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**PRIVATIZATION AND THE 'RECONSTRUCTED' FAMILY:
RECENT DEVELOPMENTS IN CHILD CUSTODY AND CHILD SUPPORT IN CANADA**

By

Dawn Bourque, B.A.

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfilment
of the requirements for the degree of
Master of Arts
in Canadian Studies

Carleton University

Ottawa, Ontario

August 1994

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"Privatization and the 'Reconstructed' Family:
Recent Developments in Child Custody and Child Support in Canada"

submitted by Dawn Bourque, B.A.
in partial fulfilment of the requirements for
the degree of Master of Arts

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ABSTRACT

An examination of recent developments in child custody and child support in Canada documents a movement toward a re-privatization of 'family,' resulting in considerable concession, on the part of the judiciary, of paternal authority over women and their children. Socialist feminist modes of analysis are integrated with postmodern notions of micro-practices, particularly as developed by Michel Foucault, to investigate the 'family' through the window of post-divorce or post-separation arrangements with regard to child custody and child support. Empirical evidence gathered from reported cases, reports generated by the Federal/Provincial/Territorial Family Law Committee and unreported and/or uncontested cases of child maintenance collected at the Court of Queen's Bench in Saint John, New Brunswick reveals that privatization tactics ensure the separated/divorced 'family' is re-constructed along familiar patriarchal lines.

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Introduction

Setting the Stage

Canadian family law is currently undergoing serious reevaluation. Of specific interest are the effects of marital breakdown on children. In June of 1990, federal, provincial and territorial ministers responsible for Justice announced the formation of a joint-jurisdictional committee, known as the Family Law Committee, with a mandate to study the issues of child support and child custody and access upon marital dissolution.¹ Government recognition of the shortcomings of support and custody legislation can be credited to, at least in part, feminist examinations of the inequities and biases within the present legal regime.² Many of the problems identified in the public discussion papers generated by the Committee reflect an awareness of feminist critiques of family

¹Canada. Custody and Access: Public Discussion Paper. Ottawa: Federal/Provincial/Territorial Family Law Committee, March 1993, 1; Canada. Financial Implications of Child Support Guidelines: Executive Summary. Ottawa: Federal/Provincial/Territorial Family Law Committee, Ottawa, May 1992, 2. It is difficult to determine precisely who sits on the Committee; 'senior government employees' was the best explanation I was able to discover. After much enquiry, Marie Josie William, assistant to senior counsel, Glen Rivard, at the Federal Justice Department, informed me that a definitive list of members was not available since the membership was continuously shifting. Each of the provinces and territories are represented but apparently their membership also fluctuates.

²Canada. Child support: Public Discussion Paper. Ottawa: Federal/Provincial/Territorial Family Law Committee, June 1991. 1-6; See also, Custody and Access, *supra* note 1, 7-21.

law and appear to begin from a position that recognizes women's systemic disadvantage in relation to the two areas of study.

Despite an apparent acceptance of feminist challenges to family law, the Committee's ideas and proposals for reform fall far short of achieving any kind of real change and in my view, could exacerbate an already precarious situation. The Committee's utilization of feminist language and critique is often contradictory. While the reports recognize women's systemic disadvantage in relation to the family and family law, suggested reform proposals endorse private and de-politicized solutions, which serve to obscure or negate the existence of systemic inequality.

The work of the Committee provides a timely arena to direct feminist efforts for change but represents only one example of the current social, political and legal trends, both within and beyond family law. In order to explore these systemic issues, this thesis will examine the means by which women/mother's position in relation to family law remains one of disadvantage and offer an alternative view of the problems associated with child custody and child support.

The present situation is one where the ability of mothers and their children to achieve and sustain economic, social and emotional well-being is seriously diminished. Although for many women this is not news, the current and specific tactics correlate to larger political movements on the right end of the political spectrum. The current social, political and economic climate is one

of privatization, 'downsizing' and the like. State policies promoting fiscal restraint, social welfare clawback, massive 'belt-tightening,' in the private and public sector (read, job cuts), cutbacks in women's funding, and specific policies such as limits to Unemployment Insurance Benefits, the end of universal Family Allowance, 'free trade' agreements, and 'workfare' are only some of the examples of the privatising trend.

Concurrent with neo-conservative fiscal politics, we have witnessed the rise of 'Pro-Family' groups, political campaigns calling for a return to 'traditional family values' and a general sentiment of anti-feminism. Within such a social and political landscape, it would be foolhardy to assume that family law has remained immune. Indeed, such private measures are inextricably connected with a privatising trend within family law.

Recent support and custody case law, as well as the relevant legislation that guides it, indicate a movement toward a re-privatization of 'family.'³ For separated and/or divorced women with children, these privatization tactics serve to perpetuate and even create situations whereby women/mothers remain dependent upon their former male partners, irrespective of any particular man's desire for such a relationship. Through the privatization of family, women's forced dependence is manifest economically,

³It is debatable whether the family ever left the private sphere and hence, whether it can 'return.' In terms of many women and their children's economic sustenance, at least sectors of the 'family' have moved squarely into the public domain in the form of daycare subsidies, welfare benefits, and the like. The recent push to eliminate or reduce state expenditures in these areas points to a re-privatization.

socially, emotionally and physically and translates into serious limitations on women's freedom.

Analysis of the family as a site of oppression has a long history in the Western women's movement. From the eighteenth century through to the present, feminists' of virtually all persuasions have grounded many of their fights for legal reform, their political alliances, their grass-roots organizing, in women's relationship to the family. Whether via a socialist feminist analysis of the family as an oppressive institution and/or ideology, or whether via a maternal feminist perspective that demanded an expansion and revaluing of women's 'natural' roles, the family has been characterized as central to women's experience. For instance, maternal feminists in Britain, Canada and the United States saw their reform initiatives as well as their fight for suffrage as a means of ameliorating conditions of women within the family.⁵

'I realize 'feminist' in this context is somewhat anachronistic, since the word itself did not appear in women's language until the early twentieth century. In hindsight, however, I think it is appropriate to refer to such early reform-minded women, and occasionally men, as feminist.

⁵In the Canadian context, see for example, Carol Bacchi. Liberation Deferred? The Ideas of the English Canadian Suffragists. Toronto: U of Toronto P, 1983; Linda Kealey, ed. A Not Unreasonable Claim: Women and Reform in Canada 1880-1920. Toronto: Women's P, 1979. In the United States, see for example, Ellen Dubois. Feminism and Suffrage: The Emergence of an Independent Women's Movement in America 1849-1869. Ithaca: Cornell U P, 1978. In Britain, see for example, Sandra Stanley Holton. Feminism and Democracy: Women's Suffrage and Reform Politics in Britain 1900-1918. Cambridge, Cambridge U P, 1986; Jane Lewis, ed. Before the Vote Was Won: Arguments For and Against Women's Suffrage. London: Routledge, 1987.

With the onset of the 'second wave' of feminist activity,⁶ the family rose once again as a central issue of scrutiny. Since the Second World War, women's presence in the paid labour market has steadily increased.⁷ There has not, however, been a correlative decrease in women's primary responsibility for social reproduction, especially their daily responsibility for children.⁸ In the work of socialist and/or Marxist feminists, recognition of these conditions has led to examinations of women's unequal position in the paid labour force. One of the most powerful critiques centres on women's "double day" of labour which serves to limit their potential earning capacity and keep them in an economically subordinate position in relation to men.⁹

In conjunction with theories of women's labour, socialist feminist writers have also sought to theorize the family at the

⁶I am highly suspect of terminology that denotes women's resistance to oppression in terms of 'waves.' In the first instance, the implication is that women between the 'waves' were somehow lulled into complacency for more than a generation. Second, discussions of the 'waves' of feminist activity tend to focus on the organizing and activist efforts of a particular class and 'race' of women, namely middle-class and white, to the virtual exclusion of women who do not fit this narrow category. Furthermore, categorizing women's resistance into 'waves' implies a rigid definition of activism which also contains within it racial and class biases. However, despite its problematic nature, it does appear that there was a marked increase in the public visibility of feminist activism beginning in the 1960s.

⁷See for instance, Ann Duffy, Nancy Mandell and Norene Pupo. Few Choices: Women, Work and Family. Toronto: Garamond P, 1989. 9-13.

⁸See for instance, Meg Luxton. "Two Hands For the Clock." Through the Kitchen Window: The Politics of Home and Family. Second Edition. Meg Luxton, Harriet Rosenberg, Sedef Arat-Koc, eds. Toronto: Garamond P, 1990. 40-55.

⁹Pat and Hugh Armstrong. The Double Ghetto: Canadian Women and their Segregated Work. Toronto: McLelland and Stewart, 1984.

level of ideology. Much of this analysis centres on notions of 'public' and 'private' and the subsequent effects of these distinctions on women.¹⁰

'Public/private' has a multiplicity of meanings. For my purposes, it is meant to distinguish between private enterprise and government funded or sponsored enterprise; the 'home' and the 'workplace'. It also distinguishes between the public world of politics, which includes within it both 'private enterprise' and state operations, and the private, personal world of family, friendships, and social relations. As well, Dorothy Smith has utilized this distinction to differentiate between the objective, textualized and 'neutral' world according to men and 'the everyday world of women.'¹¹ In my own theorising about the public/private, all of these definitions come into play, some overlapping one another and some operating discreetly, depending on the specific under analysis.¹²

Since the onset of advanced capitalism, the family has been squarely placed in the 'private' sphere. It has been argued that the nuclear family, far from being a 'natural' form of social

¹⁰See for example, Michele Barrett and Mary McIntosh. The Anti-Social Family. London: Verso P, 1982; Michele Barrett. Women's Oppression Today: Problems in Marxist Feminist Analysis. London: Verso P, 1980; Zillah Eisenstein, ed. Capitalist Patriarchy and the Case for Socialist Feminism. New York: Monthly Review P, 1979; Varda Burstyn and Dorothy Smith. Women, Class, Family and the State. Toronto: Garamond P, 1985.

¹¹Dorothy Smith. The Everyday World as Problematic: A Feminist Sociology. Toronto: U of Toronto P, 1987.

¹²I must emphasize that I do not accept the distinctions between public and private as 'given'; these distinctions are almost entirely artificial and certainly constructed.

organization, arose in part out of capitalism's need to create and sustain consumer-oriented units.¹³ Thus the family as 'private' not only exists in the context of home and domestic life, but also in congruence with the world of private enterprise and consumer consumption. This relegation to the 'private' sphere, in both senses, serves to 'individualize' the family into a single unit which obscures the existence of individuals within it. Until the late nineteenth and early twentieth century, the 'individual' family was represented by and, in law subsumed under, the father, who became the individual economic actor. As Dorothy Smith argues:

That individual depends on the domestic labour as the essential basis of his capacity to sell his labour-power to the capitalist, hence to appear as an individual in the marketplace....This relation is integral to the appearance of the worker as individual on the market. Hence the social form of the individual as worker is, like the wage, an appearance which conceals an actual relation between domestic labour done largely by women in the home and the individual wage-earner in the productive process.¹⁴

Smith's analysis is specific to a historical situation where women lack formal legal equality and where a majority of women do not engage in paid labour outside the home¹⁵ and appears to have little

¹³See for example, Roberta Hamilton. "Women, Wives and Mothers," in Reconstructing the Canadian Family: Canadian Perspectives. Nancy Mandell and Ann Duffy, eds. Toronto: Butterworths P, 1988. 3-26.

¹⁴Dorothy Smith, "Women, Class and Family," supra note 10, 10.

¹⁵I hasten to recognize that the male breadwinner-female homemaker model has always been a gross anomaly within the working class and people of colour, where women/wives were also engaged in paid labour. Neither does this model account for the practices of women engaged in paid labour within the home, such as piecework, taking in boarders, or laundering. The model is meant more as the ideal of bourgeois ethos than as reflecting the material realities of many women's lives.

bearing on our current situation where the 'individual' male is no longer legally the head of the household under which all others are subsumed.¹⁶ However, Smith's analysis does offer a framework within which to examine the family's continued relegation to the private sphere. Despite legal changes, 'family' still signifies a singular cohesive unit.

Mere mention of the word 'family' conjures up immediate and powerful images. Although descriptions of what constitutes one's own family may vary greatly across a variety of perspectives, rarely is it represented as other than a "haven in heartless world."¹⁷ Despite this dominant ideology, we know that at least one in ten Canadian women is beaten by her male partner¹⁸ and that "on average, two women were killed by their intimate partners every week in 1991."¹⁹ These atrocious statistics point out the contradictions between ideologies of family and many women's realities.

¹⁶I do not wish to imply that Dorothy Smith has utilized this analysis in a contemporary framework. On the contrary, she takes great pains to articulate that the model is largely a thing of the past. See Smith, "Women, Class and Family," supra note 10, 10-15.

¹⁷Christopher Lasch. Haven in a Heartless World. New York: Basic Books, 1977.

¹⁸Linda McLeod. Wife Battering in Canada: The Vicious Circle. Ottawa: Canadian Advisory Council on the Status of Women, 1980. 21.

¹⁹Canada. Changing the Landscape: Ending Violence - Achieving Equality. Ottawa: Final Report of the Canadian Panel on Violence Against Women, Minister of Supply and Services Canada, 1993. 33. These figures were gathered from 1990-91 Canadian homicide records. The breakdown of reported homicides in 1991 are as follows:

270 women were killed; of the 270, 225 cases were solved; 210 women died at the hands of men; 121 women were killed by their intimate partners.

See: Canada. Homicide Survey, Policing Services Program. Ottawa: Canadian Centre For Justice Statistics, October 1992. Table 17.

Still, the 'family' as ideology has powerful significance in our culture. This ideology is achieved through a variety of practices. For instance, Barrett and McIntosh argue that 'familialism' permeates our culture by appropriating notions of 'family' in the social ordering of non-'family' organizations. For instance, child welfare agencies and the education system are both structurally organized around notions of family, complete with pseudo-parents and pseudo-siblings.²⁰ Moreover, organized political struggles often utilize familial language to unite participants or offer media images of family to evoke immediate and powerful response from the public. Barrett and McIntosh cite the British example of the Labour Party's campaign to cut defence spending:

Take the case of the recent disarmament poster that announces: 'The average British family spent £16 a week last year on arms'. Predictably it is illustrated by an image of a typical family whose supermarket trolley contains a miniature missile nestling among the groceries. Why are we addressed in this way rather than as individual tax-payers with no control over the proportion of our taxes allocated to defence? Because 'the family' is a so much more resonant image. The poster tries to construct an association between domesticity, family values and pacifism. We are shocked at this militaristic invasion of the sanctity of hearth and home.²¹

The predominance of familial structures and images serves to sustain ideologies that valorize familial relationships to the exclusion of every other form of intimacy, in effect creating the 'haven' of which Christopher Lasch spoke.²²

We need only look to descriptions of closeness and trust in our everyday speech to recognise the force with which ideas of

²⁰Barrett and McIntosh, supra note 10, 30.

²¹Barrett and McIntosh, supra note 10, 33.

²²Barrett and McIntosh, supra note 10, 28-33.

family are imbued. When speaking of a close and intimate social relationship, we are hard pressed to find words that do not intimate notions of 'family.' For instance, parents often instruct their children to refer to adult friends as 'uncle' or 'aunt' despite the lack of any blood ties. Likewise, 'she is like a sister to me' or similar statements clearly signify the value of a given relationship. With such a privileging of one form of social relations to the virtual exclusion of all other possible forms, it is no wonder that the 'family' has such purchase.

Moreover, despite material conditions that say otherwise, the idea that the 'family' is made up of a husband/father, wife/mother and biological and/or adopted children is largely accepted.²³ The fact that 'single-parent' families, or 'same-sex parent' families are so labelled indicates that they are a deviation from the norm-the norm being merely 'family.' The family exists not only as a privileged form of social relations, within which a particular form of 'family' is further privileged, but also as ideology, or a complex of ideologies, that relegate intimacy and social/personal inter-dependence to the world of the 'private.'

According to 1991 Census studies, twenty percent of all Canadian 'families' do not adhere, even superficially, to the dominant formula. Twenty percent of 'families' in Canada are lone-

²³While many individuals do not accept these definitional boundaries, the recent defeat of the same-sex benefits bill in Ontario shows that, at the level of the state, 'the family' remains rigidly defined.

parent female headed.²⁴ The remaining eighty percent are categorized under a two-adult-with-children model. While at first glance it appears that the dominant or 'average' family model is alive and well in the remaining eighty percent, what such statistics do not account for is the real membership of these 'average' families. For example, some 'families' are regroupings of previously constituted social organisms, such as one divorced parent living together with another divorced or never-married parent; lesbian and gay male partners living together; opposite or same-sex people living in a household without any sexual and/or romantic tie - and these are only some of the examples that fit the "two adult with children" model. Depending on the arrangement, all could be considered 'families' by Census standards, but all deviate from the ideological norm. Yet within popular discourse 'the family' is considered a static entity, whose relative gaining or waning in importance, is applauded or bewailed. And even if 'the family' is recognized as dynamic rather than static, its existence as an 'entity' in and of itself is rarely questioned.²⁵

The casting of 'the family' as a cohesive unit, however it is comprised, gives it the value of an 'individual' of which Smith spoke, regardless of any 'rights' gained by women and children to act autonomously. Taxation law and social welfare policies are two examples of areas in which such an ideology is enforced via

²⁴Colin Lindsay. Lone-Parent Families in Canada. Ottawa: Statistics Canada, Ministry of Industry Science and Technology, 1992 (Draft copy). 10.

²⁵Barrett and McIntosh, supra note 10, 47.

practice. Income tax payment is based on how an individual is situated within a 'family.' Deductions are permissible for supporting a spouse, children, and dependant adults, such as disabled adult children or infirm extended relatives.²⁶ As for social welfare, benefits are derived from one's situation within or outside of a 'family'; changes in 'family' status alter the level of payment.

Such 'individualizing' of the family as a cohesive unit serves to mask or mystify the reality of social relations that exist within this grouping as well as obfuscate relations with individuals existing 'outside' it. As Barrett and MacIntosh argue, sustaining intimate social relations outside the unit of 'family' is difficult if not next to impossible since 'the family' is so heavily privileged.²⁷

The private nature of family makes critical examinations of the goings-on within families difficult and problematic. The moment of marital breakdown, however, offers researchers an otherwise largely unavailable window into the private world. Family law not only offers an opportunity to scrutinize some of the practices within individual families, it also furnishes a moment where the intimate relationship between the (public) state and the (private) family is revealed. As Carol Smart has noted, legal marriage is not

²⁶It should be noted that the basis of income tax can be viewed as in contradiction to my premise since we are taxed as individuals, not as families. However, individuals within families are required to claim incomes derived from all family members, thus creating a defacto 'family' income tax.

²⁷Barrett and McIntosh, supra note 10, 23.

only a contract between two individuals but also one between those individuals and the state.²⁸

Ironically, it is through the public window of divorce and marital breakdown that evidence of manoeuvres that work to re-privatize the family can be found. In the following chapters, I will examine the legislation and recent reported cases concerning child custody and child support. I have selected these two areas in part due to the recent state attention devoted to them and in part because experience has shown me that individual male control over their former woman partners can actually increase following marital breakdown through the vehicle of family law regarding children.

Recent child custody and support decisions show that family law has sanctioned patriarchal authority beyond the intact 'family' and served to create a situation whereby unequal power structures are legitimized and maintained. The current legal practices surrounding custody and support reveal a tendency to re-place the family squarely in the private sphere and maintain its patriarchal form. In so doing, women's freedom and safety, as well as their children's, are placed in serious jeopardy.

This is not to suggest that men, as some sort of homogeneous group, act in concert to control and harass their former partners. Tactics that serve to privatize the family create a situation whereby husbands/fathers are conceded authority and control over their former partners, regardless of whether this control is

²⁸Carol Smart. The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations. London: Routledge and Kegan Paul, 1984. xiii.

desired or welcomed. However, for some fathers, control is the desired goal.

The move to privatization has been facilitated by fathers' rights advocates, who represent perhaps the most overt political demonstration of this move. While their full mandate is unclear, at least part of their position lies in the notion that the alleged judicial preference for maternal custody presents an unfair disadvantage to men/fathers.²⁹ They have also advocated a legal presumption for joint custody and have argued that difficulties with non-custodial parent access (read paternal access) to children is a major social problem and one which the courts have no real means of ameliorating.³⁰

Social science research has served to strengthen fathers' rightists' arguments by presenting theories claiming the importance or necessity for children to maintain contact between both parents after marital dissolution.³¹ The ideology of the 'new fatherhood' has also served to legitimize the fathers' rights' claims, by presenting popular images of fathers actively engaged in child care. The reality of such images, however, is suspect. As Carol

²⁹See for instance, Bruce Rosove. "I Am a Father." in Everyman: Canadian Men's Journal. 3 (Spring, 1993), 18,23.

³⁰Custody and Access, supra note 1, 17.

³¹See, for example, Susan Maidment. Child Custody and Divorce. London: Croom, Helm, 1984; Judith Wallerstein and Joan Berlin Kelly. Surviving the Breakup. New York: Basic Books, 1980; and Norris Weisman. "On Access After Parental Separation," (1992) 36 R.F.L. (3d), 35. For an interesting and alternate view, arguing similar levels of incidents of problems among children raised in single-parent homes and children raised in two-parent homes, see Frank Furstenberg, Philip Morgan and Paul Allison. "Paternal participation and children's well-being after marital dissolution." American Sociological Review. 25:3 (1988), 485-554.

Smart notes:

Such men no doubt exist. The question is whether they are the vanguard of a real trend and whether they provide a sound basis for reforming laws on custody and access.³²

Moreover, Smart notes a real discrepancy between images of new fatherhood and the claims of fathers' rightists:

The new fatherhood is based on the idea of fathers becoming engaged in what has traditionally been regarded as mothering.... Fathers' rights movements, on the other hand, are not lobbying for the right to change nappies, for a shorter working week, or to reverse child care roles, but for greater legal control over children outside marriage (i.e. after divorce or where there has been no marriage).³³

Nevertheless, fathers' rightists have benefitted from this growing ideology because their claims are made against a social backdrop that assumes their active and willing participation in child care, despite a lack of empirical evidence to support it.³⁴

To an extent, fathers' rights' claims have been recognized and legitimized by the Family Law Committee. The Public Discussion Paper prepared by the Committee outlines several areas deemed in need of reform, one of which is access enforcement for non-custodial parents. As well, several cases involving access enforcement decry the unavailability of effective enforcement measures in both editorial comments and judicial decisions.³⁵

Moreover, the language of custody law is under scrutiny by

³²Carol Smart. "Power and the Politics of Custody." in Carol Smart and Selma Sevenhuijsen, eds. Child Custody and the Politics of Gender. London: Routledge, 1989. 10-11.

³³Smart, supra note 32, 17.

³⁴Numerous studies have shown that in reality, women/mothers continue to bear an unequal responsibility for home and child care, regardless of their status in relation to the paid labour force. See supra notes 8 and 9.

³⁵Custody and Access, supra note 1, 35-36.

the Committee. Against a backdrop that valorizes the maternal nature of the 'new father,' arguments have been made that words such as custody and access denote ownership and property and are therefore inappropriate for determinations involving children.³⁶ Instead, the adoption of a 'parenting plan' has been proposed. Instituted in states such as Florida, Maine and Washington in the United States, parenting plans consist of a detailed schedule of the parents' respective rights and responsibilities to the child(ren) and have been severely criticized by feminists on many of the same grounds as joint custody. Parenting plans serve to aggravate efforts by the custodial parent (read mother) to make and carry out decisions concerning her welfare and her children's. Conversely, they concede too much authority to the non-custodial parent (read father) without corresponding duties and responsibilities.³⁷

Unfortunately, Canadian case law provides fertile grounding for state promotion of parenting plans. Under the guise of the importance of paternal involvement with children, judicial decisions involving custody and access serve to re-create and maintain paternal authority despite the physical separation of the parents and regardless of who is granted custody of the children. As I intend to demonstrate, the current climate that valorizes privatization informs family law in a way that results in the

³⁶Custody and Access, supra note 1, 20-21.

³⁷For feminist discussions on the problems with joint custody see Chapter Two. Please refer to Chapter Four for discussion of parenting plans.

legitimization and enforcement of paternal 'rights' and authority at virtually any cost. A woman's ability to act independently for herself and her children is being curtailed through restrictions on her mobility. Women are forced to endure the potential of further and/or increased violence and harassment at the hands of their former partners for the sake of paternal contact. Perhaps most distressing, children who are victims of sexual and/or physical abuse are forced to maintain contact with their abuser. Sole custody awards, while placing responsibility for the care of children primarily on one parent, do not entitle that parent to act freely, nor do they guarantee freedom from potential harm.

