CHAPTER 10

Parenting Arrangements after Divorce[1]

A. INTRODUCTION

Since 1968, more than 1 million Canadian children have been affected by the divorce of their parents. More than 100,000 of these children have witnessed the breakdown of a second long-term relationship of their custodial parent.

Divorced mothers and their children have a higher risk of living in poverty. Children who are raised in poverty by a single parent often encounter nutritional, health, and educational problems that significantly affect their adult lives.

Less than 4 percent of all divorce proceedings result in full-blown contested trials and, of these, very few involve disputes concerning the children. Less than 1 percent of contested divorce cases are confined to custody and access disputes.

Contested custody litigation is often a reflection of continued and unresolved personal hostility between the spouses. Custody litigation may also disguise an issue relating to money and property, rather than the children. A custodial parent may, for example, obtain an order for exclusive possession of the matrimonial home or an order for spousal support that would be unavailable if custody were denied to that parent. Or a non-custodial parent may seek an order for shared parenting in order to reduce the amount of child support payable.

1 For sweeping proposals to change the law, see Canada, Parliament, Report of the Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (Ottawa: Senate and House of Commons, December 1998), Summary of Recommendations 1–48 at xvii–xxiii.

A custodial parent has the authority to make decisions that affect the growth and development of a child[2] but is expected to exercise that authority in the best interests of the child. Where the parents disagree, either of them may institute legal proceedings to have the dispute resolved by a court.

B. DEFINITION OF "CUSTODY ORDER"

Section 2(1) of the *Divorce Act*[3] provides that "custody order means an order made under subsection 16(1)" of the Act. Having regard to the provisions of section 16(1), the term "custody order" includes an order for access.[4] It does not include, however, an interim order for custody or access made pursuant to section 16(2) of the *Divorce Act*. The distinction between interim and permanent orders for custody or access is of special significance with respect to the jurisdiction of the courts to vary, rescind, or suspend such orders.[5] It may also prove to be of significance with respect to appellate proceedings insofar as these proceedings are governed by provincial rules of practice and procedure.[6]

C. DEFINITIONS OF "CUSTODY" AND "ACCESS"

Section 2(1) of the *Divorce Act* provides that "custody" includes care, upbringing, and any other incident of custody. The reference to "any other incident of custody" in the statutory definition of "custody" facilitates a court-ordered division of the various incidents of custody between the respective claimants, where an order for custody or any variation thereof is made pursuant to section 16 or section 17 of the *Divorce Act*.[7] Section 2(1) of the *Divorce Act* provides no definition of "access" in the English language, but the French version provides as follows: "'Accès' comporte le droit de visite." Section 16(5) of the *Divorce Act* qualifies this definition of "accès" by entitling a spouse who is granted access privileges to make inquiries and receive information concerning the health, education, or welfare of the child. This right exists in the absence of a court order to the contrary. It does not extend to any person other than a spouse who has been granted access privileges. Section 16(5) entitles a spouse who is granted access privileges to direct relevant inquiries to the custodial parent or to a third party, such as the child's doctor or school principal.

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2 *MP v NM*, 2008 BCSC 1501.

3 RSC 1985, c 3 (2d Supp).

4 See *Chisholm v Bower* (1987), 11 RF (3d) 293 (NS Fam Ct).

5 See Section L, below in this chapter.

6 *Divorce Act*, s 21(6).

7 *Crawford v Crawford* (1991), 36 RFL (3d) 337 at 341 (Ont Gen Div).

This right may not extend to being entitled to be involved in school activities.[8] The onus is on the non-custodial spouse to seek the relevant information[9] unless the court specifically directs that custodial parent to provide the information.[10] Section 16(5) does not expressly require the custodial parent to consult with the spouse who has access privileges before decisions are taken that affect the child's health, education, and welfare.[11] If, for example, the parents cannot agree on where their child should go to school, the custodial parent has the ultimate decision-making power,[12] subject to a court's right to override that decision.[13]

The term "custody" is imprecise and has in the past been used in both a wide and a narrow sense. In *Hewar v Bryant*,[14] Sachs LJ, of the Court of Appeal in England, observed that in its wide sense, custody is virtually equivalent to guardianship, whereas in its narrow sense, custody refers to the power to exercise physical control over the child. In Canadian divorce proceedings, caselaw tends to support the conclusion that, in the absence of directions to the contrary, an order granting sole custody to one parent signifies that the custodial parent shall exercise all the powers of the legal guardian of the child.[15] The non-custodial parent with access privileges is thus deprived of the rights and responsibilities that previously vested in that parent as a joint custodian of the child.[16] Although a parent who has been granted access privileges may

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8 *Moss v Boisvert* (1990), 74 Alta LR (2d) 344 (Master); see also *Boyd v Wegrzynowicz* (1991), 35 RFL (3d) 421 (BCSC); *Amaral v Myke* (1992), 42 RFL (3d) 322 (Ont UFC); and see *Hamilton v Hamilton* (1992), 43 RFL (3d) 13 at 23 (Alta QB) (express waiver of right to contact third parties upheld by court).

9 *Hume v Hume* (1989), 79 Nfld & PEIR 114 (PEISCTD). Compare *Perillo v Perillo* (1994), 6 RFL (4th) 29 (Alta QB).

10 *McLean v Goddard* (1994), 129 NSR (2d) 43 (Fam Ct) (custodial parent required to provide a monthly list of the child's upcoming events); *Hess v Hess* (1994), 2 RFL (4th) 22 (Ont Gen Div) (onus placed on custodial parent to give access parent "full and meaningful notice" of children's activities).

11 See *Anson v Anson* (1987), 10 BCLR (2d) 357 (Co Ct); compare *Abbott v Taylor* (1986), 2 RFL (3d) 163 at 169 (Man CA); and see Berend Hovius, "The Changing Role of the Access Parent" (1993) 10 Can Fam LQ 123.

12 *Ducas v Varkony* (1995), 16 RFL (4th) 91 (Man QB).

13 See *Perron v Perron*, 2012 ONCA 811.

14 [1970] 1 QB 357 at 372–73 (Eng CA). But compare *Dipper v Dipper*, [1981] Fam 31 (Eng CA).

15 See *JR v NR*, 2013 BCSC 2139, citing *Young v Young*, [1993] 4 SCR 3 at paras 40–41; see also *BDM v AEM*, 2014 BCSC 453; *JM v JA*, 2014 NBQB 233; *MacDonald v MacDonald*, 2016 NSSC 71; *Jackson v Mayerle*, 2016 ONSC 72. But see *contra*: *Walsh v Binet*, 2013 ABQB 686, citing *VL v DL*, [2001] AJ No 1259 (CA) at paras 48–56. And see John-Paul Boyd, "A Regime of Peaceful Coexistence, Part 2, Disentangling Custody and Guardianship under the *Divorce Act* and the *Family Law Act*" (2013) 71:3 *The Advocate* 359 at 366, cited with approval in *Rana v Rana*, 2014 BCSC 530.

16 *Young v Young*, [1993] 4 SCR 3, L'Heureux-Dubé J; *Ross v Ross*, 2004 BCSC 637.

have some limited powers to make decisions where an emergency necessitates action and the custodial parent is unavailable, these limited powers fall short of a fundamental right to equally participate in decisions affecting the child's welfare and development.[17] The provisions of the *Divorce Act*, and particularly the definitions of "custody" and "accès" in section 2(1), apparently preclude Canadian courts from adopting a narrow definition of custody. Pursuant to section 2(1), "'custody' includes care, upbringing and any other incident of custody" and "'accès' comporte le droit de visite." The use of the word "includes" in the definition of "custody" implies that the term embraces a wider range of powers than those specifically designated in section 2(1).[18] It is legitimate to deduce, therefore, that the term "custody" is to be regarded as virtually synonymous with guardianship of the person.[19] Consequently, in the absence of an order for joint custody or for shared parenting[20] or a court-ordered division of the incidents of custody,[21] a non-custodial spouse with access privileges remains a very interested observer who gives love and support to the child but whose opinions cannot undermine the custodial parent's ultimate decision-making authority in matters relating to the child's welfare, growth, and development. This remains true notwithstanding that section 16(10) of the *Divorce Act* provides that the court shall promote "maximum contact" between the child and the non-custodial parent to the extent that this is consistent with the best interests of the child.[22] It is always open to a court, however, to grant an order for shared parenting or adjudicate the diverse incidents of custody individually on an evidentiary basis and thus avoid an order for sole custody that places absolute control in one of the two

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17 See *Young v Young*, [1993] 4 SCR 3; *Anson v Anson* (1987), 10 BCLR (2d) 357 at 368 (Co Ct); *BDM v AEM*, 2014 BCSC 453; *DM v SM*, 2014 NBQB 268; *Glasgow v Glasgow (No 2)* (1982), 51 NSR (2d) 13 at 24–25 (Fam Ct); *Gubody v Gubody*, [1955] OWN 548 (HCJ); *Misch v Pfister*, 2012 ONSC 5278; *Gunn v Gunn* (1975), 24 RFL 182 at 185–86 (PEISCTD); *Droit de la famille — 301* (1986), 3 RFL (3d) 65 at 78 (Que CS), rev'd (1988), 14 RFL (3d) 185 (Que CA); *Bannman v Bannman* (1992), 106 Sask R 219 (QB). Compare *Gordon v Goertz*, [1996] 2 SCR 27.

18 See *Anson v Anson* (1987), 10 BCLR (2d) 357 at 365 (Co Ct); see also *Clarke v Clarke* (1987), 7 RFL (3d) 176 (BCSC).

19 *Young v Young*, [1993] 4 SCR 3, 49 RFL (3d) 117 at 184; compare *Gordon v Goertz*, [1996] 2 SCR 27.

20 See *Da Costa v Da Costa* (1990), 29 RFL (3d) 422 (Ont Gen Div), aff'd on other grounds (1992), 40 RFL (3d) 216 (Ont CA).

21 See *Hines v Hines* (1992), 40 RFL (3d) 274 (NSTD); *Ganie v Ganie*, 2014 ONSC 7500.

22 *Young v Young*, [1993] 4 SCR 3, 49 RFL (3d) 117 at 184, L'Heureux-Dubé J; *BDM v AEM*, 2014 BCSC 453; *Scanlan v Tootoo* (1994), 152 NBR (2d) 304 (QB); *Misch v Pfister*, 2012 ONSC 5278. Compare *Pang v Pang*, 2013 ONSC 2564 at paras 123–24. See also *Dukart v Quantrill* (*Jones*), 2015 SKCA 138.

parents.[23] It is not necessary for a court to make a specific finding regarding "custody."[24]

D. JURISDICTION

1) Constitutional Authority of Parliament of Canada

The provisions of the *Divorce Act*, insofar as they relate to the custody of a "child of the marriage," are within the legislative competence of the Parliament of Canada.[25] Although the matter is not beyond dispute, it is submitted that the jurisdiction to make third-party orders pursuant to section 16 of the *Divorce Act* falls within the federal legislative domain where such claims arise on or after divorce.[26]

2) Definition of "Court"

Sections 16 and 17 of the *Divorce Act* empower a "court of competent jurisdiction" to grant interim, permanent, and variation orders respecting the custody of and access to the children of the marriage. In determining whether a court is "a court of competent jurisdiction," the definition of "court" in section 2(1) applies, and the court must be presided over by a federally appointed judge. If this definition is satisfied, sections 3 to 6 of the *Divorce Act* determine the province or territory wherein proceedings under sections 16 or 17 shall be instituted.[27]

3) Competing Jurisdictions under Federal and Provincial Legislation

An existing custody order made under provincial legislation does not bar the matter of custody from being reopened in subsequent divorce proceedings, but a custody order granted pursuant to the *Divorce Act* precludes a subsequent order being granted pursuant to provincial legislation by virtue of the doctrine of paramountcy.[28] A court may make orders for custody and access under the *Divorce Act*, supplemented by orders relating to guardianship and

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23 *Young v Young*, [1993] 4 SCR 3; *Hines v Hines*, (1992), 40 RFL (3d) 274 (NSTD).

24 *Marrello v Marrello*, 2016 ONSC 835 at para 113, citing *M v F*, 2015 ONCA 277.

25 *Papp v Papp*, [1970] 1 OR 331 (CA).

26 See *Kerr v McWhannel* (1974), 16 RFL 185 (BCCA); compare *Clarke v Hutchings* (1976), 24 RFL 328 (Nfld CA).

27 See, generally, Chapter 7, Section B, for a discussion of jurisdiction over divorce.

28 *Adamson v Adamson* (1979), 15 BCLR 195 (SC); *McKay v McKay* (1982), 30 RFL (2d) 463 (Ont HCJ).

parenting responsibilities under the British Columbia *Family Law* Act that are not operationally incompatible with the custody order.[29]

4) National Effect of Custody or Access Order; Extraprovincial Registration and Enforcement

A custody or access order made under section 16 of the *Divorce Act* has legal effect throughout Canada and may be extraprovincially registered and enforced pursuant to sections 20(2) and (3) of the *Divorce Act*.

E. TYPES OF ORDERS

1) General

Courts have an extremely wide discretion in making or declining to make[30] custody and access orders or attaching conditions thereto. They may grant interim or temporary orders, consent orders, joint custody orders, third-party custody and access orders, orders dividing the incidents of custody, non-molestation or restraining orders, supervision orders, orders restricting mobility or providing for notice of any intended change of residence, orders for the tracing of missing children, orders for the apprehension of children to prevent parental abduction, orders for the return of a child from outside the province or territory, orders for the enforcement of custody and access arrangements, and orders for the variation and termination of custody and access.

2) Interim Custody Orders

Section 16(2) of the *Divorce Act* expressly confers a discretionary jurisdiction on a court of competent jurisdiction to grant an interim order for the custody of or access to any child of the marriage pending a final determination.[31] A final determination can be made under the *Divorce Act* only upon the granting of a divorce judgment.[32] Any subsisting interim order made under section 16(2) of the *Divorce Act* will expire in the unlikely event of a dismissal of the

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29 *CMLS v FCMS*, 2016 BCSC 1298 at para 70.

30 *NL v RRM*, 2016 ONCA 915.

31 As to the nature and purpose of interim custody/access orders, see *Wiktorowski v Ramsay*, 2011 SKQB 348 at paras 22–24. And see, generally, Julien D Payne, *Payne on Divorce*, 4th ed (Scarborough, ON: Carswell, 1996) c 12 at 381–88.

32 *Yu v Jordan*, 2012 BCCA 367; compare *Bridgeman v Balfour*, 2012 ONSC 6583.

divorce petition.[33] In *SMS v TMP-S*,[34] Walsh J, of the New Brunswick Court of Queen's Bench Family Division, characterized applications for interim custody in the following words:

> Interim hearings such as this are different. They are limited by time and the nature of the evidence before it. The evidence is in affidavit form, and as usual, there is great conflict in the competing affidavits. In these circumstances, our Court of Appeal has directed judges to try to find "a reasonable temporary solution" to a very difficult problem from a host of options, pending the full hearing (See: *Legault v. Rattray* [2003] N.B.J. No. 442 (C.A.) at para. 4).

Although the best interests of the child is the sole consideration in proceedings for interim and permanent custody or access, preservation of the *status quo* plays a more significant role in proceedings for interim custody than in proceedings for permanent custody. In the absence of material evidence that the child's best interests demand an immediate change, the *status quo* will ordinarily be maintained until trial.[35] In the words of Laskin JA in *Papp v Papp*,[36] the "evidence to warrant an order for interim custody must more cogently support disturbance of the *de facto* situation than evidence to support an order for custody after a trial on the merits." Generally speaking, the *status quo* relied upon by judges in adjudicating motions for interim custody relates to the situation that existed during the parents' relationship, not the situation created as the immediate response to the parents' separation, although the post-separation effluxion of time may eventually create a new *status quo* for the court to consider.[37] Courts are disinclined to disturb the *status quo* on a temporary basis because they do not want to give one parent an advantage in the litigation and because it is disruptive for children to go back and forth between different parenting regimes.[38] In the words of Laing J, of the Saskatchewan Court of Queen's Bench, in *Guenther v Guenther*, "courts should

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33 *Papp v Papp*, [1970] 1 OR 331 (CA); see also *Yu v Jordan*, 2012 BCCA 367; and compare *Bridgeman v Balfour*, 2012 ONSC 6583.

34 2010 NBQB 329 at para 4; see also *Lee v Taggart*, 2015 BCSC 1959; *Coe v Tope*, 2014 ONSC 4002 at para 25; *Gebert v Wilson*, 2015 SKCA 139 at para 8.

35 *JV v ES*, 2014 NBQB 210; *Bateman v Bateman*, 2016 NLCA 55; *RR v SR*, 2015 NSSC 206; *MacPhee v Thistle*, 2015 ONSC 4803; *Ly v Wade*, 2016 ONSC 1155; *Babich v Babich*, 2015 SKQB 22. Compare *Whidden v Ellwood*, [2015] OJ No 3815 (Sup Ct) (no presumption in favour of *status quo*); see also *Bell v Ferguson*, 2015 ONSC 7267; *RL v MW*, 2016 PESC 43, citing *DJ v DL*, 2009 PECA 6.

36 [1970] 1 OR 331 at 344–45 (CA).

37 *Gebert v Wilson*, 2015 SKCA 139.

38 *Shotton v Switzer*, 2014 ONSC 843 at para 15, Van Melle J; *Fraser v Fraser*, 2015 ONSC 4640; *Gebert v Wilson*, 2015 SKCA 139.

not vary interim custody arrangements whether legal or de facto in the absence of evidence that the child or children are in some way at risk, or other compelling reason."[39] Where a motion judge is faced with untested evidence and incomplete investigations, coupled with the imminence of a trial date, it is unnecessary or even undesirable to make rulings that may be significantly altered when the full picture is available. Therefore, these matters should be left to the trial judge.[40] In *LSW v IEW*, Daley J, of the Nova Scotia Family Court, stated:

> Given the focus on the welfare of the child at this point, the test to be applied on an application for an interim custody order is: what temporary living arrangements are the least disruptive, most supportive and most protective for the child. In short, the status quo of the child, the living arrangements with which the child is most familiar, should be maintained as closely as possible. With this in mind, the following questions require consideration.
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> 1. Where and with whom is the child residing at this time?
> 2. Where and with whom has the child been residing in the immediate past? If the residence of the child is different than in #1, why and what were the considerations for the change in residence?
> 3. The short-term needs of the child including:
>   (a) age, educational and/or preschool needs;
>   (b) basic needs and any special needs;
>   (c) the relationship of the child with the competing parties;
>   (d) the daily routine of the child.
> 4. Is the current residence of the child a suitable temporary residence for the child taking into consideration the short-term needs of the child and:
>   (a) the person(s) with whom the child would be residing;
>   (b) the physical surrounding including the type of living and sleeping arrangements, closeness to the immediate community and health;
>   (c) proximity to the preschool or school facility at which the child usually attends;
>   (d) availability of access to the child by the noncustodial parent and/or family members.

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39 (1999), 181 Sask R 83 at para 5 (QB); see also *Shawyer v Shawyer*, 2016 ONSC 830; *JLR v GSR*, 2016 PESC 22; *Gebert v Wilson*, 2015 SKCA 139; *Kerr v Kerr*, 2016 SKCA 9; *CLB v JAB*, 2016 SKCA 101.

40 *Zaidi v Qizilbash*, [2013] OJ No 4406 (Sup Ct).

5. Is the child in danger of physical, emotional, or psychological harm if the child were left temporarily in the care of the present custodian and in the present home.[41]

Applications to vary interim custody orders are discouraged when a trial of the issues will take place in the near future. Courts have an inherent jurisdiction to vary interim custody orders under the *Divorce Act* but such variations are not granted lightly and they are rare. There is a heavy onus on the person who, rather than wait for the trial, brings on a variation motion.[42] Appeals from interim custody orders are similarly discouraged.[43] An interim order is not binding on a trial judge.[44] In the words of Slatter JA, of the Alberta Court of Appeal, in *Olson v Olson*:

> An interim order in a family matter can be varied by the court if there is a change in circumstances. Further, after a trial the trial judge may make a different order, and can vary the interim terms previously ordered: *MacMinn v. MacMinn* (1995), 174 AR 261, 17 RFL (4th) 88 (CA); *Hartley v. Del Pero* at para. 9. This allows the court to promote the best interests of the child on an interim basis, based on what is often an incomplete or inadequate record. Before permanent arrangements are put in place, the parties are entitled to a reasonable opportunity to marshal their evidence, gather documents, consult experts, and testify *viva voce* on contested issues.[45]

F. PRESERVATION OF FAMILY BONDS; JOINT CUSTODY; MAXIMUM CONTACT PRINCIPLE

1) General Application

The history of custody during the last century has witnessed a radical judicial shift from a strong paternal preference, through a strong maternal preference, to the present-day philosophy that both parents are forever and marriage

41 [1989] NSJ No 492 at para 11 (Fam Ct); see also *MR v MR*, 2016 NSSC 167 at para 4.

42 *PLM v SYB*, 2014 NBQB 222 at para 27, d'Entremont J; see also *Wissman v Wissman*, 2017 MBQB 13; *Simle v Borchuk*, 2014 NWTSC 80; *Duchnay v Jakibchuk*, 2016 ONSC 6058. As to the jurisdiction to entertain an application for interim variation of a permanent custody order pursuant to s 17(5) of the *Divorce Act*, see *LS v GS*, 2016 BCCA 346 at paras 43–44.

43 *TN v JCN*, 2013 BCCA 432; *Fitzgibbon v Fitzgibbon*, 2014 BCCA 403 (interim order for supervised access); *Wilson v Funk*, 2015 MBCA 57; *Magnusson v Duguay*, 2015 MBCA 65; *DA v JR*, 2012 NBCA 38; *Bateman v Bateman*, 2016 NLCA 55; *Howe v Whiteway*, 2015 SKCA 72. See also Section L, below in this chapter.

44 See *Prediger v Santoro*, 2016 ABCA 11; *CMH v TTH*, 2014 MBQB 65, citing *Skinner v Skinner* (1999), 134 Man R (2d) 313 at para 5. See also *VMB v KRB*, 2014 ABCA 334.

45 2014 ABCA 15 at para 5.

breakdown and divorce should not preclude continuing meaningful relationships between the child and both parents. Increased legal recognition of the importance of preserving the child–parent bond that evolved during the marriage is manifested by changes in orders for joint custody and access that have evolved over several decades.[46] Before the first Dominion-wide *Divorce Act*[47] came into force in 1968, orders for joint custody were statistically insignificant. In recent years, courts have moved away from their former practice of granting sole responsibility for the children of separated or divorced parents to one of the parents and granting only access rights to the non-custodial parent. Today, some form of joint custody disposition is found in more than 40 percent of divorce cases, and a non-custodial parent is likely to be granted access privileges on one evening every week in addition to overnight access from Friday to Sunday on alternate weekends. During the summer vacation, a non-custodial parent is frequently granted access for two to four weeks, and other vacations and statutory holidays are often equally shared between the parents on a rotational basis.

Sections 16(4), (5), and (10) of the *Divorce Act*[48] go some way towards recognizing that divorce should not undermine the family bonds that a child develops during the marriage of his or her parents.

Section 16(4) of the *Divorce Act* empowers the court to make orders "granting custody of, or access to, any or all children of the marriage to any one or more persons." This section is of fundamental importance in that it recognizes a place for joint custody arrangements; it also entitles third parties, such as grandparents or other relatives, to enjoy access to the children of divorcing or divorced parents. Third-party applications for custody and access can only be brought under the *Divorce Act* by leave of the court.[49] Courts will only allow third-party applications to be brought by persons who have been previously involved in the child's life. Third-party custody orders are rare. Applications for access privileges by third parties, especially grandparents, are far more likely to be favourably received by the courts, especially when such access will provide a measure of ongoing stability for the child. Grandparents have no presumptive right of access to their grandchildren and must discharge the onus of proving that they should have a continuing

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46 For an excellent overview of changes in the judicial approach to custody litigation, in particular, the shift in emphasis from the need of the child to have an attachment to one "psychological parent" to the need for children to maintain relationships with both parents, see *Moreira v Garcia Dominguez*, 2012 ONCJ 128.

47 SC 1967–68, c 24.

48 RSC 1985, c 3 (2d Supp).

49 *JH v JC*, 2015 NBQB 97 (application by third party under *Family Services Act* dismissed in light of prior divorce proceedings).

relationship with the child, notwithstanding the opposition of the custodial parent to access.[50]

Section 16(5) of the *Divorce Act* entitles a spouse who is granted access to make inquiries and to be given information concerning the health, education, and welfare of the children. Although section 16(5) falls short of giving equal participatory rights in the upbringing of the child to the non-custodial and the custodial parent,[51] it provides the foundation for an exchange of opinions that may facilitate the non-custodial parent's meaningful involvement in decision making. While section 16(5) of the *Divorce Act* does not confer decision-making authority on the non-custodial parent,[52] an equal right to participate in major decisions respecting a child's health, education, or welfare may be conferred by a joint custody order under section 16(4) of the *Divorce Act*, notwithstanding that one of the parents is contemporaneously granted primary day-to-day care and control of the child.

"Joint custody" is a term that generates confusion. It may signify that separated or divorced parents will continue to share in making all major decisions concerning their child's health, education, and upbringing. In this context, it is sometimes called "joint legal custody" to differentiate it from "joint physical custody," which signifies that the child will reside with each parent for substantial periods. Joint physical custody may, but does not automatically, involve equal time-sharing,[53] such as three and one-half days a week with each parent, or alternating weeks or months or years[54] with each parent. Joint legal custody usually exists when the parents have joint physical custody, but joint legal custody can also exist independently of joint physical custody.[55] Joint legal custody may extend across provincial boundaries or international borders.[56] Negotiated settlements and court orders should spell out parenting arrangements in unambiguous words that

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50 *CML v RST*, [2000] SJ No 362 (QB). See, generally, *Chapman v Chapman,* [2001] OJ No 705 at para 21 (CA), and compare *Simmons v Simmons*, 2016 NSCA 86, both of which are discussed in Chapter 12, Section E(6). See also the *Children's Law Reform Amendment Act* (*Relationship with Grandparents*), SO 2016, c 28.

51 *Misch v Pfister*, 2012 ONSC 5278, citing *Young v Young*, [1993] 4 SCR 3 at para 41.

52 *TLMM v CAM*, 2011 SKQB 326, citing L'Heureux-Dubé J's judgment in *Young v Young*, [1993] 4 SCR 3 at para 42.

53 *Strong v Strong*, 2014 MBQB 176.

54 *Auigbelle v King*, 2008 ABCA 295.

55 *CM v DJL*, 2012 NBQB 188; *Rowe v Coles*, 2012 NLTD(F) 24; *Schick v Woodrow*, 2012 SKCA 1; *Richardson v Biggs*, 2012 SKQB 162. For the most comprehensive judicial analysis in Canada of expert evidence relating to joint custody, see *GCV v GE*, [1992] QJ No 337 (CS).

