Only rarely do people have their custody and access decisions made by trial courts. Although witnesses generally believed that 10 to 20% of divorcing couples become involved in litigation, there was some disagreement about whether this indicates the predominance of amicable decision making or a reluctance to become engaged in litigation, possibly because of a feeling on the part of at least one parent that litigation would be costly and futile, given the likelihood of a decision in favour of the other parent. Even as a forum of last resort, however, the courts were seen invariably as less than desirable places to make decisions about parenting.

It's virtually a truism to say that divorce, by definition, is a hurtful, hostility-provoking process. To the extent that the process involves litigation about parenting, the process is even more hurtful and more painful. The current legal framework-that is, the adversarial process for custody and access determination-has proved to be absolutely, atrociously ill-suited to the needs of the child. (Ian Solloway, Lawyer, Meeting #15, Montréal)

Members of the Committee agree that struggles pitting parents against each other are far from being in the interests of children. Indeed, they obscure the very focus the Committee was seeking to maintain by emphasizing adults and their preoccupations. Cerise Morris, a Montréal psychotherapist, articulated a concern shared by the Committee:

Some women's advocacy groups have argued that fathers' rights systematically take precedence in custody and access disputes in the Canadian justice system, thereby perpetuating women's inequality and even placing some women and children at risk of violence from abusive ex-partners. Advocacy groups popularly known as "men's rights groups" charge that women are unfairly favoured in custody decisions and are allowed by the justice system to arbitrarily and unfairly deprive fathers of sufficient or any access to their children, even when they're meeting their parental and financial obligations. Of course, sometimes truth can be found in both sets of claims. But the danger, as I see it, lies in allowing this area of family law to become the battleground for gender politics. (Meeting

#16, Montréal)

Because it had a mandate to focus on children affected by divorce, rather than on parents who were divorcing, the Committee set out to learn what it could about patterns of divorce in Canada at the end of the twentieth century, the developmental and psychological impact of divorce on children, the array of legal and other mechanisms available to assist with child-centred custody and access decision making, and the potential for improving outcomes for children. One of the first things Members wanted to identify clearly was the prevalence of divorce in Canada and the numbers of children affected.

In 1994 and 1995, according to Statistics Canada, there were 78,880 and 77,636 divorces in Canada.¹ In each of these years, more than 47,000 children were the subjects of custody orders.² Divorce rates rose steadily in Canada after 1968, when the first federal divorce legislation was passed, and peaked immediately following the 1985 amendments to the *Divorce Act*, which introduced marriage breakdown as the single ground for divorce, most often based on a separation of at least one year. Although the fault-based grounds of adultery and physical or mental cruelty are still present in the legislation, 1985 is recognized as the beginning of no-fault divorces in Canada. This trend was described by Adrienne Snow, Policy Coordinator for the National Foundation for Family Research and Education:

Ironically, no-fault divorce legislation, as you know, was intended to reduce divorce rates and remove acrimony from divorce proceedings, but in Canada the numbers are stark. Before the introduction of the *Divorce Act* in 1968 the divorce rate sat at 8%. By 1987, the year after the institution of no-fault divorce, that figure had skyrocketed to 44%. Last year it fell to a stable rate of around 40%, according to the Vanier Institute of the Family in Ottawa. (Meeting #36)

The increase in the number of divorces has led to the presence of a wide variety of living arrangements for Canadian children. Most Canadians continue to live in family settings, but the form these families take varies increasingly.

According to the 1996 census, 84% of the Canadian population in 1996 lived in a family setting. Married couples with children made up 45% of all families, married couples without children, 29%, lone-parent families, 15%, common-law couples with children, 6%, and common-law couples without children make up the remaining 6%. ... In 1996 ... 15% [of all children under 17] lived in lone-parent families headed by women, as compared to 2% in families headed by men. (Jim Sturrock, Researcher, Department of Justice, Meeting #3)

It is often difficult to uncover Canada-wide family law statistics. As a result, a number of the Committee's key questions about family law and parenting arrangements went unanswered. Divorce statistics are drawn largely from the Central Divorce Registry, which is a repository of information about pleadings filed in divorce cases. Its chief purpose is to monitor the commencement of proceedings, to ensure that two actions do not go ahead between the same two people simultaneously. Its information is limited strictly to what can be read on the face of divorce documents. No information about informal arrangements, rearrangements, variations in court orders, or other important developments can be derived from Central Divorce Registry data. Joe Hornick, Executive Director of the Canadian Research Institute for Law and the Family, cautioned the Committee about

the difficulty of reviewing laws and making proposals for law reform of the *Divorce Act* without sound empirical research. In the absence of good, objective evidence, all too often decisions are made on the basis of anecdotal and personal experience. (Meeting #20, Calgary)

Witnesses were agreed that in the vast majority of post-divorce arrangements, children are placed in the custody of their mothers. Usually this is by agreement of the parties. Many witnesses felt that this pattern reflects the

division of child-care responsibilities in intact households and that parents make this arrangement because it continues the arrangement that existed pre-divorce, or is otherwise in the best interests of their children. Several witnesses cautioned that some men might be inclined to agree to such an arrangement because they believe that their chances of being awarded custody by agreement or by a court are limited. According to Statistics Canada's 1995 report on divorce, 11% of dependent children were placed in the custody of fathers, 68% were placed in the custody of their mothers, and the custody of a further 21% went to the parents jointly.³ These figures include cases where consensual arrangements were made and then formalized by a court, as well as cases where the determination was imposed by a court. They do not include arrangements that were not legally formalized as part of a divorce.

However, the 1995 Statistics Canada numbers on joint custody probably indicate a larger proportion of children in joint custody arrangements than is the actual case, for they reflect only the formal attribution of custody - that is, the parties or the court have identified the custodial arrangement as a joint one. These situations are not all cases where the physical custody of children is split in an equal fashion between the parents. Indeed, the number of children living in arrangements involving substantially shared custody - in terms of time with each parent - is significantly smaller than the 1995 figures indicate. As Statistics Canada reported on 2 June 1998, in the latest release of data from the National Longitudinal Study on Children and Youth, "most children (86%) lived with their mother after separation. Only 7% lived with their father, about 6% lived under a joint custody arrangement, and the remaining (less than 1%) lived under another type of custody agreement."⁴ This number more accurately reflects the proportion of children living in an equally shared physical custody arrangement. As social worker Denyse Côté reported from her research on joint custody in Québec,

We cannot rely on the statistics that Statistics Canada provides us on joint custody. The statistics we are given are those concerning agreements reached in Court and they do not reflect what is happening in real life. ... However, I can say that there is currently shared physical custody in approximately five to seven percent of cases. These are very limited figures, which vary across the different studies. They never exceed 10%. (Meeting #16, Montréal)

Another key finding from the latest National Longitudinal Study on Children and Youth data is that children are increasingly likely to experience parental separation at a younger age. "One of five children born in 1987 and 1988 had experienced their parents' separating before they reached the age of five. For people born between 1961 and 1963, this same rate was not attained until they were 16 years old." (Yvan Clermont, Statistics Canada, Meeting #35) Clearly this fact will have implications for our understanding of the developmental impact of divorce on these children, as well as the therapeutic and other interventions we need to adopt as a society to improve outcomes for them.

In the course of this study, it became clear to the Committee that while there must be respect for the constitutional delineation of legislative authority in the area of family law, there is an even greater need for co-ordinated or multi-jurisdictional efforts to resolve many of the problems brought to light. In fact, it has long been recognized in Canada that family law is an area of shared jurisdiction, and although the federal Parliament has exclusive jurisdiction to legislate in the area of divorce, most family law initiatives depend upon federal/provincial-territorial co-ordination. Canadian governments have established the Federal/Provincial/Territorial Family Law Committee to work toward this very purpose. In making many of its law reform and other recommendations, this Committee is fully cognizant of shared federal/provincial jurisdiction in the family law area and of the fact that reforms are best initiated in a co-ordinated, multi-level fashion.

Constitutional expert Peter Hogg notes that most family law is within provincial jurisdiction, the exception being the exclusive federal power in relation to "marriage and divorce."⁵ The power over divorce extends to matters of corollary relief flowing from a divorce, including support and custody/access. This federal power acknowledges "the desirability of nation-wide recognition of marriages and divorces".⁶ Provincial legislatures derive their

jurisdiction from the power they have in relation to "property and civil rights in the province,"⁷ which includes property, civil and contract law. This authority extends to the areas of matrimonial property, adoption, support enforcement, the establishment of paternity, change of name, child protection and, in cases other than those where a divorce is sought, child and spousal support, as well as custody and access.

¹ Statistics Canada, *Divorces 1995*, Catalogue No. 84-213-XPB, Ottawa, p. 2.

² Many other children, of course, will have experienced parental separation during the same period, in situations where their parents were unmarried or did not seek a divorce.

³ Statistics Canada, *Divorces 1995*, p. 20.

⁴ Statistics Canada, *Daily*, 2 June 1998, available on-line at <http://www.statcan.ca/Daily/English/980602/d980602.htm>.

⁵ *Constitution Act, 1867*, section 91(26), cited in Peter W. Hogg, *Constitutional Law in Canada*, 4th Edition (Scarborough: Carswell, 1997), p. 26-1.

⁶ *Ibid.*, p. 26-2.

⁷ *Constitution Act, 1867*, section 92(13).





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CHAPTER 1: The Divorcing Family

I thought how is this possible? Why did it have to happen to me? So I asked my Mom and she said: 'because life isn't fair.' (Witness, age 12)

Very few children in Canada are aware that the *Divorce Act* exists, yet every year tens of thousands of children's daily lives are directly affected by this law. Many children understand that divorce happens, but unlike adults, they assume that it will never happen to their family. When it does, the children's lives are changed forever.

A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown in their marriage. *Divorce Act*, section 8(1).

A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all of the children of the marriage. *Divorce Act*, section 16(1).

In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs and other circumstances of the child. *Divorce Act*, section 16(8).

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. *Divorce Act*, section 16(10).

These four briefly worded sections of Canada's *Divorce Act* have a major impact on children's lives each year. For many couples these legislative clauses provide a simple and effective way to terminate a relationship that is not working for one or both of the partners. The Committee and its witnesses looked at these clauses with the objective of examining how the provisions could be changed to reduce any negative impact on families and children and to improve outcomes for family members.

When the Special Joint Committee on Child Custody and Access began its work, Members undertook more than a legislative review. The Committee was given a mandate to assess the need for a more child-centred approach

to family law policies that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests.

Court will help with custody and stuff, but it won't help with the feelings you have inside you.
(Witness, age 12)

The Committee heard directly from children about how divorce had affected their lives. These children, who presented as individuals and in groups, told the Committee about the pain and upset that their parents' divorce had caused them. They spoke about their worries and fears, their sense of loss, and their feelings of exclusion from a legal process that had such a direct impact on their lives. These children wanted changes in the ways their parents and the courts made decisions that affected them. In particular, the children and young adults who testified about the impact of their parents' divorce stressed the need for more formal and informal mechanisms for child participation in decisions about parenting arrangements. Children who reported a positive experience to the Committee generally described post-separation arrangements in which their relationship with both parents was unrestricted and a good deal of control over schedules was in their own hands.

A. Statistics About Children and Divorce

The high divorce rate meant that in 1994 and 1995, more than 47,000 children were the subjects of custody orders under the *Divorce Act*.¹ As a result, more children - and younger children - are experiencing rearrangements in their households.² Their parents' remarriages or other new relationships following divorce compound the complexity of these children's lives.³ Some 75% of divorced men and women remarry, so that children from first marriages have to develop relationships with step-parents. In 1992, 13% of divorces were of second marriages.⁴

Professor James Richardson of the University of New Brunswick, who testified during a meeting in Fredericton, has looked at some of the reasons for the increased divorce rate and concluded that our attitudes about marriage have changed significantly in recent years. First, people no longer believe they should marry or stay married or have children to conform with community expectations. Second, people "take it for granted that they will marry for love and emotional gratification rather than for economic or other instrumental reasons." Third, "more people now than in the past can afford to base marriage on emotional rather than purely economical considerations."⁵

Although the divorce rate is increasing, Richardson reports that most divorces are concluded without extensive conflict over parenting arrangements. Referring to a 1990 Department of Justice study, Richardson reports that in Canada,

well over 90% of divorces are now granted without a formal court hearing. As only non-contested divorces can be processed in this way, it is evident that, contrary to popular and media images of divorce, most divorces do not involve bitter and protracted battles over custody and property. Indeed, the evidence from the evaluations is that less than 5% of divorces are contested to the extent that matters must be settled in court. The central issues in these are more often spousal and child support, and division of property, than child custody.⁶

Finally, Richardson comments on custody arrangements after divorce:

The evidence, then, shows that there is no great revolution with respect to child custody. Apparently, most divorcing spouses believe that children are better off with the mother, and the matter is not formally contested. While fathers' rights groups have been able to point to the exceptions, the reality is that most fathers are not interested in custody and day-to-day care of the children (or are advised by their lawyers that their chances of success are probably slim.)⁷

Richardson's assertions were contested by many of the witnesses who testified before this Committee.

B. Attitudes Toward Divorce

Most Canadians consider divorce to be a right. Adults are free to marry whom they wish, and if one of the partners finds the relationship unsatisfactory, unhealthy, or unsafe, he or she is free to end the relationship through divorce. The 1985 changes to the *Divorce Act* removed most of the blame from divorce proceedings, and since then Canada has had, in effect, no-fault divorce.

When Canada joined other countries and moved toward less constraining divorce law in the 1960s, '70s, and '80s, the prevalent assumption held by mental health professionals was that it was better for children to grow up in a divorced family than to grow up in a family where at least one of the parents was unhappy with the relationship. While acknowledging that divorce is a difficult and painful experience for all family members, the prevailing belief was that divorce did not cause long-term harm to children. Clinical literature from that era focused on the need for preventive counselling for children. It was assumed that if children were given the opportunity to talk about their feelings, long-term emotional complications could be avoided.

For example, Dr. Richard Gardner, known more recently for his ideas about parental alienation syndrome, wrote in his 1970 book, *The Boys and Girls Book about Divorce*, "the child living with unhappily married parents more often gets into psychiatric difficulties than the one whose mismatched parents have been healthy and strong enough to sever their troubled relationship."⁸

The assumption that children would be better off in a divorced family than in a stressed or difficult intact family resulted in a significant shift in professional thinking about divorce. Until the 1970s, divorce often carried a social stigma, but since then it has become more acceptable in Canadian society. Many articles in the professional literature commented on the relative harmlessness of divorce. Although divorce was recognized as stressful, it was not thought to present any serious emotional dangers for those who experienced it. Happy parents, even if they lived apart, were thought to be able to provide the best environment for their children.

In fact, divorce was seen by many as an opportunity to leave behind a flawed relationship and try again. A 1975 report of the Law Reform Commission of Canada suggested that "divorce is not necessarily destructive to family life." The Commission argued that since many divorced people remarry, "divorce may sometimes offer a constructive solution to marital conflict through the provision of new and more viable homes for spouses and children."⁹

The Committee heard several witnesses testify that most divorces in Canada are "low-conflict" divorces. These witnesses claimed that up to 90% of divorcing parents do so with only minimal conflict. Such parents are apparently able to dissolve their marriages and make good plans for the children without having to go to court. Since mental health research shows that children are harmed by exposure to continuing conflict between parents, it might seem to follow that low-conflict divorces would not be permanently damaging to children.

All witnesses agreed, however, that high-conflict divorces are very damaging to the children and the adults involved. No one could give an accurate number for these situations, but the often quoted 10% figure means that, based on the 1994-95 statistics, approximately 4,700 children each year are exposed to ongoing tension, fighting, and even violence between their parents.

C. The Impact of Divorce on Children

In hearings across Canada, the Committee heard moving evidence about the negative impact of divorce on children. Very few witnesses supported the assertion that decisions made on the basis of the parents' right to personal happiness were automatically in the children's best interests. Witnesses' evidence of the detrimental effects of divorce on their children is supported to a great extent by more recent mental health literature on this subject.

Divorce is seen from an individual's as opposed to societal perspective. The *Divorce Act* gives legal status to an individual's decision to terminate his or her marriage, thus recognizing, for legal purposes, an individual's right to marry and to end a marriage. The fact that this individual right, if realized, may impact on the rights of others is not recognized in our laws. Accordingly, the balance of rights, which characterizes most social legislation, is absent from divorce and family law legislation. (Alexandra Raphael, Meeting #13, Toronto)

A few witnesses even suggested that the current no-fault divorce law should be repealed and parents should be required to stay together for the sake of their children. This thinking is apparently behind recent changes in divorce law in the state of Louisiana, which have made it more difficult for parents with children to have access to a quick no-fault divorce. In effect since August 1997, the Louisiana *Covenant Marriage Act* obliges couples to have premarital counseling and to seek marriage counseling if problems arise. The act also reintroduces the concept of conduct into applications for divorce.

In 1989 Judith Wallerstein and Sandra Blakeslee published *Second Chances: Men, Women and Children a Decade after Divorce*. This groundbreaking study, cited by a number of witnesses, followed 161 children from 60 families for 10 years after a divorce. The study provoked a great deal of reaction from mental health professionals, because the findings challenged the idea that most children are unharmed by divorce.¹⁰ Contrary to Wallerstein's own expectations, most of the children in her study showed severe difficulties in school and in personal and social relationships. There was a noticeable increase in drug and alcohol use and a higher rate of delinquency. The children of divorce showed high rates of depression, aggression and social withdrawal. The study also challenged the idea that helping children express their feelings in therapy at the time of divorce would have long-term preventive benefits. Many were experiencing serious difficulties in their adult relationships.

The professional reaction to this work was highly sceptical. Critics argued that Wallerstein's sample was too small and questioned her research methodology. However, almost ten years later, at the 1998 Annual Conference of the Association of Family and Conciliation Courts in Washington, D.C. - which was attended by a group of Members of this Committee - a panel of sociologists and psychologists argued that Wallerstein's findings were correct, because larger research studies in the United States and Great Britain had subsequently supported them.

Lamb, Sternberg and Thompson wrote about the negative impact of divorce on children in 1997:

Most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social and economic distress as well as stresses related to the legal divorce), and diminished contact with many familiar or potential sources of psycho-social support (friends, neighbours, teachers, schoolmates, etc.) as well as familiar living settings. As a consequence, the experience of divorce is a psychosocial stressor and significant life transition for most children, with long-term repercussions for many. Some children from divorced homes show long-term behaviour problems, depression, poor school performance, acting out, low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships.¹¹

Amato and Keith analyzed 37 divorce studies, involving 81,000 individuals, that investigated the long-term consequences of parental divorce for adult well-being. This analysis showed a significant pattern of problematic after-effects for adults and children. The authors concluded:

The data show that parental divorce has broad negative consequences for quality of life in adulthood. These include depression, low life satisfaction, low marital quality and divorce, low educational attainment, income, and occupational prestige, and physical health problems. These results lead to a pessimistic conclusion: the argument that parental divorce presents few problems for children's long-term development is simply inconsistent with the literature on this topic.¹²

In 1997, Hope, Power and Rodgers reported on a research project that used as its base a national longitudinal study of 11,407 men and women born in Britain in 1958.¹³ This study showed that by the age of 33, the adult children of divorced parents were much more likely to engage in problem drinking than adults whose parents had not divorced.

Finally, Wallerstein's research showed that ways had not yet been found to prepare children adequately for the stress of divorce. Therapy and counseling may be helpful at the time, but they do not seem to have long-term preventive effects.¹⁴

Recent studies on children's attachment patterns also indicate that divorce can cause serious emotional difficulties for younger children (0 to 48 months). Ainsworth and her associates identified four distinctive patterns of childhood attachment to parents, ranging from "secure attachment" to "disorganized and disoriented" attachment.¹⁵ Dr. Pamela Ludolph and Dr. Michelle Viro reported in 1998 that even the normal upset and disorganization caused by a so-called friendly divorce caused young children to slip from secure feelings of attachment to insecure attachment behaviour.¹⁶ In high-conflict cases, secure children were observed to slip to disorganized and disoriented states of attachment with their parents.

Both the mental health literature and the testimony of witnesses, especially the young people, have convinced this Committee that the impact of divorce on children is significant and potentially harmful. Parents and their advisers must be made aware of the potential repercussions of their decisions on their children and work to minimize any damage. Certainly a number of mitigating factors, many of which are within the control of parents, can ameliorate the post-separation scenario for children. The Committee was impressed by the creative solutions adopted by some parents and encouraged by the handful of very positive stories we heard about successful parenting arrangements. By expanding our understanding of the consequences of divorce for children and investigating all potential aids to parents and children dealing with divorce, this Committee and the others who continue with this work can contribute to improving outcomes for children whose parents divorce.

A number of issues were brought to the Committee by groups and individuals representing the interests of the adult members of divorcing families. Many women presented the Committee with ideas and concerns about parenting arrangements for children after divorce. Some witnesses were mothers who told of their personal experiences. Others represented local and national women's groups. Others spoke of their experiences working in social service agencies and women's shelters. These witnesses identified three main areas of concern.

First, they testified that violence is a major problem for many women during their marriages and that the risk of violence for women and children escalates around the time of separation. Many individual women, as well as researchers and representatives from women's groups, community social service agencies, and women's shelters, testified about domestic violence. These witnesses often referred to statistics documenting the prevalence of violence against women, including Statistics Canada's *Violence Against Women Survey*. That 1993 survey, which documented the experiences of 12,000 women, indicated that 29% of Canadian women reported experiencing

violence in their married or common-law relationships. The serious and contentious problem of domestic violence, and the Committee's response to it, is explored in Chapter 5 of this report, which deals with the complications of high-conflict divorces.

Second, they told the Committee that in most families women are still the primary caregivers for children and questioned why this arrangement should change dramatically after divorce. Advocates for women insisted that, in the majority of cases, women are the primary caregivers of children before separation and should therefore continue in that role after separation and divorce. These witnesses stated that most women today would prefer that their husbands play a more prominent role in child care, but they referred to studies showing that women continue to have primary responsibility for the day-to-day care of children. Women's advocates argued that many men ask for shared parenting after divorce in order to continue to exercise control over decision making by their former wives or to avoid having to pay as much financial support for their children, not out of a genuine desire to share parenting responsibilities.

Marriage breakdown is not an appropriate time to redefine the responsibilities of parents to care for their children in the interests of gender equality. Instead, it is a time to decide on the responsibilities in the best interests of the child, based on the child's existing relationship with each parent as it has developed during the course of the child's lifetime. (Elaine Teofilovici, YWCA, Meeting #8)

The parenting responsibilities in our families are allocated in particular ways when parents live together, and that allocation in the majority of families is that women do the caregiving. Interestingly enough, that has not changed significantly in recent years, even though in the past 20 to 30 years there have been huge upheavals in our social structures. I guess the issue I'm urging on the Committee at this point is that there are real limits to the role law can play in changing patterns of post-divorce parenting behaviour. (Carole Curtis, National Association of Women and the Law, Meeting #8)

I can't help but observe that this room is an unfamiliar arrangement for me. There are all these men here. They were never in my court. I don't know where they were, but when the kids were in trouble the mothers came. The men came unwillingly, generally - for a maintenance default or some other problem. (Herbert Allard, Retired Family Court Judge, Meeting #20, Calgary)

Finally, these witnesses reported that problems with shared parenting arrangements are not a question of denial of parenting time: they testified that it is often difficult to keep fathers involved with children after divorce.

Although many fathers testified about the problem of denial of access, many women argued that the problem for them was the opposite: fathers who do not make use of the access they have been given by agreement or in a court order. Mothers and women's groups testified that, in these types of situations, it is the mothers who have to deal with their children's disappointment, sadness and anger when their fathers do not appear when expected.

Picture if you will, two young children dressed in their best clothes, packing their little suitcases or knapsacks and waiting for their dad to pick them up. They're excited; looking forward to the visit. The mom's looking forward to catching up on things around the house or on her work outside of home, on making a few extra dollars, or whatever. They wait and they wait. The phone rings. It's dad. He can't make it... All too often access is not exercised in a predictable and reliable manner, causing severe disappointments in the children, who then turn to their mom to make it better. The mom then rearranges all of her plans; she diverts her energy towards helping the children work through the rejection and disappointment of having the visit cancelled. The cost, financially and emotionally for the children and the mother is high. (Cori Kalinowski, National Action Committee on the Status of Women, Meeting #8)

As has been widely reported by the media, many fathers from across Canada testified before the Committee. Some began preparing their presentations and alerting others to the Committee's existence before public hearings were officially announced. Whether testifying as individuals or as representatives of fathers' groups, these men shared their profound unhappiness about difficult separations and divorces that culminate all too often in a minimal or non-existent relationship with their children. Most of these witnesses emphasized the importance of strong father-child relationships after divorce.

The main grievances brought to the Committee by these witnesses related to obstacles to maintaining fathers' relationships with their children, such as gender bias in the courts, unethical practices by lawyers, flaws in the legal system, false allegations of abuse, parental alienation, and inadequate enforcement of access orders and agreements. The latter three issues are discussed fully in later sections of this report - false allegations of abuse and parental alienation in Chapter 5 (Complications of High-Conflict Divorce), and access enforcement in Chapter 4 (Federal and Provincial Government Roles).

All the concerns expressed by witnesses were considered carefully by Committee Members, and their impact is reflected throughout our recommendations.

D. Child-Parent Relationships Must Survive Divorce

The Committee heard a great deal of moving and sincere testimony from parents, grandparents and professionals about the harm done to children when their relationship with one parent is interfered with by the other parent. Non-residential parents, often fathers, testified not only about their own pain when parenting time is denied, but also about the harm that such denial does to their children.

A great deal of the professional literature about children and divorce concludes that it is in the child's best interests to have continuing contact with both parents after divorce. The exception to this general rule arises when the child experiences violence by one parent toward the child or the other parent. In these cases, most experts believe that the abusive parent's parenting time should be restricted or supervised.

The testimony of several witnesses supported the benefits of regular contact with both parents:

Continuing relationships with and contact with both parents, including step-parents, following separation and divorce is the entitlement of the child and exists regardless of the nature and status of the adults' relationship with each other, with one exception: where contact with a parent or former caretaker places the child at risk physically, psychologically or sexually. (Barbara Chisholm, Ontario Association of Social Workers, Meeting #13, Toronto)

While we argue over the theoretical points of view, legal process, rules of order or problem definition, we miss the most important issue to children and youth: the need to experience and feel a strong bond of love, intimacy and connection to the significant adults in their lives and their communities. In regards to denying access... children, especially very small children are developing very rapidly and not having the time to spend with their parents in those early formative years is time lost forever. (Fred Matthews, Central Toronto Youth Services, Meeting #14, Toronto)

The question for me then becomes how come some children have to live in a situation where one parent's needs seem to be far more important than the other's? Most children I've talked to want to be with both parents. They unconsciously leave stuff at the other parent's home so they'll have to go back. (Kent Taylor, Edmonton and Northern Alberta Custody and Access Mediation Program, Meeting #20, Calgary)

Why shouldn't the focus be on the child's right to insist, post-divorce, post-separation, that they have the right to have this equal participation and to benefit from both a mother and a father? (Sharman Bondy, Lawyer, Meeting #12, Toronto)

Edward Kruk, a professor of social work at the University of British Columbia, has studied children and divorce for 20 years. He testified about a U.S. study showing that over 50% of children lose contact with their non-custodial fathers. Using 1994 Canadian data showing that there were 47,667 children about whom there was a custody decision, 33,164 of whom were placed in sole custody arrangements with their mother, Professor Kruk concluded that 16,582 of these children would eventually lose all contact with their fathers.

Those who work in the area of grief and loss say that there is nothing worse than the loss of a child, no matter how that loss came about, but there is something far worse; for a child, the loss of a parent who's been a constant, loving presence in one's life, the loss of a parent who is part of who one is, an integral part of one's identity. (Edward Kruk, Meeting #27, Vancouver)

We need to have a presumption that the child will continue to have those two parents after separation. It can only be the best thing for the child. How could it not be best for the child to have both parents in their lives? A child is born with two parents. God made it that way. It's God's plan, and it seems unfair that the child should have only one parent after separation and divorce. Let's look at what's best for the child. (Yvonne Choquette, Fairness in Law, Meeting #12, Toronto)

I call this the fixed love pie mentality - that there's only so much love to go around. Children can only benefit from more and more love. But there's that fixed pie mentality that "Oh, if the child sees Daddy, there'll be less love for me." That's pretty immature, but it happens. It's an emotional response to divorce. (Nardina Grande, Step-Families of Canada, Meeting #13, Toronto)

The testimony of these witnesses was actively supported by testimony from many fathers' groups across Canada. These men and their supporters testified that children and their fathers have the right to a continuing relationship, and they spoke of the dangerous consequences when this relationship is interfered with.

Children define themselves by their parents. They form their identity through modeling after their parents. Denying the right of the child to a dependable schedule of parenting contact with the non-custodial parent is nothing less than child abuse, which leads to many costly societal problems as the child grows. (Heidi Nabert, National Shared Parenting Association, Meeting #7)

My family is dead. It is gone. It doesn't exist. The system gave it the final deathblow. Here is how I was helped by the system. It cost me everything - my self-esteem, my confidence, my self-assuredness as a young man, security, peace of mind and the ability to cope with life. For my parents, it cost them a heck of a lot of money and estrangement from me for many years. My entire extended family was destroyed. Most children of divorce seek to escape this painful reality they are trapped in with petty crime, substance abuse, and promiscuity. (Danny Guspie, National Shared Parenting Association, Meeting #7)

E. Gender Bias in the Courts

Many fathers testified that their experience with the justice system showed that there is gender bias in the courts against men. For several decades, ending in the mid-1970s, courts often applied the "tender years doctrine" in making custody and access determinations. This approach held that mothers were generally entitled to custody of a child during its tender years, or period of nurture, from birth to age seven, after which time the father became

entitled to custody of the child. The common-law doctrine was thoroughly rejected by the Supreme Court of Canada in 1976.¹⁷ Since then, it has occasionally been discussed by judges and replaced by analysis based on consideration of the "best interests of the child". Although the tender years doctrine is not part of current family law or case law, many witnesses expressed the view that judges still operate on the presumption that mothers are better parents.

Canada has a long history of using the gender of the parent to guide custody decisions. This gender preference is created and led by judges in courtrooms, yet the evidence does not support that one sex has innately superior parenting abilities. In fact, reliance on gender to determine custody may contribute to negative outcomes for children by failing to provide the best available parent. (Paul Miller, Men's Educational Support Association, Meeting #20, Calgary)

When I go to court with a male client who is looking for custody, it's always an uphill battle. I always have to have a special fact situation in order to have a good chance at getting custody. (Michael Day, Lawyer, Meeting #12, Toronto)

I've been practising law for 35 years. When I entered the practice of law, Mom stayed at home, Dad was the breadwinner, and she looked after the children. We developed and still carry on with the attitude that mother knows best and father pays best when it comes to issues of child custody and support. (Bruce Haines, Lawyer, Meeting #12, Toronto)

When people are going through a divorce they become very self-centred, and unfortunately their respective lawyers promote that by doing a good job for them... My focus is to tell them they are still a family. They may be a family that is split and separated but they are still a family and until their children reach the age of majority they are a family and it's in their interest to get along so the children don't suffer.... My finding is that there are a lot of nurturing fathers out there. I've had some women tell me they don't care how the assessment turns out because they are going to get custody of the children anyway "because they always give custody to the woman". (Marty McKay, Meeting #13, Toronto)

Wayne Allen, of Kids Need Both Parents, quoted Judge Norris Weisman of Toronto in support of his argument that gender is not a reliable guide to quality parenting abilities and that both parents must remain involved: "...it is not unusual to find that the custodial parent is using the child as a weapon in the matrimonial warfare and is sabotaging the access visits." Quoting from a statement by Judge Karen Johnson on July 15, 1993, Mr. Allen continued: "The court should start with the assumption that, absent issues regarding the child's physical, mental or emotional safety, the continued involvement of both parents in the child's life is the desired goal: this involvement ideally will be of the same quality post-separation as pre-separation." (Meeting #13, Toronto)

F. Unethical Practices by Family Law Lawyers and Flaws in the Legal System

Many witnesses, including several lawyers, alleged that some family law lawyers make a practice of escalating the fight between divorcing parents. These practices include encouraging their clients to make false claims of abuse and encouraging women to invoke violence as a way to ensure an advantage in parenting and property disputes.

President Lincoln said that there is nothing more dangerous to society than a hungry lawyer. Okay, we now have 25,000 lawyers practising in Ontario, whereas when I started there were 5000. The legal problems the public faces have not increased fivefold. So what we have here is 25,000 hungry

lawyers. (Richard Gaasenbeek, Lawyer, Meeting #12, Toronto)

They go into a lawyer's office, though, when they're in a custody access dispute or a divorce situation, they hand over a blank cheque to someone they've never met before, and off they go on this merry ride through the justice system that drains their bank account. That moment, for Canadians, as consumers in our justice system, is a real disgrace. (Michael Cochrane, Lawyer, Meeting #13, Toronto)

I told the lawyer I didn't know what my rights were, that I wanted to end my marriage, and I wanted to know, if I left the house, would I lose my entitlement to the property. His response shocked me. ... He said to me, and I quote,... `get him to hit you'. This is what a lawyer said to me. In 17 years of marriage, my husband never raised a hand to me. But he went on to say, `If you get him to hit you, you can have him forcibly removed from your home; you'll get spousal support.' (Heidi Nabert, National Shared Parenting Association, Meeting #7)

Then we have what I would term the barracuda lawyers, and they do inflame the system. I would say they probably do so for financial gain. There are those kinds of lawyers. They're pretty few and far between, but they certainly are there. They take advantage of an emotionally vulnerable client and they can influence that client to do a lot of unnecessary and costly things - the things they are doing are legal - to advance their case. (Susan Baragar, Lawyer, Meeting #22, Winnipeg)

False allegations continue to enter divorce proceedings by way of lawyers who place allegations of criminal behaviour in affidavit material, without substantiation from child welfare or police authorities, and without consequence to the accusing parent or lawyer involved. (Louise Malenfant, Parents Helping Parents, Meeting #22, Winnipeg)

Several witnesses also commented on perceived flaws in the family law system, which allow affidavit material to be submitted in court without the challenge of proof. These witnesses were concerned that the same standards of proof required in criminal and civil law do not seem to operate in family courts.

