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PROTECTING THE CHILDREN OF FRACTURED FAMILIES: ALTERNATIVES TO THE ADVERSARIAL LEGAL PROCESS*

par Julien D. PAYNE**

The Legal Consequences of Marriage Breakdown and Divorce

Fundamental changes in the substantive law of "Marriage and Divorce" in Canada have been implemented in the past fifteen years. Canadians have withnessed major policy shifts in the field of divorce reform with the introduction of no-fault divorce grounds to complement an extended list of "offence" grounds. The changes effectuated by the federal *Divorce Act* of 1968 have been accompanied by fundamental changes in provincial statutes regulating the economic consequences of marriage breakdown and divorce. The decision of the Supreme Court of Canada in *Murdoch* v. *Murdoch,* [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367, which denied recognition to the non-financial contribution of a wife to the husband's property acquisitions, has now been substantially consigned to the realm of an historical anachronism. Changing judicial attitudes as reflected in the decisions of the Supreme Court of Canada in *Rathwell* v. *Rathwell,* [1978] 2 S.C.R. 436, [1982] 2 W.W.R. 101, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289 and in *Pettkus* v. *Becker,* [1980] 2 S.C.R. 834, 34 N.R. 384, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257 have expressly recognized the economic contributions of the wife or "common law" wife, who actively assists in the husband's or "common law" husband's business activities, as entitling her to an interest in the property acquired by him as a result of those business activities. But the recent decision of the Supreme Court of Canada in *Leatherdale* v. *Leatherdale* (1982), 30 R.F.L. (2d) 255, 142

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D.L.R. (3d) 193 denies any corresponding recognition to the wife's contribution, where her role has been that of a homemaker who is not directly involved in the husband's business activities. In most provinces and territories, however, the homemaking spouse is now entitled to a share in such property pursuant to the provisions of recently enacted provincial statutes. In addition to conferring statutory rights to a property division on a non-title holding spouse, many but not all provinces and territories have enacted legislation that implements radical changes respecting spousal support rights and obligations arising independently of divorce. Most provinces have abandoned the traditional fault system, which was based on the commission of a designated matrimonial offence, in favour of a "needs" and "capacity to pay" approach.

Statutory reforms in the field of children's rights have been modest in comparison with the aforementioned changes affecting husbands and wives. The concept of "children's rights" is relatively new, although certain legislative trends are emerging. In the Province of Ontario, for example, the status of illegitimacy has been substantially abolished by statute (see *Children's Law Reform Act,* S.O., 1977, c. 41, sections 1 and 2, now R.S.O., 1980, c. 68, sections 1 and 2). The child's rights to independent legal representation in wardship proceedings, albeit in the discretion of the court, has also been legislatively recognized in the Province of Ontario (*Child Welfare Act,* S.O., 1978, c. 85, section 20, now R.S.O., 1980, c. 66, section 20). In the context of custody and access disputes, innovative substantive and procedural changes were implemented in the Province of Ontario as of October 1, 1982 by *The Children's Law Reform Amendment Act,* S.O., 1982, c. 20 (see text, *infra*). These statutory changes reflect contemporary concern for the rights of children and the need to provide for the more effective protection of the children of dysfunctional families.

Children and the Traditional Legal Divorce Process

Divorce is a complex human process. Paul Bohannan has identified six "stations" in the divorce process: (i) the emotional divorce; (ii) the legal divorce; (iii) the economic divorce; (iv) the co-parental divorce; (v) the community divorce; and (vi) the psychic divorce. Each of these stations of divorce involves an evolutionary process and there is substantial inter-action between them.

