Reforming the Framework in Which Custody and Access Decisions are Made

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In 1996, the federal government was taken by surprise when public pressure and widespread concern over the state of custody and access law in Canada almost derailed passage of the government's Bill C-41. Recall that Bill C-41 completely reformed the manner in which child support is calculated, but did not introduce any changes regarding custody and access decisions. When Bill C-41 was at the stage of public consultations before Senate committee, there was a groundswell of public pressure and concern that forced the Liberal government to take another look at the issues of custody and access. Further public consultations were held, and by May 1999, the federal government committed itself to three actions:

- preparing specific proposals for reforming the framework in which custody and access decisions are made;
- holding public consultations on reform proposals in 2001, and
- reporting to Parliament by May 2002 on the reforms necessary.

Three stages in the public consultation and legislative reform process have already been completed: the Senate Committee Review and public consultation on Bill C-41 during December, 1996 and January, 1997; the Special Joint Committee on Custody and Access public consultations in 1998 and final report released December, 1998; and the Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access released May 10, 1999.

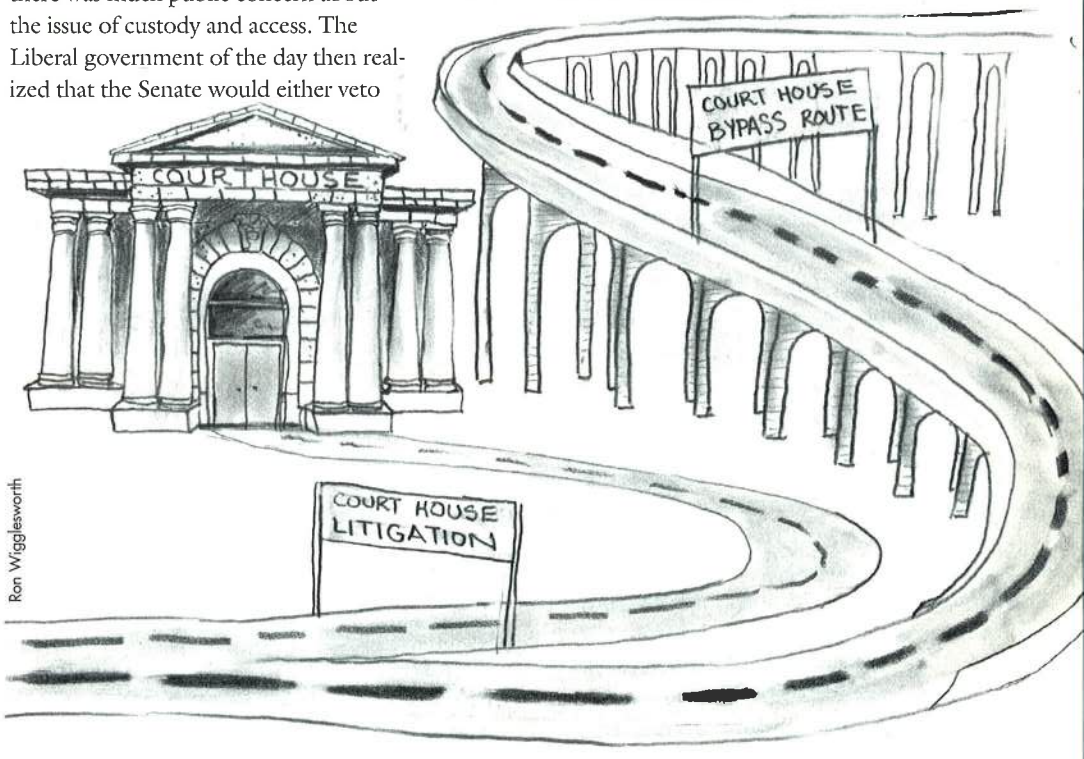
This article discusses what caused the government to take a serious look at reforming the existing framework in which custody and access decisions are made, and what reforms we may expect to see after 2002. Keep in mind that although the federal government can amend only the *Divorce Act*, which is federal legislation, the federal government is involved in all aspects of the access and custody decision-making framework administered at the local level.

