

The Dichotomy between Family Law and Family Crises on Marriage Breakdown

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Résumé de l'article

L'analyse suivante porte sur trois aspects de la désintégration du mariage : la crise émotionnelle, la crise économique et la crise parentale. La réponse apportée par les avocats et le processus légal à ces trois crises qui s'entrelacent si souvent, est examinée de façon à offrir une perspective plus large à la résolution des conflits de famille.

The Dichotomy between Family Law and Family Crises on Marriage Breakdown*

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ABSTRACT

The following analysis focuses on three crises of marriage breakdown: the emotional crisis; the economic crisis; and the parenting crisis. The response of lawyers and of legal processes to these three crises that so frequently interact with each other is examined with a view to providing a broader perspective of family conflict resolution.

RÉSUMÉ

L'analyse suivante porte sur trois aspects de la désintégration du mariage: la crise émotionnelle, la crise économique et la crise parentale. La réponse apportée par les avocats et le processus légal à ces trois crises qui s'entrelacent si souvent, est examinée de façon à offrir une perspective plus large à la résolution des conflits de famille.

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* Lansdowne Lecture, University of Victoria, British Columbia, September 28, 1988.

I. THE THREE CRISES OF MARRIAGE BREAKDOWN

For most families, marriage breakdown provokes three crises : an emotional crisis; an economic crisis; and a parenting crisis. Both spouses and their children suffer severe emotional upheaval when the unity of the family disintegrates. Failure in the most basic of life's commitments is not lightly shrugged off by its victims. Marriage breakdown, whether or not accompanied by divorce, is a painful experience. Furthermore, relatively few families weather the storm of spousal separation or divorce without encountering serious financial hardship. The emotional and economic crises resulting from marriage breakdown are compounded by the co-parental divorce when there are dependent children. Bonding between children and their absent parent is inevitably threatened by spousal separation and divorce.

Paul Bohannan identified six "stations" in the highly complex human process of marriage breakdown : (i) the emotional divorce; (ii) the legal divorce; (iii) the economic divorce; (iv) the co-parental divorce; (v) the community divorce; and (vi) the psychic divorce.¹ Each of these stations of divorce involves an evolutionary process and there is substantial interaction between them. The dynamics of marriage breakdown, which are multi-faceted, cannot be addressed in isolation. History demonstrates a predisposition to seek the solution to the crises of marriage breakdown in external systems. During the past one hundred and fifty years, the Church, Law and Medecine have each been called upon to face the crises of marriage breakdown. Understandably, each system has been found wanting in its search for solutions. People are naturally averse to losing control over their own lives. Decrees and "expert" rulings that exclude the affected parties from the decision-making process do not pass unchallenged. Omniscience is not the prerogative of any profession. Nor should the family's right to self-determination be lightly ignored. Let us, therefore, address the three crises of marriage breakdown in that light.

II. THE EMOTIONAL CRISIS

For many people, there are two criteria of self-fulfilment. One is satisfaction on the job. The other, and more important one, is satisfaction in the marital or familial environment. When marriage breakdown occurs, there is a fundamental sense of loss and isolation, if not desolation, that is experienced by each of the spouses. Separated spouses find themselves living alone in a couples-oriented society. The

1. Paul BOHANNAN, "The Six Stations of Divorce", published in *Divorce and After*, Anchor Books, 1971, Ch. II.

concept of the “swinging single” was belied by reality long before the AIDS crisis. The devastating effect of marriage breakdown is particularly evident with the displaced long-term homemaking spouse whose united family has crumbled and who is ill-equipped, both psychologically and otherwise, to convert homemaking skills into significant gainful employment.

In Canada, eighty-five per cent of divorces are uncontested and only a relatively small proportion of initially contested cases result in protracted litigation. Issues relating to the economic and parenting consequences of marriage breakdown are typically resolved by negotiation between the spouses, who are usually represented by independent lawyers. Because the overwhelming majority of all divorces are uncontested, it might be assumed that the legal system works well in resolving the economic and parenting consequences of marriage breakdown. That assumption, however, cannot pass unchallenged.

In the typical divorce scenario, the spouses negotiate a settlement at a time when one or both are undergoing the emotional trauma of marriage breakdown. Psychiatrists and psychologists agree that the “emotional divorce” passes through a variety of states, including denial, hostility and depression, to the ultimate acceptance of the reality of the death of the marriage. A constructive resolution of the spousal emotional divorce requires the passage of time, which varies according to the circumstances but is rarely less, and not infrequently more, than twelve months. In the interim, decisions, often of a permanent and legally binding nature, are made to regulate the economic and parenting consequences of the marriage breakdown. From the lawyer’s perspective, the economic and parenting consequences of marriage breakdown are interdependent. Decisions respecting any continued occupation of the matrimonial home, the amount of child support, and the amount of spousal support, if any, are conditioned on the arrangements made for the future upbringing of the children. The perceived legal interdependence of property rights, support rights and parental rights after divorce naturally affords opportunities for abuse by lawyers and their clients. The lawyer who has been imbued with “the will to win” from the outset of his or her career, coupled with the client who negotiates a settlement when his or her emotional divorce is unresolved, can wreak future havoc on the spouses and on the children, the innocent victims of the broken marriage. All too often, when settlements are negotiated, the children become pawns or weapons in the hands of gameplaying or warring adults and the battles do not cease with the judicial dissolution of the marriage.