As a criminal lawyer I deal with accused people who, when they come before the court, have the protection of the *Charter of Rights and Freedoms* and the whole common law. It is stunning to me that in family law process, the future relationship between parents and children and grandparents is decided without even minimal attention being paid to due process and propriety... Perjury is common, but how can we put the custodial parent in jail for lying? As a result, the family law process ricochets behind closed doors or even in open court without a transcript and without any of the basic sanctions our courts have traditionally used to control the process. (Walter Fox, Lawyer, Meeting #13, Toronto)

CHAPTER 2: Improving Outcomes for Children

A. Hearing Children's Voices

They think you are nine years old and you don't know anything. But it's your life. (Witness, age 15)

They're deciding your life and your future but they don't even know you. (Witness, age 15)

Children do not ask their parents to divorce. The Committee heard testimony from children across Canada, none of whom said that divorce was a good thing. What they did speak about was the disruption in their lives and the severe emotional distress that accompanied their parents' divorce.

When parents divorce, children are left with a new set of worries and fears about what will happen to them. Children are not prepared for these worries and fears, and they tend to struggle with them on their own.

There's a lot of odd feelings. Feelings you never had before. Everyone says it's not your fault but you wonder sometimes. (Witness, age 14)

Children testified that they felt left out of proceedings that would determine the arrangements for their daily lives for many years to come. Many lawyers and mental health professionals supported the idea that children need a voice in divorce proceedings.

This Committee has heard from mothers, fathers, custodial and non-custodial parents, lawyers, judges, psychologists and a host of others, but I have no sense that this committee has heard from the very people this is all about, the children . . . When one takes the time to listen to the children and truly places their interests first, a greatly different picture can emerge as to what ought to be done in each individual family... Most children, however, know how they feel and what they want and need from their parents. All children need their parents to quit fighting... Children find it incomprehensible that some unseen person called a judge has said that from now on, one parent, usually daddy, is someone you now have visits with, and not very often. You aren't going to see your parent every day, the way you did before. (Kathleen McNeil, Mom's House-Dad's House, Meeting #27, Vancouver)

Since adults are the ones making the decision to divorce, they have some sense of justification for their decision and a sense of confidence that things will work out eventually. Often they also have a support network of family and friends to help them emotionally and practically during the difficult period of adjustment. Finally, adults have direct access to lawyers to help them argue their case and push the arrangement they believe is best for the children. But children are often surprised by their parents' decision to divorce.

The question I had was, why are you getting divorced? Why does this have to happen? (Witness, age 10)

Some children who testified told the Committee that they knew things were tense before their parents separated but they did not expect them to divorce. They felt they had no say in the decision, and they were left unsure about what to expect in the future. They also did not have the support systems available to their parents.

Separation and divorce is a traumatic event for children, regardless of age. When they're told of the decision they have fears, worries and questions. What do they worry about? They wonder, Where will I live? Who will I live with? Do I have to leave? What about my friends? Will we still go on holidays? Will I get to see Dad, Grandma? What about the dog? What about the cat? How much time will I spend with people? Can I still have lessons, hockey, skating... These questions speak volumes on children's interests. Why should we listen? Because their lives are changed forever - emotionally, socially and economically. They have no control over the decision. They have to live with it and, yes, they struggle to accept... No child wants to experience the separation and divorce of his or her parents. (Sherry Wheeler, Alberta Office of the Children's Advocate, Meeting #20, Calgary)

If the children who need us to get this right are not served as they deserve to be, then we will get the children we deserve - children who do poorly emotionally and academically, whose relationships in adulthood are doomed to repeat the mistakes made by their parents, children who will draw disproportionate attention from the criminal justice system, who will draw disproportionately upon all our resources - in short who won't achieve their true potential, and we will fail to achieve our potential as a society and as a nation. (Michael Guravich, President, Family Mediation Canada, Meeting #26)

Children often feel very alone in their emotional distress. Some children testified that they worried about how to tell their friends about the divorce. One little girl told us she was quite convinced she would be the only child in her school from a divorced family

We believe children need to feel loved, secure, and safe. They need to know the divorce is not their fault. They need to know both their parents and their extended family will continue to be part of their lives. They need to know their viewpoints and their wishes have been considered when developing a family plan for how to move forward in their family life. They need to feel empowered to ask for changes to the plan without being made to feel disloyal to either of their parents or other members of the family. (Margaret Treloar, Girl Guides of Canada, Meeting #13, Toronto)

Most important, children feel they do not have a voice in their own future. Several children testified that all children should have someone - a lawyer or child advocate, or even a member of their extended family - to represent them in legal proceedings. One child testified that without anyone to represent her, arrangements were made that left her and her younger brother at risk when they visited one of their parents.

This need for representation does not end with the divorce. Children told the Committee about circumstances that required changes in the original custody and access arrangements. Without someone to help give the children an opportunity to speak about their needs and voice their concerns, these sometimes dangerous situations were allowed to continue, and children were put at risk.

Members of the Committee also understood that it is necessary to distinguish between hearing children's views and putting children in the position of having to choose between parents. Many professionals warned the Committee that most children want to remain loyal to both parents after divorce; having to choose one parent over the other would create incredible inner conflict for a child. In fact, many Members of the Committee became convinced that a child's sudden wish to break off contact with a parent could indicate a major problem, necessitating therapeutic rather than legal intervention. Committee Members deliberated carefully on this matter to find solutions that would give children the opportunity to be consulted and heard on decisions that affect them without being pulled into an emotionally dangerous situation.

The importance of hearing children's voices was underlined in the presentation of every child witness before the Committee. This message must be heard by parents, who are to be encouraged to consult their children respectfully when making parenting and other arrangements upon separation, and by policy makers and legislators. The legal system has already demonstrated significant flexibility in designing non-litigation models for decision making in which children can readily be accommodated. The existing offices of Child Advocates and the Children's Lawyer are government responses that, if expanded, could enhance the ability of children to make themselves heard during divorce processes. The following section, which deals with children's rights, expands on this theme and notes that the United Nations *Convention on the Rights of the Child* requires that Canada make possible the effective participation of children in decision making that affects their lives.

B. Children's Rights

The *Convention on the Rights of the Child* was opened for signature by the United Nations General Assembly on 20 November 1989. Canada signed on 28 May 1990. After the requisite 30 nations had ratified the Convention, it came into force on 2 September 1990. Canada ratified it in December 1991 and submitted its initial report to the UN Committee on the Rights of the Child in June 1994. This Convention, which is the most widely ratified human rights treaty in history, sets minimum legal and moral standards for the protection of children's human rights, including civil rights and freedoms, rights related to the provision of optimal conditions for growth and development (health care, education, economic security, recreation), and the right to protection from abuse, exploitation, neglect and unnecessary harm. The Convention expressly recognizes the special role of the family in the nurture of the child.

The key provisions of the Convention relating to the subject matter of this study include article 3, which states that in all actions concerning children, the best interests of the child shall be a primary consideration; article 9, which includes the right of the child to contact with both parents if separated from one of them; and article 12, which provides that children have the right to express their views freely in matters affecting them.

Responsibility for implementing the Convention, like other international treaties, is shared in Canada by the federal, provincial and territorial governments. All jurisdictions took part in the preparation of Canada's first report under the Convention.¹⁸ Where action to implement is identified either as having taken place or as being required, the report indicates which level of government is responsible for that action. Paragraph 149 of *Canada's First Report* indicates that the federal Department of Justice is reviewing the issues of custody and access and states that current empirical data demonstrate that children are badly affected by experiencing or witnessing family violence. The *First Report* also indicates that the federal government is reviewing the *Divorce Act* to determine whether measures should be adopted to implement article 12 of the Convention, which deals with respect for the views of the child.¹⁹

A number of witnesses recommended that the Committee give consideration to the Convention, particularly articles 3, 9 and 12 on the best interests of the child, the child's right to maintain relations with family members, and the child's right to be heard in proceedings affecting him or her. Many of these witnesses felt that a reference to the Convention in a preamble to the *Divorce Act* would give judges useful and important guiding principles, thereby improving decisions about parenting arrangements. Katherine Covell, Director of the Children's Rights Centre in Cape Breton, emphasized the relevance of the Convention to custody and access decision making:

Under the United Nations *Convention on the Rights of the Child*, Canada is obligated to move toward legislation and public policy that is really in the best interests of the child. In the context of custody issues, there is a large body of psychology research suggesting that the best interests of the child are served under the following two conditions. The conflict between parents during and after the divorce should be minimized, and in the absence of abuse, children should maintain meaningful relationships with both parents (Meeting #30, Halifax)

Many witnesses felt strongly that the Convention mandates a greater role for child participation in custody and access decision making than is currently afforded them. The form this participation should take, as outlined in proposals the Committee received, ranged from full, automatic legal representation and party status for every child whose parents divorce, to some other form of participation whereby a child's views, in an age-appropriate and sensitive way, would be solicited and made known to decision makers, whether parents, assessors or a judge. Lawyer Jeffery Wilson, representing one end of this continuum, interpreted the Convention as requiring the provision of state-financed legal representation for every child. Other witnesses, including the Child Advocates of each province in which they exist, recommended that children always have the opportunity to have their voices heard, but noted that current funding levels for child advocacy programs, and the mandates under which they operate, preclude the Child Advocates themselves from filling this role.

Members heard a clear message from several child witnesses. If children are not given the opportunity to participate, if they feel that important decisions about their future are made without consulting them or considering their wishes, then children will not easily accept the decisions made about them. This could have dire consequences for a child's ability to adapt to custodial arrangements, with long-term mental health or other negative implications for that child. The Committee has therefore concluded that in all cases, children should have the opportunity to express their views to a skilled professional whose duty it would be to communicate those views to the judge making a parenting determination. The skilled professional might be a social worker, psychologist, lawyer, family doctor or nurse who is skilled in communicating with children. Members also thought that in some cases a member of the child's extended family might be uniquely well situated to provide support to the child and represent his or her interests before the court.

Committee members felt that it was imperative that children in high-conflict situations, in particular, have the opportunity to be heard and have legal representation. Legal representation for a child is considered necessary whenever the child's interests are not going to be advanced by counsel for either parent. Members were particularly impressed by the efficacy of unified family court systems in which legal services are combined with therapeutic services, such as those provided by counsellors, giving children access to an enabling listening professional.

At the same time, Members were acutely sensitive to the need to avoid putting children in the position of having to choose between their parents. Many Members found the testimony of Michigan Judge John Kirkendall helpful. He told the Committee that although he often consults children to ask them how they feel, he is always careful to let them know that they are not the decision makers. While he considers what they have to say, he tells the children that he will not necessarily make the decision they have requested. Members also thought it important that parents be advised to talk to their children about possible parenting and residential arrangements and rearrangements and that they avoid imposing new arrangements on their children without consultation.

An additional matter related to the rights of children came to the attention of the Committee. The superior courts in Canada have always had an overarching authority to act in the best interests of children, enabling them to provide for children's well-being even when a specific remedy is not provided expressly in statute law. This power comes from the equitable jurisdiction of the court to act as a sort of "super parent" to the child - what is referred to as the court's *parens patriae* jurisdiction. Some Members of the Committee are of the view that the courts have hesitated to exercise this inherent jurisdiction on behalf of children and should be encouraged to do so. The Committee is therefore recognizing that children have a need and a right to the protection of the courts, particularly the protection afforded by the exercise of the courts' *parens patriae* jurisdiction.

Recommendations

- 1. This Committee recommends that the *Divorce Act* be amended to include a Preamble alluding to the relevant principles of the United Nations *Convention on the Rights of the Child*.**
- 2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the *Divorce Act* be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another.**
- 3. This Committee recommends that it is in the best interests of children that**
 - 3.1 they have the opportunity to be heard when parenting decisions affecting them are being made;**

3.2 those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;

3.3 a court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;

3.4 the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and

3.5 we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.

4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child.

C. Reducing Conflict

It's bad when your parents are screaming. It can give you a headache or make you feel sad. And you might just want to grab a teddy bear and lie in the corner and not come out ... for a long time.
(Witness, age 12)

The Committee heard many witnesses testify that the majority of divorces are resolved without a great deal of conflict between the parents. These so-called "friendly divorces" are presumed difficult for children, but not permanently damaging. Unfortunately, a significant number of divorcing parents become locked in bitter and sometimes violent disputes over custody and access arrangements. These situations are truly dangerous for children, and the Committee examined the evidence carefully for ways to reduce conflict between divorcing parents, to the benefit of the children. Indeed, the principal objective underlying all the recommendations in this report is to induce as thorough as possible a shift from the current state of family law policies and practices, which all too often escalate conflict between divorcing parents, to a decision-making approach that reduces conflict.

When divorce occurs, society offers no healing rituals. Instead, we dishonour the parties through an adversarial process that requires couples to prepare affidavits that publicly humiliate each other. Family members, friends and neighbours are pressured to take sides, causing permanent rifts, and children are treated as scarce resources to be divided up like chattels. (Barbara Landau, Meeting #11)

Our concern, as mediators, is the well-being of the children. The parents are often too entangled in their emotional problems. There is a heavy layer of emotion in every divorce, even if it is not contested. If it is contested, it is hell. (Philip Shaposnick, Meeting #11)

All the children who testified told the Committee that it felt terrible to be caught in the middle of their parents' fight.

It feels really bad when they fight cause you think, Wow, a few years ago they used to be happily

married. (Witness, age 14)

There should be a law that parents can't yell at the children when they get divorced. It's not the child's fault. (Witness, age 8)

The children who testified also said that lawyers and courts do not pay attention to what is important to the child. Several children talked about the need for flexibility in access schedules so that children do not become resentful about missing social and recreational activities because it is time to see a parent. Other children said that the courts do not understand the importance of stepsibling relationships.

Most children testified that it was important for them to maintain a relationship with both parents. The Committee noted that children usually did not use the language of "custody and access" when talking about family relationships; these are legal terms and are not part of most children's vocabulary. Children also tended to measure their relationships not in terms of time but in terms of availability.

Psychologists, psychiatrists and social workers across the country testified that many of the children they see in their clinics are damaged by conflict that continues after divorce.

Research has shown us time and time again that children do not care who has ownership of them but rather they have great concerns about how each parent will be able to maintain their relationship with them. We know that children who experience ongoing conflict between their parents suffer the long-term effects of being caught in between the most important people in their lives. It is a damaging and untenable position to be in. (Resa Eisen, Meeting #12, Toronto)

Dr. Eric Hood, of the Clarke Institute in Toronto, testified that high-conflict divorce situations "are like war zones." The children go back and forth between their fighting parents and "are afraid to tell the truth." These children bear the burden of suffering in divorce. He added:

I can speak very personally about it, because those of us who work in trying to assess and understand these situations - dealing with each parent and with the children, dealing with the parents and kids together... end up very stressed, very troubled by the experience of dealing with these situations. It's as if we're like the children and it makes our stomachs churn. If it does that to me and it's not my family, what's the pressure on the children? (Eric Hood, Meeting #12, Toronto)

I think of family conflict like, unfortunately, an intense war zone when it's at a severe level for children. For the victims of war, one would hope that every once in a while there would be what I think of as a safety zone. When I train volunteers and staff for the Supervised Access Program, I like to use the image of wearing the blue hat, wearing the hat of the United Nations peacekeeper's role. We cannot perhaps end the war, and we cannot determine the outcome on either side, but we can provide the safety zone, and that's really essential for children. (Sally Bleecker, Ottawa-Carleton Parent-Child Supervised Access Program, Meeting #24)

Wilson McTavish is the Director of Ontario's Office of the Children's Lawyer. This government-funded service provides legal counsel for approximately 8,000 children per year, 1,600 of whom are involved in custody/access disputes. He testified that

both parents, and we have found this in every case, love their child. Every child we represent pleads for a reconciliation of their parents. Tearfully they acknowledge that can't happen, and then the child asks us to stop the fighting. (Meeting #12, Toronto)

Several legal and mental health professionals gave testimony that supported the children's view of divorce. All agreed that high-conflict situations are dangerous for children. The Committee explored a number of suggestions from witnesses for reducing the conflict that, to some degree, seems an almost unavoidable aspect of divorce. These suggestions ranged from parenting education programs - to make parents aware of their own conduct during and after separation, its impact on their children, and means by which they might change it or at least shield their children from its effects - to non-litigation models for custody and access decision making, such as mediation.

1. The Language of Divorce

Many witnesses testified that the current language of "custody and access" promotes a potentially damaging sense of winners and losers. These witnesses suggested that more neutral language would help reduce conflict and let both parents focus on their responsibilities rather than their rights. This was seen as an important means of reducing parental conflict by defusing the winner-take-all custody contest. The language of divorce was an important focus for Committee Members, who found the testimony about the impact of the terms "custody", "access", "custodial" and "non-custodial parent" particularly compelling. The use of these words clearly can escalate conflict between divorcing parents, even to the extent of contributing to access denial and other disputes.

The corrosive impact of the current terminology was discussed extensively during the Committee's hearings.

"Custody" is the formal word for imprisonment, and "access" is the formal word used for a prisoner's privilege to see a lawyer, or vice-versa. These are nauseating, abominable words, and they extinguish a child's right to have a father. Let's get rid of these words and concepts now. (Gene Keyes, Meeting #30, Halifax)

As they now stand in current federal legislation, language and terms serve to create that winner-loser scenario that really exacerbates parental conflict during separation and divorce. Such inappropriate language is not family friendly, and it is experienced as demeaning to children who hear themselves referred to in the same language used in the prison system. (Judy McCann-Beranger, Meeting #31, Charlottetown)

In the opinion of a number of witnesses, the current terminology not only increases conflict between parents but promotes a completely erroneous understanding of the decisions about parenting that parents are expected to make when they divorce.

The current language in child custody statutes is problematic in that it connotes the ownership of children. This perpetuates the notion that children are chattel, is antithetical to what is implied in the UN Convention, and is disrespectful to children. The inference of ownership serves to sidetrack what is meant to be a child-centred focus. In turn, it may fan the fires of what may already be an emotionally charged situation. Furthermore, the current legislative language can be disempowering to parents. (Elaine Rabinowitz, Prince Edward Island Provincial Child Sexual Abuse Advisory Committee, Meeting #31, Charlottetown)

Most witnesses recommended that legislators seek new language to describe the parenting decisions that divorcing couples are required to make, although a few cautioned against new legislation, because new legislation invariably means increased litigation, for some at least, while the courts interpret the new legislative language. Nonetheless, the Committee clearly heard a call for change in this area.

The *Divorce Act* is replete with language such as "custody" and "access" which reflects a bygone era in which women and children were legally chattels in the possession of the head of the household, the father. Instead, the language of the Act should reflect the modern era in which all family members have rights, with both parents equal before the law. Thus, as regards post-divorce parenting, the focus of the Act should be on the formulation of parenting plans. Such plans should reflect a shared responsibility of care and assume the existence of two parenting households. Further, the Act should strive to maximize the involvement of both parents in the ongoing care of the children of the marriage although circumstances may force recognition of resident and non-resident parents. (Howard Irving, Mediator, Meeting #11)

A number of witnesses urged the Committee to recommend terminology based on the new language adopted in other jurisdictions, such as the four discussed in Chapter 3 of this report:

On the issue of language, though, virtually every jurisdiction that has modernized its law in this area in the last decade or so has recognized that terms like "custody" and "access" are not appropriate. Unless you're familiar with the legal terminology, they're not terms that naturally flow to a parent. They have unfortunate connotations. They're not concepts that capture what parents are actually doing or should be doing, and they are concepts that tend to alienate one parent or indeed both parents. So I think we'd like to have legislation that recognizes what it is that parents are really doing. (Nicholas Bala, Meeting #6)

The Committee was offered examples from a number of other jurisdictions as models for new conflict-reducing language. For example, custody and access regimes could be replaced with concepts and terms like "parental responsibility" (Australia), "joint parental responsibility" (United Kingdom), "shared parental responsibility" (Florida), or "residential placement" and "parenting functions" (the state of Washington). Custody itself is often replaced by the concept of "residence" combined with decision-making authority. What is currently referred to as access in Canada may be referred to as "contact", "visitation" or "parenting time" in other jurisdictions. The new terminology is often attached to new substantive legal regimes, some of which presume that joint custody or shared parenting - or alternatively some form of shared decision making without equal time sharing - will be the norm (see Chapter 3).

This Committee is of the view that a shift to new, less loaded terminology is critical to reducing conflict in divorce. Coupled with our intention to reduce conflict, Committee Members feel strongly that the legal regime under the *Divorce Act* must discourage the estrangement of parents and children, and that to do so the act must ensure that parent-child relationships survive marital breakdown. Therefore, in addition to proposing new language to replace that of custody and access, the Committee concludes that parental decision-making roles should, in most cases, continue beyond divorce. Members hope that this new regime and new language will foster the type of co-operative, child-focused post-separation parenting that will advance the interests of children, and that parents will find their post-separation arrangements more flexible, natural and beneficial to all members of the family.

The Committee concludes that the current *Divorce Act* terms custody and access should be replaced by the concept and the expression "shared parenting". By this, the Committee is not recommending a presumption that equal time-sharing, or what is currently referred to as joint physical custody, is in the best interests of children. The Committee recognizes that the details of time and residence arrangements for children will vary with the family involved. In view of the diversity of families facing divorce in Canada today, it would be presumptuous and detrimental to many to establish a "one size fits all" formula for parenting arrangements after separation and divorce. By the new term "shared parenting", the Committee intends to combine in one package all the rights and responsibilities that are now embodied in the two existing terms - custody and access - and leave decisions about

allocating the various components to parents and judges.

Several other recommendations flow naturally from this proposed change of language. The *Divorce Act* should be amended to remove the current definition of custody, and one defining "shared parenting" in the manner it is defined in this report should be added. The Committee also hopes that the new language will eventually be integrated into provincial and territorial family law statutes, so that children across Canada, regardless of whether their parents are married, would benefit from this new regime in the event their parents separate. The federal government should seek this change through its participation in the Federal/Provincial/Territorial Family Law Committee. Also, with the removal of the concept of custody, the outdated and discredited "tender years doctrine" is clearly no longer useful, and to ensure that it has no further influence, the Committee recommends its rejection.

Throughout this report, and in particular in our recommendations, the Committee has applied the proposed terminology of "shared parenting". Only when referring to the current custody and access regime is the current terminology employed. Of course, where witnesses are quoted, their submissions generally refer to custody or access, as they are referring to matters decided under the current *Divorce Act* regime. Where the Committee uses the words "shared parenting", "shared parenting order", or "shared parenting determination" in a recommendation, those terms are to be interpreted in the manner we have proposed.

Under the new regime and terminology formulated by this Committee, in almost all cases both parents will continue, after separation and divorce, to exercise their pre-separation decision-making roles with respect to their children. To ensure that neither parent is excluded unfairly from fulfilling that obligation, the Committee is also recommending change in the way authorities such as schools and doctors provide information to parents. In the event of separation or divorce, important information about the child's development and well-being should be provided directly to both parents.

Recommendations

5. This Committee recommends that the terms "custody and access" no longer be used in the *Divorce Act* and instead that the meaning of both terms be incorporated and received in the new term "shared parenting", which shall be taken to include all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms "custody and access".

6. This Committee recommends that the *Divorce Act* be amended to repeal the definition of "custody" and to add a definition of "shared parenting" that reflects the meaning ascribed to that term by this Committee.

7. This Committee recommends that the federal government work with the provinces and territories toward a corresponding change in the terminology in provincial/territorial family law.

8. This Committee recommends that the common law "tender years doctrine" be rejected as a guide to decision making about parenting.

9. This Committee recommends that both parents of a child receive information and records in respect of the child's development and social activities, such as school records, medical records and other relevant information. The obligation to provide such information should extend to schools, doctors, hospitals and others generating such information or records, as well as to both parents, unless ordered otherwise by a court.

2. Parenting Education

Many witnesses suggested to the Committee that parenting education immediately following separation would also help reduce conflict between divorcing spouses. These witnesses argued that mandatory education programs for divorcing parents would help make them aware of how divorce affects children and the damage that can be caused to children by ongoing conflict. Parenting education courses, increasingly available across North America, offer the hope of mitigating the negative effects of divorce on children. Early research on the effectiveness of these programs is beginning to provide some grounds for optimism. Witnesses urged the Committee to recommend more comparative research to identify the programs with the best potential.

There was strong support from many witnesses for this type of education. Divorced parents and mental health experts indicated that parents need the opportunity to learn about how the conflict that so often accompanies divorce can harm children. Witnesses also testified that post-divorce education programs help parents gain perspective and develop skills that enable them to behave more appropriately with their children.

My belief is that divorce causes damage to kids no matter how well it's handled. I just believe that. I have not yet come across a situation, even in the best of situations, where there hasn't been some damage caused. Parents, however, are in a position to minimize that damage, but they have to recognize what it is they are doing that causes the damage. They have to want to change that. They have to understand what is happening for their children and they have to be aware of what the options are. Some of them just don't know what else to do; they're reacting out of anger, resentment, hurt, guilt, and pain, and they just don't know what options they have. Once they understand that, they're almost always willing to take a look and try something else. They can see the pain it's causing their children. (Jeanne Byron, Lawyer/Educator, Meeting #26)

There needs to be an understanding of the effect of prolonged exposure to high levels of conflict on children, and on all of the other family members as well, because not only is it difficult for children but it also places the type of stress on parents that diminishes their own personal life and their parenting capacity. (Orysia Kostiuk, Manitoba Parent Education Program, Meeting #26)

Several witnesses presented detailed evidence about parenting education programs offered in their communities. In Alberta, a parenting education program entitled Parenting After Separation has become mandatory - parents must attend a course before they can proceed with an application for divorce. In other parts of the country, social service agencies, community groups, family court clinics, and at least one law firm offer education programs.²⁰ The Committee learned that in Florida, children also must attend a divorce education program before their parents can proceed with an application to the courts.²¹

Parenting education programs give participants general information about the separation or divorce process, legal and other issues they will face as parents, and how the transition will affect their children. Some go further to train parents in the types of parenting techniques most likely to prevent children from being exposed to parental conflict. U.S. research about the effectiveness of parenting education programs, while in its early stages, has produced results confirming the usefulness of such programs in advancing the well-being of children affected by parental separation and divorce.

Research on U.S. parenting education programs has indicated the following positive results:

- participating parents were more likely to communicate positively with their children about the other parent, and non-residential parents had greater access to their children;²²
- parents demonstrated improved communication skills;²³ and
- the programs lowered the exposure of children to parental conflict and increased each parent's tolerance for the parenting role of the other parent.²⁴

Although program content varies significantly, most programs emphasize the post-divorce reactions of parents and children, children's developmental needs at different ages, and the benefits of co-operative parenting after divorce. They emphasize the impact of divorce on children and the parenting behaviours most likely to promote children's well-being. Legal issues may also be covered. In most jurisdictions where parenting education programs are mandatory, including Alberta, special programs are offered to victims of domestic violence.

Family Mediation Canada, supported by Health Canada, has recently produced an inventory of Canadian parenting education programs and resources, entitled *Families in Transition: Children of Separation and Divorce*. This volume reports all the parent education programs - voluntary and mandatory - available across Canada. Over 140 programs, in every province, are listed, as well as a wide variety of videos, books and other resources to which parents and those offering them assistance can refer. The inventory makes clear the variety in form and content of voluntary parenting education programs, as well as their wide availability.

Rob Huston, who testified in Calgary, spoke about his own positive experiences with the Parenting After Separation program, as a result of which, he reported to the Committee, he and his child's mother work together as a team and are parenting their son very successfully and co-operatively.

It's turned out that I'm proud of it. I've been promoting Parenting After Separation. Why? Because we need some changes, and when we get the changes through the mindset of other parents....
(Meeting #20, Calgary)

Recommendation

10. This Committee recommends that all parents seeking parenting orders, unless there is agreement between them on the terms of such an order, be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children's developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available. A certificate of attendance at such a post-separation education program would be required before the parents would be able to proceed with their application for a parenting order. Parents should not be required to attend sessions together.

D. Shared Parenting and Parenting Plans

Some men's groups and fathers asked that the Committee consider recommending a presumption in favour of shared parenting or joint custody. They argued that such a presumption was the only way to ensure that both parents negotiated or participated in mediation in good faith and with the children's best interests as the main focus. Without a presumption of joint custody, these witnesses argued, mothers often would not participate in mediation, and the perceived gender bias in the courts would perpetuate the predominance of mothers as the custodial parents. Although the Committee has not recommended establishing a legal presumption in favour of either parent or any particular parenting arrangement, the Committee does see the value of shared decision making and even substantially equal time sharing where appropriate. For parents with the emotional and financial resources necessary to make a joint physical custody arrangement work, it is the Committee's view that such arrangements can encourage the real involvement of both parents in their children's lives.

The Committee heard testimony from psychologists and social workers who stated that children benefit from maintaining a relationship with both parents after divorce. These clinical impressions were supported by many research studies showing that children's emotional development is enhanced if both parents are involved after divorce. Parents denied a significant role in the life of a child might withdraw gradually, to the detriment of the

child. By ensuring that each parent has a major child care and decision-making role, as the new regime proposed by this Committee would do, shared parenting can maximize the involvement of two parents in the child's life.

Dr. John Service, Executive Director of the Canadian Psychological Association, testified that "the best solutions are, of course, those that can effect a separation and divorce with a minimum of trauma. Generous custody and access arrangements are most often in the best interests of the children and the parents." (Meeting #18)

Ester Birenzweig, of the Families in Transition Program, testified that

the children we see in our practice that seem to be more secure are the ones where the parental conflict has decreased, and where the child feels sure of the parental commitment of love for them and being there for them, regardless of where the parent is and how often this parent is seeing the child. (Meeting #17)

The various fathers' groups from across Canada all supported a presumption in favour of joint custody. Malcolm Mansfield, from Fathers Are Capable Too (FACT), summarized the thinking of most of the men's groups that appeared:

The advantages of shared parenting are that there's a win-win situation. The children will continue to be with both parents and have loving and nurturing parents. When there's a divorce, the children have more of a need for both members of the family. They have a need for more influence and more affection and love from both parents. If they have just one parent, the insecurity makes them feel stressed.... What I would like to share with you today is that there should be a continuance, a presumption of shared parenting. When sole custody is awarded and the children's father is relegated to that of the uncle dad or the Disneyland dad, the children lose... Kids don't suffer from too much parenting. They need as much love and affection from both parents as absolutely possible. (Meeting #7)

Some women's groups and mothers cautioned that a presumption in favour of joint custody might lead to its imposition in inappropriate cases and testified that in many cases, joint custody could allow an abusive father to continue to harass his wife and children. These witnesses also suggested that the main issue is not joint custody; they stated that many fathers abandon their families and do not use the access they already have to their children.

As explained in Chapter 4, the Committee is convinced that children are not served by legal presumptions in favour of either parent, or any particular parenting arrangement. In the same chapter the Committee recommends the addition to the *Divorce Act* of a series of criteria defining the best interests of the child, among which would be the principle that children benefit from consistent, meaningful contact with both parents, except in exceptional cases, such as those where violence has occurred and continues to pose a risk to the child. Whether an equal time-sharing arrangement is in the interests of a particular child would have to be determined on a case-by-case basis, with a full evaluation of the child's and parents' circumstances.

Shared parenting arrangements involving substantially equal time sharing, when agreed to by the parents through the assistance of a counselor or mediator, are often spelled out in detail in parenting plans. More elaborate than the traditional separation agreement or court order upon which many couples rely, these agreements specify where the child is to reside throughout the year, how decision-making responsibilities are to be shared by the parents, and the mechanism parents will use to deal with any disputes that arise between them. Parenting plans, while not enshrined in any Canadian custody and access legislation, are used routinely in therapeutic or negotiation settings, to help parents make decisions about parenting arrangements.

Lawyers, therapists and mediators described the benefits of this tool to the Committee. Parenting plans shift

parents' focus away from labels ('I have custody, you just have access') to the schedule, activities and real needs of the child. The Committee recognizes the usefulness of parenting plans as a decision-making tool, commends them to divorcing parents and to professionals working with them, and concludes that all shared parenting orders should take the form of parenting plans. Cognizant of the disadvantages of long mandatory parenting plan forms (such as those that have to be filed in the state of Washington), the Committee cautions the Minister of Justice, in implementing these recommendations, to ensure that forms are brief and straightforward enough to be accessible and useful to parents and the professionals assisting them.

Parenting plans, especially if negotiated directly between parents or with the help of a mediator, are customized to meet the needs of a particular child and family and have the additional advantage of flexibility. Such plans can account for children's specific needs, in terms of activities and schedules, but can also provide for much-needed review as the child develops and his or her needs and interests change. Other people important to the child can be accommodated in a parenting plan, such as by scheduling time with grandparents or other extended family members, or by specifying that such contact is important and that the parents will facilitate such contact. Of course, such provisions would not apply in a case where such contact was considered contrary to the best interests of the children involved. In addition to establishing a dispute resolution mechanism to which the parents will have recourse should they be unable to settle a disagreement, parenting plans should specify the timing and process by which parents will revisit the plan as necessary as the child matures.