Senate Committee Review and Public Consultation on Bill C-41

The full name of Bill C-41 was *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act.* It completely reformed the manner in which child support is calculated, but did not in any way deal with the issue of how custody and access determinations are made in the first place.

Bill C-41 was a government bill; that is, it originated in the House of Commons. A bill which originates in the House of Commons (a "C-bill") is reviewed by a Senate committee between second and third readings in the House of Commons. Witnesses from the public appear before the Senate committee as the first stage of the Senate committee review process. After the Senate committee completes its final report on the bill, including recommended amendments, the bill goes back to the House of Commons for third reading. It must then pass through three readings in the Senate before it can receive Royal Assent and become law. A bill must be passed by both Houses of Parliament in order to become law.

In December, 1996, the Standing Senate Committee on Social Affairs, Science and Technology reviewed Bill C-41 after it had passed the first two readings in the House of Commons. The Senate Committee held public consultations on the bill during December 1996 and January 1997, during which time it became apparent to the Senators that there was much public concern about the issue of custody and access. The Liberal government of the day then realized that the Senate would either veto



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the bill or delay its passage. One senator on the review committee, Anne Cools, publicly stated that she would vote against the bill during Senate readings. If the bill were not passed by both Houses of Parliament and given Royal Assent by the end of the current session, it would die on the table. Recall that soon thereafter, on April 27, 1997, the federal government called a snap election, and the second session of the 35th Parliament came to an abrupt close.

To ensure that Bill C-41 would be speedily passed through the Senate, then-Minister of Justice and Attorney General of Canada, Allan Rock, confirmed in writing to the Senate Committee that "the government will take the steps necessary to introduce a motion in this session to establish a Joint Senate-House of Commons Committee to study issues related to custody and access under the Divorce Act. The government is offering this commitment in response to concerns raised by some Senators, on behalf of non-custodial parents, who believe that this issue should be re-examined." Note that in 1997, the federal Justice Minister was of the view that only non-custodial parents had concerns about the framework in which custody and access decisions are made.

At the suggestion of the Senate Committee, Bill C-41 was amended to lower the boundary for "shared custody" in the Child Support Guidelines down to 40% from the original 50%. The bill very quickly passed through third reading in the House of Commons and the three readings in the Senate. It received Royal Assent on February 19, 1997 and came into force on May 1, 1997.

Special Joint Committee on Child Custody and Access

The federal election intervened, and the Joint Senate-House of Commons Committee could not be created until the next session of the new Parliament. The Senate and the House of Commons adopted the motions necessary for the creation of the Special Joint Committee on October 28 and November 18, 1997, respectively. Anne McLellan was now the Justice Minister and Attorney General of Canada, and she brought the motion in the House of Commons. The Special Joint Committee on Child Custody and Access was created in December 1997 and began hearing evidence from the public in February 1998.

From February to November 1998, the Special Joint Committee on Custody and Access held 55 meetings across Canada at which Committee members heard from witnesses appearing as representatives of organizations or as individuals. It was essentially a cross-country public forum on the existing framework or system for making custody and access decisions. Transcripts of the evidence received at the meetings are still available on the Parliamentary internet website at www.parl.gc.ca/ and following the path to www.parl.gc.ca/36/1/parlbus/commbus/house/CommitteeMain.asp?Language+E&CommitteeID=46

More than 520 people may have wanted to appear before the Committee to give evidence, but the Committee heard from only those witnesses selected to appear. The overwhelming public response from all sectors or Canadian society proved that there is widespread public concern about the issue of custody and access.

The Special Joint Committee released its report, *For the Sake of the Children*, at the beginning of December 1998. It contains summaries of the evidence heard and final recommendations grouped according to subject. In addition to the majority report, there are also three dissenting opinions presented by each the Reform Party, the Bloc Quebecois and the New Democratic Party.

