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*Softening the Blow -
Changing Custody to Residence*

The 2001 World Congress on Family Law and the Rights of Children and Youth

CHILD CUSTODY LITIGATION – BEST PRACTICES IN CANADA

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1. INTRODUCTION

There is a growing interest in Canada in less adversarial options for dealing with custody and access disputes. It is now recognized that interventions which reduce conflict, and promote positive co-parenting, will enhance the adjustment of children following divorce and will lead to greater satisfaction for the parents as well. At the same time, there has been a growing dissatisfaction amongst the general public with the financial and emotional costs, and the delay occasioned by, a traditional litigation process for resolving disputes. While the courts are, of course, established to administer the law, on a practical level they are fundamentally service providers. As such, they must, like all other institutions, meet the changing demands of those using the service. These factors have created an impetus for significant change in Canadian court systems and, in particular, in those courts where family law litigation is conducted and particularly with respect to children.

In recent years Canada has seen the development of specialized family courts with unified jurisdiction¹ utilizing judges who specialize in family law issues. These courts have developed procedures such as early intervention settlement conferences and case management systems which are designed to encourage litigants to settle matters where possible and, in any event, to move the case expeditiously to a conclusion. Many of these courts have support services available such as parent education programs and mediation services to assist the parents in resolving custody issues themselves. Some have mental health professionals available to provide home and parent assessments and to provide a voice for children who otherwise do not participate directly in the litigation. Many family court judges have acquired skills in alternative dispute resolution such as mediation and arbitration and offer these procedures as an alternative to traditional litigation. Some courts ensure confidentiality of their proceedings in order to protect the rights of the children. Civil legal aid is available to give poor litigants access to justice through counsel of their choice, although unfortunately funding for these programs has diminished somewhat in recent years. In some jurisdictions, programs have been developed to assist the self-represented litigant. One court in Manitoba is providing litigants with copies of their court orders at the time of the hearing, so as to increase understanding of court decisions.

These developments illustrate the extent to which the Canadian legal system has responded to the desire of the public for a more understandable and accessible legal system with increased emphasis on non-adversarial approaches to dispute resolution. It is an evolving process with programs that are often implemented on a pilot basis or with only temporary funding. Considered as part of a larger trend, however, the changes have been remarkable and are a positive development for both children and their parents.

2. UNIFIED FAMILY COURTS

¹ The Canadian constitution divides jurisdiction for family law matters between the provinces and territories on the one hand, and the federal government on the other, and these specialized courts “unify” the jurisdiction in one court.

In 1974 the Law Reform Commission of Canada prepared an extensive paper on family courts and recommended that courts be created with exclusive jurisdiction to deal with all matters related to family law. At that time at least two, and sometimes three, different courts exercised overlapping jurisdiction in family law matters in each of the provinces and territories. For example, in the Province of Manitoba the County Court had jurisdiction over adoption, the Provincial Court had jurisdiction over custody and access when the parties were separating as well as over child protection proceedings, and the Queen's Bench had jurisdiction over custody and access in the event of divorce. These courts had different and sometimes conflicting philosophies and procedures. The Commission concluded that unified courts should be established in order to reduce delays, inconvenience and confusion to the litigants and to improve service. It also recommended that these unified courts have certain support services necessary to adequately resolve complex family law problems.

Although it has taken a couple of decades, most Canadian jurisdictions now either have unified family courts or are in the process of implementing them. Many unified family courts have helpful support services including parent education, mediation, counselling, and court ordered custody and access assessments.

The judges who are appointed to these unified courts are often specialists who are knowledgeable about, and genuinely interested in, family law issues. They are often selected from people with a background in family law and, as such, are more sensitive in dealing with the complex social issues related to family law. They generally have an interest in, and ability to apply, alternative approaches such as mediation and interest based settlement negotiation. Certainly presiding in family court requires a special judicial temperament as well as a desire to do this kind of work which is often very demanding. In addition, specialist judges are generally more familiar with family law legal issues. This knowledge makes court hearings more efficient because lawyers can argue difficult and complex fact scenarios without lengthy references to case law which the judges are generally familiar with. It also improves consistency between judges and predictability for the litigants.

The use of unified family courts is a trend in Canada which has greatly improved child custody litigation for both the litigants and their children.