Under the guise of the 'best interests of the child,' non-custodial (read paternal) parent access to children has taken priority over virtually all other considerations in custody and access determinations. In effect, the separated family becomes reconstructed, albeit in a "binucleated" form.³⁸ In the reconstruction, traditional patriarchal authority is endorsed and legitimized.

³⁸I borrow this term from literature on family mediation, particularly but not exclusively, Michael Benjamin and Howard Irving, who state:

If children are present, then separation will involve evolution into a binucleated form, with both spouses typically likely to form new intimate relationships, but always linked through their mutual interest in the future and well-being of their children.

See Benjamin and Irving. Family Mediation: Theory and Practice of Dispute Resolution. Toronto; Carswell P, 1987. 81. I am indebted to Elizabeth Pickett for her discussion of the means by which the patriarchal family form is 'reconstructed.' See, Elizabeth Pickett. "Family Ideology, Family Law and Mediation: Law Casts More Than a 'Shadow.'" Journal of Human Justice. 3:1 (1991), 27-43.

These privatizing trends in the courts give strong indication of which path the state will follow in adopting reforms if left to pursue its current course. The legislative endorsement or requirement of a 'parenting plan,' or some derivation thereof, not only represents the worsening of an already critical situation for women and their children, but also a logical extension, or even codification, of judicial practices occurring at present.

Judicial decisions regarding child support awards reveal a related movement toward privatization. Child support awards, also based largely on judicial discretion, have consistently proven to be inadequate. Given the still overwhelming female responsibility for child care both before and after parental relationships dissolve, inadequate levels of child support translate into a substantial economic disadvantage for single-parent women, evidenced by the recent emergence of terms such as the feminization of poverty."³⁹ By 1981 Census reports, female-headed single parent families were heavily over-represented in percentages of low-income families.⁴⁰ According to 1991 Census data, the average annual income of female-headed single parent families in 1990 was a meagre

³⁹I borrow this term from Mary Jane Mossman and Morag McLean, "Family Law and Social Welfare: Towards a New Equality." Canadian Journal of Family Law. 5:1 (Summer, 1986), 81. However, many writers have used it. While the term has potentially great political purchase, it is extremely problematic. Criticisms by feminist women of Colour and working class women point out that the feminization of poverty has long been a reality in their lives and is by no means a new phenomenon.

⁴⁰Mossman and Mclean, supra note 39, 85.

\$22,000.⁴¹

Reform proposals in relation to child support, which have been developed by the Committee, are stated to be directed at better providing for the needs of children by devising some sort of standard formula that will ensure a more equitable distribution of finances between separated parents.⁴² Unfortunately, inadequate quantum of awards is not the only economic problem facing women and their children. In Chapter Two, I examine recent reported cases and demonstrate that determinations of child support awards depend heavily on women's supposed access to a man's income, rather than on the needs of the children or the 'father's' ability to pay. Judicial determinations of child support serve to aggravate an already bleak economic picture and to re-place women under the financial dependence of men.

In a most overt example, the Department of Income Assistance in New Brunswick recently implemented policies that force single mothers in receipt of welfare benefits to name the father or face a suspension of benefits. Single-parents under the age of thirty and in receipt of assistance must also submit the names of the child's maternal and paternal grandparents so that it may be determined whether assistance can be procured from them.⁴³ In these

⁴¹Colin Lindsay, supra note 24, 35. Further, single-parent female-headed family incomes were 38% of husband-wife families and only 62% of single-parent male-headed families.

⁴²Canada. The Financial Implications of Child Support Guidelines: Research Report. Ottawa: Federal/Provincial/Territorial Family Law Committee, May 1992.

⁴³Elizabeth Weir. "Income Assistance Policy to Deny Assistance to Single Parent Women Who Refuse to Identify the Father of Their Child." Speaking Notes. Fredericton, New Brunswick: Press

atrocious policies, which undermine rights of privacy, social welfare clawback and 'family' privatization tactics are directly and obtrusively linked.

The reported cases I encountered were rarely so blatant as the New Brunswick policies. However, cases of support determinations involving fathers with second family responsibilities clearly indicate that women are to remain dependent on a male income. Mothers' access to an alternate male income, rather than the needs of the children, appears to be the deciding factor in determining support. I do not mean to suggest that fathers should not be forced to pay child support. Indeed, support enforcement programs have provided a much needed addition to many women's income. Rather, male financial support is presented as the only available means of economic redress for women. As a result, women's disadvantaged economic position within an 'intact' family and subsequently following marital dissolution is obscured and negated. Moreover, those women without access to child support or those who, for a myriad of reasons, do not wish to receive it, are left without a means of economic amelioration. In the New Brunswick case, such women are left without even meagre support from welfare benefits. Devising effective child support payment standards, largely the

Conference, March 29, 1994. In her capacity as provincial leader of the New Democratic Party and MLA for the riding of Saint John South, Weir called upon local lawyers to offer their services to challenge the policies. As of March 28, 1994, 17 New Brunswick lawyers have agreed to volunteer to represent women on income assistance who wish to fight the Department. See for example, David Meagher. "Welfare Mothers Must Identify Fathers of Their Children: Government Won't Change Policy." The Daily Gleaner. Fredericton, N.B.: Wednesday, March 30, 1994, 3.

mandate of the Family Law Committee devoted to the issue, has come to represent the means of ameliorating women's poverty in general.

Devising effective strategies to combat such oppressive forces and effect lasting social change of course depends largely on one's theoretical position. The problem areas in family law that I identify are inevitably informed by my own experience and theoretical underpinnings. The privatization tactics described herein are analyzed from a theoretical framework that incorporates notions of 'public' versus 'private' with the notion of tactics deployed in creating, maintaining and perpetuating such distinctions. These distinctions are ultimately not only constructed but, in relation to many women's lived experience, false. These artificially constructed 'spheres' serve to further subjugate women and perpetuate patriarchal and capitalist interests. For this part of my analysis, then, I am working within the relatively established, although by no means homogeneous, traditions of socialist feminism."

My fundamental subscription to socialist feminism, however, is not without major qualifications. First and foremost, as an overriding 'catch-all' position, I endorse the basic tenets of socialist feminist but do not accept the functionalist or reductionist argument that tends to stem from Marxist thought. My intent, rather, is to provide a nuanced understanding of some of

"Although by no means an exhaustive list, I draw my analyses from such writers as Michele Barrett and Mary McIntosh, Carol Smart, Dorothy Smith, and Nancy Fraser. Please see bibliography for complete references.

the oppressive forces at work. I hope to move away from notions of 'grand theory' and into analyses of particular oppressive practices, while simultaneously recognizing the interconnectedness and overall effect of their conglomeration. In this respect, I accept Foucault's position on power, when he argues:

[L]et us not look for the headquarters that presides over its rationality; neither the caste which governs, nor the groups which control the state apparatus; nor those who make the most important economic decisions direct the network of power that functions in a society...; the rationality of power is characterised by tactics...tactics, which becoming connected to one another, attracting and propagating one another, but finding their base of support and condition elsewhere, end by forming comprehensive systems: the logic is perfectly clear, the aims decipherable, and yet it is often the case that no one is there to have invented them, and few who can be said to have formulated them.⁴⁵

Using Foucault's analysis, privatization tactics occurring simultaneously in a multitude of social arenas and on many different levels may be philosophically connected and serve a particular interest (or 'class') but do not necessarily point to a located group or organism of 'rulers.' Rather, privatization tactics can be viewed as a complex of practices which materially privilege certain modes of behaviour and discourage or de-privilege others. They form "a dense web that passes through apparatuses and institutions, without being exactly localized in them."⁴⁶ The current practices in family law which serve to ensure the privatization of family are exercised by the judiciary, legislators, social scientists, social workers, political actors,

⁴⁵Michel Foucault. The History of Sexuality. Volume I: An Introduction. Robert Hurley, transl. New York: Random House, 1990. 95.

⁴⁶Foucault, supra note 45, 96.

parents and a myriad of other actors. The work of privatization is accomplished at a micro-level, with each of the actors simultaneously strengthening, resisting, altering and shaping the framework in which it occurs.

Foucault's idea of micro-practices turns Marxist notions of power on their head. Foucault argues that contrary to Marxist theory that sees power as an instrument of class dominance understood to originate from economic interest, power is something that is exercised rather than possessed. It is not attached to agents and interests but is incorporated in numerous practices. He states:

Power comes from below; that is, there is no binary and all-encompassing opposition between rulers and ruled at the root of power relations, and serving as a general matrix - no such duality extending from the top down and reacting on more and more limited groups to the very depths of the social body. One must suppose rather that the manifold relationships of force that take shape in the machinery of production, in families, limited groups, and institutions are the basis for wide-ranging effects of cleavage that run through the social body as a whole. These then form a general line of force that traverses the local oppositions and links them together....Major dominations are the hegemonic effects that are sustained by all these confrontations.⁴⁷

Privatisation in its many forms presents a compelling example of how micro-practices constitute a web of domination without imbuing the state, or ruling apparatus with any inherent power. This is not to suggest that the state does not exist nor that it is incapable of exercising power in oppressive ways. Rather, the state is one of many arenas in which privatization tactics occur and, just as all other arenas is subject to shifts and alterations based on varying

⁴⁷Foucault, *supra* note 45, 94.

degrees of reinforcement and resistance.

Analysis of the deployment of privatisation at the level of micro-practices rather than state initiatives (or from the bottom rather than the top) enables us to recognize and give credit to those forces which resist domination and shift the status quo. As well, it reconciles the often contradictory position of the state in sometimes worsening, sometimes ameliorating the conditions of the oppressed.

In accepting Foucault's position I recognise that a tension emerges between much of the Marxist-based analyses I have also incorporated. The use of power/oppression in a postmodern relativist sense is difficult to reconcile with socialist understandings of power as located.

On one hand, leaning too far toward the relativism of Foucault can lead to a devaluation of the speaking subject, thus eliminating the power of the voices of the oppressed. In refusing to grant authenticity to the individual speaking subject, notions of constructed knowledges place the experience of the oppressed on the same plane as those who oppress.⁴ On the other hand, the classical base-superstructure model of Marxist thought presents us with an analysis that reeks of universalism, not to mention the equally immobilizing tendency to view loci of power, be they called 'the

⁴For critiques of the shortcomings of postmodern relativism, see for example, Nancy Hartsock. "Foucault on Power: A Theory For Women?" in Linda J. Nicholson, ed. Feminism/Postmodernism. London: Routledge, 1991. 163-164; and Kate Ellis. "Stories without endings: Deconstructive theory and political practice." Socialist Review. 17:2 (1989), 57.

ruling apparatus,' 'the state,' or 'dominant ideologies,' as monolithic and transhistorical; hence, unchangeable.

I would argue that reconciling the apparent incompatibility of the two theories lies in deconstructing the dichotomy of oppressor versus oppressed without losing sight of the knowledge that oppressors and oppressed exist.

In formulating this analysis, I accept that women constitute an oppressed group but since 'women' is anything but an homogeneous group, the oppression of women differs in its form and content in relation to intersecting oppressions based on, for example, class, race, ethnicity, religion, sexual orientation, age, and ability. Hence it remains problematic to speak of 'women' at all.

'Women' as a static category denies the reality that women can be both oppressor and oppressed simultaneously. Within the women's movement, strategies and arenas for social change have been defined and agendized by a relatively privileged minority of white middle-class heterosexual able-bodied young women and served to exclude 'other' women from participation and recognition. Still, to eliminate 'women' as a term of reference when speaking about and/or acting against oppression is to risk silencing strong voices of social criticism and powerful forces for social change. Moreover, while it remains materially impossible to separate the 'intersectionality'⁴⁹ of oppressions, we must not forget that

⁴⁹I borrow this term from Kimberly Crenshaw. See Kimberly Crenshaw. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics." Katharine Bartlett and Rosanne Kennedy, eds. Feminist Legal Theory. Boulder, CO.: Westview P,

gender in and of itself continues to be a site where oppression is executed.

Just as women do not constitute a homogeneous group uniformly oppressed or resisting in concert, neither does a 'ruling apparatus' uniformly oppress or benefit from oppressive action. In the case of current practices in child custody, the valorization of paternal contact can result in more men being 'burdened' with increasing childcare responsibilities. Given the systemic disadvantage associated with women's responsibility for childcare, it is difficult to argue that individual men will benefit from such an arrangement. Moreover, increased pressures to standardize and enforce child support awards can cause individual men considerable economic hardship.

Conversely, some alleviation from the daily responsibilities of child care can result in increased freedom for women just as standardized and enforced child support payments can and do result in economic amelioration for some women. However, the means by which both initiatives are being deployed have seriously negative and devastating effects on some women and their children and considerably beneficial and advantageous results for some men.

The following chapters are an attempt to outline those negative effects for women and to present child custody and support issues in a different light than they have previously been cast. The current work of the Family Law Committee contributes a certain urgency to my discussion in that recent state focus on these issues

1991. 57-80.

offers a valuable opportunity for feminists to increase activist efforts and awareness. However, with or without the work of the Committee, the problems identified with family law are serious and deserve attention. Whether we are mothers or not, married, divorced, separated or single, heterosexual or lesbian, these issues affect us all.

It is not with pessimism that I present the following study. Rather, by bringing to the forefront some of ways in which such privatization/domination is deployed, as well as some of the ways resistant forces have altered and are altering practices, we can continue to act and resist in ways that effect lasting change.

Chapter Two

Child Custody, Paternal Access and Private Control

For the last decade, matters surrounding separation and divorce have been accorded prominent status on the Canadian political landscape. Media coverage has increased, new legislation has been enacted, scholarly research produced, and state sponsored studies initiated. Family law has steadily gained in importance as an arena of political action. While feminist calls for family law reform have over a century of history in Canada, only recently have issues pertaining specifically to the custody of children regained heightened feminist attention.¹ With the liberalization of divorce laws and the adoption of equality and gender-neutral principles in both Canadian family law and the Canadian Charter of Rights and Freedoms, changing practices in custody disputes have intensified feminist awareness of a patriarchal backlash and resulted in renewed calls for reform.

If feminists were the only actors in calls for reform there might be cause for celebration. Unfortunately, challenges to the

¹As Constance Backhouse has documented, women's political action in the mid- to late- nineteenth century concentrated heavily on issues of custody as the infamous Caroline Norton case in Britain can testify. See Constance Backhouse. Petticoats and Prejudice: Women and Law in Nineteenth Century Canada. Toronto: Women's Press, 1991.

current family law regime originate from a wide range of actors/interests holding a variety of political positions. This is not to say that feminist efforts have gone or will go unnoticed. Rather, we are faced with competing and conflicting interpretations of the failings and potential shortcomings of the current legal situation and hence, competing and conflicting understandings of which issues need to be addressed.

Evidenced by the rise of neo-conservative politics, anti-feminist backlash and the violent imposition of rigid definitions of 'family,' it is no wonder that family law has been located as a site of contested terrain. As of late, one of the more highly contested areas within family law has been custody of children between separated parents. Myriad issues and problems present themselves when the topic of child custody is raised and feminist scholarship of the last decade has pinpointed several areas of concern. The rise of favour for joint custody, calls for enforced access to non-custodial parents, an alleged judicial preference for maternal custody, the increase in allegations of sexual and/or physical abuse of children, and the 'new fatherhood' mythology represent some of the arenas to which feminists have devoted and must continue to devote attention and resistance.

When examined discreetly, each area presents a direct threat to women with children who are facing separation and/or divorce, as feminist scholarship has demonstrated.² However, child custody

²For feminist scholarship on child custody, see for example, Katherine Arnup. "'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada." Canadian Journal of Women and the

determinations between separating and/or divorced parents has an impact upon far more people than those who find themselves overtly embroiled within it. A rise in judicial favour of joint custody, or enforced access, has potentially serious implications for mothers who have not entered into marriage or common-law relationships. For example, single heterosexual women or lesbians with children could be faced with custody or access lawsuits from a 'father' with whom there was only a fleeting sexual encounter or from a sperm donor.³ Thus how the law defines 'father' and the rights that derive from that definition has potentially far-reaching implications.

For the last decade or so, feminist scholars writing on family law have argued that despite major changes to the Divorce Act in 1985, and despite the legal guarantee of gender equality in the Charter of Rights and Freedoms, women remain in an unequal and disadvantaged position upon spousal relationship breakdown. Formal legal equality has failed to recognize the unequal situation of women in our society generally as well as the unequal situation of

Law. 3:1 (1989) 18-32; Susan Boyd, intra note 6; Janice Drakich. "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood." Canadian Journal of Women and the Law. 3:1 (1989) 69-87; Martha Fineman, intra note 5; Jane Gordon. "Multiple Meanings of Equality: A Case Study in Custody Litigation." Canadian Journal of Women and the Law. 3:1 (1989), 256-268; Wendy L. Gross. "Judging the Best Interests of the Child: Child Custody and the Homosexual Parent." Canadian Journal of Women and the Law. 1:2 (1986) 505-531; Sheila M. Holmes. "Imposed Joint Legal Custody: Children's Interests or Parental Rights?" University of Toronto Faculty of Law Review. 45:2 (Fall, 1987), 300-323.

³Katherine Arnup has documented six cases in the United States in which sperm donors sought paternal rights. In five of the six cases, rights of access were granted and the sixth case is currently under appeal. See Katherine Arnup. "Finding Fathers: Artificial Insemination, Lesbians and the Law." Canadian Journal of Women and the Law. 7:1 (1994), 97-115.

women within a marriage. Moreover, the adoption of formal legal equality has served to obscure women's disadvantaged economic position and treat this disadvantage as an isolated or individualized misfortune. For instance, scholars writing on divisions of marital property and/or spousal support have noted that courts tend not to recognise women's disadvantaged position within the paid labour force in deciding settlements.⁴ Furthermore, principles of gender neutrality in both the Divorce Act and the Charter, have obscured women's unequal responsibility for home and child care and hence their subsequent unequal access to paid labour market remuneration. Martha Fineman sums it up well in saying:

[T]he new property rules removed economic security from women by abolishing the common-law obligation of a husband to support his wife and children (even after the marriage ends). They also destroyed the legitimacy of a paternalistic urge to give the "little women and children" the family home so they could take care of themselves. In addition, a woman now receives half the house along with half the debts. Further, a woman now shares an equal obligation with regard to children and may be saddled with her "equal" share of the family (or husband's) debt, even though she is far from "equal" in job and salary prospects.⁵

With respect to issues of child custody, the same arguments have been put forth in a different context. Susan Boyd has argued

⁴See for example, Carol Rogerson. "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)." Canadian Family Law Quarterly. 7:2 (February 1991), 155-269; Lenore Weitzman. The Divorce Revolution: the unexpected social and economic consequences for women and children in America. New York: Macmillan, 1985.

⁵Martha A. Fineman. The Illusion of Equality: The Rhetoric and Reality of Divorce Reform. Chicago: U of Chicago P, 1991. 34. See also, Fineman. "Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality." Canadian Journal of Women and the Law. 3:1 (1989), 88-110.

that principles of gender neutrality have served to obscure women's unequal situation in society in general and in the family in particular and resulted in more women losing custody of their children.'

Immediately, such a scenario points to some of the difficulties inherent in 'rights discourse' that feminists have already recognized.' In an historical situation where 'legal equality' prevails, recognition of discrepancies among those not equally situated in society can be obscured if not eliminated and rights arguments can be and have been put forth by those whom law has historically favoured/benefitted. In the American context, Martha Fineman notes:

These [fathers' rights] groups appropriated and successfully employed the feminist rhetoric of equality to force reforms in the family law area, such as mandatory joint custody, which were not particularly beneficial to women and children."

'See Susan Boyd. "Child custody law and the invisibility of women's work." Queen's Quarterly. 96: (Winter 1989), 831-58; "Child Custody, Ideologies and Employment." Canadian Journal of Women and the Law. 3:1 (1989), 111-133; "Child Custody and Working Mothers." in Sheila L. Martin and Kathleen Mahoney, eds. Equality and Judicial Neutrality. Toronto: Carswell P, 1987, 169-183; "From Gender Specificity to Gender Neutrality? Ideologies in Canadian Child Custody Law." in Carol Smart and Selma Sevenhuijsen, eds. Child Custody and the Politics of Gender. London: Routledge, 1989, 126-157.

'See, for example, Fineman, The Illusion of Equality, supra note 5; Judy Fudge. "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles." Osgoode Hall Law Journal. 25:3 (1988), 485-554; Carol Smart. Feminism and the Power of Law. London: Routledge, 1989; Elizabeth M. Schneider. "The Dialectic of Rights and Politics: Perspectives from the Women's Movement [1986]." in Katherine T. Bartlett and Rosanne Kennedy, eds. Feminist Legal Theory: Readings in Law and Gender. Boulder, Co.: Westview P, 1991, 318-332.

'Fineman, The Illusion of Equality, supra note 5, 29.

As a starting point, I will begin by challenging the premise of one of the sites or locales of anti-feminism: fathers' rights groups. Via an historical account of child custody laws and judicial practices in Canada, I will counter the popular perception of a judicial preference for maternal custody, which is the mainstay of fathers' rights advocates' position'.

While it may be argued that affording attention to anti-feminist forces only serves to validate their positions, I would argue that those engaged in overt anti-feminist efforts represent a point on a continuum or part of a complex web of practices that serve to oppress women and their children. For not only would it be an entirely false construction to present a polarized view of political actors, with feminists on one side and fathers' rightists on the other, it would afford fathers' rightists far more political importance than they are due. In fact, fathers' rights advocates represent only a tiny fraction of the actors involved and an even more minute percentage of the Canadian population.¹⁰ Nevertheless,

'In the U.S., Equal Rights For Fathers' president, Dave Gerfen, goes even further than merely claiming a judicial bias, stating:

"The current system creates a 'quiet conspiracy' involving attorneys, judges, probation departments, Conciliation Courts—even the husband's attorney—and is clearly not in the best interests of the child."

Quoted in Weitzman, supra note 4, 237. Canadian fathers' rights groups include The Canadian Council for Co-Parenting, FACTS (Fathers and Children, Their Society, Fathers For Justice, and In Search of Justice. See Susan Crean. In The Name of the Fathers: The Story Behind Child Custody. Toronto: Amanita P, 1988, 104-105.

¹⁰While father's rights groups refuse to publish their memberships, in 1988, Ann Rauhala of the Globe and Mail estimated a total of about eighty members nationwide, See Crean, supra note 9, 104.

fathers' rightists have contributed to the popular perception of a judicial preference for maternal custody of children and it is this point that I will first address.

I will begin by examining the alleged judicial preference for maternal custody of children, in light of the existing work by feminist writers. From that point, I hope to establish connections among issues of joint custody, enforced paternal access, allegations of sexual and/or physical abuse, and demonstrate the part they play in what I refer to as the deployment of privatisation. When examined concurrently, I argue that these deployment techniques serve to re-create and re-place the 'family' in the private sphere and in so doing, re-establish the means by which domination and control of women in the family are exercised.

The legal possibility of married mothers receiving custody of their children is a relatively recent development in Canadian and British Common law.¹¹ Prior to 1839, English common law, which was relevant to those Canadian provinces then established, acknowledged exclusively paternal rights to custody and guardianship of children, even children still at the mother's breast.¹² With the

¹¹Carol Smart notes that mothers of "illegitimate" children usually retained sole custody of their children after 1841. However, it is more to the point that such women had sole responsibility for children without any legal access to paternal compensation for their 'burden.' See Carol Smart, "Power and the Politics of Custody," in Child Custody and the Politics of Gender, supra note 6 6-7.

¹²Constance Backhouse. "Shifting Patterns in Nineteenth-Century Canadian Custody Law." David H. Flaherty, ed. Essays in the History of Canadian Law. Volume I. Toronto: Osgoode Society, 1981. 216.

passage of the first custody statute known as the Talfourd Act,¹³ judges were given the discretionary power to award custody of children under the age of seven to their mothers, as well as rights of access where the children were held in the custody of the father or another guardian. Adulterous women were excluded from the benefit of the Act.¹⁴ This limited power was expanded in 1886 and 1887 to provide that the

Court could make such orders as it may think fit regarding the custody of such infant and the right of access thereto either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father.¹⁵

Although the welfare of the child was given priority on the list of the court's considerations, these 'rights' were contingent on the mother not having committed adultery, 'deserted' the matrimonial home, or engaged in some other form of 'immoral' conduct.¹⁶

Although paternal custody was still favoured by the judiciary in the late nineteenth and early twentieth-century, the wording of the Talfourd and subsequent acts gave rise to what is referred to as the 'tender years doctrine,' where it was generally believed that children under the age of seven were best placed with their

¹³The Talfourd Act was a British law but has relevance for Canada in those provinces established prior to 1839. For a detailed discussion of the origins and relevance for Canada of the Talfourd Act, see Backhouse, *supra* note 12.