The interplay between the emotional dynamics of marriage breakdown and regulation of the economic consequences of marriage breakdown may be demonstrated in a meaningful way to lawyers by reference to the following examples. A *needy* spouse who insists that no

claim for spousal support should be pursued may well be manifesting a hope for reconciliation, a sense of guilt respecting the marriage breakdown, or a state of depression. A spouse who insists that his or her marital partner be "nailed to the wall" is obviously manifesting hostility. And a spouse who proffers an unduly generous financial settlement may be expiating guilt or temporarily calming the potentially troubled waters of a new "meaningful relationship". Guilt, depression and hostility are all typical manifestations of the emotional divorce. Like most emotional states, however, they will change with the passage of time. Practising lawyers, who ignore the human dynamics of marriage breakdown, should not be unduly surprised if returning clients take no solace from the "finality doctrine" espoused by the Supreme Court of Canada in *Pelech*,² *Richardson*³ and *Caron*.⁴ Lawyers, like mediators, should always be aware of the dangers of premature settlements. Indeed, the notion of a "cooling-off" period, though unsuccessful as a means of divorce avoidance in jurisdictions in which it was implemented, might have significant attractions in the context of negotiated spousal settlements on marriage breakdown. Certainly, lawyers should more frequently assess the strategic potential of interim agreements as a possible "stage" in a longer-term divorce adjustment and negotiation process.

Lawyers must not only be alert to the fact that the legal divorce and the emotional divorce are not coincidental in point of time. They must also be alert to the fact that the emotional divorce is not usually contemporaneous for the respective spouses. Lawyers frequently encounter situations where one spouse regards the marriage as over but the other spouse is unable or unwilling to accept that reality. In circumstances where one of the spouses is adamantly opposed to cutting the marital umbilical cord, embittered negotiations or contested litigation over custody or access, support or property division often reflect the unresolved emotional divorce. Spouses who have not worked their way through the emotional divorce "displace" what is essentially a non-litigable issue relating to the preservation or dissolution of the marriage by fighting over one or more of these litigable issues. Not surprisingly, therefore, the judicial divorce often fails to terminate the spousal hostilities arising from the emotional trauma of marriage breakdown. And when the legal battles over support and property have been finally adjudicated by the courts, the most effective means of continuing the spousal conflict is through the children.

2. *Pelech v. Pelech*, [1987] 1 S.C.R. 801, [1987] 4 W.W.R. 481, 76 N.R. 81, 14 B.C.L.R. (2d) 145, 17 C.P.C. (2d) 1, 7 R.F.L. (3d) 225, 38 D.L.R. (4th) 641.

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

4. *Caron v. Caron*, [1987] 1 S.C.R. 892, [1987] 4 W.W.R. 522, 75 N.R. 36, 2 Y.R. 246, 14 B.C.L.R. (2d) 186, 7 R.F.L. (3d) 274, 38 D.L.R. (4th) 735.

The multi-faceted aspects of marriage breakdown require more than an adversarial legal response. In the words of Paul Bohannon,

A “successful” divorce begins with the realization by two people that they do not have any constructive future together. That decision itself is a recognition of the emotional divorce. It proceeds through the legal channels of undoing the wedding, through the economic division of property and arrangement for alimony and support. The successful divorce involves determining ways in which children can be informed, educated in their new roles, loved and provided for. It involves finding a new community. Finally, it involves finding your own autonomy as a person and as a personality.⁵

In speaking to the prospects of achieving a positive resolution of the total divorce process under existing laws and procedures, Professor Andrew Watson, M.D. observed :

In some respects, the phenomena which unfold in the wake of a failing marriage are very similar to those which occur in response to any stress — they reflect a fight or a flight reaction. While few lawyers know Cannon’s Law, they in fact work with its manifestations in many divorce actions. For example, if our hypothetical couple above had failed to resolve their problems, after they have fought and fled in various ways within the marriage, they may seek the social and legal resolution of flight through divorce. In advance of the divorce proceeding and while still aided by ignorance it may *seem* to them that divorce will terminate the marital conflict and the war will be concluded. More often than not this result appears to be true, but when there are children in the marriage it is not so easy. In the latter cases, providing the divorced parents love their children (which is the usual state of affairs), they will be forced into continuing contact by virtue of the need to provide ongoing care and to deal with a stream of decisions, such as education, summer vacation, medical problems, and the visitation rights of the noncustodial parent. Since much if not most of this contact will be in the context of some kind of decision-making, the old conflicts with their concomitant resolution-incompetence will be dragged into the open once more. Since the divorce process *per se* does not endow the parties with any new negotiation skills or interpersonal insights, the ancient warfare will most likely continue. However, there are a number of factors about the *way* a divorce is carried out that can either increase or decrease the likelihood of postdivorce feuding. Since we psychiatrists are deeply concerned with the healthy growth of children, we should see that these families become an important target for primary prevention in community mental health centers.⁶

5. *Supra*. note 1, p. 62.