3. COURT SERVICES

It is a necessary part of an effective family court to have comprehensive family law services to support and enhance the work of the court. There has been a rapid growth in Canada of broad reach, publicly sponsored programs in the past five years. Some programs are offered by government and are affiliated with the family court system itself. Some are offered by non-governmental organizations which are generally not for profit. Services are either at no charge, at a reduced rate, or on a sliding scale dependent upon income.

Some of the most useful services include:

PARENT EDUCATION PROGRAMS – These programs are normally delivered by social workers and family lawyers to parents who have accessed the family court system. They generally explain what a person can expect of themselves, of their partners, and of their children at the time of separation. They outline the children's various developmental stages and how best to develop a parenting plan which is in their best interests post separation. The programs generally last several hours and sometimes take place over several sessions². Some of these programs are mandatory in the sense that a parent cannot seek the assistance of the court in resolving their custody or access dispute without first having attended the information session³. Presently these programs are generally available in Canada in the larger cities. Most participants in these programs are glad that they attended the program, would recommend them to other parents, and felt that the programs were helpful in understanding how to prevent children from being put in the middle of conflicts and improving communication with the child's other parent. Recently there have been calls for expansion of these programs including making such programs mandatory for all separating parents⁴.

PARENT COUNSELLING – This service is normally delivered by social workers and is designed to assist parents to cope with the wide range of emotions that they will often experience at separation and thereby to hopefully reduce conflict between the parents. Specific problems such as substance abuse, financial mismanagement, or problems with anger management, are potential triggers for

² A truly excellent series of programs are offered by "Families in Transition" to persons living or working in Toronto, Ontario. These programs are tailored to the specific needs of the parent and include single information sessions on such topics as children's reactions to parental separation, how to create a successful parenting plan, and supporting child adjustment to separation and divorce. They also include group sessions such as for young adults ages 14 to 17, and for mothers who do not have primary care of their children.

³ There are some exceptions to this rule such as when there is family violence or child abduction and the court must be accessed immediately.

⁴ See the "Submission on *Divorce Act* Reform" by the National Family Law Section of the Canadian Bar Association, July, 2001.

conflict during family breakdown which can impact upon the relationship post-separation and, in particular, upon the parenting of the children.

MEDIATION – In addition to mediation which is provided by judges within the court process [see page 8], many courts have trained mediators available where family law clients can be referred. Mediation is an important method of dispute resolution. Where successful, mediation can create increased satisfaction with and adherence to parenting arrangements post-separation.

The availability of these services when attached to the court are most often contingent upon parties commencing court proceedings which is not desirable since it starts the parties off on an adversarial footing. Further, the services sometimes stop when the court file is concluded. The nature of custody/access matters is that they often continue for many years and many of these services would be useful to parents at various points in their parenting journey and should therefore be made available on an as-needed basis. Finally, these services are not always provided on a consistent and ongoing basis because funding is often on a pilot basis only. This needs to change. Generally, however, the implementation of this programming has been a positive development which has greatly added to the effectiveness and usefulness of family courts in Canada for separating and divorcing parents.

4. COURT PROCEDURES

The role of the court has changed by attempting to incorporate more alternative dispute resolution techniques into the court process and by trying to assist with “managing” cases that cannot be settled to an early conclusion. This is consistent with public demand for a quicker, less costly, and less adversarial process.

Some of the procedures that have been introduced include:

PRE-TRIAL CONFERENCES – In traditional litigation these conferences are only undertaken when a matter is ready to be set for trial. In many family law courts these conferences can be set at any point in the process and attendance by clients is mandatory. Alternatives to litigation can be canvassed in the presence of a judge who will not hear the trial or contested motion if settlement is not achieved. As such, parties can feel comfortable exploring settlement without the worry that they may prejudice their case. Often interim, and even final agreements are made, perhaps after a series of such conferences.

EARLY INTERVENTION CONFERENCES – These are essentially an opportunity for the parties and their counsel to meet with a judge, early on in the proceedings. Often this is the first opportunity for the parties to get together, particularly in a high conflict separation. There is an emphasis on settlement or, if settlement is not possible, then on an agreed method of resolving the outstanding issues. Often the conferences are informal and their success is somewhat dependent upon the skill of the judge to promote resolution. Those judges who have received training in interest based mediation, rather than positional negotiation techniques, often have more success. However, even having an authority figure such as a family court judge express an opinion upon an issue in the case is often the catalyst needed to provoke settlement.⁵

CASE MANAGEMENT – This process involves the court taking a leadership role in ensuring that cases are moved through the system and brought to a conclusion in a timely fashion. In any good case management system there is provision for consent adjournments as sometimes the parties are both agreed that some time needs to pass before either party is in a position to continue with the litigation. Indeed, sometimes the passage of time allows parties to adjust to the separation and anger dissipates and settlement becomes possible. For those cases which require a lengthy court intervention, this insures that steps towards resolution are taken in a timely fashion.

