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Résumé de l'article

Le maintien des droits parentaux de garde et de visite dans une procédure contestée à la suite de la dissolution du mariage suppose que le tribunal concilie les intérêts concurrents des enfants, des parents et des autres membres de la famille « élargie » ou « reconstituée ».

Dans *C.* c. *C.* (decision non publiée de la Cour suprême de l'Ontario, rendue le 7 mars 1984), la cour ordonna à la mère qui était liée par les termes d'un accord de séparation antérieur, de ne pas emmener les enfants hors de l'Ontario sans le consentement du père ou sans qu'une ordonnance de la cour le lui permette. Pour arriver à cette conclusion, le juge s'est appuyé sur la preuve apportée par le conciliateur qui avait tenté, sans succès, de résoudre la mésentente des parents. Celui-ci était d'avis qu'il serait néfaste pour les enfants que la mère, qui songeait à se remarier, s'établisse avec eux en Angleterre.

La décision *C.* c. *C.* soulève plusieurs points essentiels sur la façon de résoudre légalement les problèmes des parents en cas d'échec du mariage ou de divorce. Dans le présent commentaire de cette décision (reproduite en annexe) les points suivants sont analysés :

1. Quelle signification, s'il en est, un tribunal doit-il donner aux termes d'un accord de séparation ?

2. Lorsqu'un conciliateur intervient, le processus de conciliation, y compris le rapport du conciliateur, doit-il être « ouvert » (c'est-à-dire susceptible d'être porté à la connaissance du tribunal) ou « fermé » (c'est-à-dire confidentiel et non admissible en preuve dans une procédure subséquente) ?

3. Comment le meilleur intérêt des enfants — critère légal à adopter pour régler les différends des parents — peut-il être concilié avec le meilleur intérêt des autres membres de la famille concernée ?

4. Le tribunal peut-il ou doit-il examiner la possibilité de solutions différentes susceptibles de ménager les intérêts concurrents de toutes les personnes concernées ?

5. Dans quelle mesure les tribunaux peuvent-ils légalement brimer la liberté du parent gardien des enfants de créer un nouveau foyer pour lui-même et ceux-ci ?

Certains de ces points sont étudiés dans les motifs du jugement *C.* c. *C.* D'autres n'y ont pas été abordés. Le but du présent commentaire est de les cerner tous et de souligner qu'une solution familiale plutôt qu'une solution visant les seuls droits individuels est nécessaire pour résoudre les différends des parents en matière de garde et de visite, ce qui va à l'encontre de l'attitude traditionnelle des tribunaux à cet égard.

The Co-Parental Divorce: Removing the Children from the Jurisdiction

by
JULIEN D. PAYNE* AND EILEEN OVEREND**

ABSTRACT

The preservation of parenting rights in contested custody or access proceedings arising on the dissolution of marriage necessitates a judicial reconciliation or balancing of the competing interests of the children, the parents and members of any extended or reconstituted families. In C. *v.* C., *(unreported, March 7, 1984, Ont. S.C.) the mother was held to the terms of a prior separation agreement and was ordered not to remove the children from the Province of Ontario without the father's consent or a further order of the court. In reaching this decision, the trial judge placed heavy reliance on the evidence of a mediator who had unsuccessfully attempted to resolve the differences between the parents and who was of the opinion that the children*

RÉSUMÉ

Le maintien des droits parentaux de garde et de visite dans une procédure contestée à la suite de la dissolution du mariage suppose que le tribunal concilie les intérêts concurrents des enfants, des parents et des autres membres de la famille « élargie » ou « reconstituée ».

Dans C. *c.* C. *(decision non publiée de la Cour suprême de l'Ontario, rendue le 7 mars 1984), la cour ordonna à la mère qui était liée par les termes d'un accord de séparation antérieur, de ne pas emmener les enfants hors de l'Ontario sans le consentement du père ou sans qu'une ordonnance de la cour le lui permette. Pour arriver à cette conclusion, le juge s'est appuyé sur la preuve apportée par le conciliateur qui avait tenté, sans succès, de résoudre la*

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(1984) 15 R.G.D. 645

would be at risk if the mother proceeded with her plans to remarry and establish a new home for herself and the children in England.

C. *v.* C. *raises diverse fundamental issues concerning the legal resolution of parenting disputes on marriage breakdown or divorce. The following issues are addressed in the commentary of this judgment (reproduced in annex):*

1. What significance, if any, does, and should, a court give to the express terms of a separation agreement?

*2. If a mediator is retained, should the mediation process, including the mediator's evaluation, be "open" (*i.e. *subject to disclosure to the court) or "closed" (*i.e. *confidential and excluded from any evidence adduced in subsequent judicial proceedings)?*

3. How can the best interests of the children — the legal criterion to be applied in the adjudication of parenting disputes — be reconciled with the best interests of other concerned family members?

4. Could, and should, the court have addressed the possibility of some alternative form of parenting arrangements that might accomodate the competing interests of all the affected parties?

5. To what extent can the courts legally fetter the freedom of a custodial parent to establish a new

mésentente des parents. Celui-ci était d'avis qu'il serait néfaste pour les enfants que la mère, qui songeait à se remarier, s'établisse avec eux en Angleterre.

La décision C. *c.* C. *soulève plusieurs points essentiels sur la façon de résoudre légalement les problèmes des parents en cas d'échec du mariage ou de divorce. Dans le présent commentaire de cette décision (reproduite en annexe) les points suivants sont analysés :*

1. Quelle signification, s'il en est, un tribunal doit-il donner aux termes d'un accord de séparation?

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3. Comment le meilleur intérêt des enfants — critère légal à adopter pour régler les différends des parents — peut-il être concilié avec le meilleur intérêt des autres membres de la famille concernée?

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5. Dans quelle mesure les

home for (i) herself (or himself) and (ii) the children?

Some of these issues are specifically addressed in the unreported reasons for judgment. Others are ignored. The purpose of this commentary is to canvass these issues and point to the need for a family-oriented approach to the resolution of parenting disputes, rather than an individual rights approach, such as has been traditionally adhered to by the courts in the adjudication of custody and access disputes.

tribunaux peuvent-ils légalement brimer la liberté du parent gardien des enfants de créer un nouveau foyer pour lui-même et ceux-ci?

Certains de ces points sont étudiés dans les motifs du jugement C. *c.* C. *D'autres n'y ont pas été abordés. Le but du présent commentaire est de les cerner tous et de souligner qu'une solution familiale plutôt qu'une solution visant les seuls droits individuels est nécessaire pour résoudre les différends des parents en matière de garde et de visite, ce qui va à l'encontre de l'attitude traditionnelle des tribunaux à cet égard.*

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INTRODUCTION

Contemporary psychological and legal opinion asserts that it is highly desirable for the children of separated or divorced parents to maintain continuing positive relationships with both the custodial and non-

custodial parent.[1] This conventional wisdom was recently applied in *C.* v. *C.*,[2] wherein the custodial mother was barred from removing the children of the dissolved marriage from the Province of Ontario, notwithstanding her wish to remarry and establish a new matrimonial home in England.

THE FAMILY DYNAMICS

A bald statement of the judgment in *C.* v. *C.* hides the heartbreak and frustration that are so frequently encountered by family members as divorcing and divorced parents seek new lives for themselves and their children. It also hides the inadequacy of the law and the legal process as a means of resolving the problems of the co-parental divorce. The human drama and family dynamics are, however, relatively well-documented in the reasons for judgment in *C.* v. *C.* An examination of these reasons reveals the following facts.

The spouses were married in June, 1973 and separated in March, 1979. Two children were born during the subsistence of the six-year marriage. The first child, a daughter, was born on January 5, 1976, and the second child, a son, was born on May 25, 1977. When the spouses separated, the two children were left in the care of their mother. Between the date of the spousal separation and the date of the pronouncement of a decree *nisi* of divorce on March 7, 1984, the privileges and responsibilities of the parents evolved into an established pattern. The mother assumed the primary responsibility for the children during the week. She made the major decisions concerning their education and actively stimulated them in their school work and in the development of their artistic talents. Being actively engaged as a teacher at several schools, much of the mother's activity with the children centred upon the day-to-day management of the household, in which the children were directly involved. The father continued to discharge a significant parenting role, particularly at week-ends and during school vacations, being especially involved in the children's recreational activities. He frequently communicated with the children during the week and displayed a positive interest in their intellectual stimulation. In addition to setting up a creativity table for the children in his home, he attended a parent-teacher meeting at his daughter's school by reason of concerns expressed by the mother. He would take the children to the hairdresser and, when his schedule permitted, to the doctor.

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1. See Julien D. PAYNE and Kenneth L. KALLISH, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family", in *Payne's Digest on Divorce in Canada, 1968-80*, 745, especially pp. 752-756.

2. Unreported, March 7, 1984 (Ont. S.C.) (No. D104218/82). See annex, p. 674.

The children enjoyed a high degree of interaction with their relatives on both sides of the family, including their maternal and paternal grandparents, aunts, uncles and cousins. Their relationship with the maternal grandparents was particularly close. In the course of time, both the mother and father developed new personal relationships. Some three years after the spousal separation, the mother fell in love with a divorced man who lived in England. They planned to marry and hoped to establish their home in England, where the husband-to-be had on-going business and family commitments. The children spent relatively brief periods of time with him but their interaction was positive. The father also formed a third-party relationship in late 1982, and over the period of eighteen months proceding the divorce a friendly relationship matured between the children and their father's "fiancée".

THE INTRUSION OF THE LEGAL PROCESS

The complexities of the new and old familial relationships were compounded by the intrusion of the legal process in the three years preceding the judicial dissolution of the marriage. Shortly after the mother had decided to remarry and establish her home with the children in England, the father's solicitors sought a judgment from the court to approve the terms of an oral separation agreement negotiated by the spouses through their solicitors, which imposed restrictions upon the mother's right to remove the children from the Province of Ontario. When this occurred, the mother chose to sign the agreement in written form, but before doing so, she advised her husband that she intended to remarry and take the children to English. Clause 3A of this written agreement provided as follows:

> Neither party shall remove the children of the marriage from the Province of Ontario, except for normal vacation periods, without the written consent of the other, such consent not to be unreasonably withheld.

The mother was fully aware of this clause and of her husband's insistence upon its inclusion in the separation agreement at the time when she signed the agreement, but she was hopeful that the provision respecting the withholding of consent would not preclude her moving to England with the children. Paragraph 2 of the separation agreement provided that the mother should have the custody, care and control of the children, but that she would consult with the father on all major decisions affecting the health, education, religion or general welfare of the children, and take his wishes into consideration. Paragraph 3 of the separation agreement entitled the father to reasonable access to the children, such access to include eight days per month, two to three weeks during school vacation periods, and certain days during the Christmas and New Year holiday seasons. Paragraph 25 of the separation agreement provided that paragraphs 2, 3,

3A and certain other specified paragraphs relating to the financial aspects of the agreement "shall be incorporated in any decree of divorce that may be granted".