Divorce legislation and the legal process represent a limited context within which parenting rights and obligations and the economic consequences of the marriage breakdown are legally regulated. In Canada, 85 per cent of all divorce proceedings are uncontested. An uncontested divorce hearing usually occupies only a few minutes of the court's time. Issues relat-

ing to future parental rights and responsibilities, spousal and child support and property division are typically resolved by negotiation between the spouses, who are frequently represented by independent lawyers. Of the 15 per cent of divorces that are contested, at least at the outset, there is no statistical breakdown of the contested issue(s). The contest may relate to the dissolution of the marital status (the grounds for or bars to divorce), to spousal or child support or to parenting rights or privileges following the divorce. Because an overwhelming majority of all divorces are uncontested, it might be concluded that the present legal system works well in protecting the interests of the children of divorcing parents. Such a conclusion may be belied by the realities. In the typical divorce scenario, the spouses negotiate a settlement at a time when one or both are undergoing the emotional trauma of marriage breakdown. Psychiatrists and psychologists agree that the "emotional divorce" passes through a variety of states, including denial, hostility and depression, to the ultimate acceptance of the reality of the death of the marriage. A constructive resolution of the emotional divorce requires the passage of time, which varies according to the circumstances but is rarely less, and not infrequently more, than twelve months. In the interim, decisions respecting the upbringing of the children of the broken home must be made. They cannot await a successful outcome to the spousal emotional divorce. Practical considerations, as well as the child's sense of time, necessitate early decisions being taken respecting the children's future upbringing. Consequently, parenting decisions that are often permanent are taken under stress at a time of emotional crisis. From the lawyer's perspective, parenting decisions cannot be isolated from the total fabric of the legal divorce. Decisions respecting any continued occupation of the matrimonial home, the amount of child support, and the amount of spousal support, if any, are conditioned on the arrangements made for the future upbringing of the children. The legal interdependence of property rights, support rights and parental rights after divorce naturally affords opportunities for abuse by lawyers and their clients. The lawyer who has been imbued with "the will to win" from the outset of his career, coupled with the client who negotiates a settlement when his or her emotional divorce is unresolved, can wreak havoc on the children, the innocent victims of the broken marriage. All too often, when settlements are negotiated, the children become pawns or weapons in the hands of game-playing or warring adults and the battles do not cease with the judicial dissolution of the marriage.

And what of the contested proceeding where parental rights and obligations are directly in issue? Is not the role of the judge that of a non-partisan decision maker? Most assuredly, it is. It does not follow, however, that the interests of the children of the fractured family will be protected under the present adversarial process. As a non-partisan decision maker, the judge

cannot assume the role of "child advocate". Indeed, any judicial disposition respecting the children's upbringing is inevitably made on the basis of the evidential scripts produced and presented by counsel for either or both parents. Any search for the "best interests" of the children, the well-established legal criterion to be applied in custody adjudications, is often lost in the battleground of the courtroom where the issues frequently focus on spousal misconduct rather than the children's welfare. Far too often, the following judicial observations accurately characterize the contested custody trial:

> "From the standpoint of custody the hearing of the petition was, in my respectful view, quite unsatisfactory. Virtually no evidence was directed to this issue. The parties primarily concerned themselves with adducing evidence to show whether, on the basis of the many marital battles engaged in by them, one or the other of them should be favoured by the trial judge in his determination of the issue of cruelty.
>
> No one bothered to bring forward much information in respect of the two individuals who of all the persons likely to be affected by these proceedings least deserve to be ignored — the children. We know their names, sex and ages, but little else. Of what intelligence are they? What are their likes? Dislikes? Do they have any special inclinations (for the arts, sports or the like) that should be nurtured? Any handicaps? Do they show signs of anxiety? What are their personalities? Characters? What is the health of each? (This list of questions is not intended as exhaustive or as one that is applicable to all contested cases but only as illustrative of those questions which may be relevant). In short, no evidence was led to establish the intellectual, moral, emotional and physical needs of each child. Apart from the speculation that these children are 'ordinary' (whatever that means) there is nothing on which to base a reasoned objective conclusion as to what must be done for this child and that child, as individuals and not as mere members of a general class, in order that the welfare and happiness of each may be assured and enhanced.
>
> Nor was any direct evidence led to show which of the parents, by reason of training, disposition, character, personality, experience, identification with a child's pursuits, ability to cope with any special requirements of a child's health, religious observance and such other pertinent factors (again the list is intended as only illustrative of matters which may be relevant) is best equipped to meet the needs of each individual child. The evidence presented on behalf of each side was principally, if not exclusively, geared to do one thing: show how badly one spouse treated the other. Such evidence is hardly a proper basis upon which to make a determination — a crucial one indeed from the standpoint of the children — as to which parent is best suited to meet the needs of the children and upon which to found an order for custody. How inconsiderate one spouse is of the other, or how one spouse reacts towards the other in a marital battle and the ability of a spouse to come out of a marital battle a winner, either actual or moral, are not high-ranking factors, if factors they be at all, in determining where a child's happiness and welfare lie, particularly whether such happiness and welfare are better assured by placement with one parent or the other.": *Wakaluk* v. *Wakaluk* (1976), 25 R.F.L. 292, at pp. 299-300 (Sask. C.A.) (per Bayda, J.A., dissenting).