MEDIATION AND ARBITRATION - Some judges are prepared to support dispute resolution by presiding as a mediator in order to assist the parties to reach their own resolution. Alternatively, they may preside as an arbitrator which is an

⁵ For example, a parent who hears from the presiding judge that the other parent will almost certainly obtain overnight access to the children in court might feel more able to settle this issue and work towards an agreed parenting arrangement including such access.

adjudicative role but with a more streamlined process than traditional litigation. For example, there would normally be no examinations for discovery with arbitration, and the rules of evidence would be considerably relaxed. A much shorter period of time would be set for the process than would normally be set for a trial. Unlike mediation, at the end of the arbitration process the parties can be assured that they will have a decision, something which is not always achieved in a mediation. Sometimes the parties will agree to use a “med/arb” process with the judge whereby they essentially agree to attempt mediation and, failing resolution, then to be bound by the decision of the judge based upon what he or she has heard during the mediation.

All of these procedures are in development and are responsive to the demand by users of the system for a process which is less costly, and less adversarial.

5. IMPROVING LANGUAGE

CUSTODY/ACCESS TERMINOLOGY - "Custody" and "access" is the terminology used in the various statutes in Canada to describe a parent's relationship to their child post separation and divorce. In recent years, many Canadians have come to believe that such terms convey an inappropriate sense of ownership over the child and, for the access parent, imply that the parent is merely a transitory figure in the child's life. Certainly many family lawyers and mediators have become aware that if you want to settle a file, it is wise to stay away from these "hot button" terms and focus instead on a discussion of actual responsibility for parenting the children.

The federal government in Canada is currently studying the issue of whether this terminology needs to be changed in the *Divorce Act* to use nomenclature which more accurately addresses the responsibilities of day to day parenting and care of the children. A Special Joint Senate and House of Commons Committee on child custody and access recommended in 1998 that the terms "custody and access" no longer be used and that a term of "shared parenting" be used instead⁶. More recently, the Canadian Bar Association representing 36,000 Canadian lawyers recommended that the terms in the legislation "custody" and "access" be replaced with the term "parental responsibility".

It is anticipated that the federal government will report to the Canadian Parliament in the Spring of 2002 at which time recommendations as to changes to the language in our legislation may be made. It is not known if the provinces and territories will follow suit in their various legislation which sets out custody and access provisions in the event of separation, pursuant to the division of powers contained in the Canadian constitution.

AUTO ORDERS PROJECT - Traditionally the language used by the legal system has been quite inaccessible to the lay person. This is a particular hardship to family law clients who must often use their legal documents on a day-to-day basis, generally without the luxury of legal counsel and judges on stand-by to assist when a difficulty in interpretation arises. Most jurisdictions have made some changes to wording in documents by dropping the traditional Latin phrases and replacing them with plain wording⁷. However, it is still true that the words used in documents can be complicated and that the lawyers themselves will often waste valuable time, and their clients' money, arguing about which words should be used.

A unique project in the Province of Manitoba attempts to address the issue of improved wording in court documents. Called the "Auto Order Project", it's ultimate goal is to physically produce an order and provide it to the parents before they leave the court room after a hearing. The present procedure requires counsel to create the order after the hearing and this can take weeks or

⁶ See recommendation number 5, page 27, "For the Sake of the Children", a report of the Special Joint Committee on Child Custody and Access, December, 1998.

⁷ For example, an *ex parte* order is now simply called a *without notice* order.

even months depending upon how busy counsel is with other files and how much difficulty they have in negotiating the terms with one another. Sometimes the counsel are ultimately unable themselves to agree upon words that adequately capture what the judge has ordered. In those circumstances, transcripts can be ordered, at a cost, from the court for the counsel to review. If that does not solve the matter, then an appointment is taken out to meet back with the original judge to have him or her clarify the order. All of this takes time and money, both things which family law clients often lack.