¹⁴Jean McBean. "The Myth of Maternal Preference in Child Custody Cases," in *Equality and Judicial Neutrality*, *supra* note 6, 185.

¹⁵Act to Amend the Law Relating to the Guardianship and Custody of Infants, 1886, in T. Brettel Dawson. Relating To Law: A Chronology of Women and Law in Canada. Toronto: Captus P, 1900. 27.

¹⁶Boyd, "From Gender Specificity to Gender Neutrality?" *supra* note 6, 130.

mother. In Ontario, mothers gained equal entitlement to the custody of children in 1925,¹⁷ thereby further diminishing absolute paternal authority over the family. Susan Boyd argues that this shift to 'equal parental rights' can be linked to the diminishing importance of the family as a unit of production, the increasing split between home and workplace, and the growing belief that childhood and adolescence were distinct developmental periods that required nurturing by mothers.¹⁸

By the 1930s, the 'tender years doctrine' had taken root in the judiciary and in 1933, the Ontario Court of Appeal stated that "as a general rule children under seven years of age needed their mothers more than their fathers."¹⁹ Based on popular assumptions of women's 'natural' disposition for the caring and nurturing of children, judges awarded maternal custody only to those women who adhered to appropriate definitions of female purity and chastity. Consider, for instance the often-quoted case of Bell v. Bell:

No father, no matter how well intentioned or how solicitous for the welfare of such a child, can take the full place of the mother. Instinctively, a little child, particularly a little girl, turns to her mother in her troubles, her doubts and her fears. In that respect, nature seems to assert itself. The feminine touch means so much to a little girl; the frills and flounces and the ribbons in the manner of dress; the whispered consultations and confidences on matters which to the child's mind should only be discussed with Mother; the

¹⁷Guardianship of Infants Act, 1925, which "provided generally...that the welfare of the child was the paramount consideration, and provided specifically that a mother as well as a father could appoint a guardian to act jointly with the surviving parent." In Dawson, supra note 15, 28.

¹⁸Boyd, "From Gender Specificity to Gender Neutrality," supra note 6, 130-131.

¹⁹Boyd, "Child Custody Law and the Invisibility of Women's Work," supra note 6, 835.

tender care, the soothing voice; all these things have a tremendous effect on the emotions of the child. This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of our Courts.²⁰

Implicit in the statements of Bell v. Bell is the assumption that any deviation from that 'natural role' would subsequently devalue a woman in the eyes of the court and substantially diminish her chances of gaining custody. So, while the maternal preference may have empowered some women by allowing them to leave abusive marriages without immediately forfeiting their young children, it granted them this right only if they conformed to strict conditions set out by ideologies of motherhood. Women engaged in paid work, 'promiscuous' women, lesbians, those who 'deserted' their families, or engaged in any other 'immoral conduct' did not generally gain custody and suffered strong reprimands from the judiciary, including judges admonishing women to return to marriages despite allegations of abuse and cruelty.²¹

It may be argued that despite the restricted application of the maternal presumption, the perception of a judicial maternal preference provided the impetus to settle a majority of out-of-court custody disputes with the mother gaining sole custody. However, it should be recognized that ideologies of motherhood and of public and private spheres that gave rise to the maternal preference in the courts also acted in society in general as a

²⁰Bell v. Bell [1955], O.W.N. 341, 344 (Ont. C.A.).

²¹See Backhouse, "Shifting Patterns," supra note 12; Boyd, supra note 6; Arnup, supra note 2; Carol Smart, The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations. London: Routledge, 1984.

powerful force against fathers seeking or even desiring custody of their children. Thus fathers who did not want or contest custody served to perpetuate the myth of a maternal preference by helping to create the societal image and reality of the divorced woman with children. Furthermore, the 'tender years doctrine' worked in conjunction with legal understandings of 'the best interest of the child,' which had replaced the previous absolute paternal right to custody. Within these vague guidelines, custody decisions were left to the discretion of the judiciary, whose decisions were also informed and guided by prevailing ideologies of motherhood.

In her study of custody arrangements in Los Angeles, Lenore Weitzman notes a considerable discrepancy in the statistics. While the figures representing sole maternal custody awards are high, ranging from 88.8% to 90.2%, examining cases where fathers requested custody presents a very different picture. She notes:

Although the number of fathers requesting custody is small, among the small number of fathers who requested custody, 35 percent were awarded it in 1968, 37 percent in 1972 and 63 percent in 1977.²²

This is a far cry from even a de facto, if not legal, reality of a maternal preference. At most, any preference for maternal custody in the judiciary must be viewed as a brief aberration in a long history of paternal rights. At worst, it is an unsubstantiated myth.

In 1983, the 'tender years doctrine' was dismissed, when the Alberta Court of Appeal in R. v. R. rejected the doctrine and

²²Weitzman, supra note 4, 233.

stated:

This view [as set forth in the opinion of the court in Bell v. Bell, quoted above] confuses cultural traditions with human nature; it also traps women in a social role not necessarily of their choosing, while at the same time freeing men; if only a mother can nurture a child of tender years, then it is the clear duty of the mother to do so; because the father cannot do it, he is neither obliged nor entitled to even try. Also, it is seen by some a self-perpetuating: by putting the female child in the custody of somebody who accepts the maternal role model so described, the rule ordains that she will have just such a role model at close hand during her most impressionable years. Thus the 'tender years principle', which at first glance seems only innocently sentimental, is seen by many as part of a subtle systemic sexual subordination.

In my view, it is no part of the law of Canada that a judge is bound to say that human nature dictates that only females can perform that parental role labelled as 'maternal'.²³

Despite the apparent insight expressed by the court in R. v. R., a closer look at the case shows that while Kerans J.A. had adopted feminist rhetoric and notions of equality in his decision-making, traditional ideologies of motherhood were still very much at work. The mother, who worked a regular work-week as a secretary, lost her appeal of an order of custody for her four year old daughter to the father. The father, who was employed by the child's paternal grandfather at a farm-ranch operation, argued that "the daycare is raising our daughter" and that he could have the child "with him constantly during the day." The mother subsequently argued that she was being punished for having to work and that the trial judge had unfairly deprecated professional child care.

On appeal, Kerans J.A. stated that the mother's arguments were unjustified: "It is mere happen-stance that the father has more

²³R. v. R. (1983), 5 W.W.R. 385, 393 (Alta. C.A.).

free weekday time than does the mother."²⁴ What the appellate judge failed to consider as relevant was the fact that the mother had been the child's primary caregiver during the marriage and had previously given up paid employment while the child was an infant. Her ability to parent had been proven whereas the father's ability had not.

In a 1980s study of reported divorce cases involving custody disputes, Susan Boyd found that when mothers employed outside the home were compared with fathers employed outside the home, the mother was often viewed unfavourably by the court. Many of these mothers failed to gain custody of their children because they did not conform to traditional ideologies of motherhood, despite the fact that in virtually every case, the mother had been the primary caregiver of the child during the marriage.²⁵

As well, in conjunction with lingering ideologies of motherhood, Boyd argues that principles of gender-neutrality and equality in family law have translated equal rights to custody into equal ability to parent.²⁶ In a custody dispute, the judiciary is to presume both parents are equally capable of providing care. This presumption of "equal ability," however, has not recognized the unequal responsibility women have held for child care during the marriage as well as their obvious parenting experience, nor has it recognized the limits and restrictions placed on married mothers

²⁴R. v. R., supra note 23, 393.

²⁵Boyd, "Child Custody and Working Mothers," supra note 6, 173-177.

²⁶Boyd, "From Gender Specificity to Gender Neutrality," supra note 6, 139-140.

with regard to economic success.

Whether due to women's "choices" to temporarily or permanently leave the paid workforce to care for children, or due to structural inequalities in pay and opportunities of advancement, the economic circumstances for many women facing marital dissolution are bleak. With the myth of an 'equal ability' to parent, economic stability and worth became primary factors by which to differentiate between parents and award custody. Judges have taken principles of equality and applied them to persons unequally situated in society. Structural labour market inequalities were characterized as individual problems of mothers and held against them.²⁷

If economic stability were the only factor working against women in obtaining custody, we might conclude that legislation enforcing larger child support awards, or enforcing real equitable distribution of marital assets, might remedy the problems. However, as Carol Smart has argued, the simultaneous rise in ideologies of the 'new fatherhood' has led to an overvaluing of any contribution to childcare by fathers, no matter how slight, and a subsequent undervaluing of mothers' contributions.²⁸ Further, ideologies of the 'new fatherhood' are legitimized by the recent flurry of social science research arguing for the importance of paternal participation in childcare on a child's personal growth and development. This combination of factors has led to more women

²⁷Boyd, "Ideologies in Canadian Child Custody Law," supra note 6, 141.

²⁸Smart. "Power and the Politics of Child Custody," supra note 11, 1-26.

losing custody of their children despite the fact that they were the children's primary caregiver during the marriage.

Changes in the perceptions of fatherhood can, at least in part, be attributed to feminist demands for equal participation in home and child work. However, it has been extensively documented that while perceptions may have altered, in reality, the majority of women still hold primary if not complete responsibility.²⁹ Janice Drakich, in her discussion of child custody determinations, points to the recent proliferation of fatherhood research in the social sciences, popular media representations of fathers and popular literature on fatherhood as part of the forces at work in developing and sustaining images of the "new father."³⁰ Ross Parke's popular book, entitled Fathers perhaps best capsulates the growing ideology:

No longer is the father with a diaper in his mouth a comical figure. The ideal father of the newest fashion goes to childbirth classes with his wife, coaches her through labour, attends her during delivery and shares in the care and feeding of the infant, especially when his wife returns to work. No longer a social accident, many fathers are active partners in parenthood and a direct influence on their child's development.³¹

The growing ideology surrounding fathers' nurturing capabilities has affected the ways in which fathers' influence on children is

²⁹See for example, Margrit Eichler. Families in Canada Today: Recent Changes and Their Policy Consequences. 2nd Edition. Toronto: Gage, 1988; Meg Luxton, Harriet Rosenberg and Sedef Arat-Koc. Through the Kitchen Window: The Politics of Home and Family. Second Edition. Toronto: Garamond P, 1990; Statistics Canada. Women in Canada: A Statistical Report. Ottawa: Supply and Services, 1985; Patricia Rogerson. Women and Work Interruptions: Results from 1984 Family History Survey. Ottawa: Statistics Canada, 1987.

³⁰Janice Drakich, supra note 2.

³¹Ross Parke. Fathers. Cambridge: Harvard U P, 1981. 2.

perceived. Once more, as Ross Parke states:

Fathers can affect how well their children progress in school, which subjects they prefer, and even the kinds of occupations they choose. Whether a child prefers reading and hates math or aspires to be a physicist or engineer rather than a book critic or historian is clearly affected by the father's attitudes, encouragement and behaviour.³²

While there is little doubt that fathers do influence their children, regardless of their participation, or lack thereof, in daily child care, what has arisen out of assertions such as Parke's is the connection between paternal influence and ability to parent. For instance, in Alexander v. Alexander,³³ the British Columbia Court of Appeal confirmed a lower court award of custody to the father who had had physical care of the child for only one out of twelve years of the child's life. The decision was made despite an earlier separation agreement giving custody to the mother and despite the fact that the mother had sole custody and care of the child for the remaining eleven years. The reason for awarding paternal custody was that there was apparently some indication from a psychologist that the child was "gifted" and might increasingly benefit from a male parent's influence and that staying with his father would benefit the child's scholastic success. The mother's eventual request for joint custody was refused.³⁴

With respect to paternal participation in childrearing, Boyd argues that the judiciary has to a large extent adopted prevailing

³²Parke, supra note 31, 65.

³³Alexander v. Alexander (1986), 2 R.F.L. (3d), 163 (Man. C.A.).

³⁴Boyd, "Ideologies in Canadian Child Custody Law," supra note 6, 142.

ideologies of fatherhood as accepted reality. As a result, the judiciary has applauded and rewarded fathers for juggling employment and child care while simultaneously criticizing and punishing mothers for doing the same.³⁵

These conflicting and often contradictory ideologies of motherhood, new fatherhood and formal equality, when coupled with the myth of a judicial preference for maternal custody are what has given rise to the favour for joint custody and are the basis of contentions by fathers' rightists, that 'rights' to children should no longer be available only to women.

In a legal climate of 'equal ability,' joint custody of children is being promoted as the arrangement of preference for separated parents. This does not, however, mean it is the preferred choice of divorcing parents or, more relevant to this discussion, the preference of women/mothers. Rather, a complex of practices and ideologies are at work in creating the perception that joint custody is a good way to make the best of bad situation - that bad situation being parental separation. Since its rise in popularity, especially in the United States, many feminists have argued and fought against joint custody as a preference or judicial presumption.³⁶ Despite their action, as of January 1987, joint

³⁵See Boyd, supra note 6.

³⁶In the American context, see for example, Fineman, supra note 5; J. Goldstein, A. Freud and A.J. Solint. Beyond the Best Interests of the Child. New York: Free Press, 1973. In Canada, see for example, Sheila Holmes, supra note 2; Sheilah Martin and Kathleen E. Mahoney, Equality and Judicial Neutrality, supra note 6. For perspectives from various countries, see also: Smart and Sevenhuisjen, ed. Child Custody and the Politics of Gender, supra note 6.

custody as an option, preference or presumption has been adopted in at least sixteen states in America.³⁷ While Canada has not adopted a preference or presumption for joint custody, it is listed as an option in the Divorce Act and has the potential to be imposed against the wishes of one or both parents.

On the surface, joint custody may look good - even feminist. The term conjures up images of equal responsibility for child care; harmonious, as opposed to acrimonious relations between separated parents; not to mention the potential for each spouse to 'get on with their lives' given periodic time away from the day to day responsibilities of child care. And in fact, for those few parents whose separations are truly amicable, who are favourably situated economically and in convenient geographic proximity, joint custody can work.

However, a crucial distinction needs to be made between joint legal custody and shared parenting. More often than not, joint custody means legal rights to children and often has little to do with corresponding responsibilities. More often than not, joint

³⁷States with statutes listing joint custody as an option include Alaska, Delaware, Indiana, Minnesota, North Carolina, and Texas. While joint custody as an option is far less restrictive than a preference or presumption, it does allow for court imposed joint custody orders. States with statutes allowing for joint custody at the request of only one parent are Hawaii, Iowa, Maryland and Michigan. Statutes providing joint custody as a preference or presumption are California, Florida, Idaho, Kansas, Maine, New Mexico, New Hampshire. Preference for joint custody assumes it as the arrangement of choice and will only consider sole custody once joint custody has been ruled out. Presumptive joint custody, the most restrictive, demands rebutted evidence proving that joint custody is detrimental to the child's best interest. See: Jan L. Hagen. "Proceed with Caution: Advocating Joint Custody." Social Work. (January-February, 1987), 26-30.

custody means both parents are legally entitled to make decisions concerning children, but only one parent (in most instances, the mother) is given the responsibility for children's day to day care." Thus the 'residential' or 'care and control' parent does not have sole decision-making authority, but must seek the concurrence (read, approval) of the non-residential parent concerning major events in children's lives.

One of the accepted provisions of joint custody is that the non-custodial parent know the residential whereabouts of the custodial parent at all times. Wife assault, economic abuse, psychological and emotional abuse, could all very well continue - even heighten - after the physical separation. Those women who might prefer sole custody, but agree to a joint order to forego exhausting and expensive litigation, or to placate a vindictive ex-spouse, or to avoid a loss of custody to an apparently 'friendly' father, are faced with potential continued harassment by their ex-partner under the guise of joint custody.

Presumptions for, or court imposed, joint custody have been criticized on the same grounds as the 'Friendly Parent Rule' which was implemented with the Divorce Act, 1985 and comprises part of the legislative guidelines for determining custody in Canada. Under the banner of 'Maximum Contact,' the provision states:

In making an order under this section, the court shall give effect to the principle that a child of the marriage should

¹⁶Joanne Schulman and Valerie Pitt. "Some Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children." Golden Gate University Law Review. 12 (1982) 538.

have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

This provision has been referred to as the 'silencer' since it sets a backdrop against which claims for sole custody will be regarded as selfish and indifferent to the child's best interests. In the case of child sexual abuse, unless allegations can be proven 'beyond a reasonable doubt' some lawyers are advising women to remain silent for fear of losing custody altogether.³⁹ Allegations of child sexual abuse are often viewed as suspect by the courts, because it is assumed that if they are believed, they present an irrefutable argument for sole custody. Justice J. Bernard Feehan, in deciding to award unsupervised liberal access to the father, reasoned:

when there is an allegation of sexual abuse in a custody case, two red flags go up. The first red flag tells the trier of fact to 'err on the side of caution' so that the child's safety is ensured. The second red flag reminds him that more and more women in divorce proceedings use bogus child sex-abuse allegations to gain custody of the children."

What is interesting about this case is that sole custody was awarded to the mother and her desire was to restrict the father's access, not play a 'trump card' to win custody. Further, the father was awarded rights of consultation on major decisions concerning the child, terms generally associated with joint custody awards. Under the banner of the 'best interests of the child,' the

³⁹Divorce Act, 1985. S.C. 1986, c.4, section 16(10).

⁴⁰Crean, supra note 9, 78-81.

⁴¹Donna von Hauff. "Framing a father fails in court." Alberta Report. March 4, 1991. 41.

paramount consideration was paternal access, eclipsing all other considerations.

Fortunately, Canada has not adopted a presumption of joint custody in either federal divorce legislation or provincial acts. It is currently an allowable option and judges have the discretion to order it if and when they see fit. In 1989, Anne Marie Delorey noted that the judiciary has been reluctant to impose joint custody on parents who do not expressly agree to or desire such an arrangement.¹² However, that joint custody is not being imposed on reluctant parents is not necessarily cause for rejoicing. Since a preference for joint custody has remained outside formal legislation in Canada, it is far more open to 'private' spheres of influence. This is not to say that the law-state has had no role to play in constructing joint custody as the arrangement of preference but rather that the lack of formal regulation hides or obscures its complicity.

Consider, for instance, the recent push in family law circles for implementing mediation for separating couples. While mediation has its own inherent problems for women, that are beyond the scope of this discussion,¹³ the aspect on which I wish to focus is the

¹²Anne Marie Delorey. "Joint Legal Custody: A Reversion to Patriarchal Power." Canadian Journal of Women and the Law. 3:1 (1989), 39-40.

¹³For a more in-depth discussion of the problems with mediation for women, see for example, Martha Shaffer. "Divorce Mediation: A Feminist Perspective." University of Toronto Faculty of Law Review. 46:1 (Winter 1988), 162-200; Nancy Thoennes and Jessica Pearson. "Predicting Outcomes in Divorce Mediation: The Influence of People and Process." Journal of Social Issues. 41:2 (1985) 115-126; Elizabeth Pickett. "Familial Ideology, Family Law and Mediation: Law Casts More Than a 'Shadow.'" Journal of Human Justice. 3:1

argument that mediation takes the adversarial component out of divorce/separation litigation by providing a relatively informal, personal environment where 'families' can work out their differences. So as the argument goes, mediation exists as an alternative to formal litigation and protects the family from exposure to the inherently antagonistic nature of the legal system. As Mr. Justice Thomas Zuber argues:

Disputes involving the custody of and access to children are difficult, sensitive and emotional and are best resolved in an atmosphere, where there is at least the possibility of leading the parties to an agreement.⁴⁴

Given its favour in public discourse in Canada, joint custody 'agreements' may be far more likely to occur in a mediation environment. Not surprisingly, much mediation literature centres around the notion that the 'family' is still the basic unit of our society and need not 'break down' following the parents' separation. Rather, the 'family' should be "reconstructed" in order to continue to fulfil its roles. As Irving and Benjamin argue:

If children are present, then separation will involve evolution into a binucleated form, with both spouses typically likely to form new intimate relationships, but always linked through their mutual interest in the future and well-being of their children.⁴⁵

Mediation literature favours joint custody as an excellent means of 'reconstructing' the family. However, as Elizabeth Pickett points out:

the reconstruction of the post-divorce family envisioned in

(1991), 27-43.

⁴⁴Report of the Ontario Courts Inquiry, quoted in Pickett, supra note 43, 31.

⁴⁵Pickett, supra note 43, 31-32.

the discourse of mediation is a reconstruction which is to take place on familiar, patriarchal lines.⁴⁶

Popular notions concerning the sanctity of the family serve to validate the claims of mediation literature and foster a perception that joint custody equals the 'best interests of the child.' While recent case law tends to support Delorey's claim that the judiciary has been reluctant to impose joint custody on unwilling parents, close examination of all the reported cases from 1990 to 1993 involving custody and access disputes, shows that while joint custody may not represent the majority of formal orders, terms generally associated with joint legal custody are being imposed at an alarming rate and with serious adverse consequences for women and their children.

Despite Canada's lack of formal/legal adoption of joint custody, a privatizing venture in itself, privatization tactics that result in quasi- or effective joint custody are being deployed through far more discreet and veiled means. To document the move to privatization, I examine the body of reported Canadian case law from 1990 to 1993 as recorded in Reports of Family Law. I chose 1990 as the starting point for a number of reasons. First, the Federal/Provincial/Territorial Family Law Committee⁴⁷ under the federal Department of Justice, whose mandate is to review and report on any 'problems' within the Canadian family law regime, began its work in 1990 and submissions to the Committee will inevitably rely, to a large extent, on the same body of law. By

⁴⁶Pickett, supra note 43, 32.

⁴⁷Hereafter referred to as the Family Law Committee.

examining the same case law in a different light, I hope to offer an alternative view and establish a different set of priority issues than those set out thus far by the Committee.⁴⁸ Furthermore, a large proportion of Canadian feminist literature on the issue of custody was published in and around the late 1980s following the passage and implementation of the new Divorce Act.⁴⁹ As Carol Rogerson notes, many problems associated with judicial interpretations are

only intensified in a new law's first few years of existence, before appellate courts have had the opportunity to establish authoritative interpretations binding on trial courts - a process which takes longer in family law, where relatively few cases are appealed.⁵⁰

Moreover, feminists in Canada fought to prevent the adoption of a preference or presumption for joint custody largely in response to legal changes within the United States.⁵¹ The focus on joint custody as a formal order has not recognized the more subtle ways in which de facto joint custody, under a sole custody order, is being implemented. Those arguing against joint custody have cited numerous means by which it enables fathers/husbands to establish and/or continue control and domination of women after they have left a marital relationship. I hope to build on the existing feminist literature by providing an analysis that seeks to play out the findings of these scholars and develop connections to a larger

⁴⁸See Chapter Four, this volume, for a detailed examination of the work and findings of the Federal/Provincial/Territorial Family Law Committee.

⁴⁹Divorce Act, R.S.C. 1985 (2nd Supp.) c. 3.

⁵⁰Rogerson, supra note 4, 161.

⁵¹See supra note 37, for American states adopting some form of joint custody preference.

condition of privatisation.⁵²

Before turning to the case law, I must first qualify my findings with a recognition of the potential dangers of relying too heavily on reported cases. First, reported cases represent only a tiny segment of litigated custody actions and an even smaller segment of all the custody actions that pass through the courts. Private arrangements between parents that never reach lawyers or judges also add to the unrepresentativeness of reported cases. As well, since the process for selecting cases to report remains unclear, it is entirely possible that cases are selected because they are atypical or unusual.⁵³

On the other hand, as a data source, reported cases are not without their merits. Both lawyers and judges rely extensively on reported cases to guide decisions and advise clients. Furthermore, reported cases do provide a glimpse, albeit somewhat distorted, into the practice and application of legislation as well as any apparent biases held by particular judges. With small exception, all cases indexed under "custody and access" published in Reports of Family Law from 1990 to 1993, were examined.⁵⁴ These included original custody orders, original access orders, variations to or

⁵²It may be argued that privatisation as an economic mandate is now on its way out with the election of a Liberal government in November, 1993. However, considering the policies of the two major Opposition parties, as well as the Prime Minister's admiration of Premier Frank McKenna's social reform efforts in New Brunswick, this may be an overly optimistic view.

⁵³Rogerson, supra note 4, 158.

⁵⁴Cases involving custody and/or access disputes between parties other than parents, such as grandparent custody/access or extended family custody/access claims were not examined. There were six such cases reported.

enforcement of existing orders, interim orders, appeals and cases involving purely jurisdictional matters. In total there were 125 cases from which to draw information. Examining a wide variety of types of cases provided a potentially larger sample of the separating population since many variation cases stemmed from original consent orders and offered a glimpse into the ways in which some women are living with those initial orders. This point becomes crucial if feminists are to continue to locate effective strategies for change.