The "Welfare" or "Best Interests" of Children: New Statutory Guidelines

Some provinces, including Ontario and Saskatchewan, have recently introduced new statutory guidelines to assist the court in determining the "best interests" of the children in custody disputes. Following the recommendations of the Law Reform Commission of Canada (see Law Reform Commission of Canada, *Report on Family Law,* Ch. 4, para. 4.29 (1976); and see generally Richard Gosse and Julien D. Payne, "Children of Divorcing Spouses: Proposals for Reform", published in Law Reform Commission of Canada, *Studies in Divorce,* (1975)), the Province of Saskatchewan has enacted statutory provisions whereby the "welfare" of the child constitutes the sole criterion for the judicial disposition of custody and access applications. The statute further provides the bases on which the court should determine the welfare of the child. Section 3 of the *Infants Act,* R.S.S., 1978, c. I-9, provides as follows:

> *"Orders as to custody, etc. of infants*
>
> 3. (1) The Court of Queen's Bench may, on the application of a parent or other person having, in the opinion of the court, a sufficient interest, make an order regarding the custody, care and upbringing of an infant.
>
> *Notice of application*
>
> (2) Where an application is made under this section, the court may, as it considers appropriate in the circumstances of the particular case, order that notice of the application be served upon any person having an interest in the custody, care and upbringing of the infant, and any such person may be heard at the hearing of the application.
>
> *Welfare of the infant the only consideration*
>
> (3) In making an order under subsection (1), the court shall have regard only for the welfare of the infant and, for that purpose, the court shall consider the physical, psychological, social and economic needs of the infant and in doing so shall take into account:
>
> *(a)* the quality of the relationships that the infant has with the persons to whom custody, care and upbringing might be entrusted and with any other persons, such as brothers and sisters of the infant, who may have a close connection with the question of the infant's custody, care and upbringing;
>
> *(b)* the personality and character and the emotional needs of the infant;
>
> *(c)* the capacity to be a parent of any person to whom the custody, care and upbringing of the infant might be entrusted, the home environment to be provided for the infant and the plans that person has for the future of the infant;
>
> and

(d) the preference of the infant, to the extent the court considers appropriate having regard to the age and maturity of the infant.

No presumption of preference in favour of either parent

(4) in considering an application under subsection (1) or (5), no presumption shall exist as between parents that one parent should be preferred over the other on account of his or her status as a father or mother...''

Similar, but not identical, provisions have recently been enacted in the Province of Ontario. Section 24 of the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, provides as follows:

''Merits of application for custody or access

24. (1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.

Best interests of child

(2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,

(a) the love, affection and emotional ties between the child and,

(i) each person entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons involved in the care and upbringing of the child;

(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) any plans proposed for the care and upbringing of the child;

(f) the permanence and stability of the family unit with which it is proposed that the child will live; and

(g) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Past conduct

(3) The past conduct of a person is not relevant to a determination of an application under this Part in respect of custody of or access to a child unless the conduct is relevant to the ability of the person to act as a parent of a child.''