56 *PLG v RJM*, 2010 NBQB 435 at para 47.

everyone can understand. This eliminates the risk that legal jargon such as "joint custody" will be misunderstood.[57]

There are no presumptions, either factual or legal, in favour of sole custody or joint custody; each case must be determined on its own unique circumstances.[58] As Goepel J, of the British Columbia Supreme Court, pointed out in *KDP v ARK*, "there are no presumptions for or against joint custody, nor is there a threshold test to establish when joint custody is feasible," and while communication is an important factor, it is also important to "balance and preserve the relationship of the child with both parents."[59] Notwithstanding the lack of any presumptions, joint legal custody is usually ordered by the courts unless there exists an insurmountable inability to communicate appropriately so as to be able to jointly make decisions with regard to a child or where there is found to be a history of abuse in the family and/or where there is disinterest by one parent as regards the care of the child that suitability of a joint legal custody arrangement likely will not be present.[60] But it has been judicially stated that shared parenting arrangements should not be ordered where the parties are in substantial conflict with each other;[61] nor should such orders be made by way of interim relief before trial if there is significant disagreement on the evidence.[62] On a shared parenting application, each parent bears the evidential burden of his or her position.[63]

Courts have recognized changing parenting roles in the two-income family by means of orders for joint custody.[64] In *Gibney v Conohan*, O'Neil ACJ, of the Nova Scotia Supreme Court, identified the following factors for consideration in determining whether a child's best interests might be served by a shared parenting arrangement:

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57 As to the inherent vagueness of the term "joint custody," see *Lennox v Frender* (1990), 27 RFL (3d) 181 at 185 (BCCA); *JRC v SJC*, 2010 NSSC 85; *Vojan v Lauzon*, 2015 ONSC 987.

58 *Robinson v Filyk* (1996), 28 BCLR (3d) 21 (CA); *ELS v CAS*, 2012 BCSC 1224; *Kopp v Burke*, 2014 MBQB 247; *FFR v KF*, 2013 NLCA 8; *Gagnon v Gagnon*, 2011 NSSC 486; *Ackerman v Ackerman*, 2014 SKCA 86 at para 48.

59 2011 BCSC 1085 at para 148, cited with approval by Warren J in *NU v GSB*, 2015 BCSC 105 at para 130.

60 *Butt v Major*, 2013 NLTD(F) 5, LeBlanc J. See also *JM v JA*, 2014 NBQB 233.

61 *MacDonald v MacDonald*, 2016 NSSC 71.

62 *Rensonnet v Uttl*, 2014 ABCA 304 at para 9, citing *Richter v Richter*, 2005 ABCA 165; *CEC v MPC*, 2006 ABCA 118.

63 *Wickens v Wickens*, 2012 ABQB 441.

64 *Gibney v Conohan*, 2011 NSSC 268 at para 45. As to the increased incidence of joint custody and shared parenting arrangements, see Rachel Birnbaum, John-Paul Boyd, Nicholas Bala, & Lorne Bertrand, "Shared Parenting Is the New Norm: Legal Professionals Agree on the Need for Reform", *The Family Way* – The CBA National Family Law Section Newsletter (October 2014).

a. the proximity of the parents' homes;
b. the daily availability of parents and others in the child's extended family;
c. each parent's motivation and capability;
d. the number of transitions between homes required of the parenting schedule;
e. the ease of mid-week contact;
f. each parent's interest in shared decision-making;
g. the ease of developing a routine in each home;
h. each parent's willingness to share the parenting burden;
i. the benefits to each parent of sharing the parenting burden;
j. any improvements to the parents' standards of living as a result of sharing the parenting burden;
k. the parents' willingness to access professional advice on parenting issues;
l. "the elephant in the room"; and
m. each parent's style of parenting.[65]

But decisions on shared parenting applications are fact specific[66] and not all of the factors identified in *Gibney v Conohan* will be relevant in all cases.[67]

Courts have moved away from presuming that if parties have difficulty communicating, all forms of joint custody are inappropriate.[68] Communication in this day and age can easily be accomplished without seeing or talking to one another by using texting, emails, or voice mail.[69] As Baird J, as she then was, of the New Brunswick Court of Queen's Bench, observed in *DLG v GDR*:

> 279 Judges are becoming far more receptive to joint custody orders in high conflict situations.
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> . . .
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> 281 Recent *jurisprudence* has challenged the oft repeated principle that joint custody orders should only be granted in cases where the parents can effectively communicate with each other. In fact, judges are resorting to creative alternatives as an attempt to maintain a meaningful role for the

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65 *Gibney v Conohan*, 2011 NSSC 268 at para 92; see also *MSC v TLC*, 2013 NSSC 378; compare *LeBlanc v Brown*, 2013 NSSC 429.

66 *Matthews v Taylor*, 2012 NLTD(G) 24; *SB v TO*, 2013 NSSC 243; *MacNutt v MacNutt*, 2013 NSSC 267.

67 *Conrad v Skerry*, 2012 NSSC 77.

68 *Landa-McAuliffe v Boland*, 2012 BCSC 465; *Kopp v Burke*, 2014 MBQB 247; *Droit de la famille — 132434*, 2013 QCCA 1530; *Gagnon v Gagnon*, 2011 NSSC 486; *JAW v CFCR*, 2012 SKQB 46. See also *Roche v Roche*, 2016 NLTD(F) 4; *Miller v Callahan*, 2016 NLTD(F) 16; *Dukart v Quantrill* (*Jones*), 2015 SKCA 138, citing *Ackerman v Ackerman*, 2014 SKCA 86 at para 40.

69 *TH v JH*, 2016 NBQB 6 at para 82, Robichaud J.

> access parent. These alternatives in high conflict situations include, but are not exclusive to, parallel parenting orders, parenting coordinators, therapeutic intervention, deprogramming of children such as is offered by the Warshak and Rand Clinic in the United States, transfer of custody from the alienating parent to the other parent or a combination of joint and shared custody orders with specified parenting clauses.[70]

But as Baird JA, of the New Brunswick Court of Appeal, further observed in *JH v TH*: "In child custody cases where it is clear the parents are not able to effectively communicate with each other, the pivotal factor, in my opinion, is whether the court is satisfied sufficient safeguards are in place so as to insulate the children from the parental conflict."[71] Although ongoing parental conflict is not an automatic bar to some form of joint custody or shared parenting order, the degree of conflict may be sufficiently high to preclude any such order.[72] In the words of Pentelechuk J in *AJU v GSU*,[73] "[c]ommunication issues and lack of cooperation for a couple caught in the turbulence of divorce should not be compared to an impossible standard that does not exist in the most functional of families." The nature and extent of the conflict must be analyzed.[74] There must be an evidentiary basis for the belief that joint custody will be feasible.[75] For shared parenting to work, the parents must both be involved in their children's lives.[76] However, one parent cannot create problems with the other parent and claim sole custody on the basis of a lack of co-operation.[77] Joint custody may be appropriate to preserve a

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70 2012 NBQB 177 at paras 279 and 281. See also *MacDonald v Ross*, 2013 NSSC 117, citing *Baker-Warren v Denault*, 2009 NSSC 59 at para 26. And see *Hsiung v Tsioutsioulas*, 2011 ONCJ 517 at para 17; *JH v TH*, 2017 NBCA 7.

71 2017 NBCA 7 at para 33.

72 *CEC v MPC*, [2006] AJ No 383 (CA) (interim proceeding), citing *Richter v Richter*, [2005] AJ No 616 at para 11 (CA); see, generally, *AJU v GSU*, 2015 ABQB 6; *Robinson v Filyk* (1996), 84 BCAC 290; *Javid v Kurytnik*, [2006] BCJ No 3195 (CA); *Kopp v Burke*, 2014 MBQB 247; *VC v PR*, 2016 NBQB 90; *JH v TH*, 2017 NBCA 7; *FFR v KF*, 2013 NLCA 8; *Hustins v Hustins*, 2014 NSSC 185; *Kern v Kern*, 2015 ONSC 4345; *JAW v CFCR*, 2012 SKQB 46; *CMS v MRJS*, 2009 YKSC 32; compare *CS v SN*, 2008 YKSC 22; see also *Children's Act*, RSY 2002, c 31, s 30(4). See also *Wardell v Perreault*, 2011 ONCJ 288, citing Justice Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 96.

73 2015 ABQB 6 at para 76.

74 *Kopp v Burke*, 2014 MBQB 247; *MAB v LAB*, 2013 NSSC 89.

75 *May-Iannizzi v Iannizzi*, 2010 ONCA 519.

76 *Kopp v Burke*, 2014 MBQB 247; *KCWV v KLP*, 2010 NBCA 70; *RJ v WJ*, 2011 NBQB 294; *BP v AT*, 2014 NBCA 51 at para 14.

77 *Hestbak v Hestbak*, 2012 ABQB 633; *DLG v GDR*, 2012 NBQB 177; *Roche v Roche*, 2016 NLTD(F) 4; *Lawson v Lawson*, [2006] OJ No 3179 (CA); *Caverley v Stanley*, 2015 ONSC 647; *Ackerman v Ackerman*, 2014 SKCA 86. See also *AJU v GSU*, 2015 ABQB 6 at paras 70–73.

parent's relationship with the children in cases where the primary caregiver objects to joint custody without just cause and there is a risk that he or she will try to marginalize the other parent's involvement with the children.[78] The fact that one parent is opposed to sharing major decision-making authority over the children does not preclude an order for joint custody. If the court is satisfied that the parents are capable of communicating and that the child would not be adversely affected, an order aimed at enhancing parental involvement in the child's life would generally seem consistent with the best interests of the child.[79]

In *Jordan v Jordan*,[80] Joyce J, of the British Columbia Supreme Court, discussed factors to be considered by a court in relation to a joint custody order:

> [279] . . . I am satisfied that the ability of the parents to communicate and cooperate remains an important factor when considering the best interests of a child. That is apparent from the decision in *Robinson v Filyk* itself as well as from the decision in *Ness v Ness* (1999) 43 R.F.L. (4th) 363 (B.C.C.A.). It is not the only factor to be considered, however.
>
> [281] In my view, some other factors that are relevant to this enquiry include: (i) the ability of each parent to make proper decisions for the child; (ii) the extent to which the child will reside with each parent; (iii) the geographic distance between the parents' homes; (iv) the extent to which the parties' "parenting styles" may differ and, consequently, the extent to which their different parenting styles may provide the opportunity for disagreement; (v) the harm that may be caused to the child if the parents' disagreement on issues creates an atmosphere of conflict; and (vi) the nature of the disagreements in the past, particularly whether they relate to "access issues" that are likely to be resolved by the court order or whether they concern matters of child rearing that are likely to continue to arise. These are not necessarily all of the factors that have a bearing on what sort of custody order is in the best interests of the particular child but they are, I think, some of the important ones.

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78 *Vendetti v Mackenzie*, 2014 ONSC 4846 at para 15, citing *Kaplanis v Kaplanis*, [2005] OJ No 275 (CA), and *Ladisa v Ladisa*, [2005] OJ No 276 (CA); *Fraser v Fraser*, 2016 ONSC 4720.

79 *VL v DL*, [2001] AJ No 1259 (CA); *Kopp v Burke*, 2014 MBQB 247; *JAW v CFCR*, 2012 SKQB 46. In Ontario, guardianship of the person of a child is subsumed under "custody" of that child. "Guardianship" is a term that is confined to the guardianship of the property of a child: see *Children's Law Reform Act*, RSO 1990, c C.12, Part III, especially ss 20, 47–58, and 61.

80 2001 BCSC 1058; see also *Marino v Marino*, 2008 BCSC 1402; *Haigh v Spence*, 2010 BCSC 270; *CLH v RJJS*, 2012 BCSC 579; *Merritt v Merritt*, 2010 ONSC 4959; see also *Hammond v Nelson*, 2012 NSSC 27 at para 68.

And in *Droit de la famillle – 16261*[81] and *Droit de la famille – 162418*,[82] the Quebec Court of Appeal endorsed the opinion of Professors Jean Pineau and Marie Pratte, who emphasize that the interests of the child must take into account the following elements in determining whether an order for shared parenting is appropriate:

a) The parental capacity and availability of parents.
b) The child's need for stability,
c) The proximity of the residences.
d) The age and the child's desire when applicable.
e) The minimum capacity parental communication.
f) The lack of systematic disagreement between the parents.
g) The existence of educational values, normal [legal] spiritual and comparable modes of intervention in educational matters.

However, these criteria do not create a presumption in favour of joint custody.[83] In *Ladisa v Ladisa*,[84] the Ontario Court of Appeal upheld the trial judge's order for joint custody, which provided for the two younger siblings, aged thirteen and nine at the time of the appeal, to spend alternate weeks in each parental home. In dismissing the appeal in the absence of any demonstrated palpable and overriding error, the Ontario Court of Appeal observed that the trial judge's exercise of discretion properly took account of the history of co-parenting during the marriage, the wishes of the thirteen-year-old child, the absence of any compelling reason to separate the siblings, expert evidence presented by the Children's Lawyer who recommended joint custody, the evidence of third parties respecting the parents' interaction with the children, and the ability of the parents to communicate effectively and put their children's interests ahead of their own, notwithstanding ongoing parental strife. The provisions of the trial judge's order with respect to an older child, who was almost seventeen years of age at the time of the appeal, were vacated by the Ontario Court of Appeal on the basis that this child was now old enough to determine with whom she would live.

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81 2016 QCCA 224 at para 8, citing Jean Pineau & Marie Pratte, *La famille* (Montréal: Les éditions Thémis, 2006) at 477 et 861–65.

82 2016 QCCA 1572.

83 In *Droit de la famille – 162418*, 2016 QCCA 1572 at para 3.

84 [2005] OJ No 276 (CA); see also *Ursic v Ursic*, [2006] OJ No 2178 (CA); *Cook v Sacco*, [2006] OJ No 4379 (CA); *May-Iannizzi v Iannizzi*, 2010 ONCA 519; *Madott v Macorig*, 2010 ONSC 5458; *Walters v Walters*, 2012 ONSC 1845.

The judgment in *Ladisa v Ladisa* may be compared with that of the same panel of judges of the Ontario Court of Appeal in *Kaplanis v Kaplanis*.[85] In the latter case, the trial judge was found in error in granting an order for joint legal custody of a two-and-a-half-year-old child in the face of ongoing spousal conflict but in the hope parental co-operation would improve in the future after the parents received counselling. The trial judge was also found in error in ordering mandatory counselling for the parents with the unnamed counsellor being empowered to make decisions respecting the child's schools, activities, and hobbies, if the parents were unable to agree. While acknowledging that it might be desirable for parents to have recourse to a counsellor or parenting coach to resolve their disputes, the Ontario Court of Appeal stated that the counselling provisions of the order of the trial judge were problematic. In particular, the Ontario Court of Appeal observed that the legislation does not specifically authorize the court to order counselling,[86] although some trial judges have held that such orders may be granted in the exercise of the court's inherent jurisdiction.[87] In the present case, however, there was no evidence that the parties would be able to agree upon a counsellor and no agreed procedure was established for appointing a counsellor if the parents could not agree; nor was there any evidence that the parents were willing to have their disputes resolved by a counsellor outside the court process envisaged by the *Divorce Act* and without recourse to it. In addressing the broader issue of joint custody, the Ontario Court of Appeal expressed the opinion that the ongoing needs of the child require some evidence to be presented to the court that the parents, despite their differences, can effectively communicate with each other. Where such evidence is lacking or the evidence points to a parental inability to communicate, the hope that communication will improve

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85 [2005] OJ No 275 (CA); see also *Roy v Roy*, [2006] OJ No 1872 (CA); *Giri v Wentges*, 2009 ONCA 606; *BV v PV*, 2012 ONCA 262; *Beirnes v Brown*, 2015 ONSC 7138; *BC v SW*, 2016 ONSC 4521. For an excellent review of the criteria applied by Ontario courts in determining whether an order for joint custody is appropriate, see *Khairzad v McFarlane*, 2015 ONSC 7148 at paras 27–33, Chappel J. And see Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 Fam LQ 285; Martha Shaffer, "Joint Custody since *Kaplanis* and *Ladisa*: A Review of Recent Ontario Case Law" (2007) 26 Fam LQ 315; Martha Shaffer, "Experiments in Custody Reform" in Law Society of Upper Canada, *Special Lectures 2006: Family Law* (Toronto: Irwin Law, 2007) at 373.

86 But see *contra*, *Marquez v Zapiola*, 2013 BCCA 433 at para 66, citing s 16(6) of the *Divorce Act*. And see *Testani v Haughton*, 2016 ONSC 5827 (exercise of jurisdiction to order therapeutic counseling pursuant to ss 24(2) and 28(1)(b) and (c)(vii) of the *Children's Law Reform Act*, RSO 1990, c C-12).

87 See also *LM v TM*, 2012 NBQB 238, citing s 129(2) of the *Family Services Act*, SNB 1980, c F-2.2; see also s 16(6) of the *Divorce Act*. And see *LM v JB*, 2016 NBQB 93 (exercise of *parens patriae* jurisdiction).

once the litigation is over is an inadequate basis for making a joint custody order. Given its finding that this is what occurred in *Kaplanis v Kaplanis*, the Ontario Court of Appeal substituted its own order for sole custody in favour of the mother and directed a rehearing of the issue of access, with the hope that the Children's Lawyer would become involved.

Where a court is concerned about the disruption caused by the children's frequent moves between the two parental households, the court may reduce the frequency of the exchanges by substituting an alternate weekly parenting regime for daily exchanges.[88] Exceptionally, a court may grant a "nesting order" whereby the children will reside in the home of one of the parents and each of the parents will be allotted specific blocks of time to spend with the children in that home.[89] Although the benefits of a "nesting order" under which the parents visit the children rather than *vice versa* are best achieved where the children are able to stay in the matrimonial home, particularly if it is the only residence that they have known, all benefits are not lost merely because the matrimonial home has been sold and the parents have acquired separate residences.[90] As an alternative to an order whereby the children continue to reside in the matrimonial home and each parent lives in the home with the children at different periods of time, a court may grant exclusive possession of the home to one spouse but provide for specified access periods within the home by the non-custodial parent, during which time the custodial parent must vacate the premises.[91] Given privacy concerns and the financial costs involved, "nesting orders" are exceptional even on a temporary basis, save in circumstances where the parents are agreeable to that form of order. Such orders, nevertheless, constitute one of the options available to promote shared parenting responsibilities.

Faced with a pattern of previous parental conflict, expert opinions may differ on the question whether the best interests of a child of separated or divorced parents will be served by a shared parenting regime. Judges in Quebec are inclined to grant orders for shared parenting only when the following conditions co-exist: (1) adequate parenting capacity; (2) some minimal functional ability in the parents to communicate and co-operate; and (3) geographic proximity of the two households. In a high-conflict situation where the expert evidence of a psychologist supports a finding that the parents are incap-

88 *Zukerman v Villalobos-Cardeilhac*, 2009 BCSC 1223.

89 *Hughes v Erickson*, 2014 BCSC 1952; *Rinella v Rinella*, 2015 ONSC 5737 (interim order); *Yetman v Tenaglia*, 2016 ONSC 579 (temporary nesting arrangement in the matrimonial home); see also *Perks v Lazaris*, 2016 ONSC 1356 (termination of nesting order).

90 *Hatton v Hatton*, [1993] OJ No 2621 (Gen Div); *Greenough v Greenough*, [2003] OJ No 4415 (Sup Ct).

91 *Stefanyk v Stefanyk* (1994), 1 RFL (4th) 432 (NSSC).

able of reaching a viable parenting plan that will meet the developmental needs of their child, the trial judge's refusal to grant an order for shared parenting should be upheld on appeal.[92]

Although many Canadian courts have been traditionally averse to granting any form of joint custody order where the parents have a history of ongoing substantial conflict after their separation, some courts have endorsed the concept of "parallel parenting" in cases where the parents are openly hostile and uncooperative.[93] Indeed, the conventional wisdom that joint custody and joint guardianship orders should be granted only when the parents can co-operate and communicate relatively well is being challenged in more and more cases, especially in Alberta,[94] British Columbia,[95] Ontario,[96] and Saskatchewan.[97] The following characteristics of parallel parenting orders have been identified:

- A parent assumes responsibility for the children during the time they are with that parent.
- A parent has no say or influence over the actions of the other parent while the children are in the other parent's care.
- There is no expectation of flexibility or negotiation.
- A parent does not plan activities for the children during the other parent's time.
- Contact between the parents is minimized.
- Children are not asked to deliver verbal messages.
- Information about health, school, and vacations is shared in writing, usually in the form of an access book.[98]

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92 *TPG c DM*, [2004] JQ no 5040 (CA); *Droit de la famille — 091541*, [2009] JQ no 6461 (CA).

93 *SLK v TRK*, 2015 SKQB 91, citing *Hladun v Hladun*, 2002 SKQB 319 at para 40. For a summary of the evolution of caselaw on joint custody in Alberta and Ontario, see *VL v DL*, [2001] AJ No 1259 (CA); *VK v TS*, 2011 ONSC 4305; see also *Frame v Frame*, [2007] MJ No 344 (CA); *MacDonald v MacDonald*, 2011 NSSC 317; *Sgroi v Socci*, [2007] OJ No 5801 (Sup Ct); *Howard v Howard*, [2007] SJ No 489 (CA). Compare the use of the "Joyce" style of joint guardianship order in *Jordan v Jordan* (elsewhere known as "joint legal custody"), which is frequently used in British Columbia, with or without a substantial child–parent time-sharing regime ("joint physical custody"): see, for example, *SDN v MDN*, [1997] BCJ No 3027 (SC); *DCR v TMR*, [2007] BCJ No 1684 (SC); compare *Cavanaugh v Balkaron*, 2008 ABCA 423; *ANH v MKC*, 2010 NBQB 120. See also *Koeckeritz v Secord*, 2008 SKQB 502.

94 *McCurry v Hawkins*, [2004] AJ No 1290 (QB); *Roberts v Salvador*, [2006] AJ No 715 (QB).

95 *Carr v Carr*, [2001] BCJ No 1219 (CA); *JR v SHC*, [2004] BCJ No 2444 (Prov Ct); compare *Javid v Kurytnyk*, [2006] BCJ No 3195 (CA).

96 See *VK v TS*, 2011 ONSC 4305, wherein several Ontario Court of Appeal cases are reviewed.

97 *McMartin v Fraser*, 2014 SKQB 243.

98 *JEB v CB*, 1998 ABQB 774 at para 18; *McCurry v Hawkins*, [2004] AJ No 1290 (QB); *Hensell v Hensell*, [2007] OJ No 4189 (Sup Ct); *JAW v CFCR*, 2012 SKQB 46. And see Peter G Jaffe

Cases involving high conflict, including suspected parental alienation, may be candidates for a parallel parenting regime.[99] Parallel parenting orders do not depend upon co-operative working relationships or even good communication between the parents.[100]

In *VL v DL*,[101] the Alberta Court of Appeal summarized various judicial and legislative efforts to ensure that the children of separated or divorced parents continue to benefit from the input of both parents on the breakdown of the family unit. The task of the court is to find a parenting arrangement that optimizes the children's best interests. In some, but not all, cases in which the parents can no longer co-operate, an order for parallel parenting may constitute a viable option. Such an order has three advantages. First, it allows the court to make decisions on disputed evidence because an order for parallel parenting typically requires the parents to maintain a communications record, thereby enabling the court to decide which of the parents is unreasonable, controlling, or obstructive. Second, and more important, it gives primacy to the children's best interests rather than to the dispute between the parents. A parallel parenting regime avoids a destructive result in that it enables both parents to have continuing input into their children's lives, rather than have one of them reduced to the role of a passive observer or babysitter as a result of ongoing hostility and lack of co-operation between the parents. Because custody and access orders are never final, a parallel parenting order can always be revisited if it fails to accommodate the best interests of the children. In granting its initial order, therefore, a court does not have to make a permanently binding choice between optimism and prudence. It is well placed to monitor the effects of a parallel parenting regime and, if it becomes satisfied that an ongoing poor relationship between the parents is having a detrimental effect on the children, the parenting regime can be changed. The third advantage of parallel parenting is that it nurtures the objective of ensuring, insofar as is practicable, maximum contact between the children and their two parents, a legislative objective that has been endorsed

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et al, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting" (2008) 46 Fam Ct Rev 500 at 516.

99 *DJG v JRG*, [2008] NBJ No 516 at para 115 (QB); *AL v CM*, 2010 NBQB 46. Compare *AA v GG*, 2010 ONSC 1261 at paras 238–41; *Seed v Desai*, 2014 ONSC 3329; see also *Madott v Macorig*, 2010 ONSC 5458, citing *Andrade v Kennelly*, [2007] OJ No 5004 (CA); *Ladisa v Ladisa*, [2005] OJ No 276 (CA); *Ursic v Ursic*, [2006] OJ No 2178 (CA).

100 *Askin v Askin*, 2011 BCSC 1779; *Barnes v Parks*, [2001] OJ No 643 (CA); *TGM v PGM*, [2002] OJ No 398 (Sup Ct); compare *JDL v RJJL*, 2012 NBQB 378; *Ryan v Scott*, 2011 ONSC 3277.

101 [2001] AJ No 1259 (CA). For a useful and succinct review of the increasing use of "parallel parenting" orders in high-conflict custody disputes, see *JR v SHC*, [2004] BCJ No 2444 (Prov Ct), Tweedale Prov Ct J; see also *JAW v CFCR*, 2012 SKQB 46.

by the Parliament of Canada in the *Divorce Act* and by provincial legislation that deals with both married and unmarried parents.

In *VK v TS*,[102] Chappel J, of the Ontario Superior Court, listed the following factors as particularly relevant in determining whether a parallel parenting regime, rather than sole custody, is appropriate:

a) The strength of the parties' ties to the child, and the general level of involvement of each parent in the child's parenting and life. In almost all cases where parallel parenting has been ordered, both parents have consistently played a significant role in the child's life on all levels.
b) The relative parenting abilities of each parent, and their capacity to make decisions that are in the child's best interests.[103] Where one parent is clearly more competent, responsible and attentive than the other, this may support a sole custody arrangement. On the other hand, where there is extensive conflict between the parties, but both are equally competent and loving parents and are able at times to focus jointly on the best interests of the child, a parallel parenting regime may be ordered.
c) Evidence of alienation by one parent. If the alienating parent is otherwise loving, attentive, involved, competent and very important to the child, a parallel parenting arrangement may be considered appropriate as a means of safeguarding the other party's role in the child's life. On the other hand, if the level of alienation is so significant that a parallel parenting order will not be effective in achieving a balance of parental involvement and will be contrary to the child's best interests, a sole custody order may be more appropriate.
d) Where both parties have engaged in alienating behaviour, but the evidence indicates that one of them is more likely to foster an ongoing relationship between the child and the other parent, this finding may tip the scale in favour of a sole custody order.
e) The extent to which each parent is able to place the needs of the child above their own needs and interests. If one of the parties is unable to focus on the child's needs above their own, this may result in a sole custody order, even if that parent is very involved with the child and otherwise able to meet the child's day to day needs.

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102 2011 ONSC 4305 at para 96; see also *Denninger v Ross*, 2013 NSSC 237; *Pang v Pang*, 2013 ONSC 2564 at paras 123–24. For additional factors, see *KH v TKR*, 2013 ONCJ 418 at paras 51–54. And see *Batsinda v Batsinda*, 2013 ONSC 7869 (interim orders); *Ruffudeen v Coutts*, 2016 ONSC 3359.

103 See *HD v PED*, 2012 NBQB 315 at paras 143–51.

f) The existence of any form of abuse, including emotional abuse or undermining behaviour, which could impede the objective of achieving a balance of roles and influence through parallel parenting.