The first step in the Auto Orders Project was to create an agreed set of common language for clauses which are commonly contained in court orders called the "Standard Clauses Package"⁸. This took many months of work by government staff and including the active volunteer involvement of the local Bar. Once these phrases were agreed upon, then lawyers began to pilot test them. When orders were either agreed to by counsel or made by a court which did not conform to the auto orders clauses, then this was brought to the attention of the committee who could choose to include or change the clause, thereby growing and refining the number of standard clauses to include most eventualities.

This Standard Clause Package was developed to the extent possible in plain language so that it is understandable by clients. It is anticipated that the package will continue to change as new issues are addressed or new laws legislated.

The policy of the court in Manitoba is that orders will not be accepted for signing unless they are in conformance with the Standard Clause Package, except where there is an explanatory note provided by counsel. The practical effect of this policy has been that in negotiating the terms of an order with opposing counsel, unless counsel can articulate a reason to diverge from the standard wording, it is simply used without argument. This has already reduced the time it takes for counsel to produce an order and it has improved clarity and consistency of all court orders.

The standard clauses have been in effect since March 1, 1998, and the current version numbers approximately 450 clauses.

The second stage of the Project is the automation of the orders. A software program has been developed which integrates the standard clauses at various choice points throughout a standard form of order. Lawyers are expected to e-mail to the court house registry draft orders based upon the relief sought in their notice of motion or application prior to the scheduled court hearing. This allows the clerk to prepare, to the extent possible, the form of order. A special software has been developed so that the clerk can do this with ease.

This phase of the Project has been implemented successfully in the Masters' Maintenance Enforcement Court since March 2, 1999. This court was chosen as the initial venue for two reasons. Firstly, this court deals only with the

⁸ Same is attached to this paper as Appendix "A".

enforcement of child and spousal maintenance orders and, as such, only includes a minimum number of standard clauses. Secondly, counsel for the recipient of support is always a government lawyer in the Family Law Branch of the Department of Justice in Manitoba. Since these lawyers agreed that they would be responsible to draft the orders prior to the hearing, the Project was therefore only dealing with a small and controlled number of lawyers. These factors have contributed to the success of this test phase of the Project.

Counsel appear on the day of the Maintenance Enforcement docket and as their matter is called, the clerk calls up the form of order which she has been able to prepare in advance in draft based upon what has been e-mailed to her by the lawyer from the Family Law Branch. Counsel argue for a disposition of the matter and when the Master gives his or her decision, the clerk completes the draft order. A copy is printed out for counsel and the judge to review for accuracy. Once it is confirmed, then the clerk sends it electronically to registry and the order is considered filed. At the same time, she prints out copies for the parties so that they leave the court room knowing exactly what has been ordered in their matter.

It is hoped that the automation portion of the Project will expand to the courts hearing more general family law matters, including custody and access, within the next year. There is currently a group of lawyers who are piloting the software at their own offices for this purpose.

This Project is an excellent example of the use of technology to improve services to the family law client by making court orders available in a timely fashion and with consistent, and understandable, language.

6. HEARING THE VOICE OF CHILDREN

The sole criteria for deciding custody and access disputes in Canada is the “best interests of the children”. Both parents may argue that their proposal for custody and access is indeed in the best interest of the children, although they each reach an opposite conclusion. In Canada, we have come to appreciate that the children, who are after all the subject matter of the litigation, should have a voice in their fate. This voice is not necessarily determinative of what is in their best interest, but it is an important component which is not always well-represented by the parents themselves.

How best then to bring this voice to the attention of the court? A possible approach is to include the child as a party to the litigation, able to give evidence and be examined and cross-examined. A similar approach, but with perhaps less stress for the child, is to allow that child to give evidence in Chambers, sometimes in camera from even the parents themselves or their lawyers. Courts in Canada have increasingly moved away from these techniques for involving the child as a litigant participating directly in the proceedings because of concerns of the long-term impact and the emotional damage such involvement can cause. Instead, Canadian courts are increasingly utilizing custody and access assessments, and as well are sometimes appointing lawyers to represent the interests of the children.