In some cases, of course, parents will be unable to agree on a parenting plan either on their own or in mediation. In that event, the parents will be able to make application under the *Divorce Act* for a shared parenting determination. Judges making such determinations will be able to give consideration to proposed parenting plans filed with the court by each parent, and, guided by the "best interests of the child" test, make a court order in the form of a parenting plan. Such a plan, although judicially imposed, will retain the benefits of being focused on the child's needs and interests, as well as the advantages of flexibility and adaptability.

Recommendations

11. This Committee recommends that divorcing parents be encouraged to develop, on their own or with the help of a trained mediator or through some form of alternative dispute resolution, a parenting plan setting out details about each parent's responsibilities for residence, care, decision making and financial security for the children, together with the dispute resolution process to be used by the parties. Parenting plans must also require the sharing between parents of health, educational and other information related to the child's development and social activities. All parenting orders should be in the form of parenting plans.

12. This Committee recommends that the relationships of grandparents, siblings and other extended family members with children be recognized as significant and that provisions for maintaining and fostering such relationships, where they are in the best interests of those children, be included in parenting plans.

13. This Committee recommends that the Minister of Justice seek to amend the *Divorce Act* to require that parties applying to a court for a parenting order must file a proposed parenting plan with the court.

E. Non-Adversarial Dispute Resolution

The Committee heard a great deal about the effectiveness of mediation and other forms of alternative dispute resolution in helping parents make arrangements for their children following divorce. Experts in mediation from across Canada testified about the importance of promoting this non-adversarial method of helping families restructure themselves after divorce. The benefits of mediation and other alternative dispute resolution

mechanisms include reducing rather than escalating tension and conflict between divorcing parents and reducing expenses; they also have the capacity to include children and other interested parties more easily than would be the case with litigation. The growth of mediation as a forum for making parenting decisions after separation or divorce is a widespread international phenomenon. Indeed, in Australia, the 1995 *Family Law Reform Act* refers to mediation and arbitration as "primary dispute resolution", intending to signal that it is litigation that should be seen as "alternative".

Legislation in Québec requires that divorcing parents attend at least one information session about the benefits of mediation. If they decide to continue with mediation, they are entitled to up to six sessions paid for by the provincial government. The Québec legislation permits parties in appropriate cases, such as those with a risk or history of domestic violence, to opt out (including from the information session) by signing a release filed with the court.

Women's advocates and some mediators expressed concern about mediation in situations where there has been abuse. They believe that the abusive partner would use mediation as a forum in which to harass or overpower the other partner. These groups also testified that since violence is a common occurrence in Canadian families, mandated mediation would put many women and children at risk.

Mediation is usually inappropriate in situations of violence. Mediation is usually inappropriate in such cases because of the inequality of bargaining power in abusive relationships and because of the ongoing risk of additional abuse during the mediation process. (Martha Bailey, Queen's University, Faculty of Law, Meeting #11)

Mediators who appeared as witnesses argued that there needs to be a shift away from adversarial thinking in divorce situations. Howard Irving stated:

In the past decade, the adversarial system, especially as it pertains to family law, has increasingly been brought into question. The primary thrust of this criticism has been that the communication and compliance behaviours that are necessary if individuals are to work together as parents after they cease to be spouses are more difficult to maintain [in an adversarial forum]. In other words, a major difficulty of family law is that the problems brought by clients are frequently not legal problems; they are deep, human problems in which the law is involved. While legal problems must be resolved, their resolution does not alleviate the human problems, and, more important for the lawyer, frequently the legal problem cannot be handled properly unless the human problem is dealt with. As it is practised, adversarial divorce, with its stress on fault, retaliation, win and loss, has no positive benefit for the contestants. Such legal battles over interpersonal relationships do not provide a healthy or just atmosphere for divorcing couples and their children. (Howard Irving, University of Toronto, Faculty of Social Work, Meeting #11)

Recommendation

14. This Committee recommends that divorcing parents be encouraged to attend at least one mediation session to help them develop a parenting plan for their children. Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision making should be structured to screen for and identify family violence. Where there is a proven history of violence by one parent toward the other or toward the children, alternative forms of dispute resolution should be used to develop parenting plans only when the safety of the person who has been the victim of violence is assured and where the risk of violence has passed. The resulting parenting plan must focus on parental responsibilities for the children and contain measures to ensure safety and security for parents and children.

F. Widening the Circle: Involving Others with the Children of Divorce

Children whose parents are separating often feel isolated and powerless. A number of witnesses, including mental health professionals, children, grandparents and other extended family members, discussed means of including other people in the divorce process, as support or resource persons, advocates or intermediaries, on behalf of children. Some families, of course, seek professional therapeutic assistance for their children, and some may have no need for it, but many are unaware of the potential helpfulness of counselors experienced in the dynamics of parental separation and its impact on children.

The Committee listened with interest to the evidence of supports for children already present in our society, often in the form of grandparents or other extended family members. The Committee recognized the value of this type of support in Recommendation 3, where we recommended that judges have the power to appoint interested family members or others to support children through the divorce process. Such interested third parties could be valuable sounding boards for children experiencing difficulties related to their parents' separation or divorce and could perhaps in some cases even speak on behalf of the children in court.

We need legislation to recognize the importance and value of our relationships in a child's life and development. And grandparents need to be utilized as resources, support adjuncts and placement possibilities, particularly when our grandchildren are apprehended by social services. (Annette Bruce, Orphaned Grandparents Association, Meeting #20, Calgary)

Grandparents from across Canada testified before the Committee and asked that their relationship with their grandchildren be respected in law after parents divorce. The Committee heard many painful examples of how divorce had severed a caring and loving relationship between grandparents and grandchildren. These witnesses also pointed out that grandparents often provide a child's continuing involvement with his or her heritage and that this should be honoured in law.

Some studies have shown that grandparents often provide children with a temporary residence while the parents are in conflict over custody and access. A survey carried out in 1990 in Toronto determined that of the cases referred to the Family Court Clinic, one-third of the parents and three-quarters of the children had lived in a grandparent's home during or after parental separation.²⁵

At present some provinces accord grandparents automatic status in child custody and access hearings. The legislative situation and the potential for law reform in the area of grandparents' rights to apply for custody or access are discussed fully in Chapter 4. It should be noted that grandparents' groups were not asking for equal status with the child's parents in terms of custody and access. They were asking only that the courts respect the grandparent/grandchild relationship as special and significant and that access be facilitated.

Why should grandparents have access? It is a well known fact that there is mutual attraction and rapport between the young and the old, and this is especially true between grandchildren and their grandparents. One of the many advantages to the children from interaction with their grandparents includes emotional support in a stable, secure environment, and this is most important. Often, it does include financial support as well. Unconditional love is given freely and a sympathetic ear is provided to hear the children's fears and their frustrations and their needs. (Irma Luyken, Waterloo Branch, Association to Reunite Grandparents and Families, Meeting #9)

The Committee also encourages parents contemplating separation or divorce to avail themselves of the resources available in their communities and the extensive literature available in libraries and bookstores to help them achieve the optimal outcomes for their children. Given the number of families experiencing separation and

divorce in Canada and throughout the western world, no family - and no child - should feel as though they are the only ones experiencing the upheaval of divorce.

CHAPTER 3: Models from Other Jurisdictions

Recognizing that Canadians are not alone in wanting to improve decision making about parenting arrangements after divorce, the Committee undertook to study custody/access legislation and practice in several jurisdictions outside Canada. Some other examples were brought to the Committee by witnesses. Here the Committee reviews the four foreign models about which evidence was received from experts working in those jurisdictions: Australia, the United Kingdom, and the states of Michigan and Washington.

A. Australia

Australia's most significant family law reform since 1975 came about through the adoption of the *Family Law Reform Act 1995* (referred to as the "Reform Act"), most of which came into force on 11 June 1996. The new law, which amended the *Family Law Act 1975*, introduced the new notions of "parental responsibility", "residence" and "contact" orders, replacing the previous concepts of guardianship, custody and access. The terminology change was inspired by the example of the *Children Act 1989*, adopted in the United Kingdom. As Regina Graycar, Professor of Law at the University of Sydney, told the Committee:

It seemed to be fairly widely agreed that the set of aims that were adopted came largely from looking at the English legislation, and the aims were very much to encourage both parents to be involved in the care of their children after separation: to reduce disputes between parents by removing the notion of winner takes all that some people associate with the language of custody and access; to emphasize the rights of children over the rights or needs of parents; to encourage private agreement and private ordering and increase the use of what's now called "primary dispute resolution"-we've abolished the word "alternative" and [mediation] is the primary form of dispute resolution; and, finally, to ensure that contact or access wouldn't expose people to a risk of violence and to ensure that violence was a factor taken into account in determining what was in the best interests of children. (Meeting #35)

The Reform Act contains a statement of objects and principles drawn from the UN *Convention on the Rights of the Child*. It also replaced the legal concepts of custody and guardianship with that of "parental responsibility". Both parents have parental responsibility for their child(ren) and do not lose it if the nature of their relationship with each other changes. Each parent may exercise the full range of parental responsibility independently of the other, unless restricted by a "specific issues order". Parental responsibility is defined to include "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children".²⁶

The notion of parental responsibility covers the types of duties included in the concept of custody and includes discipline, religion, education, medical treatment, property, and naming of a child. These are not listed in the legislation. A parent can be excluded from parental responsibility in general, or from a particular aspect of parental responsibility, by a specific issues order.²⁷ In addition to specific issues orders, the Reform Act creates three other types of parenting orders that can be made by a court:

- (1) residence orders, dealing with where the child is to reside;
- (2) contact orders, specifying when the child will be with the other parent; and

(3) child maintenance orders.

Professor Graycar also informed the Committee about the preliminary results of her research, conducted in conjunction with the Family Court of Australia, to assess the effects of the changes. At this early stage, there is a wide range of views about the degree to which the new language of the act is having a real impact on parenting arrangements after divorce, but there seems to be no increase in the amount of time non-residential fathers are spending with children. There may have been an increase in the courts giving parents contact (or access) in cases where it might previously have been denied. Also, the legislative changes occurred at the same time as a dramatic reduction in the availability of civil legal aid, and researchers are having difficulty separating the effects of that change from those of the legislative reform.

One of the key differences between Australia and several other jurisdictions the Committee considered, including Canada, is that a single national court deals with family law matters, and that court combines its legal role with an extensive therapeutic arm. The counsellors affiliated with the court are available to the public at relatively low cost, and as Professor Graycar indicated, are particularly effective in dealing with parenting disputes, such as those involving the exercise or denial of access. The presence of the Family Court's non-legal services has often been cited as a major distinction between Australia and the United Kingdom in comparisons between the two countries' new family law.

B. United Kingdom

The United Kingdom's *Children Act 1989* is a comprehensive law bringing together and simplifying several child-related laws. The act integrated laws dealing with private custody and access matters, child protection and other public obligations toward children. It was intended to strike a new balance between family autonomy and the protection of children.²⁸ The act starts from the premise that children are best provided for by their parents, with little or no court involvement. The new concept of "parental responsibility" is defined to sum up the collection of rights, duties, powers, responsibilities and authority that a parent has in respect of a child.²⁹ In both Australia and the UK, parental responsibility continues regardless of the status of the parents' relationship with each other. Unlike the Australian statute, however, the UK act includes a reference to parents' "rights".

The concept of parental responsibility was described to the Committee by Janet Walker, of the Relate Centre in England, who is also a board member of the Canadian Research Institute for Law and the Family:

The term we're using is "joint parental responsibility", and at the point of separation or divorce, because, of course, it applies to unmarried parents as well as to those who are married and divorcing, the parents are reminded of what those joint parental responsibilities are, and the expectation is that they will indeed consult about making decisions in a child's life. However, we also have the concept that responsibility for day-to-day decision-making runs with the child. So given that the child might be with mother at any moment in time, mother takes responsibility for day-to-day decisions. When the child is with father, father takes the responsibility for day-to-day decisions. The big decisions are supposed to be discussed jointly. (Meeting #20, Calgary)

Adopting the concept of parental responsibility was intended to contribute to attitudinal change, so that parents would not see parenting as a question of their own rights, but as a privilege carrying obligations. It was hoped that the competitive "winner take all" character of these disputes might be reduced. One difference in the UK model is that the act makes clear that one parent can act unilaterally in exercising parental responsibility, without consulting the other, so long as no court order is infringed.³⁰ Janet Walker alluded to the beneficial impact of the new terminology.

There is quite a lot of research evidence in England now around the changes we've made in the policy field in trying to help parents deal with the difficulties of what we now call "residence and contact". I think we've been fairly successful in taking a lot of the heat out of the battles and the arguments through our legislation. (Meeting #20)

The *Children Act 1989* provides for parenting orders, including "contact orders", "residence orders", "specific issues orders", and "prohibited steps orders". The latter are orders that prohibit a parent from taking any specified step in meeting his or her parental responsibility for a child, without the consent of the court.³¹ The legislation expresses a preference for the less interventionist types of parenting orders. The making of specific issues and prohibited steps orders is restricted by section 9(5) of the act if the same result could be reached by making a residence or contact order. In addition to restricting the court's power to make parenting orders, section 1(5) directs the courts to make a parenting order only if it can be demonstrated that to do so would be better for the child than not doing so.

C. Michigan

Under the Michigan *Child Custody Act of 1970*, issues of custody and "parenting time" (the equivalent of "access" under the *Divorce Act*) are to be resolved according to the best interests of the child.³² Section 3 of the act sets out a series of factors that must be considered by the court in determining the child's best interests, including some of the same types of criteria used in some provincial family law and in case law in Canada. These include the emotional ties between the child and the parties; the length of time the child has lived in a stable environment; the preference of the child, if he or she is old enough to express it; and the willingness of the parties to facilitate a close relationship between the child and the other parent. Also, the presence of domestic violence must be considered, regardless of whether it was witnessed by or directed at the child.

The act encourages parents to consider joint custody when making parenting arrangements and requires that parents in a custody dispute be advised of the joint custody option.³³ If either parent requests joint custody, the court must consider it and state on the record the reasons for granting or denying it. In deciding whether to award joint legal or physical custody, the court must consider the best interests criteria set out in section 3 and whether the parents will be able to co-operate in decision making about the child. When joint custody has been awarded, each parent has decision-making authority regarding routine matters while the child is resident with him or her.

In addition to assigning custody to one or both parents, the court may provide for reasonable parenting time for the parents, grandparents or others. Parenting time is to be granted in accordance with the child's best interests, although it is presumed to be in the child's best interests to have a strong relationship with both parents.³⁴ Also, the section makes parenting time with each parent the child's right, unless there is clear and convincing evidence that it would endanger the child's physical, mental or emotional health.

Recently, after extensive public hearings into concerns about child custody law, Michigan has restructured its approach. The hearings produced little or no consensus in terms of where improvements should be made, but Michigan proceeded to combine its previously separate judicial arrangements for divorce law and juvenile delinquency into a Family Division of the state's Circuit Court. The new Family Division was created by the state legislature in 1996 and took effect 1 January 1998. The legislation left it open to each county in the state to develop its own approach to family court operations.

Judge John Kirkendall, of the Washtenaw County Trial Court in Ann Arbor, Michigan, described the advantages of the unified court for divorcing couples and their children.

We have been [operating as a family division of the Circuit Court] now for about two years, and we have learned some things from this experience. One thing we have learned is that we are able to act more efficiently, more knowledgeably, and more quickly in handling family issues. As a court, when we're able to see one family before us with all these problems, we're able to give more consistent treatment to that family than that family would receive if it went to a variety of courts. (Meeting #26)

A division of the Circuit Court in each part of the state is called the Friend of the Court. This office is responsible for investigating and making recommendations to courts on child custody, parenting time and support matters, and also for initiating the enforcement of orders dealing with these matters.³⁵ Social workers employed by the Friend of the Court office provide support to divorce judges by doing custody/parenting time assessments. If the parties are unhappy with the social worker's recommendation, they are entitled to a conciliation hearing, failing which the third step is a trial. Friend of the Court workers are also involved in child protection matters, where they take a more proactive role as advocates for children.

The Friend of the Court office is involved in enforcing parenting time orders. If the office is convinced that the order has been violated, it applies the local make-up parenting time policy (each court is required to have one).³⁶ The office can also schedule a contempt of court hearing, at which the defaulting parent must show "good cause" why the parenting time order was not obeyed, or apply to the court to change the order. The Circuit Court can also suspend occupational or driver's licences for violations of parenting time orders. The Friend of the Court's enforcement role, backed up by the courts, was described to the Committee by Thomas Darnton, Visiting Professor of Law at the University of Michigan Child Advocacy Clinic:

If there is an established schedule and there is a deviation from that schedule, they have a hearing process. Again, these are informal. Lawyers are frequently not involved. This is where the "friend of the court" officer will examine what the reasons were behind the particular problem that came up, will order make-up visitation if that's appropriate, and will recommend changes in the schedule. There are various options, beginning with changing orders and requiring make-up time, to financial penalties or recommendations for jail time for the parents if the order is not followed. Now, referees can't put people in jail, only judges can do that. It really doesn't come up very often that people are faced with that sort of a sanction. (Meeting #26)

D. Washington

With the passage of its *Parenting Act* in 1987, Washington was the first of several states to adopt a parenting plan system.³⁷ The *Parenting Act* did away with the terms "custody" and "visitation", substituting the concept of "residential placement".³⁸ Legislators intended the change of language to shift the focus away from the sometimes acrimonious battle between parents and onto the more important matter of ensuring the best possible parenting arrangements for children. Many witnesses cited the Washington model with approval, but not all had a detailed understanding of what the legislation entails. For example, some understood the legislation to presume or mandate shared parenting, which it does not.

The basic mechanism for spelling out post-separation parenting arrangements is the parenting plan. All parents separating in Washington must complete detailed temporary and permanent parenting plans. A plan has three parts: a residential schedule; decision-making allocation; and a dispute resolution mechanism. Thinking through the children's post-separation arrangements is intended to help parents develop an understanding of children's complex needs and the importance of co-operating with the other parent in decision making. The long parenting plan forms that have to be filled out make sure that parents consider an extensive list of practical matters to meet the children's needs. The residential schedule must indicate at which parent's home the child will live on given

days of the year.

Although it is hoped that the parties will arrive at the terms of the parenting plan by agreement, in the event that they cannot agree, the statute sets out criteria courts can use to impose a parenting plan. The residential provisions must encourage each parent to maintain a loving, stable and nurturing relationship with the child, consistent with the child's developmental level and the family's socio-economic circumstances. However, a parent's residential time with a child must be limited if the parent has engaged in any of the following behaviours: wilful abandonment of the child; physical, sexual or emotional abuse of a child; domestic violence or sexual assault; or conviction for one of several other specified sexual offences.

The Washington law does not refer to joint custody or shared parenting, nor does it create any presumption about the desirability of such an arrangement. Shared parenting under a parenting plan is possible and can even be imposed by a court if to do so would be in a child's best interests.

Any matter can be sent for mediation of the contested issues before or at the same time as the matter is to be heard, unless one of the parties cannot contribute to the cost or would be placed at risk emotionally or physically. There is provision in the legislation for the court to appoint an attorney to represent the interests of a child in proceedings dealing with any aspect of a parenting plan in a marriage dissolution or legal separation matter between the child's parents.³⁹ The court will order one or both parents to pay the legal expenses of the child's attorney.

Gene Oliver, a Seattle lawyer specializing in child abduction cases, told the committee that the *Parenting Act* had succeeded in reducing the acrimony in most child-related proceedings. Its advantage is that it shifts the focus from "ownership" of the child to the concrete tasks of parenting, such as scheduling, decision making, and so on. However, the voluminous detail required on parenting plan forms has increased the cost and time required for most such proceedings; most parents would have been able to settle their affairs amicably without incurring the expense of preparing parenting plans.

The parenting plan is pretty complicated to prepare and there's a lot of detail in it. For those people who don't need it, it's a lot of extra time and money, and sometimes it raises issues that they would be pretty well able to deal with if they had to deal with them as they came up, but when you put them in an abstract sense and sit them down at a table and say they have to agree on this before they get their divorce done, it causes problems. (Meeting #19, Vancouver)

Dr. John Dunne, a psychiatrist and a member of the committee that drafted the *Parenting Act*, is researching the impact of the legislation. Early results show that the drafters' objectives for the new law have not been realized, and it has had a negative impact on parents' post-divorce adjustment. Neither parents nor children were better off under the new legislation.

The *Parenting Act* basically requires people to get divorced twice. They have to do a temporary parenting plan, which often becomes quite litigious and takes several months to work out, and then they have to turn right around and start developing a permanent parenting plan. I think that accounts for a good deal of the anxiety that the parents were experiencing under the new law that they didn't have under the old. (Meeting #19, Vancouver)

Dr. Diane Lye has been commissioned by the Washington Supreme Court to undertake a major research project to evaluate the impact of the *Parenting Act*. She distinguished between the impact of the act on more affluent parents, who have the time and money to meet with experts and develop plans that really meet their needs, and its impact on low-income people, for whom the legislation poses a particular disadvantage.

Low-income people, immigrant people, or people for whom English is not their first language are often said to be disadvantaged by the system because they cannot afford either the time or the money to get the services they need to make the system work for them. (Meeting #19, Vancouver)

CHAPTER 4: Federal and Provincial Government Roles

This Committee recognizes and underlines the important distinction between federal and provincial/territorial government roles in the area of family law and its many associated services. Committee Members were aware throughout the study that many of the matters brought to their attention by witnesses related to areas of jurisdiction outside federal competence. To do justice to the subject matter and the tremendous expertise and experience offered by witnesses, Members considered it important to report on all potential areas for action. Nonetheless, every effort has been made to identify the level of government with responsibility and authority in each sphere and to indicate in particular areas where governments will be called upon to work together to implement much needed change.

A. The Federal Government

1. The Divorce Act

(i) No Presumptions

The key piece of legislation discussed at the Committee's hearings was of course the *Divorce Act*. A number of witnesses reported that the current *Divorce Act* provisions on child custody and access provide a useful framework for decision making. Many of the reports received about the unsatisfactory nature of custody and access decision making in the current legal regime related to matters other than the wording of the law. Still, there were a number of recommendations advocating change in various provisions of the act or its overall approach.

One of the most frequent recommendations was that the *Divorce Act* be amended to add a legal presumption to help parents and judges make decisions about parenting arrangements. Many women's groups and individual women advocated strongly that the act should contain a presumption in favour of the primary caregiver of children, as this would best reflect the pattern whereby women perform most of the functions associated with caring for children in intact families. This is an approach often followed by Canadian courts, in the absence of a legislated presumption. As law professor Susan Boyd informed the Committee:

The studies are clear that mothers are still primary caregivers in the vast majority of intact families and also after divorce. Even when mothers are employed outside the home, they spend roughly double the time on child care that employed fathers do. These studies [*Women in Canada*, Statistics Canada, and *Women Count*, published by the Province of British Columbia] basically show us that the majority of fathers do not share child care equally. (Ad Hoc Committee on Custody and Access Reform, Meeting #27, Vancouver)

An emphasis on parenting arrangements during marriage reflects the view often expressed by Canadian courts that disruption of the children's lives should be minimized and that stability can be promoted by replicating the parenting roles adopted during the marriage as closely as possible after separation. However, mediator Howard Irving warned against disqualifying fathers from real participation in parenting on the basis of the division of

labour to which the parties agreed voluntarily during the marriage.

I do not think it should be looked at in terms of this notion of primary caregiver. In fact, that notion bothers me. Many fathers and mothers decided at the time they were married, before they had children, that one would be an at-home parent and the other one would be the working parent outside the home. That was their decision and it was mutual. ... The point is that there is a decision made between the parents. Is it right after marriage to punish a parent because they cannot get the frequency in terms of the hours or minutes spent with a child when in fact he or she - the gender does not matter - may have a very close emotional bond with that child? I would advocate for the quality of the relationship and not the frequency of the minutes and the hours some people are counting. (Meeting #11)

On the other hand, many witnesses, including individual fathers, fathers' groups and shared parenting advocates, recommended strongly that the act be amended to include a presumption in favour of joint physical custody, meaning an arrangement in which children would spend roughly equal amounts of time with each parent and where decision making would also be shared. Its proponents argued that such a presumption would be the best means of levelling the playing field or overcoming any unfair advantage women might have in disputes about parenting arrangements because of gender bias. Others thought it would increase the significance of the parenting roles played by fathers after divorce, to the ultimate advantage of their children.

The Committee was interested in testimony about the benefits of joint custody, for both parents and children, when it is agreed to voluntarily and works effectively. This type of arrangement generally involves joint decision making by parents, at least respecting important issues such as schooling, religion and medical care, with significant periods of time spent in the care of each parent. There seems to be at least anecdotal evidence to the effect that, with sufficiently mature children, willing parents, and conducive economic circumstances, joint custody offers benefits to children. However, legislation that imposes or presumes joint custody as the automatic arrangement for divorcing families would ignore that this might not be suitable for all families, especially those with a history of domestic violence or of very disparate parenting roles.

Presumptions in favour of joint custody or the primary caregiver have been adopted in a number of U.S. jurisdictions, but in some cases legislatures have subsequently withdrawn them after finding that they were not having the intended desirable effects. Presumptions that any one form of parenting arrangement is going to be in the best interests of all children could obscure the significant differences between families. As Edward Kruk, a professor of social work, warned:

First, because there is so much variation in our society in the way women and men enact their parental roles, any form of "one shoe fits all" approach to child custody, whether that's a joint custody or a primary caretaker presumption, is problematic. Research tells us that children fare best within an arrangement that attempts to approximate as closely as possible the parent-child relationships in the original two-parent home, within as co-operative an atmosphere as possible between the parents. (Meeting #27, Vancouver)

Members of the Committee were warned that advancing any form of presumptive model for parenting after divorce would conflict with the best interests of children. Fundamentally, there is too much variation among families for either presumption to offer a benefit to the aggregate of Canadian children.

In the past, there have been suggestions that a presumption in favour of the primary caregiver or in favour of joint custody would be beneficial. We disagree. It is our view that the courts must retain the discretion to deal with the unique facts of each case. Relying upon a presumption will not assist, whether the presumption is based upon the status quo prior to separation or based upon assuming

that parents are equally willing or capable of meeting the needs of their children. In particular, a presumption in favour of joint custody is a presumption in favour of a legal concept, which is extremely elastic. This lack of definition of joint custody is, in our view, sufficient to make such a presumption fruitless. (Angus Schurman, Lawyer, Meeting #30, Halifax)

Presumptions can also have the negative effect of compelling families who might otherwise have been able to make constructive, amicable arrangements to apply to a court if they want to avoid the application of the presumptive form of parenting arrangements. The Committee was asked to consider this unintended consequence by lawyer Daphne Dumont.

Please do not establish presumptions that will require parents to go to court. Under no circumstances should the federal government establish presumptions that custodial parents must rebut in order to protect their children. Custodial parents tend to be poorer than non-custodial parents, particularly before the child support starts to flow, and it rarely flows early. The need to agree on the terms of access in order for access to occur is a great encourager of agreement. If you impose some sort of 50-50 parenting time arrangement, we will lose that benefit. (Meeting #31, Charlottetown)

On the basis of this argument, a number of witnesses concluded that the *Divorce Act* should not be amended to include any presumption in favour of a particular type of parenting arrangement. Instead, they suggested strengthening the "best interests of the child" test, which is the current basis for custody and access decisions. In addition, it was argued that families would benefit from the expanded availability of non-litigation services to give divorcing couples better information about their options. With more resources and better information, parents would be able to promote the best possible outcomes for their own children through their post-separation behaviour and decision making. As lawyer Michael Cochrane pointed out to the Committee:

I think what we really need to have, rather than presumptions of joint custody, which I do not favour, is a much more sophisticated shopping list, one that the judge is aware of and the lawyers and clients are discussing. From that more sophisticated list of choices and with informed consumers, we will get better parenting plans and we'll get people asking for things they know they're entitled to, rather than lying down at the wrong moment in a case and not taking what's really in their interest or the child's interest. (Meeting #13)

(ii) Best Interests of the Child

Many witnesses emphasized the importance of the "best interests of the child" test, set out in section 16(8) of the *Divorce Act*, declaring that it is the only test that is sufficiently broad, flexible and discretionary to allow courts to consider fully the individual circumstances of children in parenting disputes. However, others criticized the test as being too imprecise to give real guidance to separating parents. The concept of the best interests of the child is used widely, in Canada and elsewhere, and is therefore recognized, at least to some extent. Every provincial family law in Canada refers to the welfare or best interests of the child as the primary criterion for custody and access decisions,⁴⁰ and the expression can be found in the statutes of many other jurisdictions, as well as several international treaties.

A number of witnesses recommended that the *Divorce Act* be amended to include a list of criteria or a definition of the best interests of the child, to guide judges and parents applying the test. Without being exhaustive, such a list would set out all matters decision makers should consider. Some children's circumstances might necessitate consideration of factors other than those listed in the legislation. The presence of a list of guiding criteria would improve the predictability of results and encourage consideration of factors considered particularly important to the well-being of the child.

Witnesses had a variety of suggestions about what should be included in a list of criteria for the best interests of the child.

One [key objective] is to provide security, stability, and nurturance, as exemplified by warm, affectionate, and responsive parent-child relationships.

The second would be effective parenting that's free from psychological disturbance and substance abuse.

The third would be to reduce or eliminate parent conflict and exposure to violence.

Fourth is that parents make timely decisions about children.

Fifth is that there be particular support and specialized services for children in high-conflict families. We see them as a much needier group than the general population of children in divorcing families.

Sixth is that there be special provisions for parenting plans if violence continues, and that we have protections for children. (Rhonda Freeman, Families in Transition, Meeting #17)

I would like to see the legislation changed so that [judges] must direct their mind to family violence. I would like to see added to subsection 16(9) of the *Divorce Act* the phrase "Family violence shall be considered conduct relevant to the ability to act as a parent of the child". (Eve Roberts, Lawyer, Meeting #29, St. John's)

One of the criteria I thought should be added, which doesn't [currently] exist, has to do with the children, and that is the adaptability or adjustment of the child to the proposed parenting plans. In other words, children differ not only in terms of age but even within an age group as to their ability to adapt to various changes in their environments, and one plan does not fit all. (Gary Austin, Psychologist, Consultant, London Family Court Clinic, Meeting #18)

Elaine Rabinowitz, a member of the Prince Edward Island Provincial Child Sexual Abuse Advisory Committee, articulated a series of principles that should be included in the definition of best interests of the child, including (1) the child's developmental needs; (2) continuity of care; (3) continuity of relationships with both parents; (4) the least detrimental alternative; and (5) the family context.

The National Family Law Section of the Canadian Bar Association recommended that criteria similar to those set out in Ontario's *Children's Law Reform Act*, as amended to reflect any new terminology adopted in the federal legislation, be enumerated in the *Divorce Act*. Their recommended list contains several items in addition to those in the Ontario act, including the following:

- the caregiving role assumed by each person applying for custody during the child's life;
- any past history of family violence perpetrated by any party applying for custody or access;
- the child's established cultural ties and religious affiliation; and
- the importance and benefit to the child of having an ongoing relationship with his or her parents.[41](#)

Recommendations

15. This Committee recommends that the *Divorce Act* be amended to provide that shared parenting determinations under sections 16 and 17 be made on the basis of the "best interests of the child".

16. The Committee recommends that decision makers, including parents and judges, consider a list of criteria in determining the best interests of the child, and that list shall include:

16.1 The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;

16.2 The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;

16.3 The views of the child, where such views can reasonably be ascertained;

16.4 The ability and willingness of each applicant to provide the child with guidance and education, the necessities of life and any special needs of the child;

16.5 The child's cultural ties and religious affiliation;

16.6 The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;

16.7 The importance of relationships between the child and the child's siblings, grandparents and other extended family members;

16.8 The parenting plans proposed by the parents;

16.9 The ability of the child to adjust to the proposed parenting plans;

16.10 The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;

16.11 Any proven history of family violence perpetrated by any party applying for a parenting order;

16.12 There shall be no preference in favour of either parent solely on the basis of that parent's gender;

16.13 The willingness shown by each parent to attend the required education session; and

16.14 Any other factor considered by the court to be relevant to a particular shared parenting dispute.

(iii) Official Languages

Concern about access to court services in the language of their choice by those engaged in litigation under the *Divorce Act* led the Committee to consider the application of the *Official Languages Act* to divorce proceedings. The use of English and French in the judicial system is governed generally by a number of constitutional provisions that apply to certain courts. The use of both languages in the federal courts is guaranteed by the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*, but divorces are heard before provincially administered courts, to which no such language rights apply consistently. Only in New Brunswick,

Québec and Manitoba are the parties' right to proceedings in either language constitutionally protected. The Committee agrees that, as the *Divorce Act* governs all divorces in Canada, and Canadians whose preferred language is either French or English are found across the country, divorce-related judicial services in both languages should be available nationwide.

In November 1995, the Commissioner of Official Languages released a report dealing with the use of French and English in Canadian courts.⁴² That report reviewed the constitutional framework protecting the use of both official languages in the judicial system, the use of both languages in criminal courts, and the use of both languages in the civil courts. The report noted that language rights have been expanded significantly in criminal matters, even though such matters are also heard in provincially administered courts. Section 530.1 of the *Criminal Code of Canada* provides specifically that accused persons have the right to be tried in the official language of their choice. Accused persons also have the right to have a lawyer, prosecutor and judge who speak the official language of their choice. Transcripts of proceedings and written judgements must be provided in the language chosen by the accused. To implement these language rights, the federal government has provided funding for language training for judges in an effort to increase the number of judges capable of conducting trials in both official languages.