As Chappel J further observed, parallel parenting orders, like orders for sole custody or joint custody, may address incidents of custody beyond the residential schedule.[104] In the particular circumstances of the case, she concluded that the ongoing high conflict between the parents could be effectively managed by a parallel parenting order for equal time sharing, with sole decision-making authority over the child's education being granted to the father and sole decision-making authority on matters relating to the child's medical and health needs being given to the mother. Cases that support joint custody even when there is a high degree of conflict generally include clauses for parallel parenting and contain multidirectional orders.[105] In some cases, a parallel parenting order provides that each parent has the final decision-making authority with respect to a different area. In other cases, parallel parenting means that each parent has the right to make major decisions respecting the child when the child is with that parent.[106]

Sections 16(10) and 17(9) of the *Divorce Act* extol the virtues of preserving the parent–child bond after divorce. They expressly require the court, in making an order for custody or access, or a variation order relating thereto, to give effect to the principle that a child of the marriage should have as much contact with each spouse or former 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.[107] The maximum contact principle is mandatory but not absolute. The *Divorce Act* only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact.[108] The maximum contact principle, although a laudable objective, is diminished in cases where there is high parental conflict and where the trier of fact determines

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104 See also *South v Tichelaar*, [2001] OJ No 2823 (Sup Ct); *Hodgins v Durnford*, 2011 ONSC 4580.

105 *Quercia v Francioni*, 2011 ONSC 6844 at para 8.

106 *Pang v Pang*, 2013 ONSC 2564 at para 136; *Jackson v Mayerle*, 2016 ONSC 72 at para 616.

107 See *Young v Young*, [1993] 4 SCR 3 at para 17; *Lust v Lust*, [2007] AJ No 654 (CA); *DME v RDE*, 2015 ABQB 47; *RMS v FPCS*, 2011 BCCA 53; *SS v DS*, 2013 NSSC 384; *BV v PV*, 2012 ONCA 262; *Magnus v Magnus*, [2006] SJ No 510 (CA).

108 *Young v Young*, 49 RFL (3d) 117 at 117–18 (RFL), McLachlin J; see also *SLT v AKT*, 2009 ABQB 13; *Rensonnet v Uttl*, 2016 ABCA 196; *RMS v FPCS*, 2011 BCCA 53; *KM v SM*, 2011 NBQB 369; *MacRae v Hubley*, 2011 NSCA 25; *AF v JW*, 2013 ONSC 4272; *JP v JP*, 2016 SKCA 168.

it is necessary to reduce access in order to immunize the children from its long-term negative consequences.[109] The maximum contact principle does not, of itself, provide a sufficient basis upon which to order shared parenting,[110] although such an order may be deemed appropriate in light of the attendant circumstances.[111]

Where a joint custody order is inappropriate, an access order will enable the child and parent to develop or maintain a positive relationship and facilitates the parent's ongoing contribution to the child's development during his or her formative years.[112]

2) Maximum Contact: Infants and Toddlers[113]

Recent Canadian caselaw affirms that orders whereby infants and toddlers enjoy overnight access to their non-custodial parent should no longer be regarded as exceptional. It has been asserted that the view formerly held by social scientists that overnight access for infants is undesirable, reflects an outdated perception of parent–child relationships, and is inconsistent with more recent research on child development. Current opinion suggests that infants readily adapt to the different household environments, provided that feeding and sleeping routines are similar in each household to ensure stability.[114] Consistent with this approach and with a recommendation that the father accept the primary-caregiving mother's advice respecting the child's routines and schedules, Wilson J in *Lygouriatis v Gohm*[115] granted the father

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109 See *JH v TH*, 2017 NBCA 7 at para 27, Baird JA.

110 *Rensonnet v Uttl*, 2016 ABCA 196; *Dempsey v Dempsey*, [2004] BCJ No 2400 (SC); *FFR v KF*, 2013 NLCA 8; *Fraser v Fraser*, 2016 ONSC 4720; *Bromm v Bromm*, 2010 SKCA 149.

111 *Moreau v Moreau*, [2004] AJ No 1296 (QB); *Fraser v Fraser*, 2016 ONSC 4720.

112 *MEE v TRE*, [2002] NSJ No 425 (SC); compare *KRC v CAC*, [2007] NSJ No 314 (SC). See also *Richardson v Biggs*, 2012 SKQB 162.

113 For an insightful detailed analysis of this issue that examines mental health research and relevant legal judgments, see Melanie Kraft, "Things You Need to Know about Parenting Plans for Children under 3 Years Old" (Paper presented to Law Society of Upper Canada, 2011 Six-Minute Family Law Lawyer, Toronto, 1 December 2011).

114 See *Cooper v Cooper*, [2002] SJ No 226 (QB), citing Joan B Kelly & Michael E Lamb, "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children" (July 2000) 38 Family and Conciliation Courts Review 297 at 308–9. See also *Marsden v Murphy*, [2007] AJ No 830 (QB); *JV v ES*, 2014 NBQB 210; *Hann v Elms*, 2011 NLTD(F) 45; *MT v MG*, 2010 NSSC 89; *Ryan v Scott*, 2011 ONSC 3277; *Hasan v Khalil*, 2012 ONSC 7264. But compare *Perchaluk v Perchaluk*, 2012 ONCJ 525 at paras 36–43. And see Nicholas Bala, "Expert Evidence, Assessments and Judicial Notice: Understanding the Family Context" in Harold Niman & Anita Volikis, *Evidence in Family Law*, loose-leaf (Aurora, ON: Canada Law Book, 2010–).

115 [2006] SJ No 609 (QB); As to breast-fed child, see *SV v SS*, 2015 BCSC 1665; *Squires v Smith*, 2015 NLTD(F) 6, leave to appeal denied, 2015 NLCA 25 at para 37, Hoegg JA; subsequent

interim access to a three-month-old child that included specified overnight access on alternate weekends. Different considerations apply where a substantial block of summer access is sought. In *Ursic v Ursic*,[116] Laskin JA, of the Ontario Court of Appeal, accepted the opinion of an expert witness that the father's access to a three-year-old child for a full, uninterrupted month during the summer would be inappropriate, having regard to the child's age and state of development, and would likely be harmful to the child's sense of security and primary attachments. And in *Richardson v Biggs*,[117] Smith J, of the Saskatchewan Court of Queen's Bench, held that an alternating weekly shared parenting regime was inappropriate for a three-year-old child.

In *Chaisson v Williams*, MacDonald J, of the Nova Scotia Supreme Court, stated:

> 9 This is a very young child. I do not think it is controversial to say that children under five generally require relatively frequent contact with each of his or her parents to establish and maintain healthy attachments. The *Divorce Act*, R.S.C. 1985, c. 3 specifically directs that a child is to be provided as much contact with each of that child's parents as is consistent with that child's best interests. Although this requirement does not specifically appear in the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, the *Act* under which this application had been commenced, this principle is recognized and applied. This is because it has now been understood both parents play a significant role in developing a healthy well adjusted child. Negative consequences can result from infrequent contact with one of the child's parents.
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> . . .
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> 16 There appears to be some consensus amongst those who study child development that children younger than two or three should have an opportunity to interact with both parents every day or every other day (if at all possible) in a variety of functional contexts such as feeding, play, discipline, basic care, limit setting, and putting the child to bed. Most children who have a secure attachment to their parents can move from one parent to the other without concern about psychological distress. They may still exhibit transition stress reactions typical for their age but generally these cause no long term damage if properly managed by the child's parents. After the age of two it is generally recognized many children can manage 2 consecutive overnights with one parent in the absence of the other. After age 3 many children tolerate 3 to 4 consecutive days absence from one par-

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proceedings, *GS v AS*, 2016 NLTD(F) 7; *Stewart v Abedi*, 2015 ONSC 1870; *Cavannah v Johne* (2008), 64 RFL (6th) 203 (Ont Sup Ct).

116 [2006] OJ No 2178 (CA). Compare *Bolan v Bolan*, 2013 SKCA 97 (interim order).

117 2012 SKQB 162. Compare *Parsons v Parsons*, 2014 ABQB 586.

> ent while in the care of the other parent and they may be able to be quite happy for several consecutive days with that parent when they are in a stimulating situation, going on a special trip for example. Many child psychologists would not recommend a child to be absent from the care of one of his or her parents for as long as two consecutive weeks until that child reaches six years of age. These are general recommendations. Whether they should apply to a particular child will depend upon many factors including the personality and temperament of the child and the personality, temperament, and parenting skills of the parent.[118]

Reviewing the conference of the Association of Family and Conciliation Courts on Divorce Custody and Attachments held in Chicago in June 2012, Bill Eddy, a lawyer, mediator, and author from San Diego, California, states:

> The issue of when to start overnights and how many nights to have with the other parent remains controversial during these first three years. Research was presented that showed that one or more overnights a week away from the primary attachment parent is distressing to the child during the first two years. What seems to be agreed upon is that the gender of the "primary attachment" is not the biggest factor, and that shared parenting up to 50-50 after about age 4–5 generally can work well.[119]

G. TERMS AND CONDITIONS

1) General

Sections 16(6) and 17(3) of the *Divorce Act* confer a broad discretion on the court to grant custody or access orders for a definite or indefinite period and subject to any such terms, conditions, or restrictions as the court thinks fit.[120] These subsections are broad enough to permit a court to incorporate a peace officer assist clause in a custody or access order.[121]

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118 2012 NSSC 224 at paras 9 and 16.

119 Bill Eddy, Online Blog, online: http://highconflictinstitute.com/blog. But see *Parsons v Parsons*, 2014 ABQB 586.

120 *Lust v Lust*, [2007] AJ No 654 (CA) (interim custody order coupled with judicial directions for counselling); *Marquez v Zapiola*, 2013 BCCA 433 (counselling); *JDL v RJJL*, 2012 NBQB 378 (diverse conditions imposed); *VC v PR*, 2016 NBQB 90 (hair follicle testing for drugs); *Crewe v Crewe*, 2008 NSCA 115 (restrictions on access); *Gagnon v Gagnon*, 2011 NSSC 486; see also *Perron v Perron*, 2012 ONCA 811 (minority language education rights).

121 *DJS v JMD*, 2013 BCSC 2302.

Custody orders can be reviewable or varied after a specific period of time.[122] Review orders, unlike variation orders under section 17 of the *Divorce Act*, do not require proof of a change of circumstances to justify modification of an existing custody or access order.[123] It is appropriate that the court order a review where there is uncertainty as to what the final disposition of a matter should be, and when and how the trial judge anticipates the uncertainty will be resolved.[124] A review order is also appropriate in situations where serious uncertainty may arise and require case management of transitions for limited purposes.[125]

Although courts are generally averse to attaching conditions to a custody order that limit the powers of the custodial parent,[126] it is not that unusual for a court to impose restrictions on an access order that restrain the non-custodial parent from engaging in conduct that is detrimental to a child.[127] In determining what restrictions, if any, should be placed on a custodial parent, a court should be wary about interfering with the custodial parent's right to decide what is best for the child. A court should defer to the decision-making responsibilities of the custodial parent unless there is substantial evidence that the child's long-term welfare will be impaired.[128] There are two notable exceptions where courts will impose restrictions on a custodial parent.[129] The first arises in mobility cases wherein the court determines that restrictions should be imposed on a custodial parent's right to relocate with the children.[130] The second arises in high-conflict parental disputes wherein the court directs one or both parents to undergo counselling.[131] These orders are becoming increasingly common. While enforcement of court-ordered counselling by means of contempt proceedings may not be permissible, it is not improper for a court to draw an adverse inference against a parent who

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122 *LG v RG*, 2012 BCSC 1365; *LES v MJS*, 2014 NSSC 34; *Noah v Bouchard*, 2013 ONCA 383; *RLP v SNM*, 2015 SKQB 288.

123 *MWB v ARB*, 2011 BCSC 1663; *LES v MJS*, 2014 NSSC 34; *Chernoff v Chernoff*, 2014 SKQB 139.

124 *Zaidi v Qizilbash*, 2014 ONSC 201 at paras 166–68.

125 *Ross-Johnson v Johnson*, 2010 NSSC 262; see also *Sather v McCallum*, [2006] AJ No 1241 (CA). Compare *EKI v MGS*, 2013 NBQB 406; *Moore v Moore*, 2013 NSSC 252.

126 Compare *Martin v Martin*, 2014 ONSC 7530 at paras 199–200.

127 See, for example, *Hannigan v Flynn*, 2010 ONSC 4076.

128 *MacGyver v Richards* (1995), 11 RFL (4th) 432 at 445 (Ont CA), Abella JA, as she then was.

129 *Perron v Perron*, 2012 ONCA 811, introduces the possibility of an additional exception in cases where the preservation of minority language rights and culture is an issue between Anglophone and Francophone parents.

130 See Section G(2), below in this chapter.

131 See *NL v RL*, 2008 NBCA 79; compare *Kaplanis v Kaplanis*, [2005] OJ No 275 (CA); see also *SC v ASC*, 2011 MBCA 70; *Kramer v Kramer* (2003), 37 RFL (5th) 381 at para 38 (Ont Sup Ct); *Kozachok v Mangaw*, 2007 ONCJ 70 at para 25; *JKL v NCS*, [2008] OJ No 2115 at para 192 (Sup Ct); *Faber v Gallicano*, 2012 ONSC 764.

refuses to comply with such an order, and this may result in a court-ordered variation of the parenting regime. By analogy to court-ordered blood tests in disputed paternity cases that may result in an adverse inference being drawn against a person who refuses to undergo the test, a parent who refuses to undergo counselling is unlikely to be successful in any *Charter* challenge of the court's order.[132]

In the absence of spousal hostility, courts will often order specified mid-week, alternate weekend, and summer access. When spouses are still at war and cannot work out an access schedule, the court will step in to fill the vacuum by stipulating detailed access arrangements. Detailed specifications are usually imperative in high-conflict situations.[133]

Where appropriate, a court may order supervised access, which signifies that a third party will be present when access privileges are being exercised.[134] Supervised access may be ordered when some risk to the child is envisaged.[135] Supervised access creates an artificial environment that inhibits the development of a natural, healthy parent–child relationship. Consequently, it should be imposed by a court only in exceptional circumstances.[136] Because of their inevitable limitations, the exercise of access at a supervised access centre should be avoided unless a suitable access supervisor cannot be found or there are serious and current safety issues which can only be addressed through institutional supervised access.[137] Supervised access may be found appropriate where there is reason to question a non-custodial parent's fitness to parent, or ability to protect the child if domestic violence, child abuse, or parental alienation has occurred, or if there has been no contact between the parent and child for an appreciable length of time. Supervised access is used as a last resort and should not become a permanent feature of a child's life. It is intended to provide a temporary and time-limited means of resolving a parental impasse over access and should not ordinarily be used as a long-term solution.[138] It is typically ordered when

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132 For relevant *Charter* cases on court-ordered blood tests in affiliation proceedings, see *Crow v McMynn*, [1989] BCJ No 1233 (SC); *LLDS v WGF*, [1995] OJ No 418 (Gen Div); *KP v PN* (1988), 15 RFL (3d) 110 (Ont HCJ).

133 See *RMS v FPCS*, 2011 BCCA 53 at para 50; see also *MacFarlane v Ferron*, 2011 ONSC 2053.

134 As to various levels of supervision, see *LES v MJS*, 2014 NSSC 34 at paras 87–91.

135 *BP v AT*, 2014 NBCA 51.

136 *C(RM) v C(JR)* (1995), 12 RFL (4th) 440 (BCSC); *Price v Laflamme*, 2012 MBQB 145; *EAM v ADM*, 2014 NBQB 216; *Catizzone v Cowell*, 2016 ONSC 5297; *Guenther v Vanderhoof*, 2014 SKQB 296.

137 *APGP v MSP*, 2013 ONSC 6595.

138 *M(BP) v M(BLDE)* (1992), 42 RFL (3d) 349 (Ont CA), citing Judge Norris Weisman, "On Access after Parental Separation" (1992) 36 RFL (3d) 35 at 74, leave to appeal to SCC refused (1993), 48 RFL (3d) 232 (SCC). See also *LAMG v CS*, 2014 BCPC 172 at paras 35–36;

children require gradual reintroduction to a parent or until a parent is sufficiently rehabilitated so that the child is no longer in danger of physical or emotional harm.[139] But in *Merkand v Merkand*,[140] the Ontario Court of Appeal dismissed the appellant's submission that the trial judge had erred in law by ordering supervised access to the children for an indefinite term, being of the opinion that the trial judge was aware that her order was exceptional in that it included no provision for a transition to unsupervised access nor any prescribed review date. While acknowledging that such an order should be made only in rare circumstances, the Ontario Court of Appeal found that the record fully supported the trial judge's decision to order the continuation of supervised access because of the appellant's attempts to manipulate the children and pressure them into living with him. In rejecting the appellant's submission that the order of the trial judge rendered it practically impossible for the appellant to obtain a future order for unsupervised access, the Ontario Court of Appeal pointed out that the trial judge's order in no way precluded a future application to vary the terms of access upon proof of a material change of circumstances. Orders for supervised access to a teenager are rare but the circumstances of a particular case may justify a determination that it is in the child's best interests to have long-term supervised access, notwithstanding the age and wishes of the child.[141] Although supervised access is not a remedy the law looks on with favour, particularly over the long term, termination of access is obviously an even more drastic remedy, rarely invoked unless absolutely required in a child's best interests.[142] In appropriate circumstances, a court may suspend access pending the submission of an acceptable parenting plan.[143]

2) Intended Change of Residence; Mobility Rights[144]

Pursuant to section 16(7) of the *Divorce Act*, any person granted custody of a child may be required to give notice of any change of residence to any other

TAF v MWB, 2013 MBQB 213; *HD v PED*, 2012 NBQB 315; *Slawter v Bellefontaine*, 2012 NSCA 48; *McIntosh v St Georges*, 2015 NSSC 114; *Talbot v Talbot*, 2015 ONSC 2062; *Smith v Ainsworth*, 2016 ONSC 3575; *TLMM v CAM*, 2011 SKQB 326.

139 *Tuttle v Tuttle*, 2014 ONSC 5011 at para 15, Robertson J; *HL v MK*, 2015 ONSC 4926.

140 [2006] OJ No 528 (CA). See also *LAMG v CS*, 2014 BCPC 172; *Tuttle v Tuttle*, 2014 ONSC 5011; *VSG v LJG*, [2004] OJ No 2238 (Sup Ct); and see Section L, below in this chapter.

141 *Tuttle v Tuttle*, 2014 ONSC 5011.

142 *BC v JC*, 2014 NBQB 59 at para 7, Walsh J; see also *LAMG v CS*, 2014 BCPC 172 at para 36, Woods Prov Ct J.

143 *Zanewycz v Manryk*, 2010 ONSC 1168.

144 See, generally, Michael A Saini, "Critical Review of Social Science Research on Parental Relocation Post-Separation/Divorce" (2013), online: www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crssr-ecrss/crssr-ecrss.pdf.

person who has been granted access privileges.[145] In the absence of any specified period to the contrary, such notice must be given thirty days in advance of the change of residence. Given such notice, the person with access privileges may apply to the court to challenge the intended change of residence of the child or seek variation of the custody or access arrangements in order to preserve meaningful contact with the child.

The issue of mobility rights was addressed by the Supreme Court of Canada in *Gordon v Goertz*,[146] wherein the custodial parent, the mother, intended to move to Australia and wished to take her daughter with her. Upon learning this, the non-custodial parent, the father, applied for custody of the child or, alternatively, an order restraining the mother from removing the child. The mother cross-applied to vary access so as to permit her to change the child's residence to Australia. In the majority judgment of McLachlin J, as she then was, which represented the opinion of seven of the nine judges, the law was summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.[147]
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.[148]
5. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.

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145 *KK v AK*, 2012 NBQB 276.

146 [1996] 2 SCR 27 at paras 49–50; see also *Spencer v Spencer*, [2005] AJ No 934 (CA); *RL v MP*, 2008 ABCA 313; *CLR v RAR*, [2006] BCJ No 945 (CA); *Orring v Orring*, [2006] BCJ No 2996 (CA); *Chera v Chera*, 2008 BCCA 374; *Falvai v Falvai*, [2008] BCJ No 2365 (CA); *SSL v JWW*, 2010 BCCA 55; *EAL v HMG*, 2011 BCCA 167; *Hejzlar v Mitchell-Hejzlar*, 2011 BCCA 230; *Delichte v Rogers*, 2011 MBCA 50, subsequent proceedings, 2012 MBCA 105; *NT v RWP*, 2011 NLCA 47; *Harris v Mouland*, [2006] NSJ No 404 (CA); *Cameron v Cameron*, [2006] NSJ No 247 (CA); *Burgoyne v Kenny*, 2009 NSCA 34; *KC c NP*, [2006] QJ No 8697 (CA); *Olfert v Olfert*, *2013 SKCA 89*.

147 *Talbot v Talbot*, 2015 ONSC 2062; *Bachorcik v Bachorcik*, 2014 SKQB 235.

148 As to the importance of the views of the custodial parent, see *Delichte v Rogers*, 2011 MBCA 50. Compare *Rink v Rempel*, 2011 SKQB 472. See also *Sferruzzi v Allan*, 2013 ONCA 496.

6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, *inter alia*:
   (a) the existing custody arrangement and relationship between the child and the custodial parent;[149]
   (b) the existing access arrangement and the relationship between the child and the access parent;
   (c) the desirability of maximizing contact between the child and both parents;[150]
   (d) the views of the child;[151]
   (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;[152]
   (f) disruption to the child of a change in custody;
   (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.[153]

> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

In applying the above criteria to the facts of the case, the Supreme Court of Canada, in both its majority and dissenting judgments, concluded that the mother's custody of the child should be continued, notwithstanding her intended move to Australia. However, the access arrangements were varied to provide for access to be exercisable in Canada so that the father's limited time with the child would be more natural and the child could maintain contact with friends and the extended family.

In determining whether a custodial parent should be entitled to relocate with the children, Burnyeat J, of the British Columbia Supreme Court, has

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149 *McAlpine v Leason*, 2016 ABCA 153; *Morrill v Morrill*, 2016 MBCA 66 (trial judge erred in relying on extrinsic academic articles).

150 *Berry v Berry*, 2011 ONCA 705.

151 *Seymour v Seymour*, 2012 SKQB 161.

152 See *MacPhail v Karasek*, [2006] AJ No 982 (CA); *Nunweiler v Nunweiler*, 2000 BCCA 300 at para 28; *Zacharias v Zacharias*, 2012 MBQB 199; *Berry v Berry*, 2011 ONCA 705; *Trisolino v De Marzi*, 2013 ONCA 135.

153 See *Sferruzzi v Allan*, 2013 ONCA 496.

identified the following twelve factors as relevant, together with pertinent jurisprudence dealing with each of them:

1) the parenting capabilities of and the children's relationship with their parents and new partners;
2) the employment security and the prospects of each parent and, where appropriate, their partner;
3) access to and support of extended family members;
4) any difficulty in exercising the proposed access and the quality of the proposed access if the move is allowed;
5) the effect upon the children's academic situation;
6) the psychological/emotional well-being of the children;
7) disruption of the children's existing social and community support and routines;
8) the desirability of the proposed new family unit for the children;
9) the relative parenting capabilities of each parent and their respective ability to discharge parenting responsibilities;
10) the child's relationship with both parents;
11) any separation of siblings; and
12) retraining/educational opportunities for the moving parent.[154]

In *NDL v MSL*,[155] MacDonald J, of the Nova Scotia Supreme Court, set out the following list of factors to consider in mobility cases:

- the number of years the parents cohabited with each other and with the child
- the quality and the quantity of parenting time
- the age, maturity, and special needs of the child
- the advantages of a move to the moving parent in respect to that parent's ability to better meet the child's needs
- the time it will take the child to travel between residences and the cost of that travel
- feasibility of a parallel move by the parent who is objecting to the move
- feasibility of a move by the moving parent's new partner
- the willingness of the moving parent to ensure access or [sic] will occur between the child and the other parent
- the nature and content of any agreements between the parents about relocations

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154 *One v One*, [2000] BCJ No 2178 (SC); see also *CAP v MSP*, 2015 BCSC 183. For additional factors, see *Chepil v Chepil*, 2014 SKQB 341 at para 40, Megaw J.

155 2010 NSSC 68 at para 9; see also *Gibney v Conohan*, 2011 NSSC 268 at para 92; *Rink v Rempel*, 2011 SKQB 472. For additional factors, see *SL v CB*, 2013 SKQB 333.

- the likelihood of a move by the parent who objects to the relocation
- the financial resources of each of the family units
- the expected permanence of the new custodial environment
- the continuation of the child's cultural and religious heritage
- the ability of the moving parent to foster the child's relationship with the other parent over long distances

Although such specified factors may be useful, *Gordon v Goertz*[156] makes clear that the best interests of the child inquiry must relate to the particular child's needs and the ability of his or her parents to satisfy that child's needs. The inquiry is individualized. Decided cases are of limited assistance, although they provide guidance to the application of governing principles.[157]

Gordon v Goertz sets out the legal framework for analyzing cases involving a provincial change of residence by a custodial parent. The primary issue is not the appropriateness of the move, unless there is evidence of the underlying purpose being to interfere with access by the non-custodial parent. Rather, where the move constitutes a material change of circumstances, the issue becomes a reconsideration of which parent is better qualified to have custody of the child under the present circumstances.[158] *Gordon v Goertz* acknowledges that a trial judge is entitled to give some weight to the existing custody order in determining whether the best interests of the child will be served by allowing the custodial parent to relocate with the child. Where the moving parent, after a reconsideration of all relevant factors, is still found to be the appropriate custodial parent, variation of the terms of access may be justified so as to reflect the new realities. If access problems have been encountered in the past, it may be necessary to spell out where access shall be exercised and at whose expense so that the maximum contact principle under section 17(9) of the *Divorce Act* can be accommodated.[159] In determining whether a custodial parent should be entitled to relocate with the child to another country, the custodial parent's perceptions of his or her personal academic and professional interests should not be confused with a detached appreciation of the child's best interests.[160]

In *Spencer v Spencer*,[161] the Alberta Court of Appeal expressed concern about the "double bind" faced by custodial parents who acknowledge that

156 [1996] 2 SCR 27.

157 *Hannan v Hannan*, 2010 BCSC 1626.

158 *DHP v PLP*, 2012 NBQB 345.

159 *Brink v Brink*, [2002] PEIJ No 7 (CA).

160 *KC c NP*, [2006] QJ No 8697 (CA). Compare *MacPhail v Karasek*, [2006] AJ No 982 (CA). See also *CS v EL*, 2010 ABQB 285; *HS v CS*, [2006] SJ No 247 (CA).

161 [2005] AJ No 934 (CA); see also *RJF v CMF*, 2014 ABCA 165; *McAlpine v Leason*, 2016 ABCA 153; *SSL v JWW*, 2010 BCCA 55; *NT v RWP*, 2011 NLCA 47; *DP v RB*, 2009 PECA 12;

they would abandon their relocation plans if the children were unable to accompany them. It observed that if a custodial mother, in response to an inquiry, states that she is unwilling to remain behind with the children, her answer raises the prospect of her being regarded as selfish in placing her own interests ahead of the best interests of the children. If, on the other hand, she is willing to forego the relocation, her willingness to stay behind "for the sake of the children" renders the *status quo* an attractive option for the presiding judge to favour because it avoids the difficult decision that the application otherwise presents.[162] In *Spencer v Spencer*, the chambers judge was found to have erred in failing to address the effect on the children if they were left in Calgary without their mother, their stepfather, and their soon-to-be-born sibling, and the effect on them if they were left in the care of their father, who the chambers judge found was unable to assume primary care or even significant responsibility for the children. The mother's appeal was allowed and the order prohibiting her from taking the children to Victoria was set aside. Failing parental agreement on access, this issue was ordered to be returned to the Alberta Court of Queen's Bench for determination. In *Stav v Stav*, Prowse JA expressed the following opinion with respect to the "double bind":

> [64] I should observe, however, that I perceive a problem with the stricture against courts expressly taking into account evidence of what one or the other parent would do depending on the decision made by the trial judge in relation to mobility. It is arguable that avoidance of questions giving rise to the double-bind is directed more to the interests of the parents than it is to the interests of the children. It may be unfair to place either or both of the parents in the double-bind, but is it unfair to the children? Is it contrary to their best interests? Arguably, the answer is that it is only by asking this question of both parents and assessing their answers, that the court can make a determination in the children's best interests, cognizant of all of the options.[163]

Droit de la famille — 091332, 2009 QCCA 1068. See also *Morrill v Morrill*, 2016 MBCA 66 at paras 12–14 ("double bind" relocation question relevant to issue of spousal support).