6. Andrew WATSON, “Contested Divorces and Children : A Challenge for the Forensic Psychiatrist” in *Legal Medicine Annual*, 1973, 489, pp. 491-492.

III. THE ECONOMIC CRISIS

Before the enactment of the *Divorce Act* in 1968,⁷ laws regulating the right to divorce and the economic consequences of marriage breakdown were offence-oriented. To all intents and purposes, adultery was the sole ground for divorce. The right to financial support on marriage breakdown was regulated by provincial statutes. These statutes provided financial relief to wives whose husbands had committed a designated matrimonial offence, such as adultery, cruelty or desertion. Wives in financial need, who had themselves committed adultery, would be denied spousal support, regardless of the conduct of their husbands. In the event of marriage breakdown, with or without divorce, "innocent" wives were, in theory, entitled to potentially lifelong financial support from their "guilty" husbands. The homemaking wife, who made no direct financial contribution to her husband's acquisition of assets, had no legal right to share in the property acquired by him during the marriage.

In 1968, no-fault divorce grounds were introduced to complement an extended list of "offence" grounds. The focus of claims for spousal support on divorce shifted from spousal misconduct to the economic consequences of the marriage breakdown. The *Divorce Act* of 1968⁸ established mutuality between the spouses respecting support rights and obligations. This particular legislative change ultimately resulted in a pronounced judicial emphasis on rehabilitative support orders that underlined the obligation of a formerly dependent spouse to strive for financial self-sufficiency after divorce. Some would argue that the concept of economic self-sufficiency has been indiscriminately applied by the courts to displaced long-term homemaking wives whose career potential has been seriously impaired, if not undermined, by the obligations assumed during the marriage.

The radical changes effectuated by the federal *Divorce Act* of 1968⁹ were followed in the nineteen-seventies by equally fundamental changes in provincial statutes regulating the economic consequences of marriage breakdown. In most provinces and territories, the traditional fault system was abandoned in spousal support claims arising independently of divorce. The old system that required proof of the commission of a designated matrimonial offence was substantially rejected in favour of a "needs" and "capacity to pay" approach. Equally significant changes were introduced by provincial statutes regulating the distribution of property between spouses on marriage breakdown or divorce. The injustice of the *Murdoch* decision,¹⁰ which denied any property interest

7. S.C. 1967-1968, c. 24.

8. *Ibid.*

9. *Ibid.*

10. *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367.

to the ranch wife who had worked alongside her husband, was consigned to the realm of an anachronism. By the early nineteen-eighties, every province and territory had enacted legislation that conferred property rights on a homemaking spouse in the event of marriage breakdown or divorce.

The nineteen-eighties also witnessed further legislative developments in the fields of divorce and spousal and child support. The *Divorce Act, 1985*¹¹ continued the trend towards “no-fault” divorce by establishing the breakdown of marriage as the sole criterion for divorce, although subsection 8(2) of the *Act* imposes limitations on the means of proving the breakdown of a marriage. Pursuant to this subsection, marriage breakdown will be established “only if” the spouses have lived separate and apart for at least one year immediately preceding the divorce judgment, or a spouse against whom a divorce is sought, has, since the celebration of the marriage, committed adultery or treated the applicant spouse with physical or mental cruelty of such a kind as to render continued matrimonial cohabitation intolerable. In the context of spousal support, subsection 15(6) of the *Divorce Act, 1985*¹² stipulates that “any misconduct of a spouse in relation to the marriage” is to be ignored in determining the right to and quantum of both spousal and child support. It would be naive, however, to assume that litigants, lawyers and judges will now ignore distinctions between “the good, the bad, and the beautiful”. Although misconduct has been outlawed in spousal support disputes, “image” is still a fact of life. And there is no difficulty in counsel introducing spousal misconduct through the backdoor by invoking the offence-oriented criteria of marriage breakdown, namely the respondent’s adultery and/or cruelty.

Subsection 15(5) of the *Divorce Act, 1985*¹³ defines the criteria that the court must take into account in determining the right to and quantum of spousal support. These include the condition, means, needs and other circumstances of the parties, the duration of cohabitation and the functions performed during cohabitation. The court must also take account of any order, agreement or arrangement relating to the support of a spouse or child. These criteria are so broad as to confer a virtually unfettered discretion on the court in determining the right to and quantum of spousal support. Subsection 15(7) of the *Divorce Act, 1985*¹⁴ complements subsection 15(5) by providing that an order for spousal support should (i) recognize any economic advantages or disadvantages arising from the marriage or its breakdown; (ii) apportion

11. S.C. 1986, c. 4. Now R.S.C. 1985, c. 3 (2nd Supp.).

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

between the spouses any financial consequences arising from child care; (iii) relieve any economic hardship arising from the marriage breakdown; and (iv) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. In an age when the "new property" is found not in accumulated capital but in security of employment, innovative claims for substantial spousal support may be engendered by these newly defined statutory objectives of spousal support on divorce.