The express terms of the separation agreement subsequently became of primary importance, particularly in light of the following conclusions of the trial judge:

> Counsel for Mrs. C. has emphasized to the court that clause 3A does not contain an absolute prohibition against removing the child from the province on a permanent basis. The agreement provides Mr. C.'s consent must be obtained and such consent is not to be unreasonably withheld. Counsel for Mrs. C. would have me construe this paragraph as saying that if Mrs. C.'s plan to move is a reasonable one, in the sense that she will advance herself in life and is not deliberately seeking to deprive Mr. C. of his access rights, he must consent. This is not the same thing. If Mrs. C.'s plan is a reasonable one for her it does not follow that Mr. C. is being unreasonable if he does not consent to it. The agreement gives to Mr. C. the right to have his children have the benefit of his love and guidance through consultation about their care and to frequently have them in his care. There is no dispute that Mr. C. has been a very interested and involved parent who has always exercised his access rights. Because he chooses to continue to assert his rights rather than to forfeit them, I do not think it can be said Mr. C. is acting unreasonably. The court must therefore look to the best interests of the children.[3]

Prior to the divorce proceeding in which the above conclusions were reached, the parents had attempted to resolve the impasse by consulting an experienced mediator. The efforts to mediate the dispute proved unsuccessful and the responsibility for making a decision was thus transferred from the parties to the judge presiding over the divorce hearing. At this hearing, the mediator filed a report that was amplified by his oral testimony at the trial. The mediator expressed concern that "the effects of moving the children from a positive situation with close relationships with both parents to a different culture with only minimal contact with their father and other family members will present a risk situation for the children".[4] In the mediator's opinion, the established custody and access arrangements were working well and should remain undisturbed. The ideal solution envisaged, but not examined, by the mediator would have involved the mother's husband-to-be emigrating to Canada and establishing the matrimonial home in Toronto. The business expertise of the husband-to-be was not readily transferable to Canada, however, and his commitments to the children of his dissolved marriage and more particularly to his aged parents in England presented obstacles to such a ready-made solution.

The opinions of the mediator were questioned by a psychologist who was called to give evidence by counsel for the mother. The psychologist, unlike the mediator, had no opportunity of interviewing the inter-

3. *Id.*, at p. 679, *infra*.
4. *Id.*, at p. 681, *infra*.

ested parties and her role was confined to evaluating the mediator's report. The psychologist emphasized the potential impact on the children of the frustration of the mother's plan to remarry and establish a home in England. The psychologist opined that the children would benefit from a two-parent family and that this would compensate for any consequential loss of or reduced contact with the father and members of the extended families. In short, the psychologist was of the opinion that interference with the autonomy of the custodial parent would pose a greater risk of adverse impact on the children than the risk involved in the mother's plan to move to England with the children. The psychologist acknowledged, however, that it would be detrimental to the children if the proposed second marriage should end in divorce.

Faced with this conflict of evidence, the trial judge was not persuaded that the best interests of the children would be served by changing the existing custody and access arrangements. Accordingly, the trial judge ordered that the mother "shall continue to have custody of the children and that [the father] continue to have access as set out in paragraphs 2 and 3 of the separation agreement, but that the children not be removed from the Province of Ontario, other than for normal vacation periods, except on consent of both parents or, if they cannot agree, by court order."[5]

RELEVANT ISSUES

C. v. *C.* raises diverse fundamental questions concerning the legal resolution of parenting disputes. The following issues might properly be addressed:

1. What significance, if any, does, and should, a court give to the express terms of a separation agreement?
2. If a mediator is retained, should the mediation process, including the mediator's evaluation, be "open" (*i.e.* subject to disclosure to the court) or "closed" (*i.e.* confidential and excluded from any evidence adduced in subsequent judicial proceedings)?
3. How can the best interests of the children — the legal criterion to be applied in the adjudication of parenting disputes — be reconciled with the best interests of other concerned family members?
4. Could, and should, the court have addressed the possibility of some alternative form of parenting arrangements that might accommodate the competing interest of all the affected parties?

5. *Id.*, at p. 683, *infra*.

5. To what extent can the courts legally fetter the freedom of a custodial parent to establish a new home for (i) herself (or himself) and (ii) the children?

Each of these issues will be addressed sequentially, although some degree of overlapping is necessarily involved.

1) Effect of separation agreement

Where marriage breakdown results in spousal separation, arrangements must inevitably be made for the continued parenting of any dependent children. The sharing or abandonment of parental privileges and responsibilities, whether as a result of conscious decision-making or by default, necessarily ensues as a consequence of the cessation of matrimonial cohabitation. The most common sequence of events is that the husband leaves the matrimonial home, leaving his wife and children there. Parenting arrangements thereafter evolve, often in an informal way, that over a period of time develop into an established pattern.

If and when either or both spouses seek legal advice, the *de facto* parenting arrangements will frequently be formalized in a written separation agreement. More often than not, the drafting of such an agreement follows a standard form and the efforts of the spouses and their lawyers in negotiating a settlement are concentrated on defining the economic consequences of the marriage breakdown. Most separation agreements stipulate that one parent shall have the custody, care and control of the children and the other parent shall be entitled to access rights. The access privileges of the non-custodial parent may be defined simply in terms of "reasonable", "generous" or "liberal" access, or they may be defined more specifically by the spelling out of particular periods of time which the non-custodial parent is entitled to spend with the children. All too frequently, the custody and access provisions of a separation agreement constitute "standard boilerplate" and little or no attention is paid to the long-term implications of the formalized arrangements.

In the vast majority of cases, any subsequent divorce will be uncontested and the children will remain with the parent, usually the mother, with whom they resided following the spousal separation. Statistics indicate that 85 per cent of all divorce proceedings are uncontested and that, upon divorce, the children of the marriage are placed in the custody of their mother in 85.6 per cent of all cases and in 95.7 per cent of the cases wherein the mother is the divorce petitioner.[6]

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6. See Julien D. PAYNE and Kenneth L. KALLISH, "The Welfare or Best Interests of the Child: Substantive Criteria to be Applied in Custody Dispositions made Pursuant to the Divorce Act, R.S.C., 1970, c. D-8", in *Payne's Digest on Divorce in Canada*, 1983 tab, 1201, especially p. 1251.

The informality with which separated and divorced spouses resolve parenting disputes without recourse to lawyers and the courts stands in stark contrast to the formality and inflexibility of the legal process that is invoked when disputed issues are referred to the courts for adjudication. The family dynamics of marriage breakdown centre on feelings and emotions that cannot be pigeon-holed within established legal norms. Responsible parenting after separation or divorce cannot be decreed by judicial orders.

The rigorous application of the law of contract to the interpretation and enforcement of separation agreements that regulate future parental privileges and responsibilities creates a wholly artificial distinction between two types of agreement. Where parents disagree about whether the custodial parent should be entitled to establish a new home with the children in another Canadian province or in a foreign country, the courts will usually permit the removal of the children out of the jurisdiction, if the separation agreement provides only that the non-custodial parent shall have "reasonable", "liberal" or "generous" access. Where, however, the separation agreement includes specific terms of access, as in *C.* v. *C.*, the spouses will usually be held bound by the agreed terms and the custodial parent will be denied the freedom to remove the children from the jurisdiction. It is submitted that the distinction drawn by the courts between the two types of access provision confuses form and substance, by placing an unwarranted emphasis on the express terms of the separation agreement. It ignores the fact that legal practitioners rely heavily on standard form precedents and their selection of a particular form may be quite fortuitous and bear little or no relation to what the parents intended or anticipated at the time of the execution of the separation agreement. Family relationships are not static; they change with time and cannot be pre-ordained by the terms of separation agreement negotiated on marriage breakdown or divorce. The undue emphasis that the courts have placed on the express terms of a separation agreement is amply demonstrated in the following reported judicial decisions.

When a separation agreement grants access to the non-custodial parent but contains no explicit or implied prohibition on the custodial parent's right to remove the children, the courts have felt free to construe the document flexibly "in light of the terms used in and the circumstances surrounding the agreement in question": *Hunt* v. *Hunt*.[7] In this case, a separation agreement that granted the wife "full and free liberty of access" was no bar to the husband's removal of the children to such places as he would be in pursuant to the discharge of his responsibilities as an army

7. (1884) 24 Ch. D. 606 (Eng.).

surgeon. And in *Wright* v. *Wright*,[8] the Ontario Court of Appeal held that a custodial parent had an unfettered right to remove the children, because the agreement explicitly provided that she could reside wherever she chose and the use of the term "reasonable" access indicated no implied restriction on moving. Similarly, in *Bruce* v. *Bruce*,[9] the court concluded that there was no such restriction, because the agreement was silent on the issue of the right to move and was couched in general terms with respect to access.

In contrast, when the seperation agreement sets out specific terms of access, the courts have usually concluded that the spouses intended the children to remain in sufficiently close proximity to the non-custodial parent as will ensure meaningful exercise of the right of access. In *Shoot* v. *Shoot*,[10] for example, where the agreement contained specific provisions with respect to access, the Ontario Court of Appeal held the custodial parent in breach of the agreement when the children were taken to Florida without explanation. And in *Wagneur* v. *Wagneur*,[11] the separation agreement contained detailed arrangements for joint custody. Each spouse subsequently sought sole custody because the mother was contemplating moving with the children from Montreal to Toronto. The Québec Superior Court affirmed the terms of the separation agreement and expressed the opinion that the status quo as laid down by the parties themselves ought to be adhered to. The courts may, nevertheless, exercise a discretionary power to override specific access provisions in a separation agreement, having regard to the best interests of the child, but the onus of establishing the propriety or necessity of the removal of the children contrary to the terms of the agreement falls on the parent who seeks to remove the children.[12]

In *C.* v. *C.*, a significant portion of the reasons for judgment concentrates on the legal distinctions that are drawn between cases where there is no separation agreement, cases where there is a separation agreement with no express or implied prohibition against the removal of the children by the custodial parent, and cases where the separation agreement contains specific terms of access that presuppose that the children will remain in close proximity to the non-custodial parent. Having extracted the legal principles articulated in these three sets of circumstances, the trial judge in *C.* v. *C.* stated:

> Relating these principles to the situation before me, I have no difficulty, based on the wording of the clauses quoted from the separation agreement, in

8. (1974) 1 O.R. (2d) 337, 12 R.F.L. 200, 40 D.L.R. (3d) 321 (Ont. C.A.).
9. (1977) 5 R.F.L. (2d) 198 (Ont. Surr. Ct.).
10. [1957] O.W.N. 22, 6 D.L.R. (2d) 366 (Ont. C.A.).
11. (1975) 17 R.F.L. 150 (Qué. S.C.).
12. *Kruger* v. *Booker*, (1961) 26 D.L.R. (2d) 709 (S.C.C.); *Shoot* v. *Shoot*, *supra*, footnote 10.

> concluding that it was intended that the custodial parent [. . .] reside in close proximity to the non-custodial parent [. . .].[13]

The trial judge further remarked that there had been no change in circumstances since the execution of the separation agreement that would warrant a variation of its terms. At the time when the mother signed the agreement, her plans to remarry and move to England with the children had already been made. While endorsing the policy of holding parents to their contractual undertakings, the trial judge declined to base her decision on the terms of the agreement standing alone. Rather, she looked to the "best interests of the children" in determining that the access provisions of the separation agreement should be respected and the mother barred from removing the children from the Province of Ontario.

It is submitted that the emphasis placed by the judiciary upon the express terms of a separation agreement is misguided. A two-stage process whereby the court first determines the nature of any contractual undertakings and thereafter evaluates those undertakings in light of the perceived best interests of the children is neither desirable nor necessary. It clouds the real issue of whether a proposed change in the children's established environment is consistent with their best interests. Contractual commitments, often entered into under stress and without a full appreciation of the legal significance of those commitments, can constitute a barrier rather than an aid to the constructive resolution of parenting disputes. Formalized agreements, though appropriate when entered into, may become inappropriate with the passage of time. Human affairs do not stand still. To cite the obvious, separated and divorced parents form new relationships, children grow up, and new job opportunities present themselves. Judicial adherence to the express terms of a separation agreement may also foster self-protective attitudes towards negotiated parental settlements. In light of existing judicial opinion, an informed custodial parent would be wise to resist the inclusion of specific terms of access in a separation agreement, so as to keep the options open with respect to future marriage or career prospects. Yet in many cases, some form of structured relationship with the non-custodial parent may be in the best interests of the children and the parents. Conversely, a non-custodial parent would be well-advised to insist on the inclusion of specific terms of access in the separation agreement, so as to ensure that continued contact with the children will not be disrupted or undermined by any unilateral future decision taken by the custodial parent.