162 See also *Hejzlar v Mitchell-Hejzlar*, 2011 BCCA 230; *NT v RWP*, 2011 NLCA 47.

163 2012 BCCA 154 at para 64; see also *De Jong v Gardner*, 2013 BCSC 1303; *TK v RJHA*, 2015 BCCA 8. Compare *MM v CJ*, 2014 BCSC 6 at para 45, wherein Jenkins J concluded that s 69(7) of the *Family Law Act* prohibits a consideration of whether a parent would still relocate without the child. See also *CMB v BDG*, 2014 BCSC 780; *Walker v Maxwell*, 2015 BCCA 282, citing s 46(2)(b) of the *Family Law Act*; *Fotsch v Begin*, 2015 BCCA 403.

In *SSL v JWW*,[164] the British Columbia Court of Appeal held that where one parent wishes to relocate with the children to another city or province, the court's task is to analyze the evidence in the context of four possible alternatives: (1) primary residence with the mother; (2) primary residence with the father; (3) shared parenting in the mother's chosen place of residence; and (4) shared parenting in the father's chosen place of residence. However, the court's first task is to determine which parent should provide the primary residence. Where the question of primary residence is evenly balanced and the court finds that the best interests of the children require both parents to be in the same area, the court must then choose between the shared parenting options proposed by each parent without presuming that the current regime is the preferred one. And in *Olfert v Olfert*, Caldwell JA, of the Saskatchewan Court of Appeal, stated that "it would be best practice for a court of first instance to consider all of the possible scenarios in any mobility application which comes before it."[165] But in *Walker v Maxwell*,[166] Kent J, of the British Columbia Supreme Court, observed:

> 57 It will be noted that s. 46(2)(b) and s. 69(7) of the *Family Law Act*[167] expressly prohibit the court considering whether the parent who is planning to move would still do so if the child's relocation were not permitted. These provisions were designed to remedy the so-called "double bind" dilemma referred to above but they can also introduce an element of artificiality into any "four scenario" analysis of the sort posited in *S.S.L. v. J.W.W.*

The criteria in *Gordon v Goertz* apply whether mobility rights arise on an original application for custody or on an application to vary an existing custody order.[168] They also apply not only to proceedings under the *Divorce Act* but also to proceedings under provincial legislation.[169] Geographically distant interprovincial relocations as well as extraprovincial relocations fall subject to the same criteria. The principles defined in *Gordon v Goertz* do not provide a precise formula; each case must ultimately be determined on its

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164 2010 BCCA 55; see also *Stav v Stav*, 2012 BCCA 154; *McIntosh v Kaulbach*, 2014 BCCA 299; *Walker v Maxwell*, 2015 BCCA 282; *Fotsch v Begin*, 2015 BCCA 403. Compare *Sangha v Sandhar*, 2013 ABCA 259.

165 2013 SKCA 89 at para 22.

166 2014 BCSC 2357 at para 57, aff'd 2015 BCCA 282.

167 SBC 2011, c 25, see text to note 149, above in this chapter.

168 *Nunweiler v Nunweiler* (2000), 5 RFL (5th) 442 (BCCA); *Mai v Schumann*, 2013 BCCA 365; *LDD v JAD*, 2010 NBCA 69; *Droit de la famille — 091332*, 2009 QCCA 1068; *DP v RB*, 2009 PECA 12; *Seymour v Seymour*, 2012 SKQB 161.

169 *McWilliams v Couture*, 2014 NBQB 86; *TH v DC*, 2015 NLCA 59, citing *Whalen v Whalen*, 2005 NLCA 35; *Borgal v Fleet*, 2014 NSSC 16.

own facts.[170] It is, nevertheless, possible to distill the following propositions from the judgment of the New Brunswick Court of Appeal in *LDD v JAD*[171] that are transmissible to diverse fact situations:

1) Although the aforementioned seven principles in *Gordon v Goertz*[172] were formulated in the context of a variation proceeding, the considerations set out in paragraphs 4 to 7 are equally applicable to initial applications for custody where the prospective relocation of a child arises as an issue. In such cases, courts should adopt a blended approach that examines the proposed relocation in the broader context of the competing custody claims of the parents.
2) In order to put the best interests of the child test in a proper context in mobility situations, courts must review the pertinent legislation as well as jurisprudence relating to this issue. *Gordon v Goertz* prescribes the minimum criteria to be considered when determining the best interests of the child in mobility cases.
3) Since the *Divorce Act* does not provide a definition of "best interests of the child," courts may look to provincial legislation for guidance where such legislation defines that concept or lists relevant factors to be considered in determining the best interests of a child.
4) The principle in sections 16(10) and 17(9) of the *Divorce Act* that a child of divorcing or divorced parents should have maximum contact with each of his or her parents is not absolute; it is qualified by the condition that such maximum contact is in the best interests of the child. Disruption of the child's relationship with his or her primary caregiver may be more detrimental to the child than reduced contact with the non-custodial parent.[173]
5) The general trend of the jurisprudence since *Gordon v Goertz* has been to grant approval for a proposed move in cases where there is a clear primary caregiver for the child or children. A proposed move is less likely to be approved where caregiving and physical custody have been equally shared between parents.[174]
6) Absent any culpable intention or any consequential impairment of the custodial parent's ability to meet the needs of the child, courts are not concerned with the custodial parent's reasons for the proposed relocation.

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170 *Sulatyski-Waldack v Waldack*, [2000] MJ No 412 (QB).

171 2010 NBCA 69; see also *ADE v MJM*, 2012 NBQB 260 (interim order); *Olfert v Olfert*, *2013 SKCA 89*. And see *Mantyka v Dueck*, 2012 SKCA 109 (unilateral removal of children to nearby community; denial of interim order for their return); *Alix v Irwin*, 2014 SKCA 46; compare *Jochems v Jochems*, 2013 SKCA 81.

172 See text to notes 146–53, above in this chapter.

173 See *RJF v CMF*, 2014 ABCA 165.

174 Compare *Thurston v Maystrowich*, 2010 SKCA 113.

> Their concern is with the potential impact of the proposed relocation on the child's life and, in particular, the child's relationship with both of the parents, with siblings, and with members of the child's extended family.

Although relocation issues typically turn upon the facts of the particular case, and previous caselaw is only of limited assistance, it is generally acknowledged that there should be a pressing reason for an immediate move before a court permits the relocation of children on a motion for interim relief. There are two primary reasons for this. First, an interim relocation may create a new *status quo* and sometimes can effectively decide the outcome of the trial. Second, the interim application is usually based on affidavits, which are incomplete or limited in scope and frequently conflict with each other. As a result, interim relocations by a custodial parent are generally allowed only in compelling circumstances.[175] In *DA v JR*,[176] Larlee JA, of the New Brunswick Court of Appeal, stated that "the *status quo* may be favoured on an interim basis unless there are compelling or urgent circumstances which dictate a move before a full hearing: relocation to live with new partner; child starting school; urgency in the move to preserve a job that would be lost; or the move may result in a financial benefit to the family unit, which will be lost if the matter awaits a trial." And in *Plumley v Plumley*, Marshman J, of the Ontario Superior Court of Justice, listed the following three factors as important:

1) A court is more reluctant to disturb the *status quo* by permitting the move on an interim basis where there is a genuine issue for trial.
2) There can be compelling circumstances that warrant relocation where, for example, financial benefits would be lost if relocation awaited a trial or the best interests of the children dictate that they commence school at a new location.
3) Although there may be a genuine issue for trial, the relocation may be authorized on an interim basis if there is a strong probability that the custodial parent's position will prevail at trial.[177]

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175 *Mantyka v Dueck*, 2012 SKCA 109; *JP v JP*, 2016 SKCA 168.

176 2012 NBCA 38 at para 14; see also *Mantyka v Dueck*, 2012 SKCA 109.

177 The three factors identified in *Plumley v Plumley*, [1999] OJ No 3234 (Sup Ct), have been endorsed in numerous cases: see, for example, *Hunter v Hunter*, 2013 NSSC 417; *Ivens v Ivens*, [2008] NWTJ No 11 (SC); *Weeres v Weeres*, 2016 ONSC 861; *Shawyer v Shawyer*, 2016 ONSC 830; *Teague v Violante*, 2016 ONSC 1402; *Forget v Green*, 2016 ONSC 5160; *DP v RB*, [2007] PEIJ No 53 (SCAD); *Harding v Harding*, 2013 SKQB 285; see also *SMK v OAJ*, 2012 ABCA 49. For cases wherein relocation was permitted on an interim basis, see *Lawrence v Lawrence*, 2012 BCSC 1315; *Zacharias v Zacharias*, 2012 MBQB 199; *EL v AN*, 2014 NBQB 200; *SS v TT*, 2012 NUCJ 17; *Boone v Boone*, 2014 NSSC 227; *Mercredi v Hawkins*, 2008 NWTSC 57; *Schlegal v Schlegal*, 2016 ONSC 4590; *Kornienko v Walsh-Kornienko*, 2016 ONSC 7300; *Longley v Mcfadden*, 2015 SKQB 370; *JP v JP*, 2016 SKCA 168.

In *MB v DAC*,[178] Sherr J, of the Ontario Court of Justice, provided the following more detailed list of relevant considerations:

a) The burden is on the parent seeking the change to prove compelling circumstances exist that are sufficient to justify the move. See: *Mackenzie v. Newby*, [2013] O.J. No. 4613 (OCJ).
b) Courts are generally reluctant to permit relocation on a temporary basis. The decision will often have a strong influence on the final outcome of the case, particularly if the order permits relocation. The reality is that courts do not like to create disruptions in the lives of children by making an order that may have to cause further disruption later if the order has to be reversed. See: *Goodship v. McMaster* [2003] O.J. No. 4255 (OCJ).
c) Courts will be more cautious about permitting a temporary relocation where there are material facts in dispute that would likely impact on the final outcome. See: *Fair v. Rutherford-Fair* 2004 CarswellOnt 1705 (Ont. S.C.J.). In such cases, the court requires a full testing of the evidence. See: *Kennedy v. Hull*, [2005] ONCJ 275.
d) Courts will be even more cautious in permitting a temporary relocation when the proposed move involves a long distance. It is unlikely that the move will be permitted unless the court is certain that it will be the final result. See my comments in: *Downey v. Sterling* [2006] O.J. No. 5043 (OCJ) and *Costa v. Funes* [2012] O.J. No. 3317 (OCJ).
e) Courts will be more cautious in permitting a temporary relocation in the absence of a custody order. See: *Mackenzie v. Newby*, *supra*.
f) Courts will permit temporary relocation where there is no genuine issue for trial (see: *Yousuf v. Shoaib*, [2007] O.J. No. 747 (OCJ)), or where the result would be inevitable after a trial (see: *Mackenzie v. Newby*, *supra*, where the court observed that the importance of the father's contact with the child could not override the benefits that the move would have on the child).
g) In assessing . . . the three considerations in *Plumley*, the court must consider the best interest factors set out in subsection 24 (2) of the *Children's Law Reform Act* (the Act) and any violence and abuse in assessing a parent's ability to act as a parent as set out in subsections 24 (3) and (4) of the Act as well as the leading authority on mobility cases, *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.).

178 2014 ONCJ 273 at para 26; see also *Kirkpatrick v Kraushaar*, 2015 SKQB 295.

h) These principles apply with necessary modifications to an initial consideration of custody and access and not just to a variation of access. See: *Bjornson v. Creighton* (2002), 31 R.F.L. (5th) 242 (Ont.C.A.).

i) The financial security of the moving parent is a relevant factor in mobility cases. See: *Greenfield v. Garside*, 2003 CarswellOnt1189 (Ont. SCJ).

j) Several cases have recognized that requiring a parent to remain in a community isolated from his or her family and supports and in difficult financial circumstances will adversely impact a child. The economic and financial benefits of moving to a community where the parent will have supports, financial security and the ability to complete their education and establish a career are properly considered in assessing whether or not the move is in the child's best interests. See: *MacKenzie v. Newby*, *supra*, . . . *Lebrun v. Lebrun* [1999] O.J. No. 3393 (SCJ) . . . .

k) There is case law that says that if a primary caregiver is happier, this will benefit the child. See: *Del Net v. Benger*, 2003 CarswellOnt 3898 (Ont. SCJ).

l) The level of co-operation that the moving parent will provide in facilitating access to the other parent is also a relevant consideration in a mobility application. See: *Orrock v. Dinamarea*, 2003 CarswellBC 2845 (B.C.S.C.).

Commenting on Ontario relocation trends in his review of the decision of the Ontario Court of Appeal in *Berry v Berry*,[179] Professor DA Rollie Thompson, Canada's leading authority on mobility cases, has noted

> the prevalence of interim relocation cases in Ontario (thanks to an overburdened and slow-moving system) and the clear division in decisions between the "proceduralists" (who apply *Plumley*) and the "deciders" . . . who just make a "final-type" decision at the interim stage. This means that many Ontario interim cases should be treated "with great caution," to quote Jay McLeod."[180]

An explanation for "final-type" decisions at the interim stage may well be found in the observations of Campbell J, of the Prince Edward Island Supreme Court, in *GER v HJR*,[181] who notes that interim orders become *de facto* final orders in many cases because very few cases ever reach the trial stage due to the delay and cost involved.

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179 (2011), 7 RFL (7th) 1; see Rollie Thompson, "*Berry v Berry*: Recent Ontario Relocation Trends" (2012) 7 RFL (7th) 10.

180 Private correspondence received by the authors from Professor Thompson.

181 2012 PESC 24. See also Section L, below in this chapter.

A court is not bound by the terms of a prior separation agreement in determining whether to permit the primary residential parent to relocate with the children, nor is an unforeseen material change of circumstances since the execution of the agreement a prerequisite to a court order that varies the terms of the agreement.[182]

With the increasing mobility of Canadian families, non-removal clauses have become fashionable in separation agreements and court orders regulating the custody of and access to children on the breakdown of spousal relationships. These clauses have been used to flag the notion that extraprovincial removal of the children must not occur without parental consent or a court order. The practical significance of such an express clause is that the task falls on the custodial parent to initiate an application to the court, if relocation is sought without the consent of the non-custodial parent. If a separation agreement or court order is silent with respect to removal, the non-custodial parent has the responsibility of bringing the matter to court to prevent the custodial parent's proposed removal of the children. In either situation, the court has the clear jurisdiction to determine whether the children can leave the province. When the agreement or court order is silent and the custodial parent chooses not to notify the non-custodial parent until after the relocation has occurred, the custodial parent runs a significant risk of incurring substantial expenses and losses in consequence of a subsequent court order requiring the children to reside in the province from which they have been unilaterally removed. Custodial parents who are not legally represented might not understand that they have a moral obligation to notify the non-custodial parent of any proposed relocation of the children, but common sense dictates that they should do so no matter how inconvenient it might be for the custodial parent to remain in the province and seek the necessary court approval.[183] The *Divorce Act* does not expressly authorize a court to order the return of children or to order a divorced parent to live in a particular location. However, these consequences may ensue pursuant to sections 16(6) and 17(3) of the *Divorce Act*, which empower the court on an original application for custody or on an application to vary a custody order to impose such "terms, conditions or restrictions in connection therewith as it thinks fit and just." Consequently, the court can make a contingent custody and access order that is dependent on where a parent chooses to live.[184]

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182 *CRH v BAH*, [2005] BCJ No 1121 (CA); *Betz v Joyce*, 2009 BCSC 1199.

183 *PLG v RJM*, 2010 NBQB 435.

184 *Decaen v Decaen*, 2013 ONCA 218; *Jochems v Jochems*, 2013 SKCA 81; *Alix v Irwin*, 2014 SKCA 46. And see *Reeves v Reeves*, 2010 NSCA 35, wherein the trial judge granted custody of three children to their mother, subject to the condition that she relocate with the children to a community in the Halifax Regional Municipality that was closer

In custody cases involving mobility, the task of balancing the various factors that would affect the children's best interests in reaching a decision whether to permit the relocation of the children is an almost impossible one. The one tool available to the court in finding a balance is the ability to order block access. A relocation, no matter how valid the reasons, should not result in a termination of the relationship between the children and their non-custodial parent. Regular and frequent access is usually not possible when divorced parents live in different provinces or countries. Block access is often the only solution under these circumstances. A custodial parent may be required to accept a considerable amount of inconvenience and expense to facilitate block access, if the custodial parent seeks judicial approval of an extraprovincial relocation of the children. Having regard to the superior financial means of the custodial parent and the obligation of the non-custodial parent to pay the applicable table amount of child support, the court may order the custodial parent to cover all the transportation costs associated with the blocks of access ordered by the court.[185]

In the opinion of Professor DA Rollie Thompson, who has reviewed hundreds of judicial decisions on mobility since *Gordon v Goertz*, "over time, the caselaw has become less predictable, not more so."[186] In later publications, Professor Thompson has spoken of a *de facto* presumption in favour of allowing the primary parent to relocate with the child(ren)[187] and a reverse presumption against relocation in cases of shared parenting.[188] In *PRH v MEL*,[189]

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to their father; see also *MacRae v Hubley*, 2011 NSCA 25. Compare *Droit de la famille — 13328*, 2013 QCCA 277, and see s 6 of the *Canadian Charter of Rights and Freedoms*, which guarantees mobility rights to adult Canadians. Any court order that directly requires a parent to personally relocate would appear to contravene s 6 of the *Charter*. And see *McIntosh v Kaulbach*, 2014 BCCA 299; *TH v DC*, 2015 NLCA 59.

185 *RBN v MJN*, [2002] NSJ No 529 (SC), supplementary reasons [2002] NSJ No 530 (SC), aff'd [2003] NSJ No 192 (CA).

186 "Movin' On: Mobility and Bill C-22" (Paper presented to 12th Annual Institute of Family Law, 2003, County of Carleton Law Association, Ottawa, 6 June 2003).

187 See *REQ v GJK*, 2012 BCCA 146 at paras 57–59, Newbury JA, citing Professor Thompson's papers: "Ten Years after *Gordon*: No Law, Nowhere" (2007) 35 RFL (6th) 307 at 315 and "Where Is BC Law Going? The New Mobility" prepared for the Continuing Legal Education Society of British Columbia's Family Law — 2011 Update at 8.2.7. See also "*Berry v Berry*: Recent Ontario Relocation Trends" (2012) 7 RFL (7th) 10. And see *Droit de la famille — 121505*, 2012 QCCA 1131. Compare *MO v CO*, 2012 ABCA 297.

188 See *SJRC v CAL*, 2014 NBQB 113, Wooder J, citing Rollie Thompson, "Heading for the Light: International Relocation from Canada" (2011) 30 Can Fam LQ 1; see also *AD v AB*, 2016 SKQB 164, citing Rollie Thompson, "Presumptions, Burdens, and Best Interests in Relocation Law" (2015) 53 Family Court Review 40.

189 2009 NBCA 18; see also *LDD v JAD*, 2010 NBCA 69; *AFG v DAB*, 2011 NBCA 100; *TDL v AL*, 2014 NBCA 57; compare *Walker v Maxwell*, 2015 BCCA 282; *Parent v MacDougall*, 2014 NSCA 3.

Larlee JA, of the New Brunswick Court of Appeal, ventured the following opinion:

> 18 The general trend of the jurisprudence since *Gordon v Goertz* has been to grant approval for a proposed move, so long as it is proposed in good faith and is not intended to frustrate the access parent's relationship with the child. However, the relocating parent must generally also be willing to accommodate the interests of both the child and the access parent. This will generally require a restructuring of access, with the relocating parent possibly incurring the increased costs of access in the new arrangement, sometimes by way of an alteration of the child support obligations. However, this general trend is most evident in cases where there is a clear primary caregiver for the child or children. A proposed move is less likely to be approved where caregiving and physical custody have been equally shared between parents. Furthermore, no such trend is evident in cases where the proposed move would result in a separation of siblings who have, prior to that point, lived together. The court-imposed separation of siblings remains exceptional.

A presumptive approach to relocation issues is addressed in Division 6 of the British Columbia *Family Law Act*,[190] which received Royal Assent in November 2011 and came into effect on 18 March 2013.[191] However, these provisions do not extend beyond the provincial boundaries of British Columbia and have no direct application even in that province when the relocation issue falls to be determined under the provisions of the *Divorce Act*.[192] Given the current nation-wide unpredictability of relocation applications, it is time for the Government of Canada to consult with its provincial counterparts for the purpose of amending the *Divorce Act* as well as provincial legislation so as to more precisely define the ground rules to be applied in relocation cases.

Parliament and the provincial legislatures have devised a comprehensive scheme for dealing with child custody disputes, and there is no ancillary right at common law for seeking damages in tort for a denial of access[193] or a parent's alleged wrongful relocation of a child.[194]

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190 SBC 2011, c 25.

191 *Walker v Maxwell*, 2015 BCCA 282; *Fotsch v Begin*, 2015 BCCA 403; see also *Wong v Rooney*, 2016 BCSC 1166; *Hefter v Hefter*, 2016 BCSC 1504.

192 See *TK v RJHA*, 2013 BCSC 2112 at paras 38–39, Verhoeven J, aff'd 2015 BCCA 8. Compare *AJD v EAE*, 2013 BCSC 2160; *MM v CJ*, 2014 BCSC 6; see also *DAM v EGM*, 2014 BCSC 2091; *CAP v MSP*, 2015 BCSC 183; *Fotsch v Begin*, 2015 BCSC 227.

193 *Frame v Smith*, [1987] 2 SCR 99; *Ludmer v Ludmer*, 2014 ONCA 827.

194 *Curle v Lowe*, [2004] OJ No 3789 (Sup Ct).

H. BEST INTERESTS OF THE CHILD

Where custody and access issues arise on or after divorce, whether by way of an original application or an application to vary an existing order, the court must determine the application by reference only to the best interests of the child.[195] A trial judge is not bound by a prior interim order and has an unfettered discretion to re-examine the facts for the purpose of determining the best interests of the child.[196] The "best interests of a child" criterion does not constitute a denial of a parent's freedom of association under section 2(d) of the *Canadian Charter of Rights and Freedoms*,[197] nor does it contravene equality rights under section 15 of the *Charter*.[198] The "best interests of the child" test has been described as one with an inherent indeterminacy and elasticity.[199] The "best interests of the child" is a fluid and all-embracing concept that encompasses the physical, emotional, intellectual, moral, and social well-being of the child.[200] The court must look not only at the day-to-day needs of the child but also to the longer-term growth and development of the child.[201] What is in the child's best interests must be examined from the perspective of the child's needs with an assessment of the ability and willingness of each parent to meet those needs.[202] As Baird JA, of the New Brunswick Court of Appeal, has stated: "There are three imperatives that must govern child placement decisions. Those decisions should: safeguard the child's need for continuity of relationships; reflect the child's, not the adult's, sense of time; and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions."[203]

Although many factors have been identified as appropriate for consideration in custody and access disputes, few attempts have been made to measure the relative significance of individual factors. The outcome of any trial may be largely influenced, therefore, by the attitudes and background of the

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195 *Divorce Act*, RSC 1985, c 3 (2d Supp), s 16(8) (original application), s 17(5) (variation proceeding). See *Doncaster v Field,* 2014 NSCA 39 (denial of access).

196 *RGN v MJN*, [2003] NSJ No 192 at paras 15–16 (CA); *MacKinnon v MacKinnon*, 2009 NSSC 278.

197 Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

198 *Green v Millar,* [2004] BCJ No 2422 (CA).

199 *MacGyver v Richards*, (1995), 22 OR (3d) 481 at paras 27–29 (CA).

200 *CDMZ v REH-Z*, 2013 NSSC 242; *Grose v Grose*, 2016 SKQB 339.

201 *Gordon v Goertz*, [1996] 2 SCR 27 at para 120; *Gagnon v Gagnon*, 2011 NSSC 486; *Lubin v Lubin*, 2012 NSSC 31; *Cooke v Cooke*, 2012 NSSC 73; *Pinto v Pinto*, 2011 ONSC 7403; *Schick v Woodrow*, 2009 SKQB 167.

202 *Gagnon v Gagnon*, 2011 NSSC 486 at para 13, MacDonald J; see also *DAM v DMT*, 2013 BCSC 359, citing *Gordon v Goertz*, [1996] 2 SCR 27 at para 69; *Steever v McCavour*, 2009 NBQB 169.

203 *JH v TH*, 2017 NBCA 7 at para 16, citing *Young v Young*, [1993] 4 SCR 3.

presiding judge. Three factors have traditionally been regarded as of special importance where, as in most cases, either parent would be capable of raising the child. First, courts have frequently stated that preservation of the *status quo* is a compelling circumstance as a temporary measure in proceedings for interim custody but it is of less significance after a trial of the issues in open court,[204] although it may still be important in the latter situation where it has been of long standing.[205] And an interim or temporary order is significant because it will frequently influence or form the basis for a final order. Once a child has settled into a life or routine with a parent on a temporary basis, the final order will frequently reflect that it is not in the child's best interests to disrupt or significantly change the temporary arrangement.[206] As Pentelechuk J aptly stated in *AJU v GSU*, "there is no presumption in favour of the pre-trial *status quo*. Instead the *status quo* is a factor to be weighed in determining the best interest of the child."[207] The *status quo* does not refer only to geographic locations but to relationships and a way of life established for the child.[208] The *status quo* that is relevant is that which existed just prior to the parties' separation, except in circumstances where there is clear and unequivocal evidence that the parties agreed to a different decision-making and residence arrangement following the separation.[209] A second important factor is the strong inclination of courts to grant day-to-day custody of a child to the parent who was the primary caregiver during the marriage.[210] However, as Walsh J, of the New Brunswick Court of Queen's Bench (Family Division), observed in *MAS v JSS*,[211] "it does not necessarily follow that because one parent has been a primary caregiver [in the past] that that parent is the 'psychological parent' of the child." Furthermore, as Roscoe JA, of the

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204 See *Kastner v Kastner* (1990), 109 AR 241 (CA); *Richter v Richter*, [2005] AJ No 616 (CA); *MAG v PLM*, 2014 BCSC 126; *GH v JL* (1996), 177 NBR (2d) 184 (CA); *ADE v MJM*, 2012 NBQB 260; *FFR v KF*, 2013 NLCA 8; *MacDonald v MacNeil*, 2012 NSSC 171; *Homsi v Zaya*, 2009 ONCA 322; *Batsinda v Batsinda*, 2013 ONSC 7869; *JDF v JLJF*, 2009 PESC 28; compare *Johal v Johal*, [2009] BCJ No 1874 (CA); *HD v PED*, 2012 NBQB 315; *Horton v Marsh*, [2008] NSJ No 306 (SC); *Kerr v Hauer*, 2010 ONSC 1995; *Haider v Malach* (1999), 177 Sask R 285 (CA); *Chernoff v Chernoff*, 2014 SKQB 139.