While the dangers associated with joint custody have been well documented by feminists, and the judiciary has, for the most part, been reluctant to impose it on unwilling parents, a different but related danger is emerging. Among the myriad of problems that arise with the recent case law, one key area presents itself as crucial to an understanding of how the privatization of family is being deployed and its subsequent negative effects. In the case of both custody orders and variations to existing orders, non-custodial parent (usually the father) access to children is the major issue of contention. In practically all the cases reported, paternal access is viewed by judges as paramount in the 'best interests of the child,' eclipsing virtually all other factors. A child's supposed 'need' for or 'right' to a father, irrespective of the quality or quantity of his parenting, has superseded virtually all other considerations. Thus while formal joint custody orders may not represent the arrangement of choice, the same terms for which joint custody is criticized are being imposed within the confines

of sole custody orders under the guise of paternal access. Like joint custody, liberal paternal access orders ensure the reconstruction of the nuclear patriarchal family, despite the physical reality of parental separation.

As a result, any judicial preference for sole custody orders, or a tendency not to award joint orders, is not necessarily cause for rejoicing. Although a sole custody order implies

that from a day-to-day point of view the best interests of the child lie with the child's being with the custodial parent⁵⁵

it does not necessarily translate into any more freedom for women from harassment or control at the hands of their former partners. In effect, even under a sole custody order, mothers' abilities to make decisions regarding their own and their children's lives are seriously curtailed. Despite their separation or divorce and the physical reality of living apart from a former spouse, many women are forced to endure restrictions placed on them by their 'ex.'

Restrictions and limitations are being placed on custodial mothers under the banner of "the best interests of the child" and his or her "right" to paternal access. This is most readily apparent when the custodial parent, usually the mother, wishes or attempts to relocate. With paternal access as the paramount consideration, mothers are finding it increasingly difficult to move their families if such a move would in any way lessen fathers' ability to exercise access. Despite a sole custody order, which allegedly affirms the ability of the custodial parent to act in the

⁵⁵Carter v. Brooks, intra note 56, 63.

best interest of the child(ren), mothers' mobility is subjected to either fathers' permission or court order.

In Carter v. Brooks⁵⁶, which has since been considered and applied in a number of mobility cases, the mother, who had earlier been awarded custody on consent, attempted to move from Ontario to British Columbia with her new partner and six-year-old son. The mother had custody of the son since the separation in 1984, at which time the son was eight months old. For the past three years, the father had exercised alternate weekend access, telephone calls and summer access. Upon notice of the mother's intent to relocate, the father applied for joint custody and for an order restraining the mother from moving. At trial, the joint custody order was dismissed and sole maternal custody reaffirmed, implying the mother's competent ability to make decisions concerning her child. The mother was nevertheless restrained from removing her son from the jurisdiction. Despite the economic advantages of the move and despite the mother's willingness to facilitate access, which included paying part of the father's travel expenses, the trial judge reasoned:

[T]here is a close relationship between Joel and his father, and that relationship would, of necessity, be negatively affected if the move of Joel to B.C. were to take place....

Given all the evidence here...I have concluded that, although there may be some potential economic benefit to Joel out of the move to British Columbia, the proposed move cannot be seen in any way as socially beneficial to him as it would be to remain in his present situation.⁵⁷

⁵⁶Carter v. Brooks (1990), 30 R.F.L. (3d), (Ont. C.A.), 53.

⁵⁷Carter v. Brooks, supra note 56, 58.

Inherent in the judge's decision is both the assumption of a negative effect of less frequent physical contact as well as an equation of physical proximity with close relationships. The mother appealed the lower court decision, arguing that the custodial parent had the right to decide where the parent and child will live. While the appellate court recognized and validated her argument, the appeal was dismissed. For the 'best interests of the child' test, Mr. Justice Morden valued the son's relationship with his father as paramount and even went so far to say that

It would appear that the trial Judge may have understated the matter when he said that the move would negatively affect the close relationship between the respondent and his child.⁵⁸

There are some decisions where the court has permitted a mother's relocation. For instance, in Levesque v. Lapointe,⁵⁹ the mother, who had remarried in 1989, applied to relocate from Vancouver to Calgary to enhance her and her husband's careers and to avoid the rising cost of housing in the Vancouver area. She had maintained primary care and residence of the two children since the separation in 1985. After two years of acrimony and extensive mediation, the parties agreed to a joint custody order with the father exercising alternate weekend and summer access.

The chambers judge found that the status quo should not be interrupted for reasons of mere career enhancement. He found that the children "suffered considerable trauma when the parents separated" and should not be forced to endure such trauma again.⁶⁰

⁵⁸Carter v. Brooks, supra note 56, 66. Emphasis added.

⁵⁹Levesque v. Lapointe (1993), 44 R.F.L. (3d), (B.C.C.A.), 316.

⁶⁰Levesque v. Lapointe, supra note 59, 323.

The nature of this "considerable trauma" was never revealed and apparently not raised by either party. While separation per se is often considered traumatic, with both separating parties receiving blame, it should be noted, that the father initially refused to pay any support and subsequently forced the matrimonial home, where his wife and children lived, into foreclosure.⁶¹

On appeal, it was found that the chambers judge had erred in the "considerable trauma" finding as well as the lack of notice paid to the reasons for the move. The mother and children were permitted to relocate in light of the fact that

The interests of the children are best served by being with the parent who has been primarily responsible for their care. The evidence supports the view that the appellant will ensure the continuing involvement of the respondent and his wife in the children's lives.⁶²

In another mobility case, while ultimately permitting the move, the judge reaffirmed the paramount importance of paternal access, despite evidence to suggest the access may not be beneficial to the child. In Fasan v. Fasan,⁶³ the mother was offered a position as an articling clerk with the Supreme Court of Canada upon completion of her law degree in Windsor, Ontario. In reaching a decision, Mr. Justice Granger recognized the bitterness and vindictive antics of the father, stating:

Mr. Fasan, from the evidence I heard, is still angry with his wife for having left the marriage. He continues to blame Mrs. Fasan's legal pursuits for the failure of the marriage and his exclusion from the matrimonial home. Mr. Fasan acknowledged that he had discussed the separation and the fact that he was

⁶¹Levesque v. Lapointe, supra note 59, 318.

⁶²Levesque v. Lapointe, supra note 59, 328.

⁶³Fasan v. Fasan (1991), 32 R.F.L. (3d), 121 (Ont. Gen. Div.).

no longer living in the matrimonial home with Brandon [the son]. Mr. Fasan has by his actions involved Brandon in his ongoing anger toward Mrs. Fasan....Mr. Fasan will continue, in my opinion to vent his anger at Mrs. Fasan for the failed marriage through Brandon."

Despite Mr. Justice Granger's obvious disapproval of Mr Fasan's behaviour, which also included stalking his former wife and calling her a 'sponge' for accepting child support, the inherent value of paternal access was reaffirmed in his order of frequent and liberal access to the father and restricting the child's residence to Ontario."

In far too many cases, custodial mothers' ability to decide the residence of their children is being subjected to non-custodial father's approval or court action." Whether or not judges

"Fasan v. Fasan, supra note 63, 127.

"Fasan v. Fasan, supra note 63, 133.

"Out of the 125 cases examined, 32 involved issues of mobility. The results are roughly evenly split between denying and allowing a mother's move. See Martindale v. Martindale (1990), 30 R.F.L. (3d), 229 (Man.C.A.); Staranowicz v. Staranowicz (1990), 30 R.F.L. (3d), 185 (Ont. Gen. Div.); Bagnell v. Bagnell (1991), 33 R.F.L. (3d), 165 (N.S. Fam. Ct.); Oldfield v. Oldfield (1991), 33 R.F.L. (3d), 235 (Ont. Gen. Div.); Burk v. Burk (1991), 34 R.F.L. (3d), 27 (Ont. U.F.C.); Leenders v. Fritz (1991), 34 R.F.L. (3d), 310 (Ont. Gen. Div.); Rempel v. Reynolds (1991), 34 R.F.L. (3d), 82 (Sask.Q.B.); Bajzat v. Bajzat (1991), 35 R.F.L. (3d), 59 (Ont. Div. Ct.); Kingwell v. Kingwell (1991), 35 R.F.L. (3d), 373 (Ont. Gen. Div.); Evanoff v. Evanoff (1991), 37 R.F.L. (3d), 393 (Sask. C.A.); Williams v. Williams (1991), 38 R.F.L. (3d), 100 (N.W.T.S.C.); de Medeiros v. de Medeiros (1992), 39 R.F.L. (3d), 274 (Ont. Gen. Div.); Koffler v. Hruby (1992), 40 R.F.L. (3d), 369 (Alta.Q.B.); MacInnis v. MacInnis, (1992) 40 R.F.L. (3d), 345 (Ont.U.F.C.); M.(C.) v. M.(G.) (1992), 40 R.F.L. (3d), 1 (Ont. U.F.C.); Vielle v. Vielle (1992), 41 R.F.L. (3d), 316 (Alta. Prov. Ct.); Welton v. Welton (1992), 42 R.F.L. (3d), 233 (Alta.C.A.); Zimmerman v. Zimmerman, (1992), 42 R.F.L. (3d), 264 (B.C.S.C.); Gillespie v. Gillespie (1992), 43 R.F.L. (3d), 84 (Ont.C.A.); James v. James (1992), 43 R.F.L. (3d), 189 (B.C.S.C.); Lueck v. Green (1993), 44 R.F.L. (3d), 206 (Y.T.C.A.); Szoke-Sieswerda v. Sieswerda (1992), 44 R.F.L. (3d), 152 (Alta. Q.B.); Brewer v. MacIntosh (1993), 45 R.F.L. (3d), 437 (N.B.Q.B.); Kingwell v. Kingwell (1993), 45 R.F.L.

eventually find in favour of the move, mothers nonetheless bear the burden of proof for the benefits of relocating.⁶⁷ Moreover, mothers are subjected to expensive court battles and legal fees, costs which they are more than likely unable to bear.

It may very well be that in some cases, maximum paternal contact is in the best interests of the child. However, a crucial point to bear in mind is that it has become the responsibility of mothers to facilitate such contact - at the expense of their own freedom. Turning the access issue on its head, we see that, either in case law or relevant legislation, there is nothing to prevent a non-custodial father from relocating away from his child or from choosing not to exercise his access rights. Alternatively, there has been no consideration of the father moving to where the child is to reside. Any alleged 'right' of the child to paternal contact hinges on a father's willingness to exercise access. This fact is obscured under the 'best interest of the child' test. While appearing neutral and benevolent, the 'best interests' test operates within a framework that prioritizes father's 'rights' of access.

Viewed in this light, the argument that paternal access is 'in the best interests of the child' loses its validity. In fact, the 'rights' of the child appear to have very little to do with it. Following the logic of much mediation literature, any

(3d), 242 (Ont. C.A.). Only one of these cases raised the issue of a custodial father's proposed move. See Hines v. Hines, 40 R.F.L. (3d), 274 (N.S.T.D.).

⁶⁷See Annotation, James G. McLeod in Carter v. Brooks, *supra* note 56, 55.

'reconstruction' of the 'binucleated' family is clearly taking place along the patriarchal lines that Pickett described.

Unfortunately, custodial mothers' mobility represents a much less dangerous point on the continuum that results from the prioritizing of paternal access. Cases involving allegations of wife abuse and/or child sexual and/or physical abuse show that paternal rights to children override both the best interests of the child and the welfare of the mother."

For instance, in Rezansoff v. Rezansoff," the parents separated in 1988 due to the father's abuse of the mother. The divorce was not contested. The mother initially left the marital home without her children out of fear for her safety. Before trial, the children had resided with the father throughout the week and with the mother on weekends. The mother then applied for residential care and control of the three children under de facto joint custody. In deciding to award joint custody, with primary care and control to the mother, Judge Carr reasoned:

My impression of the mother is that she is an interested, loving, and capable mother. She is committed to her children and impresses me as being stable, honest, and hard-working. My impression of the husband is less favourable. He has some propensity to be violent (the evidence of an "attack" on his wife went unchallenged), he has a history of moving residences frequently, an unstable work history, and his life-style is

"In all but two cases involving allegations of child abuse, mothers have made the allegation against fathers. There is not one case in the reported body of law that alleges a mother's abuse of a child. In cases where fathers or other parties raise the allegation, the alleged abuser is a male relative to the child or a mother's new partner. It is therefore entirely appropriate to discuss and analyze this issue in gender-specific terms.

"Rezansoff v. Rezansoff (1991), 32 R.F.L. (3d), 443 (Man. Q.B.).

hardly a good example for young children. Indeed, his work history and life-style are responsible for no less than 17 moves from the date of the marriage to the date of trial, and I do not believe that he is now in his permanent home and that he will shortly be employed. I do not mean to be saying that he is either a bad person or a bad parent, but by comparison to his wife, his plan is second best.⁷⁰

The report does not clarify whether the mother desired joint custody or whether the previous situation made joint custody the most logical choice for the judge. In any event, the husband's abuse of the mother was not considered relevant and little credence was given to the effect on children of witnessing or living in an environment where abuse of their mother was taking place." Paternal rights took priority over the safety and security of the mother and her children.

In Savidant v. MacLeod,⁷² Judge Mullally is less discreet about his views on paternal rights. The father had served twelve months for assaulting the mother and related charges, including seven charges of uttering threats to cause death. Following his release on day parole, he applied for access to the son. He argued that he currently held steady employment and was overcoming his addiction to alcohol and drugs with the assistance of Alcoholics Anonymous. The mother, who now works with battered women, stated that she feared for her and her son's safety and that during their

⁷⁰Rezansoff v. Rezansoff, supra note 69, 444. Emphasis added.

⁷¹For research pertaining to the relationship between wife abuse and custody determinations, see Daniel G. Saunders. "Child Custody Decisions in Families Experiencing Woman Abuse." Social Work. 39 :1 (January, 1994), 51-59; and Lorene M.G. Clark. "Wife Battery and Determinations of Custody and Access: A Comparison of U.S. and Canadian Findings." Ottawa Law Review 22:3 (1990), 691-724.

⁷²Savidant v. MacLeod (1991), 32 R.F.L. (3d), 266 (P.E.I.S.C.).

relationship, the father was rarely under the influence of alcohol or drugs when he was violent. Judge Mulially apparently disregarded her statements and chose to focus on the father's recovery from addiction. He found that

Mr. Savidant has served his criminal sentence and completed his parole period. He has taken counselling, received steady employment, and, I am satisfied, refrained from alcohol and drugs. He now wishes to see his son, **which he has the right to do.**⁷³

The father was granted two hours of access per week, to be supervised by a probation officer, as his parole order stipulated. Access was to increase as time passed.

Cases involving jurisdictional matters also demonstrate the belief in the paramount importance of paternal access. In Staranowicz v. Staranowicz,⁷⁴ the mother, who had custody of the children on consent, had previously petitioned and been granted a divorce in 1983 on the grounds of physical cruelty. The divorce went uncontested. In 1990 she took the children to British Columbia, where her family resided, after telling the father that she was vacationing in Arizona. Upon learning of the mother's move to British Columbia, the father applied for the return of the children to his custody in Ontario, or alternatively that an assessment be conducted for the purposes of a trial on the issue of custody. The mother then applied for a transfer of proceedings to British Columbia, arguing that the children were more substantially connected to British Columbia; the children were close to their

⁷³Savidant v. MacLeod, *supra* note 72, 269. Emphasis added.

⁷⁴Staranowicz v. Staranowicz (1990), 30 R.F.L. (3d), 185 (Ont. Gen. Div.).

maternal grandparents and were currently enrolled in school. She also objected to the father's request for a trial, arguing that she had been granted custody on consent and had been responsible for the children since 1983. There was also no mention by the father of any lack of fitness on the mother's part. With respect to the father's physical cruelty of the wife, Judge West stated:

The respondent claims that she agreed to access at the time of the decree nisi only because she then feared her former husband. If this were the case, then she should have moved at the earliest opportunity for an order varying the terms of access.⁷⁵

Judge West then denied the application for a transfer of proceedings and granted the father's request for a trial. An assessment was ordered, the associated costs of which were to be borne by the mother. In reasoning, Judge West stated:

In this respect, the Court is of the view that the examinations for discovery and the assessment should, as much as possible, be conducted simultaneously. The assessor should be located in Ontario as he or she will have to give evidence at trial. The respondent and the children should come to Ontario for a sufficiently long period of time for meaningful access to occur and a meaningful observation to be made of interaction between the applicant [father] and the children. This arrangement will place some additional burden on the respondent to engage counsel in Ontario for the examination and to provide for her own transportation and living expenses while in Ontario. Under the circumstances, I do not consider this to be an unreasonable burden since the proceeding was precipitated by her action in the first place and she has demonstrated continued defiance of the Court's order of access.⁷⁶

It is evident that Judge West sought to punish the mother for her actions. Incidents of violence by the father, reported in affidavits before and after the decree nisi, were completely

⁷⁵Staranowicz v. Staranowicz, *supra* note 74, 189.

⁷⁶Staranowicz v. Staranowicz, *supra* note 74, 191.

disregarded. Psychiatric reports attributing problems experienced by the children to the father were also ignored, despite statements by the children, aged thirteen and eight, that they did not wish to see their father. The court held that their wishes "can only be because of manipulation of the children by the respondent or other persons acting in her interest."⁷⁷ The only basis for a trial of issue was the mother's disruption of paternal access.

Conversely, in Hiscocks v. Marshman,⁷⁸ the mother had received sole custody of the child in California. During an access visit with the father in Ontario, the thirteen year old girl expressed wishes to remain with the father. The father then petitioned the Ontario court for a variation to the custody order. The court respected the child's wishes and granted the father the variation. No mention was made of any potential manipulation on the part of the father.

In a similar jurisdictional case,⁷⁹ an earlier joint custody order in New York State gave residential care and control to the mother and granted her request to live to Ontario. She then moved from Ontario to Manitoba, to follow her new husband's employment, without properly notifying the father. The husband's employment opportunity had come up suddenly; one day following his interview, he commenced employment. The mother argued that she was not afforded the time to take the necessary legal steps to permit the

⁷⁷Staranowicz v. Staranowicz, supra note 74, 188.

⁷⁸Hiscocks v. Marshman (1991), 34 R.F.L. (3d), 12 (Ont. Gen. Div.).

⁷⁹Mackay v. Hough (1991), 33 R.F.L. (3d), 218 (Man. Q.B.).

move. The father then claimed and obtained custody in the state of New York and had the order enforced. The mother lost custody and was to return the child to the father upon completion of the child's school year.⁸⁰ No attention was paid to the care provided by the mother since the separation in 1987 and it was not considered against the child's best interests to change her primary residence or her primary caregiver.

A comparison of these last three cases suggests the values and assumptions at work in the judiciary. A different set of standards were applied to the mothers than the fathers. A father attempting to vary a custody order is only acting in the child's best interest. A mother, on the other hand, could only be acting in her own interests since, it is assumed, limiting paternal access goes against the child's interest. With paternal contact so highly prioritized, the best interests of the child were subsumed under an apparent desire to punish mothers.

Similarly, the over-emphasis on safeguarding paternal access has led to an apparent unwillingness on the part of judiciary to accept mothers' allegations of abuse. In a number of cases, allegations of wife and/or child abuse were raised by the mother and in most cases, those allegations were deemed false or unsubstantiated.⁸¹ As a result, children were either placed in the

⁸⁰Mackay v. Hough, supra note 79, 225-226.

⁸¹Out of the 125 cases, 28 cases involved allegations of child sexual and/or physical abuse. In 26 of those cases, mothers accused fathers of abuse. Out of those 26, 18 were deemed groundless. For cases not listed in text, see B., Re, 31 R.F.L. (3d), 219 (Ont. Prov. Div.); L. v. L., 31 R.F.L. (3d), 320 (Ont. Gen. Div.); Burk v. Burk, 34 R.F.L. (3d), 27 (Ont. U.F.C.); Nickerson v. Nickerson,

custody of their alleged abuser or forced to endure access visits with him.

In Brigante v. Brigante,⁸² the mother, to whom custody of the child had been awarded on consent, sought to restrict the father's access and obtain permission to move from Hamilton to Ottawa. At the time of the divorce action, the mother informed the court that she had been abused by her former husband. Because she had not reported this abuse to the police, the judge held that the abuse did not occur. The mother had previously left the father one year prior to their final separation and told her sister of the abuse. As well, after being ordered into mediation, the mother had told the mediator of the abuse. Still the judge found the allegations to be groundless:

Considering the fact that the applicant struck me as being an intelligent and fairly articulate person who subsequently demonstrated a knowledge of helping institutions and a willingness to use them, I find it strange that she did nothing to report the violence that she says she was suffering.

...

34 R.F.L. (3d), 341 (Ont. Gen. Div.); Kingwell v. Kingwell, 35 R.F.L. (3d), 373 (Ont. Gen. Div.); S. (B.A.) v. S. (M.S.), 35 R.F.L. (3d), 400 (Ont. C.A.); M. (C.) v. M. (G.), 40 R.F.L. (3d), 1 (Ont. U.F.C.); Plesh v. Plesh, 41 R.F.L. (3d), 102 (Man.Q.B.); Strobridge v. Strobridge, 41 R.F.L. (3d), 154 (Ont. Gen. Div.); Gillespie v. Gillespie, 43 R.F.L. (3d), 84 (Ont.C.A.); Larocque v. McComb, 43 R.F.L. (3d), 185 (Ont. Gen. Div.); R. v. Adams, 44 R.F.L. (3d), 109 (Ont. C.A.); S. (P.I.) v. S. (M.), 44 R.F.L. (3d), 210 (B.C.C.A.); Hodgins v. Hodgins, 45 R.F.L. (3d), 75 (Ont. Gen. Div.); Kingwell v. Kingwell, 45 R.F.L. (3d), 242 (Ont. C.A.); B. (L.A.) v. B. (K.L.) (1993), 46 R.F.L. (3d), 316, (B.C.S.C.). There were nine cases involving wife abuse, six of which overlap with child abuse allegations. In cases involving only wife abuse, the abuse was substantiated either via criminal convictions or grounds for divorce.

⁸²Brigante v. Brigante (1991), 32 R.F.L. (3d), 299 (Ont. U.F.C.).

The allegations of severe abuse appear to have arisen during the course of this litigation and since she has decided to move to Ottawa with her new partner. The only reason she gave for not reporting the abuse to somebody was that she thought it had been "her fault." This Court is well aware that it is not unusual for the "battered wife" not to report to authorities, but in the circumstances here, I have a great deal of difficulty in accepting her evidence with respect to the alleged violence. The respondent's evidence is one of total denial of abuse of the applicant."⁸³

As the court denied the existence of abuse, it was not in any position to be sensitive to the effect on the child of living in an environment where his mother had been abused, nor was the court in any position to recognize the mother's potential fear of continued assault under a frequent and liberal paternal access order. Unfortunately, the court's lack of attention to wife abuse is not where the insensitivity stopped. Brigante v. Brigante also involved allegations of child abuse.

One year following the separation, the mother began to have concerns that the father had been abusing their son, Nicholas. She took Nicholas to her family doctor who, in turn, reported the incident to the Children's Aid Society. The Children's Aid Society worker then interviewed Nicholas and decided to refer him to a play therapist for further assessment. The play therapist confirmed the allegations of abuse and stated:

It is my considered opinion that without immediate intervention that is geared towards creating a sense of security, safety and emotional containment for Nicholas, he is likely to be at risk for emotional damage and more severe adjustment problems in the long term."⁸⁴

In order to preserve "both Nicholas' rights of protection and

⁸³Brigante v. Brigante, supra note 82, 301-302.

⁸⁴Brigante v. Brigante, supra note 82, 304.

safety as well as father's parental rights," the therapist recommended supervised access.

Finally, an independent assessment with respect to custody and access was prepared for the court by Dr. David Faux. Dr Faux interviewed Nicholas, the father, the mother, the father's fiancée and the mother's fiancée. He similarly found a probability of abuse and recommended limited and supervised access. Despite all of the reports, Judge Beckett found:

In the final analysis, I have concluded that no abuse of the child by the father has, in fact, taken place, and whatever the explanation for his [Nicholas] misbehaviour in the presence of his mother may be, this behaviour does not flow from any abuse by the father.

In the result, I am of the opinion that access to Nicholas should be frequent and liberal.⁸⁵

In the reasoning, Beckett U.F.C.J. believed that each assessor who became subsequently involved in Nicholas' case relied too heavily on the findings of the previous assessor and thus did not approach the case fairly. With respect to the mother's relocation, the judge also denied her request, applying Carter v. Brooks.⁸⁶ The relative proximity of Hamilton and Ottawa and the subsequent relative ease of rearranging paternal access visits were not considered.