For the vast majority of Canadian families, spousal property entitlements on marriage breakdown cannot provide long-term economic security for the future. Where one spouse is a high income earner, constructive implementation of the new statutory criteria for spousal support can mitigate the economic crises that so frequently face the displaced long-term homemaker on divorce. Only a small minority of Canadian families, however, will benefit over the long-term in consequence of federal and provincial legislative responses to capital and income redistribution on divorce or marriage breakdown through the mechanisms of property sharing and spousal and child support orders.

Equal property sharing regimes, the formulation of sound policy objectives respecting spousal support, and more effective enforcement processes, which were recently implemented by the joint cooperation of the federal and provincial governments to ensure the discharge of support obligations, will not significantly reduce the economic deprivation sustained by dependent spouses and their children on marriage breakdown. There is ample empirical evidence to demonstrate that, even if all support orders were paid in full and on time, the vast majority of recipients would be destined to live at or near the poverty level. In an age of sequential marriages, solutions to the financial crises of marriage breakdown must be sought not simply within the parameters of Family Law, but in social and economic policies that promote the financial viability of all persons in need, including the victims of marriage breakdown. The war on the feminization of poverty must be won by innovative and coherent socio-economic policies that effectively promote equal pay and equal opportunities for men and women in the labour force and that guarantee a basic income for all financially disadvantaged Canadians. The opportunities for paid employment in the home, rather than the office or factory, the development of well-defined policies for job sharing, and the feasibility of establishing child care or nursery facilities in the schools or in places of employment must be more fully explored. The relationship between support payments, social assistance and earned income must also be rationalized if a reasonable level of income security is to be guaranteed to the economic victims of marriage breakdown. Otherwise, faced with the projection that 40 per cent of all married Canadians will divorce at least once and the fact that the average duration of dissolved marriages is between 10 and 12 years, it is probable that the private law system of

spousal and child support will ultimately break down under the strain of sequentially dissolved marriages. At or before that time, the State will be required to intervene to guarantee basic income security for all Canadians, including the increasing number of economic victims of marriage breakdown. Indeed, by the 21st century, it is likely that the private law system of Family Law as we know it today will be the exclusive preserve of the wealthy classes. Administrative systems of income redistribution, will, in all probability, regulate the economic consequences of marriage breakdown or divorce for the vast majority of Canadian families.

An analysis of the economic crises engendered by marriage breakdown cannot ignore Professor Lenore Weitzman's findings and conclusions in her most recent book.¹⁵ The inter-relationship between marriage breakdown and the feminization of poverty is self-evident. The liberalization of divorce laws that is associated with no-fault regimes has undoubtedly had a significant impact on the economic security of dependent spouses and children. Divorce in Canada has increased some 500 per cent since the enactment of the *Divorce Act* of 1968.¹⁶ It would be a mistake, however, to assume that divorced wives and mothers were guaranteed economic security before the no-fault divorce era. The oft-cited legal principle that a blameless wife was entitled to spousal support in an amount that would preserve the standard of living enjoyed during the marriage was always far more myth than reality.

While there is little doubt that the mediation process can more adequately respond to the emotional trauma of marriage breakdown than any formal and relatively rigid legal process, it must be realized that neither process will resolve the economic crises of divorce. Both lawyers and mediators, nevertheless, have a role to play in addressing potential solutions to these crises. Most lawyers are generally aware of the income tax implications of support payments and spousal property redistribution on marriage breakdown. But how many lawyers or mediators are familiar with existing social welfare schemes that provide some minimal income security for the financial disadvantaged or with the potential for subsidized housing or with training programmes for entry or re-entry into the labour force? There is a lesson to be learned from the following extra-judicial observations of Madam Justice Bertha Wilson of the Supreme Court of Canada :

Where the parties were living close to the poverty line prior to the breakdown of the marriage so that there simply is not enough money to support them both in separate establishments, then the court must look beyond the parties' own resources and make an award which is fair, having regard to any welfare entitlement either may have. [...] It is fair to say, on the basis of very sparse

15. Lenore WEITZMAN, *The Divorce Revolution*, New York, The Free Press, 1985.

16. *Supra*, note 7.

Canadian authority, that we are beginning to think about the relationship between family law as administered by the courts and welfare as administered by the state. We are groping for the right principles and the right policies. We are, however, a long way from the level of sophistication in England and other common law jurisdictions, where the welfare implications of various levels of awards are put before the courts in the same way as the tax implications are now being put before the courts here.¹⁷

When dealing with the affluent family, lawyers and mediators must not ignore the potential for economic security that may be available by application of the new legal criteria governing spousal support and property entitlements on marriage breakdown, but where the solution to the economic crises cannot be found therein, their terms of reference should be broadened to encompass the aforementioned alternative avenues.

Mediators and lawyers must also grapple with what Professor David Chambers identifies as the “gap in psychological perception between many divorced persons about the value of payments”.¹⁸ What many men regard as far too much spousal or child support is usually perceived by women as far too little. As Professor Chambers observes, this “gap in psychological perception surely operates to widen the gaps in the post-divorce relations between parents — gaps in perceptions about ‘fault’ in the marriage, the appropriate care of children, and so forth”.¹⁹ This conclusion of Professor Chambers, which is an integral part of his empirical study of child support in the State of Michigan, emphasizes the need for a better understanding of the divorce process and the economic realities of marriage breakdown. Such understanding can clearly be promoted through mediation services.