205 *WL v NDH*, 2014 NBQB 214 at paras 21–22; *Dukart v Quantrill* (*Jones*), 2015 SKCA 138.

206 *Rifai v Green*, 2014 ONSC 1377 at para 17, Pazaratz J.

207 2015 ABQB 6 at para 50; *JMG v LDG*, 2016 ONSC 3042.

208 *Johal v Johal*, [2009] BCJ No 1874 (CA).

209 *Batsinda v Batsinda*, 2013 ONSC 7869 at para 28, Chappel J.

210 See *MAG v PLM*, 2014 BCSC 126; *Warcop v Warcop*, [2009] OJ No 638 at para 85 (Sup Ct); *Haider v Malach* (1999), 177 Sask R 285 (CA); *Chernoff v Chernoff*, 2014 SKQB 139; compare *DSW v DLW*, 2009 ABQB 279; *Ackerman v Ackerman*, 2014 SKCA 86, citing *Gilles v Gilles*, 2008 SKCA 97.

211 2012 NBQB 285 at para 61.

Nova Scotia Court of Appeal, observed in *Burns v Burns*,[212] the actual period of time spent with the children is not the only determinant. More important is which parent has taken primary responsibility for all the important decisions concerning the health, safety, education, and overall welfare of the children since the parents separated. In addition to major concerns, the primary caregiver is the parent who deals with the countless less significant but necessary arrangements for the children's clothing, haircuts, hygiene, extracurricular activities, and mundane affairs such as birthday parties, dental and medical appointments, and attendance at parent-teacher interviews. In *NDL v MSL*,[213] MacDonald J, of the Nova Scotia Supreme Court, formulates an insightful list of questions to be answered in reviewing the nature and quality of a child's relationship with each parent for the purpose of determining which parent should be given the primary caregiving role. The primary caregiver is of particular importance to very young children, for that is the person to whom children initially form a secure attachment, but the importance of being the primary caregiver decreases with the age of the children.[214] And in many two-income families, neither parent can be classified as the primary caregiver because both parents will have been actively involved, though not necessarily equally every day.[215] A third important factor is the disinclination of courts to split siblings between the parents.[216] The law not only seeks to foster the relationship between siblings but also between step-siblings.[217] There is ample caselaw supporting the principle that siblings should be raised together in the absence of compelling reasons not to do so. Compelling reasons that may justify splitting siblings include sibling hostilities, wide age differentials in the ages of the children, the special needs of a particular child, undue financial and emotional stress that would result from placing all the children in one home, or the inability of a parent to discipline some of

212 2000 NSCA 1.

213 2010 NSSC 68; see also *Marchand v Marchand*, 2011 NSSC 138; *Gibney v Conohan*, 2011 NSSC 268.

214 *AMIH v JNM*, 2009 SKQB 501.

215 *Gagnon v Gagnon*, 2011 NSSC 486.

216 *MacPhail v Karasek*, 2006 ABCA 238 at para 33; *McAlpine v Leason*, 2016 ABCA 153; *Funk v Funk*, 2004 BCSC 1800; *CMH v TTH*, 2014 MBQB 65; *PRH v MEL* (2009), 343 NBR (2d) 100 (CA); *JM v JA*, 2014 NBQB 233; *Greene v Lundrigan*, 2011 NLTD(F) 55; *Callaghan v Jackson*, 2015 ONSC 7559; *Edmonds v Green*, 2012 SKQB 307. Compare *YMW v DW*, 2016 NBQB 76.

217 *MDC v TC*, 2012 NBQB 376, citing *KK v AK*, 2012 NBQB 276 at para 67; *Callaghan v Jackson*, 2015 ONSC 7559. Compare *WL v NDH*, 2014 NBQB 214.

the children.[218] Where there is a successful *de facto* situation and the children have stable homes, it may be appropriate to separate them.[219]

It is absolutely vital to keep in mind, however, that in the final analysis, the above three factors will be taken into account only insofar as they reflect the best interests of the children in the overall context of the evidence presented in the particular case. Custody and access cases require an integrated assessment of all relevant factors and circumstances in order to determine the best interests of the child.[220] With the passage of time, the relevance or significance of any particular factor may change as new attitudes and standards emerge.[221] For example, the principle under sections 16(10) and 17(9) of the *Divorce Act* that a child should have as much contact with each parent as is consistent with the child's best interests now carries very substantial weight in contested custody proceedings.[222] The views and preferences of children are also an important consideration. On the other hand, religion plays a far less important role than it did many years ago. Although isolated cases may centre upon the religious upbringing of a child,[223] most custody and access disputes pay little or no attention to religious matters, although ethnic and cultural diversity, including minority language educational rights,[224] have emerged as a contemporary issue.[225] However, a child's racial and cultural heritage that is attributable to one but not both parents is only one factor—albeit an important factor—to consider in determining the best interests of a child for the purpose of granting a custody/access order.[226] Where no evidence is adduced at the trial to indicate that race is an important consideration, a court, and especially an appellate court, is not entitled

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218 See *Callaghan v Jackson*, 2015 ONSC 7559 at para 49, Eberhard J.

219 *MDS v DWS*, 2016 SKQB 136 (interim order).

220 *Gordon v Goertz*, [1996] 2 SCR 27, 19 RFL (4th) 177 at 197; *Rail v Rail* (1999), 180 DLR (4th) 490 (BCCA), citing *Poole v Poole* (1999), 173 DLR (4th) 299 (BCCA); *Harraway v Harraway*, 2010 BCSC 679; *CM v DJL*, 2012 NBQB 188; *JMG v LDG*, 2016 ONSC 3042; *Ackerman v Ackerman*, 2014 SKCA 86.

221 As to the impact of dual-income parents and shared child caregiving responsibilities on preservation of the *status quo*, see *Dunn v Dunn*, 2010 NSSC 321, MacDonald J.

222 See *Gallant v Gallant*, 2009 NSCA 56; *Hackett v Hackett*, 2009 NSSC 131.

223 See, for example, *Young v Young*, [1993] 4 SCR 3; *Hockey v Hockey* (1989), 21 RFL (3d) 105 (Ont Div Ct).

224 *Perron v Perron*, 2012 ONCA 811 (parental dispute on French-language schooling in light of s 23 of the *Canadian Charter of Rights and Freedoms*); see also *Horvath v Thibouthot*, 2014 ONSC 5150. Compare *Bamford v Peckham*, 2013 ONSC 5241; *Chomos v Hamilton*, 2016 ONSC 5208.

225 See, generally, John T Syrtash, *Religion and Culture in Canadian Family Law* (Markham, ON: Butterworths, 1992).

226 *Van de Perre v Edwards*, [2001] 2 SCR 1014; *Pigott v Nochasak*, 2011 NLTD(F) 26; *O'Connor v Kenney*, [2000] OJ No 3303 (Sup Ct); *Sawatzky v Campbell*, [2001] SJ No 317 (QB).

to treat the child's race as of paramount importance in determining which parent shall have custody of the child.[227]

It has been widely accepted by courts across Canada that provincial and territorial statutory criteria of the "best interests of the child" can provide useful guidance in custody cases arising under the *Divorce Act*.[228] Given the inherent vagueness of the concept of the "best interests of the child" in custody disputes, some courts have formulated lists of relevant considerations to complement those found in provincial or federal legislation. The following factors have been judicially identified in Alberta[229] and Newfoundland and Labrador[230] as relevant to determining the best interests of a child, but they do not purport to constitute a comprehensive list:

- the provision of the necessaries of life, including physical and health care and love;
- stability and consistency and an environment that fosters good mental and emotional health;
- the opportunity to learn good cultural, moral, and spiritual values;
- the necessity of setting realistic boundaries on conduct and fair and consistent discipline in teaching appropriate behaviour and conduct;
- the opportunity to relate to and love and be loved by immediate and extended family and the opportunity to form relationships;
- the opportunity to grow and fulfill his or her potential with responsible guidance;
- to have optimal access to the non-custodial parent in order to encourage and foster a good relationship;
- to be with the parent best able to fulfill the child's needs; and
- the provision of an environment that is safe, secure, free of strife and conflict, and that positively guides the child in development.[231]

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227 *Van de Perre v Edwards*, [2001] 2 SCR 1014.

228 *DME v RDE*, 2015 ABQB 47; *Rensonnet v Uttl*, 2016 ABCA 196; *SRM v NGTM*, 2014 BCSC 442 (appointment of parenting coordinator); *NU v GSB*, 2015 BCSC 105; *Elliot v Elliot*, 2016 MBQB 80; *NER v JDM*, 2011 NBCA 57; *Fowler v Fowler*, 2014 NLTD(F) 25; *MC v JC*, 2012 NUCJ 16; *Foley v Foley*, 2016 ONSC 4925; *Savoy v Savoy*, 2015 SKQB 131.

229 *Calahoo v Calahoo*, [2000] AJ No 815 (QB).

230 *Roche v Roche*, 2016 NLTD(F) 4, citing *Lane v Hustins-Lane*, 2005 NLUFC 42.

231 *Calahoo v Calahoo*, [2000] AJ No 815 (QB), citing *Starko v Starko* (1990), 74 Alta LR (2d) 168 (QB); see also *MS v JS*, 2010 ABQB 127; *MD v RD*, 2013 NLTD(G) 184. For additional factors, see *DLS v DES*, [2001] AJ No 883 (QB). And see *Family Law Act*, SA 2003, c F-4.5, s 18.

Courts in New Brunswick often look to the definition of the "best interests of the child" in the *Family Services Act* for useful guidance in custody cases arising under the *Divorce Act*.[232] It provides as follows:

> "best interests of the child" means the best interests of the child under the circumstances taking into consideration
> (*a*) the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both;
> (*b*) the views and preferences of the child, where such views and preferences can be reasonably ascertained;
> (*c*) the effect upon the child of any disruption of the child's sense of continuity;
> (*d*) the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child and, where appropriate, each grandparent of the child;
> (*e*) the merits of any plan proposed by the Minister under which he would be caring for the child, in comparison with the merits of the child returning to or remaining with his parents;
> (*f*) the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and
> (*g*) the child's cultural and religious heritage.[233]

There are additional matters relating to or arising out of this definition of which the court may take cognizance on a case-by-case basis. Among them are the following:

- Which parent offers the most stability as a family unit?
- Which parent appears most prepared to communicate in a mature and responsible manner with the other parent?
- Which parent is more able to set aside personal animosity and be generous with access arrangements?
- Which parent shows promise of being an appropriate role model for the children, and exhibits a sense of values and directions?
- Which parent is more prepared to broaden the scope of the child's life with learning, associations, and challenges?

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232 *NER v JDM*, 2011 NBCA 57; *NL v AP*, 2015 NBQB 57; *VC v PR*, 2016 NBQB 90.
233 *Family Services Act*, SNB 1980, c F-2.2, s 1.

- Are the extended families on either side polarized or are they generous of attitude with the opposite parent?
- Which parent provides the best cushion for the child against the stresses of marriage breakdown?
- Does the child have physical or mental problems that require special attention and care (for example, attention deficit disorder or asthma)?
- Does one parent play mind games with the child and carelessly expose the child to domestic turmoil?
- Where will the overall long-term intellectual and security interests of the child best be served?
- Will there be material provisions that meet at least minimal standards?
- Which parent appears most prepared to give priority to the child's best interests over and above his own?
- Which parent exhibits the most maturity and ability to accept and deal with responsibility?
- Does either parent appear more prone to litigate than to communicate or negotiate?
- Is there a positive or negative effect with respect to the involvement of third parties with either parent on the welfare of the child, and is such effect financial or emotional?
- Does the evidence disclose a more substantial bonding between the child and one parent or the other?
- In consideration of the potential for joint custody, does the evidence reveal a couple with the maturity, self-control, ability, will, and communication skills to make proper joint decisions about their children.[234]

In *Foley v Foley*,[235] Goodfellow J, of the Nova Scotia Supreme Court, formulated the following list of seventeen factors to consider in determining the best interests of a child, namely,

1) statutory direction;
2) physical environment;
3) discipline;
4) role model;
5) wishes of the children;
6) religious and spiritual guidance;

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234 *Shaw v Shaw*, [1997] NBJ No 211 (QB), Graser J; see also *LDW v KDM*, 2011 ABQB 384; *LDD v JAD*, 2010 NBCA 69; *JH v TH*, 2017 NBCA 7.

235 [1993] NSJ No 347 (SC). See also *NL v AP*, 2015 NBQB 57; *Chafe v Chaisson*, 2013 NLTD(F) 19; *Burgoyne v Kenny*, 2009 NSCA 34; *Reeves v Reeves*, 2010 NSCA 35; *Hustins v Hustins*, 2014 NSSC 185. And see *CM v RL*, 2013 NSFC 29, and *Myer v Lyle*, 2014 NSSC 233, citing 2013 amendments to the Nova Scotia *Maintenance and Custody Act*.

7) assistance of experts, such as social workers, psychologists, and psychiatrists;
8) time availability of parent for a child;
9) the cultural development of a child;
10) the physical and character development of the child by such things as participation in sports;
11) the emotional support to assist in a child developing self-esteem and confidence;
12) the financial contribution to the welfare of a child;
13) the support of an extended family, including uncles, aunts, and grandparents;
14) the willingness of a parent to facilitate contact with the other parent;
15) the interim and long-range plan for the welfare of the children;
16) the financial consequences of custody; and
17) any other relevant factors.

This list does not purport to be exhaustive, nor will all factors be relevant in every case. Determining a child's best interests is not simply a matter of scoring each parent on a generic list of factors. Each case must be decided on the evidence presented.[236] The listed factors in *Foley v Foley* merely serve as indicia of the best interests of the child. By their very nature, custody and access applications are fact-specific. The listed factors may, therefore, expand, contract, or vary, depending upon the circumstances of the particular case as manifested by the totality of the evidence. Courts must approach each decision with great care and caution. They must be mindful that there is no such thing as a "perfect parent" and they should not be quick to judge litigants for common parenting mistakes.[237] Mental illness does not necessarily disqualify a parent.[238] In *JRC v SJC*,[239] MacDonald J, of the Nova Scotia Supreme Court, listed the following questions as relevant in assessing what parenting plan was best for the child:

1. What does the parent know about child development and is there evidence indicating what is suggested to be "known" has been or will be put into practice?
2. Is there a good temperamental match between the child and the parent? A freewheeling, risk taking child may not thrive well in the primary care of a fearful, restrictive parent.

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236 *Burgoyne v Kenny*, 2009 NSCA 34; *NL v AP*, 2015 NBQB 57.
237 *MEE v TRE*, [2002] NSJ No 425 (SC).
238 *Marello v Marello*, 2016 ONSC 835 at para 125.
239 2010 NSSC 85 at para 12.

3. Can the parent set boundaries for the child and does the child accept those restrictions without the need for the parent to resort to harsh discipline?
4. Does the child respond to the parent's attempts to comfort or guide the child when the child is unhappy, hurt, lonely, anxious, or afraid? How does that parent give comfort and guidance to the child?
5. Is the parent empathic towards the child? Does the parent enjoy and understand the child as an individual or is the parent primarily seeking gratification of his or her own personal needs through the child?
6. Can the parent examine the proposed parenting plan through the child's eyes and reflect what aspects of that plan may cause problems for, or be resisted by, the child?
7. Has the parent made changes in his or her life or behaviour to meet the child's needs, or is he or she prepared to do so for the welfare of the child?

And in *Westhaver v Howard*,[240] Williams J, of the Nova Scotia Supreme Court, endorsed the following principles as applicable when a court is reviewing the issue of access:

1) While contact with each parent will usually promote the balanced development of the child, it is a consideration that must be subordinate to the determination of the best interests of the child.
2) While the burden of proving that access to a parent should be denied rests with the parent who asserts that position, it is not necessary to prove that access by a parent would be harmful to the children. The extent of the burden is to prove that the best interests of the children would be met by making such an order.
3) It is appropriate for a trial judge to consider the possible adverse effect on the mother of the father's behaviour, if the father were to be granted access.
4) The court must be slow to deny or extinguish access unless the evidence dictates that it is in the best interests of the child to do so.[241]

In Prince Edward Island, the following list of factors have been endorsed as relevant to the determination of the best interests of a child:

(1) The wishes of the parents;
(2) The proposals of the parents for the maintenance, education and religious upbringing of the children;

240 [2007] NSJ No 499 (SC).
241 *Ibid* at para 5.

(3) The parents' stations, aptitude and prospects in life;
(4) Pecuniary circumstances of the parents, not in the context that the richer shall receive custody, but to assist in the apportionment of the maintenance payments;
(5) The age and sex of the children;
(6) The conduct of the parents;
(7) Where the sense of love, affection and security of the child is directed;
(8) The home situation in which the child will be living;
(9) The requirements of the child and which parent is best equipped to meet the needs of that child;
(10) The length of time that the child has lived with a particular parent to the exclusion of the other parent;
(11) The bond that may exist between the children in a family with the intent that where a bond exists, the court should be reluctant to separate the children;
(12) The views and preferences of the child, where such views and preferences can reasonably be ascertained.[242]

I. CONDUCT

1) General

Sections 16(9) and 17(6) of the *Divorce Act* stipulate that the court, in making or varying an order for custody or access,[243] shall not take into consideration the past conduct of a person, unless the conduct is relevant to the ability of that person to act as a parent.[244]

Perceptions of morality have changed. In past generations, a parent living in an adulterous relationship would be automatically denied custody. Today, spousal conduct, which does not overtly reflect on parenting ability, is generally disregarded. A court may be concerned with the viability of a parent's

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242 *JDF v JLJF*, 2009 PESC 28 at para 14.

243 *MJT v SAT*, 2010 NBQB 268; *Poirier v Poirier*, 2011 SKQB 298.

244 See *Gordon v Goertz*, [1996] 2 SCR 27 at para 21; *DPO v PEO*, [2006] NSJ No 205 (SC) (joint custody negated by spousal abuse); compare *Somerville v Somerville*, 2007 ONCA 210, [2007] OJ No 1079 (husband's deceit at time of marriage breakdown not reflective of his parenting capacity). *BJG v DLG*, 2010 YKSC 33 (joint guardianship negated by father's controlling behavior); see also *Gallant v Gallant*, 2009 NSCA 56; *Mertz v Symchyck*, 2007 SKCA 121 (application under the *Children's Law Act*, *1997)* For a useful summary of conduct that may be deemed relevant to the determination of a child's best interests, see *TT v CG*, 2012 BCSC 1205 at para 39, citing the *Family Law Sourcebook for British Columbia* (2011 Update), published by the Continuing Legal Education Society of British Columbia at 2-26 and 2-27.

non-marital cohabitational relationship but is unconcerned with historical perceptions of the morality of the relationship. Contemporary issues of misconduct are more likely to focus on domestic violence[245] or parental alienation.[246] On an application to change the custody and guardianship of a child on the basis of the custodial parent's intransigent conduct in alienating the child from the non-custodial parent, the immediate detrimental impact on the child of a court-ordered change of custody may be outweighed by the long-term detrimental impact that will be suffered by the child if the parental alienation continues unabated.[247]

Sections 16(9) and 17(6) of the *Divorce Act* will not eliminate acrimonious custody or access litigation unless lawyers and parents jointly pursue other avenues for resolving parenting disputes on or after divorce. The strategic use of mediation and court-ordered independent custody assessments can reduce the potential for protracted no-holds-barred litigation.

2) Child Sexual Abuse Allegations

In contested custody or access proceedings, a parent who alleges that the other parent has sexually abused their child has the burden of proving the allegation on the balance of probabilities. If the evidence clearly establishes sexual abuse, such conduct will usually be determinative of future parenting arrangements. If the evidence leaves it uncertain whether sexual abuse occurred in the past, the court must still go on to assess the risk of future harm to the child.[248] A risk must be more than speculative or simple conjecture.[249] As was stated by Green J, of the Newfoundland Unified Family Court, in *CC v*

245 For insights into the appropriate judicial response to allegations of domestic violence, which may range from an isolated incident to a recurring pattern of spousal abuse that controls and disempowers the victim, see Peter G Jaffe *et al*, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans" (2008) 46 Fam Ct Rev 500. And see *CDG v DJP*, 2010 BCSC 1216; *MAB v LAB*, 2013 NSSC 89; *Docherty v Catherwood*, 2015 ONSC 5240; *CRL v REL*, [1998] SJ No 20.

246 *Ottewell v Ottewell*, 2012 ONSC 5201.

247 *AA v SNA*, [2007] BCJ No 1474 (CA); see also *LDW v KDM*, 2011 ABQB 384; *AA v SNA*, [2007] BCJ No 1475 (CA); *CLH v RJJS*, 2012 BCSC 579; *SC v ASC*, 2011 MBCA 70; *RWB v DCB*, 2015 NSSC 254; *McAlister v Jenkins*, [2008] OJ No 2833 (Sup Ct), citing Nicholas Bala *et al*, "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts" (2007) 33 Queen's LJ 79. For a useful summary of research findings on the impact of high parental conflict on the children of separated or divorced parents, see *Jackson v Jackson*, [2008] OJ No 342 (Sup Ct), JC Murray J. And see Section R, below in this chapter.

248 *HL v MK*, 2015 ONSC 4296; *Daya v Daya*, 2015 ONSC 6240; see also *CLB v JAB*, 2016 SKCA 101 (interim order).

249 *HL v MK*, 2015 ONSC 4296 at para 35, citing *CB v WB,* 2011 ONSC 3027 at paras 125–37, *Daya v Daya*, 2015 ONSC 6240.

LB,[250] "the issue in a custody and access case where sexual abuse is alleged is not whether abuse did occur in the past but whether there is a real risk to the child in the future and, if so, whether that factor, when weighed against all the other factors bearing upon the best interests of the children, mandates a particular result." Hearsay evidence respecting statements made by young children may be admitted where sexual abuse is alleged in a custody or access dispute, provided that such evidence satisfies the criteria of necessity and reliability set out in *R v Khan*.[251] In the words of Fisher J, of the British Columbia Supreme Court, in *DAM v DMT*:

> 23 In a family law case involving allegations of physical and sexual abuse against children, hearsay evidence of statements made by the children may be admitted under the principled exception to the hearsay rule. This exception requires that the evidence is both necessary and reliable. Children do not normally testify in proceedings of this nature, particularly young children, as to do so may be very harmful to them. For this reason, the hearsay evidence meets the necessity requirement: see *J.K.F. v. J.D.F.*, [1988] B.C.J. No. 278 (C.A.); *R. v Khan*, [1990] 2 S.C.R. 531; *S.F.R. v. E.C.R.* (1997), 41 B.C.L.R. (3d) 239 (S.C.); *P.V. v. D.B.*, 2007 BCSC 237; and *J.P. v. B.G.*, 2012 BCSC 938.
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> 24 Reliability for the purpose of admissibility, or threshold reliability, is aimed at identifying circumstances where the inability to test the hearsay evidence is sufficiently overcome to justify receiving it as an exception to the general exclusionary rule. This requirement may be met by showing that sufficient trust can be put in the truth and accuracy of the statement because of the way in which it came about, or by showing that in the circumstances the judge will be able to sufficiently assess its worth. The presence of corroborating or conflicting evidence may also be considered: see *R. v. Khan; R. v. Khelawon*, [2006] 2 S.C.R. 787.
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> 25 In *S.F.R.*, the indicia of reliability in cases involving allegations of sexual abuse were held to include the following factors: timing of the statement; demeanour and personality of the child; intelligence and understanding of the child; absence of motive of the child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and whether the statement was equally consistent with other hypothesis or alternative explanation.

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250 (1995), 136 Nfld & PEIR 296 at para 85 (Nfld UFC); see also *DAM v DMT*, 2013 BCSC 359; *CMB v WSB*, 2011 ONSC 3027.

251 [1990] 2 SCR 531.

> 26 If the hearsay evidence meets the test of threshold reliability, it can be admitted for its truth and its ultimate reliability is to be assessed with the rest of the evidence.[252]

The receipt of hearsay evidence is subject to judicial evaluation as to the weight to be accorded to it. In *JAG v RJR*,[253] Robertson J, of the Ontario Court, General Division, formulated the following list of factors to consider in weighing the evidence to determine whether a young child was sexually abused by a parent:

1) What were the circumstances of disclosure — to whom, and where?
2) Did the disclosure of evidence of alleged abuse come from any disinterested witnesses?
3) Were the statements made by the child spontaneous?
4) Did the questions asked of the child suggest an answer?
5) Did the child's statement provide context such as a time frame or positioning of the parties?
6) Was there progression in the story about events?
7) How did the child behave before and after disclosure?
8) Is there physical evidence that would be available by medical examination? If so, and no medical report has been filed, is there a sufficient explanation for its lack?
9) Was there opportunity?
10) What investigative or court action was taken by the parent alleging abuse?
11) Who provided background information to the experts and investigators, and is it accurate, complete, and consistent with both parties' recollections?
12) Was there other evidence supporting the allegations of sexual abuse?
13) Was the custodial parent co-operative regarding access, or was access resisted on other grounds prior to the allegations and after disclosure?
14) Was there harmony between the evidence of one witness and another, and between the evidence of the experts?
15) Was there consistency over time of the child's disclosure?
16) Did the child use wording in statements which appeared to be prompted, rehearsed, or memorized?
17) Was the language used by the child consistent and commensurate with the child's language skills?

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252 2013 BCSC 359; see also *Ganie v Ganie*, 2014 ONSC 7500 (domestic violence).

253 [1998] OJ No 1415 (Gen Div); see also *KB v CA*, 2012 MBQB 115.

18) Was the information given by the child beyond age-appropriate knowledge?
19) What was the comfort level of the child to deal with the subject matter, in particular with respect to the offering of detail?
20) Did the child exhibit sexualized behaviour?
21) Was there evidence of pre-existing inappropriate sexual behaviour by the alleged perpetrator?
22) Was a treatment plan put forth by either parent?
23) Was the child coached or prompted?
24) Did the evidence of the expert witnesses, as accepted by a trial Judge, support the allegations of sexual abuse?

Lists such as this may be helpful, but only when they are tailored to the facts of the particular case. There is no single list that can be used for all cases involving alleged sexual abuse. Nicholas Bala and John Schuman, in their commentary titled "Allegations of Sexual Abuse When Parents Have Separated,"[254] observe that, given the distinction between the rules of evidence and the standard of proof in criminal and civil proceedings, "it seems inappropriate for a family law judge to place much weight on the decision of police not to charge or on a criminal court acquittal" of a parent against whom allegations of child sexual abuse have been made.

Bala and Schuman further observe that abused children often feel an attachment to the abusing parent, notwithstanding the abuse. Consequently, a "family law court" may allow access by the former abusing parent, if it is satisfied that such access is in the best interests of the child. The judge must be satisfied, however, that the child is not at risk, and this may require supervised access in a neutral setting, before access in the home of the non-custodial parent is allowed.