The aforementioned provisions became operative in the Province of Ontario on October 1, 1982.

The formulation of new statutory criteria to assist the courts in determining the "welfare" or "best interests" of the children in custody and access proceedings will likely prove to be of limited significance so long as the traditional adversarial legal process continues to predominate in the resolution of parenting disputes. What is required is not only a re-definition of the applicable substantive criteria but also innovative processes that will promote consensual and reasonable arrangements being made for the upbringing of the children of separated or divorced parents.

Statutory Endorsement of Innovative Processes: Independent Assessments; Mediation and Conciliation

In addition to implementing new substantive criteria for determining the "best interests" of a child, the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, introduces two procedures that might well result in reducing the acrimony that commonly accompanies contested custody litigation. Briefly stated, the court is now empowered, but not required, to order an independent assessment of the child's needs and of the ability of the parties to accommodate those needs. The court is also empowered, at the request of the parties, to refer disputed issues for mediation.

A. *Court-ordered assessments*

The power of the court to order an assessment of the child's needs and the ability of the parties to meet those needs is defined in section 30 of the *Children's Law Reform Amendment Act, supra.* This power is exercisable as soon as an application for custody or access is brought. An assessment may be ordered before or during the hearing of the application. The court may order an assessment on the request of any party to the application or on its own initiative. Where possible, the court will appoint an assessor chosen by the parties, but their failure to agree does not preclude the court from appointing an assessor who is willing to undertake the assessment and report to the court within the period of time designated by the court. The court may direct the parties to the application, the child(ren) and other persons (for example, a "common law" spouse) to submit to an assessment and any refusal to do so entitles the court to draw adverse inferences against a non-consenting adult respecting his or her ability or willingness to meet the needs of the child(ren). The report of the assessor is filed with the court and copies are provided to the parties and to counsel, if any, for the child. The assessor may be required to attend as a witness at any subsequent hearing of the application for custody or access. The costs of the assessment are to be borne by the parties in such

proportions as the court directs, but the court may relieve a party from all or any of his or her financial responsibilities where serious pecuniary hardship would otherwise ensue. A court-ordered assessment does not preclude the parties or counsel representing the child from submitting other expert evidence respecting the needs of the child and the ability or willingness of the parties or any of them to satisfy those needs. In correspondence that the author has received from a psychiatrist who currently undertakes court-ordered assessments in a Family Court clinic, the following observations have been made:

> "I am also having difficulty already in terms of sections which allow the court to dictate the kind of assessment that I shall be producing and this especially appears to apply to the mysterious wonders of psychological testing."

This opinion may be attributable to sub-section 30(11) of the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, which provides as follows:

> "Upon motion, the court by order may give such directions in respect of the assessment as the court considers appropriate."

It is doubtful whether this sub-section was intended to "allow the court to dictate the kind of assessment" to be produced. In all probability, the legislative intention was to permit the court to define the ambit of the assessment rather than the manner in which it is to be conducted.

Section 30 of the *Children's Law Reform Amendment Act, supra,* is silent on the question whether it can be invoked by a court in divorce proceedings wherein custody or access is sought. Sub-section 30(1) provides that an assessment may be ordered by "[the] court before which an application is brought in respect of custody or access to a child". It is submitted that this language is sufficiently broad to include divorce proceedings wherein custody or access is sought by way of corollary relief: see *Booth* v. *Booth and Knowles* (1983), 33 R.F.L. (2d) 330 (Ont. S.C.). As to the role of the accessor, see *Hampel* v. *Hampel* (1983), 31 R.F.L. (2d) 462 (Ont. Dist. Ct.) and *Boody* v. *Boody* (1983), 32 R.F.L. (2d) 396 (Ont. Dist. Ct.).