2) Open and closed mediation

The negative impact of the traditional adversarial legal process on the resolution of parenting disputes has been increasingly recognized

13. *Supra*, footnote 2, at p. 679, *infra*.

in the last decade. The dissenting judgment of Bayda, J.A. in *Wakaluk* v. *Wakaluk*[14] forcefully points out that the 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.

Recognition of the emotional and financial costs of bitterly contested custody litigation has fostered the mediation of parenting disputes and the use of independent assessors in the litigation process. In the Province of Ontario, specific legislation has been enacted to encourage the use of mediation and independent assessments to assist in the resolution of parenting disputes: see *Children's Law Reform Act,*[15] section 30 (assessments) and section 31 (mediation). Legislative endorsement of mediation or conciliation as a means of resolving custody and access disputes is also found in article 653 of the *Civil Code of Québec* and in section 131 of the *Child and Family Services and Family Relations Act.*[16]

The essence of mediation is that the family members are themselves directly responsible for making decisions respecting the consequences of the marriage breakdown or divorce. Self-determination with the aid and guidance of a neutral third party is the cornerstone of the mediation process. The role of the mediator is to reduce the family conflict to a level where the parties can effectively communicate and examine their options with the objective of negotiating a settlement of the disputed issues.

Opinions differ concerning the advantages and disadvantages of so-called "open" and "closed" mediation. Open mediation presupposes that, in any subsequent legal proceedings, the mediator and the parties can be required to disclose to the court what was said and what occurred during the course of the mediation process. Closed mediation is premised on the confidentiality of the mediation process and, in subsequent legal proceedings, evidence of anything said or done during the course of mediation is withheld from the court. In the Province of Ontario, the parameters of *court-ordered* open and closed mediation in custody and access proceedings instituted pursuant to the *Children's Law Reform Act,* as amended by the *Children's Law Reform Amendment Act,*[17] are expressly regulated by section 31 of that Act. Where the parties to a parenting dispute in the

14. (1976) 25 R.F.L. (2d) 292, at pp. 299-300 (Sask. C.A.).

15. R.S.O. 1980, c. 68, as amended by S.O. 1982, c. 20.

16. S.N.B. 1980, c. C-21. See generally, Julien D. PAYNE, "New Approaches to the Resolution of Custody Disputes on Marriage Breakdown or Divorce", in *Payne's Digest, cit. supra,* footnote 1, at pp. 83-1255/83-1276.

17. *Supra,* footnote 15.

Province of Ontario have recourse to mediation without invoking section 31, the confidentiality, if any, attaching to the mediation process will be determined by the application of common law principles governing privileged communications. In this latter context, judicial opinion is divided on the question whether a common law privilege extends to the mediation process, if that process fails to result in a negotiated settlement.[18] The preponderance of recent judicial opinion suggests that mediation discussions entered into for the purpose of settling issues that are the subject of pending legal proceedings are protected from disclosure in subsequent legal proceedings: see *Porter* v. *Porter;*[19] *Keizars* v. *Keizars;*[20] *Hillesheim* v. *Hillesheim and Wicklin.*[21]

Whether closed mediation is compatible with section 7 of the recently enacted *Canadian Charter of Rights and Freedoms*[22] is a question that will, no doubt, engage the attention of our courts in the future. Section 7 provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In *M.* v. *K.*,[23] the New Jersey Superior Court held that, in proceedings where the custody of a child is in issue, a statutory privilege respecting spousal communications with a marriage counsellor violates the child's right to due process under the United States and New Jersey Constitutions. In a recent analysis of section 7 of the *Canadian Charter of Rights and Freedoms,* Nicholas Bala and J. Doublas Redfearn suggest that a broad interpretation might be extended to that section by the Canadian courts on the basis of precedents established by the American courts in their interpretation and application of the Fifth and Fourteenth Amendments of the American Constitution.[24]

The reasons for judgment in *C.* v. *C.* do not address the legal question of the admissibility of evidence relating to the mediation process. Having regard to the fact that the legal proceedings were instituted pursuant to the *Divorce Act,*[25] it might be presumed that any common law privilege was expressly or impliedly waived by both parents. It is also possible that the mediator, who was described by the trial judge as "a social worker

18. See SOPINKA and LEDERMAN, *The Law of Evidence in Civil Cases,* Toronto, Butterworths, 1974, especially p. 202.

19. (1983) 40 O.R. (2d) 417, 32 R.F.L. (2d) 413 (Ont. Unif. Fam. Ct.).

20. (1982) 29 R.F.L. (2d) 223 (Ont. Unif. Fam. Ct.).

21. (1974) 6 O.R. (2d) 647, 19 R.F.L. 42 (Ont. S.C.).

22. *Constitution Act, 1982,* enacted by the *Canada Act, 1982* (U.K.), c. 11, Sched, B, Part I.

23. 186 N.J. Super. 363, 452 A 2d 704 (N.J. Super. Ct.) (Ch. Div.) (1982).

24. Nicholas BALA and J. Douglas REDFEARN, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights", in Connell-Thouez and Knoppers, *Contemporary Trends in Family Law: A National Perspective,* Carswell Legal Publications, 1984, 243, at pp. 244-45.

25. R.S.C. 1968, c. D-8.

who is deeply involved in mediation and assessment'',[26] was retained by both parents in the dual capacity of a mediator and an independent assessor, whose findings and opinions would be disclosed to the trial court in any subsequent contested litigation. Whatever the attendant circumstances, the trial judge placed heavy reliance on the mediator's report and testimony that a change in the existing custodial and access arrangements resulting from the custodial parent's removal of the children to England would present ''a risk situation for the children''. Although this may have been justified, having regard to the qualifications of the particular mediator, there are serious dangers in confusing the role of a mediator with that of an independent assessor. As stated previously, the mediator's role, unlike that of a judge or independent assessor, is to facilitate the negotiation of a settlement by the parties themselves. A person who is an expert mediator is not necessarily qualified to undertake an independent multi-disciplinary assessment of a child's needs and the respective abilities of each or both of the parents to accommodate those needs.[27] Quite apart from the risk that a court may confuse the processes of mediation and assessment and place undue weight on the ''recommendations'' of a mediator, the effectiveness of the mediation process itself may be seriously endangered by the threat of subsequent disclosure to the courts. In the words of Gravely, U.F.C.J. in *Porter* v. *Porter*,[28] ''[such] efforts to settle might not take place if the parties could not rely on the confidentiality of their discussions''.

3) Best interests of children and parent(s)

Parenting is not an abstract notion. The rearing of children, whether during the subsistence of a marriage or on its breakdown, encompasses a wide variety of cooperative relationships. The judicial dissolution of a marriage is intended to sever the marital bond — not parent/child bonds. The twin legal concepts of ''custody'' and ''access'', terms used by lawyers and the courts to define parenting privileges and responsibilities on marriage breakdown or divorce, tend, however, to stress individual rights, rather than the interests of the family as a whole. The integrity of the fragmented family is thus threatened.

Despite widespread judicial condemnation of the notion that ''custody'' means ''ownership'', the traditional order granting sole custody to one parent and access to the non-custodial parent places the custodial parent in control of the child's upbringing and relegates the non-custodial

26. *Supra*, footnote 2, at p. 681, *infra*.

27. See John L. DIMOCK, ''A Model for the Psychiatric Assessment of a Divorce Custody and Access Dispute'', in *Payne's Digest, cit. supra*, footnote 1, at pp. 624-626.

28. *Supra*, footnote 19, (1983) 40 O.R. (2d) 417, at p. 421.

parent to the status of a passive bystander. Several studies have linked the non-payment of court-ordered spousal and child maintenance to the non-custodial parents' sense of frustration at being deprived of meaningful participation in their children's lives.[29] The resulting overload on judicial enforcement processes poses a significant problem, but is not nearly as serious as the threat to the economic and emotional well-being of the custodial family, as fifty per cent of all maintenance orders fall into total or partial default. To the extent that our courts continue to resolve parenting disputes on the basis of competing quasi-proprietary claims, the best interests doctrine, which supposedly governs custody adjudications, will remain more myth than reality.

Modern courts consistently assert that "the child cannot be regarded as a chattel": see, for example, *Homuth* v. *Homuth*[30] and *Bachman* v. *Mejias*.[31] In the words of Laskin, J. A., as he then was, in *Dyment* v. *Dyment:*

> The relative qualifications of competing spouses or others for the custody of children must be assessed from the standpoint of what will best serve the interests of the children rather than from the standpoint of a quasi-proprietary claim to the children.[32]

Power and control, the essence of ownership, nevertheless, remain a potent force in the way in which the courts define parental roles in the post-separation or post-dissolution family. Although the terms "custody", "care" and "upbringing" in sections 10 and 11 of the *Divorce Act*,[33] are not statutorily defined, the courts have frequently regarded "custody" as synonymous with guardianship. In *Hewar* v. *Bryant*,[34] a decision of the English Court of Appeal, which has been followed in Canada,[35] Sachs, L. J. observed that "[i]n its wider meaning the word 'custody' is used as if it were almost the equivalent of 'guardianship' [. . .]". He proceeded to list the "bundle of powers" embraced by guardianship as including: the power to control education, the choice of religion, the administration of the infant's property, the power to veto the issue of a passport, to withhold consent to marriage, the personal power to physically control the infant until the years of discretion, and the right to apply to the courts to exercise the powers of the Crown as *parens patriae*. In the context of

29. See Julien D. PAYNE, "The Collection Process", in *Payne's Digest, cit. supra,* footnote 1, especially pp. 840 and 847-848.

30. [1944] O.W.N. 556, at p. 558, [1944] 4 D.L.R. 260, at p. 263 (Ont. S.C.) (Roach, J.).

31. 1 N.Y. 2d 575, at p. 582, 154 N.Y.S. 2d 903, 136 N.E. 2d 866 (N.Y. Ct. App., 1956).

32. [1969] 2 O.R. 748, at pp. 750-751 (Ont. C.A.).

33. *Supra,* footnote 25.

34. [1970] 1 Q.B. 357, at p. 372, [1969] 3 All E.R. 578, at p. 584 (Eng. C.A.).

35. See, for example, *Huber* v. *Huber,* (1975) 18 R.F.L. 378 (Sask. Q.B.).

Canadian divorce proceedings, the case law tends to support the conclusion that in the absence of directions to the contrary, an order granting "legal custody" or "sole custody" to one parent signifies that the custodial parent shall exercise all the powers of the legal guardian of the child. In the words of Thorson, J. A., of the Ontario Court of Appeal in *Kruger* v. *Kruger and Baun:*

> In my view, to award one parent the exclusive custody of a child is to clothe that parent, for whatever period he or she is awarded the custody, with full parental control over, and ultimate parental responsibility for, the care, upbringing and education of the child, generally to the exclusion of the right of the other parent to interfere in the decisions that are made in exercising that control or in carrying out that responsibility.[36]

The corollary is that the non-custodial parent is deprived of the privileges and responsibilities that previously vested in that parent as a joint guardian of the child. Not surprisingly, therefore, the response of Canadian courts has generally been to assert the rights of the custodial parent at the expense of everyone else. In *Pierce* v. *Pierce*,[37] for example, Spencer, J. rebuked a non-custodial husband who had removed his child from the jurisdiction illegally, in the following terms: the father, he said, "has not yet grasped the fact that the mother's custody gives her the right to direct Katie's education and upbringing, physical, intellectual, spiritual and moral. His own role, through a right of access is that of a very interested observer, giving love and support to Katie in the background and standing by in case the chances of life should ever leave Katie motherless.