A five-year-old child is not a competent witness where sexual abuse of the child is alleged in contested custody or access proceedings, and the reception of hearsay evidence as to statements made by the child may, therefore, be "reasonably necessary" to make a proper determination. The reliability of the child's statements is to be evaluated and weighed along with the evidence provided by other witnesses. Where "prompting" has definitely occurred and "coaching" may have occurred, this will adversely affect the reliability to be accorded to the child's disclosures and demonstrations. Circumstantial physical evidence that is relied upon to support the allegation of sexual abuse may be discounted where there is a reasonable and plausible explanation provided for the physical condition. Past incidents in which the child "made up stories"

254 (1999) 17 Can Fam LQ 191.

are also relevant to the issue of reliability of the hearsay evidence. Where a review of all the relevant and admissible evidence leads the court to conclude not only that the burden of proving sexual abuse has not been satisfied, but also that the facts do not support a finding that there is a substantial possibility of future sexual abuse, the "maximum contact" principle should be applied and an order for joint custody with shared decision-making authority and for unsupervised access on alternate weekends is appropriate.[255]

In proceedings for interim custody and access wherein the custodial parent alleges that the non-custodial parent has sexually abused the children, the adage about erring on the side of caution has its place, but it does not merit absolute application. Allegations of sexual abuse are always troubling, but the court should not abdicate its responsibility by postponing a determination until trial and granting the non-custodial parent supervised access to the children in the meantime. Supervised access creates an artificial and stilted environment for the children and the parent and may undermine the preservation of a close bond such as the child enjoys with the custodial parent. Supervised access may be better than no access but it is not much better. Consequently, it should be ordered only when there is no reasonable alternative. Given that the *Divorce Act* endorses the principle that it is in the best interests of children to enjoy a relationship with both parents to the extent reasonably possible, access to a non-custodial parent should not be denied or restricted in the absence of a compelling reason. Instead of deferring the issue until trial, the court, on an interim application, should examine the sexual abuse allegations with care and objectivity. Where the descriptions of the alleged abuse are vague, where they were elicited by the custodial parent as opposed to being volunteered, where the children made no incriminating disclosures to third-party professionals, including a social services agency and the police who looked into the custodial parent's allegations, and where an examination of the children by a licensed physician finds no evidence of sexual abuse and provides a clinical explanation of their physical condition, an order for unsupervised access to the children by the non-custodial parent may be granted.

When the custodial parent has been the children's primary caregiver, a more fundamental change in the parental roles may be inappropriate having regard to the best interests of the children, notwithstanding that the custodial parent has relocated with the children in contravention of a court order that is currently under appeal. Although such relocation might justify a change of custody in other circumstances, Gerein CJ, of the Saskatchewan

255 *BS v RT*, [2002] NJ No 101 (SC), Cook J.

Court of Queen's Bench, in *TGF v DSV*,[256] concluded that it would constitute an improper punitive sanction in this case and it would be contrary to the best interests of the children. However, for the purposes of achieving continued meaningful involvement of the non-custodial parent in the children's lives, Gerein CJ, while conceding that such a disposition was unusual, granted the non-custodial parent access to the children for the entire and every weekend.

Determination of the credibility of witnesses is a function of the trier of fact, not an expert witness. The majority judgment of the Supreme Court of Canada in *R v Béland*[257] renders polygraph evidence inadmissible in a criminal proceeding because it contravenes certain basic rules of evidence, namely (1) the rule against oath-helping; (2) the rule against the admission of past out-of-court consistent statements by a witness; (3) the rule relating to character evidence; and (4) the expert evidence rule. These rules of evidence, which were relied upon in *R v Béland* to exclude the admission of polygraph evidence that was sought to be used to determine the credibility of the accused, are equally applicable to a contested guardianship, or custody and access proceeding, wherein a parent seeks to negate allegations of child sexual abuse by introducing polygraph evidence.[258]

J. EFFECT OF AGREEMENT

An agreement between parents or between parents and third parties respecting a child's upbringing cannot oust the statutory obligation of a court to grant a custody order that reflects a full and balanced consideration of all factors relevant to a determination of the child's best interests. A prior parenting agreement between the disputants is only one factor to be considered, albeit an important factor.[259] As Nightingale J, of the Ontario Superior Court of Justice, remarked in *Todoruck v Todoruck*, "a parent who has agreed to a child care arrangement should be prepared to explain why what he or she felt was appropriate earlier on is no longer appropriate."[260] Parents cannot oust

256 [2005] SJ No 582 (QB).

257 [1987] 2 SCR 398.

258 *EW v DW*, [2005] BCJ No 1345 (SC).

259 *AL v DK*, 2000 BCCA 455 at para 11; *Sabbagh v Sabbagh* (1994), 2 RFL (4th) 44 (Man CA); *LW v PA*, 2010 NBQB 201; *SH v AM*, 2016 NLTD(F) 14; *Blois v Gleason*, [2009] OJ No 1884 (Sup Ct); *Kerr v Kerr*, 2016 SKCA 9; *BL v ML*, 2010 YKSC 41; see also *MEO v SRM*, [2004] AJ No 202 (CA) and *Hearn v Hearn*, [2004] AJ No 105 (QB), and *AL v CC*, 2011 ABQB 819, applying *Miglin v Miglin*, [2003] 1 SCR 303.

260 2014 ONSC 6983 at para 43, citing *Summers v Summers*, [1999] OJ No 3082.

the statutory jurisdiction of the court to order child support and access by contracting to trade off child support and access.[261]

Although a separation agreement may include provisions whereby its terms shall only be varied in the event of a material change of circumstances, such provisions cannot oust the jurisdiction of a court to grant orders for custody and child support in subsequent divorce proceedings. In allowing an appeal in *Jay v Jay*[262] because the chambers judge had erred by concluding that his jurisdiction under the *Divorce Act* was limited by the provisions of the separation agreement, the Appeal Division of the Prince Edward Island Supreme Court expressed the following opinion:

> Irrespective of the terms of any agreement between the parties, the court has the jurisdiction in a motion for corollary relief in connection with divorce proceedings to hear and deal with all issues of custody and child support. An agreement between the parties is only one factor to be taken into consideration when deciding upon the best interests of the child. While such an agreement provides strong evidence of what the parties accepted at the time as meeting the best interests of the child, it does not relieve the court of its responsibility under s 16 of the *Divorce Act* to make an independent assessment of the best interests of the child. (See: *Willick v. Willick*, [1994] 3 S.C.R. 670.)[263]

In the context of custody and access orders, the above observations are clearly consistent with established caselaw and with the express provisions of section 16(8) of the *Divorce Act* whereby "[i]n 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 condition, means, needs and other circumstances of the child." Speaking to the variation of consent orders for custody in *Cheng v Li*, the Alberta Court of Appeal has stated:

> 23 Where custody agreements have been reduced to a consent order, the provisions of s 17 of the *Divorce Act* apply, requiring a material change of circumstances: *Foreman v Foreman*, 2005 ABQB 343, 53 Alta LR (4th) 319 at paras 13, 23.[264]
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> 24 Furthermore when the consent order was signed, it is presumed that the court had discharged its duty under the *Act* to ensure that the order met the best interests of the child: *Hearn v Hearn*, 2004 ABQB 75, 352 AR 260 at para 38.

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261 *Kroupa v Stoneham*, 2011 ONSC 5824 (variation of consent order).

262 [2003] PEIJ No 68 (CA); see also *Cooke v Cooke*, 2012 NSSC 73.

263 *Jay v Jay*, [2003] PEIJ No 68 (CA) at para 4; see also *EBG v SMB*, 2015 BCSC 541 (variation of consent order).

264 See *LAC v GNW*, 2016 BCCA 132.

> 25 For the mother to now suggest that the 2012 Consent Variation Order was not in the best interests of the child is to essentially collaterally attack that order, without having sought to appeal it and after having received the benefit of it.
>
> 26 Moreover, in the case of a consent order the court presumes that when parties are in agreement they usually know what is best for the family, and what is in the best interests of their children. The parties must keep their promises once they are made. If a party has compromised one advantage to achieve another, that party should not lightly be allowed to resile from the bargain freely made: *Hearn v Hearn*, at para 31.
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> 27 There are limits to permitting any perceived change to result in a change to a custody order entered into by the consent of the parents. Endless relitigation of custody issues serves the interests of no one, including the children involved. The utility of settlements respecting custody and access would be considerably diminished if parties could agree to a consent order and then be permitted to resile from it without meeting a considerable threshold test of change in circumstances in the condition, means, needs or circumstances of the child or the ability of a parent to meet the needs of a child which materially affects the child and which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.[265]

K. RELIGIOUS UPBRINGING OF THE CHILD

Although an order for sole custody under section 16 of the *Divorce Act* empowers the custodial parent to determine the religious upbringing of the child, such an order does not necessarily entitle the custodial parent to prevent the non-custodial parent from sharing religious views and practices with the child.[266] Religion will not be a critical factor in custody proceedings where the parents are not practising their religion and the child is of a young age.[267]

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265 2015 ABCA 322 at paras 23–27.

266 *Young v Young*, [1993] 4 SCR 3; see also *MW v SEM*, 2010 NBQB 26. Compare *Boudreau v Boudreau* (1994), 143 NBR (2d) 321 at 328 (QB), wherein the court stated that the custodial parent had no right to impose her religious views on the children. For further analysis of the significance of parents' religious persuasions, see *Barrett v Barrett* (1988), 18 RFL (3d) 186 (Nfld TD), wherein Bartlett J cites with approval copious extracts from a didactic brief filed by David Day, QC; see also Vittorio Toselli, "Religion in Custody Disputes" (1990) 25 RFL (3d) 261; John T Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992).

267 *White v White* (1990), 28 RFL (3d) 439 (BCSC) (two-year-old child); *Tyabji v Sandana* (1994), 2 RFL (4th) 265 at 280–81 (BCSC).

In custody and access disputes, a court should not seek to determine whether one religion is better than the other. The religious upbringing of children concerns the court only insofar as it affects their well-being and their relationships with both the custodial and non-custodial parent.[268] A court will encroach upon the personal domain of religious freedom only where the failure to do so is shown to place a child at substantial risk of harm.[269] A court will not usually object to or interfere with the religious instruction of a child by the parents;[270] indeed, exposure to different religious beliefs will often be of value to the child.[271] The court may have to strike a compromise between the parties and their wish to provide a child with a religious education. The court may direct the parents to tolerate and respect each other's religion.[272]

In *ASK v MABK*, Baird J, of the New Brunswick Court of Queen's Bench, stated:

> [122] The child's religious heritage, like racial or cultural heritage, is one factor in his or her personal identity. In making a best interest[s] decision, a court must consider that factor but it is not determinative . . . . What is more important is the child's right to make his or her own decision on religious affiliation . . . The best way to preserve that right is by not foreclosing any future options and allowing both parents to share their religious heritage with the child . . . .
>
> [123] The freedom to provide religious instruction to their children, however, cannot be used as an opportunity to undermine the children's love and respect for the other parent. In other words, there is no right or wrong religion and the children should not be taught that the other parent is somehow evil or bad because they are not practicing Christians or for some other reason.
>
> . . .
>
> [125] The age at which a court will deem a child mature enough to have established religious convictions will depend on the individual child and the facts of each case.[273]

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268 *Young v Young*, [1993] 4 SCR 3, 49 RFL (3d) 117 at 217; *ASK v MABK*, [2008] NBJ No 332 (QB); *Solomon v Solomon* (1990), 100 NSR (2d) 73 (TD), aff'd (1991), 106 NSR (2d) 28 (CA); *Hines v Hines* (1992), 40 RFL (3d) 274 (NS Fam Ct); *Voortman v Voortman* (1994), 4 RFL (4th) 250 (Ont CA); *Harvey v Lapointe* (1988), 13 RFL (3d) 134 (Que CS); *Travis v Travis*, 2011 SKQB 307.

269 *Rosenberg v Minster*, 2011 ONSC 4758.

270 *Droit de la famille — 353* (1987), 8 RFL (3d) 360 (Que CA).

271 *Young v Young*, [1993] 4 SCR 3; *Voortman v Voortman* (1994), 4 RFL (4th) 250 (Ont CA).

272 *Jaillet v Jaillet* (1988), 91 NBR (2d) 351 (QB); *Avitan v Avitan* (1992), 38 RFL (3d) 382 (Ont Gen Div).

273 [2008] NBJ No 332 (QB); see also *MW v SEM*, 2010 NBQB 26; *MP v ADA*, 2011 NBQB 351.

And in *Langille v Dossa*, Wilson JFC, of the Nova Scotia Family Court, held that

> [w]here there is conflict between the rights of a custodial parent to share her life with the child and the [tenets] of any particular religion, I must hold that the rights of the child to know their parent must take precedence . . . . To allow one party . . . to attack the morality of the other parent cannot be in the best interests of the child.[274]

A court may stipulate that a non-custodial parent is not entitled to object to the religious practices of the custodial parent,[275] and a custodial parent's objection to the non-custodial parent's religious beliefs is no bar to granting the non-custodial parent access.[276] Custody may, however, be granted to one parent if the other parent places commitment to a religion over and above responsibility to promote the best interests of the children.[277] Where a custodial parent's religious beliefs and practices are found to be detrimental to the children's welfare, custody may be granted to the other parent and an order may be made prohibiting the former custodial parent from engaging in future religious indoctrination of the children.[278] Limitations may be imposed on the non-custodial parent with respect to religious practices when the child is in his or her care.[279] Where the best interests of the children are thereby served, the court may impose restrictions on a parent to prevent the religious indoctrination of a child or to prohibit a non-custodial parent from involving the children in his or her religious activities, even in the absence of demonstrable harm to the child.[280] Such restrictions do not contravene section 2 of the *Canadian Charter of Rights and Freedoms*,[281] but in the absence of

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274 (1994), 136 NSR (2d) 180 at 189 (Fam Ct) (application under *Family Maintenance Act*, RSNS 1989, c 160).

275 *Droit de la famille — 1114*, [1987] RDF 366 (Que CS).

276 *Friesen v Friesen* (1989), 56 Man R (2d) 303 (QB); *Smith v Smith* (1989), 92 NSR (2d) 204 (TD); *Avitan v Avitan* (1992), 38 RFL (3d) 382 (Ont Gen Div).

277 *Schulz v Schulz* (1987), 12 RFL (3d) 141 (BCSC); compare *McNeil v McNeil* (1989), 20 RFL (3d) 52 (BCSC), wherein a mother's adherence to a fundamental church was found not to be detrimental to the children's best interests.

278 *Moseley v Moseley* (1989), 20 RFL (3d) 301 (Alta Prov Ct).

279 *Borris v Borris* (1991), 37 RFL (3d) 339 (Alta QB); *LCM v BAC*, 2010 NBQB 127; *Droit de la famille — 1150*, [1988] RDF 40 (Que CS), aff'd (1990), [1991] RJQ 306 (Que CA), aff'd [1993] 4 SCR 141.

280 *Young v Young*, [1993] 4 SCR 3.

281 *Young v Young*, *ibid*; *Fougère v Fougère* (1986), 70 NBR (2d) 57 at 75–76 (QB), var'd (1987), 6 RFL (3d) 314 (NBCA); *Droit de la famille — 260* (1986), 50 RFL (2d) 296 (Que CS); *Droit de la famille — 353* (1987), 8 RFL (3d) 360 (Que CA); see also *Moseley v Moseley* (1989), 20 RFL (3d) 301 (Alta Prov Ct); *Schulz v Schulz* (1987), 12 RFL (3d) 141 (BCSC); *Jaillet v Jaillet* (1988), 91 NBR (2d) 351 (QB); *Ryan v Ryan* (1986), 3 RFL (3d) 141 (Nfld TD).

compelling evidence that the sharing of religious beliefs and practices with the child or the exposure of the child to two religions is contrary to the best interests of a child, the *Divorce Act* should be interpreted in a manner consistent with the freedom of religion guaranteed by the *Canadian Charter of Rights and Freedoms*.[282]

Where one parent suggests a change to or from a religious school over the objections of the other parent, it must be demonstrated on the evidence that the change will be in the best interests of the child.[283]

L. VARIATION AND RESCISSION OF INTERIM AND PERMANENT CUSTODY AND ACCESS ORDERS

On the issue of the variation of interim custody orders, Schwann J, of the Saskatchewan Court of Queen's Bench, observed in *Rue v Babyak*:

> 15 As a starting point, this Court's reluctance to vary interim custody orders must again be emphasized. In the absence of any credible evidence the child is in danger or compelling evidence calling for a change, no change should be made to interim orders. (See *MacEwen v. MacEwen*, 2004 SKQB 271, [2004] S.J. No. 419 (QL); *Salisbury v. Salisbury*, 2011 SKQB 258, 376 Sask. R. 276 and *Guenther v. Guenther* (1999), 181 Sask. R. 83, [1999] S.J. No. 120 (QL) (Q.B.)). In fact *Guenther* goes so far as to describe it as a ". . . reversible error in law to vary interim arrangements pending trial . . ." (para 8).
>
> 16 The purpose of an interim custody/access order is to stabilize the parenting situation and the children's lives, usually by preserving the *status quo*, in order to provide an acceptable solution to difficult problems pending trial. For that reason, and to bring finality to litigation, interim orders are not lightly disturbed. As stated in *Harden v. Harden* (1987), 54 Sask. R. 155, 6 R.F.L. (3d) 147 (Sask. C.A.) " . . . interim custody is just that: a makeshift solution until the correct answer can be discovered . . . designed to minimize conflict between parents and cause the least harm to the child and determination of the cause."[284]

And Boswell J, of the Ontario Superior Court of Justice, stated in *Lamoureux v Lamoureux*:

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282 *Hockey v Hockey* (1989), 21 RFL (3d) 105 (Ont Div Ct); *Avitan v Avitan* (1992), 38 RFL (3d) 382 (Ont Gen Div).

283 *Travis v Travis*, 2011 SKQB 307, citing *Stephanson v Schulte*, 2000 SKQB 341.

284 2012 SKQB 541 at paras 15–16; see also *Sane v Sane*, 2015 SKQB 313, citing *Guenther v Guenther* (1999), 181 Sask R 83 (QB). As to the disinclination of appellate courts to disturb an interim custody order, see *HEK v MLK*, 2013 SKCA 14, citing *Mantyka v Dueck*, 2012 SKCA 109; *Ernst v Ernst*, 2015 SKCA 57.

> 29 I am also governed by a number of principles that have developed in relation to motions to vary interim orders. Interim, or temporary orders, are by their nature imperfect solutions to often complex problems. They are based on limited evidence, typically in affidavit form. They are meant to provide "a reasonably acceptable solution to a difficult problem until trial": see *Chaitas v. Christopoulos*, [2004] O.J. No. 907 (S.C.J.) per Sachs J.
>
> 30 Variations of temporary orders are not encouraged. They should not become the focus of the parties' litigation: *Cutaia-Mahler v. Mahler*, 2001 CarswellOnt 3054 (S.C.J.) per Benotto J. There is, therefore, a heavy onus on a party who seeks to vary a temporary order — essentially replacing one imperfect solution with another imperfect solution — pending trial: *Boissy v. Boissy*, 2008 CarswellOnt 4253 (S.C.J.) per Shaw J. A substantial change in circumstances is typically necessary before a variation to a temporary order will be granted: *Biddle v. Biddle*, [2005] O.J. No. 737 (S.C.J.) per Blishen J.[285]

The above opinions may be compared to the following opinion of Campbell J, of the Prince Edward Island Supreme Court, in *GER v HJR*:

> The practice of law has evolved greatly over the last number of years. The time between the start of an action and the trial, which used to be measured in months, is now often measured in years. Considerably fewer matters ever reach the trial stage. Interim orders, which used to be viewed as being "temporary" have now become the *de facto* final orders in many cases. While parties are free to go to trial in any case, the vast majority choose not to do so. Cost is often a significant factor in those decisions. The desire of the parties to gather evidence by way of an independently prepared home study is another factor which extends the time required between any interim order and an order following trial. Interim orders, varied from time to time as the need arises, have largely replaced the so-called "final" order after trial. Having stable and predictable custodial arrangements can be of great value to a child. However, given the significant changes in the use and duration of "interim" orders, courts must retain the ability to adjust interim orders to reflect developments impacting the best interests of the child. Preservation of the *status quo* should not be seen as a goal in and of itself, but only as one factor, albeit a significant one, affecting the best interests of the child.[286]

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285 2010 ONSC 4488; see also *Daley v Daley*, 2011 NLTD(F) 35; *Lafferty v Larocque*, 2013 NWTSC 10; *Shawyer v Shawyer*, 2016 ONSC 830.

286 2012 PESC 24 at para 22; see also *Lafferty v Larocque*, 2013 NWTSC 10 at para 25.

Although it is rare for a motion judge to vary an interim order granted pursuant to the *Divorce Act*, a judge always has the jurisdiction to decide the custody of a child as it relates to the best interests of that child, particularly where it can be demonstrated that there has been a change of circumstances raising concerns about the child's welfare. However, there must be compelling reasons that militate in favour of immediate action rather than waiting for a hearing on the matter and a final order.[287] There is no section in the *Divorce Act* that expressly authorizes the court to vary an interim order. If it was the intention of Parliament to prohibit such variation orders, it surely would have included a provision to indicate its clear intention. Where there is a gap in the legislation that the court is required to apply, the *parens patriae* jurisdiction of the court may be exercisable. The court may draw upon its inherent jurisdiction whenever it is just or equitable to do so, and the exercise of the court's inherent jurisdiction to vary an interim order does not contravene any provision of the *Divorce Act*.[288]

Although interim custody orders ordinarily preserve the *status quo* and any subsequent variation is unusual in the absence of evidence of risk to the child or some other compelling reason,[289] special circumstances may warrant such variation. In *Lewis v Lewis*,[290] the mother was granted sole custody of the children and the father supervised access pursuant to an interim consent order triggered by the mother's allegations of abuse. Subsequently, the court rejected these allegations and the mother's contention that she was a pawn who was being controlled by the father. For example, the court found that the parents' involvement in "phone sex" and watching pornographic movies was a joint and consensual adult activity that did not affect their parenting abilities or the best interests of the children and was therefore irrelevant to the issues of custody and access. Finding that an order for joint custody would be unworkable because of the parents' inability to communicate, the mother was granted sole custody of the children and the father was granted unsupervised access on specified terms.

Section 17 of the *Divorce Act* regulates the jurisdiction of the court to vary, rescind, or suspend a permanent custody order or any provision thereof. It involves a two-stage analysis. Before entering on the merits or an application to vary a custody order, the judge must be satisfied of a change in the condition, means, needs, or circumstances of the child, and/or the ability of the former spouses to meet the parenting needs of the child.[291] A material change in

287 *Cloutier-Chudy v Chudy*, 2008 MBQB 155.
288 *DG v HF*, [2006] NBJ No 158 (CA).
289 *Shawyer v Shawyer*, 2016 ONSC 830; *Napper-Whiting v Whiting*, 2014 SKCA 33.
290 [2005] NSJ No 368 (SC).
291 *Easson v Blasé*, 2016 ONCA 604 at para 3.

circumstances is one which (1) amounts to a change in the condition, means, needs, or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) materially affects the child; and (3) was either not foreseen or could not have been reasonably contemplated by the judge who made the order that is sought to be varied.[292] If an applicant fails to meet this threshold requirement, the inquiry can go no further.[293] A court must make a finding of a material change in circumstances even when both parents request a variation.[294] If the threshold condition of a material change is established, the court should re-assess the parenting arrangements in light of all the circumstances existing at the time of the variation proceeding. The court should consider the matter afresh without defaulting to the existing arrangements and must make its determination having regard only to the best interests of the child.[295] Although section 17(5) of the *Divorce Act* directs the court to consider the child's best interests by reference to the material change in circumstances, the inquiry cannot be confined to that change alone, isolated from the other factors bearing on the child's best interests.[296]

Section 17(1)(b) of the *Divorce Act* empowers a court to grant an interim order varying or suspending the provisions of an existing permanent custody/access order. A distinction is to be drawn between the existence of such jurisdiction and the exercise of such jurisdiction. Before granting an interim variation order, the court must be satisfied (1) that a *prima facie* case has been made out, pointing to a change of circumstances of sufficient import as might well result in variation of the custody/access order at the final hearing; and (2) that the best interests of the child lie in making an interim order of the nature of that being contemplated. The court should also have regard to the principle that a child should have as much contact with each parent as is consistent with the child's best interests. The court should exercise its

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292 *Gordon v Goertz*, [1996] 2 SCR 27; *Ryan v Ryan*, [2008] AJ No 128 (CA); *Dedes v Dedes*, 2015 BCCA 194; *LAC v GNW*, 2016 BCCA 132; *Kitt v Kitt*, 2011 MBQB 208; *SLB v PJO*, 2013 NBCA 52; *BC v MS*, 2015 NBCA 46; *Pope v Janes*, 2014 NLTD(F) 27; *Mahaney v Malone*, 2013 NSSC 400; *NL v RRM*, 2016 ONCA 915; *Talbot v Henry* (1990), 25 RFL (3d) 415 (Sask CA); *Gray (formerly Wiegers) v Wiegers*, 2008 SKCA 7; *DMM v TBM*, 2009 YKSC 50; see also *MW v SEM*, 2010 NBQB 26 at paras 165–66.

293 *Litman v Sherman*, 2008 ONCA 485; *Greene v Lundrigan*, 2011 NLTD(F) 55; *Persaud v Garcia-Persaud*, 2009 ONCA 782.

294 *Persaud v Garcia-Persaud*, *ibid*.

295 See *DEC v SCC*, 2012 ABCA 252; *Baynes v Baynes* (1987), 8 RFL (3d) 139 (BCCA); *West v West* (1994), 92 Man R (2d) 164 (CA); *Gill v Chiang*, 2011 ONSC 6803; *Talbot v Henry* (1990), 25 RFL (3d) 415 (Sask CA); *Wilson v Grassick* (1994), 2 RFL (4th) 291 (Sask CA), leave to appeal to SCC refused (1994), 7 RFL (4th) 254 (SCC); compare *Magnus v Magnus*, [2006] SJ No 510 (CA) (variation of shared parenting regime should not be disproportionate to the proven change).

296 *KRD v CKK*, 2013 NBQB 211; *Bromm v Bromm*, 2010 SKCA 149.

jurisdiction to grant an interim variation order sparingly and solely in the best interests of the child, bearing in mind that a final order will be forthcoming and even a temporary change can be unsettling.[297] Applying these principles to the facts in *Dorval v Dorval*,[298] wherein the interim variation order prohibited the mother from relocating the child, the Saskatchewan Court of Appeal found no tenable reason for interfering with the order. Addressing the incidental question of appeals challenging interim orders of limited duration, the Saskatchewan Court of Appeal stated that, while a right of appeal exists, the appellate court will exercise its powers sparingly and only in extraordinary circumstances. The reasons for this are obvious. Such appeals generate additional costs and delay, even when they are heard on an expedited basis, whereas it is in everybody's best interests that the matter proceed to a final determination as soon as is practicable. The judgment in *Dorval v Dorval* does not purport to resolve the "controversy" relating to the interim variation of spousal support orders. It rests content with the statement that "even in those cases in which it has been held that the courts are not empowered to make interim orders on applications under section 17 or its equivalent, allowance is consistently made for the *parens patriae* jurisdiction of the courts when it comes to children and their interests."[299] In *Sundara v Sundara*,[300] on an application for an interim order to vary a consent order for co-parenting when a material change of circumstances has been established within the meaning of section 17 of the *Divorce Act*, Maher J, of the Saskatchewan Court of Queen's Bench, identified the following three options available to him:

1. In exceptional circumstances without *viva voce* evidence I can make a determination of the appropriate new parenting arrangement in light of the change of circumstance;
2. If a *prima facie* case pointing to a change of circumstance has been established, I may refer the matter to a pre-trial conference and if the matters are not resolved at that stage the matter will proceed to trial;

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297 *Landry v Welsh*, 2013 NBQB 347. As to the jurisdiction of courts in British Columbia to grant an interim variation order of a prior permanent (final) custody order pursuant to s 17(5) of the *Divorce Act*, see *LS v GS*, 2016 BCCA 346 at paras 43–44.