As an alternative or in addition to ordering an assessment by a person "with technical or professional skill" pursuant to section 30, *supra,* the court, on an application for custody or access made under the *Children's Law Reform Act,* R.S.O., 1980, c. 68, as amended by S.O., 1982, c. 20, may require the Official Guardian to cause an investigation to be made and to report to the court on all matters relating to the custody, support and education of the child(ren). In divorce and nullity proceedings instituted in the Province of Ontario, an Official Guardian's report is mandatory in all cases where there is any child under sixteen years of age, or under seventeen years of age and in full-time attendance at an educational institution or unable to

earn a living by reason of illness or infirmity: *Matrimonial Causes Act,* R.S.O., 1980, c. 258.

B. *Mediation and Conciliation*

Section 31 of the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, empowers the court, on an application for custody or access, to appoint a mediator selected by the parties, who will confer with them in an endeavour to obtain an agreement on disputed issues. Unlike a court-ordered assessment, the judicial power to refer a matter for mediation is exercisable only at the request of the parties. A person who consents to act as mediator must file a report with the court within the time specified by the court. The parties may choose between "open" and "closed" mediation. The choice is made before they enter into mediation. If they select "open mediation", the mediator must file a full report on the mediation with the court and should include in that report anything that the mediator considers relevant to the issue referred for mediation. Where "closed" mediation has been selected by the parties, the mediator's report is confined to setting out the agreement reached by the parties or stating only that no agreement has been reached. Evidence of anything said or of any admission or communication made in the course of "closed mediation" is inadmissible in any subsequent judicial proceeding, except where all the parties to that proceeding consent to the admissibility of such evidence. A copy of the mediator's report to the court is available to all parties and to counsel, if any, representing the child. The fees and expenses of the mediator are to be paid by the parties in such proportions as are specified by the court, but the court may relieve a party from the responsibility for paying any of the fees or expenses where the court concludes that serious financial hardship would otherwise ensue.

In essence, section 31 of the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, endorses the voluntary use of mediation by the parties to custody and access disputes and establishes certain basic requirements respecting the admissibility of evidence in any subsequent judicial proceeding. This tentative step towards legislative recognition of mediation as a means of resolving custody and access disputes is not without its critics. In a letter addressed to this author, the following criticisms appear:

> "I am already receiving comments concerning the *Children's Law Reform Amendment Act* to the extent that it seems that lawyers are worried that they will not be able to cross-examine mediators, for instance, and I can understand their concern. Frankly I think the Act opens the door to all kinds of individuals setting themselves up as mediators or assessors in view of the vaguaries surrounding those issues and basically I am very disturbed that people under extreme stress will be 'ripped off' by such unscrupulous profiteers. I have seen examples of this already in this town and can see these individuals rubbing their hands in delight

> at the thought of dictating closed mediation, charging 40 $ and upwards per hour for 20 plus sessions and then writing a note to the court to the effect that mediation failed."

The risks attendant upon self-styled unqualified mediators meddling in family crises is not confined to financial "rip-offs" and may require governmental intervention by way of legislative regulation and/or licencing. Although there is evidence that court-connected conciliation facilities have made a positive contribution to the consensual resolution of family disputes, the quality of service rendered by self-styled private mediators is unknown and opens the door to abuse in the absence of any minimum requirements respecting qualifications or training and the absence of any form of accountability. It is submitted, however, that section 31 of the *Children's Law Reform Amendment Act,* S.O., 1982, c. 20, does not aggravate the problem of unqualified self-styled mediators meddling in family crises. Indeed, it may alleviate this problem insofar as a court order under section 31 presupposes that an opportunity will be available to the court to determine the proposed mediator's qualifications.