The *Official Languages Act* does not apply to administration of the *Divorce Act* by provincial courts. In the three provinces where there is constitutional protection for minority language rights, judicial services are available in both official languages. In the remaining seven provinces, as noted by the Commissioner of Official Languages, the provision of services in the minority languages - French - varies from province to province, as well as within provinces. The federal government has no legislative authority over matters of civil procedure before provincially constituted courts, but the federal Cabinet does have exclusive authority to appoint judges to courts hearing divorce matters. In exercising its power of judicial appointment, the federal government could provide for the use of both English and French in proceedings before certain courts. As the expansion of unified family courts proceeds across Canada, this Committee is of the view that appointments to those courts should be of bilingual judges to the fullest extent possible.

Canadians involved in divorce litigation should be able to use court services in the official language of their choice across Canada. To this end, the Committee has concluded that the *Divorce Act* should be amended to specify the right of parties to a divorce to have their proceedings go ahead in the official language of their choice. These amendments should be modelled on the language rights provisions in section 530.1 of the *Criminal Code*.

Recommendation

17. This Committee recommends that the *Divorce Act* be amended to ensure that parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages.

(iv) Parenting Survives Divorce

Among the key points made by witnesses, and one with which Members had considerable sympathy, was the concept that parental relationships survive divorce and should in no way depend on a continued marital relationship between parents. Some of this thinking was reflected in testimony about the unsuitability of the language of the *Divorce Act*, but it extended to a desire for a profound reorientation of the legislation. Many witnesses stressed that divorcing parents are not divorcing their children and that their continued parental role and relationship should not be obscured by the application of *Divorce Act* provisions to their situation. As lawyer Christian Tacit argued:

I believe it's important for this Committee to take into account the fact that parents are parents

before separation and divorce and they continue to be parents after separation and divorce. Nothing in divorce, in and of itself, disentitles a parent to the inherent rights they have as a parent, and there is no reason for the state to interfere with that or to make presumptions contrary to that unless the conduct of a parent is such that it would otherwise invite the child welfare authorities or the criminal system. (Meeting #34)

The new *Divorce Act* regime recommended by the Committee and the change in legislative terminology from "custody" and "access" to "shared parenting" (see Recommendation 5) are designed to ensure that parental relationships survive divorce. The premise is similar to the Québec *Civil Code* provision that parents, regardless of their marital status, have joint parental authority with respect to their children.⁴³ This regime differs significantly from the one in place in the common-law provinces.

When the Court grants one of the parents sole custody of a child without providing any other indication in the judgement, that does not affect joint parental authority, except in the small everyday decisions which are obviously up to the parent who has the child with him or her on a daily basis. In the same way as the custodial parent makes these decisions when the child is with him or her, the "non-custodial" parent makes those decisions when exercising his or her right of access, visiting right and right to take the child on an outing. (Dominique Goubau, Barreau du Québec, Meeting #4)

The Australian *Family Law Reform Act* sets out, as the first of four principles underlying the act, that "children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together".⁴⁴ The act also provides that "Each of the parents of a child who is not 18 has parental responsibility for the child".⁴⁵ This provision is expressly of effect "despite any changes in the nature of the relationships of the child's parents",⁴⁶ such as separation or remarriage.

(v) The Federal Child Support Guidelines

One of the most frequently mentioned sources of dissatisfaction with the legal mechanism for dividing financial and other responsibilities between parents after separation and divorce was the Federal Child Support Guidelines. These guidelines have been in place since 1 May 1997, having come about as a result of the passage of Bill C-41, which amended the *Divorce Act* and two other federal statutes. The new provisions created the Federal Child Support Guidelines, which are regulations under the act, and strengthened federal legislative measures dealing with the enforcement of child support obligations. The guidelines came into force at the same time as the tax treatment of child support was changed so that child support payments are no longer taxable in the hands of the recipient, usually the custodial parent, or deductible by the payor,⁴⁷ usually the non-custodial parent.

The guidelines have created conflict in many cases where there had been none: cases long settled were reopened by virtue of the provision that made the existence of the guidelines sufficient to entitle a support recipient to apply to vary the amount of child support being paid. For newly separated parents, the guidelines seem unfair in their exclusive focus on the income of the payor parent. Ottawa lawyer Christian Tacit identified the range of concerns brought to the Committee by many of the non-custodial fathers who testified.

The Federal Child Support Guidelines, as currently enacted, are an invitation for litigation on custody and access, pure and simple: first of all, the 40% threshold on access, before the needs and circumstances of parties are taken into account, as opposed to just looking to the tables; second, the presumption that people, after separation and divorce, after they've borne the financial devastation, can just look to the tables without taking into account expenses; third, the fact that the undue hardship test uses a means ratio test that is totally unrealistic, again having regard to the costs that parties bear after divorce and separation. So there are serious problems here. (Meeting #34)

The Committee notes that the Standing Senate Committee on Social Affairs, Science and Technology recently issued an Interim Report, dated June 1998, which makes a series of recommendations for the improvement of the guidelines. This Committee heard evidence about some of the matters dealt with in that report and appreciates and commends the work of that Committee. The Committee believes that concerns raised by witnesses will add to the body of evidence gathered by the Senate Committee and should be given serious consideration as implementation and monitoring of the guidelines continue.

The Federal Child Support Guidelines are generally recognized as having contributed in a positive way to improving predictability with regard to the amount (or "quantum") of child support and to reducing the incentive to argue or litigate over the issue of quantum. However, this was seen as inadequate justification for the extent to which they have increased the conflict between divorcing couples in a number of ways. One of the contentious issues (which was not the direct result of changes stemming from Bill C-41, but was nevertheless part of the controversy around that bill and remains unchanged) relates to the definition of "child of the marriage" in the *Divorce Act*, which has been interpreted judicially to include children over the age of majority (sometimes into their 20s) if they are engaged in post-secondary education. The effect of this judicially established rule has often been to compel non-custodial parents to pay for their children to attend post-secondary institutions, even though parents in intact families obviously are not required to do so.

Non-custodial parents' and fathers' groups that testified before the Committee often raised this issue, especially in relation to the perceived unfairness of this financial obligation in cases where there was little or no contact between the paying parent and the child. It often has a major impact on the payor's ability to meet financial obligations to the children of second or subsequent relationships. It was also seen as an unfair restriction on the non-residential parent's discretion to choose where to devote financial resources.

Divorced parents are not entitled to the same choices in their parenting that non-divorced parents take for granted. Divorced parents can be forced to pay the post-secondary education costs of their adult children. Unlike their non-divorced counterparts, the financial obligations of the divorced parents to their children do not end when their children reach the age of majority. (Cynthia Marchildon, Meeting #13, Toronto)

Many presenters asked that the *Divorce Act* be amended to provide that the definition of "the child of the marriage" not include children above the age of majority who are engaged in post-secondary education, save and except those with disabilities or identified as having "special needs". Alternatively, it was suggested by a number of witnesses that the guidelines should allow support payments for such children to be paid directly to the student or to the educational institution. The opposing argument is that children whose parents have divorced often suffer a disadvantage with respect to the financing of post-secondary education. Without a full-scale examination of the topic, given that it was outside the strict mandate of the Committee, Members wish to highlight the issue and raise it for further discussion, but also to emphasize the counter-argument - that children whose parents have divorced will be less likely to be able to continue their education if the definition of "child of the marriage" is changed. As Professor Bala argued:

Children of divorce find it extremely difficult to pursue post-secondary education. I think having a legal regime there is extremely important. If you would like to amend it so that the money can go directly to the adult child, I think there would be much to be said for that. Indeed, how some judges interpret the legislation has seen them make orders that way already. If you want to clarify the law for people and put that in it, I think that might well be appropriate. I would very strongly urge you not to eliminate that obligation, however, but to simply redefine it. (Meeting #6)

Another of the concerns raised with respect to the Federal Child Support Guidelines is the so-called 40% rule:

the section of the Guidelines that provides that where the payor exercises rights of access to, or has custody of, the child for at least 40% of the time in a given year, the quantum of child support is not determined solely on the basis of the amount set out in the table.⁴⁸ In such cases, the court will have regard to the table amount, the increased costs associated with the shared custody arrangement, and the conditions, means and other circumstances of the parents and the child. This very contentious provision was intended to give legal recognition to the increased costs borne by a non-residential parent who spends a large amount of time caring for the child. As a number of witnesses said, the rule has had the unfortunate effect of encouraging parents, who might otherwise have agreed, to fight over the residential schedule for the child.⁴⁹

The Act's use of the 40% rule actively, if inadvertently, interferes with the first principle [that two competent parents should share responsibility for their child]. It does this by attaching a financial incentive to the parents' shared responsibility of care. As it now stands, resident parents, typically mothers, are encouraged to prevent parenting involvement of the non-resident parent from exceeding 40% of the time, thus making the latter wholly responsible for child support. This holds even when resident parents have higher net earnings than non-resident parents do. Non-resident parents, typically fathers, are encouraged to seek greater parenting involvement, whether they really want it or are prepared for it, in order to escape the burden of sole support. I can tell you that in my practice over the last year or so, I have never had so many cases of mothers and fathers fighting around this 40% rule in order to follow through on what might be in their best interests financially at the risk of not really looking at what is in the best interests of their children. (Howard Irving, Mediator, Meeting #11)

Another aspect of this problem is that the guidelines continue to ignore the expenses of the non-custodial parent who provides for and cares for the child during access visits. Non-custodial parents, even those who spend less than 40% of the time with their child, can incur significant expenses. Indeed, arguably they should be encouraged to do so as part of their role as responsible parents.

Child support guidelines should recognize the fixed costs [borne by the non-custodial parent]. Whether your children are there today, tomorrow, and at their other parent's home the next day, you have to maintain a bed, you have to maintain their home, you maintain their toys and those types of things. There are certain costs that remain fixed whether you have your children one weekend or truly 50-50. (Marina Forbister, Equitable Child Maintenance and Access Society, Meeting #20, Calgary)

Many witnesses agreed that the 40% figure was too arbitrary, citing cases where fathers spending as much as 38% of the time with children were still required to pay the full amount under the guidelines. Most of these witnesses argued that recognition of non-residential parents' expenses should be based on a range of 20 to 40% of the time, provided there are proven significant expenses. The expenses of these parents when living a significant distance from their children can be particularly burdensome and should not be ignored. For reasons of fairness, the Committee is concerned about the 40% rule and the guidelines' failure to take into account significant parenting expenses. Members are even more disconcerted by the negative impact of the 40% rule on parenting negotiation and decision making. Witnesses asked the Committee to recommend that the Government investigate further how these aspects of the guidelines should be altered.

This Committee, along with the Senate Social Affairs Committee, heard a number of witnesses object strongly to the perceived unfairness of basing child support solely on the income of the payor, without taking the recipient parent's income into account. The pre-guidelines test for the amount of child support to be paid by the non-custodial parent - the apportionment of the costs of raising the child between the parents according to their relative ability to pay - seems to many to be intuitively more reasonable and palatable. Similarly, the guidelines' financial disclosure provisions, which require regular disclosure by the payor to the recipient, apply only to the

payor. This apparent inequity rankles non-residential parents, who feel that the concerns of custodial or primary residential parents are being attended to without any government action on non-custodial parents' access enforcement problems. Marina Forbister of the Equitable Child Maintenance and Access Society articulated this point of view:

Child support guidelines should be based on the income of both parents. That has been an area that has been much discussed when the guidelines were implemented. It was suggested that this was one set of guidelines, and it's based solely on the income of the non-custodial parent. That is an area that has been subject to a lot of controversy. It is perceived by Canadians as being unfair. (Meeting #20, Calgary)

Not all provinces have followed the federal example in adapting the guidelines. For example, the tables under Québec's guidelines are based on the income of both parents. In Newfoundland, mutual financial disclosure is required. As David Day, a family law lawyer in St. John's, pointed out, under the civil procedure rules of most, if not all, provinces and territories, financial disclosure from either parent can be sought through lawyers or by application to a court.

Two other related matters came to the attention of the Committee. One is the mandatory, non-discretionary nature of the guidelines. Even if they wish to, parents are not free to agree to opt out of the support tables or other provisions. Judges will sign child support orders or judgements only if they are satisfied that the requirements of the guidelines have been met. This limit on parents' freedom to settle their affairs by agreement was seen by some as an unreasonable restriction on their ability to make post-separation arrangements for their family as they see fit.

The Committee is also concerned about the impact of the guidelines on parties receiving public assistance. The concern, Members were told, is that in some parts of Canada a recipient parent could be deemed to be in receipt of the amount of child support that had been ordered under the guidelines, even if the support order was in default. The result would be that the support amount would automatically be deducted from that parent's public assistance benefits, potentially leaving the family without adequate funds in the event of non-payment of support. Although the administration of public assistance programs is not within federal legislative jurisdiction, Members of the Committee thought it important that the impact of the guidelines on that type of income be examined carefully.

As consideration of the Federal Child Support Guidelines did not fall strictly within the Committee's mandate, and as the Committee had not actively sought evidence on this topic, most Members of the Committee felt that it would not be appropriate to recommend to the Minister of Justice just how the problems with the guidelines should be corrected. A number of witnesses did not address issues related to the guidelines, or child support more generally, and the Committee expects that many would have if they had been asked to do so. However, given the volume of evidence dealing with concerns related to the guidelines, the Committee felt that our witnesses' objections should be reviewed by the Minister of Justice.

Recommendation

18. Whereas the federal government is required by statute to review the Federal Child Support Guidelines within five years of their implementation, this Committee recommends that the Minister of Justice undertake as early as possible a comprehensive review of the Guidelines to reflect gender equality and the child's entitlement to financial support from both parents, and to give particular attention to the following additional concerns raised by this Committee:

18.1 Incorporation into the Child Support Guidelines of the new concepts and language proposed

by this Committee;

18.2 The impact of the current tax treatment of child support on the adequacy of child support as it is awarded under the Guidelines and on parents' ability to meet other financial obligations, such as to children of second or subsequent relationships;

18.3 The desirability of considering both parents' income, or financial capacity, in determining child support amounts, including the 40% rule for determining whether the parenting arrangement is "shared parenting";

18.4 Recognition of the expenses incurred by support payors while caring for their children;

18.5 Recognition of the additional expenses incurred by a parent following a relocation of the other parent with the children;

18.6 Parental contributions to the financial support of adult children attending post-secondary institutions;

18.7 The ability of parties to contract out of the Federal Child Support Guidelines; and

18.8 The impact of the Guidelines on the income of parties receiving public assistance.

(vi) The "Friendly Parent Rule"

Section 16(10) of the *Divorce Act* is known as the "friendly parent" or "maximum contact" rule. It sets out 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 requires the court to take into account the willingness of each parent to facilitate contact between the child and the other parent. Proponents of shared parenting or joint custody argued that this principle is not applied often enough by the courts, or is even ignored. Lawyer Bruce Haines, who has practised law for 35 years, advised the Committee:

I've also seen the section of the *Divorce Act* that says that when it considers the awarding of custody, the court will take into consideration the parent who facilitates contact. I have yet to see that section used. I read all of the family law reports across this country, and it's almost never mentioned. (Meeting #12, Toronto)

Advocates for women, particularly those working with women who have experienced violence, argued against the friendly parent rule, saying that the presumption in favour of maximum contact could put women and children at risk. Ruth Lea Taylor, a family law lawyer and member of the Vancouver Coordination Committee to End Violence Against Women in Relationships, argued that the provision hangs a threat over women who have been victims of family violence: that they might lose custody if they fail to provide access to a violent spouse (Meeting #19). Elaine Teofilovici, of the YWCA, argued that "in cases where a parent has been the victim of spousal abuse, the victim's willingness to facilitate contact with the abusive spouse should not be considered a factor in determining custody." (Meeting #8)

Because there are conflicting opinions about the friendly parent rule, both with merit in the view of Committee Members, the Committee is recommending that the principle of maximum contact be included in the list of criteria for determining the best interests of the child that the Committee proposes be added to the act (see Recommendation 16). In this way, the principle of maximum contact would be considered by judges and parents and could be weighed against other important criteria related to the best interests of a child.

(vii) Access Enforcement

One of the most contentious, heated, and frequently mentioned issues was what is now called access - its denial, non-exercise and enforcement. This issue attracted hours and hours of testimony, pages and pages of transcripts, and many pointed exchanges during the Committee's meetings. There are a number of aspects to this issue: Do mothers deny fathers access? Do fathers fail to exercise access? Do courts enforce access orders and agreements? Is access necessary, or beneficial, for children? Is a punitive solution appropriate, or is a more service-oriented solution more likely to promote the best interests of children? These questions represent the source of some of the most deep-seated, intractable dissatisfaction with the family law system.

A complication of the access enforcement problem is Canada's constitutional division of powers. Not surprisingly, access enforcement is not one of the enumerated powers under the *Constitution Act, 1867*. Generally, the enforcement of access, like the enforcement of spousal and child support, has been treated as a provincial power, under the "property and civil rights in the province" heading. Any measures aimed at access enforcement proposed or adopted in Canada to date have been advanced at the provincial or territorial level.

As a number of witnesses advised the Committee, under the current regime, access is more likely than custody to cause problems for separated and divorced couples. The Committee heard many stories told with bitterness and anger about denied access, frustrated access and severed father-child relationships. Nevertheless, the Committee recognizes that the majority of access arrangements work reasonably well and proceed without incident. In spite of the wealth of anecdotal evidence the Committee received about the problem of access denial, little empirical evidence exists on the subject. An Alberta study on access following parental separation found that while most non-custodial parents were not denied access either by the custodial parent or a court, over one-third of custodial and non-custodial parents felt that the non-custodial parent was not visiting the child or children as much as they would have liked.⁵⁰ The same study did report, however, that many more non-custodial parents than custodial parents reported feeling that parental interactions related to access were difficult and strained.

The question of which problem is more widespread - denial of access by custodial parents, or failure of non-custodial parents to exercise access - is one the Committee is unable to answer with precision. It is clear, however, that both have negative consequences if the result is that the child loses contact with one parent. The Committee is concerned about both problems and regrets that, although many solutions were proposed to the problem of access denial, few if any were offered for the problem of failure to exercise access. Committee Members would like to encourage the regular exercise of access, by whatever means possible, wherever it has been found to be in the best interests of a child.

Fathers who testified about denial of access stressed the painful separation between parent and child that results. Particularly with very young children, this can prove disruptive to the relationship, sometimes irretrievably so. Young children whose non-residential parent disappears for an unexplained, lengthy period of time suffer tremendous hurt and feelings of betrayal and abandonment. Clearly this result conflicts sharply with the best interests of that child. Parents pleaded with the Committee to recommend measures by which parents who are entitled to access by virtue of a court order can reliably expect that access to take place.

What is agreed to has to be enforced. A child must be able to continue his relationship with both parents and not have it put on hold for weeks and months until all disputes and accusations are dealt with. The onus has to change so that children are automatically allowed to see both parents. Access is not something that should be argued and fought for. Access should be a child's right. (Rick Morrison, Fathers for Justice, Meeting #13, Toronto)

By contrast, a number of women and advocates for women argued that failure by parents to exercise their access

is the more prevalent problem, and one that is less susceptible to correction by enforcement measures. When access is exercised irregularly, or not at all, custodial or residential parents must deal with disrupted schedules, disappointed children, and sometimes increased costs. These witnesses also emphasized that there are occasions when the custodial parent must, in the interests of a child, deny access at specific times, such as when a child is ill or the visit would otherwise not be in that child's interest. They argued that the custodial parent's power to exercise such discretion, within reason, must not be undermined.

For every case that we come across where a parent is claiming that they have been denied the right to see their child, there are ten cases where parents do not exercise the access they have been provided with. These cases aren't litigated; they aren't fought in the courts. In our view, that's because it's accepted as the norm. (Claire McNeil, Dalhousie Legal Aid, Meeting #30, Halifax)

The solutions witnesses offered to deal with the problem of access denial varied widely. Most recommended a hierarchy of responses, recognizing the complicated nature of post-divorce relationships between parents, the complexity of children's lives, and the need to deal sensitively with all the participants in an access problem. For example, Joyce Preston, the British Columbia Child, Youth and Family Advocate, recommended a service-oriented solution.

I always go to a service solution that would, for me, be child-centred, I hope, rather than going to a punitive solution to either one. There are custody and access arrangements that seem to forever remain acrimonious, like "We will never get along, and every time it will be a fight", and I think there are ways of developing service centres that can act as intermediaries in regard to those arrangements, that may even be attached to the court system or something like that. Going to a punitive system never serves the children. It sort of punishes the adults and escalates that war and doesn't do anything with respect to the children who it's about. (Meeting #19, Vancouver)

Similarly, the National Family Law Section of the Canadian Bar Association (CBA) emphasized the complexity of these cases and advocated a non-legislative response.

I can tell you that in none of the cases [of access denial by a custodial parent] I've been involved in would a simplistic solution be employable successfully. They were all complicated, and all of the circumstances had to be dealt with on an individual basis. So [we recommend] services to parents [to] assist, [including] counselling, the provision of supervised access in appropriate circumstances, and they can enlarge the budget to provide for child advocates in appropriate circumstances. Changing the law will do little or nothing to address these problems. Providing services, programs, and funding will. (Eugene Raponi, Meeting #23)

*The CBA did recognize the need to empower judges to order the police to intervene in appropriate cases to enforce access and that contempt proceedings are available to deal with those limited cases where parents frustrate access and the problem cannot be solved through mediation or education programs. Given the traumatic effect of using the police to enforce access, however, the CBA also recommended that a number of officers in every police force receive specialized training to help them deal effectively with these situations.*⁵¹

Other witnesses alluded to the "parenting coordinator" model used in some U.S. jurisdictions. This individual is available to the parties at relevant times to deal with disputes as they arise.

There must be a facilitator in place when access denial is going on-not an assessor or a mediator, a facilitator. At 7 p.m. on Wednesday when you're supposed to see your kids and can't, you call somebody up and your access is going to happen, because that person is going to find out what the issues are right then and there, not six weeks down the road when you get a new judge who's going

to adjourn it for another six weeks and another \$3,000 bill. I don't need that; I need to see my kids at 7 p.m. on Wednesday. (Wayne Allen, Kids Need Both Parents, Meeting #13, Toronto)

Several witnesses cited the model in place in Illinois, under the *Unlawful Visitation Interference Act*, which provides that

Every person who is in violation of visitation provisions of a court order relating to child custody or detains or conceals a child with the intent to deprive another person of his or her rights to visitation shall be guilty of unlawful visitation interference. (Cited by Grant Wilson, Mississauga Children's Rights, Meeting #12, Toronto)

Some defences are available: that the custodial parent committed the act to protect the child from imminent physical harm, provided that the belief in imminent harm was reasonable, or that the act was committed with the mutual consent of the parties or was otherwise authorized by law.

Other options for inclusion in a hierarchy of responses to unreasonable denial of access by a custodial parent include referral to counselling or parenting education, with particular emphasis on parental alienation and its harmful consequences for children, an assessment by a qualified mental health professional, a mandatory review of the parenting arrangement, the payment of a fine, imprisonment of the custodial parent, and automatic reversal of custody. The Committee notes that several of these options are controversial, as their potential impact on children may be more harmful than helpful. One practical but partial solution to conflicts over access was put forward by several witnesses. They recommended establishing a national data bank for custody and access orders (or, under the new regime we propose, shared parenting orders), enabling police officers called upon to enforce an order to determine immediately whether that order is the most recent one.

A key observation here is that it would not be desirable for new, stringent enforcement mechanisms to apply to orders made under the *Divorce Act* in the absence of consistent mechanisms in all provinces under provincial family law. In terms of a punitive response, the Committee notes that to some extent an offence-based remedy already exists. Canadian courts can find a custodial parent who denies access in contempt of court. Penalties applied in contempt of court cases since 1980 have ranged from orders for the payment of family counselling costs to the application of make-up access time, the imposition of a fine, and, in extreme cases, incarceration. Also, section 127 of the *Criminal Code* was brought to the attention of the Committee by Linda Casey, of Helping Unite Grandparents and Grandchildren (Meeting #12). That section makes disobeying a court order an indictable offence.

In the Committee's opinion, the optimal solution to the problem of access denial would be one arrived at in a co-ordinated fashion by the federal government and all the provinces/territories working together, so that the solution provides more than a punitive response and is put in place across the country for all kinds of parenting orders. The Committee agreed that the availability of mechanisms for speedy resolution of disputes over parenting time provisions in parenting plans or orders will be key to reducing conflict between parents.

Recommendations

19. This Committee recommends that the federal government work with the provinces and territories toward the development of a nation-wide co-ordinated response to failures to respect parenting orders, involving both therapeutic and punitive elements. Measures should include early intervention, parenting education programs, a make-up time policy, counselling for families experiencing parenting disputes, mediation and, for persistent intractable cases, punitive solutions for parents who wrongfully disobey parenting orders.

20. This Committee recommends that the federal government establish a national computerized registry of shared parenting orders.

(viii) Grandparents' Applications for Parenting Orders

Another issue that was raised often but will require a response at the provincial level is applications by grandparents for parenting orders. Parliamentarians have long been aware that grandparents' groups are dissatisfied with the current provisions of the *Divorce Act*, which allow them to apply to the court for access to or custody of a grandchild, but require that they first apply for leave to do so.⁵² This leave application requirement is considered an unnecessary and costly burden on grandparents.

The testimony of grandparents denied contact with their grandchildren following the divorce, separation or death of their own child was particularly painful for Members, many of whom are grandparents themselves and could readily empathize with witnesses. However, amending the *Divorce Act* to remove the leave application requirement would be of assistance only to grandparents whose child is currently involved in a divorce. Other grandparents would have to continue to rely on provincial statutes, most of which already allow them to apply without leave. For example, Annette Bruce, of the Orphaned Grandparents Association, provided the following breakdown of the grandparents she has worked with:

Some of the causes [of grandparents being denied access to grandchildren] have been common-law relationships, 26%; divorce, 40%; intact families, 17%; death of adult children, 10%; and conflict with one or more or both parents, step-parent adoption, etc., approximately 17%. (Meeting #20, Calgary)

Because federal jurisdiction in family law is restricted to matters of marriage and divorce, including corollary relief, the idea of making grandparents automatic (or even almost automatic) parties to divorces has been seen as constitutionally problematic. This was one of the concerns that may have led members of the House of Commons Standing Committee on Justice and Legal Affairs to defeat a private member's bill, Bill C-232, advanced by Reform MP Daphne Jennings in December 1995. Mrs. Jennings (who is no longer an MP) testified before this Committee in Vancouver and endorsed a similar private member's bill recently proposed by Liberal MP Mac Harb.⁵³

The Committee found the testimony of grandparents and their representatives extremely compelling. The Committee also heard moving testimony, however, about the importance of siblings, stepsiblings and other extended family members in the lives of children. Other important people in the life of a child might well be family members or friends, and many Members of the Committee felt there should be no legislative presumption that grandparents have a different standing in parenting applications relative to those other important people.

A solution for recognizing the important role of grandparents, and one that is thought to be less susceptible to constitutional challenge, would be to include mention of the importance of grandchild-grandparent relationships to children's well-being in the proposed list of criteria concerning the best interests of the child. This would reflect the principle articulated by a number of witnesses that children's established relationships with grandparents should be safeguarded and that the presence of grandparents can enrich a child's life. Such a criterion could be weighed against any potential risk to a child posed by a particular grandparent, or any perceived interference with a parent's, or both parents', decision-making responsibilities with respect to a child. As Patricia Moreau, of the Canadian Grandparents' Rights Association, recommended:

We submit that the *Divorce Act* should provide that this relationship be presumed to be in the best interests of the child, and that it should therefore not be disturbed unless it can be demonstrated to a

court that it is not in the best interests of the child. (Meeting #9)

The Committee held several long discussions about the representations made on behalf of grandparents - about which Members were unanimous in their sympathy, but not in their conclusions about the most appropriate remedies to recommend. The Committee decided to recommend that the concerns of grandparents be addressed in two ways. First, the importance of grandparent-grandchild relationships should be included in the list of statutory criteria that will guide those making shared parenting determinations under the "best interests of the child" test (see Recommendation 16). Second, the importance of relationships with grandparents and other extended family members must be considered and provided for in the development of parenting plans (see Recommendation 12).

The Committee suggests that further solutions to the problems raised by grandparents will require action by the provincial and territorial governments. Grandparents advised the Committee that legislative action is being considered in at least three provinces - Ontario, New Brunswick and Alberta - to promote continued relationships between grandparents and grandchildren where this would be in the best interests of the children. Grandparents in Québec can already rely on Article 611 of the *Civil Code*:[54](#)

This section provides for grandparents' rights, and these rights are independent of situations. Elsewhere in Canada, it would appear that the access of grandparents comes under the *Divorce Act*. Divorce is perhaps one of the reasons that separate grandparents from grandchildren, but it is not the only one. I appreciate that, in Québec, regardless of whether or not a divorce has taken place, we have this *Civil Code* section that guarantees grandparents natural access to the grandchildren, except, naturally, in cases of incest or in cases where there are valid reasons which we would not defend. (Albert Goldberg, GRAND Québec, Meeting #15, Montréal)

Members commend to the other provinces the wording of Article 611 of the Civil Code of Québec, which provides that in no case shall a parent, without a grave reason, interfere with personal relations between a child and his or her grandparents.

Recommendation

21. This Committee recommends that the provincial and territorial governments consider amending their family law to provide that maintaining and fostering relationships with grandparents and other extended family members is in the best interests of children and that such relationships should not be disrupted without a significant reason related to the well-being of the child.

B. Other Federal Contributions

Members of the Committee want to emphasize that promoting better outcomes for children whose parents divorce is not a goal that can be assigned solely to the federal Department of Justice. It is a multi-faceted issue, and solutions will have to be undertaken across the federal government and at other levels of government as well. The recommendations in this report reflect the complexity of the problem as well as the layered responses that will be required.

(i) Federal Leadership

A concern expressed by many witnesses was that achieving positive outcomes for children whose parents divorce depends in large measure on the availability of the necessary resources. Almost all the innovative new initiatives in place across Canada, including parenting education, non-adversarial dispute resolution, therapeutic interventions and new programs in the courts, are currently restricted in scope because of limited funding. This

Committee is of the view that one of the contributions of the federal government to helping children of divorce in a measurable way is to provide resources where necessary, so that these beneficial measures can be made available to as many children and their families as possible.

Although not limited to legal aid, the inadequacy of resources for civil legal aid programs across the country was cited by many witnesses as an impediment to better outcomes for a significant number of families. Since the early 1990s, legal aid funding for family matters has decreased in every province of Canada. Witnesses who expressed concern about the current inadequacy of legal aid funding for civil matters cited the financial devastation families have experienced as a result of legal costs and the difficulties and increased expense that unrepresented litigants pose for themselves and others. Related problems include restricted access by individuals to legal advice, which might otherwise help them make their own parenting decisions, the result being poorer outcomes in contested custody or access disputes. Family law litigants are among the least able to obtain good representation that is affordable; for every separating couple, financial issues become more pressing, not less so. For a couple attempting to shift from one household to two, legal help may appear to be an unaffordable luxury. However, the Committee is concerned that without good legal representation, Canadians may not be able to benefit from the protections extended by our current divorce law or any future improvements to it.

Witnesses from a variety of professional backgrounds indicated that accessible and affordable legal advice could indeed represent a cost-saving measure for individuals and for society. Parents who understand the legislation and know their legal rights and obligations are in a better position to make their own lasting parenting arrangements or to negotiate them through counsel. As Professor Bala argued, a good lawyer should not be considered a luxury.

At least in some cases, a lawyer is a necessity. In fact, again at least in some cases, having a lawyer not only provides advice and protects people's economic and social rights, but he or she can actually lower the temperature. A good family lawyer will provide a range of very important advice for people. (Meeting #6)

The more complicated a family law case, the more necessary legal aid resources often become. Legal aid funding can provide quality custody and access assessments, to assist parents or provide guidance to judges. If guidelines or tariffs allowed, it could also fund mediation. Most important, legal representation - funded where necessary by legal aid plans - ensures that parties to litigation are functioning on a level playing field. One of the most inexpensive ways to provide a minimal level of legal aid to individuals is through the presence of duty counsel in courts where family law matters are being heard. As Keith Wilkins, of the Ontario Legal Aid Plan, described it, duty counsel "provides summary advice at court, and often results in successful negotiations and settlements of cases at a very early stage in proceedings". (Meeting #12, Toronto) This model is currently in place in the provincial family courts of Ontario, as well as some other jurisdictions. The recent Ontario *Civil Justice Review* recommended the expansion of the program to the General Division Court as well.[55](#)

Submissions about the harmful effects of inadequate legal aid funding and the lack of legal aid for civil cases were most stark in Prince Edward Island. Virtually all witnesses mentioned the absence of legal aid; assistance is available only in emergency situations where there is a present threat of violence. Ann Sherman, of PEI's Community Legal Information Association, indicated that a limited program is funded by the Law Foundation of PEI, which offers up to \$500 (or in exceptional cases, \$1,000) per client on a first-come, first-served basis. There are also staff lawyers at Health and Social Services who can assist clients receiving public assistance in seeking child support. Daphne Dumont, a PEI family law lawyer, made a dramatic argument in favour of no legislative change until the people affected - family law litigants - have access to legal assistance.