IV. THE PARENTING CRISIS

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 child/parent 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

17. Bertha WILSON, “The Variation of Support Orders”, in R. ABELLA and C. L’HEUREUX-DUBÉ, *Family Law : Dimensions of Justice*, Toronto Butterworths, 1983, 35, pp. 63 and 67.

18. David CHAMBERS, *Making Fathers Pay : The Enforcement of Child Support*, University of Chicago Press, 1979, p. 50.

19. *Ibid.*

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 parent to the status of a passive bystander. 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.²⁰

And in *Pierce v. Pierce*,²¹ Spencer, J., of the British Columbia Supreme Court, rebuked a non-custodial father 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". 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.²² To the extent that our courts continue to resolve parenting disputes on the basis of competing quasi-proprietary parental claims, the "best interests" doctrine, which supposedly governs custody adjudications, will remain more myth than reality.

The recent decision of the Manitoba Court of Appeal in *Abbott v. Taylor*²³ lends credence to the notion that the time is ripe to jettison the use of such ambiguous terms as "custody", "joint custody" and "access". Parenting roles and the feasibility of shared parenting after marriage breakdown do not require the use of legal jargon that itself fuels disputes and the prospect of future protracted litigation. Surely, it is not unreasonable to expect courts and lawyers to define precisely the responsibilities or privileges of each parent on marriage breakdown in language

20. (1980), 25 O.R. (2d) 673, 11 R.F.L. (2d) 52, at 78, 104 D.L.R. (3d) 481 (Ont. C.A.).

21. [1977] 5 W.W.R. 572 (B.C.S.C.).

22. See Julien D. PAYNE, "The Collection Process" in *Payne's Divorce and Family Law Digest* 83-831, especially pp. 83-840 and 83-847-848.

23. (1986), 2 R.F.L. (3d) 163 (Man. C.A.).

that the parents and children can understand. Mediators with a behavioural science background encounter no difficulty in avoiding the use of the legal terms “custody” and “access”. Their natural inclination is to think in terms of parenting rights, whether from the perspective of the parents involved or from the child’s perspective. Lawyers, however, are reluctant to abandon the legal concepts of “custody” and “access” that have been hallowed over the years in legislative enactments and judicial pronouncements. In *Abbott v. Taylor*, *supra*, the Associate Chief Justice of the Family Division of the Court of Queen’s Bench for Manitoba expressly refrained from using the words “custody” and “access” in a court order granted pursuant to the *Family Maintenance Act*²⁴ on the ground that the best interests of the child favoured this course of action. When this approach was challenged on appeal, Twaddle, J.A., speaking for the three justices of the Manitoba Court of Appeal, stated :

The effect of the amendments of 1983 taken together is to emphasize the contribution which each parent can make to the development of his or her child even after cohabitation of the parents has ceased. The court must give effect to the legislative intent by crafting its orders to maximize the opportunities which both parents have to make such a contribution recognizing of course, that not in all cases is a parent able or willing to do so and that in some cases, regrettably, a child’s best interests would not be served by such an order [...]

The language of custody orders has ordinarily followed the language of the statute. Custody has, however, several aspects. If effect can be given to the statutory intention by the use of language more easily understood by the parties to the proceedings and the child whose custody is in issue, there can be no objection to it provided all the responsibilities of custody are conferred on the parents between them. I do not prescribe this choice of language, but approve of it when required in the best interests of the child.

In the case at bar the learned Associate Chief Justice chose to use ordinary language in expressing the responsibilities which each parent should exercise with respect to the child. In principle, for the reasons I have just given, this course is acceptable [...].²⁵

It is submitted that the use of ordinary language instead of the legal concepts of custody and access in determining parenting rights on marriage breakdown should not merely be “acceptable”; it should be encouraged. The responsibility for drafting comprehensive and readily comprehensible terms respecting parenting rights on marriage breakdown must be assumed by the legal profession in the drafting of domestic contracts or minutes of settlement seeking to resolve parenting crises occasioned by marriage breakdown. Abandonment of present legal terminology would not merely constitute a linguistic change. It would provide the basis for a functional approach that could accommodate the

24. C.C.S.M., c. F-20.

25. *Supra*, note 23, at pp. 170 and 171.

notion that “parents are forever”, notwithstanding the breakdown or dissolution of the parents’ marriage. Singularly few parents who divorce are incapable of making some positive contribution to the growth and development of their children of the broken marriage. There are those who are mesmerized by legal terminology and who advocate the implementation of a “statutory presumption of joint custody” on marriage breakdown or divorce. It is submitted that such advocates need to re-focus their approach. Such a legal presumption, which of necessity must be provisional and not conclusive, begs the question of the circumstances wherein the presumption of “joint custody” would be rebutted. Such a presumption opens the door to a continued emphasis on misconduct and unfitness to parent. This produces a negative perspective. What is needed is a positive perspective that is premised on past family history and prospective parenting plans that can accommodate the diverse contributions that each parent can make towards the upbringing of their children. Some four years ago, I made the following written submission to the Standing Committee on Justice and Legal Affairs, which was appointed to review Bill C-47, 1985, the *Divorce Bill* introduced by the Liberal government that died on the order paper when an election was called :