ASSESSMENTS - Court ordered custody and access assessments, also known as “home studies”, “social work reports” and/or “home or psychological assessments” are increasingly being used in Canada to allow the courts to hear the views of the child without exposing the child to the “rough and tumble” of the litigation process. Most of these reports focus not only on the children’s needs and wishes, but also the parents’ ability to meet those needs. Their purpose is to make recommendations about the very issue that is before the court, namely, what parenting arrangement would be in the best interests of the children. Generally speaking, the views and wishes of the children will be a component of the report, and the children are generally interviewed privately in addition to being observed with each of their parents. Depending upon the age of the child an assessor may have a child draw pictures or tell stories or participate in play⁹.

Some jurisdictions are utilizing focused or targeted assessments where mental health professionals are assigned to simply answer the question “what does the child want?”, as opposed to “what is in the best interests of the child?”, which is the ultimate question for the court. The danger is not to fashion too narrow a

⁹ For example, instead of asking a child directly “which parent would you rather live with?”, an assessor might ask a young child “if you had three wishes, what would they be?”, or “if you were lost on a desert island, who would you like to have with you?”. Alternatively, an assessor might ask a child to draw a picture of their family noting the size and placement of the parents in relation to the child if they appear in the picture at all. For a pre-verbal child, a form of play therapy utilizing dolls can be employed to reveal family relationships.

focus since the reason why a child might express a preferences is equally important, or perhaps more important, than the expressed preference itself¹⁰.

Manitoba is in the process of developing what will be called “focused assessments” to be done through Family Conciliation Services, a government service which currently provides full blown custody and access assessments when ordered by the court. Such assessments will look only at the wishes of the child and will generally be ordered where the child is aged 11 to 16 and thought old enough to be capable of clearly expressing their wishes. Because the judges making these orders are by-and-large specialist judges serving in a unified family court, they are well placed to evaluate the evidence brought to a contested motion, case conference or pre-trial meeting of the parties with their counsel, and evaluate whether the voice of the child is missing and needed.

APPOINTMENT OF LEGAL COUNSEL - The most direct way to bring the views of the child to the attention of the court is through appointing counsel to represent the child. Some jurisdictions in Canada have courts which are prepared to appoint lawyers as an *amicus curiae*, or “friend of the court”. Strictly speaking, such counsel are not representing the child but are undertaking a task for the benefit of the court to assist it in it’s deliberations. Again, dependant upon the skill and style of the amicus, the children’s wishes may or may not be well reflected. The appointment of an *amicus*, because it is left entirely to the discretion of the court, is dependant upon the particular style and philosophy of the judge hearing the matter. Also, funding for the *amicus* can be a problem, particularly when one or the other of the parents either cannot afford to contribute to the cost of a further lawyer, or do not wish to contribute because the children’s views are not particularly helpful to their case. Finally, the lawyer so appointed may have received little or no training in the discharge of their duties.

The best practice in Canada for ensuring that the voice of the child is heard in custody and access proceedings, is the Office of the Children’s Lawyer in Ontario. The office is based in Toronto, and headed by Willson A. McTavish, who was appointed official guardian (now called the Children’s Lawyer) for the province of Ontario in 1984. Lawyers within that office represent children in custody and access disputes where a court has ordered that the Children’s Lawyer provide services and the Children’s Lawyer has agreed to undertake such representation. There are approximately twenty lawyers serving the city of Toronto and environs. In all other major centres in Ontario, there is a panel of qualified lawyers who are in the private practice of family law and have received special training with respect to the representation of children. This training helps the lawyers develop skills in interviewing and representing children as clients and facilitating settlement. In addition to receiving three days of

¹⁰ For example, a child may want to live with one parent because they have unlimited internet access, or a new puppy, or they let them smoke in the house. In the most difficult cases, a child may express that they wish to live with a parent because they have been emotionally alienated from their other parent through the actions of the “preferred” parent. This can take some considerable investigation to uncover.

intensive training, these lawyers then receive continuing legal education of one-half day to one day approximately twice per year to keep their skills current.

The appointment is under Section 89(3.1) of the *Court of Justice Act*, which gives the Children's Lawyer the full power to act for the child as though he or she were a party to the proceeding and including the right to:

- a) make a full, independent inquiry of all the circumstances relating to the best interests of the child;
- b) receive copies of all professional reports and all records relating to the child;
- c) have production and discovery according to the Rules;
- d) appear and participate in the proceeding, including the right to examine and cross-examine witnesses, call evidence and make submissions to the court, such submissions to include the position advanced on behalf of the child;
- e) take such appeal proceedings as deemed appropriate; and
- f) seek costs related to the proceedings.