Children suffer when families can't get legal aid. New legal rights are useless without a means of access to justice. ... It's better to leave things as they are than to dangle inaccessible guarantees just

beyond the fingertips of the most deprived citizens. Indeed, since all new laws are open to interpretation, if you change the *Divorce Act* and establish new access standards, you will be invalidating our solid old precedents and giving parents a whole new set of undefined guidelines to argue about. Before you do this radical act, make sure parents of children in poorer families will have resources to add their voices to the arguments that will certainly result if you change the *Divorce Act*. (Meeting #31, Charlottetown)

The Committee is of the view that the inadequacy of civil legal aid is a problem that requires further study.

The various initiatives identified by this Committee as requiring financial support from the federal government - with contributions from provincial and territorial governments - range from the augmentation of funding for civil legal aid, through the expansion of unified family courts across Canada, to the appointment of a new Children's Commissioner. The creation of this new Commissioner, who would report to Parliament, would ensure that children's interests under the *Divorce Act* and in other areas of federal jurisdiction are promoted. Legal representation for children, when such counsel is appointed by a judge, is also seen by this Committee as a crucial service that should not be denied a child because of inadequate funding. The other programs the Committee would like to see assured of adequate funding include parenting education programs, supervised access or parenting programs, and family law-related judicial professional development.

Many witnesses also urged expansion of training programs for judges to include issues surrounding post-separation parenting arrangements and to emphasize the particular aspects of concern to witnesses. For example, grandparents' groups wanted judges to receive more training on the importance to children of grandparents and extended family, fathers' groups argued that judges needed more training about the significance of children's relationships with their fathers, and women's groups tended to argue that judges should receive more training about violence against women and its impact on children. The Committee agrees that these are all important areas, and that better-informed judges will produce better, more consistent results for children.

Because of the constitutional division of powers and the importance of an independent judiciary, there are restrictions on the degree to which judicial training in any area can be made mandatory or even recommended for all judges dealing with family law matters. However, judicial training programs in this and other areas do exist. One is the judges' component of the annual National Family Law Program, hosted by the Federation of Law Societies. For judges participating in these programs, some of the matters brought to light during this study would likely be of great interest. To the extent that the federal government provides training for family law judges, in that it funds programs for federally appointed judges, the Committee urges that the preoccupations of witnesses before this Committee and issues related to the impact of divorce on children increasingly form part of regular judicial training. The provinces are urged to consider this suggestion as well.

Recommendation

22. This Committee recommends that the federal government provide leadership by ensuring that adequate resources are secured for the following initiatives identified by this Committee as critical to the effort to develop a more child-centred approach to family law policies and practices:

22.1 Expansion of unified family courts across Canada, including the dedication of ample resources to interventions and programs aimed at ensuring compliance with parenting orders, such as early intervention programs, parenting education, make-up time policies, family and child counselling, and mediation;

22.2 Civil legal aid to ensure that parties to contested parenting applications are not prejudiced by the lack or inadequacy of legal representation;

22.3 A Children's Commissioner, an officer of Parliament reporting to Parliament, who would superintend and promote the welfare and best interests of children under the *Divorce Act* and in other areas of federal responsibility;

22.4 The provision of legal representation for children when appointed by a judge;

22.5 Parenting education programs;

22.6 Supervised access programs; and

22.7 Enhanced opportunities for professional development for judges, focused on the concept of shared parenting formulated by this Committee, the impact of divorce on children, and the importance of maintaining relationships between children and their parents and extended family members.

(ii) Unified Family Courts

There was agreement about the concept of unified family courts - courts that exercise jurisdiction in relation to family-related laws at both the federal and the provincial level. Most witnesses recognized the value of specialist courts with jurisdiction to hear all cases dealing with family law, particularly where the adjudicative function of the court is combined with related therapeutic and mediation services.⁵⁶ Lawyers who practise in jurisdictions with unified family courts described being able to refer clients initially to counsellors affiliated with the court, who were often able to effect amicable settlements, particularly of problems such as access disputes or variation claims.

Unified family courts are in place in several jurisdictions across Canada. The first were established in St. John's, Newfoundland, and Hamilton, Ontario, in 1977. Under section 96 of the *Constitution Act, 1867*, provinces cannot give jurisdiction to a provincially appointed judge that is analogous to that exercised by a federally appointed one. To hear matters under federal legislation, such as applications for divorce, or to grant certain types of relief restricted to the purview of superior court judges (such as injunctive relief), unified family courts must be presided over by federally appointed judges. Such courts can therefore be established only through federal-provincial co-operation.

Unified family courts are operating across New Brunswick and Saskatchewan⁵⁷ at present, as well as in Winnipeg, five cities in Ontario (with a further expansion announced and now being negotiated by federal and provincial governments), and St. John's, Newfoundland. Not all the courts are unified in the same way, however. For example, the St. John's Unified Family Court does not hear child protection matters, and not all the courts have the same type of non-adjudicative services attached to them. In other provinces, such as Québec, and other cities in Ontario, there are specialized family law judges or divisions within courts. The federal government announced the availability of funding for 27 new unified family court judges in March 1998.

The Committee recognizes the benefits to Canadians, and particularly their children, of having parenting disputes resolved by expert, sensitive judicial officers, particularly if family law matters governed by different laws, such as custody/access and child protection, can be heard together or dealt with in the same court. More important, the Committee finds that the combination of litigation services with expert counselling services is likely to promote positive outcomes for children whose parents divorce. Therefore, the model of the unified family court is to be encouraged as far as possible across Canada.

Some witnesses went beyond the current model of a multi-purpose unified family court to propose other types of

service centres to help families in the process of reorganizing after a separation. For example, Sharon O'Brien, Chair of the PEI Advisory Council on the Status of Women, argued for establishment of a "family dispute resolution agency" to "serve as a point of entry into the legal system for case assessment and referrals and to act as a clearinghouse" for information on related programs and services for parents and children. (Meeting #31, Charlottetown) The Committee's view is that this type of service centre would be beneficial, whether located in unified family courts or outside them.

The Committee is generally agreed that the program of expansion of unified family courts across Canada should be accelerated. The majority of Committee Members agree with the assertion in the 1977 report of the Law Reform Commission of Canada, *Report on Family Law*, that unified family courts represent the best mechanism for reducing costs and confusion caused by Canada's fragmented constitutional jurisdiction in family law matters. Like the Law Reform Commission, the Committee is particularly aware of the advantage of non-litigation services being available to parents and children through the offices of a unified family court. Therefore, the Committee is recommending that unified family courts in all cases have a support arm, including family and child counselling, public legal education, mediation and assessment services, and an office responsible for hearing the views of children who are experiencing difficulties stemming from parental separation or divorce. Such courts should also offer case management services designed to monitor the progress of high-conflict cases through the litigation process and to monitor implementation and enforcement of shared parenting orders.

An important procedural innovation, and one that all provinces have adopted to varying degrees, is the use of case management or early judicial intervention. The range of such programs was described by Heather McKay, Chair of the National Family Law Section of the CBA:

Virtually every jurisdiction in Canada has adopted some method of dispute resolution that they try to put up front before [parties] get involved in the court litigation system. Some of these are mediation, pre-trial conferences, four-way negotiations among counsels and lawyers, counselling with psychologists, and bilateral custody assessments. (Meeting #23)

Along with mediation, these mechanisms make up a spectrum of alternative dispute resolution forums that have generally been very effective in facilitating speedy, inexpensive resolutions for all types of family law disputes.

Judge Thomas Gove of the Provincial Court of British Columbia described his experience in the Judge Mediated Case Conference system, introduced initially for child protection matters and now extended to custody and access disputes (Meeting #38). Judges trained in mediation help the parties come to agreement through a mediation process. It is thought that a judge may provide more encouragement to settle than a mediator who is not a judge might do. Case conferences have the advantage of allowing additional participants to be included, such as children over 12, or younger if the judge so directs, grandparents or extended family members, representatives of Aboriginal organizations, advocates, lawyers and, where appropriate, social workers. Very few participating families have failed to reach agreement through this program, thereby reducing the number of trials taking place. This has beneficial consequences not only for the families involved, but also for taxpayers.

Systems similar to British Columbia's have been put in place in other provinces as well. Ontario has developed a system in which senior family law practitioners act as volunteer Dispute Resolution Officers, meeting with parties who have applied to vary their divorce judgements to see whether they can help them reach agreement. Case conferences with judges are also required in Ontario before parties appear before a judge on custody and access applications. Pre-trial conferences held before judges are mandatory at both provincial and general division courts for all family law matters. Pre-trials, where judges encourage the parties to settle by giving them an indication of the likely outcome at trial, are taking place in most Canadian jurisdictions.

An expanded case management system was proposed in Ontario's recent *Civil Justice Review*.⁵⁸ That 1996

report recommended establishing three types of conferences in civil matters: case conferences, settlement conferences and trial management conferences. The recommendation was that the case management rules be in place across Ontario by the year 2000.

The Committee is encouraged by the creativity and resourcefulness displayed by various jurisdictions in developing models for early judicial intervention. One additional feature, modelled on examples from several U.S. jurisdictions, would be to include a new type of judicial officer in a case management system - referred to as a special master or parenting co-ordinator - who would be assigned to high-conflict cases and follow them throughout the legislative process. These officers are often assigned the task of resolving disputes over parenting times or visitation.

To the extent that shared parenting applications under the *Divorce Act* are being heard in unified family courts, the Committee believes it is important that the rules of such courts provide that child-related family law matters have priority over matters related to financial issues such as division of property, or cases where children's interests are not affected.

Delays in family law litigation were cited by many witnesses as exacerbating factors in situations that are already contentious. Of particular concern to the Committee is the impact on parent-child relationships of long delays during which meaningful contact does not take place. There was recognition, however, that acrimonious parenting disputes can be hurried only to a limited extent. In many cases such matters require expert psychological or social work assessments, and the quality of such reports depends on the assessors having sufficient time with family members to observe and reach conclusions.

In the state of Michigan, 56 days is the outside time limit for hearings on custody and access matters to be commenced by the courts. Judge John Kirkendall advised that this time limit is treated as a guideline, however, more than a mandatory requirement.

One of the things you have learned about from people who are experts in child development is that one of the worst things a court or any of us can do is to disrupt a child's present environment unnecessarily. So when somebody comes to court and asks for a change of any sort, that is a yellow flag for us. We don't want to destroy a child's environment without knowing a lot about the situation. So we refer these cases to the friend of the court, who may have to get somebody else involved, and then we may have to wait for a report. The Supreme Court and Court of Appeals have indicated to us in Michigan that if we don't handle one of these cases within the prescribed time limit, that is not a violation that's going to interfere with the enforceability of our orders. It's merely a suggestion of good practice, of trying to get these cases settled in a priority way. I think it's merely a way of saying that child custody cases are extremely important cases and judges should give those priority, and we do that. (Meeting #26)

Access matters, most witnesses agreed, can and should be dealt with as expeditiously as possible, to minimize harm to the relationship between the child and the non-residential parent. For example, the Fondation du Barreau du Québec recommended in 1997 "fast-tracking cases in which access rights are violated or there are problems of execution". (Roger Garneau, Meeting #4) The Fondation also recommended that in cases where access difficulties are anticipated, the presiding judge should remain seized of the file, either automatically or at the request of the parties, for several months, after which he or she would review the parties' success in operating under the access regime. Other witnesses recommended that child-related matters be separated from the other contentious matters between separating parents, in order to stabilize matters more quickly for the children's benefit.

Also, the rules should discourage the use of *ex parte* proceedings (proceedings heard in the absence of one

parent) in all but the clearest cases of emergency. This Committee heard from many witnesses who described the damage done to families where an *ex parte* determination was made and where the subsequent opportunity of the absent parent to be heard was insufficient to overcome the prejudice that parent suffered as a result of the initial decision. Given the nature of family law proceedings, where most positions are extremely subjective, it is particularly critical that judges hear both sides before making important decisions.

In addition or as an alternative to providing non-litigation services through unified family courts, the Committee also heard from witnesses that parenting decisions, or at least some aspects of the process, would be better dealt with in an administrative tribunal, rather than the courts. One such recommendation was made by lawyer Michael Cochrane:

It's my belief now, after having been exposed to the system as it is, that we should have a family arrive at something like a family law tribunal, something that will take a multi-disciplinary approach to helping the family sort out the issues of their finances, the children, and whatever other issues they're up against, perhaps the role of grandparents. That multi-disciplinary panel should have on it a legal voice, an accounting or financial planning voice, and someone who's skilled in social work or family support work. Whatever the family needs, that expertise should be sitting in front of them. The family would be far better served by that kind of support-and I should add public education to the list as well-than by high-powered and highly paid lawyers and judges... (Michael Cochrane, Lawyer/Author, Meeting #13, Toronto)

The Committee considers that the concept of an administrative tribunal to which certain decision-making functions could be assigned is worthy of further study. Some of the responsibilities that the Committee envisions being delegated to such an agency include intervening in disputes between parents over parenting times; helping children affected by such disputes; providing an information and referral service to parents or children; enforcing the support or parenting time provisions or parenting orders; and helping parents adjust parenting plans over time. These non-adjudicative functions might be provided to parents and children in a more straightforward, less costly manner if they were handled outside the courts, but clearly the judicial role of the courts would be maintained wherever necessary. Even where such duties were assigned to a separate administrative agency, the Committee anticipates that wherever possible, such offices would be housed with, or affiliated with, unified family courts.

Recommendations

23. This Committee recommends that the federal government continue to work with the provinces and territories to accelerate the establishment of unified family courts, or courts of a similar nature, in all judicial districts across Canada.

24. This Committee recommends that unified family courts, in addition to their adjudicative function, include a broad range of non-litigation support services, which might include:

24.1 family and child counselling,

24.2 public legal education,

24.3 parenting assessment and mediation services,

24.4 an office responsible for hearing and supporting children who are experiencing difficulties stemming from parental separation or divorce, and

24.5 case management services, including monitoring the implementation and enforcement of shared parenting orders.

25. This Committee recommends that, as much as possible, provincial and territorial governments, law societies and court administrators work toward establishing a priority for shared parenting applications, above other family law matters in dispute.

26. This Committee recommends that in matters relating to parenting under the *Divorce Act*, the importance of the presence of both parties at any proceeding be recognized and emphasized, and that reliance on *ex parte* proceedings be restricted as much as possible.

B. Provincial Governments' Constitutional Responsibilities

1. Access Enforcement

The Committee has recommended a consistent, co-ordinated approach across Canada, designed to ensure the enforcement of access pursuant to orders under the *Divorce Act* as well as under provincial and territorial family law, as the most effective response to the concerns expressed by witnesses (see Recommendation 19). For this to occur, all governments will have to work together. In this section the Committee reviews actions that have been or could be taken by provinces and territories to respond to the problem of access denial.

Courts have the power to find an access-denying custodial parent in contempt of court. In addition, a number of provinces have already enacted legislation to deal specifically with the enforcement of access orders. For example, Alberta's *Provincial Court Act* provides for a fine of up to \$1,000 or imprisonment for the breach of a custody or access order.⁵⁹ The British Columbia *Family Relations Act* makes it an offence to interfere with an access order without lawful excuse;⁶⁰ it is an offence that can be proceeded with in criminal court.

In 1989 Ontario passed, but did not proclaim, section 34a of the *Children's Law Reform Act*, which would have created a remedy for wrongful denial of access by permitting the court to award compensatory access, require supervision of the custody or access, order the reimbursement of reasonable expenses, or appoint a mediator to deal with the claim for access. The access enforcement powers specifically do not apply to orders made under the *Divorce Act*. The same provisions are in place as section 41 of the Newfoundland *Children's Law Act*, and section 30 of the new Northwest Territories *Children's Law Act* mirrors them as well.

Saskatchewan's *Children's Law Act* provides that the court may, as a remedy for wrongful access denial, order compensatory access, require supervision of the access, require the custodial parent to give security, appoint a mediator, and make or vary the custody/access order (section 26). A parent who fails to exercise access, or fails to return the child as required, may be ordered by the court, if it is in the best interests of the child, to give security to the custodial parent or provide an address or telephone number. Alternatively, the court may order supervision of the access, the appointment of a mediator, or a variation of the custody/access order. Denial of access, failure to exercise access, or failure to return the child as ordered is not wrongful if it is justified by a legitimate excuse and notice was given. In addition, the Saskatchewan court has contempt powers delineated in the statute.⁶¹

A number of witnesses, including a large number of support-paying non-residential parents, objected to the fact that Canadian governments had created a state-financed support enforcement system, present in every province, in which government resources are spent on collecting child support. These witnesses felt that equal government attention and resources should be devoted to access enforcement and that there should be a no-fee enforcement agency at their disposal to deal with access disputes. Most provincial governments have resisted this type of

demand, possibly because there is a clearer link between support payments and provincial budgets - in that support recipients receiving public assistance have their benefits reduced in proportion to the support collected - and because the incidence of access denial is perceived to be lower than the incidence of support default. A Manitoba attorney general study cited by the Canadian Bar Association compared demand for access and for support enforcement services; 85% of requests for assistance related to support, and only 15% were access problems.⁶²

Starting in 1989, Manitoba operated a pilot project, funded jointly by the federal and Manitoba governments, called the Access Assistance Program. Joint funding lasted for three years, then the project was extended for a further year funded solely by Manitoba. Its purpose was to try to help families resolve their access disputes, and it included access to counsellors as well as a legal component.

A number of witnesses promoted the conciliatory, therapeutic model for intervention in situations where access is frustrated, denied or not exercised. Punitive solutions, such as incarcerating or fining the custodial parent, were seen as contrary to the best interests of the children. As Judge Herbert Allard, now retired from the Provincial Court of Alberta, argued:

That is the same kind of difficulty as putting a man in jail for non-support. It's a futile thing. You're not going to get any money out of him when he's in jail. So that's not a new dilemma about using punitive sanctions that are jail-like for what might be viewed as civil contempt, and there never is an easy course to this. We have convicted in Alberta, under the *Summary Convictions Act*, mothers and fathers who have been in contempt of court orders. But it doesn't change anything much. (Meeting #20, Calgary)

More promising proposals included parenting education programs, specific counselling targeting the couple's particular access problem, mediation, make-up time, and potential variation of parenting orders. It is this Committee's view that, where judges enforcing access or parenting time provisions are directed to consider a range of dispositions, outcomes are likely to be more beneficial for children than if the only options are to fine or incarcerate a parent.

The enforceability of access was discussed recently by Professor James McLeod in an annotation of the case of *B.(L.) v. D.(R.)*, in which a mother was committed to jail for 60 days after being found in contempt of court.⁶³ In this case, there was a finding that the mother, who was the custodial parent, had persistently and wilfully denied access on at least 40 occasions. There was no evidence that the mother had a valid reason for doing so. Indeed, the evidence of staff at a supervised access program was that the child was very comfortable in the presence of her father, possibly more comfortable than she seemed with her mother. As Professor McLeod observed, incarcerating the mother was unlikely to promote access, but the judge was compelled to do so in order to send the message that "there are costs associated with ignoring or violating a court order".⁶⁴

Witnesses representing the Barreau du Québec offered an interesting proposal, which would require modification of the rules by which matters proceed in court, but might not require legislative amendment. Reporting on a July 1997 study conducted by the Fondation du Barreau du Québec, Roger Garneau indicated that a more streamlined, less procedurally difficult response to access denial than contempt proceedings would benefit parties and their children.

The Fondation recommends that, instead of resorting to contempt of court, a pointless and quarrelsome expedient, and one that is often dangerous when used in family cases-it is being suggested that it should be prohibited-litigants should instead merely file an application with the Court on appeal saying, "A judgement was rendered on such and such a date and my client was granted access to his or her children, and there's one party, no doubt the spouse in this case, who is

obstructing access. We ask you, Your Honour, to intervene quickly to correct this, not in a month, not in three months or in a year, but within a few days." This is one possible measure that would require a certain change in the legal organization of the courts, but that would not call for an amendment of the Act. This requires good will and a desire for efficiency on the part of judges and lawyers. (Meeting #4)

In a recently released report, three members of the Alberta legislative assembly concluded that access issues could not be resolved by a focus on enforcement alone. Among their findings were that children should have a right to the continued involvement of both parents, and that parents should be required to develop a plan to guide parenting arrangements for the family. Government's role should be to "support restructuring families through counselling, parenting support groups, and mediation, all of which give people a chance to find their own solutions tailored to their needs as opposed to having one imposed upon them."⁶⁵ The Committee also recommended codifying the sanctions available to a court for breach of a custody or access order, as has been done in a number of provinces. The potential sanctions listed by the Committee include

Orders for supervised access, orders for police to locate and take a child, support payments to trustees on terms, posting of bonds with or without sureties, fines and imprisonment, variation of access or custody orders, orders for compensatory access, appointment of mediators, attendance at parenting courses, and reimbursement of costs.⁶⁶

The Alberta committee recommended that any sanctions included in a codification should also apply to the failure to exercise ordered access, not merely to the denial of access by a custodial parent.

2. Doorstep Problems

Another area of potential provincial action to assist in access enforcement relates to the concerns of Canadian police forces, as related to the Committee by Vince Westwick, who appeared on behalf of Ottawa Police Chief Brian Ford, for the Canadian Association of Chiefs of Police. These concerns include the following:

From a police standpoint, [an access dispute the officer is called upon to resolve on the doorstep] becomes an extremely volatile situation that cannot really be resolved in any positive sort of way. It is difficult, if not impossible, for the police officer to resolve the dispute at the doorstep. If lawyers, courts and mediators have been unsuccessful to date, how can the police officer reasonably be expected to be successful in doing so in those kinds of circumstances? Undoubtedly the officer will be criticized by one or other of the parties for the action that is taken. We would ask that [court orders] be clarified, written in non-legal language, the parties be named and clearly identified, and there be concise, clear, unequivocal access schedules, including what might look like an amortization schedule, that would spill out the dates of access, particularly in those high-risk cases.

We would suggest there be some provisions, whether covered under provincial legislation or provincial policy, to deal with what we've referred to as the doorstep problems. Maybe there ought to be a place where the history of these kinds of cases is on file and where the professionals and police can get access to them, particularly in off-hours. (Meeting #24)

The latter concern would be addressed by the Committee's recommendation to establish a national registry of parenting orders (see Recommendation 20). The former would be addressed by making parenting orders more comprehensible to the police officers called upon to enforce them.

Recommendation

27. This Committee recommends that court orders respecting shared parenting be more detailed, readable and intelligible to police officers called upon to enforce them.

3. Public Awareness about Parenting and Relationships

According to a number of witnesses, most separating parents are unprepared for the process of separation or divorce and its negative effects on their children. Many witnesses felt that, given continuing high divorce rates, future parents should receive some training in how to manage conflict during marriage and after separation if it occurs. Witnesses suggested that divorce, including parenting arrangements form part of high schools' family life curricula.

I recommend that we set up these support systems long before families get into conflict. In other words, I would specifically recommend that before a child develops a relationship with the parent at birth, family life education be supported; that the importance of attachment, nurturing and bonding be identified and supported. I feel the public health system could be used to begin this process. It could be further supported through the educational curriculum with family life education. (Kathy Thunderchild, Social Worker, Meeting #20, Calgary)

Other witnesses recommended public education campaigns about the dangers of ignoring children's needs in divorce, as well as expanded marriage preparation programs and parenting classes for new parents. It is hoped that the work of this Committee will contribute to promoting public awareness about this critical area of Canadian life.

The Committee is of the view that, in addition to promoting public awareness about the impact of separation and divorce on children, it is as important to support couples who wish to avoid separation and divorce. The Committee is aware that a number of church and community groups across Canada already offer programs designed to assist such couples and agree that a special fund should be created to which those voluntary groups could apply for supporting grants. With relatively small grants, community groups would be able to extend the availability of such programs and contribute to couples' efforts to stabilize and strengthen their marital relationships, something the Committee sees as being clearly in the interests of their children.

Recommendations

28. This Committee recommends that provincial and territorial governments explore a variety of vehicles for increasing public awareness about the impact of divorce on children and, in particular, the aspects of parental conduct upon marriage breakdown that are most harmful to children, and implement such education programs as fully as possible. To the extent practicable, the Committee recommends that the federal government contribute to such efforts within its own jurisdiction, including the provision of funding.

29. This Committee recommends that the federal government extend financial support to programs run by community groups for couples wanting to avoid separation and divorce or seeking to strengthen their marital relationship.

C. Both Levels of Government

1. Do Not Link Support and Access

In law and policy, the payment of child support and access to one's children on separation and divorce are completely independent. In the minds of many, however, the two are linked in practice. Although the Committee was urged by some witnesses to link them, by reducing or terminating child support in cases where one parent interfered with the other's parenting time, most witnesses insisted that the two remain separate. The child's need and right to the financial support of both parents should not be affected by disagreements between the parents or the conduct of either parent with respect to parenting time.

2. Legal Representation for Children

To expand current programs that make legal counsel or non-lawyer advocates available to children would likely require the involvement and investment of both levels of government. The Committee has recommended that the federal government contribute to this effort (see Recommendation 22). The Committee recognizes the critical importance of providing some form of representation to children, particularly in high-conflict cases, and that the nature of representation should vary with the child's circumstances. Indeed, this is a child's right under the United Nations *Convention on the Rights of the Child*. A number of witnesses emphasized this need, and some, including Calgary lawyer Dale Hensley, concluded that its logical extension is automatic standing for children to participate in actions concerning their future:

In any decisions regarding children in the *Divorce Act*, children must have standing. That needs to be an absolute right. It can't be conditional on being verbally articulate or on age, and that's consistent with the convention. Children should be entitled to representation. If it's a legal forum, it must be legal representation, and the court must have authority to direct payment of counsel or the representative for the child. There would be many issues inherent in that recommendation, we know, but that's fundamental. However, the ideal would be for advocates to be appointed well before any contentious or legal process was begun by either parent, and that advocate obviously would not necessarily have to be a lawyer. (Meeting #20, Calgary)

Witnesses did not specify an age after which all children would be capable of instructing counsel. However, most agreed that all children 12 or over could instruct counsel, and that often younger children, depending on their maturity, would be able to as well. Jeffery Wilson indicated that lawyers have a responsibility to determine whether any client, adult or child, is competent to give instructions and that lawyers certainly do so. His general observation with respect to child clients was that "the younger the age, the harder it is to meet [the test of competency]." (Meeting #25)

Some provinces already have well-established programs to provide legal counsel for children in high-conflict custody and access disputes. Ontario's Office of the Children's Lawyer participates on behalf of the children in some 1,600 custody and access cases annually, although this falls short of the total number of files referred by the courts. (The remainder have to be turned down because of resource limitations). The office sees its duty as representing the wishes and interests of the child to the judge. As Wilson McTavish, the current Children's Lawyer, described it:

We do not represent the child's best interest, nor do children instruct us. We obtain our authority to represent the child by court order, under sections 89 and 112 of the *Courts of Justice Act* of Ontario. The child does not hire us, nor do we require the parents or anyone to pay for our professional services. It is a public duty fully funded by the Attorney General of Ontario. Our relationship to the child is one of solicitor and client. We have the responsibility to make sure that evidence about the child's wishes, consistent or not, is known to the court, and that we place those wishes into the context of the overall evidence. (Meeting #12, Toronto)

In other jurisdictions - including all the western provinces - child advocates, who are not always lawyers, represent children in child protection matters. These offices do not represent children in custody and access matters, but representatives of the Canadian Council of Provincial Child Advocates, as well as officials from several provincial member offices, appeared at the Committee's hearings because of concern about the impact of such matters on children. Indeed, although custody and access disputes between parents fall outside the mandates of these offices, their representatives testified to significant demand for advocacy services from children and parents.

Child advocacy is not new in Canada. There have been children's advocate offices around the country for about 20 years. In Quebec and Ontario we've existed since the late seventies. Alberta began its program in the late eighties, and Manitoba, Saskatchewan and British Columbia have had child advocates since 1992 and 1995. The Maritime Provinces and Northwest Territories are beginning negotiations with their respective governments at this time, so we're looking forward to having child advocacy in every territory and province in Canada. None of the provincial children's advocates have a mandate to advocate on behalf of young people before the court. However, due to the volume and the compelling nature of these calls related to custody and access disputes, advocates nationally have agreed together to respond and intervene [in this Committee's hearings]. (Judy Finlay, Ontario Office of Child and Family Service Advocacy, Meeting #12, Toronto)

3. Relocation Cases

One contentious matter between separating or divorced parents arises when one parent, usually the custodial or residential parent, seeks to relocate to another community. This has especially dramatic consequences if the distance involved is large, but even a relatively short move in geographic terms can have profound implications for the exercise of access by the non-residential parent. In its 1996 decision in *Gordon v. Goertz*, the Supreme Court of Canada set out a series of principles to be applied to such cases.⁶⁷ There is to be no presumption in favour of permitting moves proposed by custodial parents, but courts must make decisions on the basis of all relevant factors to determine what is in the best interests of the child.

Law professor Rollie Thompson told the Committee about his research on mobility and relocation cases since *Gordon v. Goertz*. In 65% of the 85 reported decisions, the court has agreed to the move proposed by the custodial parent. Courts were more likely to approve a move involving a child age 6 to 11 than moves involving either very young children or children age 12 and over. Professor Thompson argued that the difficulty with the decision, and its reliance on the best interests test, is that it gives very little guidance to parents and lawyers. Decision making is more difficult for parents if they cannot anticipate what a court would decide. Professor Thompson suggests that the custodial or residential parent proposing to move should have to show that the reason for the move is something other than a desire to frustrate access and should also have to propose a revised access schedule. Then the non-residential parent would have to show why the move should not take place. Cases involving substantially shared parenting, as well as cases where the parties have already negotiated restrictions on relocation in separation agreements or consent orders, should be treated differently.

The Committee heard from several witnesses who argued that custodial parents should have a presumptive right to move with a child. Certainly from the perspective of a custodial parent who provides virtually all the care for a child, with little or no involvement of the non-custodial parent, it seems unfair that the non-custodial parent should have any power to interfere with or delay a move. However, this situation would certainly be taken into account by a court.

Other witnesses, including the National Family Law Section of the CBA, offered a compelling argument for a statutory notice period, such that a custodial parent proposing to move would have to give the other parent

notice of at least 90 days before the proposed move, to allow time for altering access schedules, negotiation, or litigation if necessary. The Committee agrees that relocation should occur only if agreed to by the parents, or with the court's approval, and that a notice requirement is desirable.

Recommendation

30. This Committee recommends that the *Divorce Act* be amended to require (a) that a parent wishing to relocate with a child, where the distance would necessitate the modification of agreed or court-ordered parenting arrangements, seek judicial permission at least 90 days before the proposed move and (b) that the other parent be given notice at the same time.

Having their parents live in different cities is an onerous imposition on most children. It seems the most drastic extension of parental separation imaginable, yet in many cases, relocation is essential for economic and other reasons. The freedom to move, particularly within Canada, is a constitutionally protected right and one that policy makers hesitate to restrict. Nonetheless, the impact on children must be recognized. To ensure that a move by the custodial parent does not result in the disappearance of the other parent from the child's life, several witnesses stressed the need to adjust financial arrangements to make regular visits and other contact possible. For example, Lane MacIntosh suggested a new form of tax relief:

The one pragmatic, doable idea I would like to leave with the committee-and I challenge the committee to move forward on it-is for those parents who are separated from their children to be allowed to write off some of the expenses they incur to visit their children and to have their children visit them. Why on God's earth isn't this a tax deductible write-off? Surely it's perfectly natural that it should be. I challenge the committee to look at that suggestion because it would encourage more people to visit their children. (Meeting #32, Fredericton)

Many Committee members thought this suggestion merited consideration.

At the very least, it is clear to Members that in most cases involving a long-distance move by the custodial parent, there should be a re-examination of child or spousal support. The Committee identified this as one of the matters that must be examined by the Minister of Justice in her review of the Federal Child Support Guidelines and also urges the Federal/Provincial/Territorial Family Law Committee to consider how to require this re-examination in relocation cases (see Recommendation 18).

One further circumstance that came to the Committee's attention is that children whose custodial parent lives outside Canada, but who return to Canada periodically to visit the other parent, can seldom meet residency requirements that would make them eligible for health insurance coverage while they are in Canada. The Committee suggests that this problem also be studied by the provinces, with a view to offering some form of short-term coverage, at least, for such children.

4. The Professions

The role of professionals in family law proceedings was discussed by many witnesses and criticized by more than a few. Witnesses singled out lawyers, social workers, psychologists and mediators as having been responsible for, or at least having contributed to, the unfortunate outcome of the witness's family law dispute. To some extent, of course, dissatisfied parties are inevitable. However, such complaints also gave rise to proposals for action that could be very positive for parents and children. For example, social workers and psychologists, in particular those acting as assessors in custody and access matters, and family mediators as well, are not subject to legislated accreditation standards in most provinces, nor is there a clear mechanism for holding them accountable. This is clearly an area that calls for action in some jurisdictions across Canada.

Witnesses also had complaints about lawyers, identifying them and their mental health counterparts as making up the "divorce industry", a term they used pejoratively. This "industry" is described as existing for the sake of making its participants wealthy, which they do, it is argued, by promoting acrimony between divorcing couples and encouraging and extending litigation. On the basis of meetings with a large and probably representative number of professionals from both the legal and the mental health field, the Committee finds that these professions are generally made up of well-intentioned, hard working and highly skilled individuals. A July 1997 report by the Fondation du Barreau du Québec also revealed, somewhat contrary to expectations, a high level of satisfaction with both judges and lawyers in divorce proceedings.