Parenting

It is submitted that Bill C-47 should have eliminated the legal label of “custody” and “access” and should have been drafted in terms of parenting rights and responsibilities. The term custody, and more recently the term joint custody, have been the subject of diverse interpretations in Canadian courts and are obstacles rather than aids to the resolution of parenting disputes on marriage breakdown. Arguments as to whether joint custody is good or bad are futile. What the courts should be required to do is determine the best parenting arrangements that are feasible on the occasion of marriage breakdown. It is ironic that maintenance claims in divorce proceedings require the filing of mandatory detailed financial statements, whereas no requirement is imposed with respect to spousal plans for the parenting of children after divorce. Although the current divorce petition includes materials relating to children of the marriage, the typical petition simply stipulates the names and ages of the children and the “custody and access” arrangements sought by the respective parties to the divorce proceeding. We hardly serve our children well when we insist on detailed financial statements to determine economic issues but require no detailed submissions respecting the personality, character and attributes of the children and the ability of each of the parents to contribute to their future upbringing. There seems no reason whatsoever why divorcing parents should not be required to submit a detailed plan concerning their prospective parenting privileges and responsibilities after marriage breakdown.

I see no reason to change this opinion. I would, however, add an important rider. Parenting plans must take account of the contribution to a child’s growth and development that can be made by members of the extended families, including reconstituted families.

The notion that fighting over children, whether in or out of court, can provide a therapeutic catharsis for all or any members of the family is generally condemned by professionals in all disciplines. Embittered negotiations or protracted litigation between warring spouses, championed by aggressive legal gladiators, cannot heal the inevitable wounds of marriage breakdown. Indeed, they re-open the wounds and allow them to fester long after the legal conflict has been terminated. The infection usually spreads to the children and impairs the prospect of meaningful child bonds being preserved with the absent parent after the marriage breakdown.

It must be conceded that custody litigation is rare. The same is not true of access disputes that arise after the marriage breakdown. This is clearly demonstrated by the pre-Christmas blitz of access applications before the courts. The potential for post-dissolution counselling in this context has been described in the following words by Florence Bienenfeld, a Senior Family Counselor on the staff of the Conciliation Court, Superior Court, Los Angeles County, California :

Post-dissolution visitation counseling in court settings is still very new. I consider it one of our most valuable services to the community. If help is not given in time to help these parents develop a cooperative post-dissolution parental relationship, great harm can result not only to their children, but their children's children. I believe that this post-dissolution visitation counseling service has the potential of being able to break this vicious cycle and help parents move forward, away from the hostility of the marriage. This helps the parents to become more helpful, effective and responsive to the needs of their children.

This service to couples already divorced grew out of the court's ongoing concern for the best interests of the children. The success of this service cannot be measured only in terms of the number of amicable agreements reached. Either way, parents still take important things away from the counseling experience. At times, the parties that were unable to reach an agreement contact the Conciliation Court at a later date, willing to continue to work on unresolved problems.

This service provides the opportunity for parents to leave the dark past and to take themselves and their children into the light once again.²⁶

Too much emphasis may be placed, however, on court-connected counselling or conciliation services. Indeed, most behavioural scientist acknowledge that therapeutic counselling in family conflict situations must not be confined to circumstances in which litigation is imminent. If we are to avoid the dangers of "too little, too late", the need for community-based mediation and counselling services must be acknowledged.

26. Florence BIENENFELD, "Pay-offs of Post-Dissolution Visitation Counseling", (1974) 12 *Conciliation Cts. Rev.* (No. 2) 27, p. 32.

The inherent limitations of the law and the legal process in resolving the parenting crises of marriage breakdown may be exemplified by the following scenarios. Relatively recently, courts have retreated from their former aversion to impose the sanctions of imprisonment or fine on the custodial parent who persistently denies court-ordered access privileges to the non-custodial parent. Such sanctions do not, of course, re-establish harmony between the warring parents. Nor are they likely to cement any bond between the children and their non-custodial parent. Committal for contempt, to use the legal terminology, provides a punitive response to disrespect for the administration of justice. Imprisonment or fines may be inappropriate, however, if viewed from the child's perspective. Nor does the civil remedy of an order for a change of custody resolve the problem. A custodial parent, who alienates a child from his or her non-custodial parent, may evoke trenchant criticism but that is hardly a sufficient basis in itself for ordering a change in the parenting arrangements. Indeed, the more successful the alienation, the greater the reason for denying a change of custody, unless a counselling bridge can re-construct the lost bonding between the absent parent and the child. Cases involving parental child abduction pose similar problems. Judicial application of the legal maxim that a person should not benefit from his or her own wrongdoing has little, or no, place in determining the appropriate environment for the child. Penal sanctions may be imposed for parental child abduction pursuant to the provisions of the *Criminal Code*,²⁷ but concepts of guilt and punishment should not be paramount in civil proceedings wherein the "best interests of the child" is the determinative criterion.