Similarly, in Colley v. Colley,⁸⁷ the mother, who had also been awarded custody of the children on consent, wished to relocate from Hamilton to Kemptown, Nova Scotia. She alleged that the father had been abusive to the children, particularly the older child, Brennan. Brennan, who was six years old at the time of the

⁸⁵Brigante v. Brigante, supra note 82, 306.

⁸⁶See supra note 56.

⁸⁷Colley v. Colley (1991), 31 R.F.L. (3d), 281 (Ont. U.F.C.).

judgement, required therapy for his aggressive behaviour and hair loss but this was apparently not considered relevant. Furthermore, after serious aggressive outbursts and verbal threats by the father, the judge issued a restraining order against him, from the mother and her partner.

Despite Judge Steinberg's recognition of the father's violent behaviour, he denied the mother's request to move, finding that

While I am mindful of the respondent's aggressive behaviour towards her [the mother], which he has admitted, and the threatening outbursts when frustrated, I cannot accept her allegations of abusive behaviour towards the children by her husband. Having said this, I do not mean to say that she had deliberately lied. I believe that to justify her eventual uprooting of herself and the children, she has managed to convince herself that her husband's conduct was so bad as to justify this drastic step of separating him from his children.⁸⁸

Among other things, what is interesting to note about Judge Steinberg's words is his reference to "the children" when referring to the mother and "his children" when referring to the father. Through a simple choice of language, Steinberg U.F.C.J. has revealed his bias for paternity - at the expense of both the mother's freedom and the welfare of the children.

The prioritizing of paternal rights to children on the part of the judiciary has led to the belief/assumption that mothers will risk the welfare of their children and lie in court in order to secure custody of their children and spite their former spouse. The same critical stance is not applied to fathers. Not surprisingly, faced with the flurry of social science research claiming the

⁸⁸Colley v. Colley, supra note 87, 284.

'damage' to children of absent fathers, coupled with the 'new fatherhood' myth and the claims of the fathers' rightists, it is no wonder that mothers fare so poorly in custody and access cases.

For instance, in Bartlesko v. Bartlesko,⁸⁹ the trial judge awarded custody of the two children to the father, despite allegations by the mother of sexual abuse of the girls and despite the mother's interim custody of the children from the time of separation in 1985 until the trial in 1989. The mother's allegations of abuse were not raised in the context of the custody dispute but began at least one year prior to date of the trial. Nevertheless, the trial judge found the mother to be "rather manipulative and inclined to depart from the truth when it suits her."⁹⁰ Specifically addressing the issue of abuse, Mr. Justice Drake stated:

After much reflection upon the evidence I heard and study of the numerous reports of experts on this matter of sexual abuse, I have concluded that the allegations are groundless. In view of the mass of material which at first blush supports these allegations, I cannot leave the question with a bare answer."

In dismissing the allegations, he preferred the testimony of the father to that of the mother and found the allegations to be groundless.

The mother then appealed, arguing that insufficient or no weight was given to the testimony of the children and her expert witness. Mr. Justice McEachern dismissed the appeal, holding that

⁸⁹Bartlesko v. Bartlesko (1990), 31 R.F.L. (3d), 213 (B.C.C.A.).

⁹⁰Bartlesko v. Bartlesko, supra note 39, 215.

⁹¹Bartlesko v. Bartlesko, supra note 89, 216.

the trial judge had not erred in finding that no abuse of the children had occurred. Moreover, concerned with the disruption of the children's lives, McEachern J.A. found that

Since October 1989, these children have been living with their father and they are doing well in school....[I]t does not appear to me that we could interfere with the conclusions of the learned trial judge.⁹²

Apparently the learned trial judge gave no similar consideration to the four year interim in which the children were in the sole custody of the mother and the effect a disruption may have had on them at that time.

Similarly, in Lin v. Lin,⁹³ the father was awarded custody of the children, despite two independent assessment reports recommending custody to the mother and joint custody with care and control to the mother, respectively. Judge van der Hoop found the mother's allegations of sexual abuse groundless and described her in the following manner:

There is no doubt that Mrs. Lin [the mother] is an adequate care giver in the sense of feeding and clothing the children but in the broader area of care and affection, she has consistently placed her interests, rather than those of the children, first. She has, in fact, acted against the best interests of the children on a regular basis.

...

She has shown herself to be aggressive, obstinate and hostile. She coached the older child to repeat her allegations of abuse by Mr. Lin, which the boy later withdrew. She has deliberately cast obstacles in the path of access by Mr. Lin and has attempted to interfere in the children's relationship to him.⁹⁴

The mother subsequently appealed, arguing that her 'aggressiveness'

⁹²Bartlesko v. Bartlesko, *supra* note 89, 216.

⁹³Lin v. Lin (1992), 38 R.F.L. (3d), 246 (B.C.C.A.).

⁹⁴Lin v. Lin, *supra* note 93, 247-248.

was not sufficient grounds to deem her unsuitable for primary care. Mr. Justice McEachern found no error on the part of the trial judge and dismissed the appeal.

The argument that more and more allegations of abuse are entirely groundless has been made." Some psychiatric reports claim that anywhere from thirty-six to seventy-five percent of allegations of child sexual abuse raised in the context of custody disputes are entirely false." It is believed that the 'trump card' of child sexual abuse is increasingly being used by mothers to win sole custody orders. In outlining criteria to determine when a child should be believed, one psychiatrist notes the following:

False denials, therefore, are common, but false disclosures are rare. These do occur, however, in the following situations:

1. The child is "brainwashed" by a vindictive parent, usually the mother, who fabricates incest in order to punish the spouse by excluding him from further contact with the child....

2. The child is influenced by a delusional mother who projects her own unconscious sexual fantasies onto the spouse. These women truly misperceive the relationship between spouse

"See "Framing a Father Fails in Court," *supra* note 41.

"See, Arthur M. Green, "True and False Allegations of Sexual Abuse in Child Custody Disputes." Journal of the American Academy of Child Psychiatry. 25:4 (1986) 449-456: 36% of allegations are untrue. See also R. Brant and F. Sink, "Dilemmas in court-ordered evaluation of sexual abuse charges during custody and visitation." Paper presented at the 31st Annual Meeting of the American Academy of Child Psychiatry, Toronto, (October, 1984): "the non-custodial parent accused the custodial parent of brainwashing the child to make a false allegation of sexual abuse in three of four cases." See also Jessica Pearson, "Ten Myths About Family Law," Family Law Quarterly. 27:2 (Summer, 1993), 279-299. Her studies indicate that allegations deemed to be false occur no more frequently in the general population than in the context of custody and access disputes. Moreover, her studies indicate that allegations of abuse made by mothers against fathers represented only half the cases. Just as frequent were allegations against a step-parent, extended relative, etc..

and child, and are usually diagnosed as histrionic or paranoid personality disorders, or paranoid schizophrenics....

3. The child's allegations of sexual abuse are based upon sexual fantasies rather than on reality. This corresponds to Freud's early experience with adult hysterics whose powerful oedipal fantasies altered their perceptions and reality testing....

4. The child falsely accuses the father of incest for revenge or retaliation."

Green then outlines which behaviour demonstrated by a child is consistent with abuse and which is not. For instance, a child who is overly concerned with the mother's reaction to his/her response to questions by investigators is inevitably fabricating the abuse.

Unfortunately, the case law indicates that the problems associated with abuse go deeper than whether or not the mother and/or child(ren) are believed. For even in cases where abuse is believed, paternal rights are still affirmed.

For example, in P.(D.P.) v. P.(L.E.),⁹⁷ interim custody was granted to the father despite allegations of child sexual abuse made by the mother. Following the interim order, the Department of Social Services apprehended the children and returned them to the mother at which time the court varied the interim order, granting custody to the mother pending trial. Despite the seriousness with which the court treated the allegations of abuse, Gerwing J.A. also ordered that paternal access should continue and stated:

The father has had no access since December. This is also inappropriate. The father will be entitled to have access to the children on any Saturday and/or Sunday between now and the May trial date. If he wishes to exercise his right, he is to notify the mother by telephone the day before. His access will be restricted to the hours between 9 A.m. and 7 P.M. on any

⁹⁷Green, supra note 96, 451-452. Emphasis added.

⁹⁸P.(D.P.) v. P.(L.E.) (1992), 39 R.F.L. (3d), 302 (Sask. C.A.).

day he chooses to seek such access. While we are cognizant of the difficulty of a parent from out of town being restricted to these hours, the circumstances of the allegations and the history of his not having seen the children for over four months suggest that a gradual reintroduction of this nature would be appropriate."

Suspension of access until the trial, only four weeks away, was not considered an option, nor was supervised access. Rather, the rights of the father to see the children overrode the children's right to safety and well-being.

In H. v. J.,¹⁰⁰ the mother separated from the father over the son's complaints of sexual abuse at the hands of the father. Subsequent evaluations by police, social workers, and psychologists corroborated the son's allegations. Abuse of the daughter was also suspected, but could not be confirmed by the assessors. The judge found that abuse, at least of the son, did occur and granted custody to the mother. The mother had requested restricted access but Mr. Justice Gagne, citing the 'maximum contact' principles of the Divorce Act,¹⁰¹ concluded:

From this I come to the conclusion that the Divorce Act, 1985, believes that access to the non-custodial parent is important to the children. There is an order for supervised access to the respondent on June 22, 1990. In this matter there will be an order that the petitioner have custody of the two children of the marriage and that the respondent have supervised access to the children for a 2-hour period, once per week. It would be very desirable to have grandma [maternal] supervise the access as it is a place where the children felt comfortable and where the children have exercised access to their father after January 9, 1990 [date of separation].¹⁰²

⁹⁹P.(D.P.) v. P.(L.E.), supra note 98, 304.

¹⁰⁰H. v. J. (1991), 34 R.F.L. (3d), 361 (Sask. Q.B.).

¹⁰¹Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, s.16(10). See preceding text, supra pp. 47.

¹⁰²H. v. J., supra note 100, 366.

Restricting access altogether was obviously too drastic a step for Mr. Justice Gagne to take, despite the children's fear of their father and their reluctance to spend time with him. Moreover, while the maternal grandmother was willing to provide supervision, the court placed upon her an unreasonable burden, leaving her ultimately responsible for the safety of her grandchildren.

In the most distressing case of Carlson v. Carlson,¹⁰³ a lower court awarded custody to the father despite documented and uncontested evidence of abuse of both the wife and the four children. Moreover, in the interim after separation and before the lower court decision, the mother had custody of the children for two years. At the initial trial, allegations of sexual abuse were raised by the mother. The circumstances concerning the allegations of abuse began during the time of the mother's interim custody. Following an access visit by the father, blood was found in the three-year-old daughter's underpants. The mother notified a school counsellor and an investigation was conducted by the Ministry of Housing and Social Services. Despite the conclusive findings of the social worker, the trial judge stated that the mother's allegations were made "for some motive other than in the best interests of the child, perhaps as a tactic to obtain custody."¹⁰⁴ Relying solely on the report of Family Court counsellor, Ms. Jan Pikula, the trial judge reversed the interim custody order that had been made on consent and awarded custody to the father, stating:

¹⁰³Carlson v. Carlson (1991), 32 R.F.L. (3d), 383 (B.C.C.A.).

¹⁰⁴Carlson v. Carlson, supra note 103, 387.

Many witnesses testified as to the capacity of each parent as a raiser of children. Those called for Mr. Carlson were particularly impressive. They agree with the unequivocal recommendation of Ms. Jan Pikula, who investigated the family and reported to the Court, that Mr. Carlson is the more suitable parent to have custody of the children. Ms. Pikula's assessment of Mrs. Carlson as a parent is one which, after the trial, I agree. She is less likely than Mr. Carlson to provide that stability of home life which is an essential need for these children if their best interests are to be furthered, as they must be.¹⁰⁵

Mr. Justice Drake dismissed the allegations of abuse with only a few words:

There have been allegations which I categorize as vague and unsubstantiated of abuse of the two younger ones by Mr. Carlson.¹⁰⁶

On appeal, which was heard some eight months later, the decision was reversed and custody was awarded to the mother on the grounds that

- (1) The trial Judge erred by disregarding the principle of maintaining the status quo.
- (2) The trial Judge made serious errors of fact.
- (3) The trial Judge disregarded, misconceived, misapplied, and gave insufficient or no weight to the evidence of witnesses Hamilton [intake worker with Family Violence Project], Schroeder [Discovery House worker], Bryson [social worker], Cross and Zachary.¹⁰⁷

Despite the eventual removal of the children from their father, the elapsed time between the trial and the appeal put the children in real danger of risk for a period of eight months. Moreover, the case did not end on an entirely positive note. Despite the conclusion of the appellate court that abuse had indeed occurred, there is virtually no mention of access. There is no mention of the

¹⁰⁵ Carlson v. Carlson, supra note 103, 388.

¹⁰⁶ Carlson v. Carlson, supra note 103, 305.

¹⁰⁷ Carlson v. Carlson, supra note 103, 388.

social worker's recommendations that paternal access be restricted and/or supervised. It is fairly safe to assume that paternal access was granted considering the statement by Madame Justice Proudfoot that "Access will flow more smoothly once Mrs. Carlson has custody."¹⁰⁸ Even where allegations of abuse were the deciding factor in reversing a custody decision, the father's 'right' of access is not denied.

The cases involving abuse allegations point to serious and disturbing trends both within the judiciary and within psychiatric circles. Although I have chosen to focus on the issue of paternal access, I do not mean to suggest that this is the sole problem with abuse allegations. While it is not within the scope of this research to enter into debate with psychiatric theories, suffice it to say that they are extremely problematic. Not only does Green's language reveal an anti-mother bias, it also relies almost exclusively on Freudian theories that have been seriously called into question in a variety of disciplines. Similarly, there is evidence to suggest that the judiciary has singled out mothers, who raise allegations of abuse by fathers, to mistrust. The same lack of trust is not afforded to fathers who make allegations.¹⁰⁹

The criticisms levelled by feminists at joint custody presumptions and the 'friendly parent rule' have been validated.

¹⁰⁸Carlson v. Carlson, *supra* note 103, 392.

¹⁰⁹Cases involving allegations made by a father against a mother or a mother's relative have resulted in a change from maternal to paternal custody. See H. (E.A.) v. H. (R.F.), (1991) 37 R.F.L. (3d), 446 (N.S. Fam. Ct.); Millar v. Millar (1992), 41 R.F.L. (3d), 193 (Alta. C.A.), (decision reversed and custody to mother returned on appeal).

These problems are not exclusive to joint custody arrangements but can just as easily occur under sole custody orders. The case law points to the overwhelming priority given paternal rights to children.

Ultimately, the problems associated with paternal access are borne by mothers. In situations where paternal access is desired by custodial mothers and their children, mothers are forced to bear the entire responsibility for child care if that access is not exercised. Conversely, if de facto limited access occurs due to a mother's relocation, the burden of proof of the benefits rests entirely on the mother. Despite a sole maternal custody order, which implies consensus on the part of the father and/or the judiciary that she is a competent parent, able to make decisions regarding her children, she is faced with a potential court action that disregards that competence and forces her to prove the benefits for the children of her choice. Similar burdens of proof are not required by fathers who seek to restrict a move.

In the case of child sexual and/or physical abuse, the prioritizing of paternal access rights has had devastating effects. Mothers' attempts to restrict paternal access are consistently viewed as selfish and vindictive, or based on exaggerated or unfounded claims. The 'best interests of the child' become the rights of the father to exercise authority over his children and subsequently, his former wife. In many situations, this authority or control can be far more pervasive after separation than during the spousal relationship. Even in spousal relationships relatively

free from a gender hierarchy, upon dissolution, the family law regime has re-created the opportunity for paternal/patriarchal authority and control to flourish. Such a notion stands in stark contradiction to the 'clean-break' principle of the Divorce Act.

The steady rise of women's participation in the paid labour market combined with growing divorce rates and the growth of single-parent households demonstrates that the membership of many families no longer reflect dominant ideologies of 'family' nor the 'father-mother-children' model. A growing number of women/mothers live outside direct male authority (ie. outside the patriarchal heterosexual nuclear family). Prioritized paternal access is one means by which the family is 'reconstructed' in its 'binucleated' form. In the process of 'reconstruction,' individual male authority in the household is (re)established and the 'family' is re-privatised.

Ongoing privatization efforts outside of family law serve to reinforce or at least inform judicial decision-making. Regressive reform policies, combined with phenomena such as the rise of neo-fascism, the "Pro-Family" movement and fathers' rights groups help to sustain a backdrop against which privatising, 'reconstructing' tactics occur within family law. Privatization, in all its insidious forms, constitutes a system of domination that continues to oppress women in general and, in this case, mothers specifically.

I must make plain however, that I do not see these actions as consciously and deliberately, or even unconsciously organized. In

postmodern fashion, my desired end is not to develop a grand theory, but rather to locate areas in which oppressive tactics are deployed. In Foucauldian fashion, a complex web of coherent practices need not point to a 'headquarters' in order to be effective and oppressive.

The privatising effect of prioritized paternal access also tends to shift focus away from political practices and onto individual problems among separating parents or, at best, biases among judges. In fact, the problems are far more political (public) than individual (private). Privatization tactics and their potentially de-politicizing effects become even more apparent when analysis of custody and access disputes are viewed in tandem with issues surrounding child support. It is to this issue that I will next turn.

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Chapter Three

The Private Responsibility of Child Support

For roughly the last decade, much has been made of the issue of child support in Canadian social life. No doubt in part due to skyrocketing divorce rates and the recognition, albeit superficial, by the state of concepts such as the 'feminization of poverty,'¹ not to mention feminist critiques of women's post-divorce economic situations, child support has arisen as a major contemporary social issue. Much like the custody issue, media coverage has increased, enforcement legislation has been enacted at both the federal and provincial level, and multi-level government departments have recently joined forces to examine 'the problem.'

Feminist work can no doubt take at least partial credit for this heightened public awareness. Lenore Weitzman's explosive work, The Divorce Revolution, is perhaps the most well known example of studies that point to the potentially devastating economic effects of divorce on women and their children. Her study of divorced families in the United States concluded that, following divorce, women's standard of living will decrease up to 73% while men's

¹See Mary Jane Mossman and Morag MacLean. "Family Law and Social Welfare: Toward a New Equality." Canadian Journal of Family Law. 5:1 (Summer, 1986), 79-110.

standard of living will increase up to 42%.² In Canada, Carol Rogerson's study of reported spousal and child support cases, since the amendments to the Divorce Act,³ concluded that, upon divorce, women's economic situation falls to anywhere from 40 to 80 per cent of that of their former spouse.⁴

The problems identified in studies such as Weitzman's and Rogerson's can be grouped into two critical areas: one concerns judicial problems such as inadequate levels of awards and lack of payment enforcement.⁵ Second, although by no means less important, is a recognition of more fundamental and structural inequalities facing women such as women's unpaid work, lower paid wages, and uneven divisions of labour within the home.⁶ Judicial problems associated with quantum of awards are currently under study by the Canadian government and enforcement legislation has been enacted in virtually every province in Canada.⁷ These efforts, at least to

²Lenore Weitzman. The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America. New York: Free Press, 1985. 323.

³Divorce Act, R.S.C. 1985 (2nd Supp.) c.3.

⁴Carol Rogerson. "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part II)." Canadian Family Law Quarterly. 7:3 (May 1991), 274.

⁵Weitzman, supra note 2, 262-264. See also Susan Crean. In the Name of the Fathers: The Story Behind Child Custody. Toronto: Amanita P, 1988.

⁶I do not mean to suggest that structural inequalities are new issues nor were they first raised in studies such as Weitzman's and Rogerson's. Rather, in these studies, well-documented structural inequalities are recognized and incorporated into the analyses.

⁷See, for instance, British Columbia: Family Maintenance Enforcement Act, S.B.C. 1988 c. 3; Manitoba: The Family Maintenance Act, R.S.M. 1987, c. F20; New Brunswick: Family Services Act, S.N.B. 1980, c. F-2; Nova Scotia: Family Maintenance Act, R.S.N.S. 1989, c. 160; Ontario: Support and Custody Orders Enforcement Act, 1985, S.O. 1985, c. 6; Yukon: Maintenance and Custody Orders Enforcement Act, R.S.Y. 1986, c. 108.

some degree, should be applauded. Some women are receiving support payments, however minimal, and the burden of enforcement has shifted somewhat from the recipient to the state.⁸

Examining issues of child support in the context of an analysis of 'public' versus 'private' dichotomies as presented in Chapter One, two levels of analysis emerge. Recent legislative changes, judicial trends and state focus may be positive and beneficial on an individual level. For some women and their children, economic situations may improve.⁹ On a more structural level, these actions can be viewed as part of an overall process that re-replaces the 'family' squarely in the private sphere and maintains its patriarchal form.

The nature of this increased focus points to a crisis of meaning in ideological definitions of family. Material conditions such as the increased prevalence of 'family' forms outside the bounds of ideologically and state sanctioned marriage, that is mother-father-child(ren) combination, challenge, if not threaten, dominant definitions of 'family.' The nature of child support reform serves to re-privatise 'family' by shifting focus and responsibility away from structural inequalities and onto

⁸Although I have chosen to focus solely on issues surrounding child support, it should not be overlooked that spousal and child support are inextricably linked, since both contribute to the overall income of the mother. In my research, however, quantum of awards is not the issue at hand, but rather the privatising effects of child support legislation.

⁹1991 Census data indicates that twenty percent of all Canadian 'families' are lone-parent headed; the overwhelming majority of these are headed by women. See: Colin Lindsay. Lone-Parent Families in Canada. Ottawa: Statistics Canada, Ministry of Industry, Science and Technology, 1992. 10. (Draft copy).

individual parents. At the same time, this shift enables the 'family' to be reconstructed along familiar patriarchal lines.

In order to facilitate my analysis, I will be drawing primarily on three sources: federal and provincial legislation pertaining to divorce and child maintenance, child maintenance cases reported in Reports of Family Law from 1990 to 1993 and unreported and/or uncontested child maintenance cases collected from the Court of Queen's Bench, Family Division in Saint John, New Brunswick from December 1991 to March 1992. The data from these sources points to a material privileging of 'family' forms that adhere to the dominant model of 'mother-father-children.' In focusing attention on individual fathers and their child support responsibilities, the dominant model is enforced and 'family' is re-privatised.

I will begin with an examination of the 1985 Divorce Act¹⁰ as an example or prototype of the various acts under which child support is dealt. While many disputes are dealt with under provincial legislation, this piece of federal legislation covers all of Canada. Moreover, the new Divorce Act, commensurate with the Canadian Charter of Rights of Freedoms, sought to eliminate notions of gender-specificity and operate within a framework of 'equality.'¹¹ This legislation, and the judicial decisions that stem from it, offers insight into the deployment of privatization

¹⁰Divorce Act, supra note 3.

¹¹For discussion of feminist critiques of the principles of equality enshrined in the Divorce Act and the Charter, see Chapter Two.

tactics of which I speak.

With the 1985 Divorce Act came major revisions, not the least of which was the inclusion of explicit articulations governing the objectives of spousal and child support awards as well as the factors to be considered in deciding whether or not to grant an award, how much and for how long a period. Whereas the previous Divorce Act gave little guidance beyond what was considered "fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them,"¹² judges are now provided with four general criteria in awarding spousal support and additional criteria in awarding child support. The new law sought to eliminate 'fault' as a condition in ordering awards and to promote the economic self-sufficiency of both parties. Hence, the 'clean-break' principle arose. Respectively, sections 15(5), 15(7) and 15(8) of the Divorce Act outline the following objectives:

In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including

- (a) the length of time cohabited;
- (b) the functions performed by the spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of the spouse or child.

Dealing specifically with spousal support, section 15(7) states:

An order made under this section that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial

¹²Divorce Act, R.S.C. 1970, c. D-8, S.11(1).

consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Further criteria outline the principles in deciding child support awards in section 15(8):

An order made under this section that provides for the support of a child of the marriage should

- (a) recognize that the spouses have a joint financial responsibility to maintain the child; and
- (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation.¹³

In principle these objectives seem fair as they provide guidelines for interpretation that recognize women's systemic inequality in the paid labour force as well as women's unequal responsibility for home and child care and their subsequent increased economic inequality relative to their ex-husbands. Unfortunately, the potential of these objectives has thus far not been recognized in judicial decisions.