Some judges will permit the Children's Lawyer to, in effect, give evidence as to the children's wishes without the prospect of being cross-examined by counsel for the parents. Other judges will require this evidence to be given through a social worker who has interviewed the child and who can then be subject to being cross-examined.

A social worker can be assigned to assist the lawyer at the beginning of the case if there are serious clinical issues such as murder, suicide or mobility, or there are specific serious concerns which arise after the case has been assigned to the lawyer. The lawyer is also free to speak to various collateral contacts such as grandparents, teachers, day-care providers, doctors and school counsellors. The parents are asked to sign a release form for this purpose.

The Children's Lawyer participates in settlement conferences with a view to attempting to assist in the settlement of the matter. Their constant obligation is to put forward the views of the child, but, if these views are, in the lawyer's opinion, arrived at because of what the lawyer has discovered and believes to be undue pressure on a child or other inducements, then these additional facts will be brought to the attention of the court by the lawyer. If the matter proceeds to a contested trial, the Children's Lawyer examines and cross-examines witnesses in the same way as the lawyers for the parents. In terms of the order of proceeding, the judge will normally ascertain what the position is of the Children's Lawyer at the commencement of the hearing through the giving of opening statements and the Children's Lawyer will normally have the right to examine or cross-examine after the counsel for the party who's position most closely reflects the Children's Lawyer's position.

Some of the advantages of the child having their own lawyer, apart from making it absolutely certain that the court will hear this important information, is that the child hears first-hand an explanation of the process, including how long it will take and what the various steps and stages will involve. Also, the child has

a sense that what he or she thinks and feels does matter, and has an assurance that it will be brought to the attention of the court. In a very practical sense, a lawyer representing the interests of children might have a better chance to succeed in settling with the other lawyers who are representing the parents. Particularly in smaller communities, the lawyers normally have a variety of cases with one another and know each other's idiosyncrasies.

Another strong aspect of the work of the Children's Lawyer which recommends it is that there are social workers on staff and on retainer to provide assistance to counsel when there are specific serious clinical concerns that need to be addressed¹¹.

The final strength of the Children's Lawyer's office in Ontario in providing for the voice of the children to be heard, is that, regardless of the income of the parents, the children's own lawyer is paid for by the state. This ensures representation regardless of the extent to which the parents support the appointment.

The voice of the children has unfortunately in past practise often been overlooked as the parents and judges and others involved in a case often felt that they "knew best" for the child. Programs such as that of the Children's Lawyer in Ontario are well placed to correct this historical injustice.

¹¹ Alternatively, the Office of the Children's Lawyer can assess that what is needed instead of legal representation is a custody/access social work report, such as those discussed at pages 12 to 13.

7. CONFIDENTIALITY

An important factor in “softening the blow” of child custody disputes, is to remove the prejudice to the child which an open court room can create. The common law tradition in Canada is to permit an open court room in custody and access proceedings¹². It is extremely difficult to get a pocket “sealed” [that is, closed to scrutiny by non-parties to the litigation], even if both parents agree that they would like this to occur. Custody cases are generally reported using the full name of the litigants, although some judges have taken it upon themselves to use initials in cases with particularly sensitive fact situations. With the advent of the internet, this issue of confidentiality has become more acute. Many courts list in the internet all their cases by name and often the documents which have been filed in that case. It is possible for your neighbour, while surfing the internet in the privacy of their living room, to discover that your spouse has filed for divorce and is fighting you for custody of the children. Once the neighbour has been so informed, they are free to then attend the court to read your file and make copies at a small charge of the materials filed there, including affidavits. Indeed, many courts are actively working towards the day when these court materials such as affidavits can themselves be posted on the internet. Hence this issue of confidentiality will undoubtedly become more of a concern in the future.

The one exception to the above is the Province of Quebec which has a different legal system based upon a civil law tradition. Quebec has a quite different approach to the issue of confidentiality, an approach which could well be considered by the rest of Canada. Quebec ensures that the identity of children, and their parents, is kept confidential, not only in child protection matters, but in all manner of family court matters.