It is obvious that we must look beyond legal solutions. The focus must be on prevention, not punitive sanctions. There is no doubt that the law has come a long way during the past decade in shifting the focus away from the adversarial legal process as a means of resolving the parenting crises of marriage breakdown. In 1982, the voluntary mediation of parenting disputes was legislatively endorsed in Ontario by section 31 of the *Children's Law Reform Amendment Act*.²⁸ In addition, section 30 of the *Act* empowered the courts to order a mandatory independent assessment in custody and access disputes, even if neither parent consented. The federal *Divorce Act*, 1985²⁹ imposed a duty on lawyers to advise their clients of the advisability of resolving custody, access and support disputes by negotiation or mediation. These legislative provisions clearly acknowledge the limitations of the adversarial legal process. That is not to say that the arsenal of legal weapons can be consigned to oblivion in

27. R.S.C. 1985, c. C-46.

28. S.O. 1982, c. 20.

29. *Supra*, note 11, subsection 9(2).

the search for universal disarmament. The law and the courts still have a limited role to play, but it cannot be at the forefront of endeavours to promote more constructive solutions to the parenting crises of marriage breakdown. Practicing lawyers and judges are increasingly recognizing the important role that mediators can play in the resolution of parenting disputes. The strength of mediation lies not, however, in the substantive dispositions that may be thereby achieved, but rather in the emphasis on the process of marriage breakdown as a multi-faceted problem wherein the interest of all members of the fragmented family must be addressed in order to promote cooperative parenting after divorce. To return from where I started, namely linguistic considerations, even the hallowed legal criterion of the “best interest of the child” is a misplaced concept. In the words of Meyer Elkin, a pioneer in the field of court-connected conciliation services :

We cannot serve the best interest of the child without serving the best interests of the parental relationship. The two cannot be separated. The kind of relationship the parents maintain during the divorce and after the divorce will have a significant impact on the children involved — for better or for worse. [...]

Effective parenting cannot be proclaimed by court edict alone nor can desirable [*sic*] human behavior be legislated. But, effective parenting can be encouraged and realized with expert educational-counseling help. [...]

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

A custody proceeding that focuses solely on what is in the best interest of the child is too restrictive an approach. More realistically we should also strive for what is in the best interest of the family. [...]

The concept of a winner and loser has no place in custody matters. Our entire society should begin to think in terms of both families having ongoing responsibility and commitment to the child's physical and emotional welfare. The law can provide much needed leadership in moving society in that direction.

In family law we should start with a simple premise that lawyers and judges are not marriage and family counselors and conversely that marriage and family counselors are not judges. From this it easily follows that both the law and counseling professions should cooperate and communicate with each other to a greater degree if families, and therefore society, are to be served.

The skills of both professions are needed to help families involved in the crisis of divorce, which includes not only the legal divorce but the emotional divorce as well. [...]

The assumption is probably false that most divorcing parents can adequately deal with visitation problems. Many more probably need help with this than we realize.

The goal of a court in custody, visitation disputes should be to create a climate for negotiation rather than merely determining the "best" parent.³⁰

In short, what is required in any process established to address the parenting consequences of marriage breakdown is an appraisal of all realistic options that may accommodate the interests of all affected family members, 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. It was within this framework that the Law Reform Commission of Canada³¹ recommended that, whenever children are involved in divorce proceedings, the law should require an "assessment conference" involving the parents, children and, where appropriate, members of the extended family. This conference should be *informal* in character and might take place before a court-appointed conciliator or in a community-based service. The purposes of the conference would be as follows :

- (i) to ascertain whether appropriate arrangements have been made for continued parenting of the children and, if not, to determine whether such arrangements can be worked out by agreement;
- (ii) to acquaint all family members with the available resources in the community or the court that can assist in negotiating reasonable arrangements for continued parenting;
- (iii) to ascertain the need for mandatory negotiation in the absence of an agreement being reached concerning continued parenting;
- (iv) to ascertain the wishes of the children as well as those of the parents and members of the extended family;
- (v) to ascertain whether the children require independent legal representation;
- (vi) to ascertain whether a mandatory independent psychiatric or psychological assessment is required; and
- (vii) to ascertain whether a formal investigative report by a public authority, such as the Official Guardian, is required.

Whether you agree or disagree with these recommendations, or would prefer a less intrusive "informational or orientation process", there is an

30. Meyer ELKIN, "Custody and Visitation: A Time for Change", (1976) 14 *Conciliation Cts. Rev.* (No. 2), p. ii-v.

31. *Report on Family Law*, 1976, pp. 64-65.

apparent need for the implementation of constructive legal and social policies and processes to promote cooperative parenting after marriage breakdown so that neither parent is precluded from making a continued contribution to the welfare and development of the children. The notion that parents are forever must be reinforced. No longer can society subscribe to the present reality that divorce severs not only the spousal bond but also the child-parent bond.