In *D'Onofrio* v. *D'Onofrio,* the New Jersey Superior Court analysed the differences between the relationship of a child to a custodial parent and to a noncustodial parent in the following way:

> Even under the best of circumstances and where the custodial parent is supportive of a continuing relationship between the child and the noncustodial parent, the nature of a parental relationship sustainable by way of visitation is necessarily and inevitably of a different character than that which is possible where the parents and children reside together as a single-family unit. The fact remains that ordinarily the day-to-day routine of the children, especially young ones, and the quality of their environment and their general style of life are that which are provided by the custodial parent and which are, indeed, the custodial parent's obligation to provide. The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and

36. (1980) 25 O.R. (2d) 673, 11 R.F.L. (2d) 52, at p. 78, 104 D.L.R. (3d) 481 (Ont. C.A.).

37. [1977] 5 W.W.R. 572 (B.C.S.C.).

> terms of visitation and changes in visitation by the noncustodial parent must be considered.[38]

Applying the above analysis to the question of the custodial parent's right to remove the children from the jurisdiction over the objections of the non-custodial parent, the court identified the following factors as relevant:

> [. . .] the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children [. . .] the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent, and whether the custodial parent is likely to comply with substitute visitation orders [. . .] which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed. The court should not insist that the advantages of the move be sacrificed [. . .] solely to maintain weekly visitation by the father [. . . .] It is at least arguable, and the literature does not suggest otherwise, that the alternative of uninterrupted visits of a week or more in duration several times a year [or longer visits during the summer] [. . .] may well serve the paternal relationship better than the typical weekly visit [. . . .][39]

D'Onofrio v. *D'Onofrio* has been followed and applied in other American jurisdictions: see, for example, *Hale* v. *Hale,*[40] and *Henry* v. *Henry*.[41] In contrast to this approach, courts in New York State have asserted that the non-custodial parent shall not be deprived of reasonable and meaningful access rights unless access "is inimical to the welfare of the children or the parent has in some manner forfeited his or her right to access": see *Strahl* v. *Strahl*[42] and *Daghir* v. *Daghir*.[43]

Although Canadian courts have rarely been prepared to support the non-custodial parent's claim to be more than just "a very interested observer", they have, from time to time, included directions in an order for custody that limit or preclude the custodial parent from removing the children from the jurisdiction without the consent of the non-custodial parent or a further order of the court: see, for example, *Beauroy* v. *Beauroy;*[44] *Roberts* v. *Roberts;*[45] *Wittstock* v. *Wittstock;*[46] *Richardson* v.

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38. 144 N.J. Super. 200, at pp. 204-206, 365 A 2d 27 (Ch. D.), aff'd *per curiam,* 144 N.J. Super. 352, 365 A. 2d 716 (App. Div., 1976).
39. *Id.,* at pp. 206-207.
40. 429 N.E. 2d 340 (Miss. App. Ct., 1981).
41. 119 Mich. App. 319, 326 N.W. 2d 497 (Mich. Ct. App.).
42. 66 A.D. 2d 571, at p. 574, 414 N.Y.S. 2d 184, aff'd 49 N.Y. 2d 1036, 429 N.Y.S. 2d 635, 407 N.E. 2d 479 (N.Y. Sup. Ct., App. Div., 1980).
43. 56 N.Y. 2d 938, 453 N.Y. 2d 609, 439 N.E. 2d 324 (N.Y. Sup. Ct., App. Div., 1982).
44. (1965-69) 1 N.S.R. 416 (N.S.S.C.).
45. (1978) 19 N.B.R. (2d) 700, 30 A.P.R. 700 (N.B.S.C.).
46. [1971] 2 O.R. 472, 3 R.F.L. 326, 18 D.L.R. (3d) 264 (Ont. C.A.).

Richardson and Smith[47] and *Wallace* v. *Wallace*.[48] In *MacKintosh* v. *MacKintosh*,[49] cited with approval in *C.* v. *C.*, the British Columbia Supreme Court granted custody of the children to the mother, but ordered that she not remove the children from the Province of British Columbia, notwithstanding her wish to return to New Zealand. In reaching this conclusion, Catliff, L.J.S.C. stated:

> [. . .] if the children return to New Zealand the husband will be relegated to the role of an occasional visitor. In seeing his children two or three times a year he will hardly be able to participate in their day to day lives or to exercise an influence over them. Similarly, the children will be deprived of regular contact with their father and the security that a loving relationship with him will bring. [. . .] My award of custody to the mother is made on the basis that she will not remove the children from this jurisdiction. I do not consider it is in the children's best interest to give her an unfettered right to custody, as I am firmly of the view that it is "highly desirable" the children have frequent access to their father.[50]

The recent landmark decision of the English Court of Appeal in *Dipper* v. *Dipper*,[51] provides the foundation for a judicial re-assessment of the legal implications of a custody order and its effect on the relationships between the child and the custodial and non-custodial parent. In substituting an order for joint custody for the trial judge's order granting sole custody to one parent but care and control to the other, the Court of Appeal re-defined the nature and effect of a custody order. In the words of Ormrod, L. J.,

> So far as the amendment to the order relating to custody is concerned, the judge seems to me to have repeated one of the myths that the court has been trying to explode for many years. He says:
>
> > "My reasons for making the somewhat unusual order of giving custody to one party and care and control to another is that I do not want these children to be removed from their schools without the father being notified and he will have the say about their future upbringing."
>
> It used to be considered that the parent having custody had the right to control the children's education — and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other major matter in their lives, that disagreement has to be decided by the court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong. So the basis of the judge's order giving custody to the husband and care and control to the wife was, in my view, unsound. In any event, these

47. (1972) 4 R.F.L. 150, 17 D.L.R. (3d) 481 (Sask. Q.B.).
48. (1976) 20 R.F.L. 324 (Sask. Q.B.).
49. (1980) 21 R.F.L. (2d) 113 (B.C.S.C.).
50. *Id.*, at pp. 119-120 and 122.
51. [1981] Fam. 31, [1980] 3 W.L.R. 626, [1980] 2 All E.R. 722 (Eng. C.A.).

> split orders are not really desirable. There are cases where they serve a useful purpose, but care has to be taken not to affront the parent carrying the burden day to day of looking after the child by giving custody to the absent parent. In this case a joint custody order seems to me entirely right because this is a case where the husband has an intent to play an active part in his children's lives. It is right, therefore, that the order of the court should be in a form which recognises the situation as it will be. I therefore agree with the proposed amendment to the order relating to custody.[52]

The concurring judgment of Cumming-Bruce, L. J. is to the same effect:

> As Ormrod L.J. has explained, the judge was there falling into error, it being a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court. What is not practicable, when a judge is worried about the moral aspect of the parent who is going to have care and control, is to try to resolve the problem by giving the other an apparent right to interfere in the day to day matters or in the general way in which the parent with care and control intends to lead his or her life. If anxiety is such that it calls for an active control, the usual method is by making a supervision order. That would not be sensible in this case for a combination of two reasons. The husband is a responsible, highly sophisticated man. He is going, on the judge's order, to see a great deal of the children. He will be able to judge personally whether there is any reason for continuing or growing anxiety on the ground that he explained in his affidavit and it may be that if it turns out that those anxieties are justified in the sense that the children prove to be in peril by the wife's care and control, the husband may, however reluctantly, have to invite the court to have another look at the question of care and control. This kind of litigation is so very expensive that manifestly he will not take such a step without extreme reluctance.[53]

These judgments presuppose a radical shift away from the notion of control by the custodial parent to one of consultation and cooperative parenting, with the ultimate decision-making power being vested in the courts in the event that the parents are deadlocked on a disputed issue. They imply that the best interests of a child necessitate a balancing of the interests of all affected parties. They, thus, provide an opportunity for a new judicial approach to the resolution of parenting disputes, which looks to the possibility of preserving the integrity of the fragmented family. As was stated by Meyer Elkin, a pioneer of court-connected conciliation in the United States:

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

52. *Id.*, [1981] Fam. 31, at pp. 45-46.
53. *Id.*, at p. 48.

> 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 strive for what is in the best interest of the family.[54]

Bald juducial assertions that proclaim an automatic preference for exclusive control of the child by the custodial parent are no more acceptable than vapid declarations that the non-custodial parent shall not be deprived of reasonable and meaningful access unless such contact is inimical to the welfare of the child or the parent has in some manner forfeited his or her right to such access. What is required of the courts is that they address all realistic options in an effort to accommodate the interests of all concerned, including the members of any extended or re-constituted families. The pursuit of this goal must be unfettered by technical legal concepts, definitions or procedures that impede a comprehensive evaluation of practical alternatives.

4) Re-evaluating the options

The reasons for judgment in *C.* v. *C.* indicate that the trial judge addressed only two options. The field of choice was narrowed to the question whether the status quo respecting the custody and access arrangements should be preserved by the incorporation into the decree *nisi* of divorce of the express terms of the separation agreement, or whether the mother should be accorded an unfettered discretion to establish a new home for herself and the children in England. This reflects the conventional judicial approach of weighing infringements on the custodial parent's supposed right of control against the curtailment of the non-custodial parent's access rights.

A family-oriented approach to the case would have significantly broadened the scope of the judicial inquiry, but is not without difficulties of its own. Quite apart from the controversy engendered by the notion of single and multiple "psychological parent(s)",[55] the practicability of preserving close ties that have been established between a child and relatives other than the parents or siblings is an elusive goal when spousal separation or divorce occur. When social and behavioural scientists characterize the diverse forms of family structure in contemporary society as "nuclear", "bi-nuclear", "*de facto*", "single parent", "extended",

54. M. ELKIN, "Custody and Visitation — A Time for Change", (1976) 14 *Conciliation Courts Review*, No. 2, at pp. iii and v.

55. See Julien D. PAYNE and Kenneth L. KALLISH, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family", in *Payne's Digest, cit. supra*, footnote 1, especially pp. 752-756.

"reconstituted" and "blended" families, this jargon, like that of lawyers and the courts, does nothing to advance the constructive resolution of parenting disputes on marriage breakdown or divorce. It may, however, offer an excuse, if not an explanation, for the recent trend in the American courts to cut the Gordian knot by asserting the primacy of the new family, namely the children and their custodial parent, over previously established familial relationships: *D'Onofrio* v. *D'Onofrio,*[56] *Hale* v. *Hale*[57] and *Henry* v. *Henry*.[58]

The primacy of the new family unit was also recently endorsed by the Manitoba Court of Appeal in *Korpesho* v. *Korpesho*.[59] The facts and ultimate disposition in this case may be usefully compared and contrasted with those in *C.* v. *C.* Upon granting a decree *nisi* of divorce in 1979, the Court of Queen's Bench for the Province of Manitoba vested "legal custody" of the child in both parents but granted "physical custody" to the mother who was still living in the matrimonial home. Some six months later, the mother obtained employment that frequently took her out of the city of Winnipeg. In consequence, both parents made arrangements whereby the father would have the physical custody of the child while the mother was out of town. During the time the child remained with the mother, the father enjoyed generous access privileges and when the child was with the father, the mother enjoyed generous access privileges. In late 1980, the mother instituted legal proceedings for sole custody of the child. After hearing the parties and many expert witnesses, the trial judge, Hamilton, J., granted exclusive possession of the former matrimonial home and sole custody of the child to the mother, with generous access privileges being granted to the father. The trial judge directed, however, that the best interests of the child must be served by the child remaining in the marital home environment. On the mother's subsequent remarriage, she applied to vary the custody order so as to permit her to establish a new home for herself and the child with her second husband whose employers required his transfer to Edmonton, Alberta. On this application, the trial judge, Solomon, J., concluded:

> Most of the evidence adduced during the hearing before me indicated that moving to Edmonton might be in the best interest of the wife and her new husband, but it did not convince me that it would be better for the child to go to Edmonton. Since both parents are equally able to look after the child, I find that it would be in the best interest of the child to remain in the environment in which he was brought up.