The responsibility of the court to foster "conciliation" is also acknowledged in articles 448 and 653 of the Civil Code of Quebec, which relate to spousal and parental rights and duties. While endorsing the philosophy that conciliation sould be viewed as an alternative means of family conflict resolution, these articles offer no guidelines with respect to the implementation of the philosophy. More specific legislative endorsement of conciliation as a means of resolving spousal and child support and custody and access disputes is found in the Province of New Brunswick. Section 131 of the *Child and Family Services and Family Relations Act,* S.N.B., 1980, c. C-21, provides as follows:

> "131. In any custody proceeding, whether or not brought under this Part, or in any other proceeding brought under this Part, if the court is of the opinion that any question arising might reasonably be the subject of conciliation, and that it would be in the best interests of the family to attempt to resolve the question through conciliation, the court may make an order requiring the Minister to make conciliation services available to the parties and may adjourn the proceeding for a reasonable time."

This provision suggests that the Province must assume some responsibility for establishing conciliation services in the community or in the courts, although it is open for the Minister to approve the use of private conciliators or mediators. Unlike the provisions in the Province of Ontario, section 131, *supra,* is not conditioned upon the request, or even the consent, of the parties. It is unlikely, however, that the court will impose mandatory conciliation on unwilling parties, at least until such time as conciliation services are readily available in the court or established community agencies.

The prospective impact of the aforementioned statuory provisions on the resolution of custody and access disputes is speculative at the present time. It remains to be seen how often and in what circumstances lawyers and the courts will promote the use of mediation or conciliation. The frequency and efficacy of court-ordered mediation or conciliation will, in part, depend upon the reactions of practising lawyers. Whether mediation or conciliation will be viewed by lawyers as practical and beneficial complementary or alternative processes in family conflict resolution or as an invasion of the exclusive preserves of the legal profession will be answered in the years ahead. Just as successful mediation or conciliation processes require the cooperation of the parties, so too, an inter-disciplinary professional approach to the resolution of family conflicts requires the cooperation of the involved professions.

Whatever the future may hold with respect to these innovative processes, the aforementioned statutory provisions represent a major breakthrough in introducing through the law new perspectives to the resolution of family disputes. They openly acknowledge what has long been known — that the legal and judicial processes are insufficient, of themselves, to promote the constructive resolution of parenting disputes. In the words of Meyer Elkin, a former Director of the Family Counselling Service of the Los Angeles Conciliation Court:

> "In an area as complex and critical as custody, there is a pressing need for becoming more aware of what is in the best interest of the child, for developing criteria and guidelines underpinning the decision-making process in custody and visitation and translating all this into practices that are more responsive to the needs of divorcing and divorced parents and their children. Neither the law alone nor the behavioral sciences alone can reach this goal. The search must be an interprofessional effort. If the law and the behavioral sciences are not responsive to each others' findings and suggestions, both parents and children will suffer.
>
> The ultimate goal of divorce practices generally, and custody/visitation specifically, should be to insure the maximization of human ressources by minimizing the potential damage that is present for both parents and children in all divorce cases.
>
> There is no such thing as a simple custody/visitation determination. For in that determination we set the pattern of the future for not only the child but the parents. In the case of the child, he or she stands by helplessly as critical decisions are made about his or her life. We owe the children of all ages a custody/visitation determination based on a reasonable rationale and an awareness of what is in the child's best interest. A child is not a piece of property. A child is not a prize to be awarded to a winner. A child has rights. A child should not be used by the parent(s) as a convenient club with which to clobber the other parent. A child's future shoud not be snuffed out by the gales of rage generated by parents trying to emotionally end a broken but once cherished relationship.

> There is no one today who has the answers. Collectively we have a responsibility to search for answers so that when we say, 'in the best interest of the child', we will truly know its meaning. Today, for the most part, this statement glibly rolls off the tongue into a pile of social gibberish that contains phrases that do not mean too much but sound good.
>
> It is important that the law and the behavioral sciences work together to find answers. Those involved in court-connected counseling services as well as researchers outside the court system are beginning to shed some light on the direction to take. They are raising important questions without which the search for answers cannot begin.'': Elkin, ''Custody and Visitation — A Time for Change'', (1976) 14 Conciliation Courts Reviews, (No. 2), at p. iii.