As Carol Rogerson notes in her 1990 study of reported cases following the changes to the Divorce Act, even with the relatively detailed exposition of objectives, varying underlying philosophies among individual judges have served to present no clear trend in how the legislative reforms are to be interpreted and judicial interpretations have widely varied.¹⁴ Moreover, Pask and McCall

¹³Divorce Act, *supra* note 3.

¹⁴Carol Rogerson. "Judicial Interpretations of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part 1)." Canadian Family Law Quarterly. 7:2 (February, 1991), 161-162.

point out that the new objectives have resulted in a necessity to establish a direct causal link between incidents within the marriage and the economic dependency of one of the parties (usually the wife), such as career sacrifices to care for children.¹⁵

While the above problems pertain more to issues of spousal support, it is important to recognize the difficulty in separating them from child support since both contribute to the overall economic situation of the custodial mother.

The courts, however, do distinguish between the two, both in theory and application. In fact, their respective underlying principles are in direct contradiction. While the "clean break" principle of section 15(7)(d) seeks to facilitate the physical, emotional and economic separation of divorcing people, principles of child support stress the continued and ongoing responsibility for children despite marital breakdown.

Such a fundamental contradiction in principles certainly warrants study and is part of the examination in Rogerson's work.¹⁶ My own research, however, seeks to examine solely the principles and application of child support guidelines and their negative effects on women. I begin with an examination of judicial decisions on issues of child maintenance reported in Reports of Family Law from 1990 to mid-1993.¹⁷ Not all cases recorded in the three year

¹⁵E. Diane Pask and M.L. McCall. How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support. Calgary, Alberta: Canadian Research Institute for Law and the Family, 1989. 50-51.

¹⁶Rogerson, supra note 14, 161.

¹⁷31 R.F.L. (3d) to 46 R.F.L. (3d) inclusive. 188 cases were indexed under the heading of 'children - maintenance.'

period were examined. Cases dealing specifically with issues of enforcement were not addressed.¹⁸ Also, cases involving purely jurisdictional or practice and procedural issues were not examined.¹⁹ What was left were cases involving initial, interim, and variation orders, as well as appeals. In total, there were one hundred and fifty-nine cases from which to draw analysis.

I must reiterate that there is a danger in relying too heavily on reported case law. Reported case law provides only a cursory and potentially distorted glimpse of child maintenance actions. Given the expense of litigation, only those parties with the economic means have real access to it, thus the income levels, as well as the levels of support awards, of reported cases tend to be higher than average.²⁰ Looking to reported cases reflects a further class bias since low income families may not proceed at all if there are no potential funds to be gained.

Given the potential unrepresentativeness of reported cases, I will also draw on empirical research to examine the situation of child support payment, or lack thereof, in a potentially more representative sample. In late 1991 the Department of Justice,

¹⁸Eighteen cases addressed only issues of enforcement. Cases involving enforcement in addition to other issues such as, for example, variation orders, were examined.

¹⁹A total of fourteen cases pertained primarily to issues of jurisdiction or practice and procedure.

²⁰Rogerson, *supra* note 14, 158. It should also be pointed out that looking to reported case law is not an entirely futile venture since, as Rogerson argues, "given the role of reported cases as precedent, they do constitute an important repository of information." 159. Moreover, non-litigated settlements occur within the shadow of the case law. See, for instance, Elizabeth Pickett. "Familial Ideology, Family Law and Mediation: Law Casts More Than a 'Shadow.'" *Journal of Human Justice* 3:1 (1991), 27-43.

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under the auspices of the Federal/Provincial/Territorial Family Law Committee,²¹ distributed questionnaires to the Courts of Queen's Bench in Saint John, New Brunswick.²² These questionnaires were to be completed by presiding Family Court Justices. The purpose of these questionnaires was, in part, to provide research on the levels of child support being awarded in order to attempt to determine a national minimum acceptable standard or formula.²³ The quantitative results of these questionnaires were tabulated by me during my term of employment with the Court of Queen's Bench, Family Division, in Saint John, New Brunswick.²⁴

Any conclusions drawn from both the case law and the questionnaires are not necessarily statistically relevant nor can they be said to represent the 'true picture.' Rather I hope to provide a glimpse into some of the current practices surrounding issues of child support. Even though the data from the questionnaires offer a window that reported cases do not, the information is derived from only one city in Canada and is based upon a very limited sample. For example, given the predominance of

²¹Hereafter referred to as the Family Law Committee.

²²Questionnaires were also distributed to Toronto, Vancouver, Edmonton, Calgary, Whitehorse and Yellowknife. See: Canada. The Financial Implications of Child Support Guidelines: Research Report. Ottawa: Federal/Provincial/Territorial Family Law Committee, May 1992. 2.

²³See Appendix I for sample questionnaire.

²⁴The data I am working from is specific to those questionnaires completed and collected by Mr. Justice Raymond Guerette, Court of Queen's Bench, Family Division, Saint John, New Brunswick. They refer to cases heard or read through affidavit from December of 1991 to March of 1992. It was in my capacity as his research assistant that I gained access to the data and it is with his express permission that I refer to it here.

English-speaking people in Saint John, cases involving francophone and/or Acadian women will be under-represented. While there may be little difference in the outcome of cases across the country, it would be wrong to assume such as fact. Moreover, my study does not even consider differences among the Common Law tradition and the Civil Law of Quebec.²⁵

With respect to reported cases, predominant trends are difficult to interpret because of the limitations of the data. For example, the fact that certain types of cases appeared with greater frequency may merely point to editorial decisions on behalf of Reports of Family Law rather than any distinguishable trends within the separating population at large. With this caveat, common characteristics are discernable and will be discussed.

Consistent with Carol Rogerson's analysis, there is a general acceptance on the part of the judiciary of the principles of child support articulated in the Paras v. Paras²⁶ decision. In Paras, Kelly J.A. reasoned:

Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred.

²⁵Marlene Cano shows in her comparative study of child custody cases in both legal regimes that, while differences in outcomes are only slight, underlying principles of law are dissimilar. She also notes that many scholars fail to recognize the two legal regimes, even when studies profess to speak for 'all of Canada.' See Marlene Cano. "Reflections on Recent Trends in the Analysis of Custody and Parental Authority in Canada." Canadian Family Law Quarterly. 10:1 (November 1993), 269-284.

²⁶Paras v. Paras, (1970) 2 R.F.L. 328, [1971] 1 O.R. 130, 14 D.L.R. (3d) 546 (C.A.).

...
Ideally, the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate portion by the parent not having physical custody.²⁷

Although Paras was decided prior to the Divorce Act, 1985, the Supreme Court of Canada endorsed its principles in 1987 in Richardson v. Richardson²⁸ and it has been recognized within the judiciary that the clarification of support objectives in the Divorce Act, 1985 is a codification of past practice.²⁹

Thus the factors governing awards of child support have not changed significantly since Rogerson's study was published in 1991. While Rogerson hesitates to make any definitive conclusions, she does note a considerable discrepancy between the acceptance of the Paras rule and/or the objectives outlined in the Divorce Act, 1985 in principle and the often less than adequate outcomes with respect to quantum of support.³⁰ For instance, she argues that while judges may often speak to the principles inherent in both Paras and the Divorce Act, 1985, they may set the total cost of raising children too low and/or apportion financial responsibilities with little

²⁷Paras, supra note 26, 331-332.

²⁸Richardson v. Richardson (1987) 1 S.C.R. 857, 7 R.F.L. (3d) 304, 17 C.P.C. (2d) 104, 77 N.R. 1, 38 D.L.R. (4th) 699, 22 O.A.C. 317 (C.A.).

²⁹For example, Trussler J., in Murray v. Murray (1991) 35 R.F.L. (3d) 449 (Alta.Q.B.), 453 states: "The approach suggested in Paras, supra, is embodied in the Divorce Act, R.S.C. 1985 (2nd Supp.) c.3, in s. 15(8)."

³⁰Rogerson, supra note 4, 274.

regard for the low income levels of custodial parents.³¹

No doubt, these problems continue. However, there is some evidence of a recognition on the part of the judiciary of some of the shortcomings of the accepted principles and objectives. For example, in Murray v. Murray,³² Trussler J. begins by citing the principle in Paras as outlined by Kelly J.A.:

[I]f the responsibility for the children is that of the parents jointly, neither one can justifiably expect to escape the impact of the children's maintenance. Ideally, the problem could be solved by arriving at a sum which would be adequate to care for, support and educate the children, dividing this sum in proportion to the respective incomes and resources of the parents and directing the payment of the appropriate portion by the parent not having physical custody.³³

Following, he recognized criticisms that a strict application of Paras might push the spouse with the lower income below a subsistence level. In order to rectify such a situation, Trussler J. stated:

However, any criticism can be overcome by deducting a subsistence amount from both the spouses' incomes before deciding the respective share of each spouse. This amount could be anywhere between \$1,000 for a family with a lower standard of living and \$1,500 for a family that enjoyed a higher standard of living.³⁴

³¹See Rogerson, supra note 4, 274. For cases in which child care costs were apportioned between parents see Bailey v. Nash, 36 R.F.L. 292 (Ont.Gen.Div.); Chelmick v. Chelmick (Cochlan), 41 R.F.L., 117 (Alta.C.A.); Elliot v. Elliot, 42 R.F.L., 7 (Ont.U.F.C.); Fitzgerald v. Fitzgerald, 36 R.F.L., 354 (Alta.Q.B.); Harrop v. Harrop, 37 R.F.L., 433 (Sask.Q.B.); Karakatsanis v. Georgiou, 33 R.F.L., 263 (Ont.Gen.Div.); Ma v. Ma, 37 R.F.L., 197 (Sask.Q.B.); Pawsey v. Pawsey, 38 R.F.L., 371 (Man.C.A.); Reda v. DiPietrantonio, 45 R.F.L., 456 (Ont.Prov.Div.); Skelton v. Skelton, 44 R.F.L., 87 (Man.C.A.); Vervoorst v. Vervoorst, 37 R.F.L., 178 (Alta.Q.B.); Weaver v. Weaver, 32 R.F.L., 447 (Ont.Gen.Div.).

³²Murray v. Murray, supra note 29, 453.

³³Paras, supra note 26, 332.

³⁴Murray, supra note 29, 453.

Similarly, in Stunt v. Stunt,³⁵ Hoilett J. chose to adopt the Paras formula as modified through Hutton v. Hutton.³⁶ Hoilett J. stated:

The Hutton formula, as it may be so described, determined that, where the disparity in incomes of the spouses was significant, the simple application of the Paras formula could work an injustice to the parent with the significantly lower income. It made sense in those circumstances to subtract from each parent's income the so-called subsistence level of income and use the remainders as the basis for establishing the ratios, based on which the parents, respectively, should be required to assume child support obligations.³⁷

While these particular cases reflect some improvement in the real application of the objectives of the Divorce Act, the criticisms levied by Rogerson, that levels are set too low, ratios do not take into account the overhead costs incurred by custodial parents nor the non-monetary costs of raising children still hold. As well, a closer look at unreported and/or uncontested cases reveals less optimism. For despite the promising wording of the Divorce Act and the refinement of the application of Paras, child support awards remain abysmally low and default in payment of those awards remains a major social problem.

The questionnaires completed by the Court of Queen's Bench in Saint John yielded a total of seventy-nine cases. A combination of litigated cases and consent orders initiated under federal or provincial legislation were reported. Results were tabulated

³⁵(1990) 30 R.F.L. (3d) 353 (Ont.Gen.Div.).

³⁶(1985) 48 R.F.L. (2d) 451.

³⁷Stunt v. Stunt, *supra* note 35, 365. For examples of similar cases in which the subsistence deduction was utilized see Bailly v. Bailly (1991) 36 R.F.L. (3d) 224 (Alta.Q.B.); Levesque v. Levesque, 38 R.F.L., 273 (Alta.Q.B.); Shackleton v. Shackleton, 46 R.F.L., 211 (Ont.Gen.Div.).

according to a number of factors.³⁸ The most disturbing finding was the percentage of award to the non-custodial parent's income. Regardless of whether the order for support was on consent or contested, the average non-custodial parent only paid out a measly 14.44% of his income in child support, ranging from a low of 3.57% to a high of 30%, with the majority falling in the 10% to 15% range.³⁹

In order to account for the possibility that consent orders may be lower than orders based on judicial decisions, results were tabulated factoring out consent orders. The result was that the average of award to non-custodial parent's income in contested cases was nominally lower (13.85%) than when results were tabulated together.⁴⁰ These findings represent a far cry from the principles of Paras and the Divorce Act.

First, despite the provision on the questionnaire for information regarding the income of the custodial parent, in only two cases was this information provided. Immediately this indicates the lack of importance given to the ability of the recipient to support her children. Second, in order for these awards to adequately reflect the objectives of the Divorce Act, we would have to assume that in virtually every case the recipient parent had a substantially higher income than the payor. Only then would the low child support ratio be warranted. Given what we know of women's

³⁸See Appendix II. Tabulated Results of New Brunswick Questionnaire.

³⁹Ibid.

⁴⁰Ibid.

economic situation relative to men in Canada, this is a difficult if not impossible assumption to make.

In defence of the findings, it has been suggested⁴¹ that low incomes of payors mean that the principles of the Divorce Act cannot be met, since not enough money exists to provide support. Such a problem certainly does exist and will be discussed in detail in the following text. Unfortunately, higher payor incomes do not reveal a higher percentage of awards. In fact, payors with incomes lower than \$1500 per month are burdened with the highest percentage of award to income.

The dismally low level of awards is precisely the issue being addressed by the Family Law Committee, for whom the information was gathered. Despite the ideals and principles outlined in the Divorce Act and Paras, awards for child support still rely heavily on the evidence of the Financial Statement.⁴² In contested cases, both parties are to complete a Statement and submit it to the Court in order to determine (1) the payor's ability to pay and (2) the recipient's (custodial parent) need. The primary factor at issue is the payor's ability to pay.⁴³ Part of the initiatives of the Family

⁴¹This suggestion was made to me in a conversation with Justice Raymond Guerrette of the Court of Queen's Bench, Saint John, New Brunswick.

⁴²See Appendix III for a sample Financial Statement used by the Court of Queen's Bench in New Brunswick.

⁴³Evidence of this fact is available via the questionnaires. The questionnaires allow opportunity for judges to record the income of the custodial parent. However, in all but two cases, this data was not available, thus attesting to its relative lack of importance in determining levels of support payments. Still, I must acknowledge that variation applications brought by non-custodial parents do not require a financial statement of the recipient.

Law Committee is to examine the extent to which the use of the Financial Statement undermines the objectives of child support. A wide array of expense and/or debt deductions are permissible, creating a situation whereby child support is determined based on the 'extra' or disposable income of the payor."

It must be noted that these questionnaires were completed using cases prior to the April 1992 amendments to the Family Services Act⁴⁵ of New Brunswick, which brought in automatic enforcement of support awards. This in part serves to explain the high percentage of enforcement orders (28%). Moreover, many of the variation orders occurred as counter motions or subsequent motions to a recipient's enforcement action, indicating that many payors only sought a reduction or suspension of support when court action forced them to pay." Prior to April 1992, any enforcement of a support award was the responsibility of the recipient. Family Court offices took no pro-active stance in securing payments and recipients were forced to bring defaulting payors to court in order to enforce a payment order. After an order had been enforced,

⁴⁵Canada. Child Support: Public Discussion Paper. Ottawa: Federal/Provincial/Territorial Family Law Committee, June 1991. 2-6.

⁴⁶New Brunswick. Family Services Act. R.S.N.B. 1973, c.60. am. 1991, c. 60, [C.I.F. 04-15-92].

⁴⁷In 23% or 18 of cases, downward or suspension variation orders were brought by payors in direct response to a recipient's enforcement action. This figure may not be an accurate reflection since other downward or suspension variations may have been initiated following the enforcement action and subsequently, would not be listed together.

little could prevent a payor from defaulting should he so choose." Not only was the burden of evidence placed on the recipient, but also the economic costs associated with bringing a case to Court, costs which single women with dependant children are perhaps the least able to endure."

Following legislative changes in April 1992, the New Brunswick Family Services Act now provides a quasi-pro-active means of enforcing payment of support. Rather than placing the onus entirely on the recipient, the new legislation now enables the Court Administrator to take action. Consider the following relevant sections:

s. 122.3(1)

Where a support order has been filed with the court under section 122.2, the person against whom the support order was made shall, within fourteen days after the filing of the support order, provide the court with the information required by regulation and shall

(a) make an arrangement with an income source, in accordance with the regulations, whereby the income source agrees to pay the money payable under the support order into court,

(b) request a court administrator to make a Payment Order under section 125, or

(c) file with the court security in the manner and amount set by regulation to secure payment of the support order.

s. 122.3(2)

If the person against whom a support order is made does not comply with subsection (1) within the time set by subsection (1), a court administrator may make a Payment Order under section 125 directing an income source to pay to the court the amount payable under the Payment Order.

s.122.4

"I use the male pronoun deliberately since the overwhelming majority of payors are men and the overwhelming majority of recipients are women.

"Child Support: Public Discussion Paper, supra note 44, 5.

A court administrator may on the request of the person against whom a support order has been made make Payment Order under section 125 directing an income source to pay to the court the amount payable under the Payment Order.

s. 125(8)

Where an income source fails or refuses to comply with the order, the court may enforce it by like proceedings as are applicable under the Provincial Offenses Procedure Act in the case of the failure or refusal to pay a fine.

It is hard to imagine such legislative amendments as having anything but a positive effect on single mothers. With this legislation in place, support awards will be paid, at least more often, and the onus on the recipient to instigate legal action has been largely removed.

Coupled with the ongoing study by the Family Law Committee as well as a slightly better application of the Paras formula, the child support horizon looks fairly bright. The recent amendments to the Family Services Act in New Brunswick shows real potential benefits for women. As Susan Crean argues, default rates in Manitoba prior to the enactment of the maintenance enforcement program in 1980, were as high as 85%. Following the legislation, default rates fell to a record 15%." Clearly then, the legislation has benefitted some women. But it has not come without cost. I have presented a somewhat optimistic and uncritical view of recent state attention to child support. It is to the potential disadvantages that I now wish to turn.

First of all, the reported cases disclose other patterns which point to a crisis in the judiciary of what constitutes 'family' and

" Crean, supra note 5, 46-47.

hence, who is entitled to support, who is responsible for its payment and which 'family' has priority. I am speaking of the frequency of child maintenance cases which raise issues of "in loco parentis" and those that seek to vary terms of prior orders based on second family commitments. Of the cases surveyed, twenty-one raised in loco parentis arguments and fifteen involved issues directly pertaining to second family responsibilities on the part of either the payor or payee or both.⁵⁰

The term "in loco parentis," loosely translated, means "in the position of the parent." Although the Latin phrase was stricken from the Divorce Act, 1985 and replaced with the phrase "stand[ing] in the place of a parent,"⁵¹ its concept and meaning have remained essentially the same. As well, index headings in Reports of Family Law continue to use the term, as do some judges. In Andrews v. Andrews,⁵² Vancise J.A. reasons:

The concept of in loco parentis, that is, standing in the place of the parent, or alternative parenthood, and the obligations which flow from it, grew out of the obligation or duty to provide for the support of one's child.

...
There is an element of intention required. The alternate parent has voluntarily, through his actions, placed himself in the position which a parent would occupy for the provision of support and guidance, and has assumed that obligation. In loco parentis indicates an intention on the part of the parent to fulfil the obligation and duty of the lawful parent of the child.⁵³

⁵⁰In fact, there were many more cases involving second families but it was only in these fifteen that second family responsibilities were directly used as an argument to vary support orders.

⁵¹Divorce Act, supra note 3, c.3 s.2(2)(a).

⁵²(1992) 38 R.F.L. (3d), 200 (Sask.C.A.).

⁵³Andrews v. Andrews, supra note 52, 206-207.

While there are many plausible explanations for the increased number of cases raising in loco parentis issues, not the least of which is the increasing social reality of 'blended families,' judicial responses to the issue have varied widely. Analysis of these types of cases can be conducted on a multitude of levels. First, interpretation of the legal definition of 'in loco parentis' implies that the prior intent of the step-parent is the paramount consideration, despite any material/financial commitment on the part of the 'new father.'

For instance, in Slama v. Slama, the respondent, Marian Jan Slama, argued that even after a five and half year marriage, he did not stand in the position of the parent because

Although the husband contributed financially to the child's support, he did not assume an active parenting role. He was away from home for extended periods for his work, and the child maintained an ongoing relationship with her father."⁴

In deciding the validity of the argument, Girgulis J. reasoned:

Step-parents, in relatively short and mid-term marriages, often do not do more than step into the financial shoes of the absent parent, wholly or partially. This does not mean that by doing so he or she steps into the place of the parent. He or she simply contributes to the household expenses, which include the child or children which the spouse brings with them. All of the authorities agree that something more is required before a court can find that a person has the status of in loco parentis or stands in the place of the parent. In these cases the step-parent may never achieve a real relationship of parent and child, particularly where the child is older or has an established, ongoing relationship with the absent natural parent. In such cases unilateral termination is valid because the marriage was the only reason that the person stepped into the shoes of the absent parent and, in fact, that kind of relationship ends with the separation of the husband and the wife; so should the requirement of support and the courts should recognize that. The general principle that a

⁴Slama v. Slama, (1991) 38 R.F.L. (3d), 187 (Alta.Q.B.).

voluntary assumed relationship of in loco parentis may be unilaterally terminated should be applied."⁵⁵

In the somewhat similar case of Laraque v. Allooloo,⁵⁶ where the parties were not legally married, but had two children together as well as the mother's two older children from a previous relationship, De Weerdts J. stated:

[T]he view that one can doff off the in loco parentis role at will disregards the primary regard which the courts must surely have for the interests of dependent children, and the duty of the courts to ensure that those interests are judicially protected, and not ignored, especially where those interests are not separately represented.

...

At the risk of being repetitious, it is well settled law that it takes a properly informed and deliberate intention to assume parental obligations for support of a child, on an ongoing basis, to bring the in loco parentis status in law into being. Given that premise, it is difficult to conclude that this status is meaningless or can be negated at whim whenever the person in loco parentis is visited by second thoughts on the matter or decides to abandon the project altogether.⁵⁷

While Judge De Weerdts paid service to the principle of the 'best interests of the child, the decision rested on a notion of the 'new father's' implied intent, based on the history of the relationship. Implicit in Judge De Weerdts's decision is a recognition of the 'new father's' right, throughout the relationship, to unilaterally determine the nature of his position in relation to the children.

'Paternal' access following the separation also appears to be tied to support obligations. For instance, Vancise J.A., in Andrews v. Andrews,⁵⁸ accepted the trial judge's findings that "the husband

⁵⁵Slama v. Slama, supra note 54, 195-196.

⁵⁶(1992) 44 R.F.L. (3d), 10 (N.W.T.S.C.).

⁵⁷Laraque v. Allooloo, supra note 56, 17-18.

⁵⁸Supra note 52.

treated the wife's children as his own, bought clothes for them, gave them food, shelter and love and affection during the marriage."⁵⁹ However, support for the children was not granted because there was no continuing relationship between the husband and children following the divorce.

In other cases, the biological connection is ruled as paramount over all other considerations. For example, in Williamson v. Williamson,⁶⁰ Judge McLellan, on an interim order, held that the respondent was not responsible for child support because the mother received support from the biological father, who lived in Hawaii, despite a combined eleven years of marriage and living together. McLellan J. suggested that the mother apply for an increase in support by the 'natural' father:

The wife has had a very significant change in her economic circumstances with the loss of her husband from her household. Her ability to support her children has been reduced. She should immediately apply under the Reciprocal Enforcement of Maintenance Orders Act, 1985, S.N.B. 1985, c. R-4.01 ["REMO"], for an increase in the support the father of the children is paying and exhaust her remedies against him. This is because the natural parents are primarily responsible for supporting their children, not step-parents. After she exhausts those remedies, it would be fair to try her claim for child support from her husband.⁶¹

This is an interesting case in that it sets up the natural father's and step-parent's responsibility as contingent upon one another. The mere presence/existence of a biological father somehow negates or minimizes the responsibilities of the step-parent - but only after the break-up. The implied message in Williamson v. Williamson

⁵⁹Andrews v. Andrews, *supra* note 52, 215.

⁶⁰31 R.F.L. (3d), 378 (N.B.Q.B.).

⁶¹Williamson v. Williamson, *supra* note 60, 381.

is that the mother would not be entitled to any more support from the father if her relationship with her husband had not terminated. Essentially, what can be inferred from Judge McLellan's comments is that some male figure is responsible for the children; which one depends largely on their current status relative to the children. The father's responsibility lessens with the presence of the step-father and (potentially) increases upon the step-father's relinquishment of his position.