298 [2006] SJ No 94 (CA); compare *Welch v George*, 2011 SKCA 33; see also *Carey v Hanlon*, 2007 ABCA 391; *Vargas v Berryman*, 2009 BCCA 588; *Moore v Moore*, 2013 NSSC 252; *Huliyappa v Menon*, 2012 ONSC 5668; *Jones v Bahr*, 2010 SKCA 41; see also *Caparelli v Caparelli*, [2009] OJ No 5640 (Sup Ct) (access).

299 [2006] SJ No 94 at para 21 (CA); compare *Vargas v Berryman*, 2009 BCCA 588; *NS v BL*, 2015 BCSC 1366; *Welch v George*, 2011 SKCA 33.

300 2010 SKQB 313.

3. If I am satisfied there is a *prima facie* case pointing to a change of circumstances, I may order that there be a pre-trial conference and make an interim variation order which would be in place until trial.

Given the father's change to out-of-town employment and the fact that he was facing serious criminal charges that could result in his incarceration, Maher J found it appropriate to grant the mother an interim order for custody, and directed the matter to proceed to pretrial and ultimately to trial, if necessary.

On an application to vary a custody order pursuant to section 17(5) of the *Divorce Act*, the applicant must prove a material or pivotal change in the child's circumstances that requires variation of the order, having regard to the best interests of the child. Although common sense dictates that a child's parenting needs will change over the years from infancy to adulthood, the increased maturity of the child arising from the passage of time does not, of itself, constitute a material change as required by section 17(5) of the *Divorce Act*; nor is it sufficient that the non-custodial parent wishes to assume a more substantial role in the child's life. Common sense assumptions about the changing needs of children as they mature do not discharge the court's duty to consider whether the existing order should be varied because it no longer satisfies the child's parenting needs. In *Gray (Formerly Wiegers) v Wiegers*,[301] the Saskatchewan Court of Appeal held that the chambers judge had erred by ordering a substantial change in the parenting regime in the absence of evidence that the existing regime no longer served the child's best interests. The Saskatchewan Court of Appeal distinguished *Elliott v Loewen*,[302] wherein the Manitoba Court of Appeal held that the motions judge was entitled to take judicial notice of the fact that the needs of a three-year-old child in relation to his father are different from the needs of an eighteen-month-old child. The Saskatchewan Court of Appeal observed that, in *Elliott v Loewen*, limitations imposed on the father's access were specifically related to the child's very tender years when the order was made, which limitations were no longer appropriate and in the child's best interests as he emerged from infancy into early childhood. In contrast with *Elliott v Loewen*, the child in *Gray (Formerly Wiegers) v Wiegers* was just under four years of age when the parenting regime was established, and nine and one-half years old when the father brought his application for increased parenting time. The original order provided for joint custody, with the mother to have primary care of the

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301 2008 SKCA 7; see also *Brown v Lloyd*, 2015 ONCA 46; *DM v RW*, 2016 SKQB 113; *CJW v JLW*, 2016 SKQB 383; compare *Bromm v Bromm*, 2010 SKCA 149. See also *DME v RDE*, 2015 ABQB 47 (relevance of wishes of fourteen-year-old child).

302 (1993), 44 RFL (3d) 445 (Man CA).

child, and the father to have access midweek and on alternate weekends, in addition to equal time-sharing during school vacations and three weeks during the summer. These provisions, coupled with the fact that the parents had separated before the child was born and the mother had always been the primary caregiver, led the Saskatchewan Court of Appeal to conclude that there was no reason to assume that the order was contingent upon the child's tender years. Accordingly, the variation order of the chambers judge was set aside and the original order was reinstated, subject to a prior modification of midweek access to include overnight visits, which the parents had agreed to when the child was seven years old.

Ongoing and escalating conflict may constitute a change of circumstances that justifies variation of an existing custody order[303] but significant differences in parenting styles and philosophies may fall short of justifying variation of a shared parenting order.[304] A custodial parent's repeated intentional interference with the non-custodial parent's access privileges may constitute a material change of circumstances that justifies a change of custody, even though such a change will result in the child's extraprovincial relocation.[305]

A custodial parent's persistent attempts to alienate the children from the non-custodial parent may justify an order changing the custody of the children.[306] In granting such an order, it may be wise to structure the change in the children's primary residence in such a way as to promote a gradual transition and as little disruption as possible for the children. In *Rogerson v Tessaro*,[307] the Ontario Court of Appeal found the trial judge's remedy of granting custody to the father to be "dramatic" but justified by the mother's persistent, ingrained, and deep-rooted inability to support the children's relationship with their father. Since the appeal was primarily fact-driven and there was no manifest error of law, the mother's appeal was dismissed. Compare *Coyle v Danylkiw*,[308] wherein a father's appeal from a judgment awarding the mother sole custody of the child and permitting her to move with the child out of Ontario was allowed in part. The relocation provision was vacated by reason of the mother's return with the child to Ontario. The Court

303 *DLW v JJMV* (2005), 234 NSR (2d) 366 (CA); *MacKay v Murray*, [2006] NSJ No 270 (CA); *Yasinchuk v Farkas*, 2012 ONSC 2056; compare *Litman v Sherman*, 2008 ONCA 485. See also *Friedlander v Claman*, 2016 BCCA 434.

304 *Stanners v Alexandre*, 2014 ABQB 253.

305 *Ross-Johnson v Johnson*, 2009 NSCA 128.

306 *NL v RL*, 2008 NBCA 79.

307 [2006] OJ No 1825 (CA). See also *CMBE v DJE*, [2006] NBJ No 364 (CA); *CLJ v JMJ*, [2006] NSJ No 171 (SC). Compare *RPB v KDP*, [2006] AJ No 1192 (QB) (parental expert intervention ordered pursuant to *Family Law Practice Note No 7*).

308 [2006] OJ No 2061 (CA).

of Appeal dismissed the father's request for sole or joint custody based on his submissions that the trial judge had erred in failing to give adequate consideration to the maximum contact principle in section 16(10) of the *Divorce Act* by making an unreasonable finding that the mother would facilitate access, and in failing to accept the findings of a custody assessor. The Ontario Court of Appeal concluded that the trial judge's decisions on both these issues turned primarily on her findings of fact and her appraisal of the evidence, which should not be interfered with in the absence of a palpable and overriding error.

Less compelling evidence is required to vary access arrangements under a subsisting order, although the best interests of the child again constitute the determinative consideration.[309] The test to alter an order for access is that a material change in circumstance that affects the best interests of the child must have occurred.[310] However, this statutory requirement of a material change does not signify that an order, once made, calcifies and defies reexamination in the face of a child's changed needs. The cumulative effect of unrelenting stress on a child may constitute a material change that justifies termination of access.[311] As Helper JA, of the Manitoba Court of Appeal, has observed,

> The needs of a child in relation to each of his parents change frequently over the years from infancy to adulthood. No court order can be crafted to address those ever-changing needs and the concerns of separated parents as they relate to their child; thus, the need for variation.[312]

For the purposes of section 17(5.1) of the *Divorce Act*, a former spouse's terminal illness or critical condition shall be considered a change of circumstances of the child of the marriage, and the court shall make a variation order in respect of access that is in the best interests of the child.[313]

The wishes of the child may be taken into consideration when those wishes are free from interference or manipulation by either parent.[314] Discontinuance of access will be ordered only in exceptional circumstances. It

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309 *Hamilton v Hamilton* (1992), 43 RFL (3d) 13 (Alta QB); *Magee v Magee* (1993), 111 Sask R 211 (QB).

310 *Cairns v Cairns* (1995), 10 RFL (4th) 234 (NBCA).

311 *M(BP) v M(BLDE)* (1992), 42 RFL (3d) 349 at 360 (Ont CA), Abella JA, with Tarnopolsky JA concurring; Finlayson JA dissenting (application under *Children's Law Reform Act*, RSO 1990, c C.12); leave to appeal to SCC refused (1993), 48 RFL (3d) 232 (SCC).

312 *Elliott v Loewen* (1993), 44 RFL (3d) 445 at 447 (Man CA).

313 Bill C-252, *An Act to Amend the Divorce Act*, 1st Sess, 39th Parl, 2006, s 1 (in force 31 May 2007). And see *Sandercock v Croll*, 2011 MBQB 138.

314 *Keyes v Gordon* (1989), 93 NSR (2d) 383 (Fam Ct). See also *NL v RL*, 2008 NBCA 79.

may be reinstated where the custodial parent's objection to access is based on the child's fear of the non-custodial parent, which fear is attributable to the custodial parent's own improper influence,[315] although counselling may be necessary to avoid any threat to the child's emotional or psychological well-being. A *bona fide* change of residence by the custodial parent does not, of itself, warrant a change of custody, but may justify variation of the access arrangements so as to ensure that the child has as much contact with both parents as is consistent with the best interests of the child.[316]

Where an abusive relationship has left the custodial parent fearful of his or her former spouse and unwilling to continue to provide access, the trial judge may consider the possible adverse effects on the parent in continuing even limited access.[317] Allegations of sexual abuse that have surfaced since the making of the original order may require the variation of access arrangements.[318]

Access arrangements may be varied because of a child entering full-time attendance at school. The arrangements for a younger sibling may be varied to match these new arrangements, since it is appropriate that child-care arrangements should involve both children for the same periods of time.[319]

A judge may set out conditions in an original order, which, if followed by the access parent, may lead to a variation allowing increased access.[320]

Although the "best interests of the child" is the governing criterion in determining whether an access order should be varied pursuant to section 17(5) of the *Divorce Act*, this criterion is imprecise, vague, and difficult to define. While a wide variety of relevant factors should be taken into account, section 17(9) of the *Divorce Act* specifically endorses the guiding principle that a child should have maximum contact with his or her divorced parents to the extent that this is compatible with the child's best interests. The risk of harm to the child, while not the ultimate legal test, is also a factor to be considered.[321] There is a presumption that regular access to the non-custodial parent is in the best interests of a child. The right of the child to have contact with and maintain an attachment to the non-custodial parent is a fun-

315 *Clothier v Ettinger* (1989), 91 NSR (2d) 428 (Fam Ct); compare *M(BP) v M(BLDE)* (1992), 42 RFL (3d) 349 (Ont CA); *Powley v Wagner* (1987), 11 RFL (3d) 136 (Sask QB).

316 *Matthews v Matthews* (1988), 72 Nfld & PEIR 217 (Nfld UFC); *Wainwright v Wainwright* (1987), 10 RFL (3d) 387 (NSTD), aff'd (1988), 15 RFL (3d) 174 (NSCA), leave to appeal to SCC refused (1989), 27 RFL (3d) xxxiii (note); *Sweeney v Hartnell* (1987), 81 NSR (2d) 203 (TD).

317 *Abdo v Abdo* (1993), 50 RFL (3d) 17 (NSCA) (application to terminate access under *Family Maintenance Act*, RSNS 1989, c 160).

318 *McIsaac v Stewart* (1993), 119 NSR (2d) 102 (Fam Ct).

319 *Peters v Karr* (1994), 93 Man R (2d) 222 (QB).

320 *Sparks v Sparks* (1994), 159 AR 187 (QB).

321 *Young v Young*, [1993] 4 SCR 3 at para 210.

damental right that should only be judicially withheld in the most extreme and unusual circumstances.[322] A parent who seeks to reduce normal access will usually be required to provide justification for taking such a position; the greater the restriction sought, the more important it becomes to justify that restriction.[323] Terminating access is without a doubt a measure of last resort reserved for those situations where access on the evidence offers no benefit to the child.[324] Relevant caselaw provides no standard criteria for terminating access orders, but in *VSG v LJG*,[325] Blishen J, of the Ontario Superior Court of Justice, identifies the following factors as those most frequently relied upon when courts terminate an access order or, alternatively, grant an order for supervised access:

1. Long-term harassment or harmful conduct towards the custodial parent that creates fear or stress for the child.
2. A history of violence; unpredictable, uncontrollable behaviour; alcohol or drug abuse that is witnessed by the child or presents a risk to the child's safety or well-being.[326]
3. Extreme parental alienation.
4. Persistent denigration of the other parent.
5. The absence of any relationship or attachment between the child and the non-custodial parent.[327]
6. Neglect or abuse of the child during access visits.
7. The wishes or preference of an older child to terminate access.

Justice Blishen further states that when terminating or restricting access, it is necessary for the court to weigh and balance numerous factors in the context of the child's best interests, including these:

1. The maximum contact principle;
2. The right of a child to know and have a relationship with each parent;
3. A limitation of a consideration of parental conduct to that conduct which impacts on the child;
4. The risk of harm: emotional, physical and sexual;

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322 See *VSG v LJG*, [2004] OJ No 2238 at para 128 (Sup Ct), citing *Jafari v Dadar*, [1996] NBJ No 387 (QB). See also *MH v JH*, 2013 NSSC 198; *Keown v Procee*, 2014 ONSC 7314.

323 *LaPalme v Hedden*, 2012 ONSC 6758.

324 *MJT v SAT*, 2010 NBQB 268; see also *Werner v Werner*, 2013 NSCA 6 (temporary denial of access pending court-ordered psychological assessment of father).

325 [2004] OJ No 2238 at para 135 (Sup Ct); see also *LKS v SSS*, 2016 BCPC 35 at para 31; *WLC v PT*, 2014 NLTD(F) 4; *Abdo v Abdo* (1993), 50 RFL (3d) 17 (NSCA); *Miller v McMaster*, 2005 NSSC 259; *Lacoursiere v Penk*, 2015 NWTSC 19; *Harris v Alberta*, 2016 ONSC 1364.

326 See *Doncaster v Field*, 2014 NSCA 39.

327 *Jirh v Jirh*, 2014 BCSC 1973; *Smith v Ainsworth*, 2016 ONSC 3575 at para 27, citing *Griffiths v Leonard*, 2010 ONSC 4824; compare *Wallace v Closs*, 2015 ONSC 7496.

5. The nature of the relationship between the parents and its impact on the child;
6. The nature of the relationship and attachment between the access parent and the child; and,
7. The commitment of the access parent to the child.[328]

Justice Blishen accepts that the judicial termination of access is a remedy of last resort that should be ordered only in the most exceptional circumstances. A court must carefully consider the option of supervision prior to termination.[329] A supervision order has the potential to protect a child from the risk of harm, to foster the parent–child relationship, to ensure counselling or treatment that will improve parenting ability, to create a bridge between no relationship and a normal parenting relationship, and to avoid or reduce parental conflict and its detrimental effect on the child. "Clinical issues" involving the access parent and reintroduction of children into the life of a parent after a significant absence are factors the courts have considered in ordering supervision.[330] Supervised access orders are normally granted for a limited time; they are seldom regarded as providing a long-term solution. There may, nevertheless, be situations in which medium- or longer-term supervised access is in the child's best interests.[331] In Blishen J's opinion, supervised access, whether of short, medium, or long duration, should always be examined as an alternative to a complete termination of the parent–child relationship, unless the viability of supervised access has been negated by past experience or by the unwillingness of the non-custodial parent to abide by court-imposed conditions relating to treatment or counselling. The burden of proof falls on the parent requesting supervised access to demonstrate that restrictions are in the best interests of the children.[332]

Concerns voiced by one of the parents about a proposed supervisor can and should be listened to as they may provide useful information to aid the court in its determination of the child's best interests, but they cannot be absolutely deferred to; no parent has a veto over choice of supervisor.[333]

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328 *VSG v LJG*, [2004] OJ No 2238 (Sup Ct) at para 143; see also *JJT v JAS*, 2015 BCSC 628. And see *LAMG v CS*, 2014 BCPC 172 at para 35, wherein Woods Prov Ct J lists fifteen factors relevant to orders for supervised access.

329 See also *LAMG v CS*, 2014 BCPC 172 at para 36; *BC v JC*, 2014 NBQB 59 at para 7.

330 *MAG v PLM*, 2014 BCSC 126 at para 34, Fleming J.

331 See *KME v DMZ*, [1996] BCJ No 464 (SC); *LES v MJS*, 2014 NSSC 34; *WLC v PT*, 2014 NLTD(F) 4; *Kroupa v Stoneham*, 2011 ONSC 5824; *TLMM v CAM*, 2011 SKQB 326; see also *Merkand v Merkand*, [2006] OJ No 528 (CA); *LAMG v CS*, 2014 BCPC 172; *MAG v PLM*, 2014 BCSC 126; *Tuttle v Tuttle*, 2014 ONSC 5011; Section G(1), above in this chapter.

332 *Slawter v Bellefontaine*, 2012 NSCA 48.

333 *JPG v VSG*, 2012 BCSC 946 at paras 65–68, Maisonville J.

M. PARENTAL CONFLICT RESOLUTION

Custody litigation is relatively rare; access litigation is more common.[334] It is generally acknowledged that litigation should be the last resort for resolving parenting disputes. It is costly, not only in terms of money, but also in terms of emotional wear and tear. Litigation is not a therapeutic catharsis for the resolution of custody and access disputes. Children pay a heavy price when their parents engage in embittered custody and access disputes that lead to warfare in the courts. If litigation can be avoided without damage to the psychological, physical, or moral well-being of the children, it should be avoided. There will be exceptional cases where allegations of psychological, physical, or sexual abuse necessitate judicial intervention. In the vast majority of cases, however, both parents are fit to continue to discharge their responsibilities to the children after marriage breakdown or divorce.

Roadblocks to shared parental responsibilities after separation or divorce are often attributable to a lack of knowledge and to the inability of parents to communicate and segregate their interpersonal hostility from their role as parents. It is for these reasons that the Law Reform Commission of Canada recommended that a mandatory family conference be held in cases involving dependent children. In its *Report on Family Law*, the Law Reform Commission of Canada recommended as follows:

> 3. Whenever children over whom the court has jurisdiction in dissolution proceedings are involved, the law should require that there be an immediate informal meeting of the parties — an "assessment conference" — before the court, a court officer, a support staff person or a community-based service or facility designated by the court, for the following purposes:
>
> (a) to ascertain whether the spouses have made appropriate arrangements respecting the care, custody and upbringing of the children during the dissolution process, and if not, to ascertain whether such arrangements can be agreed to by the spouses;
>
> (b) to ascertain whether the appointment of legal representation for children is indicated;
>
> (c) to ascertain whether a formal investigative report by a public authority (e.g. an Official Guardian or Superintendent of Child Welfare) is indicated;

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334 See Canada, Department of Justice, *Evaluation of the* Divorce Act, *Phase II: Monitoring and Evaluation* (May 1990) at 61 and 110–15. See also Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1990) 22 Ottawa L Rev 139 at 211–13.

(d) to ascertain whether a mandatory psychiatric or psychological assessment of the situation is indicated;
(e) to acquaint the husband and wife with the availability of persons, services and facilities in the court or the community to assist them in negotiating temporary arrangements respecting children during the dissolution process as well as permanent arrangements applicable on dissolution;
(f) to enable the court to ascertain the need for, and where necessary to order the further appearance of the husband and wife before the court or a person, service or facility designated by the court to engage in one or more sessions of mandatory negotiation respecting the children; and
(g) generally to help the husband and wife, where possible, to avoid contested temporary or permanent custody proceedings through negotiation and agreement, and otherwise to avoid bringing matters involving the children before the court for adjudication.[335]

Although these proposals are confined to divorce, they are equally adaptable to proceedings for custody and access under provincial and territorial legislation. If we accept that children are entitled to enjoy the benefits and contributions of both of their parents, notwithstanding separation or divorce, the accessibility of relevant information would appear to be a vital first step on the road towards the sharing of continued parental privileges and responsibilities after separation.

N. VOICE OF THE CHILD[336]

Statutes in several provinces stipulate that the wishes of a child are a relevant factor to be considered in determining the best interests of a child in contested custody or access proceedings. Although there is no explicit provision to this effect in the *Divorce Act*, judicial practice has long acknowledged the relevance of an older child's wishes in custody and access proceedings arising under that Act. The best interests of a child are not to be confused with the wishes of the child, but a child's views and preferences fall within the parameters of a child's best interests.[337] When children are under nine

335 Law Reform Commission of Canada, *Report on Family Law* (Ottawa: Information Canada, 1976) at 64–65.

336 See Rachel Birnbaum, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review* (Ottawa: Department of Justice, Canada, 2009). And see Chapter 12, Section E(3).

337 *New Brunswick (Minister of Social Development) v SMJA*, 2015 NBQB 49; *Bhardwaj v Kaur*, 2014 ONSC 1163; *Knudsen v Knudsen*, 2013 SKQB 216.

years of age, courts have not usually placed much, if any, reliance on their expressed preference.[338] The wishes of children aged ten to thirteen have commonly been treated as an important but not a decisive factor. The wishes of the children increase in significance as they grow older and courts have openly recognized the futility of ignoring the wishes of children over the age of fourteen years.[339] Possibly because of the impact of the United Nations *Convention on the Rights of the Child*, Canadian courts appear to be placing more emphasis on children having a voice in contested custody/access proceedings.[340] In some recent cases, the views and preferences of children under the age of nine have been sought but there is no indication that the weight to be given to such a young child's opinion is any greater than it has been hitherto.[341] In an era of self-represented litigants and costly expert input, using age cut-offs to signify the weight to be given to a child's preference is a rough and ready tool that reflects past judicial decisions; it does not, of course, foreclose the need to look beyond the child's age. Caselaw in Canada demonstrates that the significance of a child's wishes will depend on a number of factors, including the child's age, intelligence, maturity, the ability of the child to articulate a view, and any improper influence of either parent.[342] The court must look to the child's capacity to understand and appreciate the relevant and significant issues involved in making a wise, informed, reasoned, and responsible choice.[343] In *Decaen v Decaen*, the Ontario Court of Appeal stated:

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338 See *Newbury v Newbury*, 2012 ABCA 335 (six-year-old child); *New Brunswick (Minister of Social Development) v SMJA*, 2015 NBQB 49.

339 See, generally, *DME v RDE*, 2015 ABQB 47; *SMM v JPH*, 2016 BCCA 284; *Druwe v Schilling*, 2010 MBQB 75; *ADE v MJM*, 2012 NBQB 260; *FFR v KF*, 2013 NLCA 8 (limited weight given to wishes of seven-year-old child); *Parent v MacDougall*, 2014 NSCA 3; *Kincl v Malkova*, 2008 ONCA 524; *Fraser v Logan*, 2013 ONCA 93 (access); *NL v RRM*, 2016 ONCA 915; *Droit de la famille — 07832*, [2007] RDF 250 (Que CA); *Bromm v Bromm*, 2010 SKCA 149; compare *Dowe v Semler*, 2015 BCSC 1870; *Sandercock v Croll*, 2011 MBQB 138; *CD v KD*, 2010 NBQB 22; *Salem v Kourany*, 2012 ONCA 102; *Demong v Demong*, 2014 SKQB 170, citing *McGinn v McGinn*, 2006 SKQB 105 at para 12; *DM v RW*, 2016 SKQB 113; *GWC v YDC*, 2012 YKSC 8.

340 See *RM v JS*, 2013 ABCA 441; *BJE v DLG*, 2010 YKSC 33; *Bhajan v Bhajan and The Children's Lawyer*, 2010 ONCA 714. For guidance on the purpose and scope of Voice of the Child Reports in Nova Scotia, see *EP v SP*, 2016 NSSC 173, citing Nova Scotia Department of Justice, Court Services, *Voice of the Child Report Guidelines* (2015), online: www.nsfamilylaw.ca/other/assessments-VCR/VCR/VCRGuidelines.

341 See, for example, *FFR v KF*, 2013 NLCA 8; *Parent v MacDougall*, 2014 NSCA 3.

342 *SLT v AKT*, 2009 ABQB 13; *CJJ v AJ*, 2016 BCSC 676; *PB v CJ*, 2008 NBQB 375; *Poole v Poole*, [2005] NSJ No 68 (QB); *Hill v Hill*, [2008] OJ No 4730 (Sup Ct); *Kittelson-Schurr v Schurr*, [2005] SJ No 111 (QB); *CLP v RT*, [2009] SJ No 346 (QB).

343 *RM v JS*, 2013 ABCA 441 at para 25, citing *MLE v JCE (No 2)*, 2005 ONCJ 89 at paras 12–13; *Perino v Perino*, 2012 ONSC 328 (child with cognitive impairment); *Klingler v Klingler*, [1994] SJ No 620 (QB).

> In assessing the significance of a child's wishes, the following are relevant: (i) whether both parents are able to provide adequate care; (ii) how clear and unambivalent the wishes are; (iii) how informed the expression is; (iv) the age of the child; (v) the maturity level; (vi) the strength of the wish; (vii) the length of time the preference has been expressed for; (viii) practicalities; (ix) the influence of the parent(s) on the expressed wish or preference; (x) the overall context; and (xi) the circumstances of the preferences from the child's point of view: See Bala, Nicholas; Talwar, Victoria; Harris, Joanna, "The Voice of Children in Canadian Family Law Cases", (2005), 24 C.F.L.Q. 221.[344]

It is unusual for a court to grant any order for custody after a child reaches the age of sixteen years.[345] However, in accordance with the definition of "child of the marriage" in section 2(1) of the *Divorce Act*, a court has jurisdiction under section 16 of the *Divorce Act* to grant an order for custody of or access to an adult child who is mentally or physically disabled.[346]

Where the central factual issue to be determined in the contested custody and access proceeding is whether it is the adult child or the mother who is effectively preventing the father from visiting the child, the court may order a medical examination of the child under Rule 30 of the *British Columbia Rules of Court* or appoint an independent expert under Rule 32A to inquire into and report on the facts.[347] While caselaw generally supports placing a great deal of weight on the views and preferences of children over twelve, in cases of parental alienation where one parent has undermined the child's relationship with the other parent, the child's views may not be seen as his or her own.[348] In the most serious cases of parental alienation, however, remedial options become increasingly limited once the child becomes a teenager.[349] A distinction can be drawn between a custody order that runs counter to a

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344 2013 ONCA 218 at para 42. And see *Abbott v Meadus*, 2014 NBQB 18 at para 70; *X v Y*, 2016 ONSC 545 at para 60.

345 *MacKinnon v Harrison*, 2011 ABCA 283; *O'Connell v McIndoe* (1998), 56 BCLR (3d) 292 (CA); *JS v AB*, 2010 NBQB 429; *Kincl v Malkova*, 2008 ONCA 524; *Gharabegian v McKinney*, [2008] OJ No 5307 (Sup Ct) (access); *McBride v McBride*, 2013 ONSC 938; *Feist v Feist*, [2007] SJ No 722 (QB). Compare *TM v DM*, 2014 NBQB 132 (order granted for joint custody of eighteen-year-old child, with day-to-day care to the father, so as to avoid any uncertainty over any possible tax credits); *Goulding v Goulding*, 2016 NLCA 6; *SGB v SJL*, 2010 ONCA 578.

346 *Perino v Perino*, 2012 ONSC 328.

347 *Ross v Ross*, [2004] BCJ No 446 (CA). Compare *Perino v Perino*, 2012 ONSC 328.

348 *Letourneau v Letourneau*, 2014 ABCA 156; *VMB v KRB*, 2014 ABCA 334; *CJJ v AJ*, 2016 BCSC 676; *FFR v KF*, 2013 NLCA 8; *NS v CN*, 2013 ONSC 556; *Fiorito v Wiggins*, 2014 ONCA 603; compare *SGB v SJL*, 2010 ONCA 578; *NL v RRM*, 2016 ONCA 915.