Allow me to draw your attention to a few of the conclusions and recommendations by the Fondation's special committee. First, to the general surprise of the judges and lawyers on the committee, it turned out that the vast majority of divorced persons interviewed were very satisfied with judges and with their lawyers during their divorce. (Roger Garneau, Barreau du Québec, Meeting #4)

Clearly, lawyers are not always the problem in family law disputes, however onerous legal fees might seem to individual litigants and however disappointing the outcome. Lawyers are subject to strict accreditation requirements, and their conduct is monitored by law societies. Most of the objectionable conduct alleged by witnesses would clearly contravene the ethical rules by which lawyers are bound, and in extreme cases would result in the lawyer being disbarred. However, Members felt there was merit in witnesses' suggestions about standardizing accreditation for other professionals.

Recommendation

31. This Committee recommends that provinces and territories and the relevant professional associations develop accreditation criteria for family mediators and for social workers and psychologists involved in shared parenting assessments.

The need for lawyers representing parents to keep the interests of the children in mind was argued by Barbara Chisholm, of the Ontario Association of Social Workers.

Training for lawyers should be broadened to recognize that in family law matters, counsel representing a parent is functioning within the shadow of the children's future. Thus, the obligation to the parent-client is different to that extent from the obligation and other aspects of legal practice. (Meeting #13, Toronto)

This objective was echoed by Winnipeg lawyer Susan Baragar:

I think we need to change some of the canons of ethics that we go by in our professional associations, such that our responsibilities are a little bit different when we are looking at children. I think what we need to do is state that we have a three-part responsibility: we have a responsibility as an officer of the court; we have a responsibility to our client; and we must also have a responsibility to the children, who are unrepresented in this matter. (Meeting #22, Winnipeg)

CHAPTER 5: Complications of High-Conflict Divorces

Legal and mental health professionals recognize that divorce and separation are difficult for all parents and

children. For the majority of families this is a difficult transition phase. Some families seem to get stuck at this point, however, with one parent or both intent on maintaining such a degree of conflict and tension that it becomes impossible to resolve parenting and property decisions without a great deal of intervention from legal and mental health professionals. The incidence of such divorces is estimated at between 10 and 20% of the divorcing population. Virtually everyone involved in family law agrees that the conflict between many of these couples is so intractable that there is never likely to be a legal remedy for their problems. These are couples who perpetuate their conflict regardless of developments in the lives of their children, their own remarriage and prohibitive legal expenses. They are clearly not in the majority, and a number of witnesses insisted that recommendations made to address high-conflict divorces should not have negative effects on the rest of the divorcing population.

High-conflict couples were described by lawyer Carole Curtis, representing the National Association of Women and the Law:

I describe a high-conflict family as a family that falls short of actual violence or assault but for whom, post-separation, a hostile relationship continues. Perhaps a therapist would call that a dysfunctional relationship. There are many separated families who cannot let go of the need to fight with each other one, two, five, and seven years post-separation. We certainly need to bear those families in mind, but we also need to have realistic expectations about the help the justice system or legislation can give to those families. (Meeting #8)

A number of witnesses included families who have experienced domestic violence in the category of high-conflict divorces.

The Committee was urged to concentrate on developing options to support parents who can make their own arrangements and reach co-operative solutions. However, these types of options, such as mediation, are clearly inappropriate for some high-conflict couples, and the system has to provide alternative remedies where necessary. The challenge for the Committee, and for governments, is to design a system that can accommodate different types of divorce, without penalizing couples in one category through options meant for another type of divorce. A large number of witnesses recognized that high-conflict families consume a disproportionate amount of legal and other resources.

On the other hand, the highly conflicted families are the ones that chew up the court time. In terms of the time that the judge and the personnel that are affiliated with the court put in, these highly conflicted cases do consume a lot of time, so it's important that the systems that are designed have a focus on how to deal with those families. (Thomas Darnton, Visiting Professor, Child Advocacy Clinic, University of Michigan Law School, Meeting #26)

The Committee's findings and recommendations reflect the desire of Members to improve the legal system's response to high-conflict divorces, without imposing any harmful restrictions on the co-operative majority. One of the options Members believe should be considered is a mechanism for screening out high-conflict divorces and treating them in a different stream. This would recognize the potential harm to children whose parents continue their conflict far beyond a reasonable adjustment period. The system should identify these families in order to provide protection for their children, who are at greater risk than most children of divorce. Once families are identified, their files should be "red tagged" or flagged in some other way, so that decision makers do not make determinations about parenting arrangements without knowing the full details of the case and the family's history.

Barbara Chisholm, of the Ontario Association of Social Workers, recommended that Special Masters be appointed to deal with high-conflict cases.

Such Special Masters should receive particular training in alternate dispute resolution techniques and be prepared to monitor the cases on a long-term basis. Restrictions on the number of adjournments allowed in custody/access disputes should be put in place, as well as restrictions on the number of returns to court. After these limits have been reached, the matter should then be routinely subject to referral to the special master. ... This is a program that has begun in the States and in Australia. It's the appointment of a judge-a qualified, experienced judge-to a special status. It would be a new status of judicial appointment for someone who would receive special training and be available to deal specifically with the high-conflict cases, the ones that come back and back, where people fire their lawyers because they don't like the advice they get and shop for another lawyer and fire that one. (Meeting #13, Toronto)

The Committee recommended creating this specialized judicial role as part of the services offered by unified family courts (see Recommendation 24).

The Committee agrees that the identification and streaming of high-conflict families would be beneficial both for those families and for others involved in the litigation process. These families require specialized services and generally consume more judicial resources than others, which can result in delays in the courts that may have a negative impact on other families. With a significant number of marriages ending in divorce, and the downward trend in the age of children at the time their parents divorce, such disruptions in family life will likely have more profound effects on children, especially in high-conflict cases. The younger age of the children affected has implications for all the therapeutic and other services offered divorcing families, including those offered through the child protection system.

One particularly alarming symptom of a high-conflict divorce is that a child may decide that he or she does not want to visit one parent or the other. Committee Members were profoundly concerned about such cases when they were described to us by witnesses, especially where children told the Committee that they wished to sever a relationship with a non-residential parent. In the view of Committee Members, such a desire on the part of a child is indicative of a serious problem and calls for immediate intervention. A child who acts on such a wish, with the support of the other parent or the judicial system, may in the long term come to regret the choice he or she has made.

Recommendations

32. This Committee recommends that federal, provincial and territorial governments work together to encourage the development of effective models for the early identification of high-conflict families seeking divorce. Such families should be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children.

33. This Committee recommends that professionals who meet with children experiencing parental separation recognize that a child's wish not to have contact with a parent could reveal a significant problem and should result in the immediate referral of the family for therapeutic intervention.

Many witnesses made a connection between the degree of conflict between divorcing parents and the likelihood that those parents would require supervision of parenting time or become involved with the child protection system. The Committee considered evidence about the supervised parenting programs, or supervised access as it is currently referred to, in place in a number of Canadian jurisdictions. Members also were interested in the interaction between divorce actions affecting children and provincial child protection systems.

A. Supervised Parenting Programs

Where there is reason to believe that an access visit, or parenting time, with a non-residential parent would be in the best interests of a child, but safety or other concerns preclude unsupervised access, the solution is often "supervised access", or what this Committee would prefer to call "supervised parenting". A number of witnesses cautioned that visits that take place under supervision in a community centre or other public facility, with other families and supervisors present, might be awkward and uncomfortable for both parent and child. However, the Committee is convinced that such access is often better than no access, and that supervised parenting programs are an essential component of our response to divorce. Parent-child relationships should not suffer merely because we do not have the resources or capacity to provide supervised parenting. Sally Bleecker, co-ordinator of the Ottawa Supervised Access Program, spoke of the importance of supervised access in facilitating parent-child contact that might otherwise not take place.

All over the world, children have relationships with parents who are less than perfect. Children have a deep attachment, as we know, to parents who they hope will be better. They live often in the hope, as we all do in relationships, and I really think these children benefit from some support to see if those relationships can improve in their lives. (Meeting #24)

The Ontario supervised access program was described by its co-ordinator, Judy Newman:

Supervised access centres, as envisioned by the Ministry of the Attorney General, provide a safe, neutral, child-focused setting for visits and exchanges between children and their non-custodial family members, which can include grandparents as well as parents. Supervised access provides integrity to orders of the court by providing a place for these visits and exchanges to take place, and it supplies, when requested, factual observation notes or reports to lawyers and the court to assist them in making orders regarding custody and access. Supervised access centres are not an assessment setting and they do not make recommendations regarding custody and access. They only provide factual observations and the setting for visits and exchanges to take place. The Ministry currently funds 15 centres on a transfer payment basis across the province of Ontario. In 1997 and 1998 they served 9,000 families and conducted 24,000 visits and exchanges. (Meeting #24)

Two aspects of supervised access raised most often by witnesses were the types of cases appropriate for supervised access and the absence or inadequate capacity of supervised access programs across the country. A number of witnesses talked about how to handle supervised access and the exchange of the child between the parents in domestic violence cases or other cases where the safety of the child or the custodial parent may be at risk.

Supervised access, especially supervision of the exchange of the child between parents, and the use of a neutral location for access should be mandatory in cases where there has been abuse of the custodial parent by the parent exercising access. ... The cost of supervision and the cost for the use of a suitable access location that meets the child's needs should be paid by the parent who has abused the other spouse. These recommendations related to supervision have the additional benefit of protecting the spouse who has been the victim of abuse from being subjected to further threats, intimidation and abuse. (Elaine Teofilovici, YWCA, Meeting #8)

Claire McNeil, of Dalhousie Legal Aid, told the Committee that although judges are ordering supervised access appropriately, there is no way to provide it, as there is no funding for a supervised access program in Halifax. In some cases, access may be supervised by family members or mutually agreed friends, but such supervisors are likely not appropriate where there are concerns about violence, substance abuse or other safety issues. Even in Ontario, where there are supervised access programs in most major centres, witnesses expressed concerns about inadequate resources, limited availability and the need to expand the program.

Recommendations

34. This Committee recommends that the federal, provincial and territorial governments work together to ensure the availability of supervised parenting programs to serve Canadians in every part of Canada.

35. This Committee recommends that the *Divorce Act* be amended to make explicit provision for the granting of supervised parenting orders where necessary to ensure continuing contact between a parent and a child in situations of transition, or where there is clear evidence that the child requires protection.

B. Interaction with the Child Protection System

The Committee's hearings demonstrated the complex interaction that can arise between private parenting disputes and the child protection system. Provincial and territorial child protection statutes govern cases where the state is called upon to intervene in families to safeguard the well-being of children. Each jurisdiction's statute prescribes the conditions under which a child is deemed "in need of protection", thus justifying action by a child protection agency or children's aid society. All statutes specify that the best interests of the child is the governing criterion for decisions. Another universal feature of child protection systems, as the Committee heard from witnesses, is the overwhelming caseloads of child protection workers because of insufficient resources. Child protection clearly calls for increased government attention and resources.

When the Committee considered the interaction between child protection systems and parenting disputes, among the issues raised was how allegations of abuse of children by a parent are investigated. Such allegations are usually reported to a child protection agency, and the ensuing investigation generally has a direct impact on the parenting arrangements in place at the time the results are reported. A number of witnesses argued that false allegations of abuse can be made by one parent hoping to gain an unfair advantage over the other parent in a custody and access dispute. In such cases it is imperative that parent-child relationships be maintained through supervised parenting. Witnesses described the devastating impact of false allegations, maliciously made, on innocent parents; many witnesses reported having endured such experiences personally. The area of sexual abuse of children is extremely complex, and the problem of false allegations of abuse is discussed later in this chapter (see also Recommendation 35).

When a family is involved in both custody/access proceedings and an investigation or action by a children's aid society, the interaction between the two systems can be difficult, sometimes to the point that one interferes with the other. Given the prevalence of separation and divorce, it is inevitable that a significant proportion of situations coming to the attention of child protection authorities will relate to children whose parents are separated, with or without parenting arrangements.

Such jurisdictional difficulties must not obscure the presence of risk factors that would justify child protection action. The Committee hopes that mechanisms can be developed to ensure that children will not fall through the cracks, escaping the attention of child protection authorities and being denied positive interventions because they are the subject of parenting disputes. Establishing or expanding unified family courts - or courts of a similar nature - across Canada could contribute to resolving this problem, in that cases involving both parenting and child protection would be handled by the same court.

In some cases child protection concerns arise in the course of a custody or access dispute and a child protection agency undertakes an investigation of the family. Occasionally this is conducted before or simultaneously with a custody and access assessment by a psychologist or social worker. As psychologist Rosalyn Golfman indicated to the Committee, the results of the agency's investigation are not always made available to the assessor.

Sometimes they'll let us review how they interviewed the child and sometimes they won't, and we don't know what it depends on. Often we have to get a subpoena from the court, which is a costly, lengthy process. So we'd also like to see some changes in that. If we're doing a comprehensive evaluation, we should be able to review what the child has actually said. (Meeting #22, Winnipeg)

Another key point is that parents who engage in protracted custody or access proceedings may be putting their children at risk, even to the point where the children are in need of protection. Witnesses who recommended amending provincial child protection law, including Heidi Polowin, Counsel to the Ottawa-Carleton Children's Aid Society, advocated expanding the definition of "in need of protection" to include children whose parents are engaged in protracted disputes with respect to custody. This recommendation was also made to a coroner's jury in the Kasonde case, an inquest into the death of two Ottawa children killed by their father, following an acrimonious custody and access dispute between the parents.⁶⁸

While the jury did not adopt that particular recommendation, it did recommend that the province of Ontario establish a bridging system between child welfare and child custody and access, to clarify the role of child protection agencies in situations like that of the Kasonde family. The jury also recommended that the grounds for finding a child in need of protection be expanded to include cases where the child is exposed to parental abuse, domestic violence, substance abuse, emotional abuse, or neglect that is likely to result in developmental delay or emotional or physical harm to the child.

Recommendation

36. This Committee recommends that the provincial and territorial governments require child protection agencies to provide disclosure of records of investigations to court-appointed assessors examining families who have been the subject of such investigations.

C. Research

Throughout the course of this study, the Committee repeatedly encountered the problem of inadequate or non-existent research on a variety of areas related to divorce, its impact on children, and other questions. When some of Members of this Committee attended the May 1998 Conference of the Association of Family and Conciliation Courts in Washington, D.C., we were impressed that in many U.S. jurisdictions, research on many of these vital issues is being conducted and is widely available to guide policy makers, legislators, judges and parents. The contrast with the Canadian situation seemed stark to many of us.

The Committee has identified the following specific areas that will require further study in the near future in Canada:

- false allegations of abuse and neglect;
- parental alienation;
- the behaviours, patterns and dynamics of domestic violence; and
- parental child abduction.

Members of the Committee were impressed with the scope and potential usefulness of the National Longitudinal Study on Children and Youth, but felt that its data should be expanded and used to investigate a larger list of questions dealing with the impact of separation and divorce on children, including

- the impact of continued contact with grandparents;
- the impact of losing contact with a parent;

- the well-being of children five or ten years after parenting arrangements are made, whether by consent or judicially imposed; and
- the impact on child well-being of an amicable settlement between the parents.

D. Domestic Violence

One of the most dangerous complicating factors in separation and divorce is domestic violence. This was among the most controversial topics presented at the Committee's hearings, and one that Members find most troubling. Witnesses differed about the incidence and nature of such violence - about whether men are more often the perpetrators and women more often the victims, about the incidence of violence instigated by women, about the severity of domestic violence and its relevance to parenting/decisions. Several matters are clear, however. Children who witness violence between their parents are affected negatively. Where there is violence between the parents, the risk of escalation at the time of separation is high and poses real safety concerns for both parent and child. The presence or risk of violence is unarguably relevant to decisions about parenting arrangements. This is a problem that affects a minority of divorcing couples and unmarried separating couples.

Dr. Donald Dutton, a research psychologist who testified before the Committee in Vancouver, has studied violence in intimate relationships for a decade or more. He reminded the Committee that research shows that the majority, 75%, of men are not violent in intimate relationships. Some of his research findings relate to people not concerned with the *Divorce Act* (such as common-law couples), but he did present the following conclusions about violence linked to parenting disputes:

In terms of how this ties into issues around custody and divorce, I have from time to time served as an expert witness in custody matters, divorce matters, where there have been allegations of abuse. In my opinion, these cases really have to be taken on a case-by-case basis.

From looking at our research, the best model obviously is an intact family, but that's assuming two non-abusive parents. If you don't have that, if you have one abusive parent, then it seems to me that the child should then reside with the non-abusive parent. The issue then becomes whether the abusive parent's abusiveness will be played out on the child or is specific to the relationship with the spouse. The research seems to indicate that both can happen. For that reason, again, I think one has to adopt a case-by-case approach to these matters. Trying to be formulaic in terms of gender issues etc., really just does not work. (Meeting #27, Vancouver)

The controversies about domestic violence are many. There is debate about the definition of family violence, its extent, the usefulness of police assault statistics, the profiles of abusers and victims, and the validity of the key tools for measuring violence. While the focus is often on violence between the adult members of the family, there is also concern about abuse of children and elders. Custody and access law has always recognized the relevance of violence or other abuse of the child in decisions about custody and access. For a long time, however, violence between parents, such as one spouse physically assaulting the other, was assumed not to have a direct bearing on the parenting abilities of the assaultive spouse. It was not considered relevant, therefore, to custody and access decisions. With relatively recent mental health research establishing a clear link between spousal violence and child well-being, the courts have begun to recognize the relevance of such conduct for decisions about parenting.

The Committee heard contradictory messages from a variety of witnesses, including academics, mental health professionals, men's and women's advocates, and others. Many argued that family violence is a gendered problem, in that most perpetrators are male and most victims female. Supporting this argument are family violence data from Statistics Canada, including the controversial 1993 Survey on Violence Against Women; police statistics, including those from specialized family violence courts in Winnipeg and Ontario; and administrative data from shelters for women who have been victims of wife assault. In contrast, a number of

witnesses argued, on the basis of recent general population surveys, including work by U.S. sociologist Murray Strauss, followed up in Canada by sociologist Reena Sommer, that men and women commit roughly equal numbers of violent acts in relationships.⁶⁹

The evidence the Committee received reflected these competing schools of thought. For example, Jane Ursel, sociologist with the Winnipeg Family Violence Court, provided data on the caseload before that court:

In the three-year time period that I have the data for you today, there were 5,674 cases of spousal abuse. The court indicates that 92% of the convicted offenders were male and 89% of the victims of those offences were female. ... 562 convictions [for child abuse] in the same time period; 89% of the accused were male and 76% of the victims were female, with the [remaining victims being] male and female children. In the case of elder abuse, 91% of the accused were male and 81% of the victims were female. (Meeting #22, Winnipeg)

The latest data from Statistics Canada, which are based on police statistics, show that in 1996, 11% of victims of domestic violence were male, while the large majority (89%) were female.⁷⁰ Men were also more likely than women to kill their spouses.⁷¹ The strongest predictors of wife assault are the young age of the couple, living in a common-law relationship, chronic unemployment of the male partner, parties who witnessed abuse as children, and the presence of emotional abuse in the relationship.

Witnesses from the shelter movement stressed the prevalence of abuse of women and the need to assure the safety of abused women and their children, particularly at the time of separation.

In woman abuse situations, the time of separation is particularly dangerous. As part of the abuser's pattern of control and domination, their victims have usually been told for years that if they ever dare to leave, they, their children, or their families will be seriously hurt or killed. The resulting fear for women is well-founded. (Bina Ostoff, Counsellor Advocate, London Battered Women Advisory Centre, London Coordinating Committee to End Women Abuse, Meeting #14, Toronto)

Most witnesses advocating appropriate responses to violence against women were not suggesting that all family violence is against women, or that men are never assaulted by their spouses. For example, Gary Austin of the London Family Court Clinic recognized the potential for men to be the victims of family violence, but he stressed that the problem of violence against women is more prevalent and serious, both in the nature of the violence and because women are more likely to be financially dependent on men.

Extensive research across North America indicates that 90% of family violence is directed at women and children. We do not condone violence against men and recognize that there are a number of divorces in which women have been the perpetrators of emotional and psychological abuse on men. This form of violence may be under-reported and should lead to comparable remedies [to those] described in this paper if found to be valid. However, violence against women is still a major problem in marital relationships, with significantly more women facing death and serious injury, and with violence by men representing an overall pattern of control and domination in the relationship. (Meeting #18)

Information about female violence is available in anecdotal form, as well as in the results of general population surveys using the Conflict Tactics Scale (CTS), developed by Murray Strauss.⁷² That scale was used in Statistics Canada's 1993 Violence Against Women Survey, which was cited by a number of witnesses. They quoted its major finding that 29% of currently or formerly married women had experienced some form of domestic violence. Some Committee Members noted that the same 1993 study reported that the vast majority of women - 97% - had not experienced abuse the year before. The study reported that "Three percent of women

were assaulted by their partner in the 12 months prior to the survey."⁷³ However, the Violence Against Women Survey has been criticized because it applied the CTS only to women and did not ask men about their experiences of violence perpetrated by women. Some Committee Members noted Dr. Murray Strauss's concern about inadequate use of his methodology, the CTS, in the 1993 Statistics Canada survey, quoting Dr. Strauss as having noted the omission of questions about women assaulting men:

That is what the Canadian National Survey of Violence Against Women did. They used the techniques which I developed, the Conflict Tactics Scale. But they left out the half of it which asks about violence by women, so they wouldn't be left with politically embarrassing data. (Meeting #14, Toronto)

Manitoba sociologist Reena Sommer told the Committee about her research focusing on perpetrators of spousal abuse in the general population. She emphasized that her data should not be confused or interchanged with data from the Family Violence Court or other police data. Her research includes types of abuse that might not appear in police statistics, such as emotional abuse.

It tends not to be physical, but when it is, it also tends to be reciprocal, and it is not serious enough to require medical attention. That is why most of the people who report to the general population surveys do not show up in the crime statistics: they don't seek help. (Meeting #22)

Including this expanded range of abusive conduct, which goes beyond that generally found in criminal courts and women's shelters, Reena Sommer concludes:

The results of my research have found there are no significant differences between the rates of abuse perpetrated by males and females. They're basically equivalent. That's not to say one is more injured or less injured than the other. I'm just saying there are as many men as there are women who perpetrate abuse against their partners. (Meeting #22)

Jane Ursel offered this explanation for differences between data from the Family Violence Court and data provided by Reena Sommer:

I think that where the difference might lie is that Dr. Sommer is dealing with conflict in a relationship. Studies have been done-I know this has been much discussed at this particular table in another city-such as the Canadian study on violence against women that was done in 1993, where there was an attempt to measure degrees of violence. I would certainly agree that many couples, both members, may have difficulty resolving conflict and may choose strategies that are certainly [less than] optimal. But I believe that when we come to measuring the actual degree of physical harm, there is a difference in assaults of men against women. The magnitude of harm that can be caused typically is greater when it is a male assailant upon a female victim. (Meeting #22)

This distinction between conflict in relationships and domestic violence of a criminal nature is likely the key to understanding the different patterns detected in the data cited. More empirical research would permit a better understanding of the problem of violence in relationships, but Members nevertheless underline their view that when violence in the home puts children at risk, action is called for, regardless of which parent is the aggressor.

Violence against men clearly does occur. The Committee heard testimony from several male witnesses alleging abuse by a spouse. Lyn Barrett, of the Cumberland County Transition House Association, indicated that the transition house offers programs for men as well as women. In the last year, she stated, 110 women had sought help, while only 5 men had done so, 2 of whom were in same-sex relationships. She explained:

We don't ever see men who are suffering the same degree of violence that we see women suffering, and we never see the numbers. That isn't to say that the numbers of men out there who have never come forward because they're embarrassed or whatever don't exist, but we also know that we only touch the tip of the iceberg for women. There's this long history where women could not get help, and that's what we are all here to recognize and support. (Meeting #30, Halifax)

Because of the existence of violence against men, the Committee would not recommend that family law or divorce legislation employ a gender-specific definition of family violence.

Having heard and considered carefully witnesses' evidence on domestic violence, the Committee recognizes that there are compelling reasons for further research into family violence, its incidence, causes, potential preventive measures, and measures to reduce negative effects and protect family members. Some Committee Members noted that insufficient testimony had been presented to the Committee about the actual incidence and role of domestic violence in separation and divorce proceedings. For purposes of this study, however, the most important is research into the effects on children of witnessing violence. This evidence is less equivocal, and the Committee urges all governments to consider it carefully and ensure that the legislation requires that legal and mental health professionals participating in the development of parenting plans do so as well in relevant cases.

Reporting on the work of Peter Jaffe and others at the London Family Court Clinic, psychologist Gary Austin told the Committee that the vast majority of children living in households where there is domestic violence are aware of the violence and are affected negatively by it. There is a link between spousal abuse and child abuse, in that children who live with a violent parent are at greater than average risk of being the direct targets of abuse. Even when there is no direct abuse, witnessing a parent being abused is as harmful to the child as direct abuse.⁷⁴

One of the most significant developments in recent years in the field of family violence is the recognition that children who witness or are exposed to domestic violence are affected in a variety of ways. In fact witnessing violence is a form of psychological or emotional abuse that can leave the same adjustment problems as the direct experience of physical or sexual abuse. (Meeting #18)

Several witnesses, including Dr. Austin, recommended legislative action based on the literature establishing the harmful impact on children of witnessing domestic violence. Most of these witnesses advocated amendments to the *Divorce Act* and provincial family law to make domestic violence expressly relevant to custody/access decisions and a matter that must be considered by the judge. In addition, there should be a presumption that parents who have abused their spouses should not be considered for custody, joint custody, or liberal or unsupervised access. Gary Austin cited a model code developed by the U.S. National Council of Juvenile and Family Court Judges in 1994:

In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of the family violence. (Meeting #18)

As Dr. Austin pointed out, "No gender is implied."

E. Parental Child Abduction

Abduction of a child by a parent is frightening for both the child and the other parent. Where return of the child does not occur, the impact can be devastating.

In 1988 the federal government established the RCMP Missing Children's Registry. As described by Sgt. John Oliver, the Registry is "an internationally recognized law enforcement program devoted to the search and recovery of children." (Meeting #24) The Registry handles approximately 60 new cases each month, a proportion of which are suspected abductions by parents. Sgt. Oliver stressed the danger to abducted children, reminding the Committee that even children in the care of a parent may be at grave risk. He argued that a crucial tool to deal with both international and domestic child abduction is a national registry of custody and access orders. This is one reason for the Committee's recommendation for a registry of shared parenting orders (see Recommendation 20).

Sections 282 and 283 of the *Criminal Code* are available to prosecute parents who abduct children within Canada in contravention of a custody order. However, there is no similar provision dealing with access orders. For the civil enforcement of custody or access orders, parents must rely on the provinces' reciprocal enforcement legislation, and the process can be cumbersome, expensive and awkward for parents living far from the province to which the abducting parent has fled with the child. Alex Weir, of Child Find Alberta, told the Committee that obtaining the return of a child abducted within Canada is more difficult than securing the return of a child taken to a Hague-signatory country; he recommended that the provinces adopt provisions similar to the Hague Convention to facilitate and expedite the return of children to the province from which they were abducted. The definition of and appropriate response to parental child abduction within Canada require further study. With the recommended transition to a shared parenting regime, the distinction between custody and access should be softened, and sections 282 and 283 of the *Criminal Code* may have to be modified accordingly.

Gar Pardy, the official at Foreign Affairs and International Trade Canada responsible for helping families whose children have been abducted and removed from Canada, made a practical suggestion to facilitate the interprovincial return of abducted children:

When warrants are issued, one thing we would encourage is police jurisdiction to make them national. In many instances, when a warrant is issued for somebody's arrest they are very limited geographically. Sometimes it's very frustrating, because you try to take the fact of a warrant and use it but it doesn't necessarily have any application in a foreign jurisdiction. In a foreign jurisdiction they look at an arrest warrant and say, well, it's only valid for the city of Mississauga. So it's not very influential. (Meeting #24)

Related to the problem of parental child abduction is the unilateral removal of a child from the family home by one parent. Such a move is not considered child abduction in the criminal sense if the parent left behind had no court-imposed custodial rights. In most provinces, current family law provides that such a move disrupts the statutory right of parents prior to separation to shared custodial rights in respect of their children. Nonetheless, unilateral moves of this nature by parents have not generally given rise to remedies in favour of the parent left behind, unless that parent has acted extremely quickly to secure the return of the child through the courts. In some cases, the fleeing parent has been able to rely on the ensuing period of sole care and control of the child as a basis for a sole custody order in his or her favour. The Committee is agreed that this practice, and any resulting litigation advantage, ought to be severely curtailed and discouraged.

The problem of international child abduction was studied recently by the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade. That Committee's report, *International Child Abduction: Issues for Reform* responds to many of the issues raised by witnesses before this Committee. In November 1998, the *Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade* was released. In that report, all but three of the Sub-Committee's recommendations were accepted. The Government Response provides the Sub-Committee with a detailed response to the recommendations they made, and was very helpful to this

Committee as well. This Committee did not restrict its inquiry to international child abduction, however.

International child abductions are dealt with mainly under the *Hague Convention on the Civil Aspects of Child Abduction*. This Convention sets out straightforward procedures for securing the return of a child abducted from one Hague-signatory country to another. The custody and access order of the original jurisdiction is enforced. Gar Pardy told the Committee that marital breakdown and close family ties in another country are two of the characteristics of cases in which he is involved. He discussed the operation of the Hague Convention and recommended that Canada initiate negotiations to revise the Convention to encourage more countries to sign on. Currently, abductions to non-Hague countries are virtually impossible to resolve, although officials are often able to secure the co-operation of the other country in providing information about the child's location and well-being.

International Social Services Canada offers some assistance to abducted children and their families, even where the child is taken to a non-Hague country. Using a large international network, ISS social workers attempt to facilitate assessment of a child's well-being in the new location, or mediation between the parents. The agency is present in approximately 120 countries. They also provide assistance in custody and access cases that cross international borders.

The Sub-Committee on Human Rights and International Development made a number of recommendations related to passports and travel documents. They asked the Passport Office to review existing measures for processing passport applications for children and examine options to strengthen such measures. In the Government Response, it is pointed out that currently parents can apply either to have a separate passport issued to a child, or to have a child's name added to the passport of either parent. If the parents have separated, only the custodial parent can apply for passport services for a child, and in all cases, the consent of both parents is required. The government indicates that it does not currently plan to require all applicants to obtain individual passports for their children: indeed, such a passport could make abduction easier, if an abducting parent were to obtain possession of it.

Canada has indicated to the International Civil Aviation Organization (ICAO) that it is looking into technology that would allow a dependent child's identifying information and photograph to be printed onto a parent's passport. This type of measure could ensure that children being taken across international boundaries where passports are required are correctly identified. Such passport photographs, should they come to be required, should be updated more regularly than the five-year cycle required for adults, as children's physical appearance changes more rapidly than that of adults. It is the Committee's view that measures to improve the identification of children in passports should be pursued, and that the possibility of insisting on individual passports for all children should be considered further.

Recommendations

37. This Committee recommends that the attorneys general of Canada and the provinces, along with police forces and police organizations, ensure that all warrants in child abduction matters provide expressly that their application and enforcement are national.

38. This Committee recommends that the Attorney General of Canada work to develop a co-ordinated national response to the problem of child abduction within Canada.

39. This Committee recommends that the unilateral removal of a child from the family home without suitable arrangements for contact between the child and the other parent be recognized as contrary to the best interests of the child, except in an emergency.

40. This Committee recommends that a parent who has unilaterally removed a child not be permitted to rely on the resulting period of sole care and control of the child, of whatever duration, as the basis for a sole parenting order.

41. This Committee recommends that the federal government implement the recommendations of the Sub-Committee on Human Rights and International Development of the House of Commons Standing Committee on Foreign Affairs and International Trade entitled *International Child Abduction: Issues for Reform*.

42. This Committee recommends that the Minister of Foreign Affairs and the Passport Office continue to examine ways to improve the identification of minor children in travel documents and consider further the advisability of requiring that all children be issued individual passports.

F. False Allegations of Abuse or Neglect

At the last appeal, the judge apologized to me, saying `This poor father. What have we done to him?' What did they do? What did this justice system do to me? I haven't seen my children for now going on nine years... these false allegations do a lot of things to you. The hurt's there. It's like someone ripping your heart out. It will never go away, as some people have told you. You can make as many recommendations as you want, but the scars are here. They're with me until the day I die. My kids? I have to ask friends what they look like. (Kim Cummins, Meeting #20, Calgary)

Individual fathers relating their personal experiences and men's groups from across Canada testified that a tactic used by some parents and their lawyers, in an effort to deny parenting time to the non-residential parent (usually the father), is false allegations of physical or sexual abuse or neglect. These witnesses testified that this is a major problem that not only leads to denial of parenting time but also contributes to estrangement and alienation between fathers and their children. In some cases this estrangement becomes permanent. Estrangement may be avoided by maintaining contact between parent and child through supervised parenting (see Recommendation 35).

Several witnesses referred to the court decision in the case of Reverend Dorian Baxter, who appeared before this Committee in Toronto. The decision quoted the trial testimony of Barbara Chisholm, an experienced professional in the field of child abuse, who also appeared before the Committee in Toronto:

Ms Chisholm indicated that the experience has been for some time that sexual assault allegations made by the mother against a father in custody disputes are prevalent nowadays and indeed have become what she called the "weapon of choice."⁷⁵

In situations where allegations are made, the father faces the difficult if not impossible task of trying to disprove something that may not have happened.

