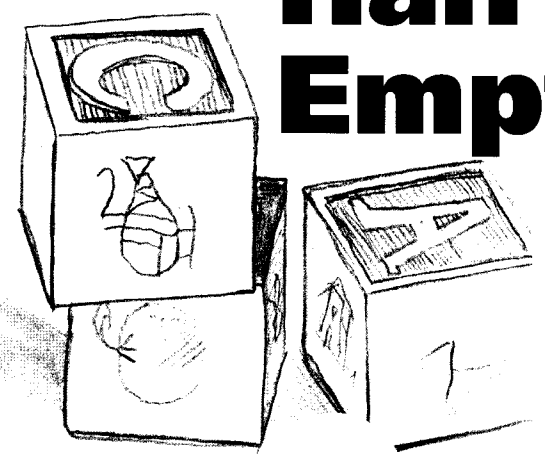
Law Reform: Half Full or Half Empty



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Since spring 2002, the federal government proceeded with public consultations about the framework in which custody and access decisions are made. A lengthy report on the public consultations was released in November 2001. Recommendations for reforms to the custody and access framework were to be integrated into the five-year review of the Child Support Guidelines released in the spring of 2002. However, they were not included in that five-year review report. The absence of any reference to custody reforms in that report indicates to me that either the federal government is losing its commitment to reform custody and access, or the process of reforming the custody and access framework is too complicated to meet deadlines earlier given.

By way of background, I will briefly review how the issue of reforms to custody and access came to be put on the government agenda, the public consultations which followed, the report resulting from those consultations, and lastly the release of the five-year review on the operation of the Child Support Guidelines. There are some very interesting recommendations in the five-year report for fine-tuning the Guidelines, and I will take those up below.

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Background to the Reform Initiative

When the Child Support Guidelines were introduced in 1996 as part of Bill C-41, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistant Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, the Bill was almost derailed at the Senate level. An agreement was made between the liberal government and the Senate to allow the Bill to be passed in exchange for the commitment from the liberal government to establish a joint Senate-House of Commons Committee to study issues related to custody and access under the *Divorce Act*. Bill C-41 received Royal assent on February 1997 and came into force on May 1, 1997.

The Senate-House of Commons Committee on child custody and access held extensive public consultations in 1998. It released its final report titled "For the Sake of the Children" in December 1998. The contents of the report clearly established that there is widespread public concern about, and dissatisfaction with, the legal framework in which custody and access decisions are made.

The federal government released its response to the special joint committee's report on May 10, 1999. Anne McLellan was Minister of Justice and Attorney General of Canada at the time, and she tabled this report in the House of Commons.

In its response, the federal government undertook to conduct further study and research jointly with the provinces concerning custody and access, and to conduct public consultations through the summer of 2001. The results of the research and studies and public consultations were to be included in the five-year report to Parliament on the operation of the Child Support Guidelines. The following is quoted from the May 10, 1999 Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access:

> "The process to implement this Strategy for Reform will involve working closely with the Provinces and Territories to integrate the review and consultation process with the Government of Canada's review of the Federal Child

Support Guidelines. The Department of Justice is required to provide Parliament with the results of a comprehensive review of the provisions and operations of the Guidelines and the determination of child support by May 2002. This Strategy for Reform will integrate the development of reforms to custody and access issues into that process. Further study and research will be carried out jointly with the Provinces leading to public consultations on specific reform proposals in 2001. In this way, the report to Parliament on the Guidelines can include the necessary reforms regarding both custody and access and child support."

Public consultations were conducted in major centers through the summer of 2001. The materials for these public consultations were titled "Federal–Provincial– Territorial Consultation Custody and Access".

In November 2001 the final report and an executive summary on the Federal-Provincial-Territorial consultations on custody, access and child support in Canada was released. They are available at the Department of Justice Canada website at http://canada.justice.gc.ca/en/cons/consultations.html.

This report again establishes that there is widespread concern and dissatisfaction with the legal framework in which custody and access decisions are made. The report noted: "While there were many varying opinions expressed on how to ensure the legislation addresses the best interests of children, most respondents agreed that the current situation is lacking and that improvement is necessary."