The Quebec Civil Code provides that all sittings of the court are public except family matters where the sittings are held “in camera” unless a court orders that the sitting be made public¹³. Only the judge, the clerks, the parties and their lawyers and witnesses may be admitted. There is provision for a journalist to be admitted but they cannot make reference to the names of the parties in their writings without an order of the Court. Further, all family law cases in Quebec are identified by the initials of the parties only. As a result, court files are generally only accessed by the parties or their lawyers. When the court renders a written decision the case may be read in the law journals, but not with the result of sacrificing the identity of the children involved.

Confidentiality of court proceedings is an aspect of child custody litigation which could be improved upon in most Canadian jurisdictions.

¹² Child protection proceedings are an exception to this rule and are generally conducted “in camera”, that is, in a proceeding which is closed to the public.

¹³ Section 13, Quebec Code of Civil Procedure.

8. ACCESS TO JUSTICE

CIVIL LEGAL AID - It is little consolation to separating parents that there is an excellent family court available if they cannot afford legal counsel to assist them in accessing it. In Canada there is a system of civil legal aid which is administered by the provinces and territories and jointly funded with the federal government. Generally, parents who are separating or divorcing and cannot afford a lawyer to assist them in resolving their custody/access disputes can apply to this government program. If they qualify financially, the legal aid program will allow them to retain either a private lawyer who is willing to take legal aid certificates, or a government staff legal aid lawyer. In either case the government pays for the legal services, although clients who can afford it will sometimes be required to make a contribution to the cost. In certain courts a government lawyer will be provided at no cost as "duty counsel" to assist all parties who attend without a lawyer and help them secure counsel privately if they can afford it, or through the local legal aid program.

Regrettably in recent years government cutbacks have affected Legal Aid Programs and many poor family law litigants in Canada can no longer secure Legal Aid funding and are therefore denied the benefit of legal counsel. In the meanwhile, self-represented litigants are increasing in number, much to the consternation of family lawyers, judges, and court staff.

The Canadian Bar Association is active in urging the governments to restore funding as an access to justice issue for all Canadians. Recently the province of Alberta created a Task Force to study the establishment of Unified Family Courts in that Province. Their Report, which was issued in early 2001, recommends expanded access to legal aid for litigants including the provision of duty counsel¹⁴. This recommendation could well apply in most provinces.

SELF-REPRESENTED LITIGANTS - In order to assist self-represented litigants and relieve the load on court staff who are often called upon to give advice and direction to litigants without counsel, some jurisdictions have created information brochures, packages, and pamphlets. Unfortunately the legal system was not developed as a self-help process and even with this assistance many family lawyers report that litigants without counsel make the process slower and more expensive for all concerned. When parents have legal counsel to explain their rights and responsibilities and to guide them through the litigation they are less apt to take positions which are unreasonable and litigate matters which should best be settled.

The Province of Alberta has recently developed a series of comprehensive information packages for family law litigants which are available on-line at <http://www.albertacourts.ab.ca/familylaw/booklets.htm>. There is a specific and comprehensive booklet on custody and access which includes how to apply for or defend an application for custody or access, how to seek a variation, and what to

¹⁴ See The Province of Alberta Unified Family Court Task Force, Report and Recommendations, December 29, 2000, Recommendation number 13(6), page 45.

do if the order was made outside of Alberta. At the time of writing this information was current as of August, 2000.

While such information booklets are helpful to litigants, even those with counsel, it is no substitute for having someone who is legally trained representing your interests. The civil legal aid crisis in Canada must be solved in order to ensure access to justice for all Canadians.

9. CONCLUSION

Change to custody and access litigation is an evolving process that needs further support and development. The use of unified family courts needs to expand throughout Canada. Support services such as parent education and mediation need to be consistently funded and available in all centres, including the smaller cities. These services need to be available to all separating parents, not just those that choose to litigate in court, and continuing until the children are grown and the active parenting issues are finished. Judges need to be specialized and trained in alternative techniques such as mediation and interest based negotiations. The work of the court needs to be more understandable to the users of the service. Language, particularly describing parental rights and responsibilities, needs to be improved and made less ownership based and confrontational. Children need to be heard in the process, and not just once they have reached their later teen years. All family courts must develop and implement systems to manage their cases so that resolution can take place as expeditiously as possible.

Having said that, the cumulative changes to child custody litigation in Canada in recent years have been quite remarkable and participants in those changes ought to be justifiably proud. The court as a centre for problem-solving, and not just a place to litigate, has evolved to meet the challenges of this new millennium.

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