The problem is that it's never disproven. It's very difficult. That's the Catch-22. It's not provable, but it really stays on the record as something that happened. It's like where there's smoke, there's fire, so something must be happening. (Dory Gospodaric, Second Spouses of Canada, Meeting #13, Toronto)

This takes time and money, and the Committee heard many painful stories from fathers who had lost contact with their children for extended periods of time. In several cases, contact was never restored.

Let me tell you the story of this necklace. Ten years ago I made a commitment to my daughter that on her twenty-first birthday I would give her a pearl necklace. About a month ago I went shopping for this necklace. The sales assistant inquired who it was for and what she liked to wear. I told it was for my daughter's twenty-first birthday but I couldn't tell her what she generally wore or how she liked to dress. After selecting the necklace, the sales assistant stated that it was very beautiful and that my daughter was very lucky, and that she was sure my daughter would like it very much. I just said, 'I probably will never know. I haven't had any communication with her in over seven years.' (Stan Gal, Meeting #13, Toronto)

Witnesses, including individuals, lawyers and other professionals, identified several ways that false allegations can be introduced into the legal system when parents are in conflict over their children. Allegations of abuse or neglect are often made to a child protection agency, or they are introduced through affidavits and pleadings submitted by the lawyer of the parent making the allegation. False allegations can also take the form of perjury in sworn written and oral testimony.

In a submission to the Committee from Parents Helping Parents, a Winnipeg organization established by Louise Malenfant to help parents experiencing family law problems, she reported that there has been a problem with the over-validation of false allegations of sexual abuse arising in divorce cases in Manitoba.

The problem of false allegations during divorce proceedings was extensive in Manitoba, as it was acknowledged by the CEO of the Child and Family Services in Manitoba that 25% of all investigations arose during divorce proceedings. In June of 1996, executive at Winnipeg CFS also admitted that only 15% of allegations made in divorce cases were likely true. (Meeting #22)

Heidi Polowin, Director of Legal Services for the Children's Aid Society (CAS) of Ottawa-Carleton gave the Committee the "rough statistic" that three of every five cases of alleged abuse the CAS investigates involve custody and access, and of those three, two are found to be unsubstantiated. Ms. Polowin noted that reports to the CAS are made by neighbours, doctors, teachers, and other relatives, as well as parents, and she was careful to note that "unsubstantiated" does not necessarily mean that an allegation is false: it means that the CAS was unable to verify the claim for any one of a variety of reasons.

I wouldn't want to suggest that when we say two out of the three allegations are not substantiated, we're saying they're false allegations. We're saying that we can't substantiate the allegations. They are two different things. I think that when you use the words "false allegations", there's an intentional element there. And that isn't always there. Sometimes the allegations just cannot be substantiated by us. (Meeting #24)

Following on Ms. Polowin's point that not all unsubstantiated allegations are false, the mental health literature contains many articles providing conflicting data about rates of false allegations in cases reported to child welfare and protection agencies.

The complexity of investigating and proving allegations of child sexual abuse was alluded to by Rosalyn Golfman, a psychologist who testified on behalf of a group of psychologists and social workers who do private custody/access assessments and specialize in cases involving allegations of child sexual abuse.

With regard to allegations of sexual abuse, particularly in young children under the age of five, we have found a relatively small but significant number of false allegations of sexual abuse following the dissolution of a relationship. False allegations may occur in highly conflictual separating couples. It is our collective experience that parents and children may misinterpret or may have distorted or

misinformed perceptions of the child's relationship to the ex-partner. Young children are highly susceptible to false memories and inaccurate reporting when they are asked repeated questions and when they are retelling the story many times, when they're asked leading questions. Also, one parent's anxiety regarding the abuse may subtly affect the child's accurate reporting abilities. That's the most significant point, really. It's quite subtle. Parents may observe behaviours in their children that could indicate sexual abuse, but frequently these same behaviours could also be explained by the aspects of a conflictual relationship or the trauma of separation. Often these resemble post-traumatic stress disorder. (Meeting #22, Winnipeg)

Some of the debate focuses on the question of children's ability and tendency to lie about such serious matters. For a long time, many practitioners argued that children were incapable of lying in these situations, or at least that it was unlikely that they would lie about abuse. Therefore, any comment suggesting that abuse had occurred could be seen as sufficient reason to justify reporting suspected abuse.

In 1984, Berliner and Barbieri reported that "there is little or no evidence indicating that children's reports are unreliable, and none at all to support fear that children often make false accusations of sexual assault or misunderstand innocent behavior by adults."⁷⁶ In another study, Dziech and Schudson concluded: "Children do not commonly make false claims of being sexually abused. Underreporting and denial are far more common... The adult notion that children lie about sexual abuse is illogical to those who have studied them."⁷⁷

More recently, however, other studies have concluded that children may say whatever is expected of them by people they love, especially when asked repeatedly to talk about a difficult problem. Ceci and Bruck wrote in 1993, "children can be led to make false or inaccurate reports about very crucial, personally experienced, central events."⁷⁸ The factors that might influence children's reporting of difficult experiences are complex, contributing to the inherent difficulty of investigating reported child abuse, especially sexual abuse.

In a comprehensive review of research studies investigating the frequency of allegations of sexual abuse, Judith Adams reported: "The context in which the allegations arose appears to be critical. Call (1994) reviewed 7 studies of the rate of allegations of sexual abuse arising in divorce cases and found that the rates ranged from 15% to 79%. Ceci and Bruck (1995) cite several studies of allegations of sexual abuse arising in divorce cases, in which rates fall conservatively in the range of from 23% to 35%."⁷⁹ Allegations made by children are often made to custodial parents, who are responsible for determining whether to report the matter, ask that it be investigated, or otherwise intervene to protect the child. Not surprisingly, this area becomes even more difficult during separation or divorce proceedings.

In a 1994 article about alleged child sexual abuse in custody and access disputes, lawyer Lise Helene Zarb reported that child sexual abuse is pervasive in Canadian society, while its exact extent is unknown.⁸⁰ She discussed the disadvantages to the parent who makes a false allegation of abuse, including potential liability for failing to protect the child and the risk of jeopardizing custodial rights if found to be an "unfriendly parent", in addition to extra hassle and legal expense. Problems for the courts are also serious, Zarb concluded, in that there are no guidelines for judges assessing such allegations or legislative guidance about the amount or type of access that should be given.

In a paper submitted to the Committee in June 1998, Professor Nick Bala reviewed the difficulties inherent in researching false allegations of abuse.⁸¹ The proportion of abuse allegations that are false varies over time and is exceedingly difficult to quantify in a useful way. As Professor Bala points out, a common defence of genuinely abusive men is to dismiss their partners' allegations as deliberate fabrications, or to attribute children's expressed fears about access visits to their mothers' alienating behaviour. Most important, the societal problem of male abusers denying abuse is more serious than the problem of women exaggerating or falsifying claims of abuse. Each case must be dealt with on its own facts, and judges will often be assisted by expert evidence to distinguish

between false allegations and those with some foundation.

Whatever the actual number, false allegations cause grief and pain for the accused parent. The Committee heard testimony from many fathers who had been the subject of accusations that were not substantiated and who had been ruined financially, socially, and emotionally.

These false allegations place all the onus on the accused, whose life instantly becomes destroyed psychologically, economically and socially, and creates an immediate severance of the accused parent from further contact with their children, and that was the purpose of the false allegation in the first place. It allows the game to be played and the game is very effective. I want again to play a positive part in the lives of our children. One false allegation has destroyed that possibility and I'm not hopeful that I'll be re-united with our children. (Larry Shaak, Meeting #21, Regina)

Other fathers who testified added their own observations about the painful consequences of false allegations made deliberately or maliciously by their former spouses. Tony McIntyre, of Men Supporting Men Inc., described his experiences helping such men in British Columbia.

We have heard accounts of men who feel helpless in the face of unproven allegations made against them. It appears that the simple fact these allegations are made by a woman against a man is enough for social service workers and legal professionals to give the benefit of the doubt to the woman and act against the man as if the allegations were already proven. This kind of frustration coming on the heels of grief and loss of close relationships and the pain of being separated from children often leads to the rapid unravelling of many areas of a man's life. They cannot function properly at work and so may lose their jobs. Without money they lose much of their ability to access the legal system. They then approach the agencies as a last resort, agencies designed to help people in this predicament, only to be met with closed doors and cold shoulders. ... There is no greater violence to a decent person's character than false allegations of sex abuse against children. Consequences for the individual can be devastating while they set out to prove their innocence. (Meeting #19, Vancouver)

Witnesses who raised the problem of malicious allegations of abuse suggested that the current system of investigating such complaints is inadequate and adds to the severity of the problem. These witnesses were concerned that in some extreme situations, some parents might be counselled by lawyers or other professionals to make a false allegation as a way of promoting their case for restrictions on the other parent.

My position is that assessments are being used to deprive children of meaningful relationships with both parents. They're being misused. They're being informed by a political attitude that sees a woman's word as much stronger than a man's; that on the basis of an accusation a man cannot clear himself. It doesn't matter if he passes a psychological assessment, a lie detector test, or even a penile measure for child abuse. He could still be on a child abuse register and prevented from seeing his children, except under the most rigorously supervised conditions, when he has done nothing wrong. I'm well aware that abuse exists. In 15 years of consulting with the Children's Aid Society, I know that children are abused sexually, physically, emotionally. That's why I feel it is so important not to give credence to false allegations, especially when children's lives and futures are at stake. (Marty McKay, Clinical Psychologist, Meeting #13, Toronto)

Other witnesses suggested creating a criminal offence of making intentional false allegations of child abuse. Reverend Dorian Baxter, of the National Association for Public and Private Accountability, offered the following recommendation:

[Because of the devastating personal and financial repercussions for the falsely accused] I think

there needs to be some way of checking and balancing what the present social services have to offer. I see that as being a civilian child protection or welfare review board made up of well-to-do people, professional people, who are well respected and are prepared to give of their time to determine whether this has any merit. (Meeting #14, Toronto)

Unwarranted allegations by one parent against another must be discouraged. At the same time however, many Committee Members were concerned that any changes introduced to discourage false allegations must not limit, interfere with or restrict the voicing of legitimate concerns for a child's safety, even if they were subsequently shown to be unsubstantiated. Members of this Committee hope that reducing conflict in divorce will reduce the incidence of intentional false allegations. Among the most promising mechanisms for reducing conflict is parenting education during the divorce process. Such programs offer parents concrete skills for use in post-separation negotiations about the children and ensure that all are fully informed about the harm caused by unwarranted allegation of abuse.

While the Committee is convinced that the safety of children must be the principal consideration, Members believe that a legal remedy should also be available to deal with false allegations of abuse. Some members also suggested that the incidence of false allegations in custody/access conflicts warrants a thorough exploration of how affidavits are taken in family law, how pleadings are made, and how solicitor-client privilege may let counselling to make false allegations go undetected.

A number of governments in the United States have enacted legal prohibitions on the false reporting of child abuse or neglect. Statutes in 22 states and the District of Columbia set out penalties for false reports, usually false reports made "knowingly" or "willfully".⁸² Penalties take the form of fines or imprisonment in most cases. Similar penalties can be imposed in all states on those who knowingly or intentionally fail to report suspected child abuse or neglect.

G. Action on Perjury in Civil Courts

In describing their personal custody and access experiences, a number of witnesses alleged that the other party to their dispute had either sworn a false affidavit or been untruthful in giving evidence. Family law disputes, particularly those related to custody and access, tend to turn on the credibility of the parties, who are often the key witnesses. Even the most truthful parties have their own unique perception of events during and after a marriage. Judges often have a difficult time sorting out which version of events to accept, especially if all the evidence is in the form of affidavits. Often judges will be unable or unwilling to make precise determinations about which party is telling the truth about each and every matter raised, but will draw general conclusions about which evidence is preferred.

Witnesses stressed the damage inflicted on already strained family relationships in cases where the parties' evidence contains inflammatory untruths about each other. To the extent that there is a public perception that lying in family law matters is accepted, or at least not challenged, there is damage to the credibility and reputation of the family law system and the courts. Deborah Powell, representing Fathers Are Capable Too, cited a speech by Justice Mary Lou Benotto on ethics and family law, in which she referred to a comment in the first report of the Ontario Civil Justice Review, to the effect that

the single greatest complaint about lawyers by members of the public was with respect to the damage to family relationships caused by the allegations in these affidavits - where, it is widely acknowledged, perjury is rampant and, moreover, goes unpunished. (Meeting #7)

Indeed, there may be family law cases in which false testimony should be challenged. The Committee recognizes that knowingly making a false statement under oath or by affidavit is an indictable offence under the *Criminal*

*Code.*⁸³ The elements of the offence include the falseness of the statement, that the accused person knew it was false, and that the accused person intended to mislead. These elements demonstrate that only very deliberate, clear falsehoods are susceptible to challenge using the *Criminal Code* offence of perjury. One party's perception of dishonesty will not always justify a finding of perjury, however. Indeed, differing versions of events are the rule, not the exception, in family law, given the nature of the proceedings, the degree of acrimony between the parties, and the fact that most incidents were observed only by the parties to the action.

In addition to the *Criminal Code* offence of perjury, two other Code provisions have potential application to false allegations of abuse or neglect. These are the sections dealing with public mischief and obstruction of justice. Section 140 of the Code provides that the offence of public mischief is committed when someone causes a police officer to initiate or continue an investigation by making a false statement accusing another person of committing an offence. Section 139 makes it an offence to attempt wilfully to obstruct justice in any manner.

Both offences might have application to deliberate false allegations of abuse or neglect, as might sections 131 and 132 dealing with perjury. In the Committee's view, the efficacy of these provisions in dealing with false allegations should be studied by the Minister of Justice. This examination should determine whether the three current provisions are sufficient to deal with the problem of false allegations of abuse or neglect, whether their effectiveness might be enhanced by adopting a new charging policy, or whether a new, more specific provision is required.

Recommendation

43. This Committee recommends that, to deal with intentional false accusations of abuse or neglect, the federal government assess the adequacy of the *Criminal Code* in dealing with false statements in family law matters and develop policies to promote action on clear cases of mischief, obstruction of justice or perjury.

H. Parental Estrangement and Parental Alienation

A number of witnesses testified about how they became estranged from their children after divorce. Most of these situations were described by fathers, but some grandparents and a few mothers gave details about how a relationship with a child had been interfered with in the course of a dispute between the parents after divorce. One young woman from Vancouver told the Committee a wrenching story about how she and her brother had become estranged from their mother after their father removed them from her care. This young adult described how negative stories about her mother were told over and over again until she and her brother began to believe them.

In some of the situations, one parent made false allegations to police, child protection agencies, or the courts as a way to keep the other parent from having time with a child. In other situations, one parent poisoned the child's mind against the other parent by implying that the other parent was dangerous. In such cases, the child often becomes distrustful of the other parent and asks that time with that parent be restricted or even that all contact cease. Members of the Committee were struck by the pain created by these situations for both the child and the estranged parent.

Other witnesses who described estrangement from their children suggested that they were struggling against parental alienation syndrome. These witnesses referred the Committee to research by a U.S. child psychiatrist, Dr. Richard Gardner, who defines parental alienation syndrome as a pattern in which one parent, deliberately or otherwise, alienates the children from the other parent. Some witnesses referred to this as a psychological syndrome; others called it a symptom or disorder.

Mental health professionals have used the term parental alienation for many years, but it was Dr. Richard Gardner who brought the term to public attention and proposed that it be considered a syndrome. In his book, *The Parental Alienation Syndrome*, Gardner defines parental alienation as "a relationship disturbance in which the children are not merely systematically and consciously brainwashed, but are also subconsciously and unconsciously programmed by one parent against the other."⁸⁴ Gardner claimed further that this syndrome occurs to some degree in 90% of custody conflicts.⁸⁵

This statistic, in particular, has resulted in a great deal of debate in the legal and mental health communities. Few question that parents may attempt to alienate their children from the other parent, but many professionals doubt that it occurs as often as Gardner suggests. Other critics believe that Gardner's work is being used to argue that any child who wishes to sever a relationship with a non-residential parent, or at least reduce contact time, must have been alienated deliberately by the custodial parent. These critics argue that there may be other valid explanations for the estrangement of a child from a parent that could be obscured by misapplying Gardner's theories.

As Peter Jaffe and Robert Geffner caution, professional recognition of a 'parental alienation syndrome' could prevent the evaluation of each case on its own merits, obscuring the real problem between a parent and child, possibly to the detriment of the child.⁸⁶ This is particularly worrisome in the light of research demonstrating that

Many judges, police officers, social workers and mental health professionals who do not have much specific training in the area of domestic violence and child maltreatment are more likely than those with such training to believe that many false allegations of sexual abuse are made in divorce cases.⁸⁷

If a child discloses abuse by the non-residential parent, the parent who acts on this information risks being seen as raising the allegation in an attempt to alienate the child from the other parent. Jaffe and Geffner point out that Richard Gardner raised this same caution himself:

Even Gardner (1996), who coined the term *parental alienation syndrome*, has raised concerns about the abuse of this diagnosis and the danger of professionals being premature in their assessment and custody plans.⁸⁸

There is a link between the issues of false allegations of abuse and parental alienation. Some argue that false allegations against a non-residential parent indicate that the other parent is engaging in parental alienation. The incidence of false allegations made willfully in the context of custody and access conflicts is widely disputed. Many witnesses testified that it was a common occurrence. The social science literature largely fails to support that contention. Thoennes and Tjaden investigated 9,000 divorce cases and found that less than 2% involved allegations of abuse. Interestingly, this study also showed that of these allegations, 48% were brought by mothers against fathers, 30% were brought by fathers against mothers and their new partners, and 22% were brought by third parties against mothers or fathers.⁸⁹

Witnesses argued that false allegations of abuse are a symptom of high-conflict divorces, but it is not clear from the literature that such allegations are made more frequently in the context of custody and access disputes than at other times. Jon Conte wrote in 1992: "As of the writing of this article, I am not aware of a single empirical study that has documented that in fact false cases of sexual abuse are more likely to arise in divorce/custody cases."⁹⁰

As a result of criticism of his research and the possible over-application of parental alienation syndrome in the United States, Dr. Gardner published an *Addendum* to his book in 1996.

I have seen reports of mental health professionals dealing with mild and moderate cases of PAS as if they were severe, injudiciously and erroneously, then transferring custody to the father, and even putting the mother in jail whose levels of indoctrination are minimal and might even be reversed once they had the reassurance that they would remain the primary custodial parent. I have seen cases in which the courts and mental health professionals have assessed PAS on the basis of the mother's indoctrination, and not the degree to which the programming process has been successful in the child. In such cases the children may have exhibited only mild PAS manifestations, but the mother was treated as if the children were in the severe category and therefore deprived of custody.⁹¹

In addition to the personal stories of fathers, the Committee heard testimony from two Canadian researchers on the subject of parental alienation. Professor Glenn Cartwright of McGill University argued that Dr. Gardner's statistics provide an accurate picture of what happens in many divorced families.

Parental alienation syndrome is extremely serious, and I'm using very strong language here. It's nothing less than the symbolic killing of the non-custodial parent in the life of the child. It not only kills the non-custodial parent; it kills the grandparents and the aunts, the uncles, the friends and so on. One half of the child's family disappears from view and the child is not able to grieve that loss. (Glenn Cartwright, McGill University, Meeting #16, Montréal)

Pamela Stuart-Mills, of the Parental Alienation Information Network, referred to children who are alienated from a parent as "children of the lie", because they are prevented from understanding the real reason for the excluded parent's absence from their lives. Ms. Stuart-Mills also pointed out that parental alienation does not happen only to fathers.

I would also remind you that everything you hear from the men's groups applies to women too, except that the women are too ashamed of the rejection and the separation from their children that many of them are afraid to come forward because of the social stigma attached. We have such an apple pie picture of motherhood that many women have failed to come forward and have failed to contest their rights before the courts simply because of the social stigma. (Pamela Stuart-Mills, Parental Alienation Information Network, Meeting #16, Montréal)

Members of this Committee took the evidence about parental alienation very seriously but are also conscious of concerns about the preliminary state of research on this problem. The main recommendations advanced by witnesses would encourage more research, more education about the dangers of parental behaviour that could cause alienation, and training for professionals working with separating and divorced families.

Recommendation

44. This Committee recommends that the federal government work with the provinces and territories to encourage child welfare agencies to track investigations of allegations of abuse made in the context of parenting disputes, in order to provide a statistical basis for a better understanding of this problem.

CHAPTER 6: Aboriginal Concerns

The Parliament of Canada has authority under section 91(24) of the *Constitution Act, 1867* to legislate in relation to "Indians, and Lands reserved for the Indians". This power has been exercised in the passage of the *Indian Act*, which sets out a complex system for registering Indians, administering their lands and regulating their lives. Since

its passage, there has been a distinction in terms of the legal regime, and the benefits provided under it, between "status" and "non-status" Indians. From 1955 to 1985, for example, a registered (or "status") Indian woman who married a non-registered or non-Indian man forfeited her status, as well as that of any children she had, under the *Indian Act*. Such provisions do not affect Inuit, Métis people, or "non-status" Indian people.

Aboriginal organizations have worked for many years to make Canadians aware of the social and health problems affecting Aboriginal people, whether or not they live on reserves. Housing continues to be inadequate for many, and most reserves have insufficient housing availability. Many rural and remote reserves lack running water, sewage and indoor plumbing, and there is a high rate of fires. The health situation of status Indians is startlingly poor, with Indian children facing a much shorter life expectancy than the general population. Labour force participation is very low in many areas, and Aboriginal persons are three times more likely than non-Aboriginals to spend time in federal penitentiaries.⁹²

In her appearance before the Committee, Ethel Blondin-Andrew, Secretary of State for Children and Youth, made clear that it is partly their predominance in Aboriginal communities that makes children such a precious responsibility for Aboriginal peoples.

Aboriginal children make up a larger proportion of their communities. About 40% of Aboriginal children are under 15, compared with 20% of non-Aboriginal Canadians. This is from the 1994 census. The Canadian Institute of Child Health has noted that while the bulk of Canadian population is aging into retirement years, the majority of Aboriginal population is aging into reproductive years. Furthermore, Aboriginal women are having more children and at a younger age than non-Aboriginal women. (The Honourable Ethel Blondin-Andrew (Secretary of State (Children and Youth)), Meeting #45)

Ms. Blondin-Andrew also referred to cultural traditions that place children in the centre of very close extended family structures. In addition to pointing out the importance of children to these communities, the Secretary of State expressed her concern about the lack of statistical information about the well-being of Aboriginal children, particularly those affected by parental separation or divorce. The Committee appreciated this input, and suggests that the problems faced by Aboriginal children affected by family disruption could be studied by the Standing Senate Committee on Aboriginal Peoples as part of its study on Aboriginal governance.

There is no federal law that addresses the relationship between status Indians and most aspects of the general law, such as family law. Therefore, Aboriginal people, including status Indians, are governed by the *Divorce Act* when they seek divorce and corollary relief, and by provincial family law for other matters such as division of property. Provincial matrimonial property law may determine the rights of ownership and possession of the moveable property of Indian persons living on reserves, but provincial laws cannot affect ownership or possession of reserve land.⁹³ Courts are unable to apply provincial laws to order partition and sale of reserve lands. However, a court can make an order for compensation for the purpose of adjusting the division of family assets between the spouses.⁹⁴

Provincial child welfare laws also apply to Indian people living on reserves. Child protection matters are dealt with under provincial law, although a number of jurisdictions have developed separate child protection agencies to serve their Aboriginal populations. Aboriginal children have been over-represented in the child welfare system. There is the potential for controversy when the interest of the Aboriginal community in exposing the child to Aboriginal culture is in conflict with the provincial child protection agency's concerns about the other needs of the child.

The 1996 report of the Royal Commission on Aboriginal Peoples highlights the assertion of control over child welfare by the Spallumcheen First Nation Community near Vernon, British Columbia. Chief Wayne Christian,

who himself had been in foster care, was moved to action following the suicide of his brother, who had tried unsuccessfully to become reintegrated into the community after a period in foster care. Chief Christian led his community in passing a child welfare by-law in 1980 under the authority of the *Indian Act*. The federal government was persuaded to refrain from overturning it, and the government of British Columbia agreed to cooperate, under pressure from the Aboriginal community. Spallumcheen remains the only First Nation community to have achieved this degree of autonomy in child welfare administration.⁹⁵

Adoption is another area of concern for Aboriginal people, because provincial adoption laws may conflict with cultural traditions around adoption, particularly among Inuit. Case law has held that Indian customary laws or provincial laws may apply to the adoption of Indian or non-Indian children by Indian parents. An adoption of an Indian child by Indian parents does not affect the original band membership of the child, unless a band membership code alters this basic rule. There is also case law permitting adoption in accordance with Inuit custom.⁹⁶

In addition to child protection matters and family violence, the Royal Commission's recommendations related to children and families included the following: that governments acknowledge that the field of family law is generally a core area of Aboriginal self-governing jurisdiction, in which Aboriginal nations can undertake self-starting initiatives without prior federal, provincial or territorial agreements; that governments acknowledge the validity of Aboriginal customary law in areas of family law, such as marriage, divorce, child custody and adoption, and amend their legislation accordingly; and that governments engage in consultations with Aboriginal nations or organizations regarding other problems related to family law.

The Committee heard from several witnesses in its travels across Canada who raised concerns related to Aboriginal peoples. Also represented were the Métis National Council of Women, Pauktuutit (the Inuit Women's Association), the Native Women's Association of Canada, the Assembly of First Nations, and the Métis National Council. These witnesses, from diverse communities and representing the perspectives of both men and women, raised a number of important and complex issues. They stressed to Members the inapplicability of many features of the custody and access decision-making system - and the inaccessibility of many of the supports society offers to those experiencing separation and divorce - to those living in rural, impoverished or remote locations, such as the far north. This is especially so if their language is neither English nor French. Standards and criteria that may be appropriate for families who are part of the majority population in urban communities may not be so for members of such isolated communities.

The impact of poverty on people in strained circumstances brings additional complexity. In addition, often the most difficult cases relate to mixed Aboriginal and non-Aboriginal couples, where intercultural conflict may be added to the conflict experienced by any separating couple. Resolving these multiple issues requires study beyond that undertaken by this Committee. There is also an urgent need for a broader consultation on these issues than the Committee was able to offer.

In the evidence from Aboriginal organizations and individuals, several interesting themes emerged and were often enlightening for Members in a broader sense. For example, a number of witnesses proposed a round table or "sentencing-circle" model of decision making, akin to traditional Aboriginal models, whereby elders, grandmothers, parents and other interested parties could come together to make decisions about parenting arrangements.⁹⁷ As Marilyn Buffalo, of the Native Women's Association of Canada recommended:

We are advocating sentencing circles for our people. I would say that the same would apply in the case of family law. Some sanity has to be brought into it and the only place you will find sanity is in spirituality. The elders should take the lead. If you call the elders first, you will not have problems. The grandmother should also have a say in that circle. (Meeting #37)

The critical importance of children and extended families was stressed by Art Dedam of the Assembly of First Nations:

First Nations' families and communities have since time immemorial placed the well-being of the child as their focus. The child, in any matter before the community, is respected. The child is held as sacred and as one that holds our future. A child's welfare was inherent in the life of First Nation communities. The assistance of family and/or community members in taking care of a child was common, and still is today. The extended family was available as a support system for the raising of children, and still is today. The extended family remains a strong reality in First Nation communities. (Meeting #37)

There was support for more research into the specific family-law related needs of Aboriginal communities. There was also support for the concept that the best interests of the child should be the paramount consideration in decisions about parenting arrangements and that resources for families should include counselling, mediation and other therapeutic interventions as needed. Training for professionals and judicial education should include issues related to the lives and needs of Aboriginal persons, especially as geographically appropriate. The importance of legal aid availability, the need for child advocates, and consideration of grandparents' roles were also raised.

Consideration of all of these issues will require further study and consultation and will ultimately be to the benefit of all Canadians.

Recommendations

45. This Committee recommends that the federal government engage in further consultation with Aboriginal organizations and communities across Canada about issues related to shared parenting that are particular to those communities, with a view to developing a clear plan of action to be implemented in a timely way.

46. This Committee recommends that the federal government include as the basis for such consultations the family law-related recommendations of the Royal Commission on Aboriginal Peoples and work toward their implementation as appropriate.

CHAPTER 7: Sexual Orientation, Religious and Ethno-Cultural Minorities, and Canadians Living Abroad

The first five chapters of this report were directed to, and written in contemplation of, the so-called "general population" of divorcing couples. The racial, ethnic, religious or other character of individuals involved in divorce has not been critical to the analysis presented, or relevant to the Committee's recommendations. The Committee recognizes, however, that in many circumstances, families have racial, ethnic, religious or other characteristics that affect their experiences during separation and divorce. Such characteristics should be recognized and accommodated within the legal system and may in some cases require customized options or responses. This chapter looks at four groups identified by the Committee through its hearings and the preoccupations we heard about these communities and divorce.

A. Sexual Orientation

The issue of sexual orientation, as noted by Professor Katherine Arnup, is relevant to the Committee's work:

The primary [way] is in the context of the breakdown of a heterosexual relationship when there's a revelation of lesbianism or homosexuality on the part of one or both of the parents. Here, judges are faced with the task of assessing the potential impact of sexual orientation on the welfare of the children involved. (Meeting #10)

Witnesses representing Égale (Equality for Gays and Lesbians Everywhere) advised the Committee that society under-appreciates the number of gays and lesbians who are involved in a parenting role. In considering gay parents, the courts are called upon to "deconstruct stereotypes or disprove myths", in the words of lawyer Cynthia Petersen, about the quality of parenting by gay and lesbian individuals. Ms. Petersen discussed the evidence presented in the recent Ontario adoption case, *Re K.*, in which the empirical evidence from the social sciences literature was reviewed extensively and a determination made that no qualitative difference in parenting between heterosexual and same-sex couples could be demonstrated.⁹⁸

Witnesses who testified about same-sex couples and parenting issues wanted to remind the Committee that the sexual orientation of the parent should not be considered, in and of itself, relevant to determinations about parenting abilities or parenting arrangements. With respect to same-sex couples and their parenting roles, the witnesses urged the Committee to recommend that they should have the same range of relationship options as heterosexual couples have. It is the Committee's view that the former issue - the equality rights of gays and lesbians in family law - as in other contexts, is guaranteed under the *Canadian Charter of Rights and Freedoms* and does not call for any specific Committee recommendation. The latter, the relationship options of same-sex individuals, goes beyond the scope of this study but is certainly a matter for future consideration elsewhere.

Recommendation

47. This Committee recommends that sexual orientation not be considered a negative factor in the disposition of shared parenting decisions.

B. Religious Minorities

Canadians are also protected under the Charter from discrimination or unequal treatment on the basis of their religion. Religion can become a contentious point of conflict between separated or divorced parents, however, particularly where one parent's religion requires onerous observances or practices. The Supreme Court of Canada has been called upon to rule in two separate cases involving the religious freedoms of non-residential parents.⁹⁹ Unfortunately, although the two cases involved very similar facts, the Court came to contradictory conclusions. Since then a number of commentators have remarked that the decisions provide little guidance for the courts or for parents in future cases.

Some religious communities have criticized the best interests of the child test as permitting the consideration of matters such as religion that would be better shielded from scrutiny. Given the Committee's preference for the best interests test, supplemented by statutory definition as recommended earlier, Members are satisfied that judges and parents are qualified to determine when there is a valid connection between religious practices and the best interests of a child. In most cases, other criteria will be found to be more influential, but a court should be permitted to consider religion when it is a factor.

C. Ethno-Cultural Minorities

The Charter protects the right of Canadians to be free from discrimination on the basis of their ethnic origin. Ethnicity, like religion, should not generally be a factor in decisions about parenting arrangements at separation and divorce. There will no doubt be cases in which parents who do not share the same ethno-cultural origin will have disagreements related to cultural practices. For this reason, the Committee was urged to consider the importance of judges, lawyers, and especially mental health professionals such as custody/access assessors, being free of ethnic or cultural prejudices and being sensitive to the ethno-cultural needs of parents and children.

As the Committee was told by Naïma Bendris, who testified in Montréal,

Matrimonial law reproduces stereotypes and negative prejudices towards immigrant women that stem from the way they are represented in Western societies in general and in Canadian society in particular. These women are seen and judged as different based on their membership in a different group and on the stereotypical images assigned to them which certain court professionals have assimilated, in particular concerning Arab and Muslim women such as me, since I am an Arab and Muslim woman. Immigrant women are assessed in accordance with an analytical grid based on the dominant ideology, which does not reflect their psychological, sociological, cultural and anthropological background. Ignorance of these women's cultural background can result in biases and mistakes in the assessments and can harm these women. In my view, there must be a cultural adjustment to these assessments. (Meeting #16)

Witnesses' concerns in this area would be answered, at least to some degree, by implementation of our recommendation regarding professional accreditation (see Recommendation 31).

D. Canadians Living Abroad

A final group whose interests may differ slightly from those of families living in Canada is Canadian families living outside Canada. Many of these families include at least one member who is employed by the Canadian foreign service or by a foreign employer. Gar Parry, of Foreign Affairs and International Trade Canada, estimated that about 1.5 million Canadians are living and working abroad. This large group faces complications on marriage breakdown, because they do not have access to the Canadian legal system or its attendant resources. In many cases, part or all of the family will return to Canada upon separation, but some choose to stay and resolve their parenting issues under the local legal regime.