Every conceivable issue related to custody and access was covered in the report. The issues ranged from gender bias to access enforcement, to poverty, to public education about the "best interests of the child" test, and so on. The report, a critique of the entire framework in which custody and access decisions are made, clearly proves there is widespread public concern about custody and access.

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Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access

On December 1, 1998, the Special Joint Committee approved the final draft of its report, and also formally requested a government response. The Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access was tabled in the House of Commons on May 10, 1999 by Anne McLellan, Minister of Justice and Attorney General of Canada.

In its response, the government suddenly saw fit to implement a "Strategy for Reform" of the overall framework in which custody and access decisions are made. The federal government will integrate into the five-year review of the Child Support Guidelines the development of custody and access reforms.

First, the federal government will carry out further study and research jointly with the provinces leading up to the federal government proposing specific reforms to the framework for custody and access decisions. Second, in 2001 there will be public consultations on the government's reform proposals. Then the Justice Department will report to Parliament by May 1, 2002, both on the operation of the Child Support Guidelines with suggested amendments and the necessary reforms to the framework for custody and access decisions.

The government response could not possibly address all the subject areas and recommendations in the Special Joint Committee's report, so it restricted itself to six elements or guiding principles for its Strategy for Reform. The six guiding principles draw heavily from the report of the Special Joint Committee and are discussed below. The six principles are

- Focusing on the best interests of the child;
- Maintaining relationships meaningful to the child;
- Managing conflict between parents or litigants;
- Financial Responsibility, that is, specific issues to be considered in the five-year review of the Guidelines;
- Collaboration and partnership between federal, provincial and territorial governments and agencies; and
- Building a better understanding, that is, compiling research and statistics.

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Focusing on the Best Interests of the Child

While the "best interests of the child" test is already the law for any order or judgment concerning a child, the government may introduce a list of best interests criteria into the *Divorce Act* to better direct the judiciary in making custody and access decisions. One of the recommendations from the Special Joint Committee was to include into the Act a non-exhaustive list which would include a reference to the importance of contact with grandparents and other significant members of the extended family. Incidentally, the Ontario *Children's Law Reform Act* has contained a best interests list for many years.

To help parents focus on the best interests of the child, the government supports the concept proposed by the Special Joint Committee of having parents draw up parenting plans. However, the government response notes that further study is needed to "determine how best to incorporate parenting plans into the family law system"; that is, whether parenting plans must be filed with the court, and whether court orders must be in the format of a parenting plan. Incidentally, the Alberta MLA Review of the Maintenance Enforcement Program and Child Access completed in the summer of 1998 had recommended that parenting plans be a mandatory precondition to the granting of a divorce or custody order, and that all orders be in the format of a parenting plan.

Maintaining Relationships Meaningful to the Child

This is also part and parcel of the best interests principle. It is axiomatic that a child benefits from continued contact with both parents and those extended family members who are interested in that child's wellbeing.

The Special Joint Committee had recommended clearly setting out in the preamble to the *Divorce Act* the principle that parents and their children are entitled to close and continuous relations with one another. In its response, the government more cautiously said that it will attempt to identify "the most appropriate way to emphasize the continuing responsibilities of parents to their children and the ongoing parental status of both mothers and fathers post-divorce".

Hand in glove with the concept of parenting plans is the need for new terminology to stress *parenting* rather than *custody* and *access*. The Special Joint Committee had recommended that the terms *custody* and *access* be removed from the *Divorce Act* and be replaced with the term *shared parenting*. The government in its response agreed that the terminology issue warrants further consideration. To some readers, this attempt to change terminology may seem like window dressing, but remember that the proposed new terminology is only part of a much larger attempt to bring about a fundamental change in attitudes about child custody, part of which is to discourage parents from using litigation.

Access enforcement also comes under this topic heading. The Special Joint Committee had recommended federal-provincial-territorial cooperation to institute education and enforcement programs, as well as a nation-wide registry of shared parenting orders (access orders). The 1998 Alberta MLA Review of the Maintenance Enforcement Program and Child Access had also devoted an entire section of its report to the issue of enforcing custody and access orders. In its response to the Special Joint Committee report, the federal government committed itself to work with the provinces and territories to "develop a nation-wide, coordinated response to failures to respect parenting orders, involving a range of both therapeutic [counseling] and punitive elements".