Court-connected Conciliation Services

In the past ten years, there has been growing recognition of the fact that the ability of separated or divorced parents to cope with continuing parent/child relationships after the breakdown of the marriage does not naturally flow from legal intervention or the judicial dissolution of the marriage. In many instances, the preservation of positive relationships between an absent parent and his or her children requires counselling services to be available to both parents, the children and, in appropriate cases, members of the extended family and/or reconstituted families. In some larger urban centres in Canada, court-connected conciliation services have been established to defuse the acrimony that so commonly accompanies the traditional litigation process. The pioneering work undertaken by Judge Marjorie Bowker and Franklin Bailey in Edmonton during the early nineteen seventies established a momentum for court-connected family conciliation services that has survived government restraint programmes and contributed to the development of similar services in other provinces.

Pursuant to the recommendations of federal and provincial law reform agencies, Unified Family Court pilot projects were established during the nineteen seventies in several urban centres across Canada, including the Richmond, Surrey, Delta districts in British Columbia; Fredericton, New Brunswick; St. John's, Newfoundland; Hamilton, Ontario; and Saskatoon, Saskatchewan. Several of these projects have now been established on a permanent basis, but only in the Province of Prince Edward Island has a Unified Family Court been established on a permanent and province-wide basis. There are two essential characteristics of a Unified Family Court. First, the court must exercise a comprehensive and exclusive jurisdiction over family law matters. Secondly, administrative, counselling, legal and enforcement services must be established in or available to the court. The objective of the counselling service is to promote the settlement of family disputes and to avoid recourse to more formal and adversarial legal proceedings.

Internal and independent assessments of court-connected conciliation services in Canada attest to the advantages of promoting the non-litigious resolution of family disputes. Assertions that the provision of court-connected conciliation services are too costly are unsupported by such evidence as is available. Indeed, there is evidence that conciliation in far less expensive to the taxpayer and the parties than litigation. And the non-financial rewards of conciliation in the promotion of continuing meaningful relationships between the children of the broken marriage and both of their parents cannot be ignored. These benefits cannot be measured in terms of dollars and cents; they must be measured in terms of individual and societal welfare.

Other Conciliation and Mediation Services

There is a danger that too much emphasis will be placed on court-connected counselling services. Crisis counselling in family conflict situations must not be confined to circumstances where litigation is imminent or has already occurred. Counselling services must be available in the community to assist the dysfunctional family in resolving its problems without recourse to the law. Existing community agencies are currently overloaded and under-staffed. The public demand for increased counselling facilities is amply demonstrated by the emergence of private mediators. In the United States, private mediation has become an area of major growth in the last five years and the public demand for such services is unlikely to stop at the Canadian border. Indeed, as stated previously, the time may have already arrived when the State should intervene to guarantee the competence and qualifications of private mediators. Otherwise, the risks to already endangered families may be aggravated rather than eliminated by the intervention of the self-styled mediator. The development of educational and training programmes for private mediators is vital if a basic standard of competence is to be assured. It is not sufficient, however, to establish a limited class of specialists. General medical practitioners must be alerted to the physical and emotional consequences of stress resulting from family crises and their professional training must equip them to treat the family unit as a whole so as to alleviate these problems. Adequate professional training must also be provided to members of the church who are actively involved in counselling families in distress. What is required is a network of well-trained professionals, including lawyers, social workers, psychologists, psychiatrists, medical practitioners and clerics who can work cooperatively between themselves and with community-based and court-based conciliation agencies in the search for constructive solutions to family crises. The court of law must become a forum of last resort. The conflict of the judicial arena must be abandoned in favour of concerted efforts to facilitate the self-determination of family disputes by the affected parties. The ultimate responsibility for positive parent

and child relationships, whether before or after marriage breakdown, lies within the family itself. The affected parties must, therefore, be permitted to make a much more substantial input into any decision making respecting their rights and responsibilities. As Meyer Elkin has stated:

> "Family law courts should allow divorcing couples more self-determination. It is their lives that are involved. It is their future. They should therefore be encouraged and allowed to play a greater part in the decision-making process, particularly in matters like custody and visitation. Rather than fostering increased dependency on the court, these couples should be encouraged to accept more responsibility for decisions affecting their lives and their children. If the anger is too great, if the communication between the parties is broken down, the impulse of the court should be to refer the couples to a court-connected marriage and family counselor before proceeding with the adversary process. Let us not underestimate the ability of divorcing persons to help themselves in their crisis. Let us not rob them of the opportunity to grow with the crisis. More self-determination, when appropriate, increase[s] the chances for this to happen.": *loc cit, supra,* et p. iv.

General conclusions

The potential benefits of conciliation or mediation in the resolution of parenting arrangements on the breakdown of marriage may be briefly summarized.

1. Conciliation or mediation promotes the cooperative resolution of parenting disputes. Settlements in which the affected parties are directly involved in the decision making are far more likely to be respected than judicial dispositions that impose a solution, in some cases after a bitterly fought battle in the courts.
2. Conciliation or mediation can promote systems of co-parenting after marriage breakdown that will provide benefits to the children and both their parents. Contested litigation that involves an exchange of charges and counter-charges of parental unfitness constitute an inappropriate foundation for cooperative parenting, regardless of the judicial disposition made. It is for this reason that many courts refuse to make orders for joint custody after protracted litigation.
3. Conciliation or mediation is relatively inexpensive when compared to the costs of the legal and judicial process.
4. Conciliation or mediation services provide a more appropriate environment in which to determine the wishes and best interests of all affected parties. Statutory requirements asserting that the "best interests" of the child shall prevail ignore the reality that the "best interests" of the child cannot be segregated from the interests of the parents. In the words of Meyer Elkin:

> "We cannot serve the best interest of the child without serving the best interests of the parental relationship. The two cannot be separated. The kind of relationship

> the parents maintain during the divorce and after the divorce will have a significant impact on the children involved — for better or for worse....
>
> A custody proceeding that focuses solely on what is in the best interest of the child is too restrictive an approach. More realistically, we should also strive for what is in the best interest of the family.'': *loc. cit., supra,* at pp. iii — iv.

Furthermore, legislative provisions that direct the courts to have regard to the wishes of the child become meaningless in the context of hotly disputed custody and access litigation between the parents. The practice of some judges of interviewing the children in their chambers often adds little of value to a determination of the child's true preference of the child's ''best interests''. Few lawyers and judges are trained in the skills of interviewing children and the judge's office is hardly an appropriate location for conducting any such interview. The use of conciliation or mediation services provide more effective avenues for determining the wishes and the best interests of the child and those of the whole family.

5. Conciliation or mediation services can make provision for necessary ongoing therapeutic counselling for family members. They are also more readily available to resolve recurrent problems relating to the parenting of the children without delay or undue expense. This is especially true of access disputes, which by their nature do not lend themselves to resolution by the imposition of legal sanctions.

Final summation

It should not be assumed that conciliation or mediation is a panacea for the crises that erupt on marriage breakdown or divorce. The economic and emotional crises provoked by marriage breakdown will not be eliminated by the use of counselling and conciliation facilities, although they may be alleviated to some degree. What conciliation or mediation does offer is an opportunity for family members to gain a more insightful appreciation of the consequences of marriage breakdown or divorce and a less destructive approach to the resolution of family disputes than that engendered by protracted litigation. Whether conciliation or mediation will achieve its apparent potential will only be determined in the future. The responsibility for its development and the realization of its potential lies with you and your *confrères*. I wish you well in your endeavours.