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56. *Supra,* footnote 38.
57. *Supra,* footnote 40.
58. *Supra,* footnote 41.
59. (1983) 31 R.F.L. (2d) 449 (Man. C.A.), rev'g (1983) 31 R.F.L. (2d) 140 (Man. Q.B.).

> [. . .] I am convinced that home environment in a community where the child was brought up assists the child to adjust to the ill effects which were caused by the separation of the parents. I do not think that the child should be moved from home environment merely to accommodate the best interests of the parent, particularly when the other parent remains in the community and is capable of looking after the welfare of the child.
>
> The application to vary the custody order is dismissed.[60]

In subsequent appellate proceedings, this judgment was reversed. Delivering the opinion of the Manitoba Court of Appeal, Monnin, J. A. stated:

> This child is old enough to realize that his parents have been divorced, that his mother is remarried and that he now forms part of a new family unit. Of necessity, he must also realize that his ties with his natural father can no longer be as close as they were before the divorce when all three lived under the same roof. It is not suggested that the child will not make new friends or associations in Edmonton.
>
> The new unit must be allowed to live its life as freely as possible, even to the extent of moving out of Winnipeg and out of Manitoba in order for the new husband to secure his monthly income. It is certainly in the interests of this child that his new father have a secured income, rather than to force the new father to seek new employment or to apply for unemployment insurance or social assistance. It is not in the interests of the child that he be returned to his natural father since the prior contested hearing decided just the opposite, namely, that custody should be placed in the hands of the mother.
>
> This new couple must be allowed to build a new life around the new husband and his employment. In order to do so, with as little economic or other disruption as possible, it must have the necessary mobility certainly within Canada. If the couple is to have mobility the child must follow his new parents. I agree with the submission of counsel for the mother that it is in the long-term, best interests of the child to be part of the rebuilding process of his mother's second marriage. This is so, although the natural father will not enjoy his present generous visiting rights with his son. The mother has said she will co-operate so that the child will continue his association with his natural father. Of necessity this will be to a lesser degree than at present.
>
> The order of Solomon J. will be quashed. The non-removal clause in the decree nisi will be quashed. The mother is given leave to remove the child to the province of Alberta. The father is to be given generous access. If the parties cannot agree on the terms, this court may be spoken to.[61]

In view of the statements by the Manitoba Court of Appeal that "the father had access to his son for some 156 days in a calendar year"[62] and the child had ties with "both [the] paternal and maternal larger family",[63] the disposition of this appeal presents an interesting contrast to the disposition of the trial judge in *C.* v. *C.* Distinctions between the two cases can, of course, be perceived. In *Korpesho* v. *Korpesho,* the economic

60. *Id.*, (1983) 31 R.F.L. (2d) 140, at pp. 141-142.
61. *Id.*, (1983) 31 R.F.L. (2d) 449, at pp. 451-452.
62. *Id.*, at p. 450.
63. *Id.*, at p. 451.

implications of the alternative dispositions were a major consideration, whereas in *C.* v. *C.* the financial circumstances were of no great significance, notwithstanding the trial court's finding that "the children would be better off financially if Mrs. C. were to marry Mr. S.". And in *Korpesho* v. *Korpesho,* the mother had already remarried at the time of her application to vary the custody order, while in *C.* v. *C.* the mother had only made plans to remarry. These and other possible distinctions, including the use made of expert witnesses, may justify the conclusion that each case was decided on the basis of its own particular facts. In all probability, however, these two decisions reflect differing judicial perceptions of the best means of promoting a child's welfare and development after the separation or divorce of the parents.

It is significant that in *Korpesho* v. *Korpesho* the co-parenting arrangements that were made following the divorce had been superseded by a court order granting sole custody of the child to the mother after contested litigation, whereas in *C.* v. *C.* the viability of some form of co-parenting arrangement was never addressed, at least, in the reasons for judgment. It is uncertain whether this omission is explained by the evidence that was adduced before the trial judge or the manner of its presentation, or by a *sub silentio* judicial adherence to the precedents established in *Baker* v. *Baker*[64] and *Kruger* v. *Kruger and Baun.*[65] There is little doubt, however, that these two decisions of the Ontario Court of Appeal inhibit the freedom of the Ontario courts to accommodate the wide diversity of actual and prospective familial relationships that affect or may affect the welfare of the children of separated and divorced parents. In confining her attention to the narrow issue of determining the conditions, if any, subject to which the mother was entitled to sole custody of the children, the trial judge in *C.* v. *C.* excluded other options, including the possibility of granting the custody of the children to one parent during the school year and to the other parent during school vacations. Judicial precedents whereby the care and control of children has been divided between the parents during different times of the year can be found in several Canadian provinces: see, for example, *Parker* v. *Parker;*[66] *Wagneur* v. *Wagneur;*[67] *Favreau* v. *Éthier;*[68] *Benoit* v. *Bisaillon;*[69] *Buchko* v. *Buchko.*[70] But the judicial aversion to joint custody manifested by the Ontario Court of Appeal in *Baker* v. *Baker,*[71] and *Kruger* v. *Kruger and Baun,*[72] has tended to

64. (1979) 23 O.R. (2d) 391, 8 R.F.L. (2d) 236, 95 D.L.R. (3d) 529 (Ont. C.A.).
65. *Supra,* footnote 36.
66. (1976) 20 R.F.L. 232 (Man. C.A.).
67. *Supra,* footnote 11.
68. [1976] C.S. 48 (Qué.).
69. [1976] C.S. 1651 (Qué.).
70. (1973) 11 R.F.L. (2d) 252 (Sask. Q.B.).
71. *Supra,* footnote 64.
72. *Supra,* footnote 36.

stifle the exploration of any form of shared parenting in contested custody proceedings instituted in the Province of Ontario.

With the benefit of hindsight, the question arises whether Mrs. C. might have been wise not to seek sole custody, but instead, an order for joint custody and, in the alternative, generous access privileges. Faced with such an application on the facts of this case, even if the court were to conclude that any form of joint custody order would be an unacceptable solution, it is likely that the mother would have been granted generous access privileges entitling her to spend substantial time with the children during their school vacations, notwithstanding her proposed emigration to England for the purpose of remarriage. And even if it is conceded that the non-custodial parent enjoys a diminished legal right, the distinction between an order for joint custody and an order for generous access may be more apparent than real. Had the aforementioned legal strategy been adopted, it is possible that the court would have insisted that the mother periodically return to Canada in order to enjoy her access privileges, but there is no apparent reason why the court would have denied to the mother the right to enjoy her access privileges by having the children spend their vacations or a significant portion of them with their mother and her new husband in England: compare *Berard* v. *Berard*.[73] Whether this compromise solution would have been acceptable to the mother at the time of the divorce proceedings is an unknown factor. If unacceptable at that time, it remains to be seen whether her position will change and result in a future application to the court in the event that she establishes a new matrimonial domicile in England.

5) Mobility rights under the Canadian Charter of Rights and Freedoms

The trial judge in *C.* v. *C.* specifically directed that "the children not be removed from the Province of Ontario, other than for normal vacation periods, except on consent of both parents or, if they cannot agree, by court order."[74] Similar directions can be found in a substantial number of reported decisions[75] and arise in a variety of contexts. They may be imposed, as in *C.* v. *C.*, to protect the access privileges of the non-custodial parent, to forestall the possibility of child abduction by the non-custodial parent, or to preserve jurisdictional control in the issuing

73. (1979) 10 R.F.L. (2d) 371, at p. 375 (B.C.S.C.).

74. *Supra*, footnote 2, at p. 683, *infra*.

75. See *Payne's Digest*, *cit. supra*, footnote 1, § 38.29 "Removing child from jurisdiction".

court. Whatever the reason, they are usually premised on the court's perception of the best interests of the child(ren).

The recent legislative implementation of the *Canadian Charter of Rights and Freedoms*[76] necessitates an examination of the constitutional validity of such directions in the context of section 6 of the Charter, which provides as follows:

> *Mobility of citizens*
>
> **6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> *Rights to move and gain livelihood*
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move and to take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> *Limitation*
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> *Affirmative action programs*
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Section 6 is subject to the overriding provisions of section 1, which reads as follows:

> *Rights and freedoms in Canada*
>
> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 7 of the Charter provides a means of protecting "a freedom to enjoy family life, subject to deprivation only 'in accordance with the principles of fundamental justice' ".[77]

It is uncertain whether sections 6 or 7 of the Charter will be interpreted as fettering or precluding the future exercise of the judicial discretion to impose restraints on the mobility of the children and either or both of their parents by directions such as those hitherto imposed in

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76. *Supra*, footnote 22.

77. Nicholas BALA and J. Douglas REDFEARN, *loc. cit.*, *supra*, footnote 24, at p. 244.

custody and access proceedings. The issue of a child's mobility right under section 6 of the Charter was recently considered by Dickson, J. in *Re K.K.; K.K.* v. *Minister of Social Services for Saskatchewan, Smith.*[78] The applicant, a thirteen year old child, sought to restrain the Minister of Social Services for the Province of Saskatchewan from returning her to the Province of Alberta. The child was a ward of the Minister of Social Services for the Province of Alberta and had run away from a "receiving home" in Alberta. She went to Saskatchewan and was living with an adult in that province who wished to adopt her. In dismissing the application, Dickson, J. (at pp. 334-335) stated:

> The applicant does not suggest that the minister's intended act is either illegal or beyond statutory power but, instead, pleads that the intended act would violate her rights under the *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, Pt. 1, specifically s. 6(2) which provides in part:
>
> "6(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and . . . ."
>
> The application must be dismissed because the act sought to be restrained is not illegal or beyond the statutory power of the minister. But I must add that it is patently absurd to suggest that the rights and freedoms of a child are violated by a minister of the Crown, acting within the scope of her authority, returning that child to her home, from which she has run away and where her legal guardian has decided she should live. If a child has a right under the Charter to take up residence in any province, that right is subject to the reasonable limit of the legal guardian's right, prescribed by law, to determine where that child shall live.[79]

If a child's mobility right may be restricted by the reasonable exercise of the legal guardian's right to determine the child's residence, court-imposed restrictions on child or parent mobility rights in custody or access adjudications are likely to be upheld under section 1 of the Charter, provided that the restrictions are imposed on the basis of the child's or family's best interests.

In considering the constitutional validity of judicial restrictions on parental mobility rights in the United States, Blair W. Hoffman has expressed the following opinions:

> Serving the welfare of the child appears therefore to be a "constitutionally permissible state objective". This does not mean, however, that a court may automatically use these magic words every time it decides for any reason to restrict exercise of the right to travel. As already mentioned this involves the balancing of two factors: the welfare of the child, who has been thrown into an often unfortunate position by the divorce of his parents and the subsequent custody struggle over him; and the threatened curtailment of the fundamental right to travel, to be free to live where one desires.

78. (1982) 31 R.F.L. (2d) 335 (Sask. Q.B.) (Unified Family Court).
79. *Id.*, at pp. 334-335.