349 *LG v RG*, 2012 BCSC 1365; see also *LM v JB*, 2016 NBQB 93.

child's wishes and an access order that does the same. Absent evidence of harm, or the potential for harm or risk to a child if access is ordered, there is no compelling reason for a court to simply default to a child's wishes and the potential difficulty involved in enforcing an order.[350]

Although the child is the focal point of all disputed custody and access proceedings, the question arises as to who speaks for the child.[351] Even though judges apply the "best interests of the child" as the determinative criterion of custody and access disputes, the role of independent arbiter precludes a trial judge from acting as an advocate for the child. How, then, can the child's interests be protected? In some provinces, courts have exercised a discretionary jurisdiction to appoint an independent lawyer to represent the child in contested custody proceedings.[352] However, such appointments are exceptional and children are rarely represented by independent lawyers in settlement negotiations, and their voices may go unheard if mediation[353] is used as a means of resolving parenting disputes. In contested proceedings, some judges will interview the children privately to ascertain their wishes; other judges are averse to this practice.[354]

In *NL v RL*,[355] the New Brunswick Court of Appeal held that the trial judge made no palpable and overriding error by gleaning the child's views and preferences from a social worker's report instead of directly interviewing the child. In its opinion, since the mother had succeeded in alienating the child from her father, no purpose would be served by interviewing the child who would, no doubt, favour the mother.

In *BJG v DLG*,[356] at a hearing to consider applications by the father and mother of a twelve-year-old child to vary existing custody and child support orders granted pursuant to the *Divorce Act*, Martinson J, of the Yukon

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350 *Corey v Corey*, 2010 NBQB 112 at paras 38–39, Wooder J; see also *Zaidi v Qizilbash*, 2014 ONSC 201 at paras 156–59.

351 See Christine Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can Fam LQ 153.

352 For examples of provincial legislation that expressly provide for independent representation of children, see Québec *Code of Civil Procedure*, CQLR c 25.01, art 90; *Children's Act*, RSY 1986, c 22, s 167 (Official Guardian has exclusive right to determine whether any child requires independent representation); see also *Kalaserk v Nelson*, [2005] NWTJ No 3 (SC); and see, generally, *Payne's Divorce and Family Law Digest* (Don Mills, ON: Richard De Boo, 1982–93) tab 22.39 "Legal Representation of Child; *Amicus Curiae*."

353 See Bob Simpson, "The *Children Act* (England) 1989 and the Voice of the Child in Family Conciliation" (1991) 29 Family and Conciliation Courts Review 385.

354 See Chapter 12, Section E.

355 2008 NBCA 79.

356 2010 YKSC 33; see also *NJK v RWF*, 2011 BCSC 1666; *MAS v JSS*, 2012 NBQB 285; *Libke v Sunley*, 2013 SKQB 109. Compare the more conservative stance of the Ontario Court

Territory Supreme Court, observed that the evidence relating to the child's custody did not include any information about the child's views, and she requested submissions from counsel on the issue of whether the court should hear from the child. After hearing from counsel, she determined that federal, provincial, and territorial legislation relating to child custody should be interpreted to reflect the values and principles found in the United Nations *Convention on the Rights of the Child*,[357] which was ratified by Canada, with the support of the provinces and territories, in 1991. Looking to the "best interests of the child" test in section 16(8) of the *Divorce Act* and to section 30(1)(c) of the *Children's Law Act*,[358] which requires a court to consider the views and preferences of a child, if they can be reasonably ascertained, Martinson J concluded that these statutory provisions should be interpreted to reflect the Convention's key premise that hearing from children is in their best interests. She placed particular reliance on article 12 of the Convention, which specifically provides as follows:

> 1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Justice Martinson observed that there is no ambiguity in the language of the Convention. Pursuant to its provisions, *all* children capable of forming their own views have the legal right to be heard, without discrimination. No exception is made for high-conflict cases that may involve domestic violence and/or parental alienation. Decision makers have no discretion to disregard the legal rights conferred by article 12 of the Convention because of the particular circumstances of the case or because of the view the decision maker may hold about children's participation. Legitimate concerns about hearing from children, particularly in complex cases such as those involving high conflict, domestic violence, or parental alienation, can be accommodated

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of Appeal in *Bhajan v Bhajan and The Children's Lawyer*, 2010 ONCA 714, discussed in Chapter 12, Section E(3)(d).

357 Can TS 1992 No 3.

358 RSY 2001, c 31.

within the flexible legal framework provided by the Convention. This flexibility is manifested in the following contexts:

1) Children have the legal right to express their views, but they are not under any legal obligation to do so. They can choose not to participate.
2) There must be a determination of whether the child is capable of forming his or her own views before the child has the legal right to express them. In some parental alienation cases, the alienating conduct of a parent may render the child incapable of forming his or her own views.
3) Decision makers can deal with all of the circumstances of the case in determining the weight to be given to the child's views.
4) The views of the child may cover a wide variety of issues as distinct from a stated preference for either parent.[359]
5) Last but not least, there are many different ways of obtaining the child's views, depending on the family circumstances and the age and maturity of the child.[360] The appropriate method does not have to be intrusive or insensitive to the child's needs. Evidence can be presented by the child in person, in writing, or by videotape. But see *Gagné v Gagné*,[361] wherein a sealed letter from a ten-year-old child was deemed inadmissible because it was not under oath and there was no cross-examination, and the trial judge was, therefore, unable "to explore testimonial factors regarding the letter and its contents: memory, perception and sincerity." Evidence can also be proffered by a parent, by a lawyer,[362] or by a representative of the child. A neutral third party may be appointed by the court to ascertain the child's views, or the child may be interviewed by the judge in chambers.[363] Justice Martinson urges Canadian judges to avoid token recognition of the United Nations *Convention on the Rights of the Child*. She states:

> 47 More than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:
>
> 1. be informed, at the beginning of the process, of their legal rights to be heard;

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359 *MAS v JSS*, 2012 NBQB 285.

360 *NJK v RWF*, 2011 BCSC 1666 at para 204.

361 2010 ABQB 711 at paras 23–26, WA Tilleman J.

362 *Hackett v Leung*, 2010 ONSC 6412 (children given an opportunity to voice their views through the Office of the Children's Lawyer).

363 See, generally, Alfred A Mamo & Joanna ER Harris, "Children's Evidence" in Harold Niman & Anita Volikis, eds, *Evidence in Family Law*, loose-leaf (Aurora, ON: Canada Law Book, 2010–) ch 4 at 4–16 (July 2010).

2. be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;
3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
4. have their views considered in a substantive way; and
5. be informed of both the result reached and the way in which their views have been taken into account

As stated in her judgment, "[a]n inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate."[364]

Applying the aforementioned legal criteria to the facts of the case, Martinson J observed that the existing consent order for custody reflected the wishes of the twelve-year-old child for alternating weekly custody, and the child had not manifested any desire for a change and apparently wanted to avoid getting caught in the middle of what, in essence, was a dispute between the parents about the amount of child support to be paid. As Martinson J ultimately decided,[365] the father's application to vary the custody arrangement was motivated by financial considerations, rather than by a genuine concern for the child's best interests; he was simply following through on threats he had previously made to apply for custody, if the mother pursued her application for increased child support.

There is little doubt that the voice of the child in contested custody/access proceedings will be louder in the future than it has been in the past. This is apparent from the judgment of the Supreme Court of Canada in *AC v Manitoba (Director of Child and Family Services)*,[366] which pertains to court orders for medical and surgical treatment, wherein Abella J stated:

> [92] . . . With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures. This is true not only when considering the child's best inter-

364 *BJG v DLG*, 2010 YKSC 44 at para 6.
365 See *BJG v DLG*, 2010 YKSC 33.
366 2009 SCC 30 [emphasis in original].

ests in the placement context, but also when deciding whether to accede to a child's wishes in medical treatment situations.

[93] Such a robust conception of the "best interests of the child" standard is also consistent with international instruments to which Canada is a signatory. The *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, which Canada signed on May 28, 1990 and ratified on December 13, 1991, describes "the best interests of the child" as a primary consideration in all actions concerning children (Article 3). It then sets out a framework under which the child's own input will inform the content of the "best interests" standard, with the weight accorded to these views increasing in relation to the child's developing maturity. Articles 5 and 14 of the Convention, for example, require State Parties to respect the responsibilities, rights and duties of parents to provide direction to the child in exercising his or her rights under the Convention, "in a manner consistent with the evolving capacities of the child". Similarly, Article 12 requires State Parties to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the *views of the child being given due weight in accordance with the age and maturity of the child*" (see also the Council of Europe's *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Eur. T.S. No. 164, c II, art. 6: "The opinion of the minor shall be taken into consideration as an increasingly determining factor in proportion to his or her age and degree of maturity.")

However, some of the methods for ascertaining the views of a child in disputed custody and access cases, particularly court-ordered assessments and independent legal representation for the child, are costly. Since provincial/territorial governments are unlikely to approve new major financial expenditures, judicial interviews are likely to occupy a more prominent role in the determination of a child's views and preferences in the future. But this will require additional funding to be allocated to judicial educational programs relating to child development and interviewing and, even with such programs, some judges may conclude that they lack the necessary skills to properly interview a child.[367]

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367 For relevant commentary on the United Nations *Convention on the Rights of the Child* in particular, and on the voice of the child generally, see the following articles which are published by the Department of Justice Canada, online: www.justice.gc.ca/eng/fl-df/index.html: Jean-François Nöel (with comments by Elizabeth Jollimore, QC), "The *Convention on the Rights of the Child*"; Linda Tippett-Leary (with comments by Elizabeth Jollimore, QC), "The Voice of the Child in Court Proceedings"; and Public Health Agency

O. PARENTING PLANS

When economic disputes arise on separation or divorce, lawyers and courts insist on full financial disclosure as a condition precedent to resolving issues relating to property division and spousal or child support. The need for access to all relevant and available information is no less compelling when custody and access disputes arise. All too easily, however, the interests of children can be overlooked in custody and access litigation as parents engage in forensic combat for the purpose of ventilating their personal hostilities. Although it is generally acknowledged that separation and divorce sever the marital bond but should not sever parent–child bonds, adversarial conflict on marriage breakdown can present major obstacles to a meaningful relationship being preserved between children and a non-custodial parent.

The difficulty faced by a court when embittered spouses engage in custody litigation was exposed in the dissenting judgment of Bayda JA, of the Saskatchewan Court of Appeal, in *Wakaluk v Wakaluk*.[368] He stated:

> From the standpoint of custody the hearing of the petition was, in my respectful view, quite unsatisfactory. Virtually no evidence was directed to this issue. The parties primarily concerned themselves with adducing evidence to show whether, on the basis of the many marital battles engaged in by them, one or the other of them should be favoured by the trial judge in his determination of the issue of cruelty.
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> No one bothered to bring forward much information in respect of the two individuals who of all the persons likely to be affected by these proceedings least deserve to be ignored — the children. We know their names, sex and ages, but little else. Of what intelligence are they? What are their likes? Dislikes? Do they have any special inclinations (for the arts, sports or the like) that should be nurtured? Any handicaps? Do they show signs of anxiety? What are their personalities? Characters? What is the health of each? (This list of questions is not intended as exhaustive or as one that is applicable to all contested cases but only as illustrative of those questions which may be relevant.) In short, no evidence was led to establish the intellectual, moral, emotional and physical needs of each child. Apart from the speculation that these children are "ordinary" (whatever that means) there is nothing on which to base a reasoned objective conclusion

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of Canada, "A Child's Age and Stage of Development Make a Difference," extracted from *Because Life Goes On . . . Helping Children and Youth Live with Separation and Divorce* (Ottawa: Health Canada, 1994). See also *Schamber v Schamber*, 2011 ABQB 473 (judicial interview of seven-year-old child); *Zaidi v Qizilbash*, 2014 ONSC 201 at para 132.

368 (1977), 25 RFL 292 (Sask CA); see also *EZ v MJ*, 2013 ONSC 606 at para 66.

> as to what must be done for this child and that child, as individuals and not as mere members of general class, in order that the welfare and happiness of each may be assured and enhanced.
>
> Nor was any direct evidence led to show which of the parents, by reason of training, disposition, character, personality, experience, identification with a child's pursuits, ability to cope with any special requirements of a child's health, religious observance and such other pertinent factors (again the list is intended as only illustrative of matters which may be relevant), is best equipped to meet the needs of each individual child. The evidence presented on behalf of each side was principally, if not exclusively, geared to do one thing: show how badly one spouse treated the other. Such evidence is hardly a proper basis upon which to make a determination — a crucial one indeed from the standpoint of the children — as to which parent is best suited to meet the needs of the children and upon which to found an order for custody. How inconsiderate one spouse is of the other, or how one spouse reacts towards the other in a marital battle and the ability of a spouse to come out of a marital battle a winner, either actual or moral, are not high-ranking factors, if factors they be at all, in determining where a child's happiness and welfare lie, particularly whether such happiness and welfare are better assured by placement with one parent or the other.
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> . . .
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> The welfare of the children dictates that a new trial be held, restricted to the issue of custody, and I would direct an order accordingly.[369]

Although spousal misconduct may sometimes provide insight into parenting capacity, it may also be put forward for ulterior motives that have nothing to do with the welfare of the child. The threat of mudslinging litigation can usually be avoided, however, unless both counsel pursue such a course of action. An astute counsel for either spouse may avoid allegations of blame and fault by focusing pleadings, evidence, and submissions on the past parent–child relationship and on future plans for the care and upbringing of the child. In the words of Boisvert J, of the New Brunswick Queen's Bench,

> Spousal censure, or condemnation, has no place in custody disputes, unless it is directly and unmistakably linked with the disablement of one parent to answer to the children's best interests. A cogent and positive proposal aimed at sound child management, will, in most instances, lay by the heels arguments founded mainly on blame and accusations.[370]

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369 *Wakaluk v Wakaluk* (1977), 25 RFL 292 (Sask CA) at 299–300 and 306.

370 *Pare v Pare* (1987), 78 NBR (2d) 10 (QB).

It is ironic that judicial proceedings between spouses that involve matrimonial property and spousal and child support require sworn financial statements to be filed, yet no requirement is imposed in custody proceedings for the disputants to file detailed information concerning the children whose future is at risk. We hardly serve our children well when we insist on mandatory financial statements in spousal economic disputes, but in custody disputes, require no specific information respecting the personality, character, and attributes of the child and the ability of the disputants to contribute to the child's growth and development.

What is needed on separation or divorce is a perspective based on past family history and prospective parenting plans that can accommodate the different contributions that each parent can make towards the upbringing of the child.[371] There is no reason why separated and divorced parents should not be required to submit a detailed plan concerning their past and future parenting privileges and responsibilities. Such parenting plans should also take account of the contribution to the child's growth and development that has been and may continue to be made by members of the extended families, and especially the maternal and paternal grandparents.

Parenting plans will not eliminate hostile negotiations and protracted litigation by parents who are intent on battling through lawyers and the courts. What they can do, however, is shift the focus of attention to the child. Although parenting plans are not required to be filed in custody litigation, there is nothing to prevent parents from formulating such plans regardless of whether litigation is contemplated. Parenting plans can serve a useful purpose in assisting both parents to make appropriate arrangements for the upbringing of their children. Such plans can specifically define the contributions to be made by each parent and by third parties in the day-to-day and long-term upbringing of the children.

In December 1998, a Special Joint Committee of the Senate and House of Commons published its report titled "For the Sake of the Children," which proposed abandonment of the terminology of custody and access in favour of

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371 See Julien D Payne & Kenneth L Kallish, "The Welfare or Best Interests of the Child: Substantive Criteria to Be Applied in Custody Dispositions Made Pursuant to the *Divorce Act*, RSC 1970, c D-8" in *Payne's Divorce and Family Law Digest* (Don Mills, ON: R De Boo, 1982–93) 1983 tab at 83-1201/1253, especially 83-1239/1243, and Essays tab, E-177 at 184–85. See also Julien D Payne, "The Dichotomy between Family Law and Family Crises on Marriage Breakdown" (1989) 20 RGD 109 at 121. For details concerning the use of parenting plans in the state of Washington, see Canada, Department of Justice, *Parents Forever: Making the Concept a Reality for Divorcing Parents and Their Children* by Judith P Ryan (31 March 1989) at 44–95. Compare *Children's Law Reform Act*, RSO 1990, c C.12, s 21, as amended by *Family Statute Law Amendment Act*, SO 2009, c 11, s 6.

the concept of "shared parenting."[372] This recommendation constitutes one of forty-eight specific proposals for changes in the law and in the processes for resolving parenting disputes. Although a few Canadian courts have endorsed the abandonment of legal jargon,[373] most lawyers and judges still speak in terms of "custody" and "access" rather than in the everyday language of "shared parenting" in its various forms. It is interesting to observe, however, that legislative changes in England[374] have abandoned the terminology of "custody" and "access" and substituted the notion of "shared parental responsibilities" as well as minimal judicial intervention.[375]

P. THIRD PARTIES

In divorce proceedings between the parents of a child, leave to apply for custody under section 16(3) of the *Divorce Act* may be granted to non-parents whose claim is not frivolous or vexatious. The onus of proving that the claim is frivolous or vexatious falls on the party opposing the application. Maternal grandparents with whom the child had been living may be added as third parties to a divorce proceeding between the child's parents, both of whom were opposed to the leave application.[376] But a court should grant leave only where there is a reasonable chance of success on the access or contact application; it can never be in the interests of the parties or in the interests of the public or in the interests of justice to allow litigation to go forward when it has no reasonable prospect of success.[377]

Q. PROCESS

The *Divorce Act* is primarily concerned with the substantive rights and obligations of divorcing and divorced spouses and parents. Matters relating to evidence and procedure are primarily regulated by provincial and territorial

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372 See Rachel Birnbaum *et al*, "Shared Parenting Is the New Norm: Legal Professionals Agree on the Need for Reform" *The Family Way* – The CBA National Family Law Section Newsletter (October 2014).

373 See *Abbott v Taylor* (1986), 2 RFL (3d) 163 (Man CA); *Lennox v Frender* (1990), 27 RFL (3d) 181 at 185–87 (BCCA); *Harsant v Portnoi* (1990), 27 RFL (3d) 216 (Ont HCJ).

374 *Children Act 1989* (UK), 1989, c 41.

375 See Janet Walker, "From Rights to Responsibilities for Parents: Old Dilemmas, New Solutions" (1991) 29 Family and Conciliation Courts Review 361. See also Andrew Bainham, "The *Children Act 1989*: Welfare and Non-interventionism" [1990] Fam Law 143. And see *Family Law Act*, SA 2003, c F-4.5; *Family Law Act*, SBC 2011, c 25.

376 *Boychuk v Boychuk*, [2001] AJ No 1578 (QB). See Chapter 12, Section E(6).

377 *Hrycun v Theriault*, 2015 ABQB 794 at paras 11–16 (application for leave under the Alberta *Family Law Act*), Veit J.

legislation and rules of court. Only a few aspects of the divorce process are regulated by the *Divorce Act*. They include the statutory duties of lawyers and the courts respecting reconciliation and the duties of lawyers to promote the use of negotiation and mediation in resolving custody and access disputes.[378]

The definition of "court" in section 2(1) of the *Divorce Act* signifies that divorce is a matter that must be adjudicated by courts presided over by federally appointed judges. Provincially appointed judges have no jurisdiction to deal with divorce, although they have power to enforce orders for support or custody that have been granted in divorce proceedings.

The *Divorce Act* does not require that a divorce petition be tried in open court. Many provinces and territories have introduced so-called "desktop" uncontested divorces where the spouses do not personally appear in court. Instead, the relevant evidence is presented by way of affidavits.

The current *Divorce Act* introduced the innovative procedure of joint petitions for divorce and joint applications for support, custody, and access.[379] Joint petitions are appropriate only when the spouses are in agreement and there are no hotly contested issues. As stated previously, third parties, such as grandparents or other relatives, may be permitted to intervene in divorce proceedings for the purpose of pursuing claims for custody of or access to the children of the marriage.

R. HIGH CONFLICT: PARENTAL ALIENATION

Legal and mental health professionals are in general agreement that high-conflict parenting disputes, especially those involving parental alienation, require constructive institutional responses to ensure early intervention and assessment, the management of ongoing disputes by a single judge, and the expedition of any trial.[380] The Alberta Court of Appeal in *VMB v KRB*[381] has stated that section 16(10) of the *Divorce Act* makes parental alienation a relevant consideration in high conflict custody disputes and "[t]here is no rule of

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378 See Chapter 6, Section D.

379 *Divorce Act*, RSC 1985, c 3 (2d Supp), s 8(1) (divorce), ss 15.1(1) and 15.2(1) (support), s 16(2) (custody and access), and s 17(1) (variation proceedings).

380 See *AA v SNA*, 2009 BCSC 387; *TLLL v JJL*, 2009 MBQB 148; *CM v DJL*, 2012 NBQB 188; *AJD v EED*, 2009 NLUFC 17; *Baker-Warren v Denault*, 2009 NSSC 59; *Iusi-Johnston v Iusi*, 2015 ONSC 6266. See also ABA Centre on Children and the Law, *High-Conflict Custody Cases: Reforming the System for Children* (2001) 34 Fam LQ 589; Canada, Department of Justice, *High-Conflict Separation and Divorce: Options for Consideration*, background paper 2004-FCY-1E by Glenn A Gilmour, online: www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_1/index.html. And see the Family Court Review, January 2010, wherein several relevant articles are published by American and Canadian authors.

381 2014 ABCA 334 at para 16.

law that a finding of alienation can only be made based on expert evidence."[382] It must be recognized, however, that the adversarial litigation system provides a forum that is ill equipped to ensure the counselling that is so frequently necessary to address the deep-rooted and ingrained levels of distrust and animosity that exists between the parents. As Germain J, of the Alberta Court of Queen's Bench, has observed, "[b]adly needed court resources are committed to proceedings where the opportunity to create meaningful, responsive, and useful solutions is very limited, as there is no ability on the part of the courts to collect and gather evidence, or order the expenditure of state resources to assist the family in chronic distress.[383]

A finding that a custodial parent is guilty of parental alienation does not predetermine any one particular judicial remedy.[384] The law provides a veritable arsenal of sanctions that can be imposed to deter custodial and non-custodial parents from engaging in parental alienation. They include injunctions to restrain vexatious litigants, imprisonment,[385] fines and financial penalties for civil contempt,[386] costs against recalcitrant parents, and, depending on which parent is at fault, orders for a change of custody or for supervised access. Each of these sanctions may be found wanting. Judicial restraints on vexatious litigants do not preclude ongoing parental warfare outside the courtroom. Imprisonment may deprive the children of their primary caregiving parent, although this deprivation may be mitigated in some cases by the strategic use of intermittent periods of imprisonment while the non-custodial parent exercises court-ordered access, including compensatory access to the children. Orders for fines, financial penalties, and costs may operate to the economic prejudice of the children. A change of custody may not reflect the best interests of the children.

Supervised access is more appropriate as a temporary measure, rather than as a permanent solution, to ongoing parental conflict. The need for parental and child counselling is often beyond dispute. However, the jurisdiction of a court to order parents to undergo counselling is perhaps open to

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382 Compare *Williamson v Williamson*, 2016 BCCA 87.

383 See *PMEL v BJL*, 2013 ABQB 227 at paras 31–33.

384 *LG v RG*, 2012 BCSC 1365 at para 220; *Williamson v Williamson*, 2016 BCCA 87.

385 See *Carr-Carey v Carey*, 2014 ONSC 6764 (order for conditional sentence to be served in the community).

386 For a learned summary of the law of civil contempt as a sanction in family law proceedings and the special considerations to be borne in mind in cases involving wilful contempt of custody and access orders, see the judgment of Chappel J in *Jackson v Jackson*, 2016 ONSC 3466. And for a useful review of relevant caselaw exemplifying the diverse sanctions available for the wilful disobedience of a custody or access order, see *Rogers v Rogers*, 2008 MBQB 131 at paras 110–14, Little J. See also *Friedlander v Claman*, 2016 BCCA 434.

question,[387] although a parent's rejection of a judicial recommendation for counselling may warrant an adverse inference being drawn. Recognition of the limitations of the law in responding to high-conflict parental disputes, including parental alienation, invites therapeutic intervention, which may include attendance at a family reunification program.[388] It has been judicially asserted that a court cannot take judicial notice of parental alienation. It requires expert evidence to inform any decisions that it might make based on allegations of parental alienation;[389] the court cannot merely consult articles proposed by one of the litigants, or, even less, articles that the court itself may find on the Internet or elsewhere.[390] An insightful review of the indicia of parental alienation and possible options available to the court and their short-term and long-term risks and benefits for the child is provided in the judgment of MacPherson J, as he then was, of the Ontario Superior Court of Justice, in *WC v CE*,[391] wherein heavy reliance was placed on the testimony of Dr Barbara Jo Fidler, an expert in the field of parental alienation and reunification therapy. Justice MacPherson noted that when allegations of parental alienation are made, there are essentially four possible courses of action:

1) do nothing and leave the child with the alienating parent;
2) do a custody reversal by placing the child with the rejected parent;
3) leave the child with the favoured parent and provide therapy; or
4) provide a transitional placement where the child is placed with a neutral party and therapy is provided so that eventually the child can be placed with the rejected parent.

And as MacPherson J further stated:

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387 See *Kaplanis v Kaplanis*, [2005] OJ No 275 (CA); see also Section F, above in this chapter. Compare *Bruno v Keinick*, 2012 NSSC 336.

388 See *Stanners v Alexandre*, 2014 ABQB 253; *JCW v JKRW,* 2014 BCSC 488; *NRG v GRG*, 2015 BCSC 1062; *Frescura v Castellani*, 2015 BCSC 1089; *CJJ v AJ*, 2016 BCSC 676; *JKL v NCS* (2008), 54 RFL (6th) 74 (Ont SCJ); *Testani v Haughton*, 2016 ONSC 5827; *Huckerby v Paquet*, [2014] SJ No 791. Compare *PAR v MLR*, 2011 ABQB 246; *BSM v JIM*, 2009 BCSC 477; *Williamson v Williamson*, 2016 BCCA 87; *KEF v TWP,* 2016 BCSC 1706. See also Joan B Kelly, "Commentary on 'Family Bridges: Using Insights from Social Science to Reconnect Parents and Alienated Children' (Warshak, 2010)" (2010) 48 Fam Ct Rev 81.

389 *Williamson v Williamson*, 2016 BCCA 87; compare *VMB v KRB*, 2014 ABCA 334, text above for note 381.

390 See *SLT v AKT*, 2009 ABQB 13, wherein several articles were cited but a bilateral assessment was deemed necessary. Compare *NDL v MSL*, 2010 NSSC 68; see also *LG v RG*, 2012 BCSC 1365.

391 2010 ONSC 3575 at para 129; see also *LDW v KDM*, 2011 ABQB 384; *NRG v GRG*, 2015 BCSC 1062 at para 28; *Williamson v Williamson*, 2016 BCCA 87; *RQ v MBW*, 2014 NLTD(F) 29; *LM v JB*, 2016 NBQB 93; *Luo v Le*, 2016 ONSC 202; *NL v RRM*, 2016 ONSC 809; *JMG v LDG*, 2016 ONSC 3042; *X v Y*, 2016 ONSC 4333.

> As confirmed by Dr. Fidler, each case of alienation must be considered on its own particular facts. In determining the appropriate remedy there must be a balancing of both the short term and long term risks and benefits which take into consideration the needs of this particular child. It is also necessary to consider the specific and multiple factors that have contributed to the situation.[392]

392 2010 ONSC 3575 at para 169; see also *Williamson v Williamson*, 2016 BCCA 87.