Aside from parents, there are also in most cases extended family members who are interested in the child's wellbeing. Very often it is the grandparents. The importance to the child of the grandparent-grandchild relationship was referred to by the Special Joint Committee in both the majority report and also the Reform Party minority opinion. In its response, the government has committed itself to work with the provinces and territories to "address the problems raised by grandparents".

Managing Conflict

This is again part of the best interests principle. Children suffer harm when they are in the middle of a bitter dispute between adults.

The concept of *parenting plans* again comes into play in managing conflict between parents as it takes parents out of the competitive arena of the courtroom, and

directs them to consider doing what is best for the child. The Special Joint Committee had recommended mandatory education programs and the preparation of parenting plans. The government in its response has committed itself to work toward reforms targeted specifically at helping parents cooperate to the extent necessary to work out parenting arrangements. Alberta already has in place a mandatory education program which attempts to focus parents on the best interests principle and on parenting plans. Alberta also has a free custody mediation program.

However, there will always be a group of litigants who are so high conflict that it is impossible for them to cooperate to come up with a parenting plan and resolve their own dispute. The Special Joint Committee had recommended that high-conflict couples be directed into a special process in which the court would be more interventionist and actively manage how the couple is progressing through the court system. The government in its report noted that policy development work is already underway to determine how best to deal with high-conflict couples in order to protect the children from being adversely affected by the bitter dispute.

The Special Joint Committee had also heard evidence that while child abuse can be a major factor in divorce and custody, there have also been false allegations of abuse being sworn in affidavits during custody disputes. The government in its response acknowledged that this may be a problem and undertook to do statistical tracking and research into the area.

Specific Issues to be Considered in the Five-year Review of the Guidelines

The Special Joint Committee had listed a number of specific issues it wished to see addressed in the five-year review of the Guidelines. Of specific interest is that the Committee requested review of the 40% rule now used in calculating child support. Recall that under the Guidelines, the amount of child support granted can be greatly affected once each of the parents has the child in his or her care for at least 40% of the time over the course of a year. Not surprisingly, this arbitrary rule often leads to litigation as one parent attempts to cross the 40% threshold, while the other tries to block those attempts. Interestingly, the Province of Quebec has adopted guidelines, replacing the federal Guidelines, which use a formula that adjusts the amount of child support paid when one parent has the child in his or her care between 20 to 40 percent of the time over the course of a year. In its response to the Special Joint Committee report, the government only said that it has been monitoring, and will continue to monitor, all aspects of the operation of the Guidelines as part of the five-year review process.

Collaboration and Partnerships

The first three principles of the government's Strategy for Reform are all directed at keeping parents out of the court room as much as possible. The principle of Collaboration and Partnerships deals primarily with how the federal and provincial governments cooperate in funding education and mediation programs for parents in custody and access disputes. The Special Joint Committee had recommended that federal government provide adequate funding for such initiatives in addition to several others.

Building a Better Understanding

This principle consists of nothing more than a commitment to compile research and statistics to be used in making decisions about which reforms for custody and access are necessary.

Conclusion

The general message of the Strategy for Reform is that the government will attempt to introduce reforms that will keep custody and access disputes out of the court room as much as possible. Based on the principles laid out for the Strategy for Reform, we are unlikely to see early amendments proposed for the *Divorce Act* other than, possibly, a best interests list and, perhaps, an access enforcement provision. However, the federal government will likely propose the expansion or improvement of the education and mediation programs which already exist in some provinces and to promote the concept of parenting plans in that way. The writer does not expect that the government will propose to make the filing of parenting plans mandatory before a custody order is granted, or to require all court orders to be in the format of a parenting plan.

The government has undertaken to provide specific reform proposals for public review and consultation in 2001. Perhaps by that time the government's position on custody and access issues will reflect the views of a broader range of the general public. We will see what the proposed reforms are, and how the public reacts.

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