> If there is no conflict between these two factors then the right to travel should not be curtailed. In other words, unless removal of the child from the state has been demonstrated to be harmful to his welfare, restraint on that removal, in the author's opinion, would not be constitutional. Under this standard, those cases which prohibited removal merely because the custodial parent could not show that it would promote the child's welfare would be unconstitutional. Moreover, a court should not be able to avoid the issue by simply changing the wording of its findings to include the words "serving the welfare of the child". Specific evidence of harm to the child by removal would have to be required if the right to travel is to have any real meaning.
>
> If a conflict between these two factors is shown it would be difficult, probably impossible, to argue that the welfare of the child must yield to the right to travel. However, in the author's opinion, the right to travel should not be restricted unless this is the only way to serve the welfare of the child, and only to the extent it is necessary to achieve this end. [. . .]
>
> One important factor in the balancing of rights and obligations is the relative ease of transportation today. If custody were given to one parent, with the right given to the other parent to have the children for, say, six weeks once a year, it would be hard to justify restricting the residence of the custodial parent, because wherever the custodial parent lived it would be relatively easy to send the child to visit the other parent. This type of custody order should be issued whenever possible so that a restraining order may be avoided. To do otherwise would be to infringe upon a constitutional right when less drastic means are available. If the transportation costs were a serious problem, the decree might include some provision for sharing them between the parents.[80]

These observations suggest a possible means of reconciling the individual's guaranteed right of mobility under the *Canadian Charter of Rights and Freedoms* with the best interests of the child in custody and access adjudications. It remains to be seen whether they will prove acceptable to Canadian courts.

As stated previously, in parenting disputes, the courts have traditionally placed far too much emphasis on individual rights and far too little emphasis on the interests of the fragmented family as a whole. This individual rights approach is consistent with the focus of the *Canadian Charter of Rights and Freedoms,* but the central thrust of the Charter is the protection of the individual's liberty against unwarranted State intrusion, rather than the arbitration of essentially private disputes. Courts must guard against the danger of asserting individual rights guaranteed by the Charter to the exclusion of a family-oriented approach to the resolution of parenting disputes arising on marital separation or divorce. A proper balancing of the many competing interests in such disputes requires concessions and compromises by all the individuals concerned — not the assertion of absolute individual rights. It is submitted that section 1 of the *Canadian*

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80. Blair W. HOFFMAN, "Restrictions on a Parent's Right to Travel in Child Custody Cases: Possible Constitutional Questions", (1973) 6 *U. of Calif., Davis L.R.* 181, at pp. 187-188.

Charter of Rights and Freedoms is sufficiently broad to encompass a family-oriented approach and that this section provides an opportunity for the courts to constructively resolve parenting disputes by defining the ambit of the individual's right to mobility in the context of the overall best interests of the family.

CONCLUSIONS

No rational person can envy the position faced by the trial judge in *C.* v. *C.* The purported resolution of parenting disputes by judicial decree in never easy. The human dimensions of contested custody and access litigation that follow the tragedy of marriage breakdown do not escape the trial judge whose role is that of the surgeon who must determine the degree to which the scalpel shall be used to sever familial umbilical cords. Human relationships, being dynamic and subject to change, do not lend themselves to the application of fixed legal definitions or rules. Indeed, rigid judicial adherence to previously espoused legal doctrine may constitute a stumbling block to the constructive resolution of parenting disputes on marriage breakdown or divorce.

The emphasis that courts have placed on the express terms of an existing separation agreement is, it is submitted, misconceived, although an established pattern of familial relationships before or after separation or divorce must be viewed as an important consideration to be weighed in determining the best interests of the fragmented family in any subsequent custody or access adjudication.

Judicial unanimity on the paramountcy of the "best interests" doctrine cannot obscure the fact that the interpretation and application of this doctrine is far from monolithic. The usual judicial practice of granting sole custody to one parent and only access privileges to the other parent, when coupled with the legal definitions of "custody" and "access" in terms of parental control or lack thereof, focuses on the rights of the individual, usually one or other of the parents, to the exclusion of the best interests of the child or those of the fragmented family as a whole. Responsible parenting after separation or divorce is not fostered by legal generalizations and may, indeed, be hampered by them. It is not surprising, therefore, that courts have differed in determining whether the best interests of a particular child will be promoted by the judicial assertion of control in the hands of the custodial parent, or by the imposition of restrictions upon the custodial parent's supposed right of control. The respective claims of "old" and "new" families have provoked a wide divergence of judicial opinion. And so it will remain for as long as the courts focus on individual rights rather than the interests of the fragmented family as a whole.

Section 6 of the *Canadian Charter of Rights and Freedoms* provides a constitutional means of challenging court-imposed restrictions

on a child's or parent's freedom of movement and section 7 provides a possible means of challenging unwarranted interference with the freedom to enjoy family life. It remains to be seen whether the courts will uphold the primacy of parental rights over those of the child and whether the interests of members of the extended family can be protected under the Charter.

The view advocated here is that the language and concept of individual rights is not helpful in the judicial resolution of parenting disputes. Instead, the courts must seek an accommodation that intrudes least on the liberties of parents and children and that also best serves the welfare of all affected family members. In light of the wide diversity of family relationships, flexibility of approach must be the cornerstone of the judicial resolution of parenting disputes. When, as in *C.* v. *C.*, both parents enjoy a close relationship with their children, the courts should canvass a much wider range of custody dispositions than those presently addressed, including divided physical custody on the basis of the school year and vacation periods.

Finally, it is submitted that mediation can be a valuable aid to the settlement of parenting disputes, but persons having recourse to mediation should be aware of the legal implications of so-called "open" and "closed" mediation and of the risks of confusing the roles of the mediator and the independent assessor.

IN THE SUPREME COURT OF ONTARIO

BETWEEN:

(J.A.B.) C.

Petitioner

- and -

(A.M.) C.

Respondent

Counsel:

Burke Doran, Q.C. for the petitioner
Rebecca Regenstrief

Stephen Smart for the respondent

BEFORE THE HONOURABLE JUDGE KAREN M. WEILER

REASONS FOR JUDGMENT

The petition requesting a divorce of J.A.B.C. and A.M.C., married on June 2, 1973, is granted. It is also agreed that A.M.C. will have custody of the two children of the marriage, Claire, born January 5, 1976, and Christopher, born May 25, 1977, and that J.A.B.C. will have access. The real issue in this case is whether I should make an order that these children not be removed from Ontario, other than for normal vacation periods, without further order of this court. Mrs. C. presently lives in Toronto but wishes to marry a gentleman who resides in England and to move there with the children. Mr. C. is opposed to this plan as it would mean he would no longer be able to exercise access in the manner he has enjoyed since the spouses separated in March 1979 and as embodied in a separation agreement dated October 27, 1982.

Paragraph 2 of the separation agreement provides that the wife is to have custody, care and control of the children but that she is to consult with the husband in respect of all major decisions affecting the health, education, religion or general welfare of the children and take his wishes into consideration.

Paragraph 3 of the agreement entitles the husband to reasonable access to the children including, but not being limited to:

> (a) Eight full days (including overnight) per month;
>
> (b) For two full weeks during the year at times when the children are not in school to be increased to three full weeks once each child attains the age of six years; . . .
>
> (c) For the whole day on either December 24th or December 26th in each and every year, as well as a few days during the Christmas and New Year's holiday season;

In addition, the husband is entitled to communicate with the children by telephone and letter and to have access at other times as might be agreed upon by the parties.

Paragraph 3A provides as follows:

> Neither party shall remove the children of the marriage from the Province of Ontario, except for normal vacation periods, without the written consent of the other, such consent not to be unreasonably withheld.

Paragraph 25 of the agreement provides that paragraphs 2, 3, 3A and certain other paragraphs related to the support of the children and financial aspects of the relationship "shall be incorporated in any Decree of divorce that may be granted".

Before signing the agreement in October 1982, A.M.C. had met Mr. S., the man she wishes to marry, in April of that year. He is also divorced and decided to visit his brother in Canada with whom A.M.C. and her father were both well acquainted. An open invitation had been given by Mrs. C. to use the pool in her townhouse building complex and on one occasion Mr. S. availed himself of that opportunity with his children and met her. The following weekend some friends had a dinner party for Mr. S. on the eve of his departure back to England which Mrs. C. attended.

Mr. S. wrote Mrs. C. upon his return to England and out of their correspondence and telephone calls a friendship developed.

In August 1982 Mrs. C. took the children to Cape Cod for a two week vacation and by prearrangement Mr. S. joined them. After two or three days Mr. S. asked Mrs. C. to marry him when she was free to do so and she accepted his proposal.

Shortly after Mrs. C. returned from her summer vacation, Mr. C.'s solicitors brought a motion for judgment in accordance with the terms of the separation agreement alleging they had previously been orally agreed to by the parties through their solicitors. When this happened, Mrs. C. decided to sign the agreement but before she did so she called Mr. C. and advised him she planned to marry Mr. S. and take the children with her to England. The next day she signed the agreement. Although she objected to clause 3A being in the agreement, she knew Mr. C. had insisted upon it. She knew the agreement did not contain a blanket provision and hoped the words "such consent not to be unreasonably withheld" would be a safeguard to her. The signed separation agreement was accompanied by a letter from Mrs. C.'s solicitor, Stephen Smart of Osler, Hoskin, Harcourt (Exhibit 2), referring to a previous telephone call and indicating concerns with respect to future litigation respecting paragraph 3A. Mr. Smart alluded to the possibility that Mrs. C. "might consider moving to England" at the end of the school year, but stated no final decision had been made.

Mr. C.'s solicitor, Rebecca Regenstreif of Lang, Michener, replied the same day to the effect that she had not bound Mr. C. to any arrangement with respect to the removal of the children from Ontario aside from the specific wording of clause 3A, that she had never had any instructions aside from the wording of this clause, and that the wording of the clause spoke for itself. There were minor revisions to the agreement and she rushed to make this position before Mrs. C. signed it. Mr. C. signed the revised agreement and Mrs. C. once again signed.

At Christmas time, Mrs. C. went to England alone and spent ten days with Mr. S., returning on January 4, 1983. While she was in England they looked at houses and Mr. S. put in an offer on a five bedroom home in a village some two hours from London, which was accepted.

Mr. S. came to Canada for Easter and the March break in 1983 and spent twelve to thirteen days here. For the first weekend after his arrival the children were at home and after that they were in Florida with their father.

During the summer of 1983 Mrs. C. and the children went to England for five weeks and stayed in the house Mr. S. had purchased.

This past Christmas, Mr. S. came to Canada for fifteen days and testified in the proceedings.

Counsel have both been very helpful in drawing to the attention of the court authorities which they felt would be of assistance. The law to be applied in this case is summarized in *Wright* v. *Wright* (1974), 12 R.F.L. 200 (Ont. C.A.) at pp. 202-203 as follows:

> Absenting all consideration of unreasonableness, . . . the parent who has custody of children has the right to remove the children without the permission of the other parent in the absence of some specific agreement to the contrary or in the absence of such

specific terms with respect to access as would clearly indicate that the parties must have intended that the children remain in close proximity if the specified right of access provided in the agreement was to be an effective right.

This summary of the case law can be further broken down into the following principles:

1. WHERE THERE IS NO SEPARATION AGREEMENT

(1) The court should not lightly interfere with the way of life selected by the custodial parent: *Nash* v. *Nash* (1973), 2 All E.R. 704.

(2) Where the proposed move by the custodial parent is a reasonable one, then leave to remove the children should be granted unless the best interests of the children and those of the custodial parent are incompatible: *Chamberlain* v. *De La Mare* (1983), 13 Family Law Journal 15.

(3) Instances where the courts have held that a proposed move by the custodial parent is reasonable and should be allowed are where the custodial parent was in the Canadian Armed Forces and was ordered transferred to another province, *MacDonald* v. *MacDonald and La Fortune* (1981), 17 Man. R. (2d) 441 (C.A.); where the custodial parent had an opportunity to advance his or her career, *Nash* v. *Nash* (1973) 2 All E.R. 704 (C.A.); *McGowan* v. *McGowan* (Huchcroft) (1979) 11 R.F.L. (2d) 281 (Ont. S.C.); where the custodial parent had remarried, was expecting a child of the second union and the step parent had career opportunities abroad, *Chamberlain* v. *De La Mare* (1983), 13 Family Law Journal 15; and *P (L.M.) (otherwise E)* v. *P (G.E.)* (1970), 3 All E.R. 659 (C.A.); where there was no substantial relationship between the children and the non-custodial parent as indicated by the fact he had not supported them or exercised his access rights, *Lazaridis* v. *Lazaridis*, (unreported) Ont. S.C., July 28, 1983.