CONCLUDING OBSERVATIONS

Many lawyers and judges have now joined their critics from other disciplines by openly acknowledging the inefficacy of the law in resolving parenting disputes between separated and divorced spouses. The limitations of the law in resolving the economic consequences of marriage breakdown have been more cautiously acknowledged. However, the emergence of rules of court regulating such matters as mandatory financial disclosure, pre-trials and formal offers to settle, manifest a growing realization that litigation should be regarded as a last resort in the resolution of all family disputes. These and other indicia signal that Family Law reform in the next decade will focus on processes rather than on substantive rights and obligations. It is not insignificant that subsection 9(2) of the *Divorce Act, 1985*³² acknowledges the potential of mediation as a process for resolving support as well as parenting disputes arising on divorce. Section 3 of the *Family Law Act*³³ endorses voluntary mediation as a process for resolving any matter falling within the ambit of that *Act*, including spousal support, child support and property entitlements on marriage breakdown. Legal aid is now available in Ontario to meet the costs of mediation. The Law Society of Upper Canada has followed the precedent established by the Law Society of British Columbia³⁴ by endorsing the role of lawyer as mediator.³⁵ These are all signposts for the future.

Although court-connected conciliation or mediation services are not new to Canada in the context of family dispute resolution, they are likely to be perceived in future with greater enthusiasm than that hitherto enjoyed. Economic restraints, however, will continue to limit the resources available to promote the consensual resolution of family disputes with the aid of court-connected or community-based conciliation and counselling services. Consequently, there will be a growing demand for private mediation of these disputes. Although private family mediation

32. *Supra*, note 29.

33. S.O. 1986, c. 4.

34. See *British Columbia Professional Conduct Handbook*, Rule G12.

35. Rule 25 of the *Ontario Professional Conduct Handbook*, January 30, 1987.

is still in its infancy in Canada and is still passing through a trying adolescence in the United States, there is little doubt that it will come of age during the next decade. The private mediation of what lawyers traditionally define as custody and access disputes has already established a foothold in Canada. With the passage of time, it will constitute an increasingly attractive alternative to parents who are faced with the prospect of protracted litigation or hostile legal negotiations over their children.

In the long-term, private mediation will not be confined to parenting disputes. The support and property rights of spouses and children on marriage breakdown will undoubtedly fall within the purview of private mediation in the next few years. Whether from a genuine sense of commitment to the mediation process or from the natural instinct for survival, many family law practitioners will feel compelled to involve themselves directly or indirectly in the mediation of support and property disputes between separating and divorcing spouses. The role of the "neutral lawyer", who advises the dysfunctional family as a whole in an attempt to reach a negotiated settlement, will emerge to complement the traditional role of lawyers who advise and represent the individual family members. Many, if not most, family law practitioners will discharge both of these separate functions, but not, of course, in relation to the same family. A much closer association can be anticipated between lawyers and other professionals engaged in advising and assisting dysfunctional families. Indeed, team mediation involving lawyers and other professionals, such as social workers or psychologists, will likely develop as an effective means of promoting the consensual resolution of the aforementioned three crises of marriage breakdown.

Although the day may come when community-based centres will provide a multi-disciplinary approach to the resolution of the multi-faceted crises of marriage breakdown, that development lies far in the future. In the meantime, the various professions and, indeed, federal and provincial governmental agencies (including Departments as diverse as Employment, Finance, Revenue Canada, Health and Welfare, and Justice), which are directly or indirectly involved in the "systemic management" of the human process of marriage breakdown, must recognize their own limitations and foster efficacious lines of communication in the search for more constructive and comprehensive solutions to the human and socio-economic problems associated with marriage breakdown.

In an essay on the uneasy alliance between parliamentary sovereignty and judicial supremacy under the *Canadian Charter of Rights and Freedoms*, one commentator has stated :

Courts attempt to resolve complex social problems by transforming the issues into technical legal questions to be dealt with in an adversarial process.

While this distinctive judicial method may resolve traditional kinds of civil and criminal disputes, it does not follow that it will be well suited to divisive political issues.³⁶

The above observations could readily be adapted to the resolution of family conflict through formal legal processes. It is a mistake, however, to cast lawyers and the courts in the role of the “bad guy”. To assert the truism that law and lawyers, like all other disciplines and professions, can lay no claim to omniscience in the resolution of family conflict is not the same as saying that law and lawyers have no contribution to make. We should not forget that lawyers, in practice, on the Bench, in federal and provincial legislatures, and in academe, have been at the forefront of welcome reforms in divorce laws, matrimonial property regimes and in child law. Nor should we forget that the viability of Alternative Dispute Resolution processes, including mediation, cannot be divorced from the legal process as the ultimate means of resolving intractable disputes. In the House of Family Conflict, there are, indeed, many mansions. Now, if we could only build in a working intercom, our problems might not be over, but they could be significantly reduced. In a phrase, “Have you hugged your lawyer, social worker, family therapist, or mediator today?”

36. Eric ROHER, “Power to the people — or to the courts”, *The Ottawa Citizen*, November 28, 1987, p. B-3.