Agnes Casselman, Executive Director of International Social Services Canada, urged the Committee to recommend that Canada sign the 1996 *Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*. This Convention, which covers a broad range of civil law matters related to parenting arrangements after divorce, would be very helpful in resolving such disputes across international boundaries.

The federal government recognizes the additional stresses on families who move abroad to live and work and, in the case of foreign service officers and their families, encourages them to return to Canada to make arrangements on separation or divorce. For those who remain outside Canada, however, the *Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* might be of assistance. Consultation between governments toward the eventual ratification of that treaty would be necessary in order for Canadians living abroad to benefit from its provisions.

Recommendation

48. This Committee recommends that the Minister of Foreign Affairs work toward the signing and ratification as soon as possible of the 1996 *Hague Convention on Jurisdiction, Law Applicable, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*.

1 Statistics Canada, *Divorces 1995*, p. 2

2 Statistics Canada, *National Longitudinal Study on Children and Youth* (see note 4).

3 Other countries have also become concerned about high divorce rates. The United States concluded a national study, *Parenting Our Children: In the Best Interests of the Nation* (Washington, September 1996), similar to that of this Special Joint Committee, in 1996. This study showed that the number of children in the United States whose parents divorced in 1990 was 1,005,000. Once the children from divorced families were added to those born to unmarried parents, the report noted that "over half of all children sometime before they reach adulthood will live in a home with one parent." The report also identified the economic costs of divorce. Between 1970 and 1991, only 9% of families with children under 18 headed by a married couple were identified as poor, whereas 46% of single parent families headed by women and 23% of such families headed by men were identified as poor.

4 C. James Richardson, "Divorce and Remarriage", in *Families: Changing Trends in Canada* (Toronto: McGraw-Hill Ryerson, 1996), p. 233.

5 Ibid.

6 Ibid., p. 231.

7 Ibid., p. 234.

8 Richard A. Gardner, *The Boys and Girls Book about Divorce* (Bantam Books, 1970), p. xix.

9 Quoted in Richardson, p. 219.

10 Judith S. Wallerstein and Sandra Blakeslee, *Second Chances: Men, Women and Children a Decade After Divorce* (Boston: Houghton Mifflin Company, 1989), p. 299.

11 Michael E. Lamb, Kathleen J. Sternberg and Ross A. Thompson, "The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment", *Family and Reconciliation Courts Review*, Vol. 35, No. 4 (October 1997), pp. 395-396.

12 Paul R. Amato and Bruce Keith, "Parental Divorce and Adult Well-Being: A Meta-analysis", *Journal of Marriage and the Family*, Vol. 53 (February 1991), p. 54.

13 Steven Hope, Chris Power, and Bryan Rodgers, "The Relationship between Parental Separation in Childhood and Problem Drinking in Adulthood", *Addiction*, Vol. 93, No. 4 (1998), pp. 505-514.

14 As Wallerstein and Blakeslee indicate in *Second Chances*, "[We assumed that] if we help children acknowledge and recognize their feelings at the time of divorce they'll do better in the years to come. But from what we saw ten and fifteen years later, this is not the case. Some of the least troubled, depressed, seemingly content and calmest children were in poor shape ten and fifteen years later. One cannot predict long-term effects of divorce on children from how they react at the onset." (p. 15)

- 15 M. Ainsworth, M. Blehar, E. Walters and S. Wall, *Patterns of Attachment* (Hillsdale N.J.: Erlbaum, 1978).
- 16 Pamela Ludolph and Michelle Viro, "Attachment Theory and Research: Implications for Professionals Assisting Families of High Conflict Divorce", Paper given at the 35th Annual Conference of the Association of Family and Conciliation Courts, Washington, D.C., May 1998.
- 17 *Talsky v. Talsky*, [1976] 2 S.C.R. 292.
- 18 *Canada's First Report on the International Convention on the Rights of the Child*, available on-line at <http://www.pch.gc.ca/ddp-hrd/english/rotc/rc01index.htm>.
- 19 *Ibid.*, paragraph 82.
- 20 The law firm is Reiersen Sealy in Halifax, Nova Scotia.
- 21 M. Gary Neuman, *Helping Your Kids Cope with Divorce the Sandcastles™ Way* (Random House, 1998).
- 22 Jack Arbuthnot, Cindy Poole and Donald Gordon, "Use of Educational Materials to Modify Stressful Behaviours in Post-Divorce Parenting", *Journal of Divorce and Remarriage*, Vol. 25, 1/2 (1996), p. 117.
- 23 Jack Arbuthnot and Donald Gordon, "Does Mandatory Divorce Education for Parents Work?" *Family and Conciliation Courts Review*, Vol. 34, No. 1 (January 1996), p. 60.
- 24 Jack Arbuthnot, Presentation to the 1996 Family Mediation Canada Conference, Winnipeg, Manitoba, cited by Jeanne Byron in her brief to the Special Joint Committee on Child Custody and Access, 13 May 1998.
- 25 C. Wilks and C. Melville, "Grandparents in Custody and Access Disputes" *Journal of Divorce*, Vol. 1 (1990), cited by Jeanette Mather, Honorary Member G.R.A.N.D. Society, Ottawa Chapter, Meeting #9.
- 26 *Family Law Reform Act 1995*, No. 167 of 1995, SECT 31, section 61B.
- 27 Section 61C.
- 28 UK Department of Health, "An Introduction to *The Children Act 1989*", (London: HMSO, 1989), p. iii.
- 29 *Children Act 1989* (1989, c. 41), section 3.
- 30 *Children Act 1989*, section 2(7).
- 31 Section 8, *Children Act 1989*.
- 32 *Child Custody Act of 1970*, MCL ACT.1970.91, 722.25, section 5.
- 33 Section 6a.
- 34 Section 7a.
- 35 Michigan Supreme Court, FAQ, "Family Issues", available on-line at <http://www.supremecourt.state.mi.us/faq/faqfam.htm>.

[36](#) Michigan Supreme Court, FAQ, "Public Programs: Friend of the Court - Enforcement of Domestic Relations Orders", available on-line at <http://www.supremecourt.state.mi.us/pubprog/focb/brochure/enforce.htm>.

[37](#) More information about the Washington legislation can be found in the Library of Parliament paper entitled "Child Custody and Access Law: Some Models from Other Jurisdictions", 18 February 1998.

[38](#) Family Law Advisor, *Frequently Asked Questions: "Washington Parenting Plan FAQs"*, p. 1, available on-line at <http://www.divorcenet.com/wa/wa-faq04.htm>.

[39](#) Section 26.09.110.

[40](#) The "best interests of the child" test is found in the custody and access legislation in all common-law Canadian jurisdictions except Alberta, the Northwest Territories and Nova Scotia, where the roughly synonymous expression "welfare of the child" is used. The Québec *Civil Code* uses the expression "in light of the child's interest and the respect of his rights" (Article 33).

[41](#) National Family Law Section, Canadian Bar Association, Brief, "Custody and Access Review", May 1998, pp. 4-5.

[42](#) Commissioner of Official Languages, *The Equitable Use of English and French Before the Courts in Canada*, November 1995.

[43](#) Article 600 of the Québec Civil Code reads, "The father and mother exercise parental authority together. If either parent dies, is deprived of parental authority or is unable to express his or her will, parental authority is exercised by the other parent."

[44](#) Section 60B(2).

[45](#) Section 61C(1).

[46](#) Section 61C(2).

[47](#) In family law, the payer of child or spousal support is generally referred to as the "payor".

[48](#) Section 9, *Federal Child Support Guidelines*, SOR/97-175.

[49](#) This problem was recently recognized by the Ontario Court (General Division) in *Rosati v. Della Penta* ((1997) 35 RFL (4th) 102), where Justice Eberhard concluded that "the section 9 [of the Federal Child Support Guidelines] delineation of 40% of time has distracted these litigants from the real questions in custody proceedings and has led the discussion into a backwards determination of custody being arranged to address support issues rather than support ordered to facilitate appropriate custody/access" (p. 104).

[50](#) Debra Perry et al., "Access to Children Following Parental Relationship Breakdown in Alberta" (Calgary: Canadian Research Institute for Law and the Family, 1992), p. xiii.

[51](#) See, for example, the 1997 Ontario case *Fergus v. Fergus*, 33 RFL (4th) 63 (Ont. CA), where the repeated use of police by the non-custodial parent to enforce access was humiliating and harmful to the children and ultimately destructive of their relationship with the non-custodial parent.

[52](#) Section 16(3), *Divorce Act*.

[53](#) Bill C-340.

[54](#) "In no case may the father or mother, without a grave reason, interfere with personal relations between the child and his grandparents. Failing agreement between the parties, the terms and conditions of these relations are decided by the court."

[55](#) Ontario Civil Justice Review, *Supplemental and Final Report* (Toronto: November 1996), p. 139.

[56](#) An exception to this rule was lawyer Tony Merchant, who testified in Regina that the "sequestered" unified courts, such as those in Hamilton and St. John's, have been less successful than specialized judges within general civil courts, following the model in Alberta, British Columbia and many Ontario judicial districts.

[57](#) In both provinces, family law matters are heard in the Family Law Division of the provincial superior court.

[58](#) Ontario Civil Justice Review, pp. viii-ix.

[59](#) Section 3(8).

[60](#) Section 128.

[61](#) These provisions are drawn largely from the *Uniform Custody and Access Jurisdiction and Enforcement Act*, prepared by the Federal/Provincial/Territorial Family Law Committee and the Uniform Law Conference of Canada in 1988.

[62](#) Canadian Bar Association brief, p. 12.

[63](#) 35 RFL (4th) 241(Ont. Ct. (Prov. Div.))

[64](#) *Ibid.*, p. 242.

[65](#) *MLA Review of the Maintenance Enforcement Program and Child Access*, Alberta Justice, June 1998, letter from Marlene Graham, MLA, to Minister of Justice Jon Havelock, p. 2.

[66](#) *Ibid.*, p. 44.

[67](#) [1996] 2 S.C.R. 27.

[68](#) *Verdict of Coroner's Jury*, Inquest into the Deaths of Margret and Wilson Kasonde, Ottawa, April 22 - June 24, 1997, Dr. Bechard, Coroner for Ontario (unreported).

[69](#) The expression "general population" is used to indicate that the subjects of the study were not involved in the criminal justice system. Sommer's data are derived from interviews with a random sample of 899 individuals, roughly half from each sex.

[70](#) Statistics Canada, *Family Violence in Canada: A Statistical Profile* (Ottawa: Canadian Centre for Justice Statistics, 1998).

[71](#) Spousal murder is one statistical area unlikely to be affected by underreporting.

[72](#) Murray Strauss, "Measuring Intrafamily Conflict and Violence: The Conflict Tactics (CT) Scale", *Journal of Marriage and the Family* 41 (1979), pp. 75-88. See also Murray Strauss and Richard Gelles, *Physical Violence in American Families: Risk Factors and Adaptations to Violence in 8,145 Families* (New Brunswick, N.J.: Transaction, 1990).

[73](#) Juristat, Statistics Canada, *Wife Assault: The Findings of a National Survey*, Vol. 14, No. 9 (March 1994), p. 4.

[74](#) Peter Jaffe et al., *Children of Battered Women* (Newbury Park: Sage Publications, 1990).

[75](#) *B(D) v. The Children's Aid Society of Durham, Ont. Ct. (Gen. Div.)* unreported, court file No. 20962/87, March 23, 1994.

[76](#) L. Berliner and M.K. Barbieri, "Testimony of the Child Victim of Sexual Assault", *Journal of Social Studies*, Vol. 40 (1984), pp. 125-137.

[77](#) B.W. Dzielick and C.B. Schudson, *On Trial: America's Courts and their Treatment of Sexually Abused Children* (Boston: Beacon Publishers, 1989).

[78](#) S. J. Ceci and M. Bruck, "The Suggestibility of the Child Witness: A Historical Review and Synthesis", *Psychological Bulletin*, Vol. 113 (1993), pp. 403-429.

[79](#) Judith K. Adams, "Investigation and Interviews in Cases of Alleged Child Sexual Abuse: A Look at the Scientific Evidence", *Issues in Child Abuse Allegations*, Vol. 8, No. 3/4 (1989), p. 136.

[80](#) Lise Helene Zarb, "Allegations of Childhood Sexual Abuse in Custody and Access Disputes: What Care is in the Best Interests of the Child?", *Canadian Journal of Family Law*, Vol. 12, No. 1 (1994), p. 92.

[81](#) Nicholas Bala, "Spousal Abuse in Custody and Access Disputes: A Differentiated Approach", 3 June 1998, paper submitted to the Special Joint Committee on Child Custody and Access.

[82](#) National Clearinghouse on Child Abuse and Neglect Information, "Reporting Penalties", *Statutes at Glance Fact Sheet*, p. 1.

[83](#) Sections 131 and 132.

[84](#) Richard A. Gardner, *The Parental Alienation Syndrome: A Guide for Mental Health and Legal Professionals* (Cresskill, N.J.: Creative Therapeutics, 1992).

[85](#) Many of the other criticisms focus on Gardner's claims about frequency and his research and qualifications. Cherie Wood summarized these concerns: "Gardner is self-published. This means that he has based his ideas solely on clinical impressions from his own cases and has not had his work reviewed by independent professional peers...Gardner's statistics do not match those found in national studies." (Cherie L. Wood, "The Parental Alienation Syndrome: A Dangerous Area of Reliability", *Loyola of Los Angeles Law Review*, Spring 1994.)

[86](#) Peter G. Jaffe and Robert Geffner, "Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals", 1998, pp. 380-381.

87 M.D. Everson, B.W. Boat, S. Bourg, and K.R. Robertson, "Beliefs among Professionals about Rates of False Allegations of Child Sexual Abuse", *Journal of Interpersonal Violence*, Vol. 11, pp. 541-553, cited in *ibid.*, p. 380.

88 *Ibid.*, p. 380.

89 Nancy Thoennes and Patricia Tjaden, "The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes" *Journal of Child Abuse and Neglect*, Vol. 14 (1990), pp. 152-153.

90 Jon R. Conte, "Has This Child been Sexually Abused? Dilemmas for the Mental Health Professional Who Seeks the Answer", *Criminal and Justice Behavior*, Vol. 54 (1992) , p. 62.

91 Richard A. Gardner, *Addendum III: Recommendations for Dealing with Parents Who Induce a Parental Alienation Syndrome in their Children* (Cresskill, N.J.: Creative Therapeutics, November 1996).

92 Bradford W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1991), p. 6.

93 Jack Woodward, *Native Law* (Toronto: Carswell, 1996), p. 129.

94 *George v. George* (1992), [1993] 2 C.N.L.R. 112 (B.C.S.C.).

95 Royal Commission on Aboriginal Peoples, *Report*, Vol. 3 (1996), available on-line at <http://www.indigenous.bc.ca/rcap/rcapengv3/ch1&2-vol3.doc>.

96 Woodward, pp. 348-349.

97 Sentencing circles are already used in some criminal law cases.

98 (1995) 23 OR (3rd) (Ont. Ct. (Prov. Div.)).

99 *Young v. Young* [1993] 4 S.C.R. 3; *D.P. v. C.S.* [1993] 4 S.C.R. 141.





REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109 of the House of Commons, the Committee requests that the Government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings is tabled (Meeting #55).

Respectfully submitted,

The Hon. Landon Pearson

Roger Gallaway

Joint Chairs



DISSENTING OPINION - REFORM PARTY OF CANADA

DECEMBER 1998 - ``FOR THE SAKE OF THE CHILDREN''

Paul Forseth, M.P.

(New Westminster-Coquitlam-Burnaby)

Eric Lowther, M.P.

(Calgary Centre)

Philip Mayfield, M.P.

(Cariboo-Chilcotin)

The Reform members support the themes of the Report as far as they go, but have profound disappointment that some proposed recommendations were not ultimately supported by the government members, and to varying degrees by the other Parties. The Reform members have been an integral part of the Report process from the beginning, and the Report hopefully will heighten a national concern for the intrinsic value of the family. The Reform members support the concept of "shared parenting" as a right and obligation. There are shortcomings that the Committee failed to address in the final version of the Report, due to the ideological intransigence of some Committee members, regardless of the public testimony.

Reformers recognize the seriousness and extent of the national problem of family breakdown in Canada. The consequences of dissolving families bring injury to children and parents, and hurt the quality of Canadian society. The prevalence of divorce and unstable families is a national problem that has not been sufficiently recognized by the present government. Consequently, a more dynamic political leadership is required at both the federal and provincial level to reduce the social forces that mitigate against stable family life, and secondarily, to improve the set of rules under which families may dissolve. Moreover, the needs of children require a bold approach in family-law reform.

We recognize that the existence of the Committee was not initiated by the government, but was only created as a compromise in exchange for Senate passage of amendments to the law governing child maintenance payments. It is recognized that under the federal Divorce Act, parents themselves may divorce, but they do not divorce

their children. Also, the balance of parental rights and obligations has not been sufficiently defined in the current Divorce Act. Consequently, in view of the serious political vacuum surrounding the national family-law problem, the Committee Report recommends a change to the historical nature of divorce law.

It is recognized that parental rights and obligations continue after family dissolution. However, it is clear that in too many cases, the legal system poorly serves the interests of children. In view of the outcry in Canada of many sad stories, a new approach that legally emphasizes children's needs over short-term parental wants, has been recommended. Studies and social convention point to the ideal, that children thrive best in a conventional stable two-parent family where there is a loving father and mother. If families dissolve, then a legal climate that facilitates the ongoing involvement of children with both parents in a full and meaningful way, should be the preferred outcome of parenting plans.

Specifically, in addition to the Committee recommendations, the Reform members recommend that:

- The individuals to whom the *Divorce Act* applies should be more clearly defined concerning who is considered "a child of the marriage". The *Act* concerning the parenting plans and maintenance payments should be applied only for "children" and not "young adults". Therefore the definition of "*child*" in the opening definition section of the *Act* should be amended to read in part... *is the age of majority or over and under their charge but unable, by reason of illness, disability, to withdraw from their charge.* The existing additional terms "*or other cause*" and "*or to obtain the necessities of life*" should be deleted from the definition, as the courts have unreasonably read-in obligations from these terms that have created a fundamental inequality between "intact families" and "divorced families".
- Grandparents of both blood and adoption not be required to seek "leave of the court". The second profound shortcoming of the Committee Report is the failure to recommend a change to Section 16(3) of the *Divorce Act*, which says "*A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court*". The recommendation recognizes the special relationship and obligation that grandparents may have in the legal parenting plans for children of divorce. Grandparents should not have to first seek permission of the Court, if they choose to file their own Court action for the making of parenting plans. Interestingly, the new Nisga'a settlement in B.C. says its government does not need "leave" under this section.
- The Report forcefully comments upon the obvious historical failure of the federal government to contemplate in family law the pervasive and insidious problem of "false accusations of criminal conduct", the "unreliability of sworn affidavits" that lawyers have deposed from their clients, and the pathetic record of the Courts to defend the Orders they make about child-care arrangements and parent-child contact. The Reform Committee members wanted clear recommendations for action on these points but were unable to persuade the Committee. The Committee would not approve recommendations for improvements to the *Criminal Code* concerning deliberate false accusations of abuse or neglect, and the need for "prosecutors" to more frequently act to enforce *Criminal Code* sections 131 & 132-misleading justice, 135-contradictory evidence, 137-fabricating evidence, 138-affidavits, 139-obstructing justice, in family law matters.
- The ethical standards of law societies and bar associations concerning the swearing and filing of affidavits be improved, and codes of conduct be actionable in law.
- Provincial governments review their definitions of "child at risk" in their respective "child-protection legislation", where there are repeated unsubstantiated allegations of abuse.
- The provisions of the "Child Support Guidelines" operate under the principle of reasonableness. Reform Members wanted a clear statement recognizing how the new rules of the "Child Support Guidelines" may operate against the best interests of children. Specifically, the Committee merely recommended that the Minister of Justice undertake as early as possible a comprehensive review. Reform members of the Committee argued for stronger language in this section including the principle of "ability to pay versus demonstrated need".
- Enforcement of parent-child contact terms, as rigorously as child maintenance. Although financial

transactions and parent-child contact are not legally tied together, the persistent psychological connection and sometimes real social connection must be recognized. Capricious non-compliance of ordered parent-child contact could be considered a form of child abuse, and treated accordingly during enforcement proceedings. Parents that disturb children through a failure to fulfil their duties under a court order should be penalized.

The long-standing record of inaction to the pervasive complaints on the preceding points from across the country, partially explains the deep malaise in Canadian family law practice. These serious problems on the operational side of the law, require remedy through government leadership with the provinces, the law societies, and the court system. The Committee Report does not go far enough in signalling these problems or suggesting remedies. It clearly is an area for further study.

As the pressures that mitigate against the stability of families are often economic, the Reform members also note the systemic discrimination of the income tax law between "intact families" and "dissolved families". Reform members promote the development of a family or household orientated comprehensive social security system administered through the income-tax system. Additionally, it should have been noted that the rules for delivery of the "child tax benefit" are in some disarray, and in many cases are delivered contrary to Divorce Act court orders.

Recourse to a Court is often the final phase of the disintegration process when alternatives have failed. Unfortunately, the Court is a rather blunt instrument to respond to the unique and changing needs of children caught in a parental conflict. Sadly, some parents are able to unreasonably manipulate the justice system during a divorce proceeding, and thereby communities in general suffer.

Therefore, it must be emphasized that the witness testimony that the Committee heard, highlighted the need for a societal focus on better parenting, family life education, and for much greater alternative dispute settlement services outside of courts. There is great need for a spectrum of preventive and remedial social services, and a renewed commitment from the workers in the system, to speak out for renewal and for quick change from what is currently delivered. When family trouble strikes, governments have a role to provide accessible and affordable help to children and parents.





DISSENTING OPINION OF THE BLOCK QUÉBÉCOIS

ON THE REPORT OF THE SPECIAL JOINT COMMITTEE

ON CHILD CUSTODY AND ACCESS

The study conducted by the Joint Committee deals with problems that are very timely and constantly changing. The growing numbers of divorces and of children born outside marriage have created new and complex dynamics in the lives of families and, by definition, children. In our view, the Committee was not the appropriate forum for finding legislative solutions to the social problems that affect an ever-growing number of our fellow citizens. However, the Committee's sittings, particularly when the draft report was written, did help to spotlight a paradoxical situation: the manner in which provincial and federal jurisdictions in this field are divided up, which cannot be justified today.

The situation is that all matters relating to the family, education and social services are clearly within the jurisdiction of the provinces, as are any questions relating to separation from bed and board. In Quebec, separation from bed and board is covered by articles 493 et seq. of the Civil Code of Québec. On the other hand, divorce is under federal jurisdiction, by virtue of the Constitution. The vast majority of divorces are settled out of court. In most cases, agreements regarding child custody and access are made when a couple separates. Since separation from bed and board is under provincial jurisdiction, it would be logical for legislation on divorce to be as well.

Accordingly, we recommend that the Divorce Act be repealed and that jurisdiction over divorce be transferred to the provinces.

It would also be logical to repeal the Marriage Act and transfer that jurisdiction to the provinces. The celebration of marriage, as well as division of property, the civil effects of marriage and filiation are within the exclusive jurisdiction of the provinces, while the substantive requirements (capacity to contract marriage and impediments to marriage) are under federal jurisdiction. In Quebec, for example, the Government of Quebec has legislated to permit civil marriages. In our view, this is another example of the pointless and outdated division of powers. It would be much simpler for all family law to be under the jurisdiction of a single level of government: the provinces. On this point, we would quote the Honourable Senator Gérald-A. Beaudoin, who wrote, in 1990:

[TRANSLATION] *"One might ask why, in 1867, the framers gave Parliament exclusive jurisdiction over marriage and divorce. This seems to have been for religious reasons. Under article 185 of the Civil Code of Lower Canada, marriage could be dissolved only by the natural*

*death of one of the spouses. This principle was accepted by the vast majority of Quebecers, who were Catholics; the Protestants, on the other hand, wanted the Parliament of Canada to be able to legislate on divorce. Accordingly, subsection 91(26) of the Constitution Act, 1867, was enacted to give exclusive jurisdiction over marriage and divorce to the federal Parliament." (Beaudoin, Gérald-A., *La constitution du Canada, Institutions, partages des pouvoirs, Droits et libertés*, Montreal, 1990, éditions Wilson et Lafleur 1990, p. 360)*

What was appropriate in 1867 no longer is today. Given that the religious issue no longer has the same significance, our laws ought to reflect reality. Our recommendation would mean that the provinces could have complete jurisdiction over their family law and could legislate in that field as appropriate to their own social context.

We would again quote the Honourable Senator Beaudoin:

[TRANSLATION] "The question then arises of whether the field of marriage and divorce should not be returned to the provinces, thereby enabling Quebec to have more absolute control over its family law, an important part of its private law, which is different from the private law of the other provinces.

Some authors believe that it would be best to leave this area of jurisdiction in section 91. They consider it paradoxical to want to decentralize this field, while the United States seems to want to move toward centralization and uniformity in divorce laws. Perhaps they are forgetting that we have two systems of law in Canada, and that the arguments they make in support of their position lose some of their force in a heterogeneous federation such as Canada." (Ibid., p. 366)

It was apparent from the Committee's inception that jurisdictional problems would dog its every step. The Committee's mandate was as follows:

*"That a Special Joint Committee of the Senate and House of Commons be appointed to examine and analyze issues relating to custody and access arrangements **after separation** and divorce, and in particular, to assess the need for a more child-centred approach to **family law policies and practices** that would emphasize joint parental responsibilities and child-focused parenting arrangements based on children's needs and best interests."*

We participated in this Committee because the subject is a very serious and important one in our society, particularly for people who have experienced difficulties in the process of a divorce or separation from bed and board. However, it is not up to the federal government to legislate in this field; that is a matter for the provinces. We need only compare the manner in which the provinces deal with family policy to understand that there are significant differences. For instance, in Quebec, our civil law system means that our vision of family law is different from the rest of Canada's: we would cite the long debate that took place in the Committee regarding the concept of the best interests of the child, which has been part of the Civil Code of Québec for a number of years now.

Parents and children would be much better served if family law were entirely under provincial responsibility.

Notwithstanding our position, we nonetheless consider it important to point out a number of facts:

1. Given that the large majority of custody and access cases are settled by mutual agreement, we would express serious reservations regarding the need to legislate controls on all cases.

2. The fundamental rights of all individuals must be protected, and specifically their right to privacy.
3. We recognize the principle of the best interests of the child. This means that a child must not be the victim of conflicts between his or her parents, and the child's interests must not be confused with those of the child's parents or extended family.
4. Family violence exists, and the danger to victims of family violence is exacerbated in a separation. The safety of children and their parents must therefore be protected. The large majority of studies and statistics show that women are most often the victims of family violence. In view of how hard it is to bring situations of violence out into the open, we would question the need to refer to "proven" violence (see recommendation 16.11).
5. The responsibility for resolving disputed cases lies with the courts.
6. The vast majority of parents sincerely want what is best for their children: they are not highway robbers. We do not consider the use of sanctions and coercion, and making parental obligations excessively rigid, to be helpful approaches in a process which, even under the best circumstances, is always a difficult one.
7. Although a number of witnesses talked about cases in which there had been false accusations of abuse, it must be recalled that the *Criminal Code* already contains provisions against perjury. Before legislating in this respect, it is essential that research be done to shed light on these situations.
8. Although the Committee should have emphasized parental responsibilities, it must be acknowledged that instead it was transformed into a battle of the sexes. It is regrettable both that the positions of fathers and mothers became so polarized and that some people chose to question the ground women have struggled long and hard to gain.

To summarize, the position of the BQ on the recommendations in the report is as follows:

We are opposed to the following recommendations: 10, 19, 22, 23, 25, 26, 30, 43.

We are in favour of the following recommendations: 1, 2, 15, 17, 37, 41, 42, 45, 47, 48.

We are in partial disagreement with the following recommendations: 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 18, 20, 21, 24, 27, 28, 29, 31, 32, 33, 34, 35, 36, 38, 39, 40, 44.

Acknowledgements

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Madeleine Dalphond-Guiral, M.P. Laval-Centre

Caroline St-Hilaire, M.P. Longueuil



CHILD CUSTODY AND ACCESS: FOR THE SAKE OF THE CHILDREN

DISSENTING OPINION-NEW DEMOCRATIC PARTY

Submitted by Peter Mancini, M.P.-Sydney-Victoria

The response by Canadians to the Special Joint Committee study on Child Custody and Access has been overwhelming. The NDP is grateful to the many individuals and organizations who took the time and effort to make their views known. Together, the input, advice and feedback constitute an important body of research for pursuing changes to current legislation dealing with issues of child custody and access. Underlying it, is a clear sense of responsibility to ensure that the best interest of children is paramount.

The NDP is committed to an approach that ensures the best interests of children are made the determining factor in all decisions related to custody and access.

Canadians want a fair and equitable process for dealing with the very painful and difficult issues of child custody and access in divorce. They want their government to play a pro-active role to ensure the best interests and safety of children and parents are met by the system.

The primary focus of the committee has been to develop an appropriate framework to ensure that the best interests of the child are served by the system. Time and time again, Canadians expressed concerns about the current system and its failure to meet the needs of parents and children. The Committee has addressed many difficult issues and the report reflects a great deal of progress and many recommendations that the NDP supports.

There are however, a number of issues that the NDP feels were not adequately addressed by the committee:

Process

There were a number of problems related to the process the committee employed in gathering evidence and hearing witnesses.

The NDP felt that in order for the committee to fully address the serious issues before it, it was imperative for all interested Canadians to have equal access to the committee to have their views heard. In order to achieve that goal we believed that it was essential for the committee to travel beyond urban centres to address the specific concerns of rural communities. We recognized the difference in the nature and quality of services available to Canadians living in rural communities compared to those in urban centres.

While the committee recognized the need to reach out to rural communities, funding was not provided by Parliament for the necessary travel. Consequently a rural perspective is lacking from the report.

Other concerns related to the process include:

- A lack of public notice given to enable all interested parties to appear before the committee
- A perceived bias of some committee members
- The poor treatment and lack of respect shown witnesses by some committee members

These concerns cast a shadow on the quality of the end product of the committee and on the excellent work of the dedicated staff of the committee. The clerks of the committee, researchers and staff worked tirelessly demonstrating the highest degree of professionalism providing invaluable service and support, without which our report would not have been possible.

Poverty

The issue of child poverty is not dealt with in the report despite the fact that child poverty is a serious problem facing Canadian families. Child poverty in Canada has increased by 60% since 1989 and 26,000 more children are living in poverty today in Canada than at this time last year.

No real discussion of a child-centred approach can take place without this issue being addressed.

The NDP recommends:

- That as poverty is a contributing factor to family break-up and domestic violence it must be addressed by all level of governments.
- That the federal government live up to its commitment to end child poverty.
- The federal government address the fact that as long as parents who have custody of children are forced into poverty, then society will accept that the divorce process will punish children of divorce, particularly those from low-income families.

Domestic Violence

The report recognizes that domestic violence is not compatible with the best interest of the child and that where there is a history of violence, joint access and custody may not be beneficial or in the best interest of the child. Parents should not be required to attend mediation in such circumstances. The report clearly identifies that a history of violence be taken into account as a determining factor in assessing the best interest of the child.

Many groups and individuals that appeared before the committee expressed serious concerns about the impact of domestic violence, particularly towards women, on children.

Women are the main victims of domestic violence and face serious safety concerns when leaving an abusive relationship. Moreover, children who witness domestic violence are negatively affected by it.

The NDP recommends:

- The federal government take a leadership role in ending domestic violence against women and children.
- That the safety of parents and children should be considered a priority when determining custody and

access, supervised exchanges and visitations.

- That legislation allow a court to require perpetrators of domestic violence to undertake counselling or treatment as a condition of custody or access.

The test when determining proof of violence should be that of the Civil Test based on the "balance of probabilities" and not the criminal test "beyond a reasonable doubt".

Access to Information

The committee has placed a reverse onus on professionals requiring them to release information about the child to either parent unless otherwise ordered. We reject the argument that a greater burden be placed on teachers, doctors and other professionals to determine whether or not they should release information to parents, especially in high-conflict divorces.

The NDP recommends:

- That any parenting plan put forward be required to state that each parent is entitled to pertinent information about the child including medical and school record, etc. There should be a presumption by the court that any such information be shared and that reasons be provided if this is not the case. When the presumption is not followed then the agreement or order should clearly set out exactly what information is available to each parent. These orders can then guide those responsible for releasing records.

Enforcement of Custody and Access Orders

The non-compliance of court orders and the inability or unwillingness of the court to act was a major source of frustration and anger for many who appeared before the committee or submitted briefs. The issue sparked heartbreaking testimony from parents, many of whom had been separated from their children for years, highlighting problems with the legal system in dealing with access enforcement.

Many also argued that parents who have custody and are charged with ensuring the best interests of the child are placed in a difficult position when following an access order that may not be in the best interest of the child.

The major sources of frustration for parents in access disputes centre on the legal system. The lack of legal counsel, delays in obtaining appearance dates for enforcement hearings and the cost of court appearances to enforce access orders, all contribute to the overwhelming frustration and feelings of powerlessness felt by parents dealing with the system.

Often parents wait for months for a hearing, paying the price of being denied access until a court order is issued, in effect penalizing parents who seek to avoid conflict by involving the court.

The need for enhanced legal aid programs is critical. The availability of affordable legal counsel and a speedy court process is essential.

The NDP recommends:

- That the importance of meaningful access to legal aid be acknowledged and that federal and provincial funding be provided to increase the availability of civil legal aid.
- That resources be put in place to ensure the speedy resolution of access denial.