When a biological father is not available, the intentions of the step-father reappear as the paramount consideration. In the case of Chevrier v. Chevrier,⁶² the respondent husband argued that he was not responsible for child support because he did not stand in loco parentis to the children, despite a 'living relationship' and marriage of over four years, and despite the mother's clear indication to him that she would be forfeiting the "social-financial benefits she has been receiving as a single parent by living with him."⁶³

In deciding not to award child support, Bolan J. considered two primary factors: the quality of the relationship between the step-father and the children and the circumstances surrounding the break-up of the marriage:

The main issue before me is whether the respondent stood in loco parentis to the children at separation. Throughout the 4 years they lived together, the respondent provided the petitioner and her children with food, shelter, and clothing. Although the respondent played some role as a figurehead of the family, I am not satisfied that the relationship between

⁶²30 R.F.L. (3d), 215 (Ont.Gen.Div.).

⁶³Chevrier v. Chevrier, supra note 62, 215.

the respondent and the children was strong enough to say that he stood in loco parentis to the children. There was never that psychological bonding which created a father-son relationship. They had the odd family outing together but nothing really firm developed between them.

This is not a case of a spouse unilaterally terminating his responsibilities to his family. I accept the respondent's evidence that the separation was brought about when the petitioner threw the respondent out of the matrimonial home. From that point on, the children made no attempts to see the respondent and he made no attempt to see them.⁶⁴

There are many assumptions and value judgements at work in this particular case, not the least of which was the Judge's moral disapproval of the mother's conduct. He refers to her in the following manner:

[T]he petitioner, who was an unmarried woman with two children sired by two different men, entered into a living relationship with the respondent.

...
Since the separation, the parties went their own way and the petitioner has had a third child (not the respondent's).

....
Even if the respondent stood in loco parentis to the children, it would be inappropriate to order child support under the circumstances. Whatever the relationship was, it was unilaterally terminated by the petitioner and the responsibility of supporting the children should not be visited on the respondent.⁶⁵

It would appear that the primary concern is reprimanding the mother rather than the interests of the children. Despite the moral element of this particular case, or perhaps in light of it, what is most noteworthy for the purposes of this study, are the assumptions and value judgements inherent in the decisions and judicial approaches. They point to the difficulties faced by the judiciary in finding guiding principles that are commensurate with dominant

⁶⁴Chevrier v. Chevrier, supra note 62, 215-216.

⁶⁵Chevrier v. Chevrier, supra note 62, 215-216.

ideologies of 'family' or at least parenthood. The rigid model of mother-father-biological and/or adoptive children is enforced, to the point where third-party actions for child support have been brought against hitherto absent biological fathers by the husband.⁶⁶ In the absence of a biological father, the intent of the step-parent, whether overtly stated or implied via the 'quality' of the parent-child relationship, is the paramount consideration. And in some cases, it remains the right of the step-parent to unilaterally withdraw from the in loco parentis position.⁶⁷

Inherent in these decisions is an apparent disagreement on the part of judges as to what constitutes a family and what does not. Regardless of the 'right' or 'wrong'ness of their decisions, the fact that such distinctions must be made points to the far-reaching force of ideologies of 'family.' Primarily, the biological paternal connection remains as paramount and the courts are forcing individuals with alternate social arrangements to adopt the dominant model of father-mother-biological and/or adoptive children. As well, ideologies of familialism that incorporate

⁶⁶Slama v. Slama, supra note 54.

⁶⁷Andrews v. Andrews, supra note 52. For cases raising in loco parentis arguments not mentioned in text, see Bailey v. Nash, 36 R.F.L., 292 (Ont.Gen.Div.); Baumann v. Clatworthy, 35 R.F.L., 200 (Ont.Gen.Div.); Bradbury v. Mundell, 46 R.F.L., 184 (Ont.Gen.Div.); Burns v. Burns, 32 R.F.L., 257 (Man.Q.B.); Campbell v. Campbell, 44 R.F.L., 229 (B.C.C.A.); Delorme v. Delorme, 45 R.F.L., 373 (Ont.Gen.Div.); Desjardines v. Desjardines, 31 R.F.L., 449 (Alta.Q.B.); Dixon v. Baird, 44 R.F.L., 448 (Ont.Gen.Div.); Gaudrey v. Johnson, 32 R.F.L., 174 (Ont.Gen.Div.); Gavigan v. Gavigan, 30 R.F.L., 314 (Alta.Q.B.); Goodyer v. Goodyer, 42 R.F.L., 67 (N.S.T.D.); Madge v. Karkoulis, 36 R.F.L. 96 (Ont.Prov.Div.); McKeeman v. McKeeman, 43 R.F.L., 7 (Alta.Q.B.); Nelson v. Nelson, 37 R.F.L., 86 (B.C.S.C.); Sartor v. Sartor, 45 R.F.L., 250 (N.W.T.S.C.); Tweed v. Newton, 32 R.F.L., 400 (B.C.S.C.).

notions of close and bonding relationships, or the 'haven in a heartless world' model as promoted by Lasch,⁶⁸ are deployed in determining a step-father's position. Dominant definitions of 'family' are being imposed, in a Procrustean fashion, on an increasingly varied array of social arrangements among individuals, such as 'blended families', step-parent or second-parent families.

The next visible site of conflict between ideological definitions of 'family' and social realities lies in maintenance cases before the courts involving second families. As in the in loco parentis cases, prevailing definitions of 'family' as a private entity with limited and exclusive membership deny the realities of social arrangements that do not adhere to dominant models. Judicial decisions vary greatly, with each case decided on different grounds and using different assumptions. For example, in Firth v. Firth,⁶⁹ where the father sought a reduction in child support based on his second family responsibilities, the assumption by Selbie J. is that obligations to first children are paramount and

Knowingly taking on new responsibilities cannot be used as justification for ignoring old obligations to children.

...

I am satisfied on the material before me that but for his remarriage, the applicant would have been able to contribute to the children involved here. They stood in obvious priority behind his new family.⁷⁰

The second ground on which the father sought a reduction was

⁶⁸Christopher Lasch. Haven in a Heartless World. New York: Basic Books, 1977.

⁶⁹(1991) 35 R.F.L. (3d) 445 (B.C.S.C.).

⁷⁰Firth v. Firth, supra note 69, at 446.

the ability of the mother to support the children without his help. Selbie J., however, was of the opinion that "[t]he fact that the custodial parent is able to do so does not absolve the other from the responsibility to contribute if able."⁷¹

In direct contrast, in Kelly v. Kelly,⁷² MacDonald C.J.T.D. reasoned:

In order to allow the variation of a maintenance order, there must be shown a change in the conditions, means, needs, or other circumstances of the parties since the making of the order. I find there to be two substantial changes in the present case. First, the applicant [father] has remarried. Secondly, the respondent is living in a common-law relationship and is receiving financial assistance from her common-law companion.⁷³

Despite similar circumstances, the contradictory outcomes of Firth v. Firth and Kelly v. Kelly, respectively, point to the weight given the presence of an alternate male breadwinner in the mother's life. In Firth v. Firth, support was not reduced despite the mother's ability to support the children. While this decision was not necessarily wrong, the same principles were not applied in Kelly v. Kelly. The ability of the custodial 'family' to support the children was not the issue. The mere presence of a male breadwinner (in this case a common-law spouse), despite his history of only seasonal employment and reliance on Unemployment Insurance benefits and despite the low income level of the mother, was considered a primary factor in the decision to reduce the amount of child support.⁷⁴

⁷¹Ibid.

⁷²(1992) 44 R.F.L. (3d) 214 (P.E.I.T.D.).

⁷³Kelly v. Kelly, supra note 72, 216.

⁷⁴Kelly v. Kelly, supra note 72, 215-216.

Similarly, in McKinney v. Polston,⁷⁵ MacDonald J. ordered that child support and arrears be reduced on the grounds that the father now had a second family to support and the mother, who had remarried, now had access to her partner's funds. While both parties' incomes were low, the custodial family's income was lower than the father's and the father's income was considered substantial enough to warrant payment, albeit reduced, evidenced by the judge's reluctance to cancel arrears of over \$15000 and to merely reduce them to \$13000.⁷⁶

Despite inconsistencies in decisions, the common underlying thread is that dominant definitions of 'family' are being imposed on individual social arrangements that do not meet its criteria. One way in which this is deployed is via the almost compulsive desire on the part of the judiciary to establish a male figure in the 'family.' This is evidenced by the fact that in both the in loco parentis and second family cases, judges were far more willing to terminate financial obligations of 'fathers' when another man was present in the child(ren)'s lives.

The securing of a male-breadwinner in the 'family' serves to re-privatise the 'family' on two levels simultaneously; the

⁷⁵42 R.F.L. (3d), 141 (B.C.S.C.).

⁷⁶McKinney v. Polston, *supra* note 75, 152-153. For cases raising the issue of second family responsibilities not cited in text see Blachford v. Blachford, 39 R.F.L., 367 (Ont.Gen.Div.); Dombroski v. Dombroski, 46 R.F.L., 255 (Alta.Q.); Doole v. Doole, 32 R.F.L., 283 (Alta.Q.B.); Gaudrey v. Johnson, 32 R.F.L., 174 (Ont.Gen.Div.); House v. Tunney (House), 35 R.F.L., 68 (Sask.Q.B.); Parkin v. MacMillan, 46 R.F.L., 347 (B.C.Master); Smith (Arsenault) v. Smith, 40 R.F.L., 316 (N.S.Fam.Ct.); Snelgrove-Fowler v. Fowler, 46 R.F.L., 352 (Alta.Q.B.); Watson v. Watson, 35 R.F.L., 169 (B.C.S.C.).

individual family is re-privatised by sustaining individual mothers' reliance on individual men and the 'family' in a larger social context, is re-privatised by obscuring the relationship between the 'family' and the state, which I now go on to discuss. Although I present these deployment tactics separately for purposes of clarity, it is important to remember that they are not discreet but are inextricably connected and interdependent.

In the preceding chapters, I began to articulate ways in which ideologies of 'family' are materially produced and deployed. Part of that analysis included ways in which 'the family' has been constructed as part of the 'private' realm. As Deborah Baskin claims, the establishment of a social body/practice in the realm of the 'private' is an active state venture and one which is currently receiving increased focus. Baskin argues that the state is currently facing a crisis in accumulation and legitimation which is consequently exposing it to increased scrutiny from which it had once been spared.⁷⁷ Following this line of thinking, I would argue that the recent flurry of attention and legislation devoted to child support issues as well as the difficulties faced by the judiciary in dealing with alternative 'family' forms are examples of attempts to extend dominant definitions of 'family' to alternate social arrangements and relegate them 'back' to the private sphere.

If we probe into the question of 'who benefits,' we can see certain benefits for the state and ruling apparatus of recent

⁷⁷Deborah Baskin. "Community Mediation and the Public/Private Problem." Social Justice. 15:1 (Spring, 1988), 98-115.

legislation and judicial decisions. With respect to support enforcement, the New Brunswick scenario is a case in point. By forcing women in receipt of benefits to name the father, the New Brunswick Department of Income Assistance argues that it can save \$2 million annually, since child support payments are deducted dollar-for-dollar from welfare benefits.⁷⁸ On even a superficial level, Baskin's contention of the state crisis in accumulation and legitimation gains immediate credence. At once saving the public purse millions of dollars in expenditures and appearing as the defender of women, thus legitimatizing its role, the state serves its twofold purpose.

Taken by itself (or out of its historical context), principles and objectives that seek to increase child support obligations appear as a positive, if less than perfect, means of ameliorating the economic conditions of some women. However, if placed in the current historical context of the rise of neo-conservative politics, an active "Pro-Family" movement, recent pushes for favouring joint custody arrangements, the rise of 'fathers' rights' groups, a dismantling of the welfare state, and myriad regressive social reforms, enforced child support obligations can also be viewed as a movement toward re-placing 'the family' in its rightful realm of the 'private.'

Measures that compel individual 'families,' however reconstructed, to be entirely responsible for their economic

⁷⁸New Brunswick. Legislative Assembly. Oral Questions. March 29, 1994. 4-5.

sustenance, serve to aid in re-establishing 'the family' as a private entity in the face of glaring contradictions in material conditions - material conditions that indicate that single-parent families derive nearly thirty percent of their income from government transfers;⁷⁹ material conditions that tell us that fifty-two percent of single mothers in the paid labour force have incomes below the poverty line and that just over one quarter of all single mothers have incomes just over \$12000 annually."⁸⁰

In the face of such conditions, can we really expect child support to right the balance? Given the language of the reports generated by the Family Law Committee, it appears that child support reform is the method of choice to redress women's economic inequalities. Rather than directly ameliorate women's economic conditions, this method of redress operates within a context of privatization that obscures and effectively denies the systemic realities. Recent legislative changes and the trends in the case law, as well as related political and economic regressive trends, indicate that the movement to privatization is well underway. The recurring force of familial ideology and familism has served as a convenient backdrop against which schemes of privatisation have flourished.⁸¹ As Elizabeth Pickett has pointed out, "the call to

⁷⁹Lindsay, supra note 9, 37-38.

⁸⁰Lindsay, supra note 9, 37.

⁸¹Barrett and McIntosh distinguish between 'familism' and 'familialism' in the following manner:

The former refer to the propagation of politically pro-family ideas and the strengthening of families themselves. The latter refer to ideologies modelled on what are thought to be family values and the rendering of other social phenomena like families.

privacy has a particular resonance in relation to issues involving the family."²

On an individual level, the relative willingness or reluctance on the part of the judiciary to enforce or terminate support payments, depending on the availability of an alternate male 'breadwinner,' can provide some economic amelioration of some women's and their dependent children's needs, but it simultaneously secures their dependence on men. For instance, for mothers in receipt of some form of welfare or similar benefits, their relationship to a male partner, past or present, dictates the amount of benefits they will receive.³

Moreover, of those women who might economically benefit from support enforcement measures and/or 'better' application of the principles of the Divorce Act, their dependence on a male breadwinner is also secured. This in turn serves to reconstruct 'the family' in its patriarchal nuclear form, despite any "binucleated" living arrangements.⁴ Efforts for any kind of autonomy and self-determination are curtailed and women's dependence on men is re-established. That is to say, as Carol Smart

Michele Barret and Mary McIntosh. The Anti-Social Family. London: Verso P, 1982. 26.

²Pickett, supra note 20, 30.

³In their study of conflicting ideologies at work in child support law and welfare agencies, Mossman and MacLean show that benefits are contingent on women's ability/inability to collect funds from a man, be it a partner or former partner. See Mossman and Maclean, supra note 1.

⁴I borrow the term "binucleated" from literature on family mediation and I am indebted to Elizabeth Pickett for the means by which the patriarchal family form is 'reconstructed.' See Pickett, supra note 20.

has:

[Law] does not 'give' power to men over women in the family, rather it legitimizes the preconditions which create an unequal power structure.⁸⁵

I do not intend to imply that women should not turn to the 'fathers' for financial compensation. However, in struggling for change, we must be continually aware of how certain reforms affect all women. For instance, given the tendency in the judiciary to link child support to access, as clearly evidenced by 'in loco parentis' cases, women who left abusive partners may be reluctant to push for enforced, increased or any child support if it could result in petitions for access to children by the (step)-father. As noted in the previous chapter, paternal access to children is rarely denied even if abuse of the wife and/or children is believed by the courts.

In the case of Wilbur v. MacMurray,⁸⁶ the link between access and support is poignantly clear. Upon separation, the mother retained sole custody of the children and the father was granted access. The court held that the mother had deliberately frustrated access to such an extent that the teenage children had not seen their father in five years. In deciding to rescind the child support order, Athey J. stated:

I find that Ms. Wilbur's interference in the children's access to their father, the establishment of a new family unit excluding Mr. MacMurray completely from the lives of the children, and Ms. Wilbur's obtaining employment constitute

⁸⁵Carol Smart. The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations. London: Routledge and Kegan Paul, 1984. xi-xii.

⁸⁶Wilbur v. MacMurray, (1991) 38 R.F.L. (3d), 74 (N.B.Q.B.).

substantial changes in circumstances. The existing support order is rescinded effective November 30, 1991. Ms. Wilbur may apply to have support for the children reinstated if she can satisfy the court that a child and parent relationship has been re-established between the children and Mr. MacMurray.⁸⁷

The above statements reveal the underlying assumptions of Judge Athey: the mother does not deserve nor require child support because of her actions and because of her and her new husband's ability to support the children. On two fronts, this judgement shows the connections among paternal contact, the presence of a male-breadwinner and awards of support. It is likely that if either circumstance was not present, that is, no male-breadwinner or continued contact between the father and the children, support would not have been terminated.

Moreover, standardized formulas for child support or a 'better' application of the principles of the Divorce Act means very little to poor families, where there is not enough money to go around in the first place. The available numbers from the questionnaires collected by the Court of Queen's Bench, indicate that low-income fathers bear the highest percentage of financial burden. And of those women who could gain from increased or enforced child support, that gain is counterbalanced by their forced dependence on their former partners.

Recent judicial and legislative developments in child support can be viewed as part of an overall movement to re-privatize and hence re-depoliticize structural inequalities in women's lives. Part of this move has been facilitated by the material deployment

⁸⁷Wilbur v. MacMurray, supra note 86, 76.

of familial and family ideologies that seek to re-place women in the patriarchal family, however that 'family' is reconstructed. Alternatives to child support are simply not available. Dominant familial ideologies, in both theory and practice, dictate that we turn to 'the fathers' for economic redress.

Privatization tactics force women to adopt dominant definitions of 'family,' despite their realities of living separate and apart from their former partners. Constructions of 'family' are forced upon mothers and their children despite the fact that no bonding relationship was ever formed with the biological father. Similarly, efforts among individual women and/or heterosexual couples to resist replicating dominant definitions of family are curtailed or negated by privatizing efforts that define women by their relationship to a male-breadwinner.

Child support payments can and do result in some economic amelioration for some women and their children. Men's higher earning power relative to women's does provide a rationale for increasing the quantum of awards on a large scale. These are in part the objectives of the Family Law Committee. The context in which the issues have thus far been framed, however, indicates that child support has become the method of choice to right the balance of women's systemic inequality by relegating the costs of social reproduction back to the private sphere.

Conclusion:
The Family Law Committee and the
Challenges For Change

The Federal/Provincial/Territorial Family Law Committee was given the mandate to study the issues of child custody and access and child support. The discussion paper on custody and access issued by the Committee outlined seven specific areas in need of legislative attention. They are:

- (1) Clarify the scope and effect of custody orders;
- (2) Address access concerns;
- (3) Remove the "friendly parent rule;"
- (4) Deal directly with domestic violence and abuse;
- (5) Accept and address gender bias concerns;
- (6) Representing children;
- (7) Address enforcement issues¹

On the surface, the Committee's reports appear to reflect a general acceptance of concerns and issues long expressed by feminists. For instance, there is strong appreciation for the potential dangers and failures of presumptive joint custody, general acceptance of a primary caregiver standard, and critique of the courts' lack of attention to issues of wife assault. Moreover, while the Committee gives credence to the 'problem' of denial of paternal access, their report also acknowledges feminist research which demonstrates that access problems are far more likely to consist of fathers not

¹Canada. Custody and Access: Public Discussion Paper. Ottawa: Federal/Provincial/Territorial Family Law Committee, March 1993, 29-36.

exercising their access in a responsible manner, rather than mothers denying access.²

As an option for reform, the Committee suggests the adoption of an entirely new legislative approach: the parenting plan. It has been argued that the language of custody and access law is inappropriate to describe relationships between parents and their children.³ As the Committee notes:

The term "custody" for example, is a term commonly applied to incarcerated criminals and is also used in relation to the conservation of property. The use of this term with respect to children of divorce implies that they are prisoners or property to be divided between their parents, in much the same way as other assets accumulated during the marriage. Similarly, the word "access" derives from property law, where it is used to describe a right to enter and pass over adjoining land without hindrance. Applying this property concept to parent-child relationships undermines the role of the "non-custodial parent".⁴

Much in the same manner as joint custody, parenting plans lend themselves well to popular appeal because they appear to concern the children's interests and needs first and foremost. Eliminating the property-like language supposedly prevents parents from battling over custody and forces them to plan for their children.

It has been argued that parenting plans would go some distance in eliminating those grey areas concerning the allocation of duties and responsibilities among parents and that separating parents would agree beforehand which decisions are to be made by the custodial parent and which are to be shared. Legislation in the

²Custody and Access, *supra* note 1, 17.

³M. Elkin. "The Language of Family Law is the Language of Criminal Law." Conciliation Courts Review. 13:1 (1975), viii.

⁴Custody and Access, *supra* note 1, 20.

state of Washington, for example, specifically limits situations in which mutual decision-making may be designated and thus attempts to provide a safeguard to limit the involvement of one parent where necessary.⁵ Moreover, courts are directed to approve agreed upon plans provided the plans do not breach any of the mandatory limitations that are to be applied in cases where neglect, abuse or domestic violence is found.⁶

Critics point out that since the majority of custody decisions are not litigated, the Washington plan takes a very interventionist approach in the extent to which the state attempts to regulate uncontested arrangements as well as formal disputes.⁷ From a perspective recognizing the dangers of privatization, however, the level of interventionism is perhaps the least area of concern.

The Washington plan outlines four general areas of parenting: (1) the child's residential arrangements; (2) provision for financial support of the children; (3) the allocation of decision-making authority; and (4) a dispute resolution process. The plan must indicate who has responsibility for the daily care as well as specifically allocate decision-making authority with respect to major areas such as the children's education, health care and religious upbringing.⁸ The extent to which duties and responsibilities are outlined in the Washington plan reveals potential dangers similar to those associated with family

⁵Custody and Access, supra note 1, 37.

⁶Custody and Access, supra note 1, 38.

⁷Custody and Access, supra note 1, 37.

⁸Custody and Access, supra note 1, 37.

mediation.

With so many specifics on the table, the opportunity for trade-offs would only increase. For instance, custodial mothers may agree or be compelled to agree to less than adequate property settlements, spousal or child support in return for greater residential control and/or decision-making authority over the children. This is a trade-off that single mothers are perhaps least able to bear. Moreover, the same dangers associated with the unwillingness on the part of the judiciary to accept mothers' allegations of child sexual and/or physical abuse continue. Under a parenting plan, hitherto agreed upon allocations of decision-making authority could prove difficult to alter at a later date, should abuse be discovered following the separation.

Similar to joint custody, parenting plans could potentially continue to place the daily responsibilities for childcare on the custodial mother without a commensurate ability to make and carry out decisions concerning her and her children's lives. Conversely, parenting plans could continue to allocate authority and control to the non-custodial parent without commensurate duties and responsibilities.

Should the Family Law Committee choose to endorse legislative change in their final reports, the adoption of a parenting plan seems at this point the most likely choice. Parenting plans have already been adopted in Florida, Maine and Washington in the United States. In Australia, the Family Law Council also reviewed parenting plans and noted:

The Council emphasises the usefulness and importance to all separating parents of preparing their own parenting plan as a statement of intent as to their long term commitment to their children. The Council considers that one option requiring consideration is the Family Act be amended to include the requirement for parents in conflict to formulate a parenting plan.'

Ideas that supposedly work elsewhere, especially in nations with similar political structures and cultures, are far more likely to be adopted for sheer pragmatic reasons. For example, political legitimisation is far easier to secure if outside acceptance and examples of the legislation in practice are available to the public.

Moreover, judicial decisions in the reported cases indicate that the legal adoption of a parenting plan would translate into little more than a codification of current practices. While the language of custody and access is still very much in use, it does not translate into any inherent right or ability on the part of the custodial parent to make and carry out decisions with respect to the children. Conversely, there is little evidence to support the claim that the language of custody and access serves to undermine the role of the non-custodial parent. On the contrary, non-custodial parent, or paternal, rights of access, control and authority are very much secured, maintained, and enforced. The reported cases indicate a propensity on the part of the judiciary to enforce paternal authority and there is little reason to believe that parenting plans would somehow alter these practices.

⁹Australian Family Law Council. Patterns of Parenting After Separation Discussion Paper. Quoted in Custody and Access, supra note 1, 38.

Should the Family Law Committee recommend the adoption of parenting plans in its final report, substantial legislative change in Canada may still not occur. For example, presumptive joint custody was not adopted in Canada despite its use in the United States. However, a lack of legislative endorsement has not prevented the judiciary from adopting the terms and principles of joint custody under sole custody orders. Similarly, the language and terms of parenting plans, which by their very nature endorse private solutions, can seek their way into legal and judicial practice, regardless of whether they are mandated through legislation. With privatization so heavily privileged, it is likely that they will.