(4) Instances where the courts have held that a proposed move by a custodial parent is not reasonable can be found in *Burgoyne* v. *Burgoyne* (1980), 30 N.S.R. (2d) 18 (N.S.S.C.) where the father had threatened to take the children out of the jurisdiction if his wife left him and within days of the decree nisi awarding him custody applied for a position in Algeria; and *MacKintosh* v. *MacKintosh* (1980), 21 R.F.L. (2d) 113, where the custodial parent wished to leave Canada, return to New Zealand with no definite prospect of employment, and to live with her mother, with whom she had never gotten along with very well in the past.

(5) The state of the law in certain states of the United States where greater emphasis is placed on the child's right to know the non-custodial parent and to have the benefit of that parent's adequate visitation as in *Strahl* v. *Strahl* (1979), 414 N.Y.S. (2d) 184 (N.Y. Sup. Ct. App. Div.) and *Daghir* v. *Daghir* (1982), 453 N.Y.S. (2d) 609 (Ct. of Appeals, N.Y.), is not the law of Ontario which seems to parallel English law. See *Wright* above and cases in (3) and (4).

(6) On the other hand, in *Grisdale* v. *Grisdale* (1976), 28 R.F.L. 1974 (Sask. Q.B.), where custody of the children of the marriage was in issue and the mother wished to take the children to live in Greece, while her boyfriend with whom she was living in Saskatoon pursued a two year job opportunity in Iran, the court, although it awarded custody to the mother, found it in the best interests of the children that they not be removed from the jurisdiction.

In this case, a psychiatrist had testified that the loyalties of the children were deeply divided and the court, relying on the paramount consideration of the welfare of the children, felt frequent access by the father was highly desirable. This order was made at the time the issue of custody was before the court and not, as in other cases, where the issue of custody had already been decided on a previous occasion. In a sense, therefore, the mother's remaining in the jurisdiction was a precondition to the court's decision to award custody to her.

II. WHERE THERE IS A SEPARATION AGREEMENT AND THERE IS NO PROHIBITION EXPRESSED OR IMPLIED

The children may be removed by the custodial parent provided that it is reasonable and not contrary to the welfare of the children. In *Wright* v. *Wright* (1974), 12 R.F.L. 200 at p. 202, the Court of Appeal drew a distinction between cases where a separation agreement exists and those where a separation agreement does not exist. Where there is an agreement between the parties, such as in *Hunt* v. *Hunt* (1884) 28 Ch. D. 606 which the court reviewed and which has also been cited to me by counsel for the wife, "The construction arrived at must be viewed in the light of the terms used in and the circumstances surrounding the agreement in question." In *Hunt* v. *Hunt* (above) the court found that as the husband was a surgeon in the army and the agreement provided for what was to be done during his absence in India, the parties must have contemplated that he might be ordered abroad again. As a result, the provision allowing the wife "full and free liberty of access" was not interpreted as precluding the husband from taking the children to such places as he would be and to discharge his duties.

In *Wright* v. *Wright* (supra), the court found that the agreement provided that the wife, who had custody of the children, could reside at such places as she thought fit. The court interpreted this provision as meaning that the wife had an unfettered right to take the children with her in the event she moved from Ottawa and there was no restriction placed upon her choice of residence. Secondly, the agreement provided only for reasonable access to the children so, here again, there was no implied restriction on moving. Thirdly, the agreement provided that the law of Ontario was to govern and this provision would not have been necessary if it had been intended that the mother and children remain here.

In the more recent decision of *Bruce* v. *Bruce* (1977), 5 R.F.L. (2d) 198 (Ont. Surr. Ct.) the agreement was silent as to the right of the mother to remove the children. It was held that the general terms with respect to access did not clearly indicate that the parties must have intended that the children remain in close proximity, although access appears to have actually been exercised regularly. Having decided that there was no express or implied restriction in the agreement which would prohibit removal, the court then considered whether the welfare of the children required that it intervene and concluded it did not as the mother was fit and her proposal to move for education and developmental purposes was reasonable.

III. WHERE THERE IS A SEPARATION AGREEMENT WHICH CONTAINS SPECIFIED ACCESS

The court will generally take the view that the parties intended that the children reside within such proximity that the specific right of access might be implemented without undue inconvenience to the non-custodial parent. As a corollary to this, the custodial parent should not do anything unreasonably to interfere with this term. *Wright* v. *Wright* (1974), 12 R.F.L. 200 (Ont. C.A.), interpreting *Shoot* v. *Shoot,* [1957] O.W.N. 22 (C.A.). Thus, where, as in *Shoot* v. *Shoot,* the agreement contained specific provisions with respect to the exercise of access and the custodial parent took the children to Florida without explanation, it was found that the agreement had been breached. This case is also authority for the proposition that the onus of establishing the propriety or necessity of removal of the children contrary to the agreement is upon the parent seeking to remove the children.

In *Field* v. *Field* (1978), 6 R.F.L. (2d) 278 (Ont. S.C.) the father, who had custody of the children, wished to pursue business interests in California. It was submitted that the specific terms as to access which had been the subject of a consent order, indicated that the intention of the parties was to have the children remain in proximity to both parents and precluded him from leaving Ontario. In rejecting this argument, the court looked at the history of the case and the way of life of each of the parents noting that the wife

spent a considerable portion of her time in Florida and had no permanent residence in Ontario. Having regard to this fact and the fact that for all practical purposes the mother's means were unlimited, the court concluded that a provision which might be interpreted in the ordinary case as indicating an intention to keep the children available to her lost a good deal of its force. The court concluded that, while it might seem strange at first blush, it was a perfectly perfectly practical matter for the wife to go to California for a weekend or similar short periods (p. 281). I regard this case as an exceptional situation which turns on its own facts.

The required onus was not met in *Wagneur* v. *Wagneur* (1975), 17 R.F.L. 150 (Que. S.C.). There, a detailed agreement had been entered into, vesting the attributes of parental authority jointly in the mother and father, with the children living with the mother during the week and visiting the father on weekends. The wife was involved with a man who lived in Toronto and the possible removal of the children to Ontario resulted in each party claiming sole custody. The court noted that the father, who was French Canadian, live in a francophone environment as did the children. Their mother, an American, had mastered the French language. The children had expressed great trepidation at living in an anglophone environment and evidence had indicated that removal from their French school would be detrimental.

The court went on to state (p. 153) that the parties, in their agreement, had well understood the interests of their children to be the governing criterion. Given that the parties had, with reason, conferred the care of their children on themselves jointly, that the mother wished to remove the children from their father such that for all practical purposes he would be unable to exercise his parental authority, that the status quo as laid down by the parties themselves ought to be approved by the court in the present case, and that that status quo supposed that the respondent and his children lived in Montreal, the court ordered that the terms of the agreement be incorporated in the decree nisi with the proviso that if the mother left Montreal to live elsewhere, exclusive custody of the children be conferred on the father.

Having reviewed the case law presented to me by counsel, I am of the opinion that, as in all matters having to do with children, the underlying, but not always expressed principle, is the best interests of the children. A restatement of the principles, bearing this in mind, is perhaps helpful.

1. Where there is no separation agreement or court order to the contrary, the courts have presumed that the best interests of the child be with the custodial parent. So long as the custodial parent's plans are reasonable, in that they enhance or advance that parent's standing or skills, and are not deliberately calculated to deprive the other parent of his or her right, the court will generally not intervene.

2. Where the parties have entered into a separation agreement, they are taken to have provided for the best interests of their children at that time. (*Colter* v. *Colter* (1983), 38 O.R. (2d) 221; *Wagneur* v. *Wagneur* (1975) 17 R.F.L. 150.) The court therefore must look to the agreement to determine whether it was the intention of the parties that the custodial parent, or the parent with primary care of the children, reside in close proximity to the non-custodial parent. Where the agreement is silent on this point or provides for reasonable access without specifying how it is to be exercised, the court will not presume such an intention and, again, the custodial parent's autonomy of movement will not usually be interfered with, provided the purpose is bona fide and reasonable. In such cases, the party having access must provide his own means to exercise it.

3. Where, however, the parties have expressly or impliedly agreed that the custodial parent will reside in a particular locale, the principles to be applied are those applied to cases which turn on the enforceability of separation agreements subject to the discretionary jurisdiction of the court to override the agreement in the best interests of the children. The onus of adducing evidence that it is in the best interests of the children to alter the agreement or status quo rests with the person seeking the change.

In this latter situation, in my opinion, the enquiry is not limited to evidence that the proposed move will enhance the custodial parent's life and is not calculated to deliberately deprive the non-custodial parent of his access rights. Nor have counsel presented the evidence in this manner. They have sought to place before the court all of the circumstances of the case.

Relating these principles to the situation before me, I have no difficulty, based on the wording of the clauses quoted from the separation agreement, in concluding that it was intended that the custodial parent, A.M.C., reside in close proximity to the non-custodial parent, J.A.B.C.

This is apparent by virtue of the cumulative effect of the provisions that the wife was to consult with the husband in respect of all major decisions affecting the general welfare of the children, that the husband have eight full days of access per month, and that, apart from vacation, neither party was to remove the children of the marriage from this province without the consent of the other, albeit such consent was not to be unreasonably withheld. I do not construe the exchange of letters at the time of the signing of the agreement as detracting from this conclusion. It is apparent that an oral agreement had been worked out previously and that Mrs. C. was facing a motion for judgment on the oral agreement in accordance with *C.* v. *C.* (1983), 38 O.R. (2d) 221 if she did not sign the agreement. Mrs. C. was also aware that clause 3A, limiting the circumstances wherein the child could be removed from the province, was to be incorporated into a decree nisi by virtue of clause 25.

Counsel for Mrs. C. has emphasized to the court that clause 3A does not contain an absolute prohibition against removing the child from the province on a permanent basis. The agreement provides Mr. C.'s consent must be obtained and such consent is not to be unreasonably withheld. Counsel for Mrs. C. would have me construe this paragraph as saying that if Mrs. C.'s plan to move is a reasonable one, in the sense that she will advance herself in life and is not deliberately seeking to deprive Mr. C. of his access rights, he must consent. This is not the same thing. If Mrs. C.'s plan is a reasonable one for her it does not follow that Mr. C. is being unreasonable if he does not consent to it. The agreement gives to Mr. C. the right to have his children have the benefit of his love and guidance through consultation about their care and to frequently have them in his care. There is no dispute that Mr. C. has been a very interested and involved parent who has always exercised his access rights. Because he chooses to continue to assert his rights rather than to forfeit them, I do not think it can be said Mr. C. is acting unreasonably. The court must therefore look to the best interests of the children.

Before embarking on this consideration, there is one other aspect of the evidence I wish to mention. A common basis for seeking to vary a separation agreement by court order is that there has been a change in circumstances and this was alleged in the amended answer to the petition for divorce. Counsel for Mr. C. obtained admissions from Mrs. C. on cross-examination, that between the signing of the separation agreement and the amended answer, there was no change in circumstances. At the time she signed the agreement, she had made her plans to move to England with the children. A careful perusal of the evidence, however, indicates that she really had no choice about signing the agreement because of the motion for judgment on the oral agreement. The change in circumstance occurred with Mr. S.'s proposal of marriage and her acceptance in Cape Cod. Although the evidence is not entirely clear on this point, it seems most likely that an oral agreement with respect to the children had been worked out, although all details pertaining to the matrimonial home might not have been, prior to her trip to Cape Cod.