The report went on to state that "the results of the consultation as captured in this report will inform the Federal-Provincial-Territorial Family Law Committees discussions on the child custody and access project as well as the discussions of Federal, Provincial and Territorial Ministers responsible for Justice. They will form part of the background to the report to Parliament that the Federal Minister of Justice will table before May 2002". As noted above, the five-year review of the Child Support Guidelines tabled in the spring of 2002 did not take up the issue of reforms to the custody and access decision-making framework. It was restricted to fine tuning the Child Support Guidelines.

Recommended Changes to the Child Support Guidelines

The five-year review of the Child Support Guidelines titled "Child Come First: A Report to Parliament Reviewing the Provisions and Operation of the Federal Child Support Guidelines" basically made recommendations to fine-tune the operation of the Guidelines. For example, the report recommends that a payor's Guideline Income may be adjusted if he or she lives in a country with effective rates of income tax significantly *higher* than those in Canada. At this time, the Guidelines permit an adjustment only if the payor lives in a country with effective rates of income tax which are *lower* than those in Canada. Other fine-tuning includes proposed changes to disclosure requirements where support is being paid for a child over the age of 18, and for shared custody.

At the present time, parents with shared custody can have great discretion in setting child support. A court is to have reference to the Child Support Guidelines, but the Guidelines are not determinative. The five-year review recommends that a setoff formula be implemented for shared custody situations. This formula would be very similar to that imposed on parents in split custody situations. Split custody is where the parents each have primary residence of at least one child, shared custody is where the parents would each have the children for more than 40% of the time over the course of a year. The recommendation is that the formula be applied to shared custody situations "unless that amount is deemed inappropriate based on how the parents share the child's expenses". This is actually a huge change because it takes away from parents with shared custody the almost absolute discretion they had, if both were in agreement, for setting child support.

The one issue which the writer had expected would receive attention in the report is the 40% time boundary for shared custody. As readers may be aware, in the Province of Quebec the payor begins to enjoy a reduction in child support paid if the payor has the child in his or her care more that 20% of the time over the course of a year. This creates a sliding scale for support. In addition in Quebec, the income of both parents is taken into account in calculating child support. I personally would prefer to see a sliding scale for child support in all provinces because it is hard to justify why a parent who has the child for 40% of the time should enjoy a reduction in child support, whereas a parent who has the child for only 35% of the time should not also enjoy a reduction in child support.

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All of the provinces with the exception of Quebec follow the 40% rule for shared custody, and do not have any provision for a sliding scale for significant access and caregiving time. Under s.2 of the *Divorce Act*, individual provinces may adopt their own Guidelines, and all provinces with the exception of Alberta have done so. Those Provincial Guidelines would apply if both the divorcing mother and father reside in one province. However, if they are not resident in the same province, the Federal Guidelines would apply. Therefore, it makes sense for Provincial and Federal Guidelines to be consistent. Problems with lack of consistency are illustrated by the following. If both divorcing parents live in the Province of Quebec, the 20% time threshold in the Quebec Guidelines would apply; however, if one of the parents lives in Ontario and the other lives in Quebec with the child, the Federal Guidelines would apply with its 40% threshold. Because the Federal Guidelines take precedence when the parents live in different provinces, it is up to the Federal Guidelines to introduce changes to the 40% threshold before the provinces will do so.

Summary

The federal government did not deal with custody and access reforms in the five-year review of the operation of the Federal Child Support Guidelines. To its credit, the federal Department of Justice has published a comprehensive report, released in 2001, on the Federal-Provincial-Territorial Consultations following the public consultations in the summer of 2001. While initially a federal initiative in 1996, the issue of reforming the custody and access decision-making framework has become a combined Federal-Provincial-Territorial initiative because custody and access are within shared jurisdiction. While the report on consultations clearly states "most respondents agreed that the current situation is lacking and that improvement is necessary", it remains to be seen what reforms will actually be implemented in the gederal *Divorce Act* and provincial statutes concerning the framework in which custody and access decisions are made.

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