The Committee's attention to the issues of child support reveals a similar trend toward privatization. Like the Custody and Access paper, the Committee's description of the present situation and problems recognizes the systemic economic disadvantages facing women following marital dissolution. Their reports accept Carol Rogerson's finding that:

Household incomes of the custodial parent are typically both below those of the non-custodial parent and shared between more persons....It is rare that household incomes are equalized, let alone standards of living.¹⁰

The Committee also recognizes the tendency of some courts to establish as principle that custodial parents should not benefit

¹⁰Carol Rogerson. Review of Support Factors and Objectives in Case Law Decided Under the Divorce Act, 1985. Ottawa: Report for the Department of Justice Canada, December 1989, 101. Also quoted in: Canada. Child Support: Public Discussion Paper. Ottawa: Federal/Provincial/Territorial Family Law Committee, June 1991. 2-3.

from child support and the inevitable effect this will have on the overall standard of living within the household and hence, the standard of living of the children.¹¹ Furthermore, the Committee acknowledges the non-financial costs of children to custodial parents, such as increased time devoted to household responsibilities. These personal contributions result in a potential decrease in available time for pursuit of leisure and/or career or education advancement for the custodial parent and a subsequent increase in available time for the non-custodial parent.¹²

Despite their continual reference to feminist research and their identification of the problems in clearly feminist terms, the Committee does not choose to recognize the economic disadvantages women face that develop long before the moment of marital dissolution. In both the Research Report¹³ and the Executive Summary,¹⁴ several models of standardized formulas of child support are examined and discussed. While certainly any of the proposed formulas could result in a generally larger quantum of awards and hence a better distribution of family wealth, none address the issue of women's systemic economic disadvantages raised in the Public Discussion Paper. No where in the proposals are the related

¹¹Child Support, supra note 10, 4.

¹²Child Support, supra note 10, 5-6.

¹³Canada. The Financial Implications of Child Support Guidelines: Research Report. Ottawa: Federal/Provincial/Territorial Family Law Committee, May 1992.

¹⁴Canada. The Financial Implications of Child Support Guidelines: Executive Summary. Ottawa: Federal/Provincial/Territorial Family Law Committee, May 1992.

issues of property division, spousal support or the non-financial costs of custodial parenthood raised. In essence, the Public Discussion Paper appears to utilize feminist rhetoric to identify the problems and then disregard those same analyses in their proposals for reform.

Perhaps it is asking too much of the Committee to propose reforms that would ameliorate women's economic conditions since it is not within the scope of the Committee's mandate. A mandate to study only child support does not, however, absolve the state from responsibility. Important issues related to child support, such as spousal support, divisions of marital property, women's responsibility for home and child work during marriage, women's generally lower wages relative to men have not been deemed necessary to investigate. Governmental decisions to focus solely on child support, rather than a more comprehensive approach, reveal a position that valorizes and is informed by a general climate of privatization, both in terms of the economic costs associated with social reproduction and the structure of the traditional family.

Related issues in child custody, such as family mediation, legal and social definitions of family, adoption, artificial insemination, recognition of lesbian and gay families, and a host of others remain absent from the discussion. The limited focus of the Committee, in itself, reveals a movement to privatization.

Strategies for social change must encompass an understanding of the movement to privatization and its negative effects on women. By closely examining the often contradictory effects of state

action with respect to child support, we can recognize that certain reform proposals can go some distance to ameliorate the immediate material conditions of some women's lives and for this reason, may be worth maintaining, at least in the short term. Despite some material benefit, however, we must continue to fight for fairer distribution of wealth on a larger scale than within a 'private' marital economy. For instance, eliminating the principle of dollar-for-dollar removal of welfare benefits in lieu of support payments is one specific area that needs attention. As well, issues that have been on the feminist agenda for some time, such as universally accessible, high-quality child care and real employment equity, are crucial and deserve continued struggle.

In responding directly to the work of the Family Law Committee, we must continue to voice a nuanced understanding of the issues and not allow legislation and politics to be narrowly defined and resolved. The work of the Committee is not without merit. Quantum of child support awards has been and continues to be a serious problem, both socially and specifically within family law. However, feminists must continue to struggle to shift and shape the overall agenda and mandate of this Committee and committees like it, forcing a recognition of the potential disadvantages for some women.

With respect to custody and access, the areas in need of reform identified by the Committee and the proposals stemming from them reflect an approach that also valorizes the 'private' family and consequently a reversion to patriarchal authority and control.

It must be noted, however, that parenting plans in Canada are still a long way from a fait accompli. This represents a key area in which feminists can affect the direction of legislative change, for instance through lobbying, or availing legal services for women.

On a larger scale, deflecting movements toward privatization on all fronts represents a crucial area for struggle. Current practices reveal that privatization tactics tend to build on and legitimize themselves and lead to even more regressive privatized policies. The recent New Brunswick legislation is a case in point. The tunnel-vision focus on individual responsibility for supporting children has resulted in legislation that not only eliminates any notion of women's right to privacy, but also represents an enormous step backwards in terms of social welfare policy.

Because privatization tactics tend to occur along traditional patriarchal lines, working to shift perceptions of family at both the level of popular discourse and of legal definitions continues as an important site of struggle. Whether 'family' represents a site of oppression or a site of positive and personal fulfilment or both, it nevertheless represents

the focal point of a set of ideologies that resonate throughout society. The imagery of idealized family life permeates the fabric of social existence and provides a highly significant, dominant and unifying, complex of social meaning.¹⁵

Finally, the movement to privatization underscores the need to recognize the interrelationships among issues, which serve at once

¹⁵Michele Barrett and Mary McIntosh. The Anti-Social Family. London: Verso P, 1982. 29.

to fragment resistant efforts and create avenues for alliance and concerted struggle. Feminist activism must continue to explore and examine the interconnectedness of a myriad of issues and problems, recognizing the potentially contradictory effects of social conditions on many different women and establishing means through which all women's concerns may be expressed and validated.

APPENDIX 1

**NEW BRUNSWICK QUESTIONNAIRE
TO COLLECT INFORMATION ON CHILD SUPPORT AWARDS**

**Prepared for: The Honourable Mr. Justice Raymond J. Guerette
Court of Queen's Bench of New Brunswick
Family Division
Saint John, New Brunswick
1992**

APPENDIX II
TABULATED RESULTS OF NEW BRUNSWICK QUESTIONNAIRE
RE: CHILD SUPPORT AWARDS, 1991-1992

Prepared for: The Honourable Mr. Justice Raymond J. Guerette
Court of Queen's Bench of New Brunswick
Family Division
Saint John, New Brunswick
1992

**TABULATED RESULTS OF NEW BRUNSWICK QUESTIONNAIRES
RE: CHILD SUPPORT AWARDS**

N - C P inc/mo	A w d / mo	Awd/ ch/mo	%Inc/ Awd	%Inc/ Awd/ch	Order Type
\$1833	\$250	\$125	13.64	6.82	VDiv
\$3870	\$300	\$300	7.75	7.75	FSA
\$ 589	\$173	\$173	29.43	29.43	Cons.
\$1000	\$100	\$100	10.0	10.0	FSA
\$2600	\$220	\$110	8.46	4.23	Cons/e
\$ 735	\$100	\$100	13.61	13.61	Cons.
\$2100	\$400	\$400	19.04	19.04	FSA
\$1950	\$520	\$260	26.66	13.33	FSA
\$ 700	\$ 80	\$ 80	11.42	11.42	FSA
\$ 932	\$150	\$ 75	16.09	8.05	FSA
\$ 700	\$ 80	\$ 80	11.43	11.43	FSA
\$1443	\$400	\$200	27.72	13.86	VDiv
\$ 503	\$ 80	\$ 80	15.9	15.9	VFSA/e
\$ 624	\$ 80	\$ 80	12.82	12.82	VFSA/e
\$1416	\$325	\$162.5	22.95	11.47	FSA/C
\$2000	\$600	\$300	30.0	15.0	VDiv/C
\$1300	n/a	n/a	n/a	n/a	Div
\$2000	\$200	\$200	10.0	10.0	FSA/C
\$1000	\$200	\$200	20.0	20.0	FSA/C
\$ 700	\$ 25	\$ 25	3.57	3.57	FSA
\$ 700	\$ 25	\$ 25	3.57	3.57	FSA
\$1416	\$325	\$162.5	22.95	11.47	FSA/C
\$2000	\$600	\$300	30.0	15.0	VDivCe
\$3136	\$150	\$ 75	4.78	2.39	FSA/C
\$750	\$200	\$200	30.0	30.0	FSA
\$2500	\$400	\$100	16.0	4.0	VFSA
\$1000	\$250	\$250	25.0	25.0	FSA
\$1000	\$300	\$?	30.0	?	FSA
\$ 500	\$135	\$135	27.0	27.0	VDiv/e
\$1841	\$200	\$100	10.86	5.43	Div/C
\$3207	\$600	\$200	18.71	6.24	FSA/C
\$2166	\$257	\$257	11.87	11.87	VDivCe
\$2245	\$300	\$300	13.36	13.36	FSA/C
\$2166	\$250	\$125	11.54	5.77	VDiv/e
\$1100	\$108	\$108	9.82	9.82	VDiv/e
\$ 918	\$216	\$ 72	23.52	7.84	VFSA/e
\$1395	\$160	\$160	11.47	11.47	VDiv/e
\$3833	\$400	\$200	10.43	5.21	VFSADC
\$ 875	\$108.3	\$108.3	12.38	12.38	FSA/E
\$1073	\$100	\$ 50	9.31	4.65	FSA
\$2400	\$100	\$?	4.16	?	FSA/C
\$3200	\$150	\$150	4.68	4.68	VDiv/e
\$1386	\$200	\$200	14.43	14.43	VFSA/e
\$ 990	\$150	\$ 75	15.15	7.57	Div
\$1137	\$280	\$280	24.62	24.62	Div

\$ 875	\$216	\$108	24.68	12.34	FSA/C
\$ 800	\$200	\$200	25.0	25.0	VDiv/e
\$3369	\$217	\$?	6.44	?	Cons/e
\$2000	\$300	\$300	15.0	15.0	FSA/e
\$1678	\$150	\$150	8.94	8.94	FSA/e
\$1732	\$173	\$173	10.01	10.01	FSA/C
\$2083	\$300	\$300	14.4	14.4	Div/C
\$1039	\$300	\$150	28.87	14.43	FSA/C
\$1100	\$100	\$100	9.09	9.09	VDiv/e
\$1800	\$200	\$200	11.11	11.11	VDiv/e
\$2407	\$150	\$150	6.23	6.23	FSA
\$1371	\$ 75	\$ 37.5	5.47	2.73	Div/C
\$ 704	\$129.9	\$ 65	18.45	9.22	Div/C
\$3332	\$150	\$ 75	4.5	2.25	VDiv/c
\$2150	\$ 50	\$ 50	2.32	2.32	FSA
\$2624	\$400	\$133.3	15.24	5.08	VDiv
\$1664	\$150	\$150	9.01	9.01	FSA/C
\$2036	\$300	\$300	14.73	14.73	FSA
\$1250	\$ 83.3	\$ 27.7	6.66	2.22	FSA
\$1737	\$400	\$133.3	23.02	7.67	VDiv/C
\$2135	\$500	\$125	23.41	5.85	VDiv/e
\$ 892	\$80	\$ 80	8.96	8.96	FSA
\$1430	\$130	\$130	9.09	9.09	FSA
\$1603	\$200	\$ 50	12.47	3.12	VFSADe
\$3052	\$550	\$275	18.02	9.01	FSA
\$3250	\$400	\$400	12.31	12.31	VDiv
\$ 953	\$ 60	\$ 60	6.29	6.29	FSA
\$1698	\$100	\$100	5.89	5.89	REMO c
\$1285	\$ 50	\$ 50	3.89	3.89	FSA
\$ 801	\$150	\$ 75	18.72	9.36	FSA
\$ 996	\$100	\$100	10.04	10.04	FSA
\$2063	\$250	\$250	12.11	12.11	VDivRe
\$1732	\$150	\$ 75	8.66	4.33	Div
\$3448	\$400	\$200	11.6	5.08	VDiv

CONCLUSIONS:

(A) TOTAL AVERAGES:

- \$1671.11 - Gross monthly income of non-custodial parent (mean average)
- \$223.23 - Total child support award to be paid per month (mean average)
- \$152.76 - Child support award per month per child (mean average)
- 14.44% - Percentage of non-custodial parent's gross monthly income paid to child support (mean average)
- 10.41% - Percentage of non-custodial parent's gross monthly income paid to child support per child

(B) AVERAGES FACTORING OUT ORDERS ON PARTIES' CONSENT

- \$1538.26 - Gross monthly income of non-custodial parent (mean average)
- \$202.89 - Total child support award to be paid per month (mean average)
- \$145.57 - Child support award per month per child (mean average)
- 13.85% - Percentage of non-custodial parent's gross monthly income paid to child support (mean average)
- 10.44% - Percentage of non-custodial parent's gross monthly income paid to child support per child

ABBREVIATIONS

TABLE ABBREVIATIONS

N-C P Inc:	Income of non-custodial parent per month
Awd/mo:	Total child support award to be paid per month (includes arrears)
Awd/Ch/mo:	Child support award per month per child
%Inc/Awd:	Percentage of non-custodial parent's gross monthly income paid to child support
%Inc/Awd/Ch:	Percentage of non-custodial parent's gross monthly income paid to child support per child

ORDER ABBREVIATIONS:

Div:	Initial Order for Divorce
Div/C:	Initial Order for Divorce on parties' consent
VDiv:	Variation to final Divorce Order
VDiv/C	Variation to Divorce Order on parties' consent
VDiv/e	Variation to Divorce Order and Enforcement Order
VDivCe:	Variation to Divorce Order on parties' consent and Enforcement Order
FSA:	Initial Order for Proceeding under the <u>Family Services Act</u>
FSA/C	Initial Order for Proceeding under the <u>Family Services Act</u> on parties' consent
FSA/e	Enforcement Order under the <u>Family Services Act</u>
VFSA:	Variation to Order under the <u>Family Services Act</u>
VFSA/C:	Variation to Order under the <u>Family Services Act</u> on parties' consent
VFSADC:	Variation to Order under the <u>Family Services Act</u> and Variation to Divorce Order on parties' consent
VFSADe:	Variation to Order under the <u>Family Services Act</u> and Variation to Order and Enforcement Order.
REMO c:	Confirmation Order under the <u>Reciprocal Enforcement of Maintenance Orders Act</u>
VDivRe:	Variation to Divorce Order and Provisional Order under the <u>Reciprocal Enforcement of Maintenance Orders Act</u>
Cons.	Consent Order: legislation not recorded
Cons/e:	Enforcement of consent Order: legislation not recorded

APPENDIX III

SAMPLE

**FINANCIAL STATEMENT FOR THE COURT OF QUEEN'S BENCH,
FAMILY DIVISION
SAINT JOHN, NEW BRUNSWICK**

In The Court of Queen's Bench of New Brunswick

FAMILY DIVISION

JUDICIAL DISTRICT OF

BETWEEN:

APPLICANT PETITIONER

- AND -

RESPONDENT

**FINANCIAL STATEMENT
(FORM 72J)**

I _____

make oath (or solemn affirmation) and say

1. Attached to this affidavit is a copy of the last income tax return filed by me. (Delete if not applicable.)

2. Particulars of my income, expenses, property and debts are accurately set out below to the best of my knowledge, information and belief. (Under income and expenses, give actual amounts where known or ascertainable. Otherwise, give estimates. Use weekly, monthly or yearly columns as appropriate. Convert each total to a monthly total by multiplying the weekly total by 4.33 and by dividing the yearly total by 12. Enter the results in the spaces provided. Add the results to the monthly total and enter the result in the last space on the page.)

(a) INCOME

(Include income from all sources, whether taxable or not. Show deductions in ACTUAL BUDGET and PROPOSED BUDGET.)

Category	If Received Weekly	If Received Monthly	If Received Yearly
Employment Income (gross)			
Family Allowance			
Unemployment Insurance Benefits			
Workers' Compensation Benefits			
Social Assistance			
Allowances and Support From Others			
Pensions			
Investment Income			
Rental Income			
Other (Specify)			
TOTALS	\$	\$	\$
Weekly total \$ _____ x 4.33	\$	monthly (A)	
Monthly total	\$	monthly (B)	
Yearly Total \$ _____ ÷ 12	\$	monthly (C)	
Gross Total Income on Monthly Basis (A)+(B)+(C)	\$	(D)	

(b) EXPENSES
(i) Actual Budget

(Show actual expenses only.)

Categories	If Paid Weekly	If Paid Monthly	If Paid Yearly
Rent			
Mortgage			
Common Expense Charges			
Property Tax			
Property Insurance			
Electricity			
Water			
Gardening and Snow Removal			
Gas for Heating or Cooking			
Heating			
Cable T V			
Telephone			
Repairs & Maintenance			
Food			
Clothing			
Laundry & Drycleaning			
Medicine			
Dental Care			
Dues			
Unemployment Insurance			
Pension Contributions			
Income Tax			
Life Insurance			
Blue Cross / Health Insurance			
Taxis & Public Transit			
Car Insurance			
Licence and Registration			
Gas & Oil			
Car Servicing			
Parking			
Entertainment			
Recreation			
Grooming			
Vacation			
Alcohol and Tobacco			
Gifts			
Day Care			
Babysitting			
Support For Others			
Debt Payments: credit cards			
bank loans			
other loans			
car payments			
Savings			
School or Education Expenses			
Children's Allowances & Activities			
Church or Other Charities			
Other (Specify)			

TOTALS	\$	\$	\$
---------------	----	----	----

Weekly total \$ _____ x 4.33 = \$ _____ Monthly (E)

Monthly total \$ _____ monthly (F)

Yearly total \$ _____ - 12 = \$ _____ monthly (G)

Total Actual Budget on Monthly Basis (E) + (F) + (G) = \$ _____ (H)

(ii) Proposed Budget

(Complete this page only if you anticipate that your expenses will be greater than those shown in your Actual Budget (above) after your court appearance.)

Categories	If Paid Weekly	If Paid Monthly	If Paid Yearly
Rent			
Mortgage			
Common Expense Charges			
Property Tax			
Property Insurance			
Electricity			
Water			
Gardening and Snow Removal			
Gas for Heating or Cooking			
Heating			
Cable T.V.			
Telephone			
Repairs & Maintenance			
Food			
Clothing			
Laundry & Drycleaning			
Medicine			
Dental Care			
Dues			
Unemployment Insurance			
Pension Contributions			
Income Tax			
Life Insurance			
Blue Cross / Health Insurance			
Taxis & Public Transit			
Car Insurance			
Licence and Registration			
Gas & Oil			
Car Servicing			
Parking			
Entertainment			
Recreation			
Grooming			
Vacation			
Alcohol and Tobacco			
Gifts			
Day Care			
Babysitting			
Support For Others			
Debt Payments - credit cards			
bank loans			
other loans			
car payments			
Savings			
School or Education Expenses			
Children's Allowances & Activities			
Church or Other Charities			
Other (Specify)			

TOTALS \$ \$ \$

Weekly total \$ _____ x 4.33 = \$ _____ monthly (J)

Monthly total \$ _____ monthly (J)

Yearly total \$ _____ - 12 = \$ _____ monthly (K)

Total Proposed Budget on Monthly Basis (J) + (J) + (K) = \$ _____ (L)

(C) PROPERTY*(List all property that you own or the ownership of which you share with someone else. Where ownership is shared, name other owner or owners.)***(i) Land** *(Include leases, options and mortgages. Do not deduct encumbrances or costs of disposition from values.)*

Type of Property	Location	Estimated Current Market Value	Value of My Interest
		\$	\$
		\$	\$
		\$	\$
		TOTALS (M)	\$

(ii) Household and personal property

Furniture		\$	\$
Appliances		\$	\$
Household Effects		\$	\$
Clothing		\$	\$
Jewellery		\$	\$
Motor Vehicles Year		\$	\$
Make and Model			
Boats, snowmobiles or other vehicles		\$	\$
Other (specify)		\$	\$
		\$	\$
		TOTALS (N)	\$

(iii) Savings and Pensions

Type of Property	Value	Value of My Interest
Cash	\$	\$
Bank Accounts	\$	\$
Canada Pension Funds	\$	\$
Other Pension Funds	\$	\$
RRSP's	\$	\$
RHOSP's	\$	\$
Deposit Receipts	\$	\$
Other (specify)	\$	\$
		TOTALS (O)

(iv) Securities *(List stock, bonds and other.)*

Type of Security	Estimated Current Market Value	Value of My Interest
	\$	\$
	\$	\$
	\$	\$
		TOTALS (P)

(v) Life Insurance: (List policies and cash surrender values.)

Description of Policy	Cash Surrender Value	Value of My Interest
	\$	\$
	\$	\$
	\$	\$
TOTALS (Q) \$		\$

(vi) Accounts Receivable: (Give particulars of all business or personal debts owing to you.)

Particulars	Value	Value of My Interest
	\$	\$
	\$	\$
	\$	\$
TOTALS (R) \$		\$

(vii) Business Interests: (Show any interest in unincorporated businesses and any interest in incorporated businesses not shown above under securities.)

Business Interest	Estimated Current Market Value	Value of My Interest
	\$	\$
	\$	\$
	\$	\$
TOTALS (S) \$		\$

(viii) Other Property: (List all property not shown above.)

Description of Property	Estimated Current Market Value	Value of My Interest
	\$	\$
	\$	\$
	\$	\$
TOTALS (T) \$		\$

TOTALS (M to T)

(U)
(Total Value of Property)

(V)
(Total Value of My Interest in Property)

(d) DEBTS

(Give particulars and amounts owing on debts and liabilities, whether arising from personal or business dealings, including mortgages, other encumbrances and charges on property, loans, charge accounts, credit cards and other debts and include contingent liabilities such as guarantees.)

Type of Debt	Amount Owed	Amount of My Share of Debts
	\$	\$
	\$	\$
	\$	\$
TOTALS \$		\$
(Total Debts Owed)		(Total of my Share of Debts)

(e) SUMMARY

Total Monthly Income (D)	\$ _____	Total Monthly Income (D)	\$ _____
Total Monthly Actual Budget (H)	\$ _____	Total Monthly Proposed Budget (L)	\$ _____
Difference (D) - (H)	\$ _____	Difference (D) - (L)	\$ _____
Total Value of Property (U)	\$ _____	Total Value of My Interest in Property (V)	\$ _____
Total Debts (W)	\$ _____	Total of My Share of Debts (X)	\$ _____
Difference (U) - (W)	\$ _____	Difference (V) - (X)	\$ _____

3 The name and address of my employer is _____

4 I do not anticipate any material change in my financial situation. (If changes are anticipated, describe them below.)

5 (If either spouse is making a claim under subsection 42(1) of the Marital Property Act, include the following.)

(f) PARTICULARS OF CONTRIBUTION TO PROPERTY

The particulars of my contribution to the property or properties in question are accurately set out below to the best of my knowledge, information and belief. (List the properties in question by a description sufficient to identify them and show the details of your contribution to each.)

Description of Property	Contribution
-------------------------	--------------

SWORN TO at _____

in the Province of New Brunswick.

this _____ day of _____, 19 _____

BEFORE ME

Commissioner of Oaths.

(Signature)

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FIN

English-speaking people in Saint John, cases involving francophone and/or Acadian women will be under-represented. While there may be little difference in the outcome of cases across the country, it would be wrong to assume such as fact. Moreover, my study does not even consider differences among the Common Law tradition and the Civil Law of Quebec.²⁵

With respect to reported cases, predominant trends are difficult to interpret because of the limitations of the data. For example, the fact that certain types of cases appeared with greater frequency may merely point to editorial decisions on behalf of Reports of Family Law rather than any distinguishable trends within the separating population at large. With this caveat, common characteristics are discernable and will be discussed.

Consistent with Carol Rogerson's analysis, there is a general acceptance on the part of the judiciary of the principles of child support articulated in the Paras v. Paras²⁶ decision. In Paras, Kelly J.A. reasoned:

Since ordinarily no fault can be alleged against the children which would disentitle them to support, the objective of maintenance should be, as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred.

²⁵Marlene Cano shows in her comparative study of child custody cases in both legal regimes that, while differences in outcomes are only slight, underlying principles of law are dissimilar. She also notes that many scholars fail to recognize the two legal regimes, even when studies profess to speak for 'all of Canada.' See Marlene Cano. "Reflections on Recent Trends in the Analysis of Custody and Parental Authority in Canada." Canadian Family Law Quarterly. 10:1 (November 1993), 269-284.

²⁶Paras v. Paras, (1970) 2 R.F.L. 328, [1971] 1 O.R. 130, 14 D.L.R. (3d) 546 (C.A.).