Dealing now with the best interests of the children, it is important to consider the kind of relationship the children have with the persons to whom their care and upbringing is or might be entrusted and any other persons who have a close connection with the child's care and upbringing. Mrs. C. generally has the care of the children during the school week. She is a teacher by profession and presently teaches English as a second language at four schools on a rotating basis. A lot of what Mrs. C. and the children do

together involves the day to day running of the house. The children, who are approximately eight and six years of age, help with setting the table and cleaning up afterwards. They have been taught to take care of their own room, to put their things away, and to dust. Mrs. C. has assumed primary responsibility with respect to buying clothing for the children and with respect to choosing their schools and education. She sees herself as a firm yet judicious parent giving explanations whenever the children need to be punished by having their privileges withdrawn.

Mrs. C. has encouraged the children to read and reads to them. She has also encouraged their artistic talents and used her background in education to provide a stimulating atmosphere for them.

Mr. C. has complemented Mrs. C.'s efforts. He has a creativity table set up in his home for the days when the children are with him. He has gone to Claire's school science fair and most recently had attended a parent-teacher meeting at Claire's school as a result of concerns expressed to him by Mrs. C. that Claire was not getting enough "real" work. The approach to be used with the teacher was discussed by them ahead of time. When his schedule has allowed it, he has taken the children to the doctor and seems to have taken charge of their haircuts. The children know when they are going to see Mr. C. and what they will be doing on their days together. During the winter the children usually go skating one of the two days of their weekend. Sometimes they have hockey games in the driveway. During the past summer they built a tree fort and he put up a badminton net in the backyard. Mr. C. and the children go to various parks in the city, to the paternal grandparents swimming pool and to their cottage. During the week he communicates with them frequently.

The children also enjoy a close relationship with their maternal grandparents. They frequently go to dinner at their home and speak to them on the telephone two or three times a week about their daily activities. Sometimes they go to their grandparents' farm in Cobourg. Other aunts, uncles and cousins play an important role in the lives of the children. Claire's diaries (Exhibit 10) kept on a daily basis at school over a three month period, make reference to "going to my farm", "going to see my cousin Jeffry John", going to Chudleigh's apple farm with her cousins, holding her cousin Erin, sleeping in the cabin at "her cottage", going to Kleinberg for dinner with her paternal grandparents, and her Uncle Ronny's birthday. It is clear that there is a high degree of interaction not only between the children and their father but between the children and their relatives on both sides of the family, especially their maternal grandparents.

Mr. C.'s fiancée, K. M., age 25, testified that she first met Mr. C. at the hairdressing salon where she worked and he later brought the children in to get their hair cut. She sees the children when Mr. C. has them and if Mr. C. has them during the week and has to go to court she has looked after them as she is presently not working. Over the past one and a half years she and the children have become friends, although she has a closer relationship with Claire as they do her hair, finger nails, and baking together.

If the children were to go to England they would be in the care of their mother and Mr. S. Mr. S. is presently 39 years of age, divorced, with joint custody of his two children, aged 13 and 11. These children are presently at boarding school, with the son attending the school his father attended. Mr. S. has no fixed pattern of seeing his children. He tends to split holiday time with his wife at Christmas and during the summer and, apart from this, attends school activities to which parents are invited. In addition, he indicated he has regular contact with his children by letter and telephone. Mr. S. has spent time with Claire and Chris at Cape Code, for a weekend last April and when they visited him in England during the summer. He continued to work during the summer as he is presently self-employed giving financial advice and tax planning to small companies in the south east of England. Mr. S. indicated that he has a warm relationship with the children and that after the Cape Cod holiday and the visit in England, the children were upset about leaving him.

Mr. S. has relatives in England as does Mrs. C. inasmuch as she is originally from that country. The children were introduced to these relatives. None of them live in the same village as Mr. S., although some of his cousins are not too distant to visit by car.

Dr. I., a social worker who is deeply involved in mediation and assessment, was retained by both parties to attempt to mediate the issue which is now before the court. After a process of interviewing and assessing the children, their parents and Mr. S. Dr. I gave his report to both parties, which has been filed (Exhibit 4) and amplified by his evidence at trial. He is clearly concerned that, "the effects of moving the children from a positive situation with close relationships with both parents to a different culture with only minimal contact with their father and other family members . . . [will present] a risk situation for the children". In his opinion, the present custodial and access arrangement is working quite well for the children and ought not to be disturbed. Ideally, Mr. S. should come to Canada and marry Mrs. C. and live here. Mr. S. indicated in his evidence that the suggestion had been made but had not really been gone into. Mr. S. said it would not be desirable for him to immigrate owing to his responsibility towards his aged parents in England, leaving his children and, no doubt, financial setbacks initially in Canada. He had not looked into the possibility of immigration and was not familiar with the tax or financial situation in Canada.

The Official Guardian's report (Exhibit 19) indicates (p. 4) that "both children are deeply attached to both parents and separation from either one is bound to have an effect on them". By way of conclusion, the report also states that Mr. C. feared that a move to England away from him would have a detrimental effect on Claire and Christopher and goes on to comment, "their attachment to him would make this so". The report then sets forth Mrs. C.'s position that she feels she has the right to remake her life with the man she loves and concludes, "she is hopeful that she and her fiancé can offer the children a stable environment from which to grow".

In his evidence, Dr. I. also emphasized that the unusual thing about the present situation is the significant emotional attachment the children have to both parents. In his view, this resulted from the continuity of the relationship through frequent contact with Mr. C. after the separation.

Dr. M., a psychologist who was called by counsel for Mrs. C., did not have the opportunity of interviewing the parties. She was called as an expert to comment on Dr. I.'s report and she had also been provided with a transcript of his evidence.

According to her evidence, Dr. I. did not appear to address the question of Mrs. C.'s effectivness as a parent in the event that she did not move to England and marry Mr. S., in making his recommendation. She stated it was obvious that an unhappy parent functions much less well as a parent. Dr. M. indicated that the children would be aware of Mrs. C.'s unhappiness if forced to remain in Ontario as opposed to marrying the man she loved and that the children might feel guilty and insecure that, another time, she would not make this choice.

In Dr. M.'s opinion, there would be more of a sense of loss for Mr. C. if the children moved. This would be partly because the children would be moving into a two parent family and gradually Mr. S. would become the psychological parent. She seemed to be of the opinion that a two parent family would also make up qualitatively for the loss of extended family relationships and also that the latter, although important, was "not a high priority factor". All in all, she was of the opinion that an interference with the autonomy of the custodial parent would pose a greater risk of adverse impact on the children than the risks involved in Mrs. C. moving to England and marrying Mr. C. *(sic.)*.

Under cross-examination Dr. M. did agree, however, that it was somewhat unusual for Mrs. C. to accept Mr. C.'s *(sic.)* proposal when she had been in his presence physically less than a week, bearing in mind the effect on the children. Dr. M. also stated that, on the face of it, it was not a responsible thing to do. She also agreed it would be

very unfortunate for the children if this proposed second marriage were to terminate in divorce and that this would have very negative consequences for the children.

Counsel for Mr. C. sought to establish at trial that Mrs. C. tends to be an impulsive person. By and large, I am not concerned with the conduct of Mrs. C., or for that matter Mr. C., prior to or during the marriage as I do not find that any useful pattern was shown nor is there any suggestion it affected the children. Mrs. C. testified that she had given very careful consideration to her relationship with Mr. S. and she placed a great deal of weight on the strength of the relationship which had developed through the letter writing and phone calls between April, when she first met Mr. S., and August. Yet, she could not have believed the relationship to be all that serious before she left for Cape Cod or she would not have orally agreed, shortly before going, to any limitation on her rights as a custodial parent. If I am mistaken about the timing of the oral agreement and it was in fact only reached after her return in August, her conduct is even more paradoxical.

Mrs. C. testified that since her separation from Mr. C. in March of 1979, she had had a very difficult time financially making ends meet. She was pressed by her husband to return to teaching and, with the scarcity of jobs, at first could only obtain part time employment which necessitated her getting up at 5:30 a.m., getting the children ready and over to a babysitter and a two hour bus ride in order to get to the school where she was teaching for 9:00 a.m. At the time, Mr. C. was only paying Mrs. C. $400 a month for the support of the two children and, nothing for herself, although he did pay the taxes on the townhouse which was the former matrimonial home. When an application for maintenance was finally brought over two years later in October of 1982, Mrs. C. began receiving interim maintenance of $900 per month in all. The following year, she entered a separation agreement providing for maintenance for each of the children at $300 per month and no maintenance for herself once the matrimonial home was sold. It is not disputed by Mr. C. that he pays only that which he is obliged to pay. I accept the evidence of Mrs. C. that he refused to pay for a new snow suit for Claire and that he refused to pay to send the children to a day care operated by the Y.M.C.A. for two weeks during the summer of 1982. These items were paid for by the children's maternal grandparents. Quite apart from his salary as a policeman which is over $40,000 a year, Mr. C. testified that the children were both the beneficiaries of trusts set up by his relatives. Although he does not have full control over the trust funds, he does control some of them.

Once the matrimonial home is sold this summer, Mrs. C. will have one-half the equity but this amount of $25,000 to $35,000 would not, she believes, be sufficient to buy another townhouse and she will have to look for rental accommodation for herself and the children. She will also have to hope that her contract to teach will be renewed and to rely on her parents for support as they have been providing her an allowance of $200 per month to make ends meet.

If Mrs. C. were to marry Mr. S., there is no doubt that she and the children would be financially secure. Mr. S. earns approximately $54,000 a year and, while he supports his wife and children, there is no suggestion he could not afford to support Mrs. S. *(sic.)* and take up any shortfall with respect to the children. They would live in a five bedroom home situated on one-third of an acre in Figheldean in England purchased by Mr. S. Mrs. C. would not have to work outside the home.

There was some evidence about the children being in a different culture if they were to move to England, but it would not be a radically different culture. They would be in a rural, as opposed to urban, environment which would also require adjustment on their part but which, on the evidence, did not appear to pose a problem when they visited in the summer of 1983.

Another major consideration, the views and preferences of the children, deserves comment. Dr. I. indicated he had attempted to ascertain their preference but that they had been very careful not to tip their hands. Claire had said it would be nice if Mr. S. came to Canada and then they could all be together. Dr. I. was obviously impressed with this

comment for, in his opinion, this would be the ideal. It is not disputed that the children are deeply attached to both parents.

Bearing in mind the ages of the children, their deep attachment to their father and his involvement in their lives, the fact that if Mrs. C. does not marry Mr. S., it will have an adverse effect on her and hence on her parenting ability, and the opinions of the Official Guardian, Dr. I. and Dr. M. on these matters, I am not persuaded that it would be in the best interests of the children to alter the existing access arrangements. I recognize that I am not bound by the existing separation agreement between the parties; *Kruger* v. *Booker* (1961) 26 D.L.R. (2d) 709 S.C.C. Nevertheless, I am inclined to follow the terms of the agreement with respect to the access specified, since, in the court's opinion, it accords with the best interests of the children. In making this finding I do not ignore the fact that, in my opinion, the children would be better off financially if Mrs. C. were to marry Mr. S. With respect to this factor, however, it has been held that, "the principle is undoubted that financial questions between spouses may not be permitted to stand in the way of the court when an order otherwise proper respecting custody or access is sought". *Re Bockner* (1972), 6 R.F.L. 34 et p. 35 (Ont. H.C.).

I therefore order that Mrs. C. shall continue to have custody of the children and that Mr. C. continue to have access as set out in paragraphs 2 and 3 of the separation agreement, but that the children not be removed from the Province of Ontario, other than for normal vacation periods, except on consent of both parents or, if they cannot agree, by court order. Counsel may speak to me as to the wording of the other matters to be included in the judgment and make further submissions if they cannot agree. I will also hear submissions as to costs if asked.

DATED AT Toronto, this 7th day of March 1984.

Judge Karen M. Weiler